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Top Ten English Cases of 2023: Key Developments for In-House Counsel

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Introduction

Welcome to our round up of important English cases from 2023. We have selected ten cases that we believe are important for in-house counsel to know about for their daily business, regardless of any particular industry or specialism. These cases reflect some of the key themes frequently arising in many recent disputes, including contract formation and interpretation, termination for 'material' breach, exclusion clauses and indemnities, and vicarious liability.

This year's cases illustrate the English Courts' overall approach of upholding the ordinary, objective meaning used by the parties in their contracts, making clear, precise drafting critical. The Courts have repeatedly emphasised that context is important, considering factors such as the formality and urgency of the parties' negotiations, and whether or not the contract was professionally drafted. Where the contract's meaning is clear, the words actually used will normally override the factual background – even if one party (or both) finds that the agreement did not serve their best interests with the benefit of hindsight.

It is also important for parties to formalise their agreements in a signed contract, wherever possible. Parties who have not memorialised their negotiations – such as those starting out in an informal commercial relationship, or agreeing payment terms through an exchange of emails – may find that the English Courts will not readily uphold the existence of a binding contract, or imply terms that one party alleges make commercial sense based on the wider facts.

As this year's selection of cases illustrate, disputes arising in many different circumstances could be avoided, or at least reduced in complexity, if the parties had simply entered into a signed – and well-drafted – contract.

For more insights on developments in English litigation from the past year, you can read our recent alerts here.

We hope you enjoy our selection of cases.

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CASE 1

"Context is All" When Parties Intend to Reach a Binding Agreement for Services, but Negotiations do not Result in a Signed Contract

Fenchurch Advisory Partners LLP v AA Limited

[2023] EWHC 108 (Comm)

This judgment addresses a claimant's right to payment for professional advisory services undertaken without an executed contract. The parties had exchanged emails concerning the fee structure, but did not sign an engagement letter. The High Court held that no binding or implied agreement had been concluded, but the claimant's claim for unjust enrichment succeeded.

Background

In 2019, Fenchurch Advisory Partners LLP ("Fenchurch") provided advice to a well-known breakdown recovery service, AA plc ("the AA"), in relation to the potential sale of the AA's insurance division. The terms of Fenchurch's engagement were heavily negotiated. However, the draft engagement letter ("EL"), governing the terms on which Fenchurch provided its services, was never formally executed. The intended sale of the AA's insurance division ultimately collapsed. The parties disputed the amount of fees Fenchurch was owed by the AA for its work. Fenchurch claimed that an email exchange between the parties from November 2019 amounted to a binding agreement (the "Email"). In the Email, Fenchurch's executive vice chairman said the parties had agreed that Fenchurch's engagement fee would comprise: (i) a £0.35m progress payment; (ii) a £40m success fee; and (iii) a variable value creation fee contingent on the ultimate deal value. If the AA confirmed its agreement, Fenchurch would then prepare the final EL for signature. The AA's interim CFO replied to confirm that these terms were agreed.

The AA argued that the commercial terms discussed in the Email were separate from the wider terms of Fenchurch's engagement. The terms set out in the Email were not sufficient to create a binding contract between the parties.

Judgment

No Binding Contract

The Court held that no binding contract had been concluded. For the purposes of negotiating the EL, the parties had split the commercial and legal terms for Fenchurch's engagement. The Email set out some important commercial terms, but the parties had not agreed other crucial provisions, such as what circumstances would trigger the payment of Fenchurch's success fee, and whether an indemnity sought by Fenchurch should be uncapped. The apparent agreement of the terms set out in the Email was not sufficient to show that the parties had agreed on "all of the detailed terms of the EL".

No Binding Agreement on Payment of Fees

Fenchurch's alternative argument was that the parties had reached a binding agreement on the fee construct stated in the Email, leaving other minor or non-essential points to be agreed later.

The Court accepted that, in principle, it was open to the parties to agree that they would be bound before the negotiation was completed on all of the detailed terms of the EL. However, the Court emphasised the importance of context. For example, a commodity sale or spot fixture, where the price is moving by the hour, may be a situation in which the parties could reach a binding agreement at an earlier stage, notwithstanding

CASE 1

that the negotiations are incomplete. At the other end of the spectrum, for example in the purchase of a business, there may be extensive due diligence and lawyers negotiating detailed terms. In those circumstances, there is no binding agreement until the documents are signed by both parties. In the present case, there was no evident urgency that could explain the parties limiting themselves to such an incomplete contract. On the contrary, the parties negotiated the EL over a period of months, which suggested that they intended this document to govern the terms of Fenchurch's engagement fully. For these reasons, the Court concluded that there was no binding agreement between the parties.

No Implied Contract

The Court also considered, and rejected, Fenchurch's alternative argument that there was an implied contract between the parties that Fenchurch would be paid a reasonable fee for its services. An implied contract can arise out of the parties' conduct, including in circumstances where one party begins to provide a service at the request of another party on the basis that it would be paid a reasonable sum for services rendered. However, contracts are not lightly implied from conduct under English law.

This was a clear case in which the parties were seeking to negotiate terms for a contract, and the parties envisaged agreeing the fee to be paid to Fenchurch. Fenchurch began work on the basis that its engagement terms would be agreed in due course, and not that there was already an agreement in place that the AA would pay a "reasonable" fee. The facts of the case did not give rise to an implied contract, and it would be artificial to characterise the parties' dealings in this way.

Successful Claim for Unjust Enrichment

Fenchurch succeeded in its alternative claim of unjust enrichment. The Court held that Fenchurch's work had provided the AA with a valuable benefit, even though the proposed sale did not go ahead. It would not be just for the AA to benefit from Fenchurch's work without any payment. Fenchurch undoubtedly took a risk as to whether or not the sale would go ahead and it would earn any success fee, but not about receiving any payment for its services on the project. The AA was ordered to pay restitution for unjust enrichment for Fenchurch's work on the project. The Court valued this at the amount of the progress payment (£350,000 excluding VAT), plus expenses.

Comment

This decision provides an important reminder that terms parties appear to have agreed in writing during negotiations may turn out not to be binding upon them. This outcome may appear counterintuitive to some commercial parties, but context is key. As this case demonstrates, the English Courts will consider the wider circumstances – including factors such as the degree of urgency and detail of the negotiations being, and to be, conducted between the parties – when considering issues of contractual formation.

Fenchurch's successful claim for unjust enrichment also illustrates that judges may be willing to award payment for services rendered in the expectation of a contract, in circumstances where there is no proper basis for an implied agreement.

CASE 2

Failure to Record Terms of Informal Commercial Arrangement Demonstrates Risks to Parties if the Relationship Later Fails

Zymurgorium Ltd v Hammonds of Knutsford PLC

[2023] EWCA Civ 52

This case underscores the importance of recording agreements in a formal, written contract, even when the parties are at an early stage of their commercial relationship. The parties had not recorded their commitments to each other in writing, requiring the Court to determine the extent of their contractual obligations, including the existence of exclusivity terms and a reasonable notice period for termination.

