HFW

HFW DISPUTES DIGEST 2022

Welcome to our first annual digest, in which we collate our 2022 global HFW LITIGATION and International Arbitration publications in one place.

This edition includes updates from the whole Disputes arena across England, AsiaPac, and the Middle East.

HFW is one of the world's largest and most active disputes practices, litigation is in our DNA. We have more than 350 specialist disputes lawyers in offices across the Americas, Europe, the Middle East, and AsiaPac. We are recognised in all of the major directories, by The Lawyer as "the standout firm for commercial litigation", and The Times Best Law Firms 2023 as "one of the market's largest and most active disputes practices".

We hope you enjoy reading this Digest, please contact the authors (see the end of this publication), or your usual HFW contact, if you wish to discuss any of the articles.

HFW DISPUTES DIGEST 2022

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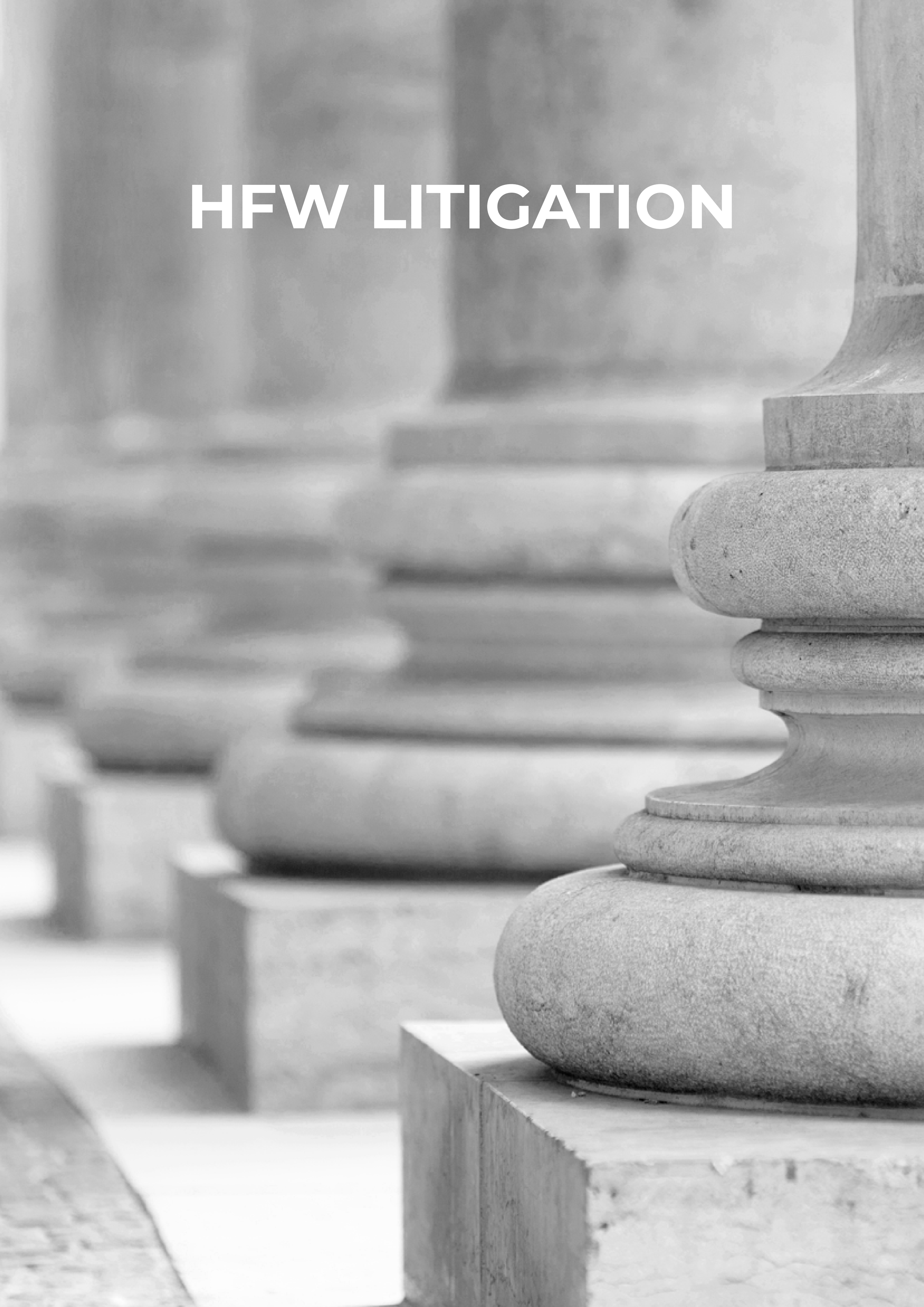
HFW LITIGATION

HFW LITIGATION
AUSTRALIA

JULY 2022

KARIS V DIGITAL CC MANAGEMENT PTY LTD

[2022] FCA 685

The Federal Court of Australia recently granted an anti-suit to restrain the taking of steps in proceedings in the United States District Court in Massachusetts. The application was made by Mr Karis, who had separately commenced proceedings in the Federal Court against two Australian incorporated companies for misleading and deceptive conduct.

The dispute arose out of a business venture to buy hardware to mine bitcoin and engage in arbitrage by trading between different bitcoin exchanges. The defendant companies, Digital CC Management Pty Ltd (**DCC Management**) and Digital CC Holdings Pty Ltd (**DCC Holdings**) were incorporated for this purpose and a listed Australian company, DigitalX Limited (**DigitalX**) acquired for the purpose of capital raising.

The representations pleaded by Mr Karis were said to have been made in breach of the Australian Consumer Law (**ACL**). Mr Karis also prosecuted claims for breach of his employment contract.

The Federal Court proceedings were commenced in April 2022; a short time earlier, DCC Management commenced proceedings in the US seeking, amongst other things, declarations as to the ownership of two bitcoin trading accounts. As the judgment notes, *[t]he US proceeding also raises issues such as the basis upon which Mr Karis received equity in DigitalX and the circumstances of his employment, including with respect to the identity of his employer and the termination of his employment* (at [20]).

Mr Karis' employment contract was stated to be governed by Western Australian law and contained an exclusive jurisdiction clause in favour of the Western Australian courts. The choice of court clause provided further that:

> *The Employer may elect to initiate injunctive proceedings in any jurisdiction in the world, which, but for 3.3.1 would have jurisdiction, against the Employee to enforce the terms of this Agreement or to seek a determination of any matter in relation to this Agreement as it sees fit.*

A second agreement (referred to in the judgment as the **Purported Agreement**) was also governed by Western Australian law and contained a Western Australian court choice of court clause.

The court turned first to the established principles in the High Court decision of *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345.

Those principles relevant to the grant of anti-suit relief were adopted and summarised in *Herold v Seally (No 2)* [2017] FCA 543:

a) In some cases, the question of whether a dispute as to legal rights should be litigated in Australia and not overseas may be resolved by one court staying its proceedings in favour of the other, or by it granting an anti-suit injunction restraining a person amenable to its jurisdiction from commencing or continuing the overseas proceedings;
b) Sometimes, steps short of an injunction may be appropriate [...];
c) The remedies of a domestic stay and of an injunction in relation to the overseas proceedings are not governed by the same principles. However, in some cases the power to grant an injunction may be an aspect of the power to stay proceedings. In other cases, the Court should not exercise the power to grant the injunction without first considering whether instead the Australian proceedings should be stayed;
d) The test for a stay of the Australian proceedings [...] of a 'clearly inappropriate forum' [...] also applies as a threshold test for the grant of an anti-suit injunction [...];
e) The power to stay proceedings upon the ground of being an inappropriate forum is to be exercised [...] 'in accordance with the general principle empowering a court to dismiss or stay proceedings which are oppressive, vexatious, or an abuse of process and the rationale for the exercise of the power is the avoidance of injustice';
f) The counterpart of a court's power to prevent its process being abused is its power to protect the integrity of those processes. [...] In some cases, protection of the Australian court's own processes will authorise the grant of an anti-suit injunction;

g) Independent of protection of its own proceedings or processes, the court may make orders in the exercise of its equitable jurisdiction to restrain unconscionable conduct or the unconscientious exercise of a legal right. [...];
h) The power may extend to protecting legal rights in Australia, such as a contract not to sue, or to sue in a particular way or forum [..];
i) A well-established category of case in which an injunction may be granted is when foreign proceedings are, according to principles of equity, 'vexatious or oppressive' [...];
j) A long history of cases arising from competing foreign proceedings establish that the 'mere co-existence of proceedings in different countries does not constitute vexation or oppression', especially if the other proceedings give 'other or additional remedies beyond those attainable' in Australia. Foreign proceedings are to be viewed as vexatious or oppressive 'only if there is nothing to be gained by them over and above what may be gained in local proceedings'. However, they will be regarded as vexatious or oppressive if there is a 'complete correspondence between the proceedings' or if 'complete relief' is available in the local proceedings;
k) The exercise of the anti-suit injunction power does not involve any determination that the foreign proceedings are vexatious or oppressive in the sense that they are an abuse of that court's processes or even that they should be stayed on forum non conveniens grounds.

There was evidence before the court that the Massachusetts court would apply the law of Western Australia in determining the claims before it. However, the US expert was unable to say whether that same court would consider the claims made under the ACL. As the court noted, *on the assumption that the US proceeding continues, there is currently a question whether and how Mr Karis' claims made under and with respect to misleading and deceptive conduct under the ACL will be pursued and determined by the [US court]* (at [27]).

Banks-Smith J cited an earlier case in the Victorian Supreme Court where the court refused to stay proceedings in Victoria (in the face of parallel proceedings in the United States), because *there is a risk that the plaintiffs' statutory claims based on misleading and deceptive conduct may not be available to them in New York*. The court held, in *Babcock & Brown DIF III Global Co-Investment Fund LP v Babcock & Brown International Pty Ltd* [2016] VSC 623, that *these were important parts of the plaintiffs' case, and the plaintiffs will be prejudiced if they cannot pursue them*.

On the question of whether the Western Australian court was a clearly inappropriate forum, her Honour, having regard to the factual matrix, the contracts in question, the claims made, the submission that *there is a juridical advantage to Mr Karis of litigating in the Federal Court of Australia due to the risk that his claims pursuant to the ACL may not be available in the US proceeding* and the exclusive jurisdiction of the Federal Court in any matter arising under the ACL, concluded that *it is unlikely that it would be found that this Court is a clearly inappropriate forum* (at [30] – [31]).

Her Honour then considered the elements required for the grant of injunctive relief – whether there was a serious issue to be tried and whether the balance of convenience fell in favour of the grant of the anti-suit injunction.

Mr Karis made a number of submissions, which can be summarised as follows:

a) There is nothing to be gained by the defendants from the US proceeding over and above the proceeding in the Federal Court;
b) The fact that the US proceeding was commenced a short time prior to the Federal Court proceeding is not determinative;
c) The US proceeding and this proceeding are in relation to the same controversy;
d) There is a risk that even if the US Court were to apply Western Australian law, the claims brought under the ACL may not be available (so that Mr Karis would suffer a prejudice); and
e) The US proceeding covers only part of the dispute.

The court accepted that *there is sufficient relevance, substance and weight in these submissions to justify the grant of interim relief, noting that the ACL claims are (on their face) of considerable relevance to the overarching relief, particularly as Mr Karis seeks an order under s 237 of the ACL that the Purported Agreement is void* (at [40]). Banks-Smith J found therefore that *it is sufficiently arguable that the US proceeding is vexatious and oppressive as those terms are to be understood in this context* (at [41]).

Her Honour further concluded, in considering the balance of convenience, that although risks were relatively remote *[a]t present, I am concerned only with an interim interlocutory injunction, and this risk can be re-visited once the interlocutory application is listed for further hearing* (at [44]).

Orders were made restraining DCC Management until further order from taking any step in the US proceeding, other than steps to have that proceeding dismissed or stayed until further order.[1]

Conclusion

This decision highlights the significance of a pleading of a breach of the ACL where a contest lies between parallel litigation in different jurisdictions. The Australian courts recognise that a party who has commenced a proceeding in the courts in Australia pleading a breach of the ACL provisions and seeking relief in respect of that breach may well be at risk of losing the right to prosecute the claim if the defendant is permitted to continue a proceeding in a domestic court of another country.

[1] The judgement records that Mr Karis gave the usual undertaking as to damages arising from the relief granted.

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DISPUTE RESOLUTION | AUGUST 2022

THE SUPREME COURT OF QUEENSLAND ENFORCES A DISPUTE RESOLUTION CLAUSE REFERRING DISPUTES TO EXPERT DETERMINATION

In *Mineralogy Pty Ltd v Adani Mining Pty Ltd*,[1] a dispute arose between Adani Mining Pty Ltd (Adani) and Mineralogy Pty Ltd (Mineralogy) in relation to a royalty deed (Royalty Deed) under which Adani had agreed to pay royalties to Mineralogy for mining a particular mining tenement.

Adani sought funding from certain financiers to assist it with the development of the tenement. Adani had agreed in the Royalty Deed not to encumber the tenement unless the financiers executed a priority deed with respect to security over the tenement. Adani requested Mineralogy to sign a priority deed (the **Priority Deed**) that had been agreed with the financiers. Mineralogy did not sign the Priority Deed and did not engage with Adani. Adani invoked the dispute resolution procedure to enforce its rights under the Royalty Deed.

Subsequently, Adani referred the dispute to an independent expert for determination under the Royalty Deed. As no agreement was reached on the appointment of an expert, the expert was appointed by the President of the Queensland Law Society in accordance with the clause and the consent of both parties. A procedural conference was arranged by the expert which was attended by both parties.

Following the procedural conference, Mineralogy applied to the court to stay the expert determination.

Did the dispute come within the dispute resolution clause?

Mineralogy argued that the dispute did not come within the terms of the dispute resolution clause in clause 8 of the Royalty Deed, and thus the dispute was not to be referred to expert determination because:

(a) clause 8 was to be narrowly interpreted;

(b) the dispute involved the rights of third parties; and

(c) the dispute involved questions of fact or mixed law and fact.

Each of these arguments was rejected by the court.

First, the court emphasised that dispute resolution provisions are to be interpreted in the same manner as other clauses in a contract. The clause is to be interpreted in light of the objective intention of the parties, taking into account the context and the contract as a whole. Importantly, the court emphasised that commercial contracts are to be interpreted so as to avoid making commercial nonsense.

The court stated that it was "*difficult to see how the present dispute could possibly fall outside any reasonable commercial interpretation of clause 8.1*".[2] Nonetheless, it considered each of Mineralogy's arguments.

First, the court did not agree that clause 8 was to be narrowly interpreted by clause 8.3 or otherwise.

[1] [2022] QSC154.

[2] Ibid [23].

Clause 8.1 provided that "*all disputes or claims arising out of or relating to the Deed*" were to be resolved pursuant to the procedures set out in clause 8. If a dispute was not resolved by the parties, it may be referred to expert determination. The parties were to appoint the expert by agreement. If the parties did not agree on the expert then the expert was to be appointed pursuant to clause 8.6.

Clause 8.6 provided that if the parties cannot agree on the appointment of an expert, then the expert was to be appointed by one of three bodies referred to in clause 8.6, depending on whether the dispute related to a technical, financial, or legal matter. For example, the President of the Queensland Law Society was to appoint an expert in relation to a dispute relating to a legal matter. Clause 8.3 provided whether a dispute was to be considered a technical, financial or legal matter.

