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Top Ten English Cases of 2021: Key Developments for In-House Counsel

Introduction

Welcome to our round up of important English cases from 2021. We have selected ten cases which we believe are important for in-house counsel to know for their daily business, regardless of any particular industry or specialism.

After a cautionary case on the importance of full disclosure to insurers, we move to cases concerning parties' behaviour during the life of a contract. These cover the limits of good faith and reasonableness clauses, what economic duress amounts to, how limitations of liability still hold after deliberate breaches and how liquidated damages for delay in performance can operate where there is no performance at all. We cover two important reminders of the frontiers of privilege in commissioning investigations and in trying to settle disputes. Given increasing attention to, and developments in, data privacy cases, we have covered a Supreme Court case on representative actions as well as cases that begin to put structures around what can and cannot be claimed. Finally, we review a case in which the Supreme Court attempted to clarify the extent of a professional adviser's liability.

For ease of reading, we have abbreviated the names of the parties and tried to keep the facts to a minimum. Each summary contains a comment section which rounds up the key takeaways to be aware of in each case.

For more insights on developments in English litigation from the past year, you can read our recent alerts here or listen to our Inside Dispute Resolution audiocast series.

We hope you enjoy our selection of cases and would welcome any comments.

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The importance of disclosure of all allegations and charges against directors

***Berkshire Assets (West London) Limited and AXA Insurance* UK Plc [2021] EWHC 2689 (Comm)**

Background

Berkshire took out a Contractors' All Risks and Business Interruption policy with AXA for a property project in Brentford. A quote for the policy included provisions on fair presentation of risk, which stipulated that cover was subject to statements about Berkshire's history, including that Berkshire's directors (and other key personnel) had not been convicted of or charged with any criminal offences.

The policy renewed automatically in November 2019. Upon renewal, the company did not notify AXA that one of Berkshire's directors had a few months' previously been charged with four offences by the Malaysian public prosecutor in relation to a fraud connected to that director's former directorship of a completely different company.

In January 2020, the property suffered water damage and a claim was made under the policy. AXA avoided the policy on the ground that Berkshire had failed to disclose charges / allegations against the director at the time of renewal and had therefore failed to make fair presentation of risk ("fair presentation" being the new requirement of the 2015 legislation). During correspondence with Berkshire, AXA affirmed that it would not have provided cover had the charges been disclosed.

Berkshire believed that it had made a fair presentation of risk to the insurers because the charges against the director were not material or relevant to property insurance in the UK and in any event the charges did not accuse the director of either dishonesty or personal involvment in the transactions which underpinned the Malaysian charges (indeed the charges were subsequently dropped).

Judgment

The Court determined that the charges against the director should have been disclosed and that, if they had been, AXA would not have underwritten the policy.

Under the new Insurance Act 2015, an insured must make disclosure of every material circumstance which the policyholder knows or ought to know. A circumstance is material if "*it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms*".

The Court referred to several cases indicating that a criminal charge was material and considered that whether the foreign law allegations involved dishonesty or deceit, such as to make them quasi criminal, was not something the insurer should be expected to resolve, it was sufficient that there were facts raising doubts about the nature of the allegations. The Court also held that materiality should be assessed at the time the policy is renewed, not retrospectively, and therefore the fact that the charges were ultimately dropped by the Malaysian prosecutor was irrelevant.

As a result, the Court found that the charges against the director were material and should have been disclosed to AXA.

The Court then found that AXA would have declined the risk had it been aware of the charges, ascribing considerable weight to an internal AXA practice note, which provided that AXA would not underwrite risks in circumstances where there were criminal allegations.

Comment

To an outside observer, it might seem a stretch that charges brought in another country (and later dropped), not of dishonesty, relating to a different company in a different industry and therefore having no factual relevance to property development in the UK, should be material to insurance for water damage to a property in Brentford. But they were.

Companies should be sure to have effective procedures in place to identify all disclosable facts prior to renewal of any type of insurance. As well as initial background checks over matters such as prior insolvencies and investigations, it would be prudent to have procedures in place to ensure timely confirmations from senior management of allegations, investigations or litigation of whatever nature in which they are or may be involved.

Do terms referring to ‘the spirit of the agreement’, ‘good faith’, and ‘acting reasonably’ mean anything?

Westfields Homes Ltd v Keay Homes (Windrush) Ltd
[2020] EWHC 3368 (Ch)

Background

Keay was entitled to 20 percent of the net proceeds of a housing development being constructed by Westfields on land Westfields owned but over which Keay retained certain protections. Certain consents were required from Keay in relation to a refinancing, including to the lender obtaining a first charge over the property. Keay refused consent, relying on a term in the relevant agreement to the effect that consent was required only where the arrangements were “*in accordance with the spirit of [the] agreement both parties acting reasonably and in good faith to each other*”.

To support its position, Keay pointed to the fact that the proposed charge gave the lender priority rights of recovery in relation to all amounts lent, rather than -- as under the prior arrangements -- an initial capped amount being subject to the lender’s priority (the ‘priority cap’), with the remainder falling behind Keay’s rights under its own charge. Keay also argued certain costs had been wasted or improperly accounted for by Westfields and that financial information had been withheld unreasonably, suggested bad faith and/or was insufficient.

Judgment

There being no prescribed basis in the agreement to determine its “*spirit*”, the Court interpreted this as referring to the parties’ shared aims, ascertained as part of the usual construction process. This wording imposed no additional obligations on the parties beyond those a reasonable person -- equipped with the background reasonably available to the parties at the time the contract was agreed and giving the words used their ordinary meanings -- would consider apparent from the other terms of the agreement.