Background

The claimant, Zymurgorium, is a manufacturer of flavoured gins and gin liqueurs. The defendant, Hammonds, is a drinks wholesaler. Between 2015 and 2018, Hammonds acted as Zymurgorium's wholesaler, during which time Zymurgorium's business expanded significantly. Hammonds negotiated bespoke arrangements with five customers (Booths, JD Wetherspoon ("JDW"), Greene King, Bargain Booze and Bookers). Zymurgorium supplied its products to Hammonds and Hammonds resold them to the customers.

During 2018, the parties' relationship began to deteriorate. Hammonds began developing a range of its own gin liqueurs and Zymurgorium began to have direct contact with JDW. In late 2018, the parties' relationship broke down after Hammonds discovered that Zymurgorium was supplying its products directly to JDW. Zymurgorium issued a claim for unpaid invoices. Hammonds counterclaimed for damages for breach of contract. Hammonds argued that there was an unwritten, overarching agreement between the parties that Zymurgorium would not supply its products except through Hammonds. Zymurgorium had acted in repudiatory breach, which Hammonds had accepted, resulting in the termination of the overarching agreement.

Following a trial on liability, the High Court held that:

- There was no overarching agreement in place between the parties. Instead, there were individual contracts in relation to each of the five customers.
- It was an implied term of each of the five individual contracts that Zymurgorium would not supply the customer except through Hammonds. By supplying JDW directly, Zymurgorium had acted in repudiatory breach of that contract and had renounced the other four individual contracts.
- It was an implied term that each contract could be terminated on a reasonable notice period of three months. Consequently, Zymurgorium was liable in damages for each of the five contracts, for a period of three months.

Hammonds appealed the High Court's decision on the following grounds:

- The Judge made an error in concluding that there was no overarching agreement between the parties.
- Even if there was not exclusivity in 2015, there had been a subsequent variation to the overarching agreement, which introduced exclusivity.
- The agreements were, or became, relational contracts.
- A reasonable notice period for termination of the contracts was 12 months.

CASE 2

Zymurgorium cross-appealed on the following grounds:

1. One of the five contracts (relating to Bargain Booze) was not an individual agreement.
2. Zymurgorium's repudiatory breach of the JDW contract (which Zymurgorium did not challenge on appeal) did not amount to a renunciation of each of the other four contracts.

Judgment

The Court of Appeal upheld the High Court's judgment in its entirety. It dismissed each ground of Hammond's appeal, for the following reasons:

1. The parties' agreement that Hammonds would act as Zymurgorium's wholesaler did not amount to the kind of legally enforceable obligations that were needed to create an overarching contract between the parties. There was no definite commitment by Hammonds to order any particular quantities of Zymurgorium's product, or any definite commitment by Zymurgorium to accept and fulfil orders placed by Hammonds.
2. The second ground was a new argument relied on by Hammonds, which it was not permitted to raise for the first time at the appeal stage.
3. Hammonds accepted that if it lost on grounds one and two, its third ground fell away. Ground three therefore did not need to be decided by the Court of Appeal.
4. The reasonableness of the notice period was an implied term, which depended on the particular facts of each case. Relevant considerations in this case included that Hammonds was able to develop its own product within three months, and that Hammonds would be required to promote Zymurgorium's product during the notice period. The High Court did not reach a conclusion that was "demonstrably wrong" when identifying a three month notice period.

The Court of Appeal also dismissed both grounds of the cross-appeal:

1. Based on the evidence heard at first instance, there was nothing wrong in the High Court's conclusion that the Bargain Booze contract was an individual agreement.
2. Zymurgorium was clearly treating itself as free to supply direct to the customer, and that applied to the other customers as much as JDW. Zymurgorium's conduct fell "well within" the concept of a renunciation of contract.

Comment

This case demonstrates the importance of having a formal, written contractual agreement, even when companies are in their infancy. It is not enough to expect the Court will imply terms that a party may think make commercial sense. Where parties agree to take matters forward at an early stage in their commercial relationship, without making any definite commitments that are sufficiently fleshed out, such an arrangement is likely insufficient to create a binding framework contract. The case also serves as a useful reminder that the Court of Appeal is not the forum to raise new arguments, as Hammonds attempted to do.

CASE 3

The Ordinary Meaning of Words Trumps the Factual Matrix when Interpreting Contracts

Contra Holdings Ltd v Bamford

[2023] EWCA Civ 374

The Court of Appeal considered the correct approach to contractual interpretation when one party argued that the High Court had overlooked important background facts. Dismissing the appeal, the Court of Appeal confirmed that the factual matrix did not detract from the clear and ordinary meaning of the words used in the parties' contract. This holds for informal contracts and is important when there are contingent obligations (e.g. success fees).

Background

A dispute arose between family members concerning the sale of the family's group of companies, the JCB Group (the "Group"). The parties reached a short, informal agreement, without the assistance of any external advisors. The agreement provided, among other matters, that the Claimant's CEO would provide advisory services to the Defendant regarding the sale of the Group (referred to in the agreement as "Project Crakemarsh").

In consideration for providing those services, the Defendant would pay the Claimant a "success fee on the completion of Project Crakemarsh", amounting to around £27m.

The Group was ultimately restructured, rather than sold. The Defendant did not pay the success fee to the Claimant. The Claimant claimed that the success fee was due and the Defendant had breached the agreement, because:

- Considering the relevant factual matrix, the terms of the agreement provided for the payment of the success fee whether the Group was sold or restructured. The Defendant's interests had been divested, and this was the intended overriding objective of the agreement.
- Alternatively, a term to the same effect was to be implied ("First Implied Term").
- Alternatively, a term was to be implied that, if no sale took place, the Claimant would be "made whole" by being allowed to charge an appropriate rate for the CEO's services ("Second Implied Term").

The High Court allowed the Defendant's application for strike out/reverse summary judgment, primarily on the basis that the natural and ordinary meaning of the express words used in the agreement related only to a sale of the Group. Nothing in the factual matrix justified extending this in the event of a restructuring. Further, the First Implied Term did not meet the relevant test of being "necessary for the operation of the agreement" or "so obvious that it went without saying". Similarly, there was no basis in the agreement for the Second Implied Term because it was clear that the only trigger for payment of the success fee was the sale of the Group.

The Claimant appealed, primarily on the basis that the High Court had misinterpreted the agreement by not considering it alongside the relevant and important factual matrix.

Judgment

The Court of Appeal unanimously dismissed the Claimant's appeal on all grounds:

- **Contractual interpretation:** The Court of Appeal emphasised that while contractual interpretation

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"must be carried out against the relevant factual matrix […] it is not permissible to construct from the background a meaning that the words of the contract will not legitimately bear. The background should be used to elucidate the contract, and not to contradict it". There was nothing in the factual matrix to detract from the clear meaning of the words in the agreement providing for the success fee only on "completion of Project Crakemarsh", which could only be interpreted to mean a Group sale. Similarly, while "context may have greater than usual weight when interpreting a more informal document […] informality is not a trump card that can overturn a text that carries an obvious and clear meaning", especially where the document had been drafted carefully and by a qualified accountant.