The court found that to read clause 8.1 confined by clause 8.3 was "*contrary to the natural and ordinary meaning of clause 8.1*"[3] and that "*no reasonable businessperson would adopt such a strained interpretation*".[4] Moreover, the "*catch-all*" phrase in clause 8.3(c) meant that "*any other matter*" was "*sufficiently wide to encompass disputes that are not strictly 'technical' or 'financial'*".[5]

Second, the court found that the dispute did not involve the rights of third parties. The dispute to be determined by the expert related to the rights of Adani and Mineralogy under the Royalty Deed and whether Mineralogy has an obligation to execute the Priority Deed. That dispute did not impact the rights of the financiers or the State of Queensland, neither of whom are parties to the Royalty Deed or to the dispute.

Third, Mineralogy argued that disputes relating to facts or mixed facts and law were not to be considered to be legal matters that could be referred to expert determination. The court rejected this argument referring to its broad interpretation of clause 8.1, noting that "*[m]ost disputes will involve some finding of fact*" and that it "*would be commercial nonsense to neuter the dispute resolution process in that way*".[6] Also given the "*catch-all*" phrase in clause 8.3, "*there is no evident intention to exclude questions of fact or even disputes involving mixed questions of fact and law*".[7]

In short, the court found that there was no reason to qualify the disputes to be referred to expert determination pursuant to clause 8.

Further, the court rejected Mineralogy's argument that the "*justice of the case*" required that the dispute be decided by the court not by expert determination, emphasising that "*parties who have made a contract should keep it*".[8]

In addition, the court found that Mineralogy had waived its right to object, as it did not object to the process of expert determination within a reasonable time. Indeed, even though Mineralogy had not responded to Adani's notices, it had agreed to the appointment of the expert and participated in the first procedural hearing. It was only after that hearing that Mineralogy raised its objection and applied for a stay. Even if there were grounds for granting the stay, the court "*would exercise its discretion to refuse to do so on the grounds of lache and delay*".[9]

The court did not accept Adani's argument that rule 12(1) of the IAMA expert determination rules[10] had the effect that Mineralogy was deemed to have waived its right to object to any irregularity because it had participated in the dispute resolution process without objection.

Was proper notice given?

Mineralogy contended that Adani had not given proper notice of dispute because: "the notice was not given in accordance with the formal notice requirements of another [d]eed; ... lacked proper particulars; ... provided an ultimatum; and ... was equivocal because it was without prejudice".[11]

The court found that notice under the Royalty Deed did not need to comply with the formal notice requirements set out in another deed. The notice provided sufficient explanation of circumstances giving rise to the dispute. Also, "a reasonable businessperson" would take the view that it was a notice under clause 8 and also "afforded Mineralogy the last opportunity to sign".[12] Lastly, the 'without prejudice' mark was a mere reservation of rights and did not qualify the referral.

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[3] Ibid [41].

[4] Ibid [42].

[5] Ibid [45].

[6] Ibid [52].

[7] Ibid [53].

[8] Ibid [58] quoting *Metropolitan Tunnel and Public Works Limited v London Electric Railway Co* [1926] Ch 371.

[9] Ibid [63].

[10] IAMA was the Institute of Arbitrators and Mediators and is now called the Resolution Institute.

[11] Ibid [67].

[12] Ibid [79].

Therefore, notice was effective under clause 8 of the Royalty Deed.

Not for the court to determine the merits of the dispute

Mineralogy argued that it was not obliged under the Royalty Deed to execute the Priority Deed. This argument related to the merits of the dispute that was to be determined by the expert. The issue to be determined was whether the execution of the Priority Deed was (a) reasonably requested by Adani and (b) requested to give effect to the Deed. These issues were not fully argued before the court.

The court emphasised that the parties had agreed to refer disputes to expert determination, acknowledging that there are many reasons why the parties may have made this agreement. The expert may have technical or specialist knowledge, the process is private not public, it is final and binding and the parties pay their own costs and share the costs of the expert equally.

Finally, the court stressed that parties should be bound by their contract and thus enforced the dispute resolution clause, including the reference to expert determination, noting that this was the most appropriate forum for the resolution of the dispute.

On this basis Mineralogy's application was dismissed.

Why is this decision important?

This decision is an important reminder that the courts will interpret and enforce a dispute resolution clause in the same manner as any other contractual term, thereby binding parties to the terms agreed in the contract.

It is also an important reminder for parties to carefully consider the appropriate methods or forums for resolving disputes at the time of negotiating the contract. Disputes may be referred to negotiation, mediation, expert determination, arbitration and/or litigation or a combination of these options.

Whatever method or forum is chosen, parties will be bound by that choice and the dispute resolution clause will be enforced by the courts.

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HFW LITIGATION
ENGLAND

HFW LITIGATION

FEBRUARY 2022

THE NEW COMMERCIAL COURT GUIDE

This briefing examines the changes brought in by the 11th edition of the English Admiralty and Commercial Court Guide, which has just been published, with a focus on the changes to the Commercial Court practice.

Speed Read

The 11th edition of the Commercial Court Guide[1] (the Guide) published on 3 February 2022 replaces the previous 10th edition published in 2017. Five years is a long time in terms of developments in practice and technology, even more so given the need to adapt to a remote world as a result of Covid.

The 11th edition of the Guide takes account of the way in which parties, their lawyers, and the courts have all now learnt to work.

In detail

The 11th Guide continues to follow the spirit and ambitions of the Commercial Court when it was established in 1895 with the aim of enabling commercial parties to litigate in a more efficient way. It continues to develop the practices adopted in the Commercial Court, as embodied in the 1st edition published in 1986.

The Guide supplements the Civil Procedure Rules (**CPRs**), in particular CPR Part 58 and the associated Practice Directions (**PD**), which in addition to the Rules contained in the more general CPRs, sets out the procedures for cases in this specialised court.

Before looking at the key changes in detail, we should first establish the role of the Guide.

What is the Guide intended to be?

a. The Guide is not part of the CPRs in that it is neither a Rule nor a Practice Direction, and is therefore not strictly speaking binding on litigants. It is more of a best practice approach to litigation in the Commercial Court.

b. However, parties should be aware that Commercial Court judges will expect them to follow it, and will take non-compliance into account when exercising their discretion, for example in relation to the awarding of costs.

c. In practice, the provisions set out in the Guide are usually followed, especially when the court makes case management orders and sets procedural timetables.

Rather than set out each and every revision, we have instead reviewed by category and themes.

The overriding theme is modernisation. The Guide has been amended to reflect the current ways of working, and the cost and time efficiencies that those bring.

Key changes brought in by the 11th Guide include:

1. Increased use of technology, the new Guide:

    a. endorses the use of virtual or hybrid hearings, and the need for evidence by remote means to avoid witnesses having lengthy journeys and where their evidence is expected to last no more than half a day;

    b. references the impact of the Disclosure Pilot (PD51U), introduced in 2019, and which requires the use of electronic disclosure (eDisclosure), and applies to nearly all Business and Property Courts, including the Commercial Court (a notable exception is the Admiralty Court). For further information, please see our Disclosure Pilot Client Guide;[2] and

[1] https://www.judiciary.uk/wp-content/uploads/2022/02/Commercial-Court-Guide-11th-edition.pdf
[2] 003563-HFW-Client-Guide-Disclosure-Pilot.pdf

c. endorses the benefits of using electronic bundles (**eBundles**) in place of hard copy or paper bundles, and requires parties to use eBundles for trials and hearings.

2. Efficiencies introduced by the Guide:

   a. in order to overcome its increased workload resulting in a lack of capacity and lengthier hearing and trial waiting times, the Commercial Court has increased the number of judges and, as the Guide makes clear, will also be looking to transfer cases to other courts, where it is appropriate to do so. Parties can now expect the court to consider transfers out at the Case Management Conference (**CMC**) stage for cases where the financial value, factual, technical, or legal issues that arise are better suited to other courts. For example, cases with a lower financial value (usually in the region of less than £5million[3]) are likely to be transferred to the London Circuit Commercial Court, and similarly cases that involve competition issues will likely be transferred to the Competition Appeal Tribunal;

   b. a requirement for parties to consider whether a case is suitable for the Shorter Trials Scheme or the Flexible Trials Scheme;

   c. updated references on the need to follow the new rules concerning the provision and use of trial witness statements brought in under PD57AC, which applies to most of the Business and Property Courts;

   d. encouragement by the Commercial Court of the parties to actively review from an early stage the question of what evidence (both documentary and witness) is needed to resolve the issues;

   e. changes to timetables for lodging CMC skeletons and orders, and increases in thresholds before leave is required, for example leave is required for statements of case over 40 pages rather than 25;

   f. encouraging the use of junior advocates, for example at CMCs, and trials;

   g. introducing costs penalties for overly lengthy Disclosure Review Documents, encouraging parties to avoid using too many different disclosure models, and requiring greater co-operation between the parties to reduce party and court time dealing with issues;

   h. the use of designated judges where appropriate; and

   i. clarification on the process for urgent or emergency hearings.

3. Foreign law and jurisdiction provisions are updated:

   a. the provisions referencing service out on parties in EU member states following Brexit have been updated;

   b. new guidance is given on the options for proving foreign law, with reference made to the Supreme Court decision in Brownlie v FS Cairo (Nile Plaza) LLC[4]; and

   c. there is a new process for the summary determination of jurisdiction challenges in arbitration.

4. Updated language is used which:

   a. adopts gender-neutral language;

   b. ends a distinction between solicitors and barristers by instead referencing all as "advocates"; and

   c. recognises that the use of "alternative" to describe "Alternative Dispute Resolution" is outdated and changing the reference to "Negotiated Dispute Resolution".

What does this mean for you?

The best practice provisions set out in the Guide support the recent CPR changes and will provide Commercial Court users with a more dynamic and efficient process within which to resolve their disputes.

Many of the changes support not only greater efficiencies but also help to reduce the carbon footprint generated by all users of the English courts. HFW is a proud founding member and signatory of the Greener Litigation Pledge, the aim of which is to reduce the environmental impact of dispute resolution. Please do consider joining us and the many other users of the English courts in signing the Pledge[5].

[3] Work | Courts and Tribunals Judiciary
[4] [2021] UKSC 45
[5] https://greeenerlitgiation.org

If you would like to comment on the Guide please do send your feedback to the Commercial Court Users Committee, by e-mail to comct.listing@justice.gov.uk, or to the authors of this briefing who will be happy to forward it for you.

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Americas | Europe | Middle East | Asia Pacific

SUMMARY DISMISSAL: SUMMARY JUDGMENT AND STRIKE OUT

This Client Guide outlines the key points to bear in mind when considering summary dismissal of a claim (or part of a claim) by summary judgment or strike out in English litigation, whether you are facing an application or considering issuing one.

Summary judgment and strike out are useful tools in resolving disputes at an early stage of the proceedings and are, in effect, mirror images of each other: broadly, a claimant will use the summary judgment route to try and bring the proceedings to an end, whereas the defendant will apply to strike out the claim to bring proceedings to an early conclusion (and can also use a reverse summary judgment procedure, but this is quite rare).

What are summary judgment and strike out?

Summary judgment and strike out are the processes by which litigation can be brought to an early conclusion, without the need for a trial, avoiding long-running litigation and the costs that would be incurred.

"[Summary judgment] … saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and I would add, generally, that it is in the interests of justice." (Lord Woolf in *Swain v Hillman*)

The court will grant summary judgment or strike out where it considers that the claim or the defence, or some of the issues:

- have no real prospect of success (or for strike out, that there are no reasonable grounds for bringing the claim); and
- there is no other compelling reason why the case should be disposed of at trial.

When should summary judgment and strike out be considered?

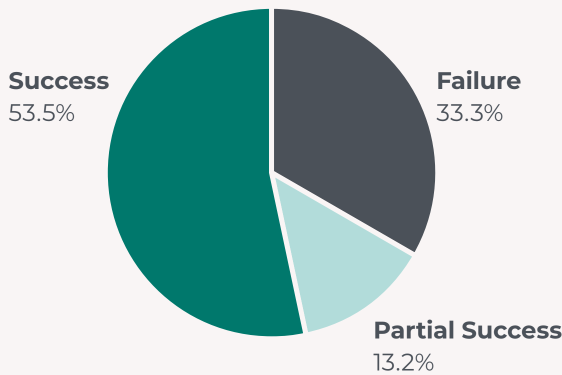
If a party considers that a claim or defence has no real prospect of success at trial, then summary judgment or strike out are useful tools to enable early disposal and to bring the proceedings (in whole or in part) to an end, saving time and costs for all involved.

A claimant is required to wait to apply for summary judgment until the defendant has filed either an acknowledgement of service or their defence. This is to ensure that the defendant has an opportunity to engage with the proceedings.

Defendants will wish to seek summary judgment or strike out as soon as possible. However, it is worth noting that the courts may be critical if an application is made before the acknowledgment of service or defence are filed.

Unless there is clear authority stating that a point cannot be determined summarily, it is for the judge who hears the application to decide whether it is appropriate or not, regardless of complexity.

Summary Judgment Success Rates



Chances of success[1]

What are the chances of your summary judgment application succeeding before the English High Court?

Summary judgments[2]:

- succeed in full 53.5%, or in part 13.2% of the time; and
- failed 33.3% of the time

What type of cases are suitable for summary judgment or strike out?

Summary judgment or strike out are appropriate for clear and obvious cases, where the facts are not in contention, such as in debt claims.

The courts will not conduct a mini-trial, therefore, the greater the complexity of the case, the less appropriate it will be to apply for summary judgment or strike out. It would be unusual for parties to apply in fraud claims or claims where witness or expert evidence needs to be heard, as the court will not carry out an in-depth review of the merits of the claim.

What do parties need to show to defeat a summary judgment or strike out application?

If you have been served with an application for summary judgment or strike out, you are the respondent, and to defeat the application will need to show that:

1. the claim would have a *"real, as opposed to a fanciful, prospect of success" (Swain v Hillman)* if it proceeded to trial.
   - This is a relatively low threshold to overcome. *"Real"* meaning the chance of the claim or defence succeeding is more than simply arguable. A *"fanciful"* chance of winning would be if there was no substance to the claim and it was contradicted by the evidence surrounding it; or
2. there is a compelling reason for the case to go to trial.
   - Examples include where the respondent has been unable to contact an important witness or needs more time to investigate their claim, which in turn, may then lead to a prospect of success at trial.

The burden rests on the applicant to prove that the respondent is unlikely to succeed. However, the respondent should not simply rely on its claim/defence or fail to submit a response to the application, as the question of success needs to be addressed.

Costs

In most cases the party succeeding in obtaining summary judgment or strike out will be awarded their recoverable costs.

Advantages and Disadvantages of applying for summary judgment or strike out

Advantages	Disadvantages
Early resolution, if successful	Relatively low threshold to defeat the application
Saves costs, if successful	Additional costs, if unsuccessful
Repeated applications can be made where circumstances change	Will cause a delay and increases duration of the dispute, as the application will stay (or pause) the claim
Narrows the issues for trial, if unsuccessful	Reveals the strength of the case at an earlier stage, if unsuccessful
Flushes out counter-party's evidence, useful if unsuccessful	
Can increase the chance of settlement	

What is the process?

The precise timings involved in the exchange of evidence will vary between the courts, therefore, the relevant Civil Procedural Rules, Practice Directions, and Court Guides should be reviewed.

In terms of timings for the actual hearing, this depends in which court the application is made. However, it is likely to be approximately six to eight weeks after the application has been issued.

1 Data is taken from data analytics platform, Solomonic.
2 As at the date of writing

The process

Applications for summary judgment or strike out are usually issued early in the proceedings, but can be applied for at any time by the parties or the court (usually after the defence has been filed).