The test for good faith was whether the conduct would be regarded as commercially acceptable by reasonable people, considering the contractual and factual context. It was not necessary to show dishonesty, but the bar for claiming a breach of a duty of good faith was high, the judge commenting that “*it is hard to understand how, without bad faith, there can be a breach*”.

The interpretation of “*both parties acting reasonably*” was not disputed: this was an objective question for the Court to decide, based on the facts. The judge endorsed the established position that if a clause purports to allow one party discretion to act in a manner it (alone) considers reasonable, it is for that party (and not the Court) to decide subjectively what is reasonable in the circumstances. However, if exercising this discretion will affect the rights and obligations of the parties, the Court can interfere where it considers that the decision reached is one no reasonable decision maker could have reached, e.g. if it includes irrelevant considerations or excludes relevant ones.

The Court held that the arrangements were in accordance with the spirit of the agreement and Westfields had acted reasonably and in good faith, and Keay was ordered to provide its consent. Specifically, the absence of a priority cap did not prove a breach of the spirit of the agreement. Whilst a cap had been arranged with the initial lenders, there was nothing to suggest the parties had considered this a requirement at the time of the agreement, and it would make no difference to Keay's commercial rights (to 20 percent of ultimate net proceeds). Similarly, Keay's costs-related points were, at most, accounting issues to be assessed at the end of the development when calculating net proceeds. Further, it was relevant -- and undermined Keay's arguments -- that the parties' interests (to maximise net proceeds) were ultimately aligned (depriving Westfields of a motive for inflating costs) and that Keay only had a 20 percent stake (suggesting the parties had not intended for its influence over the development to be substantial). The allegations relating to financial information were not made out on the facts.

Comment

This judgment is a reminder that, under English law, contractual terms referring to '*the spirit of an agreement*', '*parties acting reasonably*', and '*good faith*' will have a limited impact on rights, obligations, and remedies under an agreement, unless the agreement also specifies the types of conduct that will infringe these terms. At most, a court might rely on such terms to find a breach of contract if a party has engaged in particularly sharp conduct, but without clearly breaching any other contract terms, e.g. adopting an opportunistic or cynical interpretation (but see the next case commentary, on *Pakistan International Airline Corporation v Times Travel*, concerning economic duress). Such conduct would need to be of a type considered commercially unacceptable by reasonable and honest people and/or unfaithful to the common purpose of the contract and/or inconsistent with the justified expectations of the parties. In practice, it will be rare for a party to have engaged in such conduct without infringing other express or implied terms.

The judgment also reaffirms that a party does not have to subordinate its own commercial interests to avoid breaching such terms, so long as it recognises the legitimate rights of all parties as expressly conferred by the agreement.

The (un)availability of duress as an argument for voiding contracts

Pakistan International Airline Corporation v Times Travel (UK) Ltd [2021] UKSC 40

This case raised the question of the scope of the developing but controversial doctrine of lawful act economic duress, a doctrine that renders agreements voidable and unenforceable where a party has made an illegitimate threat, or placed illegitimate economic pressure, that causes a party to enter into a contract.

Background

Economic duress occurs where the conduct itself is not unlawful (i.e. it is not a threatened breach of contract or tort), but the behaviour, while lawful, is considered so "*highly reprehensible*" that the Courts treat it as amounting to illegitimate pressure in the circumstances. It is an example of equity protecting a party from exploitation but, given that the threats are nevertheless lawful, it is a difficult area because "*it is not easy to distinguish between threats that will count as duress and threats that will not*".

To date, the doctrine has been applied in two circumstances. The first involves criminal activity and is of less importance to in-house counsel. The second is where the person accused of duress, having exposed themselves to a civil claim by the claimant, for example, for damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive their claim (i.e., the defendant's actions put pressure on the claimant to drop their claim that the defendant has breached the contract). It is this second circumstance that will be of most interest to in-house counsel, as it addresses permitted contractual behaviours and lawful threats.

This case concerned an airline and a ticket agent who had been in dispute as to the commission payable to the agent. The airline served notice of termination of their existing agreement and a few days later reduced the ticket agent's ticket allocation. It was entitled to do both things under the contract, although the result of it would have put the agent out of business. The airline then offered the ticket agent a new contract in which the ticket agent had to waive the prior dispute over its commission. The agent agreed to the new deal but subsequently claimed that it was unenforceable for economic duress.

Judgment

The Court unanimously held there had been no lawful act duress because it would be a rare case, in a commercial context, to hold that lawful pressure by one party to induce the other to accede to a demand could constitute economic duress. The airline had engaged in hard-nosed commercial negotiations that exploited its position as a monopoly supplier, but it did not involve reprehensible means of applying pressure (or, for the minority opinion, any bad faith) and therefore did not amount to duress.

The absence of any doctrine of inequality of bargaining power, and the absence of any overriding or general organising principle of good faith means that the scope of lawful act duress in contractual negotiations is limited.

- With regard to inequality of bargaining power, that does not suffice for economic duress without more. The inequality can happen where one party can impose terms on a weaker party which a party of equal bargaining power would refuse, or where the stronger party refuses outright to enter into a contract which the weaker party desires or can impose terms which the weaker party considers to be harsh. The Courts have taken the position that, where this kind of conduct is not unlawful, it is for Parliament to regulate inequality of bargaining power.