- **Success fee:** A term requiring "payment of a success fee on the completion" could not be interpreted, as the Claimant suggested, as requiring "payment of an uplifted sum upon completion". Among other problems, interpreting the provision in this way as a deferred payment clause would create "an obvious commercial absurdity". This was because the value of the CEO's services rendered were at most £4.5m, so the £27m to be paid on completion could only be understood as representing an abnormally large reward for an inherently uncertain contingency (the completion of the sale), with no reward in the event of failure (no sale).
- **Implied terms:** The Court of Appeal found the first instance judge's conclusions on the implied terms to be "unimpeachable". Neither of the two implied terms proposed by the Claimant were sustainable as a matter of obviousness or business efficacy. This interpretation was consistent with the recent majority decision of the UK Supreme Court in *Barton v Gwyn-Jones* [2023] UKSC 3: terms will not be implied where they are inconsistent with the express (and complete) terms agreed between the parties.

Comment

This judgment is a reminder of the prime importance of clear and unambiguous drafting, especially where contracts contain terms relating to the occurrence of a contingency (such as the circumstances in which a success fee will be payable). Implied terms will not come to save a party arguing for a contractual interpretation at odds with the ordinary meaning of the words used, just as they will not save a party from a bad bargain.

It is also a reminder that the Courts are prepared – and indeed required – to "grasp the nettle" and decide a case on a summary basis where it ultimately concerns a short and decisive point of law. This includes cases where the point of law concerns the proper construction of the contract. This is so even where (as in this case) the judge would have complicated factual questions to decide if the matter were to proceed to trial.

CASE 4

What Constitutes a "Material" Breach of Contract Entitling Termination? High Court Requires "Substantial" Breach with Significant Consequences

RiverRock European Capital Partners LLP v Nicolaus Harnack and Franz Lucien Mörsdorf

[2022] EWHC 3270 (Comm)

RiverRock claimed that it was entitled to terminate a consultancy agreement for material breach. In this judgment, the High Court observed that the concept of a "material" breach is hard to define. Establishing a "material" breach depends upon the context and resulting consequences flowing from the breach. This judgment provides guidance on these points.

Background

RiverRock, an investment firm supervised by the Financial Conduct Authority ("FCA"), brought claims against the defendants alleging that it was entitled to certain payments (essentially reimbursement of expenses, including advances and salaries, paid by RiverRock) from the defendants following the termination of a consultancy agreement with Deutsche Real Estate Asset Management Limited ("DREAM").

Under the consultancy agreement and other allied agreements, RiverRock appointed DREAM, which had been formed by the defendants, as its consultant and FCA appointed representative for one of RiverRock's investment funds. In practice, the defendants were responsible for the day-to-day management and operation of the fund. However, from the fund's launch in November 2016, there were issues raising and sourcing investments and, consequently, RiverRock considered changing the fund's management. In November 2017, DREAM was struck off the company register and dissolved after it failed to file a confirmation statement with Companies House. As a result, RiverRock terminated the consultancy agreement and brought claims against the defendants on the basis that they had allegedly undertaken to meet DREAM's financial obligations following termination.

The High Court had to determine whether the breaches allegedly flowing from DREAM being struck off the register and dissolved were 'material'.

Judgment

In dismissing the claim, the High Court held that what constitutes a "material" breach has been difficult to define. Its meaning is dependent on context and is likely to be determined by the consequences of a finding that such a breach occurred.

The Court held that where those consequences would be significant, such as the termination of a contract that has required significant investment of time or resources by the parties, the breach would need to be "substantial" – meaning a serious matter, rather than one of little consequence.

In determining materiality, the Court considered various factors, including the actual breaches, the consequence of the breaches to the innocent party, the guilty party's explanation for the breaches, the breaches in the context of the parties' agreement, and the consequences of the agreement being terminated versus being continued.

The Court held that the alleged breaches flowing from the strike-off and dissolution of DREAM were not material for the following reasons:

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- The breaches were the result of a mistake. One of the defendants did not receive the notification he required to file the confirmation statement as he had moved house.
- The breaches were capable of remedy. DREAM could have been restored to the register quickly and easily, and the arrangements between the parties could have continued.
- RiverRock was not actually concerned by the dissolution of DREAM, but rather exploited it to justify the termination of the agreement because the fund was performing poorly.
- The dissolution did not result in losses to the fund or its investors, or complaints or claims against RiverRock.
- The FCA took no action against RiverRock (and there was no reason to suppose that it would) and the company suffered no penalty.
- There were no other practical consequences to RiverRock arising from the dissolution of DREAM other than the replacement of the defendants as lead managers of the fund.

Comment

This judgment demonstrates that whether a breach is material will turn on the facts of the case. Before terminating a contract on the basis of an alleged material breach, a party should consider issues such as the context and impact of the breach, whether it is capable of remedy, and whether the defendant may have an explanation for the breach. The failure to establish a valid basis for terminating a contract for an alleged material breach could result in the asserting party being liable for wrongful termination and/or breaches of other obligations under the relevant agreement.

CASE 5

Not So Special Any More: Exclusion Clauses Construed Using Standard Principles of Construction

Drax Energy Solutions Limited v Wipro Limited

[2023] EWHC 1342 (TCC)

In this judgment on a preliminary issue, the High Court concluded that an exclusion clause in a Master Services Agreement ("MSA") provided for a single aggregate cap, which applied to the defendant's total liability for the claimant's claim, and not multiple caps with a separate financial limit applying to each head of loss claimed by the claimant.

Background

Early in January 2017, Drax Energy Solutions Limited ("Drax"), an energy supplier, entered into a MSA with the IT services business Wipro Limited ("Wipro"). The MSA governed the terms on which Wipro would provide various new IT systems to Drax. The work to be done under the MSA was allocated under various 'statements of work' ("SOW").

Drax terminated the MSA in August 2019 on the grounds of repudiatory breaches by Wipro, and a background of missed milestones and IT problems.

In these High Court proceedings, Drax sought damages under four categories of losses: (i) 'Misrepresentation'; (ii) 'Quality'; (iii) 'Delay'; and (iv) 'Termination'. The quantum of the 'Misrepresentation' claims reflected Drax's entire expenditure on the MSA, with Drax arguing that but for Wipro's misrepresentations, it never would have entered into the MSA at all. Each of the other three categories of losses claimed (i.e. the Quality, Delay and Termination claims) were separate and distinct from each other.