1. The Application

- **Must state the basis on which the order is sought**
  - *Including the law and the facts relied upon*
  - *Contain a statement of belief that the claim/defence has no real prospect of success*
- **Must be made on notice to the respondent, with supporting evidence**

2. Pre-hearing

- **The parties are required to file skeleton arguments and court bundles with the court, and serve these upon each other in advance of the hearing**

3. The Hearing

- **Most applications will last less than a day**
- **A judge or master will preside**
- **Judgment will be given at the hearing, or a short time later**
- **Arguments on costs will follow**

4. Possible Orders

- **Summary judgment on the claim/particular issue**
- **Strike out or dismissal of the claim**
- **Dismissal of the application and directions for steps to be taken in the proceedings**
- **Costs and interest**
- **Orders for summary judgment or strike out can be appealed, permission is required**

This client guide was produced by Nicola Gare. Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact Nicola or your usual HFW contact to discuss.

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DISPUTE RESOLUTION | JUNE 2022

WHEN ARE JUDGMENTS FINAL? THE UK SUPREME COURT HAS THE FINAL WORD

Introduction

The point at which a judgment becomes final, and when and if parties can seek amendments to it was recently considered by the UK Supreme Court in the case of ***AIC Ltd v Federal Airports Authority of Nigeria***[1]**.**

This is an issue of relevance to practitioners and courts users, and as highlighted by the Supreme Court:

> "*This problem may arise at all levels in civil litigation, from interim and case management hearings, to final orders made at the end of a trial and even to orders made, but not yet sealed on appeal.*"

The background

The matter arises from a dispute over a development lease, and an attempt by the appellant (**AIC**) to enforce a 2010 Nigerian arbitration award in the sum of US$48 million against the respondent (**FAAN**) against its assets in England, under the New York Convention 1958[2] pursuant to sections 66 and 101 of the Arbitration Act 1996.

AIC sought permission from the English courts to enforce the award, and obtained an order in its favour. This was subsequently overturned on the basis that FAAN would provide security in the sum of approximately US$24 million by a set date. As you may by now have guessed, and despite extensions being given, the security was not provided in time and the High Court gave an oral order enabling AIC to enforce the award.

Before the order could be drawn up and sealed, FAAN provided the bank guarantee and successfully applied to have the order rescinded on the basis that whilst the order had been given verbally, it had not been sealed or "perfected" and so was not a final order.

AIC appealed to the Court of Appeal, who applied a two-stage test in order to determine whether to maintain the order, which involved determining:

1. whether it was able to consider the application; and if so
2. whether the application should be considered on its merits.

The Court of Appeal found in favour of AIC and re-instated the order enabling AIC to enforce the award and also the guarantee, which although late, had been provided. AIC called on the guarantee, which was paid in full.

FAAN appealed to the UK Supreme Court.

The Supreme Court's decision

The Supreme Court considered its role in this case was to "*determine whether the judge and / or the Court of Appeal went wrong in their application of the relevant principles to those facts and secondly, ...if they both did, to re-exercise the judge's original discretion afresh, on the basis of those facts as they now are.*"

The Supreme Court's judgment:

1. sets aside the order allowing AIC to enforce the award;
2. stays AIC's application to enforce the award, until the appeal proceedings in Nigeria are concluded; and
3. allows AIC to retain the money it has already recovered under the guarantee provided by FAAN.

In reaching its judgment the Supreme Court considered:

a. the basis on which the courts should review and vary judgments and orders made but not sealed; and
b. the application of the *Denton test*[3] on relief of sanctions.

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[1] [2022] UKSC 16

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958

[3] *Denton v TH White Ltd and another, [2014] EWCA CA Civ 906*

Looking at these in turn.

Firstly, the basis and extent to which the courts should review and vary judgments and orders made but not sealed. The Supreme Court considered that the Civil Procedural Rules (**CPRs**) and the *Overriding Objective* had application in determining the approach to be taken in these circumstances, and in so doing effectively endorsed the approach taken by Baroness Hale of Richmond in *In re L (Children) (Preliminary Finding: Power to Reverse)*[4].

CPR 1.1 (1) sets out the *Overriding Objective* in English litigation proceedings, which is namely to "*deal with cases justly and at proportionate cost*".

The Supreme Court determined that finality was a component of dealing with matters justly and therefore a key issue when considering whether to overturn a judgment or order already made but not sealed. It preferred the reliance on finality to the Court of Appeal's two-stage test, which it considered *".....[as imposing] a straitjacket upon the judicial exercise of a discretionary jurisdiction which is contrary to the way in which it was addressed in Re L and alien to the essentially flexible nature of the judge's task when weighing competing considerations of potentially limitless variety against each other."* It also found that the Court of Appeal had not given sufficient weight to the question of finality, and that it should therefore exercise its discretion to review the terms of the order.

The judgment recognises that the bank guarantee was provided by FAAN within minutes of the order being made and that this amounted to an important change in circumstances, sufficient to depart from the principle set down in the 1843 case of *Henderson v Henderson*[5] and the subsequent line of authorities, namely that a party is precluded "*from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones*".

Secondly, in reviewing the application of the *Denton test* on relief of sanctions, and having determined that it was required to review the order afresh, the Supreme Court determined that the order giving leave to enforce the award was in effect a sanction on FAAN for their failure to provide the bank guarantee in time, and as such fell within the remit of the *Denton test* on relief of sanctions.

In looking at whether the three stages of the Denton test were satisfied, the Supreme Court held:

1. the failure to provide the guarantee in time was a very serious breach, as required under Denton;
2. there was no good reason for the failure to provide the guarantee; and
3. that in so far as the third limb was concerned, FAAN's eventual provision of the guarantee and its ongoing arbitration appeal proceedings in Nigeria were such that in the circumstances relief should be granted to FAAN, and so ordered that the enforcement of the award be stayed, pending the outcome of the Nigerian arbitration appeal proceedings.

What does this mean for court users?

This judgment gives helpful clarity over when the terms of an oral judgment or order may be varied before it is sealed, and serves as a reminder to parties to avoid delay in having the order sealed. Of particular note is that where the circumstances have changed between the oral order being given and it being sealed, the courts will be willing to grant relief under the Denton test.

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[4] [2013] UKSC 8

[5] (1843) 3 Hare 100

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DISPUTE RESOLUTION | MAY 2022

BORIS BECKER: A LESSON UNDER THE INSOLVENCY ACT 1986

Boris Becker has been sentenced to two and a half years in prison in relation to the four criminal charges he was convicted of under the Insolvency Act 1986.

On 8 April 2022, following a trial at Southwark Crown Court, former tennis player Boris Becker was convicted of four counts against the Insolvency Act 1986 (the **IA 1986**). Mr Becker was subsequently sentenced to two and a half years in prison on 29 April 2022.

The Bankruptcy

Boris Becker was declared bankrupt on 21 June 2017 (the **Bankruptcy Order**) following a petition made on 28 April 2017 from Arbuthnot Latham & Co, a private bank, regarding an unpaid loan of around EUR 4,600,000 on Mr Becker's estate in Mallorca, Spain.

Over the course of his tennis career, Mr Becker argued that his approximately USD 50,000,000 earnings were consumed by his divorce from his first wife, child maintenance payments and general "expensive lifestyle commitments". Mr Becker also cited his drastic reduction in income upon his retirement in 1999 as a contributing factor towards the bankruptcy.

The Charges

Under the Bankruptcy Order, Mr Becker was under (i) a statutory duty to provide full disclosure of assets to the trustee; and (ii) to inform lenders of a bankruptcy when seeking to borrow more than GBP 500.

However, the Official Receiver of Mr Becker's estate found a series of undisclosed transactions which occurred before and after the Bankruptcy Order worth more than GBP 4,500,000.

Mr Becker was subsequently charged with 24 contraventions under the IA 1986 but was only found guilty of four of those charges, namely:

1. Removal of property worth around EUR 427,000 from his bankruptcy estate, in contravention of s. 354(2) IA 1986.
2. Failure to disclose ownership of a property in Germany in contravention of s. 353(1) IA 1986.
3. Concealment of a loan of EUR 825,000 from the Bank of Alpinum of Lichtenstein in contravention of s. 354(1)(b) IA 1986.
4. Failure to disclose ownership of 75,000 shares in Breaking Data Corp in contravention of s. 353(1) IA 1986.

Mr Becker was acquitted of another 20 charges against him which included (i) nine counts of failing to hand over trophies and medals from his tennis career; (ii) three counts of failing to disclose estate; (iii) one count of removal or property and (iv) seven counts of concealing property.

The IA 1986

Sections 353 to 359 IA 1986, make it a criminal offence for a bankrupt (if they have the intent to defraud creditors or conceal their affairs) and they:

- fail to disclose details of all property within the bankruptcy estate (and any disposals made thereof); and or
- conceal, or fail to deliver, any property that falls within the bankruptcy estate; and or
- remove any property worth more than GBP 1,000 from the bankruptcy estate; and or
- fail to account for the loss of the substantial part of their property for the 12 months preceding the bankruptcy order; and or
- make a false, fraudulent or materially incomplete statement regarding their affairs or fail to notify the trustees of a false claim made by a purported creditor; and or

- dispose of any property forming part of the bankruptcy estate, or dispose of any property within five years preceding the bankruptcy order; and or
- leave or prepare to leave England and Wales with property belonging to the bankruptcy estate in excess of GBP 1,000 after the bankruptcy order has been made; and or
- dispose of any property obtained on credit which has not been settled in the 12 months preceding the bankruptcy order (excluding any disposals made in the ordinary course of business).

Schedule 10 to the IA 1986 provides the sentencing guidelines for the above offences, which in some instances can be up to 7 years on indictment.

The Sentencing

On 29 April 2022, Mr Becker was sentenced to two and a half years in prison. Judge Taylor stated that, in reaching her decision, she concluded that Mr Becker had shown no remorse or humility.

In addition to his sentencing, Mr Becker's discharge from bankruptcy has been suspended indefinitely. Accordingly, whilst normally a bankrupt is discharged from bankruptcy (and the restrictions imposed thereof) after 12 months, it will be up to the Official Receiver as to when Mr Becker will be freed from bankruptcy.

Mr Becker is also subject to a 12-year Bankruptcy Restriction Undertaking which will take effect as of 17 October 2019. Accordingly, Mr Becker will be subject to the restrictions contained therein up to and including 16 October 2031.

Commentary

Mr Becker's conviction is proof that, regardless of celebrity status, the court will take a strict approach when a bankrupt has been found to be contravening the IA 1986. Indeed, as Dean Beale (Chief Executive of the Insolvency Service) stated at the time of Mr Becker's conviction, *"[t]his conviction serves as a clear warning to those who think they can hide their assets and get away with it. You will be found out and prosecuted."*

The Court's approach to sentencing in this regard shows that offences under the IA 1986 are taken seriously and will be prosecuted accordingly.

Additional research conducted by Trainee Solicitor **Annabella Ferrari.**

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LITIGATION | SEPTEMBER 2022

FRAUDSTERS BEWARE: THIRD-PARTY DISCLOSURE ORDERS ARE ABOUT TO BECOME EASIER TO OBTAIN

A new 'jurisdictional gateway' underlines the willingness of the English legal system to support victims of fraud, therefore ensuring it remains a jurisdiction of choice for these claims.

From 1 October 2022, in order to identify wrongdoers or the whereabouts of assets, claimants will be able to bring disclosure applications against innocent third-parties based outside the jurisdiction without, as is currently the case, first having to commence an action against them.

What are Third Party Disclosure Orders?

English law has developed processes enabling parties suffering a loss but unable to identify the wrongdoers or location of the assets to obtain this evidence from innocent third-parties caught up in the fraud or similar wrongdoing via disclosure orders often referred to as i) *Norwich Pharmacal* (**NPO**); and ii) *Bankers Trust Orders (***BTO**).

The NPO was created in the case of *Norwich Pharmacal v Commissioners of Customs & Excise [1974]*[1] and requires innocent third-parties, who are caught up in a fraud or wrongdoing to identify the wrongdoer, and / or the whereabouts of the target assets.

A form of NPO is the BTO, which arose from the *Bankers Trust Company v Shapira anors [1980]*[2] case. BTOs are limited to fraud claims and require innocent third-party banks to disclose documents in order to assist claimants in tracing assets or bringing claims.

In order to obtain these orders it is necessary to show that:

- a wrong has been carried out;
- the disclosure order is required in order to enable proceedings to be brought or continued; and
- the respondent is either the wrongdoer or able to identify the wrongdoer, or the whereabouts of the assets.

Why the change and why now?

It is recognised that third party disclosure orders have had limited success where third-parties are located outside of England and Wales because none of the *'jurisdictional gateways'* in the Civil Procedural Rules (**CPR**) apply and therefore the courts do not currently have jurisdiction to make these orders.[3]

Where it is not possible to use the NPO or BTO procedures parties are left with few options but to commence an action against the innocent third-party in order to obtain this information, with the associated time and cost involved.

The increase of global digital-asset fraud, e.g. crypto currency frauds, has led to a keener focus on the gap in the *'jurisdictional gateways',* which it is recognised is a growing obstacle preventing claimants from identifying the wrongdoer and commencing proceedings against them.

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[1] UKHL 6
[2] 1 WLR 1274
[3] See the HFW case of AB Bank Ltd v Abu Dhabi Commercial Bank PJSC [2016]

This issue has been resolved by the creation of a new '*gateway*[4] enabling claimants to serve a claim form out of the jurisdiction, with the permission of the court. The new gateway can be used:

1. to identify information regarding:
   - the identity of a potential defendant; or
   - what has become of the claimant's property
2. where the information is required for the purposes of proceedings commenced (or which, subject to the information received, are intended to be commenced) in the English courts.

In addition to the new 'gateway', it will still be necessary to show that England is the proper place to bring the claim, that there is a serious issue to be tried and the claim has a reasonable prospect of success.

NPO and BTO considerations

Those considering NPO and BTO applications on non-parties based out of the jurisdiction should have in mind the following, namely that:

- the change supports claimants seeking redress against fraudsters, but that these applications remain highly strategic;
- permission of the court is still required, and the new '*gateway*' test and jurisdiction requirements must be satisfied to show that the claim falls within one of a number of categories or 'jurisdictional gateways';
- it may be possible to obtain the evidence another way, for example via a disclosure application under the Pre-action Protocols, or even using GDPR;
- the courts are reluctant to award third-party disclosure orders in all but the most appropriate of cases: independent data shows that the courts award them only about 50% of the time;[5] and
- claimants should be aware of the potential cost consequences that may follow any misuse of the process e.g. by seeking to use them as a 'fishing' exercise.

Conclusion

From 1 October 2022, identifying wrongdoers and the location of assets hidden behind jurisdictional barriers is now an achievable goal. However, and as set out above, there are still challenges to overcome in obtaining third-party disclosure orders.

That said, this is an exciting development, which shows the English legal system is ready and willing to keep pace with the realities of a globalised digitised world.

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[4] Paragraph 3.1(25) of CPR PD6B
[5] Solomonic data as at 15 September 2022

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COMMODITIES | JANUARY 2022

HFW LITIGATION: UNFAIR PREJUDICE PETITIONS - ITS NOT PERSONAL

In a recent judgment, the Court of Appeal has confirmed that, for personal actions to be pleaded in support of an unfair prejudice petition, there must be a causal link between these actions and the company's affairs. The judgment, from England and Wales's second highest court, provides important guidance to potential claimants on the scope of unfair prejudice petitions.

What happened?