- With regard to good faith, or bad faith, the majority held that lawful act duress is not made out even where the party to a contract induces that contract through the making of a demand in bad faith. The Court commented that discreditable behaviour can be a feature of commercial activity and that there would not be lawful act duress in "*a circumstance in which, without more, a commercial organisation exploits its strong bargaining power or monopoly position to extract a payment from another commercial organisation by an assertion in bad faith of a pre-existing legal entitlement which the other organisation believes or knows to be incorrect*". The majority held that introducing a concept of bad faith would introduce an "*unacceptable uncertainty in the sphere of commercial transactions*", although Lord Burrows dissented on that point. He thought that a demand would be unjustified (or reprehensible) and amount to duress if the threatening party had increased the other party's vulnerability to the demand and the demand was in bad faith (which he described as meaning, in context, that the threatening party did not genuinely believe that it had any defence (and there was no defence) to the claim being waived).

Therefore, the majority held that, "*the mere assertion of bargaining power, such as a lawful threat to terminate an existing contract or to reduce the supply of goods under the contract in a way which the contract allowed*" or a "*hard-nosed exercise of monopoly power*" does not, without more, amount to illegitimate pressure. Something more reprehensible is needed, with the focus being on the demand (e.g. for money or for a waiver) and its justification, rather than the threat (e.g. to exercise a lawful contractual right). As for what is reprehensible, there is no overarching criterion, with the Court referring to equity's "*high standard of unconscionability*" albeit being careful to say that the specific context was all important.

Comment

It is clear that the absence of good faith requirements, and of a doctrine of inequality of bargaining power, pose significant obstacles to the development of the economic duress doctrine. The lack of solid criteria against which to judge conduct as reprehensible or not, even if lawful, will make this doctrine capable of development, but at the same time tightly controlled and restrained. It is however clear that its application will be rare and, whatever the pressure exerted on or by a counterparty, where the parties are commercially sophisticated, this is unlikely to be a tool to turn to.

Guidance on the Court's interpretation of exclusion clauses: Be mindful of fundamental, deliberate and wilful breaches at the drafting stage

Mott MacDonald Ltd v Trant Engineering Ltd
[2021] EWHC 754 (TCC)

Background

The claimant, Mott MacDonald Ltd, was an engineering consultancy firm and the defendant, Trant Engineering Ltd, was an engineering contractor. Trant was engaged to construct a new power station in the Falkland Islands and engaged Mott MacDonald to provide design services in respect of the mechanical and electrical elements.

A dispute arose between the parties early in their relationship, resulting in Trant commencing proceedings against Mott MacDonald. The parties entered into a Settlement and Services Agreement (the "**SSA**") to settle that dispute and to govern the parties' future relationship.

In the current proceedings, Mott MacDonald sought around £1.8 million for the work carried out under the terms of the SSA which had not been paid for. In a counterclaim (for over £5 million), Trant alleged that Mott MacDonald had "*fundamentally, deliberately and wilfully*" breached the SSA in various respects, including a failure to complete design deliverables, a failure to provide native data files and detailed calculations and a failure to carry out independent reviews of its design. Trant further alleged that these failures were a pressure tactic by Mott MacDonald to deliberately harm Trant.

Mott MacDonald denied the alleged breaches, and alternatively, relied upon the exclusion and limitation clauses in the SSA[1], which it claimed would operate to exclude or limit its liability. Trant claimed that the limitation and exclusion clauses did not apply to fundamental, deliberate or wilful breaches. Mott MacDonald sought summary judgment in respect of the applicability of the limitation and exclusion clauses, including whether they covered fundamental, deliberate and wilful breaches.

Judgment

The Court held that an exclusion or limitation clause is "*to be construed by reference to the normal principles of contractual construction without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability*".

1 We have not included the relevant clauses due to their size. The broad limitation clause limited Mott MacDonald's total liability to £500,000 in the aggregate for all claims.

The exclusion clause provided that Mott MacDonald would have no liability for any loss to Trent under the SSA: (i) for previous design services provided to Trant on the project, save for any mechanical and electrical engineering services; (ii) to the extent that Trant was unable to prove Mott MacDonald's breach was solely responsible in full for such loss; (iii) for any delay or late completion of the project occurring prior to the date of the SSA that arose out of any delay in the period prior to the SSA; (iv) for any liquidated damages payable by Trant in relation to the project; and (v) for indirect, special or consequential loss.

The Court found in favour of Mott MacDonald, considering that the relevant clauses provided "*clear language capable of covering breaches as those alleged by Trant*". Whilst clear wording is required to cover fundamental, deliberate and wilful breaches the Court made clear that the clause does not need to specifically refer to such breaches.

Comment

This case re-confirms that there is no rule of law preventing a party from relying upon a limitation or exclusion clause where it is guilty of a deliberate breach. Equally, there is no presumption that a court will interpret such a clause narrowly to exclude a deliberate breach. If the parties wish to exclude deliberate breaches, they must make that expressly clear in the contract.

This judgment serves as an important reminder to contracting parties to consider any exclusion or limitation clause at the drafting stage. If a dispute arises about such a clause, the Courts will interpret it in accordance with standard rules of contractual interpretation. If the wording of an exclusion or limitation clause is sufficiently broad to cover fundamental, deliberate and wilful breaches, it will be enforceable.

UK Supreme Court confirms the purpose and function of liquidated damages clauses

Triple Point Technology, Inc v PTT Public Company Ltd

UK Supreme Court decision: [2021] UKSC 29

Court of Appeal decision: [2019] EWCA Civ 230

High Court decision: [2018] EWHC 1398 (TCC)

Background

This case concerned a contract between Triple Point Technology, Inc, a software company, and PTT Public Company Limited, the state-owned Thai petrochemicals company. A dispute had arisen over significant delays in the provision of new software from Triple Point to PTT and the agreement was eventually terminated.