A trial of preliminary issues addressed the interpretation of an exclusion clause that could have radically reduced the recoverability of the sums claimed. Complicating matters, both the specific limitation relied on by Wipro and the wider provisions of the relevant clause were badly drafted. In the case of the specific limitation, this provided (in relevant part) that Wipro's 'total liability to the Customer', i.e. Drax, "shall be limited to an amount equivalent to 150% of the Charges [i.e. sums due under the SOWs] paid or payable in the preceding twelve months from the date the claim first arose. If the claim arises in the first Contract Year then the amount shall be calculated as 150% of the Charges paid or payable for a full twelve months".

The key questions arising, and the basis of the two preliminary issues that the Court was asked to decide, were: (1) did the specific clause set an overall cap for all claims brought by Drax under the MSA; and (2) if not, how did the cap apply to the claims brought in these proceedings (and specifically, did it apply to each individual cause of action, to each of the four categories of claims identified above, or to each liability owed by Wipro)?

Judgment

The Court's analysis did not break new ground on the interpretation of exclusion clauses. But it does provide helpful insights into the way the Courts are currently approaching these provisions, embracing the orthodoxy promoted in modern case law that answers to questions of contractual interpretation are found not in the application of special rules of interpretation, but in broad principles, and above all in the language actually employed by parties in the contract.

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In this case, the Judge directed himself to those general principles, and to the specific authorities applying those in the context of exclusion clauses. That approach disavows the application of old-fashioned rules like *contra proferentem* – i.e. the principle that an exclusion clause should be interpreted in the way less favourable to the party who procured it. The principles of construction for exclusion clauses are now no different from those applied elsewhere. Only the context is different; there are legal duties, and commercial norms, which the Courts recognise are ordinary incidents of contracts, and when interpreting exclusion clauses the Court will start from the assumption that, in the absence of clear words to the contrary, the parties did not intend to derogate from those rights and duties, e.g. by excluding or limiting the right to recover for their breach. But how strong that assumption will be, and whether other factors will be more compelling in the Court's analysis, are matters that will need to be determined on a case-by-case basis, employing the standard interpretative tools.

In this case, the analysis of the overall clause required a lengthy exhibition of judicial reasoning, reflecting the unsatisfactory nature of the drafting. But the Judge concluded that both the language of the specific clause itself, and the wider provisions, on balance, supported Wipro's position that the fee cap in the specific clause should be construed as applying to all claims brought by Drax. The Judge's consideration of the commercial context in which the MSA was drafted did not alter that conclusion. Nor, interestingly, did the assumption that parties did not intend to give up legally valuable rights that they would otherwise possess. The Judge noted that Drax still had recourse to compensation up to the value of £11.5 million, and that the allocation of risk between the parties was not one that made no commercial sense.

Finally, the Judge concluded that if he was wrong on the existence of a single cap for all claims, then the cap should instead be construed as applying separately to each category of claims – i.e. the 'Misrepresentation' Claims, the 'Quality' Claims, the 'Delay' Claims and the 'Termination' Claims – rejecting alternative proposals that it should apply to each cause of action, or to each liability owed by Wipro.

Comment

It is not unreasonable to suppose that if the issues in the case had been decided 20 years ago, a Judge might well have reached a different conclusion, finding against Wipro's attempts to rely on the flawed language of the clauses to benefit from wide-ranging limitations of the liabilities it might otherwise owe. That would be a natural conclusion for lawyers accustomed to think in the old methodologies of *contra proferentem*, and clear words being required to give up valuable rights. But it is the actual words used, in their context, that are determinative of meaning and now provide the more useful starting point for contractual analysis even of exclusion clauses. Indeed, in *Drax v Wipro*, only two of the forty paragraphs determining the key question of contractual interpretation were addressed to anything else.

The decision is accordingly a useful reminder that with exclusion clauses, as much as with other clauses, the paramount concern of the Courts will be to establish the true nature of the bargain between the contracting parties. While a clear, well-drafted exclusion clause is always the best defence to future claims, parties seeking the benefit of vague or overly-elaborate provisions can take particular comfort from the Court's approach here.

CASE 6

Guidance on the Approach to Contractual Interpretation in a Dispute Relating to the Exclusion of "Anticipated Profits"

EE Ltd v Virgin Mobile Telecoms Ltd

[2023] EWHC 1989 (TCC)

The High Court held that an exclusion clause was effective in excluding a damages claim that was properly characterised as a claim for "anticipated profits". In doing so, the Court provided useful guidance on the correct approach to interpreting exclusion clauses.

Background

Both EE and Virgin provide mobile phone and data services. EE is a mobile network operator ("MNO"), whereas Virgin is a virtual network operator, meaning it must contract with an MNO to use their mobile network. In 2013, EE and Virgin entered into a Telecommunications Supply Agreement ("TSA"). Pursuant to the TSA, EE gave Virgin access to its network, providing Virgin's customers with 2G, 3G and 4G services. The TSA contained an exclusivity clause in favour of EE.

In 2016, the TSA was amended with a view to Virgin providing 5G services to its customers, either using EE's network or, in the absence of agreement between the parties, via a different network owned by one of EE's MNO competitors. Virgin customers who received 5G services from an alternative MNO could also receive 2G, 3G and 4G services from that MNO. The TSA's exclusivity clause was amended to reflect this new exception. In 2021, Virgin entered into an agreement with another MNO, Vodafone, for the supply of 5G services.

The dispute between the parties concerned whether Virgin had acted in breach of the exclusivity clause in the TSA. EE claimed that Virgin had migrated non-5G customers onto the Vodafone network, and/or that Virgin added new non-5G customers to the Vodafone network, even though those customers were only provided with 2G, 3G or 4G mobile services. EE sought damages of around £24.6 million for the resulting "loss of revenue" that it would "otherwise have earned" from providing relevant services under the TSA. EE categorised its claim as one for "charges unlawfully avoided", rather than for loss of profits or wasted expenditure.

Virgin denied breaching the exclusivity clause. It also argued that EE's damages claim plainly fell within the clear and natural meaning of the words "anticipated profits" in the TSA's exclusion clause, so EE's claim must fail. Virgin applied to strike out EE's claim and/or for reverse summary judgment.

Judgment

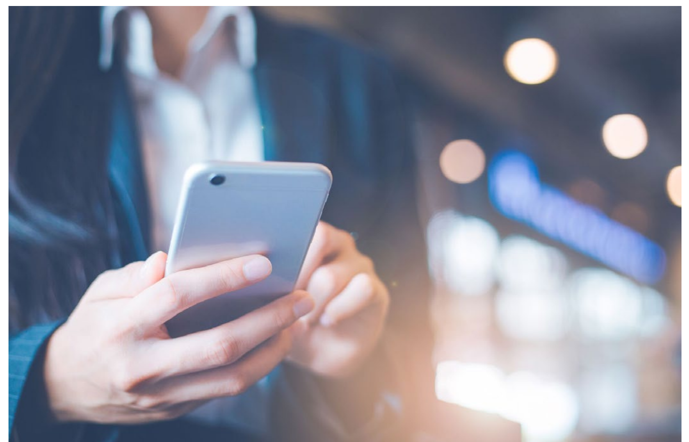
Nature of EE's Claim

The Court held that EE's claim was properly characterised as a claim for loss of profit, and to suggest otherwise was "fanciful". EE was seeking to recover the profit it would have made had the Virgin customers alleged to have been diverted to other networks used EE's services under the TSA.