The Court of Appeal's judgment[1] concerns an appeal from a decision of the High Court, *King v Kings Solutions Group Ltd*[2] during an unfair prejudice petition (the **Petition**) under section 994 of the Companies Act 2006 (**s.994 CA 2006**).

S.994 CA 2006 provides that unfair prejudice petitions can be brought by a shareholder only where they relate to the "*company's affairs*" or an "*actual or proposed act or omission of the company*".

The Petition forms part of a complex dispute between the shareholders of Kings Solutions Group Limited (**KGSL**) which initially concerned alleged misrepresentations made during negotiations for the sale of shares in KGSL from its founders (the **Minority Shareholders**) to its new owners (the **Majority Shareholders**), although the Minority Shareholders discontinued their misrepresentation claim during the trial. As one judge has colourfully put it, "*[f]rom these basic facts has sprung a multiplicity of litigation which must inevitably put any observer with a taste for nineteenth century fiction in mind of the infamous Jarndyce case.*"[3]

In support of their Petition, the Minority Shareholders presented a 68-page Points of Claim document claiming, among other things, that the Majority Shareholders had pursued a "*Campaign*" to obtain their shares in KGSL "*for as small a cost as possible*" and to exclude them from the business of KGSL.

The alleged Campaign involved actions (such as the misapplication of KGSL's resources), which would constitute conduct of KGSL's affairs. However, it also included actions, which were 'personal' and did not, of themselves, amount to such conduct (the **Personal Actions**), e.g.:

the rejection of the exercise of a put option; and

steps taken to recover legal costs awarded against the Minority Shareholders.

The Majority Shareholders applied to have parts of the Points of Claim struck out on the grounds that they were not related to the conduct of KGSL's affairs and did not fall within the scope of s.994 CA 2006.

First Instance decision

At first instance in the High Court, the judge accepted that the Personal Actions, when "*viewed in isolation*", did not constitute affairs of KGSL.

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[1] Primekings Holding Ltd & Ors v King & Ors (Re Kings Solutions Group Ltd) [2021] EWCA Civ 1943

[2] [2020] EWHC 3130 (Ch)

[3] See the comments of Mrs Justice Cockerill in King v Stiefel [2021] EWHC 1045 (Comm).

[4] [2014] EWCA Civ 191

However, the judge recognised the principle in *Graham v Every*[4] that personal actions, when combined with actions or omissions or other conduct on the part of the relevant company, may legitimately fall within the scope of an unfair prejudice petition so long as there is a "*clear link or causal connection*".

The judge held that, as the Personal Actions were pleaded to have formed part of the "C*ampaign*", this amounted to a "*sufficient causal connection*". Therefore, the Majority Shareholders' application was rejected.

The Majority Shareholders appealed.

The Court of Appeal decision

The Court of Appeal, in a unanimous decision, allowed the appeal and held that:

- personal actions which are "*causally connected*" to the conduct of the company's affairs may be included in a statement of case under s.994 CA 2006;
- however, there is "*no such justification for allowing other allegations of personal conduct [...] which are not [so] causally connected*".

As the Personal Actions themselves were not causatively connected to any conduct of the affairs of the KGSL, the relevant sections of the Points of Claim were struck out.

The Court of Appeal considered that although the judge at first instance had correctly analysed the principle in *Graham v Every*, he had incorrectly applied his analysis to the disputed paragraphs of the Points of Claim. The court commented that "*even if two actions are each said to have been part of an orchestrated plan, it does not follow that both would amount to conduct of the affairs of [KGSL], and nor does it follow that one would be causative of the other.*"

What does this mean for potential petitioners?

This judgment provides welcome clarification on the scope of unfair prejudice petitions.

Unfair prejudice claims are often messy, personal and hard fought. The Court of Appeal even noted the "*clear tendency for petitions [...] to raise myriad grievances and complaints of diverse forms of misconduct*".

The decision at first instance threatened to allow irrelevant personal grievances that have nothing to do with the company in question to be 'crowbarred' into petitions via a vague reference to a "*Campaign*" against the petitioner. However, the decision of the Court of Appeal is a welcome clarification confining shareholder claims to their proper application, i.e., whether the affairs of a company are conducted in a manner, which is unfairly prejudicial to the interests of members generally, or of some part of its members.

In light of this decision, potential petitioners in unfair prejudice claims should try and rise above any personal acrimony with their fellow shareholders and confine their petitions to the affairs of the company.

Pursuing an action for unfair prejudice under s.994 CA 2006 should be the last resort. Potential petitioners should seek legal advice at an early stage and consider if there are any viable alternatives to legal action, such as exercising rights under a shareholders' agreement.

If you have any questions relating to the above or require advice in relation to a potential shareholder dispute, please contact the authors of this briefing.

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HFW LITIGATION | FEBRUARY 2022

SELF-REPORTING THE INFRINGEMENT OF TRADE SECRETS

HFW acted in the first reported case of the English High Court making a publicity order[1] under the Trade Secrets (Enforcement etc) Regulations 2018 (Regulations). The order required the defendant to publish the court's decision on its own website.

In October 2021, HFW's client, Norwegian naval architects, Salt Ship Design (Salt), succeeded in a claim against Italian cable laying company, Prysmian Powerlink (Prysmian), for breach of confidence and unlawful means conspiracy. The court found that Prysmian had made confidential Salt design documents available to a rival vessel designer, Vard Design, and encouraged Vard to use those documents in the design of a new cable laying vessel for Prysmian, Leonardo da Vinci. You can read more about the judgment in our earlier briefing[2].

Salt has successfully applied for an order under the Regulations requiring Prysmian to publish the court's judgment on its own website. Salt's application was made under Regulation 18, which provides for several factors to be considered when deciding whether a publicity order should be made. Three factors were determinative in this case:

1. The value of the trade in question.

   It was not in dispute that Salt's confidential design documents were valuable.

2. The conduct of the infringer in acquiring, using or disclosing the trade secret.

   The court found that Prysmian had engaged in a blatant misuse of Salt's confidential information so that it could have a ship built by Vard with the benefit of the Salt design, but at a significantly lower cost.

3. The impact of the unlawful use or disclosure of the trade secret.

   The court accepted evidence from Salt on the negative effects of Prysmian's actions, in particular, that Salt had lost the opportunity to earn additional design fees and to be publicly associated with Leonardo da Vinci.

The court also considered policy reasons for publicity, observing that that it could deter future infringers and serve as a warning that the misuse of confidential information could have significant adverse consequences.

Prysmian had argued that there was no need for additional publicity. The judge, Jacobs J, accepted that there has been some publicity, including articles written about the case, but concluded that it had not been extensive. He also commented that the audience to which Prysmian markets Leonardo da Vinci would likely be interested to learn of the misuse that had occurred.

The judge ordered that the notice be posted on the page on Prysmian's UK website that publicises Leonardo da Vinci for a period of 6 months. The judge considered that visits to the webpage were likely to be infrequent and that 6 months would allow enough time for a reasonable number of market participants to see the notice. The judge also observed that the official launch of Leonardo da Vinci is scheduled for the second quarter of 2022 and that visits to the webpage may increase at that time.

This judgment demonstrates how the Regulations may be invoked as a remedy that affects the reputation of the wrongdoer following an infringement of intellectual property rights, in addition to the burden of having to disgorge profits or pay damages. The Regulations may also assist those whose trade secrets have been misused in repairing some of the damage done.

Salt is pursuing Prysmian for additional remedies, including disgorgement of profits and damages, including exemplary damages.

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[1] Salt Ship Design AS v. Prysmian Powerlink SRL [2021] EWHC 3583 (Comm)

[2] https://www.hfw.com/downloads/003360-HFW-Successful-claims-for-breach-of-confidence-and-unlawful-conspiracy.pdf

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HFW LITIGATION

DISPUTE RESOLUTION | AUGUST 2022

TWO CELEBRITIES, ONE MISSING MOBILE PHONE, AND MANY MISSING MESSAGES: THE ENGLISH HIGH COURT GIVES JUDGMENT IN THE WAGATHA CHRISTIE CASE

Introduction

It is not often that disclosure of documents and data forensics are the subject of speculation by the tabloid or indeed, the mainstream press, or a process linked to celebrities and the world of footballers' wives. However, that is exactly the scenario which arose as a result of the English High Court case brought by Rebekah Vardy against Coleen Rooney (colloquially known as the *'Wagatha Christie'* case), and on which the English High Court has now ruled[1] .

The case centred around leaked information about the defendant for which she publicly blamed the claimant and which resulted in the claimant issuing defamation proceedings in the English court. The English High Court has now dismissed the claim and in so doing, expressed some very damming conclusions around a missing device and missing data.

The case shines a light on disclosure in litigation and the inferences the court will draw where full disclosure is not given, and which form the focus of this briefing.

Disclosure

Disclosure (or the mutual exchange of documentary evidence) is an important part of the English litigation evidential process (and of other common law jurisdictions). For more information on disclosure under the Disclosure Pilot (PD 51U), operational in the Business and Property Courts (and due to be permanent as from 1 October 2022), please see our Disclosure Client Guide[2].

In this case the documentary evidence or data disclosed was not huge, amounting to some 3,000 pages of mainly Instagram and other social media posts, and newspaper articles. However, it was clear that there were gaps in the data, as noted in the judgment *"all the media files that they sent each other (including any screenshots or other images, videos and voicemail messages) [were] missing."*

It was the defendant's case that the loss was deliberate, which was denied by the claimant who alleged loss of images and media files occurred when she tried to transfer her WhatsApp messages to her lawyers. This was compounded by her disposing of the relevant laptop, which she informed the court had been *"damaged beyond repair*".

The suggestion here was that the missing data would have been detrimental to the claimant's case, and therefore, in breach of the obligation to disclose *'adverse'* documents (documents which negatively affect one's own case or support that of the counterparty) in the Disclosure Pilot (PD 51U) and under the Civil Procedure Rules (**CPR**) Part 31, and elsewhere. This obligation is ingrained in the English litigation system and supports the *Overriding Objective,* namely *"enabling the court to deal with cases justly and at proportionate cost*[3]*."*

Missing data is not an unknown phenomenon in litigation. It is, however, becoming increasingly more unusual as the technology used to retrieve 'deleted' emails and voicemails etc., and restore data on damaged devices, becomes ever more sophisticated. It cannot, however, assist with recovering locally stored data on missing or disposed of devices, at least, not yet.

In terms of the court's findings and perception, the judgment notes:

- "*The reasons that Ms Vardy and Ms Watt have given for the original WhatsApp chat being unavailable are each improbable*.";
- In relation to the mobile phone the claimant's agent dropped in the North Sea days after an order was made requiring it to be produced for inspection: "[*t]he timing is striking. In my judgment, even taking this evidence on its own, the likelihood that the loss Ms Watt describes was accidental is slim*."; and ultimately

[1] https://www.judiciary.uk/wp-content/uploads/2022/07/Vardy-v-Rooney-Trial-Judgment.pdf

[2] 003563-HFW-Client-Guide-Disclosure-Pilot.pdf

[3] CPR, Part 1.1

- "*In my judgment, it is likely that Ms Vardy deliberately deleted her WhatsApp chat with Ms Watt, and that Ms Watt deliberately dropped her phone in the sea*."

What inferences will be drawn where data is missing?

Having established that documentary evidence was deliberately withheld, what consequences follow? The court reviewed the authorities on this point including the 300-year-old case of *Armory v Delamirie*[4], which involved a chimney sweep who found a piece of jewellery whilst cleaning a fireplace. A jeweller, when valuing the jewellery, surreptitiously removed the gems. The court held that if it can be shown that evidence is missing, the assumption should then be that what is missing is of the highest possible value.

This judgment suggests that the authority in *Armory* will apply equally to missing WhatsApp messages allegedly sent by a footballer's wife, as it does to missing gems in a piece of 18th century jewellery.

How do you minimise the risk of data loss in disclosure?

Whether deliberate or not, data loss can happen. In terms of credibility and the court's perception, its consequences can be severe. That is why we work closely with our clients at the outset of a matter - advising on:

- the suspension of document destruction policies and the issue of hold notices;
- ensuring there is clarity and understanding around their and our duties and responsibilities;
- identifying those most likely to be involved in the issue;
- putting in place an effective system of data collection and device retrieval; and
- using the most up to date technology to quickly and efficiently move on to document review to identify the evidence and formulate the advice and strategy.

Conclusion

Whilst this case is far removed from the commercial litigation with which most of us are familiar, it is a general reminder that the court requires the parties to:

- preserve documents in its control (i.e. not just limited to possession) that might be relevant;
- disclose known adverse documents (and any other category as agreed between the parties or ordered by the court);
- carry out searches (if any) in a responsible and conscientious manner; and
- act honestly.

Failure to give full and proper disclosure will have consequences. For commercial litigation, under the Disclosure Pilot, under CPR Part 31, or elsewhere, these consequences can include hearings being adjourned - with the inconvenience and extra costs that this causes; adverse costs orders against the defaulting party; adverse inferences being drawn; and in the most serious of cases, an order of contempt of court (punishable by a fine, imprisonment of up to two years, or both).

Legal advisers are required to advise parties on disclosure, and parties would be well advised to take their disclosure obligations seriously and comply, or risk damaging their own case.

As written, the judgment gives little scope for appeal. However, if there is an appeal which impacts on the issues raised in this briefing, we will publish an update.

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[4] (1721) 93 ER 664

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Americas | Europe | Middle East | Asia Pacific

HFW LITIGATION | FEBRUARY 2022

UK GOVERNMENT ISSUES A CONSULTATION ON THE UK JOINING THE SINGAPORE CONVENTION ON THE ENFORCEMENT OF MEDIATION SETTLEMENT AGREEMENTS

Of interest to commercial parties who engage in or would prefer to engage in mediation to resolve their disputes, will be the UK government's newly launched Consultation seeking views on whether the UK should join the Singapore Convention on the enforcement of mediation settlement agreements (SMC)[1].

The SMC aims to create an effective cross border system for the recognition and enforcement of mediated settlement agreements – similar in concept to arbitration's New York Convention 1958[2].

Why does this matter?

Mediation is an increasingly popular form of negotiated dispute resolution (also known as alternative dispute resolution), it can provide cost-effective options for resolving disputes without having to go to court. Thereby, potentially saving parties both time and money.

The Consultation references a Centre for Effective Dispute Resolution (CEDR) report[3]. which estimates that "*mediation can save businesses around £4.6 billion per year in management time, relationships, productivity and legal fees*" and goes on to note, again by reference to a CEDR report, that the economic benefits are not inconsiderable, noting that in 2020 mediation's value was estimated at around £17.5bn[4].

However, in contrast to litigation, where there are numerous treaties and conventions, which facilitate the enforcement of judgments across most borders, and in the case of arbitration, where the New York Convention 1958 provides a similar system; mediation has not previously been able to offer parties a similar level of comfort, and so its application to those types of disputes has been limited.

The SMC seeks to address this issue and place mediation on a similar footing to litigation and arbitration, in so far as cross border enforcement is concerned.

Will it apply to all mediation settlement agreements?

The SMC will only apply to "*international*" mediation settlement agreements, and requires:

- at least two parties to the settlement agreement to have their places of business in different Convention States; or
- the Convention States in which the parties to the settlement agreement have their places of business are different from to differ:
  - the Convention State in which the obligations under the settlement agreement are to be performed; or
  - the Convention State with which the subject matter of the settlement agreement is most closely connected.