Under the contract, Triple Point was to be paid by reference to 'milestones' which would reflect progress on delivering work. The contract itself was split into nine phases. There was a significant delay to the completion of Phase 1 and work never commenced on the preparation of Phase 2.

A liquidated damages clause provided for Triple Point to pay damages to PTT for delays to the delivery of work. The damages were calculated from the due date of delivery of work up to the date PTT accepted the work.

Judgment

The first issue before the Supreme Court was around the interpretation of the liquidated damages clause and whether liquidated damages can be payable for delays to work which was never completed and never accepted before termination. The second issue concerned the interpretation of a liability cap under the agreement, and whether Triple Point's liability for negligence was excluded from this cap. The third and final issue was whether liquidated damages were subject to the liability cap.

1. On the first issue, the Supreme Court held that liquidated damages apply only up to the date of termination. After this point, it was open to the parties to seek damages for breach of contract (this was the general position, so parties are not obliged to provide for the effect of termination on liquidated damages in their agreement). It also held that liquidated damages could be payable even if works had not been completed because there might otherwise be an incentive to an overrunning contractor not to complete.

2. With regard to the liability cap, the majority held that a reference to damages arising from 'negligence' being excluded from a cap on liability included contractual negligence (the duty to exercise skill and care) as well as tortious negligence. Therefore, on the wording in question, damages for the contractual breach fell outside the cap on liability.[2]

3. Further, the Supreme Court agreed with the decision of the Court of Appeal that liquidated damages were subject to the liability cap.

[2] The exclusion to the liability cap arising from negligence read as follows: *"This limitation of liability shall not apply to CONTRACTOR's liability resulting from fraud, negligence, gross negligence or wilful misconduct of CONTRACTOR or any of its officers, employees or agents."*

Comment

Unenforceable penalty clause or enforceable liquidated damages?

Although not discussed in detail by the Supreme Court judgment, it should be noted that although the liquidated damages clause in the parties' agreement referred to the sum payable for delay as a '*penalty*', it was held to be a clause providing for the payment of liquidated damages. The original High Court decision tackled this point, holding that the description of this type of clause is not determinative, and that the Courts can find that a clause described as a penalty clause in fact sets a reasonable level of liquidated damages (and vice-versa).

In this case, the rate of 0.1 percent *"of undelivered work per day of delay from the due date of delivery up to the date PTT accepts such work…"*[3] was held to be reasonable and an enforceable liquidated damages clause.

Clear words needed to remove rights and the decline of the *contra proferentem* rule

The concurring judgment of Lord Leggatt discussed the changing approach of the Courts to the interpretation of clauses which limit or exclude liability. He highlighted a number of cases which confirmed that parties can exclude rights and remedies they are ordinarily entitled to by law, but that this must be done by clear words. The more valuable the right, the clearer the language will need to be.

Lord Leggatt noted that the *contra proferentem* rule was among outmoded formulas that *"are steadily losing their last vestiges of independent authority"*, and are instead captured by the wider principle that clear words are needed for contracting parties to give up valuable rights.

Reminder of function of liquidated damages clauses

Finally, the Supreme Court's judgment provided a useful reminder of the purposes of liquidated damages clauses. They are risk management tools helping to: (1) establish the financial loss caused by a delay without the need for difficult and inevitably disputed calculations to take place; and (2) limit one party's exposure to otherwise unknown and open-ended liability whilst giving the other certainty about the amount it can recover.

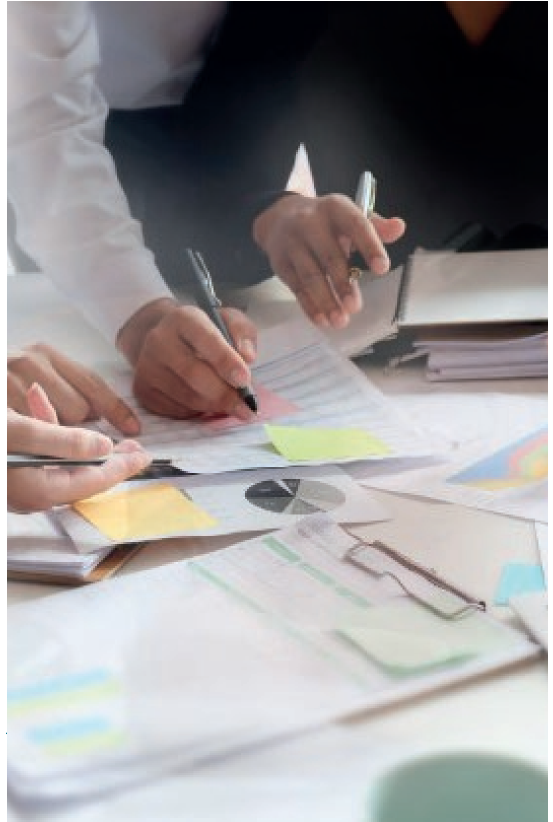
[3] The full liquidated damages clause read as follows: *"If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work…"*.

The dangers of relying on litigation privilege over internal investigation documents commissioned when proceedings have not yet been issued

State of Qatar v Banque Havilland SA and another
[2021] EWHC 2172 (Comm)

Background

The State of Qatar alleged that Banque Havilland was involved in conspiring to manipulate currency and bonds during a blockade placed around Qatar by several other Arab nations. The claim was prompted by a leaked presentation prepared by a former employee of the Bank.