Interpretation of the Exclusion Clause

The judgment is notable for its helpful overview of the approach to be taken to contractual interpretation in general (at paragraphs 25-26), and to exclusion clauses in particular (at paragraph 27). In summary:

- The exercise of construing an exclusion clause must be undertaken in accordance with the ordinary methods of contractual interpretation. The principle of freedom of contract requires the Court to respect and give effect to the parties' agreement.



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- The Court's starting point is that, in the absence of clear words, the parties did not intend to derogate from normal rights and obligations.
- The more valuable the right, the clearer the language of an exclusion clause will need to be if it is to be given effect.
- Unclear words will not suffice. If a linguistic, contextual and purposive analysis does not provide sufficient clarity, any ambiguity must be resolved against the party seeking to exclude liability.
- In commercial contracts, it would be wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning only.
- An exclusion clause will not normally be interpreted so as to defeat the main object of the contract or to create a commercial absurdity, notwithstanding the literal meaning of the words used.
- Where language is fairly susceptible of one meaning only, that meaning must be attributed to it unless "the meaning is repugnant to the contract". However, this is a principle of last resort. There is authority that it applies only in cases where the effect of the clause is to relieve one party from all liability for breach of any of the obligations which they have purported to undertake.

Applying these principles, the Court held that Virgin's liability for damages fell within the terms of the exclusion clause. The Court's reasoning for this conclusion included:

- The language of the exclusion clause was clear and unambiguous. A claim for loss of profits was capable of being encompassed by the words "anticipated profits". There was nothing in the exclusion clause to suggest a narrower, more restricted meaning.
- A consideration of all the relevant circumstances provided support for a straightforward and unrestricted reading of the words. The TSA was a bespoke, lengthy and detailed contract negotiated on a "level playing field" by two sophisticated parties.
- The exclusion clause provided a detailed regime governing the parties' rights to remedies. The exclusion of "anticipated profits" was "plainly part of the risk allocation exercise between the parties". It was a tailor-made provision that was intended to have a wide reach.

EE's claim for damages was excluded by the terms of the TSA's exclusion clause. The Court granted summary judgment on EE's claim in Virgin's favour.

Comment

This judgment contains an instructive and user-friendly guide to the interpretation of contracts, and exclusion clauses in particular. The valuable guidance set out at paragraphs 25 to 27 of the judgment are well worth a read for any practitioner. The judgment also contains useful guidance on determining when a case will be appropriate for summary judgment.

CASE 7

High Court Interprets Exclusion Clause Based on its Plain Meaning

Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc

[2023] EWHC 2506 (TCC)

The High Court granted summary judgment for the defendant, finding that an exclusion clause was effective in excluding loss of profits and wasted expenditure. Because the parties had negotiated the contract, the Unfair Contract Terms Act 1977 ("UCTA") did not apply to it, and the exclusion clause was not subject to UCTA's reasonableness test.

Background

The claimant, Pinewood Technologies Asia Pacific Ltd ("PTAP"), entered into two Reseller Agreements with the defendant, Pinewood Technologies Plc ("Pinewood"). Despite the similar names, the two companies are unrelated. Under the Reseller Agreements, PTAP was appointed as Pinewood's exclusive reseller of the latter's dealer management system for the automotive industry in certain Asian countries.

PTAP alleged that Pinewood breached various obligations under the Reseller Agreements and claimed for its resulting lost profits and wasted expenditure.

The Reseller Agreements contained identical exclusion clauses which excluded liability for various heads of loss, including: (1) special, indirect or consequential loss; (2) loss of profit, bargain, use, expectation, anticipated savings, data, production, business, revenue, contract or goodwill; (3) any costs or expenses, liability, commitment, contract or expenditure incurred in reliance on the Agreement or representations made in connection with the Agreement. Pinewood applied for reverse summary judgment on PTAP's claim, arguing that PTAP's claim for lost profits and wasted expenditure were excluded. Pinewood also counterclaimed for outstanding sums due under the Reseller Agreements on the basis that the Agreements provided that PTAP had to make monthly payments in full, without set-off. Pinewood applied for summary judgment on its counterclaim.

PTAP argued that the clauses in question formed part of Pinewood's written standard terms of business within the meaning section 3(1) of the UCTA. Both clauses did not meet the "reasonableness" test under section 11 of UCTA, meaning that the clauses were ineffective, and Pinewood was not entitled to rely on them. PTAP sought permission to amend its claim to reflect this argument (the "UCTA Argument").

Judgment

PTAP's Application to Amend its Claim

The High Court held that for UCTA to apply to the Reseller Agreements, the deal must have been done on Pinewood's standard terms of business, which must have remained "effectively untouched" by the parties' negotiations. There was no requirement that the parties' negotiations had to relate to the exclusion terms of the contract in order for UCTA not to apply.

In this case, PTAP had made several substantive changes to the draft agreement Pinewood sent over, and both parties had access to legal advice. It could not be said that the terms were "effectively untouched", and the fact that there was no negotiation on the specific clauses did not alter the position. As the Court concluded that the Reseller Agreements were not made on Pinewood's standard terms of business, it was unnecessary for it to consider the reasonableness of the clauses under UCTA. PTAP's UCTA Argument had no real prospect of success, and the Court dismissed its amendment application.

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Pinewood's Application for Reverse Summary Judgment on Exclusion of Lost Profitss

The High Court granted reverse summary judgment in relation to PTAP's claim (except insofar as PTAP had a claim for incurred costs). There was no factual or legal complexity that would necessitate a trial.

The Court held that, on a true interpretation of the exclusion clause, Pinewood's liability for lost profits and wasted expenditure fell within its terms. The Court rejected PTAP's argument that the exclusion clause could not apply to the non-performance of contractual obligations or to repudiatory breaches of contract. According to the Court, the exclusion clause was "on its face clear and unambiguous" in that the word "breach" in the clause was not qualified or limited in scope in any way. Notably, the Court concluded that, "[...] even where there is an imbalance between the parties, there is no requirement for the Court to strain the language if it is clear". There was nothing in the surrounding provisions or contractual context to justify reading words into the clause that were not there.