In addition, the settlement agreement must fulfil certain formalities under the SMC:

- it must be in writing and be signed by the parties;

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[1] United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)

[2] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards

3 Centre for Effective Dispute Resolution 'The full Ninth Mediation Audit' - www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf

4 Centre for Effective Dispute Resolution 'The full Ninth Mediation Audit' - www.cedr.com/wp-content/uploads/2021/05/CEDR_Audit-2021-lr.pdf

- a copy will need to be provided to the Competent Authority (that is the court in the jurisdiction where the enforcement is to take place);
- evidence that the settlement agreement resulted from mediation will be required to be given to the Competent Authority, this can include:
  - the mediator's signature on the settlement agreement;
  - a document signed by the mediator indicating that the mediation took place; or
  - confirmation by any institution administering the mediation.

How will it work?

The SMC enables parties who seek to rely upon a mediated settlement agreement to apply directly to the Competent Authority of the relevant Convention State to enforce the agreement.

Under the terms of the SMC, the 'seat' of the mediation, that is where the agreement was made, took place, or signed is not relevant. The relevant factor is the jurisdiction in which the settlement agreement is to be enforced and whether that jurisdiction is a party to the SMC.

Can enforcement be refused?

A Competent Authority may refuse to grant relief, in a number of circumstances, including where;

- a party lacked capacity;
- the settlement agreement is null and void, inoperative or incapable of being performed under its governing law, or under the law deemed to be applicable;
- the settlement agreement is not binding, or is not final;
- the terms of the settlement agreement have been performed;
- there was a serious breach by the mediator, or failure to declare a conflict; or
- granting relief would be contrary to the public policy.

Which countries are members of the Singapore Mediation Convention?

There are currently nine parties to the Convention: Fiji, Qatar, Saudi Arabia, Belarus, Ecuador, Honduras, Turkey, Georgia, and Singapore.

There are however, another 55 countries who have signed and whom it is presumed intend to finalise membership, these are: Afghanistan, Armenia, Australia, Belarus, Belize, Brazil, Brunei, Chad, Chile, China, Colombia, Republic of the Congo, Democratic Republic of the Congo, Ecuador, Kingdom of Eswatini, Fiji, Gabon, Georgia, Ghana, Grenada, Guinea-Bissau, Haiti, Honduras, India, Iran, Israel, Jamaica, Jordan, Kazakhstan, Laos, Malaysia, Maldives, Mauritius, Montenegro, Nigeria, North Macedonia, Palau, Paraguay, Philippines, Qatar, Rwanda, South Korea, Samoa, Saudi Arabia, Serbia, Sierra Leone, Singapore, Sri Lanka, Timor Leste, Turkey, Uganda, Ukraine, the USA, Uruguay, and Venezuela.

The Consultation

The Consultation was launched on 2 February 2022. The deadline for responses is 1 April 2022.

If you would like to take part in the Consultation you can find the online information and questionnaire on the government site[5]. Alternatively, you can send your feedback to PIL@justice.gov.uk, or if you prefer the authors of this briefing will be happy to submit on your behalf and would be happy to try and answer any questions you may have.

[5] Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) - GOV.UK (www.gov.uk)

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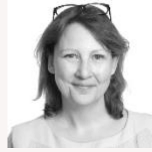

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HFW LITIGATION

DEVELOPMENTS IN BANKERS' DUTIES: *QUINCECARE*

DISPUTE RESOLULTION | MARCH 2022

PHILIPP: A "QUINCECARE" LIFELINE TO RETAIL BANKING CUSTOMERS?

In a somewhat unexpected judgment[1] that widens the scope of the duty of care banks owe to their customers, the English Court of Appeal has held that the duty of care established in *Barclays Bank Plc v Quincecare Ltd [1992] 4 All ER 363* (the Quincecare Duty) can apply to individuals.

What happened?

In January 2021, the English High Court in Philipp v Barclays Bank UK PLC [2021] EWHC 10 (Comm) (**Philipp**) gave summary judgment in favour of Barclays Bank (the **Bank**), finding in the Bank's favour that the Quincecare Duty does not apply when a customer themselves gives instructions for an "authorised push payment" (**APP**), rather than via a third party.

Mrs Philipp (the **Applicant**) appealed the decision of the High Court and, in March 2022, the Court of Appeal overturned the summary judgment and re-instated the case, commenting that the matter needed to be assessed at trial and not at a more limited summary judgment hearing.

Background

In 2018, the Applicant and her husband were informed by fraudsters posing as representatives of the Financial Conduct Authority (**FCA**) and the National Crime Agency (**NCA**) that if they moved money into certain accounts, their money would be protected from fraud. On this basis the Applicant moved GBP 700,000 from the savings account she had with her husband into an account with the Bank.

The Applicant, acting on the advice of who she thought were the FCA and NCA, then instructed the Bank, to transfer GBP 700,000 from her bank account by way of two transfers of GBP 400,000 (the **First Transfer**) and GBP 300,000 (the **Second Transfer**, collectively the **Transfers**) to bank accounts held in the United Arab Emirates. The Transfers were ordered separately, a few days apart from each other.

The Applicant alleged that no safeguarding questions, nor scam warnings, were asked at the time of the Transfers, which the Bank contested. The Applicant asserted that the Bank owed her a duty of care:

1. in common law in tort;
2. as implied into the contract between her and the bank; or
3. by statute under s13 of the Supply of Goods and Services Act 1982.

The High Court summarily dismissed the Applicant's claim on the basis that:

1. the Bank did not owe a Quincecare Duty to the Applicant, which only applied where instructions were given by an agent or third party; but
2. even if the Bank did owe a Quincecare Duty, the Applicant was so deceived by the fraudsters that she would not have believed the Bank had it intervened and made inquiries, and therefore there was no causation.

The Appeal

On appeal. the Applicant sought to extend the Quincecare Duty owed by banks to include APP instructions, arguing that whilst her instructions were not fraudulent they were based on the fraud to which she was a victim.

[1] Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318 (14 March 2022) (bailii.org)

The Applicant alleged that the transfer of such a large sum should have put the Bank on inquiry, and it had therefore breached its duty of care by not having policies and procedures in place to detect, prevent, reverse or reclaim any potential APP fraud, including:

- alerting the Applicant to the risk of fraud;
- arranging a meeting with the Applicant, police, and Bank employees; and
- carrying out further investigations.

and that, had the Bank acted on the inquiries, the Transfers would not have been made.

In response, the Bank argued that the Quincecare Duty is limited to circumstances where an agent fraudulently purports to act on behalf of the customer, and APP transactions are therefore excluded, and consequently it did not owe a duty to the Applicant.

The Consumers' Association (Which?) acted as an intervener at the hearing, supporting the Applicant, and argued that the court should find a Quincecare Duty. Which? submitted evidence at the hearing, including a report by the Financial Services Ombudsman (**FOS**), which showed that the FOS upheld around three-quarters of APP complaints in the consumer's favour.

The Court of Appeal's Judgment

The Court of Appeal judgment makes it clear that the summary judgment procedure should not have been used in this matter, noting that it was not appropriate for the High Court to carry out a mini-trial, where the Applicant's case was "arguable", and that the existence of a duty and the standard of care owed to the Applicant by the Bank should more correctly have been examined and determined at trial.

On the substantive point, the Court of Appeal noted that, whether the Applicant succeeds at trial will largely depend on the evidence around ordinary banking practices, and in what circumstances the court would consider an ordinary prudent banker as being put on inquiry of possible fraudulent activity.

The court considered three questions needed to be addressed in order to determine whether a Quincecare Duty applied, namely:

1. What was the relationship between the Appellant and the Bank in the context of the instruction to pay?
    a. the answer is that the bank is the agent for the customer as principal, which the court found was not in dispute.
2. What were the state of affairs if the Bank knew that the relevant instruction was an attempt to misappropriate funds?
    a. in these circumstances, if the Bank executed the instruction, it would be liable. It could not simply say it was an "execution only" service - Birss LJ held that the duty to execute is not absolute, as a bank still needs to exercise reasonable skill and care.
3. What lesser state of knowledge will put the bank under a legal obligation?
    a. this was established in Quincecare and affirmed by the Supreme Court in Singularis[2] - if the circumstances are such that an *ordinary prudent banker* would be "on inquiry" then the duty arises.
    b. the duty is not to execute the order whilst on inquiry, and to make inquiries.

Did it matter that the instructions came from the Appellant and not directly from a third party?

The Court of Appeal was not persuaded that this case was automatically defeated because the line of authority developed from Quincecare involved instructions given to banks by fraudulent third parties and not (as in this case) by the duped but innocent account holder. Birrs LJ in giving the judgment stated:

> "*I hold that as a matter of law the duty of care identified in Quincecare, which is a duty on a bank to make inquiries and refrain from acting on a payment instruction in the meantime, does not depend on the fact that the bank is instructed by an agent of the customer of the bank.*"

The Floodgates argument

The High Court was persuaded by the Bank's submission that imposing the Quincecare Duty in the consumer context would put banks under an onerous and unworkable burden. However, the Court of Appeal held that this issue should not have been decided without a trial.

The Court of Appeal recognised the "*ample evidence to make it arguable that the duty of care contended for would be neither unworkable nor onerous in terms of banking practice in March 2018.*", noting that Which? the intervener, submitted further supporting evidence showing that the practices needed to have prevented this fraud were in place at the time, and had since been developed. It was not persuaded that the flood gates would open.

[2] ***Singularis Holdings v Daiwa Capital Markets*** [2019] UKSC 50

What does this mean for the consumers, banks, and the future of the Quincecare Duty?

This decision will be welcomed by consumers, as it brings back into question whether the Quincecare Duty applies to consumer banking transactions and APPs – an increasing area of concern, with over GBP 350 million being stolen using APP mechanisms in the first six months of 2021, according to Payment Systems Regulator's data.

It has yet to be seen whether the Bank will settle this case, but if not, and unless any future trial on the substantive issues departs from the reasoning in the Court of Appeal's judgment, this judgment will act as important precedent for future APP fraud Quincecare Duty cases.

Ultimately, it appears as though the application of the Quincecare Duty will turn on when banks were, or should have been, put on notice to make reasonable inquiries with reference to industry norms.

Whilst the future of the Quincecare Duty's application is uncertain, banks should be looking at their procedures to ensure that their practices and policies comply with industry standards. This is especially important when considering the FOS' approach to APP fraud; where the majority of cases are found in favour of the consumer. Consumers may also have redress via the APP Voluntary Code under which a number of banks have agreed to reimburse victims of APP fraud where certain conditions have been met.

Whilst the Philipp's decision is an important step in the extension of the Quincecare Duty, it does not necessarily follow that the cost of all APP frauds will be borne by the banks. The facts in Philipp were unusual in that high sums and foreign banks were involved. Most consumer APP frauds will be less complex, and so may not be sufficient to put a reasonable ordinary prudent banker on notice to make inquiries.

We will write an update if there is a subsequent judgment in the Philipp case.

For further details on the Quincecare Duty and its subsequent application, please see our earlier briefings:[3]

Additional research conducted by Trainee Solicitor **Annabella Ferrari**.

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[3] HFW | Quincecare duty applied by the DIFC Courts

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DISPUTE RESOLUTION | MAY 2022

QUINCECARE DUTY: PRIVY COUNCIL RULES THAT DUTY OF CARE IS NOT OWED TO NON-CUSTOMERS OF A BANK

On 12 May 2022, the Privy Council handed down the judgment in *Royal Bank of Scotland International Ltd v JP SPC 4 and another* [2022] UKPC 18, confirming that banks do not owe a duty of care to non-customers who have been victims of fraud, even where the fraud was committed through an account with that bank.

The Background

JP SPC 4 is a Cayman Island based investment fund (the **Fund**). The Fund operated a litigation funding scheme in England and Wales (the **Scheme**). Any loans made under the Scheme were to be advanced and repaid through Synergy (Isle of Man) Ltd (**SIOM**) via their two separate bank accounts (the **Accounts**) held with Royal Bank of Scotland (the **Bank**). Any funds held within the Accounts beneficially belonged to the Fund.

Between July 2009 and October 2012, the joint owners of SIOM misapplied approximately £77.8 million of the Fund's money from the Accounts held with the Bank (of which at least £60 million was misappropriated following the Bank classifying the Accounts as "high risk").

The Fund subsequently commenced proceedings against the Bank in the Isle of Man. The Fund alleged that, notwithstanding the fact that the Fund was not a customer of the Bank, the Bank was under a duty to take reasonable care to protect the Fund from losses caused by the fraud from the date that the Bank knew that the money in the Accounts were beneficially owned by the Fund.

The Bank applied to strike out the proceedings on the basis that there was no arguable pleaded basis on which the Bank could be said to owe a duty of care, which was dismissed at first instance but allowed on appeal to the Court of Appeal. The Fund then appealed to the Privy Council.

The Issues

The Fund, *inter alia,* asserted that the claim should proceed to a full trial as the Bank owed them a duty of care on the basis that the existing authorities supported the establishment of such a duty or in the alternative, that the court should extend the duty of care to this situation as a matter of incremental development.

The Decision

The Privy Council found that the claim should be struck out on the basis that a duty of care did not arise on the facts. In reaching their conclusion, the Privy Council considered the various ways in which the Fund asserted that a duty of care arose on the facts:

> The Quincecare Duty
>
> Firstly, the Fund argued that the principles as established in Barclays Bank plc v Quincecare Ltd [1992] 4 All ER 363 (the **Quincecare Duty**) applied.
>
> The Quincecare Duty is an implied duty owed by a bank to its customer to take reasonable care when making a payment on the instructions of the customer. Steyn J in *Quincecare* explained the scope of the duty as: *"…a banker must refrain from executing an order if and for as long as the banker is "put on enquiry" in the sense that he has reasonable grounds for believing that the order is an attempt to misappropriate the funds of the company…".*

The Fund argued that, as the Bank had actual or constructive knowledge that the monies held in the Accounts were beneficially owned by the Fund, it therefore owed (and breached) its Quincecare Duty to the Fund. In considering

the Quincecare Duty (and subsequent case law), the Privy Council concluded that the authorities did not support the argument that the Quincecare Duty extended to non-customers of the Bank.

Whilst the Privy Council acknowledged that Steyn J in *Quincecare* stated that the eponymous duty existed to also protect third parties as well as bank customers, this did not mean that the duty is owed to those third parties.

The Baden Principle

Secondly, the Fund argued that a duty of care arose on the facts from the principles established in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509.

In *Baden,* Gibson J found that a duty of care is owed by a bank to non-customers where the bank has knowledge that the accounts are held by its customer as a fiduciary for known beneficiaries.

The Privy Council found that *Baden* could no longer be considered good law as, although it had not been expressly overruled, it was formed on the premise of the now overruled two-stage test for duty of care as stated by Lord Wilberforce in *Anns* v *Merton LBC* [1978] AC 728.

Implied Assumption of Responsibility

Thirdly, that the Bank owed a duty of care on the basis of an implied assumption of responsibility (i.e., that the circumstances show that the Bank assumed a responsibility towards the Fund as the beneficial owner of the monies).

The Privy Council considered the leading authorities on assumed responsibility, such as *N* v *Poole BC* [2019] UKSC 25, and restated that it is an objective test which focuses on the exchanges which cross the line between the defendant and the claimant.

The Privy Council emphasised that there was no express assertion of an assumed responsibility made by the Bank and there were no relevant factors to suggest that the responsibility was implied (i.e., the Bank did not take any task or service for the Fund and there were no exchanges between the Fund and the Bank).

Incremental Development?

Finally, the Fund argued that if the existing authorities do not support a duty of care in and of itself, it should be considered as an incremental development from existing case law which supports a duty of care being owed to third parties suffering pure economic loss.