The Bank notified its regulators in London and Luxembourg and instructed PwC in November 2017 to conduct an investigation into how the presentation was created and leaked, the result of which would enable the Bank to respond to any potential questions by the regulators. In December 2017, Qatar's lawyers sent a letter to the Bank requesting that it put a litigation hold over its documents. PwC produced a report on the results of its investigation in June 2018.

In April 2019, Qatar brought a claim against the Bank and its former employee. During the subsequent litigation, Qatar applied for disclosure of the PwC report, which the Bank claimed was subject to litigation privilege.

Judgment

The Court held that, when the Bank instructed PwC in November 2017, it was for the dominant purposes of fact-gathering and enabling the Bank to answer the regulator's potential questions, rather than as a step in preparation for adversarial proceedings that were reasonably contemplated by the Bank at that time. Accordingly, the Bank did not have a right to withhold the PwC report from Qatar on the ground of litigation privilege.

For litigation privilege to apply, litigation or adversarial proceedings need to be a real likelihood, rather than a mere possibility, at the time the potentially privileged communication is commissioned (in this case, November 2017). The judge emphasised the importance of considering the Bank's state of mind, as the party instigating the PwC report, when assessing the sole or dominant purpose for which the PwC report was produced. Despite the Bank considering the matters discovered by PwC were serious, such a consideration was deemed "*far too general to support the claim for litigation privilege*". In this instance, the judge held that there was "*little in the evidence to suggest that the* [Luxembourg regulator's] *position was, or was regarded by the Bank as, hostile, or that adversarial regulatory proceedings were, or were regarded by the Bank, as reasonably in contemplation*". By contrast, the contemporaneous evidence suggested that the Luxembourg regulator was "*fairly positive*" and "*convinced that the Bank was not involved with the plan*". Similarly, there was little evidence that adversarial proceedings from the UK regulator were anticipated at the time of the commission of the PwC report. Accordingly, there was no threat of adversarial litigation in November 2017, or at some later time prior to PwC producing its report in June 2018.

Although the position regarding litigation privilege can evolve (for instance, where an investigation develops into adversarial proceedings), the early positive signals from the regulators in this case were not subsequently reversed.

The judge held that the Luxembourg regulator's involvement did not go beyond the investigative stage, nor was there any evidence to suggest that it would do so. In addition, the judge stressed that matters should not be considered with hindsight.

The Bank also cited the civil claim by Qatar in its claim to litigation privilege, but given that there was no evidence of any communication between the parties, or any intimation or fear of a claim against the Bank before November 2017, this was insufficient to claim litigation privilege.

Comment

This case could be seen as somewhat contrasting with earlier decisions in which litigation privilege was applied to internal investigation documents. The important distinction is that in previous cases, adversarial proceedings were held to be in reasonable contemplation by the company at the relevant time. The entitlement of a party to claim litigation privilege over internal investigative documents is highly fact-specific and will depend on the state of mind of the party claiming privilege at the time the document in question is commissioned or created.

This case is a useful reminder that documents produced by a third party for investigative and/or fact-gathering purposes are potentially disclosable in subsequent litigation, if they do not satisfy the test for attracting litigation privilege. In order to maximise the possibility of such documents being protected by litigation privilege, where appropriate, clearly record that the dominant purpose for creating the document is the specific adversarial proceedings that are in progress or reasonably in contemplation at that time. For further guidance, episode three of our Inside Dispute Resolution audiocast discusses strategic considerations for parties and counsel to enhance and preserve privilege in the context of investigations.

When are mediation position statements covered by 'without prejudice' privilege?

Berkeley Square Holdings Limited and others v Lancer Property Asset Management Limited and others
[2021] EWCA Civ 551

Despite being labelled "without prejudice", a set of mediation position statements were held by the Court of Appeal (upholding a High Court decision) to be admissible in subsequent litigation, to rebut an allegation that the settlement agreement concluded between the parties following the mediation was obtained by fraud.

Background

Berkeley Square Holdings, along with the other claimants, owned a London property portfolio estimated to be worth £5 billion. This portfolio was managed by Lancer Property Asset Management Ltd under a set of agreements executed in 2005 and 2006.

These agreements entitled Lancer to management and performance fees for their services. In 2011, an amendment was entered into that gave Berkeley Square's agent authority to direct Lancer to make payments to certain third parties, including BVI companies beneficially owned by the agent. Lancer was directed to make such payments by the agent on behalf of Berkeley Square and duly did so.

In early 2012, a dispute arose about the management and performance fees Lancer was entitled to, and the parties agreed to a mediation. Mediation position statements, which were marked "without prejudice", were exchanged and the mediation took place in September 2012. This dispute was settled shortly after the mediation, involving a payment from Berkeley Square to Lancer, with settlement deeds being signed by the parties including the agent.

In 2018, Berkeley Square launched proceedings against Lancer and the other defendants, alleging their involvement in a fraud by which the agent had misappropriated amounts from Berkeley Square. Berkeley Square sought to void the settlement deed that had been entered into. Berkeley Square alleged that it was not aware of such payments until 2017. However, Lancer's mediation position statement had expressly referred to the existence of those payments as part of the background to the earlier dispute.

Lancer sought to rely on its mediation position statement in its defence, on the basis that it fell within exceptions to the without prejudice rule. Berkeley Square sought to strike out those references in the defence on the grounds that they were not admissible under the without prejudice rule.

Exceptions to the without prejudice rule

At first instance, the High Court referred to the key case of *Unilever v Proctor & Gamble* [2000] 1 WLR 2436, in which Walker LJ summarised the without prejudice rule and exceptions to the rule that had been established in case law, which may allow without prejudice statements to be admissible in later proceedings. In particular, Lancer relied on the second exception set out by Walker LJ: that evidence of the negotiations is admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence.