Pinewood's Application for Summary Judgment on Set-off of Unpaid Fees

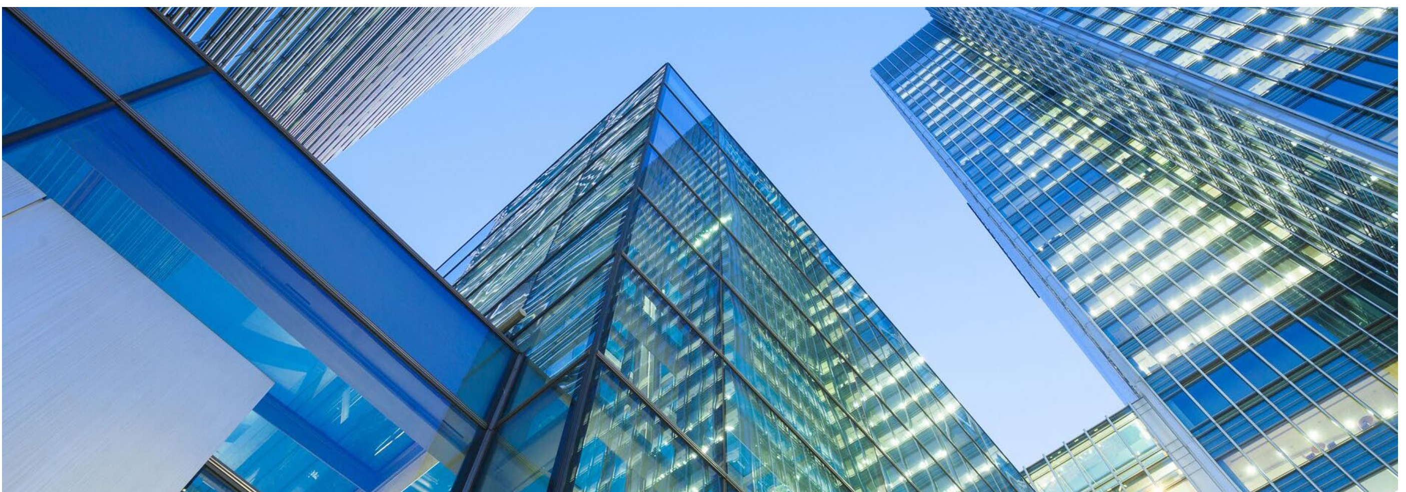
The English Courts typically approach a clause attempting to restrict set-off rights with caution. If a set-off is to be excluded by contract, clear and unambiguous wording is required. This is all the more important where a set-off clause is asymmetrical, as it was in this case.

The Court agreed with Pinewood's construction. The clause clearly stated that the monthly fees "shall be made in full without withholding deduction or set off, *including* in respect of taxes, charges and other duties" (emphasis added). Based on the plain meaning of the clause, this was not an exhaustive list of items that may not be withheld, deducted or set off against the monthly fees. The Reseller Agreements' interpretation clause further clarified this point by stating that "the word 'including' shall be deemed to be followed by '(without limitation)'". As there was no factual evidence on this issue that would need to be determined at trial, the Court held that Pinewood was entitled to summary judgment on its counterclaim.

Comment

The judgment demonstrates the English Courts' approach to the interpretation of exclusion clauses. The Court made it clear that it would not look beyond the plain meaning of the language in the clause, which was clear and unambiguous.

The judgment is also an important reminder that UCTA will only apply where the contract is made on one party's standard terms of business, which must be "effectively untouched". Although the parties did not negotiate either the exclusion clause or the set-off clause, UCTA did not apply because there were substantive amendments to other terms. As a result, neither clause was subject to UCTA's reasonableness test.



CASE 8

Commercial Court Finds that a Buyer's Indemnity Covered Negligence in the Absence of Express Wording

PA(GI) Limited v Cigna Insurance Services (Europe) Limited

[2023] EWHC 1360 (Comm)

The key issue in this case was the construction of an indemnity given by a buyer as part of its purchase of an insurance business as a going concern.

Background

PA(GI) was an indirect subsidiary of RSA Insurance, and was the insurer under certain master payment protection insurance policies (also known as "creditor insurance policies", but commonly referred to as "PPI"). In 2003, as part of a management buyout, Cigna purchased certain of RSA's insurance operations under a business transfer agreement (the "BTA"). In the BTA, Cigna agreed to indemnify and keep indemnified RSA and other members of the "Seller's Group", which at the time included PA(GI), "against the payment or performance of the Liabilities with effect from the Completion Date". "Liabilities" was given a broad definition as all the liabilities of the business transferred to Cigna apart from those which the agreement explicitly identified and excluded, but no express reference to negligence was included.

Complaints of mis-selling PPI policies were later made to the Financial Ombudsman Service. The regulator ultimately concluded that PA(GI) was the correct respondent to those complaints and liable to pay compensation under a redress scheme in respect of its agent's negligent selling of PPI polices. Consequently, PA(GI) brought a claim against Cigna under the indemnity contained in the BTA for those losses.

Cigna primarily sought to defend the claim on the basis that the wording of the indemnity did not cover liabilities arising from PA(GI)'s or its agent's negligence. Relying on the line of authority from *Canada Steamship v The King* [1952] AC 192, Cigna claimed that there is a principle of "inherent improbability" of one party agreeing to assume liability for another party's wrongdoing without clear words being used, and that this was a "useful guide" when ascertaining contractual intention. Accordingly, as the indemnity was not expressly stated to cover negligence, Cigna argued it was not liable to PA(GI) for its losses resulting from PPI mis-selling.

Judgment

The Commercial Court's decision reiterates that the starting point for the Courts when considering questions of contractual construction is to apply the well-known principles set out by the UK Supreme Court in *Wood v Capita Insurance* [2017] UKSC 24. In brief summary, these are:

- That the Court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The Court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning.
- Where there are rival meanings, the Court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions, the Court must consider the quality of drafting of the clause.

CASE 8

- In doing so, the Court must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve their interest.