The Privy Council distinguished the pre-existing authorities from the facts of this case on the basis that usually either:

(i) a legal lacuna is required (as in *White v Jones* [1995] 2 AC 207) whereby practical justice demanded a remedy; or

(ii) very exceptionally there is no legal lacuna (as in *Golden Belt v BNP Paribas [2017]* EWHC 3182) but that the purpose of the service provided was to benefit the third party.

The Privy Council found that there was not a legal lacuna, as SIOM has a potential claim against the Bank and the Fund has a potential claim against SIOM, and that the purpose of the service was not to benefit the Fund but rather SIOM. The Privy Council also stated that the Fund, in any event, did not place any direct reliance on the Bank or that (if reliance was placed) that the Bank should have known that reliance was being placed as required.

Dishonest Assistance

The Privy Council also considered whether the Bank could be deemed to have dishonestly assisted in the breach of fiduciary duty in accordance with *Royal Brunei v Tan* [1995] 2 AC 378.

However, the Privy Council determined that what was required was dishonesty and not merely negligence, which supported the decision that no duty of care was owed by the Bank to the Fund.

Commentary

This decision will be welcomed by banks, as it definitively excludes non-customers from the scope of the Quincecare Duty, even where the bank knowingly holds funds beneficially owned by a non-customer.

The approach may be considered as pragmatic, as extending the duty of care owed by banks to third parties could prove burdensome or unworkable.

Banks should still ensure that they treat with care accounts in which the money is owned by a beneficiary who is not the customer. Whilst the Privy Council may not have extended the Quincecare Duty in this case, banks should exercise caution to ensure that their conduct does not amount to "dishonesty" so as to fall foul of the principles of dishonest assistance set out in *Tan*.

The Privy Council's decision comes just a few months after the Court of Appeal overturned a strike out judgment in *Philipp v Barclays Bank UK PLC [2021] EWHC 10 (Comm)*, which revived the question as to whether the Quincecare Duty applies to individuals. For further analysis of the Quincecare Duty and its subsequent application, please see our earlier briefings.[1]

Additional research conducted by Trainee Solicitor **Annabella Ferrari.**

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DISPUTE RESOLUTION | JUNE 2022

ENGLISH COMMERCIAL COURT GIVES FURTHER CLARIFICATION ON THE QUINCECARE DUTY

The Commercial Court's keenly awaited judgment in *Federal Republic of Nigeria v JP Morgan Chase*[1], *the largest Quincecare claim before the English courts,* has clarified the issues to be considered when determining the standard of a reasonable and honest banker under the Quincecare Duty, and highlighted its potential extension to "external" frauds.

Once more the duty established in *Barclays Bank v Quincecare,*[2] namely that a bank has a duty to not follow a customer's instructions when a reasonable and honest banker would be put on enquiry that it may facilitate a fraud on the customer (the **Quincecare Duty**), is under consideration by the English courts.

In this briefing we continue our analysis of judgments on the developing law around the Quincecare Duty, our earlier briefings can be found on our website[3] and are set out below[4].

The Background

In this case, JP Morgan Chase (**JPMC**) made payments totalling approximately USD 1 billion to accounts held by Malabu Oil and Gas Ltd (**Malabu**) out of an account held by the Federal Republic of Nigeria (**FRN**) in 2011 and 2013.

The FRN alleged that JPMC breached their Quincecare Duty alleging that JPMC were put on notice that Malabu had a questionable history and that the persons giving the instructions to make the payments were involved in a fraud against FRN.

The factual issues around the payments and allegations of corruption, fraud, and money-laundering are complex and whilst we do not propose to go into the detail for context it is helpful to know that they related to the former President Abacha and his then Minister of Petroleum Resources, Mr Etete.

The Commercial Court's judgment

1. The Nature and Scope of the Quincecare *Duty*

In reviewing the seminal decisions of *Quincecare and Singularis v Daiwa*[5], and the more recent cases including the Privy Council's decision in Royal Bank of Scotland International Ltd v JP SPC[6], which dealt with the distinct issue of whether the Quincecare duty applied to a receiving bank but also contained general discussion on the authorities. the court highlighted that in both instances an officer of the company had defrauded the company by causing its bank to pay company funds (i.e. an "internal" fraud).

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[1] *[2022] EWHC 1447 (Comm).*

[2] *[1992] 4 All ER 363,*

[3] *HFW | Briefings | Briefings*

[4] ENRICHMENT – AN ANSWER WHEN QUINCECARE DOESN'T APPLY?

HFW | Quincecare duty applied by the DIFC Courts
HFW | Quincecare Duty in the spotlight: more trouble for banks?
HFW | English high court limits quincecare duty in APP Fraud Cases
HFW | Philipp: A Quincecare lifeline to retail banking customers
HFW | Quincecare Duty: Privy Council Rules that Duty of Care is not owed to non-customers of a bank

[5] *2020] AC 1189*

[6] *4 [2022] UKPC 18*

In its analysis of the Authorised Push Payment fraud cases (*Philipp v Barclays Bank UK plc* [7]*and Sekers Fabrics Ltd v Clydesdale Bank Plc*[8]), the court acknowledged that traditionally the Quincecare Duty has been confined to cases of internal fraud but found that, in light of the Court of Appeal's decision in *Philipp*, the duty *may now* extend to cases of "external fraud" and that accordingly the FRN might not need to prove that Mr Adoke (as the fraudster) was behind the payment instructions.

The court noted that the authorities unanimously agreed that the Quincecare Duty should be confined and restricted, and restated the three tenets of the Quincecare Duty, namely that:

(i) the Quincecare Duty arises in relation to payment instructions;

(ii) there needs to be a clear focus on the issue of which the bank must be on notice; and

(iii) the duty does not arise unless the bank is on notice that the instruction is an attempt to misappropriate the customer's funds.

The court focused on the third limb, emphasising that it was a pre-requisite that FRN proved the fraud in respect of the 2011 and 2013 payments, and then subsequently that JPMC was on notice of the possibility of that fraud.

2. Was there a Fraud?

Given that FRN is a foreign state, did the English court even have jurisdiction to consider the actions that led to the allegations of fraud? The court determined it had jurisdiction, as the matter was presented to it for determination by the foreign state (FRN) and therefore Rule 2 of the Foreign Act of State Doctrine, which provides that the English courts will recognise and not question a foreign executive's decision or acts, which take place within the territory of that state, did not apply.

In reviewing the evidence, the court found that on the balance of probabilities, the original grant of the oil production licence (**OPL**) (which was the root of the issue) to Malabu in 1999 was corrupt. However, whilst there were certain "suspicious" or "certainly questionable" aspects and payments there was not sufficient evidence that Mr Adoke committed or partook in the alleged fraud.

The fact that FRN failed to prove fraudulent activity was crucial for the outcome of the case, as it is an essential requirement of the Quincecare Duty.

3. Was JPMC in breach of its Quincecare Duty?

Notwithstanding that the court found that FRN's case failed to establish that Mr Adoke took part in any fraudulent activity in respect of the 2011 and 2013 payments, the court went on to analyse whether (had the fraud been proven) JPMC would have been in breach of the Quincecare Duty. In so doing it looked at:

a. Gross Negligence

Due to the applicable contractual terms, FRN had to show that JPMC was *grossly* negligent.

The judgment restates the distinction between negligence and gross negligence, highlighting that it is a very high degree of negligence, but does not require a subjective element of the appreciation of the risk:

> *"even a serious lapse is not likely to be enough to engage the concept of gross negligence"* rather it is *"mistakes or defaults which are so serious that the word reckless may often come to mind, even if the test for recklessness is not met"*.

Cockerill J accepted that gross negligence may be established by demonstrating that a bank fell very seriously below the standard expected of the reasonable and honest banker. However, merely because a bank fell below that standard is not sufficient in and of itself to establish gross negligence. Ultimately it will depend on (i) the likelihood of the risk; (ii) the ease of mitigating the risk; and (iii) the seriousness of the consequences for the customer of the risk comes to fruition.

b. Was the Quincecare Duty breached in respect of the 2011 payments?

The court considered the cores issues to be:

(i) whether there was an obvious risk that FRN was being defrauded in 2011; and
(ii) if JPMC's conduct evidenced a serious disregard for that risk.

The court held that whilst the expert witnesses provided evidence on fraud and corruption generally, they were not focussed on the specific issues in dispute. Therefore, whilst the rather formidable list of "issues" of which JPMC were aware in respect of the OPL may be relevant to anti-money laundering best practice, it was not ultimately relevant to the issue of whether JPMC breached the Quincecare Duty it owed to FRN.

In this case it was necessary to assess whether there was a serious and obvious risk that the agreements resolving the matter were fraudulent and that Mr Adoke assisted in perpetrating that fraud. The court answered both in the negative.

c. Was the Quincecare Duty breached in respect of the 2013 payments?

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[7] *([2021] Bus LR 451; [2022] EWCA Civ 318)*

[8] *[2021] CSOH 89*

The court commented that the increased news articles around the OPL and Malabu, combined with the investigations being pursued in respect of the OPL throughout 2012 and 2013 (including a document production order against JPMN for documents relating to the account), would be taken very seriously by a reasonable and honest banker. However, it also considered that the various investigations would not suggest to a reasonable and honest banker that the instructions had not been made *bona fides*.

On balance, the court found that JPMC were on notice of a risk of the relevant alleged fraud and failed to act in 2013, but that the test for gross negligence had not been met.

Commentary

This is a first instance decision, which given the sums involved may well be appealed. Indeed, Cockerill J highlighted the ambiguity that still persists, noting that:

> *"...even so many years after its emergence, [it] is not entirely uncontroversial"*.

In the meantime, banks will be relieved to find that anti-money laundering and anti-corruption best practices are not synonymous with the Quincecare Duty.

The courts are trying to achieve a balance in keeping the Quincecare Duty narrow so as not to overly burden the banks, with affording sufficient protection to those who have fallen victim to a misappropriation of funds.

We will report further if this judgment is appealed.

For more information on our Litigation capabilities, see our HFW LITIGATION brochure, speak to Nicola Gare, or visit HFW LITIGATION

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Americas | Europe | Middle East | Asia Pacific

DISPUTE RESOLUTION | JUNE 2022

IS UNJUST ENRICHMENT THE ANSWER WHEN THE QUINCECARE DUTY DOES NOT APPLY?

We have previously produced a series of briefings reviewing recent judgments[1] regarding the renewed focus on the Quincecare Duty and claims brought by victims of fraud involving the execution by a bank of a payment order.

The recent case of *Tecnimont Arabia Limited v National Westminster Bank Plc*[2] highlights an alternative avenue through which victims of fraud may seek redress when the Quincecare Duty does not apply.

Development of the Quincecare Duty

When we published our original briefing in March 2020 regarding a flurry of new cases on the Quincecare Duty, we suggested that the most significant consequence of the underlying judgments could be an increased awareness of the Quincecare Duty and the willingness of the courts to award damages for its breach. Such an awareness was, we thought, likely to result in an increased number of claims being brought against banks by victims of fraud seeking to recover or minimise their losses.

What has followed is a series of notable judgments in which victims of fraud have sought to increase the scope of the Quincecare Duty and where, on occasion, the courts have highlighted and reiterated the boundaries of the Quincecare Duty. In particular:

- the Quincecare Duty has been considered and applied in the Dubai International Financial Centre Courts to the benefit of the claimant advised by HFW[3];
- the Court of Appeal decided that the Quincecare Duty can apply to individuals[4]; and
- of particular relevance for the purposes of this briefing, the Privy Council held that banks do not owe a Quincecare Duty to non-customers[5].

Limitations of the Quincecare Duty

However, whilst the Quincecare Duty has brought a renewed focus and an increased number of claims against banks by victims of fraud, the options available to a victim of fraud can often be very limited, particularly where the victim is unable to:

- make a recovery from a potentially unknown fraudster;
- bring a claim against its own bank as it has not acted in breach of the Quincecare Duty; and
- bring a claim against the recipient bank for breach of the Quincecare Duty following the decision of the Privy Council in *Royal Bank of Scotland v JP SPC*.

The recent *Tecnimont* judgment may afford a victim of fraud an alternative route in order for it to claim against the recipient bank for the misappropriated sums on the basis that it has been unjustly enriched.

Alternative Claim

In *Tecnimont v NatWest* the claimant (*Tecnimont*) brought a claim for restitution of its misappropriated monies against the recipient bank (*NatWest*) on the basis that NatWest was unjustly enriched as a result of the fraud.

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[1] *Singularis Holdings Ltd (In Official Liquidation) (A Company Incorporated in the Cayman Islands) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50 and *JP Morgan Chase Bank N.A. v The Federal Republic of Nigeria* [2019] EWCA Civ 164

[2] [2022] EWHC 1172 (Comm)

[3] *Aegis Resources DMCC v Union Bank of India (DIFC) Branch* [2020] DIFC CFI 004

[4] *Philipp v Barclays Bank UK Plc* [2022] EWCA Civ 318

[5] *Royal Bank of Scotland International Ltd v JP SPC 4 and another* [2022] UKPC 18

Tecnimont was deceived by an unknown fraudster into instructing its bank to transfer USD 5 million to an account operated and held by the fraudster with NatWest (the **Account**), Despite various internal alerts being triggered, NatWest actioned requests by the fraudster to make numerous transfers out of the Account, which resulted in Tecnimont only being able to recover a little in excess of USD 600,000 of the original USD 5 million.

Tecnimont's bank did not act in breach of the Quincecare Duty as it had not been put on enquiry as to the existence of the fraud and did not know / had no reasonable grounds for suspecting that a fraud was being committed. Consequently, it did not act recklessly in executing the payment instructions.

Instead, Tecnimont claimed that NatWest had been unjustly enriched or had knowingly received property that was subject to a trust. In its defence, NatWest denied that any enrichment had been at Tecnimont's expense; alternatively, that if there had been unjust enrichment at the expense of Tecnimont, then NatWest had a defence, namely that it had changed its position in good faith.

In respect of the unjust enrichment claim, the court was required to consider whether:

- NatWest was enriched;
- the enrichment was at the expense of Tecnimont;
- the enrichment was unjust; and
- NatWest could rely on any defences.

The issue that was most hotly argued and which will be of wide interest is the argument around whether NatWest was enriched at the expense of Tecnimont. Ultimately, the court held that NatWest had not been enriched at the expense of Tecnimont as, in this case, Tecnimont had not dealt directly with NatWest and Tecnimont and NatWest had not dealt with one another's property.

The reasoning being that was that Tecnimont's payment instruction was actioned by its bank (rather than Tecnimont), and this resulted in funds being transferred into the Account. In particular, the transfer of value flowed from Tecnimont's bank to an intermediary bank in New York and then in a second transaction from the intermediary bank in New York to NatWest in London. Whilst the economic reality of those two transactions was that USD 5 million left Tecnimont's bank account and was credited to the Account, that economic reality was the result of two separate transactions involving the intermediary bank and various layers of international banking system.

Whilst the unjust enrichment claim was unsuccessful, the court separately considered whether NatWest was able to rely on the *change of position* defence, or whether such a defence was unavailable on the basis that NatWest should have known of the fraud at the time that the funds were being dissipated out of the Account. There were three opportunities when NatWest could have frozen the funds, two from anti-fraud alerts triggered by NatWest's anti-fraud systems and the third when NatWest was actually notified of the fraud. Unfortunately, further sums were transferred out of the Account after NatWest was actually notified of the fraud.