The High Court held that this exception did apply in this case, albeit somewhat in reverse, as Berkeley Square had alleged that Lancer had been involved a deception and the without prejudice mediation position statements were being used to rebut that allegation. Although this rule had not previously been applied in English proceedings, its formulation had been approved, and there should be no distinction in the exception between a party seeking to use a without prejudice statement to prove an allegation of fraud, and a party seeking to use a without prejudice statement to disprove such an allegation.

The Court of Appeal upheld this decision, ruling that Berkeley Square's argument that this exception only allowed a party to use a without prejudice statement to prove an allegation of fraud in relation to a concluded settlement agreement was contrary to the purpose of the exception: which was to admit without prejudice statements to allow the Court to consider the question of whether a settlement agreement was binding. If this was an "extension" of the second *Unilever* exception, rather than an elucidation, it was a "principled" one that does not undermine the without prejudice rule.

Comment

This decision highlights that the general rule that 'without prejudice' documents cannot be referred to in proceedings is not an absolute rule, and there are a number of important exceptions to it. This applies to mediation position statements as well as other without prejudice communications.

The decision also represents a "principled extension" of the exception to the without prejudice rule that allows without prejudice statements to be referred to in proceedings where the validity of a settlement is in issue. In entering into without prejudice discussions, parties should remain mindful of these possible exceptions and remember that their statements could, nevertheless, later be relied on in certain circumstances in proceedings.

UK Supreme Court's landmark ruling on consumer class actions

Lloyd v Google LLC
[2021] UKSC 50

The subject of prior Covington client alerts, the *Lloyd v Google* case culminated in November 2021, when the Supreme Court ruled that Mr Lloyd's claim did not have a real prospect of success and therefore refused permission to serve proceedings out of the jurisdiction on Google.

Background

Mr Lloyd alleged that Google had tracked the internet activity of 4 million UK iPhone users without their consent, and used their personal data for the purposes of targeted advertising. Mr Lloyd argued that, as a consequence, each individual iPhone user had suffered harm, and such harm was the same harm because they had all experienced "loss of control" of their personal data in contravention of the Data Protection Act 1998 (the predecessor to the 2018 Act of the same name and the GDPR). Because of this same harm, they all had the "same interest" (a condition that has to be met in order to bring a representative action) in bringing a claim against Google. Mr Lloyd sought to bring the claim as a representative action, which would have allowed him to lead the claim as the representative of all 4 million users, who would automatically be part of the class without needing to consent or 'opt in' (making it an 'opt-out' class). Mr Lloyd proposed that each claimant would be entitled to a uniform damages award for loss of control of their data - estimated at £750 per person - meaning a total potential liability for Google in the sum of £3 billion.

Judgment

The Supreme Court's refusal was based on its view that it is not possible for individuals to claim compensation for a contravention of the DPA 1998 without also proving that they have suffered material damage (i.e. financial loss) or distress. The basis of Mr Lloyd's claim, that it was enough that the claimants had experienced "loss of control" of their data, was tantamount to saying that any non-trivial contravention of the DPA 1998 constitutes damage in and of itself, which is not the case.

The issue was not only that the particularised damage was stated as being loss of control of personal data without attempting to prove that the claimants had suffered financial loss or distress. The Supreme Court also rejected Mr Lloyd's argument that the claimants could all claim a uniform damages award, ruling instead that any assessment of damages necessarily required consideration of Google's alleged misuse on a case-by-case basis in respect of each individual claimant. The Supreme Court clarified that an individualised assessment of damages is not compatible with the representative action regime.

The Supreme Court therefore agreed with the trial judge that the claimant class: (i) did not necessarily suffer damage by reason of loss of control of their personal data; and (ii) did not have the "same interest" for the purposes of the representative action regime.

Comment

For in-house counsel, the points of note are that:

- With regard to representative actions, although the Supreme Court shut the door on Mr Lloyd's claim, it lowered the bar for representative actions more generally. The "same interest" requirement had previously been interpreted very narrowly by the Courts, such that where class members suffered harm that was in any way dissimilar, they could not be part of the same class. However, the Supreme Court clarified the circumstances in which a representative action may effectively be used, adopting a purposive and pragmatic interpretation of the phrase "same interest", i.e., to mean "no conflict". In other words, claimants who have suffered different damage may form part of the same class, as long as there is no conflict between them. This significantly lowers the bar to establish a class and, according to the Court, meets the objective of the representative action regime by giving consumers a means of redress in low-value claims. Therefore, we can now expect claimant firms and funders to seek to identify, and pursue, such claims in the near future.

- For data privacy claims specifically, we are likely to see claimants attempt to bring actions either on alternative grounds, such as based on the tort of misuse of private information or pursuant to the new Act, or by using alternative methods such as bifurcated actions (i.e. using representative actions to establish liability, with subsequent actions for individualised damages) or group litigation orders.

Both these points are expanded upon in our more detailed commentary on this case, which can be found here.

Two recent cases illustrate the English Courts taking a sympathetic approach to companies remedying personal data breaches

Warren v DSG Retail [2021] EWHC 2168 and *Rolfe v Veale Wasbrough Vizards LLP* [2021] EWHC 2809

Case 1: *Warren v DSG Retail* [2021] EWHC 2168

DSG Retail (trading as Currys PC World and Dixons Travel) suffered a sophisticated cyber-attack during which the attackers accessed the personal data of many customers. The circumstances of the cyber-attack were investigated by the Information Commissioner and resulted in a fine for DSG Retail, principally in relation to Data Protection Principle 7 of the Data Protection Act 1998 ("**DPA**") (taking appropriate technical and organisational measures against unauthorised or unlawful processing of data).