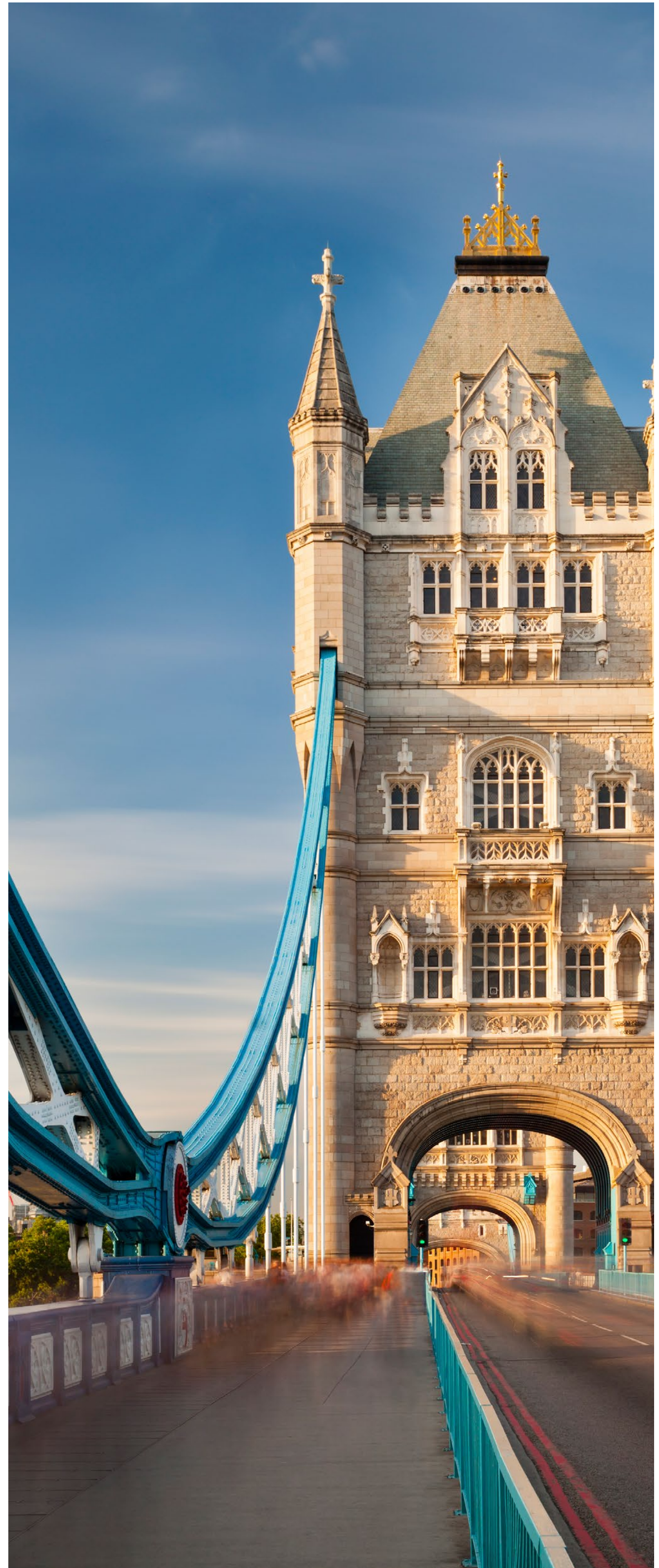
Applying those principles, the Judge found that as the BTA was a professionally drafted, complex contract with many interlinking definitions, which was not apparently produced in haste or with any informality, then its clear language must carry considerable weight.

The Judge held that Cigna put the matter "too highly" when describing the *Canada Steamship* principles as guidance. Instead, the correct principle (at least as far as negligence is concerned) is that the Court should bear in mind that a party is "unlikely to have agreed to give up a valuable right that it would otherwise have had without clear words".

Cigna's arguments on construction were therefore rejected by the Judge, who held that the liabilities for PPI miss-selling fell within the scope of the indemnity. This was consistent with natural meaning of the indemnity, the structure of the sale of the businesses as a going concern and business common sense.

Comment

This decision underlines the importance of using clear language when drafting indemnities so that these accurately reflect the parties' intentions. In the absence of express words, the Courts will not regard it as an "inherent improbability" that an indemnity was not intended to cover negligence. However, there is still ground for parties make arguments based on the construction of the contract when clear wording is not used. If the indemnity contained in the BTA had included an express statement as to whether or not it applied to losses incurred as a result of negligent acts, there would have been very little scope for argument on this point.



CASE 9

UK Supreme Court Rules out Extension of Vicarious Liability to Defendant with 'Deep Pockets' Where Tortfeasor's Wrongful Act Lacked a Close Connection to his Quasi-Employment Role

Trustees of the Barry Congregation of Jehovah's Witnesses v BXB

[2023] UKSC 15

In this appeal, the UK Supreme Court ("UKSC") held that a Jehovah's Witness organisation was not vicariously liable for a sexual assault committed by a former "elder" of its congregation. The decision summarises the modern legal principles on determining vicarious liability in tort under English law.

Background

In 1990, Mrs BXB was raped by Mark Sewell ("MS"), an "elder" of the Barry Congregation of Jehovah's Witnesses, at MS's home. In 2014, MS was convicted of raping Mrs BXB in criminal proceedings.

In 2017, Mrs BXB brought a claim for damages for personal injury, including psychiatric harm, against Watch Tower and Bible Tract Society of Pennsylvania ("Watch Tower", the charity supporting Jehovah's Witnesses' activities globally), and the Trustees of the Barry Congregation (the "Trustees") (collectively, the "Defendants"). Mrs BXB claimed that the Defendants were vicariously liable for the rape committed by MS.

The High Court ruled in Mrs BXB's favour and awarded her damages of £62,000. The Trustees appealed the High Court's decision. The Court of Appeal unanimously dismissed the appeal. The Trustees appealed again to the UKSC.

Judgment

The UKSC unanimously allowed the Trustees' appeal, finding that the Defendants were not vicariously liable for the rape committed by MS.

The UKSC's judgment summarises the modern legal principles that apply to vicarious liability in tort. There are two stages to consider in determining vicarious liability:

- **Stage One** concerns the relationship between the defendant and the tortfeasor.
- **Stage Two** concerns the link between the commission of the tort and that relationship (the "close connection" test).

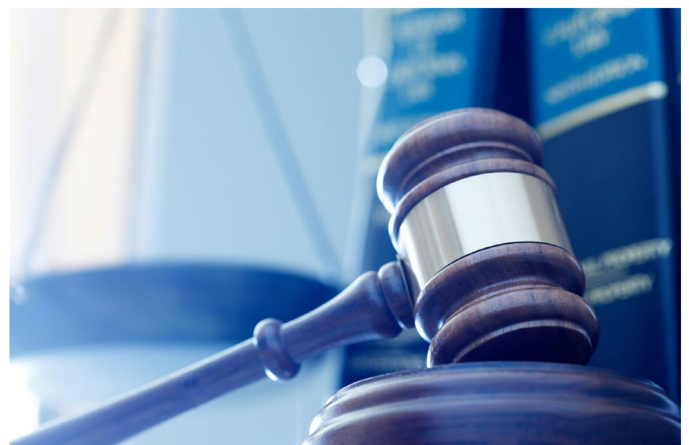
Both stages must be satisfied to establish vicarious liability. The two-stage inquiry applies equally to all cases on vicarious liability, whether involving sexual abuse or not.

Stage One

The test at stage one is whether the relationship between the defendant and the tortfeasor is one of employment or "akin to employment". Most cases will concern an employer-employee relationship. If the Court is applying the "akin to employment" aspect of the test, it must consider whether the relationship between the defendant and the tortfeasor contains features that are similar to, or different from, a contract of employment.

The UKSC confirmed that the "akin to employment" expansion does not undermine the traditional position that there is no vicarious liability where the tortfeasor is a true independent contractor in relation to the defendant.