In summary, the court found that the *change of position* defence was available to NatWest because it operated adequate and properly designed systems to deal with frauds on and by its customers. The first two alerts were aimed at protecting NatWest's own customer. In respect of the third opportunity, the court held that NatWest could rely on the *change of position* defence as: (i) the delay in NatWest freezing the Account, which permitted a payment to be made out of the Account, was "*relatively short*"; and (ii) NatWest was taking steps during that period of delay to recover monies that had already been dissipated out of the Account.

Commentary

On its face, the decision in *Tecnimont v NatWest* appears to give some comfort to banks and limit the avenues by which a victim of a fraud can seek recourse. However, it also leaves scope for a successful claim of unjust enrichment by a victim of fraud against a recipient bank where:

- the victim's bank transacted directly with the recipient bank rather than through an intermediary bank with the consequence that the recipient bank is deemed to have been enriched at the expense of the victim; and
- the conduct of the recipient bank is such that it is unable to rely on the *change of position* or any other defence e.g., if the recipient bank knew of the fraud, did not have the requisite systems in place to identify and / or prevent the fraud or did not act in a timely and appropriate manner following it being notified of the fraud.

Whilst the requisite ingredients for such a claim are seldom found in one case and are, on account of the nature of international banking transactions, more likely to be found in national rather than international transactions, it does give victims of fraud another potential option to seek a recovery from recipient banks if they are unable to pursue the fraudster or benefit from a breach of the Quincecare Duty by their own bank.

Additional Protection

The court in *Tecnimont v NatWest* noted that, whilst Tecnimont had adequate internal procedures and protocols, the fraudsters were able to perpetrate the fraud because those procedures and protocols were not followed. Care should therefore be taken to ensure that the requisite procedure and protocols are in place and that the relevant people that execute the vulnerable payment instructions receive regular training on those procedures and protocols.

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HFW LITIGATION

HONG KONG

NOVEMBER 2022

HONG KONG COURT DECIDES THAT THE ‘EXTENDED *FIONA TRUST* PRINCIPLE’ CAN BE DISPLACED BY CLEAR LANGUAGE

H v G [2022] HKCU 2213

In *H v G*, Chan J in the Hong Kong Court of First Instance held that the Extended *Fiona Trust* Principle had been displaced by clear language, which showed the parties wished disputes arising out of Contract A and Contract B to be resolved separately. It is the latest in a string of cases in the Hong Kong courts in which parties have tried (and mostly failed) to apply the Extended *Fiona Trust* Principle.

This article was first published in LexisNexis.

Mini-summary

The *Fiona Trust* principle is that parties, as rational businessmen, should be assumed to have intended any dispute arising out of their relationship to be decided by the same tribunal (*Fiona Trust & Holding Corporation & others v Privalov & others* [2007] UKHL 40). The principle is relied upon most commonly where a party wishes to have a single arbitral tribunal determine multiple disputes arising out of one contract.

The "Extended *Fiona Trust* Principle" is where the *Fiona Trust* principle is applied to a scenario where multiple disputes arise under multiple related agreements between the same parties (per Bryan J in *Terre Neuve Sarl & Others v Yewdale Limited & Others* [2020] EWHC 772 (Comm)).

In *H v G*, Chan J in the Hong Kong Court of First Instance held that the Extended *Fiona Trust* Principle had been displaced by clear language, which showed the parties wished disputes arising out of Contract A and Contract B to be resolved separately. It is the latest in a string of cases in the Hong Kong courts in which parties have tried (and mostly failed) to apply the Extended *Fiona Trust* Principle.

What are the practical implications of this case?

When considering whether an arbitration agreement in Contract A can be said to cover disputes arising from Contract B, the wording of the contracts must be construed in their context. In H v G, it was clear from that context that the parties had intended to *"carve out"* disputes arising under Contract B from the scope of the arbitration agreement in Contract A.

This is the fifth case in Hong Kong this year (2022) to consider the Extended *Fiona Trust* Principle. So far, the court has applied the principle in only one case: *Mak v. La* [2022] HKCFI 285 (notably another decision of Chan J). In *Mak v La*, the court considered Contract A and Contract B *"all deal with the same subject matter... [and] are all part of the package"* (at [50]).

"The court set aside the arbitrator's decision and held that he did not have jurisdiction over claims made under the warranty."

It appears from the decision in *H v G* and the other decisions that preceded it is that Extended *Fiona Trust* Principle has *"limited application"* in Hong Kong where the Contract A and Contract B contain different dispute resolution provisions.

What was the background?

H and G entered into a building contract whereby H agreed to carry out certain building works for G's project in Hong Kong. The building contract between H and G contained an arbitration agreement.

The building contract provided for H to give a warranty in respect of a waterproofing system to be installed and produced as a result of the building works. The warranty was to be set out in a specified form of Deed of Warranty appended to the building contract and executed under seal by G, H and H's subcontractor or supplier. The warranty included a clause stating that the warrantors agreed to submit to the non-exclusive jurisdiction of the Courts of Hong Kong Special Administrative Region. Subsequently, G, H and H's subcontractor jointly executed the warranty in the form provided.

A dispute arose between the parties in relation to the waterproofing system, among other matters, and G commenced an arbitration against H alleging breaches of the building contract and the warranty. H challenged the jurisdiction of the arbitrator on the basis that disputes arising from the warranty, which involves joint and several liability of a third party, should be determined separately from disputes arising out of the building contract. The arbitrator dismissed the challenge and said he he did have jurisdiction because the arbitration agreement in the building contract covered matters arising out of the warranty as well.

H challenged the arbitrator's decision before the court, who was asked to set it aside. In defence of the arbitrator's decision, G relied on the Extended Fiona Trust Principle, which it considered applicable.

What did the court decide?

The court set aside the arbitrator's decision and held that he did not have jurisdiction over claims made under the warranty.

The court accepted the *"forceful arguments"* advanced by H that the Extended *Fiona Trust* Principle had no application on the facts of this case. In particular, Chan J was persuaded by H and G's decision, when they entered into the building contract, to append a form of the warranty to the contract that provided a different manner of resolving claims under the warranty from the resolution of claims under the building contract in arbitration. In so doing, Chan J said they: *"expressed the clear intention... that there should be a mechanism different to arbitration, and further agreed to submit to the jurisdiction of the Hong Kong Court for the resolution of those claims under the Warranty"*.

Chan J considered the Extended *Fiona Trust* Principle to have *"limited application"* in a case where the overall contractual arrangements between the parties gave rise to agreements containing different dispute resolution provisions. In this

case, the principle had been *"clearly displaced by the language expressed in [the dispute resolution clause] of the Warranty, which formed part of the contract documents agreed to by G and H in the Building Contract."*

Chan J may also have had in mind that the Extended *Fiona Trust* Principle normally applies only where the parties to Contract A and Contract B are the same. In this case a third party, H's subcontractor, was a party to the warranty, but not the building contract. Chan J referred to the *"mischief"* which would be caused if G was able to pursue claims for breach of the warranty against H in arbitration, but had to proceed with litigation to pursue such claims against H's subcontractor. In fact, this is a very unlikely scenario given that the warrantors assumed joint and several liability. Where the Extended *Fiona Trust* Principle is applied to a situation in which the parties to Contract A and Contract B are different, an alternative would be for the court to conclude that it was the Contract A parties' intention that third parties should be able to rely on Contract A. Such a conclusion was reached by DHCJ Field in *Giorgio Armani Spa v. Elan Clothes Co Ltd (formerly known as Dalian Les Copious Clothes Co Ltd)* [2019] HKCFI 530 where the third parties were affiliates of the contracting parties.

Case details

- Court: Court of First Instance of Hong Kong
- Judge: Hon Mimmie Chan J
- Date of judgment: 10 May 2022

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INTERNATIONAL ARBITRATION

INTERNATIONAL ARBITRATION | MARCH 2022

DUBAI INTERNATIONAL ARBITRATION CENTRE ISSUES ITS NEW AND LONG-AWAITED ARBITRATION RULES

Following some uncertainty in the aftermath of Dubai Decree No. 34 of 2021 (Decree No. 34), the Dubai International Arbitration Centre (DIAC) has now issued its long-awaited Arbitration Rules 2022 (the Rules). The Rules come into force on 21 March 2022

Under Decree No. 34, the Emirates Maritime Arbitration Centre and the DIFC Arbitration Institute (and effectively, the DIFC-LCIA Arbitration Centre of which it was a part) were abolished. Their work was subsumed under DIAC, which becomes the principal arbitration centre in Dubai. Unless agreed otherwise, those with arbitration agreements referring to the abolished arbitration centres will now have arbitrations administered by DIAC under the DIAC Rules.

The new Rules provide some much needed clarity and comfort as the transition period under Decree No. 34 comes to an end. The new Rules will provide a more sophisticated framework for parties to arbitrate, and will attract arbitration practitioners to use DIAC, where they may have been reluctant to do so previously or they may have had DIAC imposed on them by virtue of Decree No. 34.

On first review, it certainly seems as though the new Rules are set to deliver. The Rules provide for expedited proceedings in certain circumstances including in matters where the sums claimed are valued at AED 1 million or less (exclusive of interest and legal costs). This is allows for a significant time and costs saving in relatively low value matters, making DIAC arbitration very appealing for lower value contracts and commercial transactions.

The default seat for DIAC arbitrations will now be the DIFC, making DIAC even more attractive to parties based overseas who can take advantage of straightforward enforcement procedures and the common-law DIFC Courts as the supervisory courts of the arbitrations.

Perhaps most significantly, the new DIAC rules expressly allow for awards of legal costs. Traditionally, DIAC arbitration could come at considerable risk to parties due to the limitations on the powers of the tribunals to award such costs. Although in practice, DIAC tribunals did often award legal costs, now they have express power to do so.

Additional amendments include provisions clarifying the use of third party funding, improved procedures for constituting tribunals, joinder and consolidation, all of which are instrumental in creating a more accessible, efficient and expedient arbitration process.

Whilst the Rules are a significant step in bolstering arbitration as a dispute resolution mechanism in the region, the ongoing effects of Decree No. 34 still linger.

There has been some uncertainty as to what happens to existing arbitrations administered by the abolished arbitration centres. At the date of writing, a number of DIFC-LCIA arbitration proceedings remain at a standstill. It is hoped that there will be clarifications by 21 March 2022, which as well as being the date of the formal enactment of the Rules, it is also the date the transitional period expires. It is expected that the administration of these arbitrations will now pass to DIAC, however we await a formal update later this month.

Nonetheless, the new DIAC rules mark a huge step in the modernisation and development of the arbitration procedures, making DIAC the pre-eminent centre for arbitration in the region.

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WHAT DO THE NEW 2022 ICSID ARBITRATION RULES MEAN FOR THE PARTIES?

In this briefing we examine the new International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules and comment on what they mean for States, investors and those involved in investment treaty arbitration.

What is ICSID arbitration?

ICSID arbitration is the dispute resolution method applicable under the ICSID Convention[1], and the leading global forum for investment arbitrations between a host State and a foreign investor investing in that State.

It covers disputes where:

1. one of the parties is an ICSID contracting State and the other a national of another contracting State (there are certain exceptions);
2. the parties have agreed to ICSID arbitration. In practice, this is achieved by either inserting an ICSID clause into the relevant concession contract between the State and the investor, or, more usually, by contracting States entering into bilateral (**BIT**) /multilateral (**MIT**) treaties which themselves provide for ICSID arbitration. In doing so the contracting State is deemed to consent to ICSID arbitration. An investor indicates its consent when they commence the ICSID arbitration; and
3. the dispute involves a qualifying investment between the State and investor. The ICSID Convention does not define "*investment*", but there is fairly well established ICSID caselaw setting out what is required.

The 2022 Rules

On 1 July 2022, and after some five years in the making, the 2022 ICSID Arbitration Rules (**2022 Rules**) [2] entered into force and apply to ICSID arbitrations commenced on or after that date.

The 2022 Rules aim to "*modernise, simplify, and streamline the rules*" as well as increase the use of technology to reduce ICSID's carbon footprint - for example Rule 4 requires electronic filing (unless otherwise ordered), something that HFW, as a signatory of the Campaign for Greener Arbitrations[3], welcomes.

The amendments can broadly be divided into three categories:

1. Increasing **transparency**;
2. Reducing the **time** and **costs** of the proceedings; and
3. Updating the rules to **regulate established practices** in international arbitration, such as security for costs and third-party funding.

1. Increasing Transparency

The ICSID arbitration framework has previously attracted some degree of criticism for its perceived lack of transparency. The criticism focused on the fact that privately appointed tribunals were making decisions regarding matters of public importance behind closed doors. The 2022 Rules aim to make ICSID proceedings more transparent.

1.1 Publication of awards, orders, and submissions

This is a significant change. The previous 2006 Rules required the parties' express consent for the publication of ICSID awards. Under the 2022 Rules, there is now an 'opt-out' mechanism whereby consent is automatically inferred unless a party objects within 60 days after dispatch of the document (Rule 62(3)). Even where the parties do not consent, ICSID will publish extracts of the award, but the parties are entitled to agree on redactions before publication (Rule 62(4)).

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[1] International Centre for Settlement of Investment Disputes (worldbank.org)

[2] ICSID Rules and Regulations Amendment | ICSID (worldbank.org)

[3] Campaign for Greener Arbitrations

The change also extends to:

- procedural orders and decisions, with redactions agreed by the parties (or by the tribunal if the parties disagree) (Rule 63);
- publication of written submissions or other documents filed in the proceedings is also permitted, with the parties' consent (Rule 64); and
- recordings or transcripts of hearings at the request of a party unless the other party objects (Rule 65(3)).

1.2 Submissions by non/third parties

Interested non-parties continue to be able to apply for permission to file written submissions in proceedings, but the relevant criteria for permission to be granted has been expanded. In addition to considering the non-party's interest and how their submission will assist the proceedings, the tribunal will also consider their identity, activities, organisation, and ownership (Rule 67(2)(d)). The tribunal will also take into account any financial or other assistance provided to them in taking part in the proceedings (Rule 67(2)(e).

1.3 The requirement to identify the ownership and control of an investment

Previously a request for arbitration only had to include information concerning the issues in dispute and confirm that the dispute arose directly out of an investment. The 2022 Rules are more specific, and now require that the request for arbitration includes "*a description of the investment and of its ownership and control*" (Rule 2(2)(a) of the ICSID Institution Rules, which apply before the registration of the case). Accordingly, claimants with complex investment structures will have to explain their corporate structure and how their various assets are attributable to the claimant-investor.

2. Saving time and costs

Another focus of change in the 2022 Rules is reducing the length of time the proceedings take, where data has shown that the average ICSID arbitration lasts between three to four years. The 2022 Rules aim to address that issue by streamlining procedures, reducing time limits, and leading to an overall time and costs saving, and include a provision requiring tribunals and parties to "*conduct the proceeding in good faith and in an expeditious and cost-effective manner*." (Rule 3(1)).

2.1 Expedited Arbitration

Chapter XII of the 2022 Rules introduces the possibility of an entirely new Expedited Arbitration. Parties can opt-in to the procedure at any time (Rule 75(1)), and where they do so, the following shortened procedure applies:

time limits for the filing of pleadings (60 days for the memorial and counter-memorial and 40 days for the reply and rejoinder (Rule 81(1));

the length of pleadings (200 pages for the memorial and counter-memorial and 100 pages for the reply and rejoinder (Rule 81(1));

timing of the hearing (to be held within 60 days after the last written submission is filed) (Rule 81(1)(g)); and

election of either a sole arbitrator or a three-member tribunal (failing which, a sole arbitrator is the default) (Rule 76)).

This new Expedited Arbitration procedure is particularly relevant for lower value claims or cases in which the dispute is not factually complex. However, as it is an opt-in mechanism requiring the consent of both parties, only time will tell how popular it proves.