Mr Warren claimed that his personal information, comprising his name, address, phone number, date of birth and email address, was compromised in the attack. He brought a claim for £5,000 in respect of distress, the causes of action being breach of confidence, misuse of private information, breach of the DPA and common law negligence. DSG Retail sought to strike out all the claims except for the one based on the DPA (which amounted to an action following-on from the Information Commissioner's decision). The Court agreed that they should be struck out.

Although the breach of confidence claim was dropped, the Court considered it along with the claim for misuse of private information (it considered negligence separately). The Court analysed the 'wrong' at issue as being a failure which allowed the attackers to access personal data (rather than positive conduct comprising a breach of confidence or a misuse of private information), in other words that DSG failed in an alleged duty to provide sufficient security for Mr Warren's data. The Court held that there is no data security duty inherent in breach of confidence or misuse of private information claims. Instead, there must be a use or misuse and, while misuse may include unintentional acts, it still requires a 'use' which means some sort of positive action. Here, it was the criminal third party hackers who disclosed or misused Mr Warren's data, not DSG Retail.

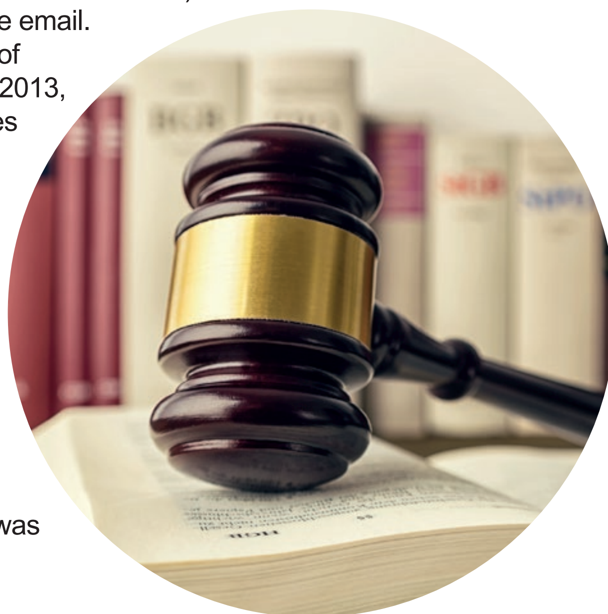
On the negligence claim, the Court held, firstly, that there was no need to impose a duty of care where a statutory duty existed which, in essence, determined the liability of data controllers. There was therefore no duty of care, nor could any proximity (for the purposes of any duty of care) be argued to have been created by the fact of a customer relationship. Secondly, the claimed loss was for distress and anxiety, but "*a state of anxiety produced by some negligent act or omission but falling short of a clinically recognisable psychiatric illness does not constitute damage sufficient to complete a tortious cause of action*". Therefore, more than "distress" is needed for negligence, although the Court recognised that, due to prior decisions, "distress" was enough for compensation for DPA breaches. However, because there was no loss for negligence purposes, there was not a complete cause of action, so the negligence claim was struck out.

***Warren v DSG Retail* [2021] EWHC 2168 and**
***Rolfe v Veale Wasbrough Vizards LLP* [2021] EWHC 2809**

Case 2: *Rolfe v Veale Wasbrough Vizards LLP* [2021] EWHC 2809

As for "distress", in September 2021 a further case, *Rolfe v Veale Wasbrough*, dealt with what would not be sufficient for a successful claim. Past judgments had indicated that there was a *de minimis* threshold below which actions would not be successful, but there had been no examples of what that meant in context until this case.

A firm of solicitors instructed by a school to chase late school fee payments sent correspondence by email to an incorrect email address (someone with an identical surname and the same first initial). The actual (but incorrect) addressee was asked to, and did, delete the email. The claimants claimed for misuse of confidential information, breach of confidence, negligence and damages under the GDPR and the DPA 2013, although the judgment did not say how much was claimed in damages and whether different sums were claimed under different heads. The defendant firm of solicitors applied for summary judgment on the claim, which appears to have been based on there having been no damage or distress suffered above a *de minimis* level.



The Court did not go into the differences between the causes of action, as had been done in *Warren v DSG Retail,* but stated that in principle: (i) damages could be recovered for breaches of data protection regulations and misuse of private information, including simply for distress; and (ii) loss of control of personal data can constitute damage, albeit this was not elaborated on. However, the Court said if any damage -- in the form of possible loss or distress -- was either "*not made out or is trivial*" then it would not succeed.

In this case, the Court found that: (i) the private information in question -- names and address and statement of account for the school fees -- was minimal (the Court later stating that it found it hard to imagine what significant misuse could result); (ii) the incident itself -- a one-off mistake to one individual who deleted the email immediately and therefore an incident that had been quickly remedied -- was minimal. Given the nature of breach, the nature of the information and the steps taken to mitigate, the Court found that it was more than fanciful to suggest either that actual loss had been suffered or that distress had been suffered above a *de minimis* level. Despite the claims (albeit not in the form of witness statements) of anxiety -- loss of sleep, feeling ill, time spent and "*fear of the unknown*" -- the Court found that "*no person of ordinary fortitude would reasonably suffer the distress claimed*" and granted summary judgment for the defendant solicitors.