The UKSC identified Watch Tower as the correct defendant for the claim. The UKSC agreed with the



CASE 9

lower Courts that the relationship between the tortfeasor, MS, and Watch Tower was "akin to employment", due to several important features: as an elder, MS was carrying out work on behalf of, and assigned to him by, Watch Tower; MS's duties were in furtherance of, and integral to, the aims of Watch Tower; there was an appointment and removal process for elders; and there was a hierarchical structure, into which the "elder" role fitted.

Stage Two

The test at stage two is whether the wrongful conduct was so closely connected with acts that the tortfeasor was authorised to do that it can fairly and properly be regarded as done by the tortfeasor while acting in the course of the tortfeasor's employment or quasi-employment.

The UKSC concluded that the test at stage two had not been satisfied by Mrs BXB. The rape was not so closely connected with the acts that MS was authorised to do that it could be fairly and properly regarded as committed by him while acting in the course of his quasi-employment as an elder. The UKSC reached this conclusion for a number of reasons, including that, at the time the rape was committed: MS was not carrying out his religious duties as an elder; MS was not exercising control over Mrs BXB in his position as an elder; and MS was not wearing his "metaphorical uniform" as an elder.

As a final check, there was also no compelling policy reason to justify Watch Tower bearing the cost or risk of the rape committed by MS. The fact that Watch Tower had deeper pockets than MS did not justify extending vicarious liability beyond its principled boundaries.

Comment

This decision is notable for clarifying the legal principles that now underlie the modern law of vicarious liability. By building on the principled approach developed in prior cases, it brings a welcome sense of certainty, particularly concerning the application of the "close connection" test. The UKSC's judgment also pre-empts the possible future over-extension of the doctrine.

The judgment also confirms that the same two-stage test for determining vicarious liability will apply equally in cases with or without sexual abuse, dispensing with the need for any complex "special rules" in sexual abuse cases.

CASE 10

Court of Appeal Rejects Novel Claim that an Employer Owes an Employee a Duty of Care from the Risk of Criminal Conviction Arising During the Performance of Duties and Related Loss of Earnings

Benyatov v Credit Suisse (Securities) Europe Ltd

[2023] EWCA Civ 140

This judgment raises a novel issue about the circumstances in which an employer may be liable to compensate an employee for loss of earnings caused by the act of a third party in consequence of the employee doing their job.

Background

From 1997, the Claimant, Mr. Benyatov, was employed by the defendant bank ("the Bank"). The Claimant was involved in privatisation consultancy work being carried out by the Bank in Romania. In 2006, the Claimant was arrested on suspicion of criminal wrongdoing in connection with the privatisation of a Romanian state-owned electricity company. He was subsequently charged and found guilty by the Romanian Court in 2013.

The parties agreed that the Claimant was wrongfully convicted in Romania, and that the Romanian conviction significantly impacted the Claimant's ability to work as a regulated financial professional, either in the UK or elsewhere. The Claimant's employment with the Bank was terminated in 2015.

In 2018, the Claimant commenced proceedings in the English High Court against the Bank, claiming that the Bank was liable to compensate him for the loss of earnings that he suffered as a result of his criminal conviction in Romania. The Claimant originally estimated that loss at over £66 million. The Claimant advanced his claim on two alternative bases: (1) that the Bank was in breach of a duty to take reasonable care to avoid the risk of the Claimant being convicted, and that he was entitled to damages for that breach; and (2) it was an implied term of the Claimant's employment contract that the Bank would indemnify him against a loss of the kind suffered. The High Court dismissed the Claimant's claim. The Claimant appealed.

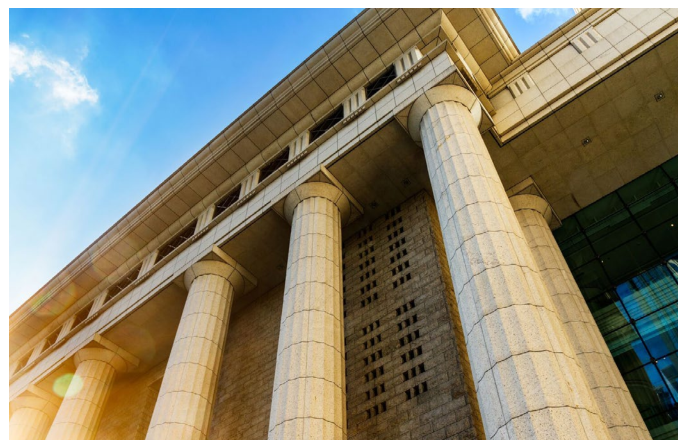
Judgment

The Court of Appeal dismissed the Claimant's appeal.

Negligence Claim

The Claimant appealed the High Court's dismissal of his negligence claim on three grounds, all of which failed:

- **Errors of law:**
    - *Reliance on the Bank's "Subjective Understanding":* The Claimant argued that the High Court wrongly adopted a subjective approach to the foreseeability of the risk to the Claimant of being exposed to a criminal conviction – that is, the Judge did not consider what the Bank *should have* foreseen, but only what it *actually* foresaw. The Court of Appeal disagreed. The Judge had correctly adopted an objective approach to the foreseeability of the risk to the Claimant, considering the information "reasonably available" to the Bank at the time of the alleged negligence. This included information which the Bank *ought to have known.*
    - *Assumption of Responsibility:* The Claimant argued that the High Court's approach to the issue of whether a duty of care arose in the circumstances was fundamentally flawed because it did not consider the concept of assumption of responsibility. The Court of



CASE 10

Appeal held that it was unnecessary for the High Court to make any reference to the concept of assumption of responsibility in the present case. The Bank could not have assumed responsibility for risks that were not reasonably foreseeable.

- *Rihan:* The Court of Appeal also disagreed with the Claimant's argument that the High Court erroneously failed to draw an analogy from the "audit duty" found in *Rihan v Ernst & Young Global Ltd* [2020] EWHC 901 (QB). *Rihan* dealt with the duty of an employer to take reasonable steps to prevent the claimant suffering financial loss by reason of their failure to conduct an audit ethically and without professional misconduct. By contrast, the alleged duty in this case was to protect the Claimant against the wrongdoing of third parties. *Rihan* had no application to the present case.

- **Errors of fact:** The Court of Appeal concluded that the High Court Judge had not erred in his approach to the law or the evidence.
- **Limitation:** The Court of Appeal agreed with the High Court that any negligence claim was time-barred.

Contractual Indemnity Claim

The Court of Appeal held that a general indemnity would not extend to losses caused by the acts of a third party without the need to establish any fault on the part of the Bank. To imply such an indemnity would not be reasonable or fair, nor would it balance the competing policy considerations. The Court of Appeal commented that a general indemnity of this kind would "wholly subvert the way in which both the common law and legislation have addressed the issue of obligations of employers".

Comment

This decision demonstrates the Court of Appeal's conservative approach to establishing a novel duty of care. Imposing an implied term that an employer would indemnify employees for future economic loss, when that loss is caused by a third party and there has been no fault on the employer's part, would have cut across the law of negligence with potentially far-reaching consequences.