Comment

We are beginning to see some structure around claims for breaches of data protection laws (see also our commentary on the *Lloyd v Google* case). These two cases are useful for understanding how the Courts will approach the two extremes of the data breach spectrum, mistakes and cyber-attacks, at least as regards what might be termed run-of-the-mill, or basic, private data. What happens in the mid-part of that spectrum, comprising employee-incidents or deliberate or negligent breaches, and different kinds of personal information, will no doubt be the subject of further cases over the next few years.

These cases show the Courts being sympathetic, at least with regard to fairly basic personal data, to the victims of cyber-attacks and to those who have made unfortunate (but quickly remedied) mistakes.

UK Supreme Court clarifies the scope of a professional advisor’s duty of care

Manchester Building Society v Grant Thornton [2021] UKSC 20

The technical legal issues raised in this judgment have practical implications concerning the recovery of damages from a professional advisor who may have given negligent advice to their client. Even if the professional advisor’s negligence may have factually caused the client’s loss (or elements of it), that loss must fall within the scope of the professional advisor’s duty of care in order to be recoverable. In practice, this could limit the extent to which the advisor may be held financially responsible for the consequences of their negligent advice. This issue was considered in *South Australia Asset Management v York Montague* [1997] AC 191 (“**SAAMCO**”). In *Manchester Building Society,* the Supreme Court addressed, for the first time, how SAAMCO applies to professional negligence by auditors.

Background

Manchester Building Society borrowed money at variable interest rates and used that to offer fixed interest rate mortgages. It entered into interest rate swap contracts to protect itself against the risk that the variable cost of borrowing would exceed the fixed rate of interest receivable on the mortgage loans.

The Society was subject to regulatory requirements that it held minimum amounts of capital, calculated against its financial statements. Given that swaps are valued on a mark-to-market basis, their values in financial statements can fluctuate regularly and significantly, and the Society recognised that it could be exposed to significant regulatory capital requirements and management in pursuing this business model.

The Society’s auditor, Grant Thornton, advised that the Society could use hedge accounting to reduce the volatility in its accounts and keep the amount of capital needed to satisfy its regulatory requirements at an affordable level. This advice was incorrect. The Society had to restate its accounts, as a consequence of which it had insufficient regulatory capital and had to prematurely terminate the swaps at a cost of around £30 million. Grant Thornton admitted that its advice had been negligent, but argued that the Society’s losses were not within the scope of its duty of care.

Judgment

The Court found that a duty of care was owed by Grant Thornton to the Society as regards economic loss, that there was a breach of that duty and that the loss in question (circa £30 million) was factually caused by the breach. The issue before the Supreme Court was whether, in accordance with SAAMCO, that loss was within the scope of Grant Thornton’s duty of care.

The classic example of the problem is negligent medical advice that a climber's knee is sound, in reliance on which the climber goes climbing and has an accident unrelated to their knee. The climber's resulting losses would not have occurred without the medical professional's negligent advice and the advice therefore factually caused the loss -- all the consequences of having gone on the climb would not have occurred if the correct diagnosis had been given. However, the law, following SAAMCO, considers that the professional is only liable for those consequences arising from matters within the professional's specific area of responsibility. As the injury sustained by the climber has nothing to do with the state of their knee, it is not within the scope of the medical professional's duty of care.

One way that has been looked at in the past is by using a positive 'counterfactual' -- if the advice had been correct (i.e. the knee was sound) the injury would still have occurred. Under the counterfactual test, professionals are considered responsible only for losses caused by the advice or information being wrong and not for losses which would have occurred even if the advice or information was correct. This is a way of achieving the objective that losses should reflect the assumption of risk implicit in the service that the professional agreed to provide. In the past this counterfactual test was not to be used in 'advice' cases (those cases where the professional is considered to assume a wide duty) but it was to be used in 'information' cases (where the duty is narrower). There had already been issues raised with regard to the counterfactual test, as to its applicability to all circumstances. There were also issues with how one differentiates between advice and information. Both approaches have now been discarded as primary analytical tools.

The case was decided by a 7-member panel of the Supreme Court, at the same time as a medical negligence case raising similar issues, and found unanimously for the Society. Lord Leggatt and Lord Burrows agreed with the result in the main judgment, but on slightly different grounds.

The Supreme Court attempted to clarify how to assess the damages in these cases, providing a set of six questions to be considered. On the SAAMCO points and the restraints on the ordinary operation of remoteness and causation:

- Lord Burrows said this was a matter of policy, in order to achieve a fair and reasonable allocation of risk of the loss between the parties.
- Lord Leggatt's analysis was closer to one of causation, explaining that there should be a sufficient causal connection between the loss and not the advice, but the state of affairs or particular fact or matter which made that advice incorrect.
- The five other judges suggested that they would not place as much emphasis on policy or on causation, but would derive the scope of duty from the purpose of the duty. The purpose of the duty is to be judged on an objective basis, by reference to the purpose for which the advice is being given. So in the case of negligent advice, one looks at what risk the duty was supposed to guard against and then to see whether the loss suffered represented the fruition of that risk. In this case, the purpose of Grant Thornton's advice was whether the Society could use hedge accounting in order to implement its proposed business model, bearing in mind its regulated status (i.e. the regulatory capital demands it was subject to). The risk was of losses in having to break swap contracts when it was realised that hedge accounting could not be used. Because the purpose of Grant Thornton's advice was to assess that risk, and the advice was wrong, the accountants were liable for the losses, subject to other issues as to contribution.

Comment

For in-house counsel as well as their advisers, this judgment calls for more thinking around engagements with professional advisers, their wording and purpose, as well as any changes to that engagement it during its course. It will also call for careful consideration when assessing the recoverability of damages from professional advisers.