2.2 Case Management Conferences

Tribunals will conduct one or more case management conferences (in addition to the First Session) to narrow the issues in dispute, identify uncontested facts on which the parties agree, and address any other procedural or substantive issues related to the resolution of the dispute (Rule 31).

2.3 Summary Dismissal of Meritless Claims

Within 45 days from the tribunal's constitution (or even before the constitution), parties can object to a particular claim on the basis that it is manifestly without legal merit (Rule 41) and apply to have the proceedings summarily dismissed. The tribunal will then fix time limits for submissions on the objection and are obliged to render their decision/award within 60 days from the later of the constitution of the tribunal of the last submission on the objection.

2.4 Bifurcation

The 2022 Rules contain a more detailed bifurcation procedure and set out the circumstances to be considered by the tribunal when determining these applications, including whether there will be time and costs savings (Rule 42(4)).

2.5 Time Limits

Tribunals must use their best efforts to render their awards within specific time frames (Rule 12). For awards other than those related to preliminary objections, the time limit is 240 days after the last submission (Rule 58). Rule 22 imposes **strict time limits of 21 days on applications to disqualify an arbitrator** (the old Rule 9 only required application to be made *promptly*). The 240 day time limit is a significant improvement as under the previous rules, it was not unheard of for awards to take over a year to be rendered.

3. Regulating established practices

3.1 Mandatory Disclosure of Third-Party Funding

The 2022 Rules require the parties to file a written notice disclosing the name and address of any non-party who funds the proceedings through a donation, grant, or in return for remuneration dependent on the outcome of the proceedings (Rule 14(1)). Notices will need to be filed on registration of the request for arbitration or immediately after concluding a third-party funding agreement (Rule 14(2)).

Additionally, the tribunal has an express power to order the disclosure of further information regarding the funding agreement and the funder (Rule 14(4)). It is not anticipated that this will be frequently ordered, and it is intended to assist in terms of conflicts rather than identifying the terms of the funding, which is not required under the 2022 Rules. Previously, the existence and identity of the funder were not required to be disclosed by claimants, giving rise to the potential for there to be unknown conflicts of interests. These enhanced disclosures will assist with the early identification of potential conflicts of interest, increase transparency, and potentially reduce conflict-related challenges.

The automatic and ongoing obligation to disclose the details of the funder is probably the most significant change introduced by the 2022 Rules. In requiring this, ICSID is following the lead set by other arbitral institutions (see for example the ICC Arbitration Rules that came into force on 1 January 2021).

3.2 Rules for security for costs

The 2022 Rules introduce an entirely new provision on security for costs (Rule 53). Security for costs applications were previously made under Rule 39, which governed provisional measures, but there was no dedicated provision. The 2022 Rules create a procedural timetable for security for costs applications and set out the key circumstances to be considered by the tribunal (which expressly includes the existence of third-party funding[4]).

3.3 The New Additional Facility Rules, Mediation, and Fact-finding Rules

Finally, amendments to the **ICSID Additional Facility Rules** significantly expand ICSID's ability to administer arbitration proceedings, including where none of the parties to the dispute are ICSID Member States or nationals of an ICSID Member State. When used, the Additional Facility Rules will provide access to ICSID's administrative support and expertise. However, they will lack some key benefits available under the ICSID Convention, such as streamlined enforcement of awards in Member State courts. Regional Economic Integration Organizations**,** including the European Union (**EU**), may also become a party to proceedings under the new Additional Facility Rules.

To complement the 2022 Rules on arbitration, ICSID's New Mediation Rules[5] offer a process to support negotiated dispute resolution between parties, and the New Fact-finding Rules[6] allow for an impartial and targeted assessment of facts related to an investment. The Fact-finding Rules allow parties to constitute a committee to inquire into and report on relevant circumstances in the pre-dispute phase. The idea behind the Fact-Finding Rules is to avoid disputes by providing an impartial assessment of facts arising in a contractual or other business dispute.

It is worth noting that Mediation and Fact-finding Rules can be used separately to, or in conjunction with, the arbitration proceedings.

CONCLUSION

The modernising of ICSID's arbitration procedures is likely to be welcomed by States and investors alike and was well overdue. The amended rules do appear to be a significant improvement and address some of the principal criticisms of the ICSID process. The introduction of an option for expedited arbitration, fact-finding committees, a summary dismissal procedure, and time limits for awards to be rendered should all help to reduce the time it takes for a claim to be determined. In doing so, the costs should also be reduced, and time and cost were, of course, two of the major criticisms of the previous regime.

The new rules relating to transparency should hopefully lead to more awards being made public and the development of the (non-binding) body of jurisprudence which, in turn, should lead to more informed and consistent decisions. The requirement for the upfront disclosure of the identity of any third-party funder is positive and in keeping with the

[4] See Rule 53(4)

[5] New ICSID Mediation Rules 2022

[6] New ICSID Fact-finding Rules 2022

direction of travel with respect to other arbitral institutions. The theory is that the greater the transparency the greater the trust and the more confidence the users will have in the system. This should in turn lead to more foreign investment which is a benefit to both States and investors.

Ultimately time will tell, but the new 2022 Rules appear to be a significant step forward.

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INTERNATIONAL ARBITRATION | DECEMBER 2022

ARBITRATION IN AUSTRALIA – CONTINUED SUCCESS OVER THE LAST TEN YEARS

It has now been 10 years since the transformative legal reforms to the Australian Uniform Arbitration Acts. These laws brought the arbitration laws in each Australian state and territory in line with the UNCITRAL Model Law.

The Australian Centre for International Commercial Arbitration (**ACICA**) recently issued its "Reflections" Report, which reflect upon the substantive developments in international arbitration in Australia over this 10 year period.

This decade has seen not only an increase in the number of Australian arbitrations but also an expansion of Australia's role in the international arbitration community. ACICA has played a key role in promoting, supporting and facilitating that success.

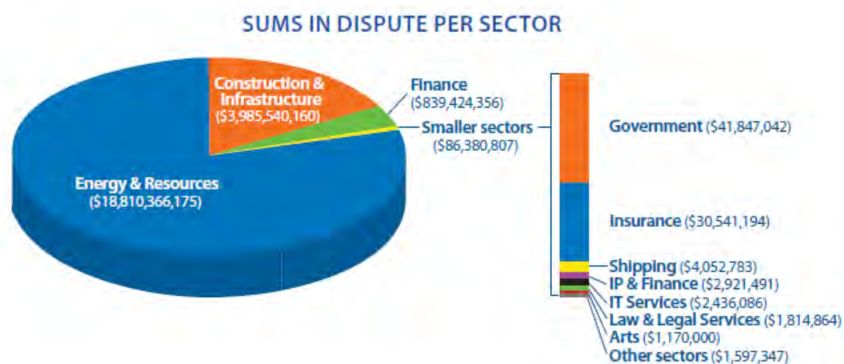
The ACICA Reflections Report

The ACICA Reflections Report, which can be accessed in full here, was issued to coincide with the 10th anniversary of Australian Arbitration Week. It demonstrates a growth in both arbitration in Australia and in the active participation of Australians in international arbitration. According to the 2020 Australian Arbitration Report, there have been 223 active arbitrations with an Australian connection for a combined value of more than A$ 35 billion.

Seat of Choice for Large and Complex Disputes

Any reflective review of this sort would not be complete without comments on the hard numbers. ACICA has reported that 100 cases have been submitted to ACICA over the last 10 years. These raw numbers are modest; however, they only tell half the story. The cumulative value of the claims in these arbitrations is almost $24 billion, which compares favourably with Australia's regional neighbours.

The size of the matters demonstrates that Australia remains the venue of choice for large complex disputes. The graphic below shows a breakdown of disputes per industry sector. Unsurprisingly, with Australia's reputation as a resource rich country and a depth of lawyers with industry expertise, ACICA Arbitrations most commonly concerned disputes in the Energy & Resources and Construction sectors.



Most of the disputes involved Australian parties, although 39% of cases had one party not based in Australia and 11% had no parties based in Australia. Foreign claimant parties were most commonly American or Singaporean. It should be noted however that these statistics do not take into account arbitrations where the parent companies are based overseas and the subsidiary party to the arbitration is registered in Australia.

83% of cases were under sole arbitrators. The arbitrators were most commonly appointed by the parties, which reflects the open nature of the ACICA Panel of Arbitrators. There is no obligation on the parties to use arbitrators solely from ACICA's list.

Another welcome trend from the report is the speed of completion of the arbitration, with 54% of arbitrations which proceeded to awards concluded in 1 year and another 29% within 2 years.

This trend is driven by the fact that ACICA plays an active role in management of time to award. The importance of the timely issue of awards is reflected by the fact that the new ACICA Rules 2021 require awards to be issued within nine months after the date that the file was transmitted to the tribunal or three months from the date that the proceedings were declared closed, whichever is the earlier.

Infrastructure

One of the primary reasons why there has been continued growth of arbitration in Australia is because of the world class arbitration infrastructure in Australia. Australia offers:

(a) A stable transparent and harmonised legal framework, based on the UNCITRAL Model Law.

(b) Legal expertise.

(c) Leading internationalist approach of judiciary and a court system which strongly supports arbitration.

ACICA plays a key role in supporting arbitration by

(a) Acting as an impartial appointing and administering body for all forms of ADR including acting as the delegated appointing authority for the Federal Court.

(b) Maintaining panels of international arbitrators and mediators.

(c) Providing rules and model clauses. The most recent rules were released in April 2021 after a thorough review. These rules reflect modern best practice.

(d) Improving education and training by hosting seminars, conferences and training sessions.

(e) Maintaining a Tribunal Secretary Panel.

The ACICA website also includes invaluable arbitration "toolkits" with guides to best practice, pro-forma notices of arbitration and checklists, which are made available for free to the international arbitration community and users of arbitration services, wherever their location.

More recently ACICA has partnered with Dexus to provide high quality arbitration facilities at discounted rates.

Future

There can be no question that there have been significant developments of arbitration in Australia over the past ten years. The ACICA Reflections Report rightly reflects those developments. However, there is still a significant amount to do, particularly in fields of diversity and reducing the environmental impact of arbitration. ACICA has committed to concentrate on these areas.

It can be anticipated that the next ten years sees ACICA use this strong base to promote Australia as a major centre for international arbitration.

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INTERNATIONAL ARBITRATION

ENFORCEABILITY OF ARBITRAL AWARDS

NOVEMBER 2022

SINGAPORE COURT CONFIRMS INTERIM AWARD BY A FOREIGN EMERGENCY ARBITRATOR IS ENFORCEABLE IN SINGAPORE

(CVG V CVH [2022] SGHC 249)

This article was first published in LexisNexis.

In an important decision, the Singapore court confirmed that an interim award made by an emergency arbitrator in a foreign seated arbitration was, in principle, enforceable in Singapore. The court held that such an interim award could meet the definition of a *"foreign award"* under the International Arbitration Act (Ch. 143A) (IAA) and therefore could be enforced. However, on this occasion the court refused to enforce the interim award on natural justice grounds after finding that the award debtor had been unable to present its case in the arbitration proceedings.

What are the practical implications of this case?

The court's decision clarifies that an interim award made by an emergency arbitrator in a foreign seated arbitration is in principle enforceable in Singapore. That had been unclear after the Singapore legislators amended the definition of *"arbitral tribunal"* to include *"an emergency arbitrator"* in one part of the IAA, but did not apply the same amendment in Part III, which deals with the enforcement of foreign arbitral awards.

Parties seeking to enforce foreign arbitration awards issued by emergency arbitrators in foreign seated arbitrations now have greater confidence their awards will be enforced in the absence of the usual grounds for refusing enforcement.

The case is also a reminder of the importance of granting each party to arbitration an opportunity to present his or her case, including where (as occurred in this case) one party presents a new allegation in post-hearing written submissions. In such circumstances, the other party must be afforded a sufficient opportunity to respond.

What was the background?

The defendant was the Singapore franchisee of the claimant. The franchise arrangement was the subject of four contracts between the parties, each of which provided for disputes to be determined by arbitration seated in Pennsylvania, USA, administered by the International Centre for Dispute Resolution (**ICDR**), and governed by Pennsylvanian law.

Disputes arose and, in May 2022, the defendant attempted to terminate the contracts on the basis that the claimant had (in the defendant's view) failed to comply with its obligations. In June 2022, the claimant commenced arbitration proceedings and applied to the ICDR to appoint an emergency arbitrator to grant an injunction to enforce certain *post-termination* provisions in the contracts. In so doing, the claimant appeared to accept the contracts had been validly terminated (otherwise it would not have sought to enforce *post-termination provisions*). However, in the claimant's post-hearing submissions, it argued for the first time that the contracts had not been validly terminated. This was a new argument that had not been made previously.

A few days later, the emergency arbitrator made an interim award granted reliefs which restored the status quo of the parties to the position before the defendant had terminated the contracts. In other words, the interim award was made on the basis that the claimant denied the validity of the defendant's attempts to terminate and did not treat the contracts as terminated. The emergency arbitrator had clearly been influenced by the new allegation made by the claimant in its post-hearing submissions that the contracts had not been validly terminated.

The claimant sought to enforce the emergency arbitrator's interim award in Singapore. At first instance, the enforcement order was granted. However, the defendant sought to set this order aside on grounds which included:

- that an interim award issued by a foreign emergency arbitrator could not be enforced in Singapore; and
- that the emergency arbitrator had breached the rules of natural justice because he had based its award on the claimant's post-hearing submissions, where it argued for the first time that the contracts had not been validly terminated, without giving the defendant an opportunity to respond.

What did the court decide?

The court rejected the defendant's argument that an interim award by a foreign emergency arbitrator is not enforceable in Singapore.

The court was not convinced by the defendant's submission that there was significance in the 2012 decision of the Singapore legislators to amend the definition of *"arbitral tribunal"* to include *"an emergency arbitrator"* in Parts I and I of the IAA, but not to apply the same amendment in Part III, which deals with the enforcement of foreign arbitral awards. The court refused to accept the defendant's argument that, as a result, an interim award by a foreign emergency arbitrator was not a foreign *"arbitral award"* that could be enforced under the IAA.

In the court's view, it was necessary to give a purposive interpretation of the 2012 amendment to the IAA, which involves ascertaining the legislative purpose of the amendment and comparing the possible interpretations of the text against that purpose. In circumstances where the legislators amended the definition of *"arbitral tribunal"* in one part of the IAA to include emergency arbitrators and the definition of *"arbitral award"* to include interim awards, there was obviously an intention to make the IAA applicable to foreign interim awards by emergency arbitrators. The court accordingly confirmed that an interim award by a foreign emergency arbitrator is enforceable in Singapore provided there are no other reasons for enforcement to be refused.

The court went on to say, however, that the interim award should not be enforced because it had been issued in breach of natural justice. The defendant had not been given an opportunity to respond to the claimant's new allegation that the contracts had not been validly terminated. This prejudiced the defendant because, had it had an opportunity to present its argument with respect to the new allegations, it could have said something that reasonably made a difference to the emergency arbitrator's decision.

Case details

- Court: Singapore High Court
- Judge: Chua Lee Ming
- Date of judgment: 07/10/2022

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SINGAPORE INTERNATIONAL COMMERCIAL COURT REFUSES ARBITRAL AWARD DUE TO "COLLATERAL ESTOPPEL"

(SANUM AND ANOTHER V LAO PEOPLE'S DEMOCRATIC REPUBLIC AND OTHERS)

This article was first published in LexisNexis.

The Singapore International Commercial Court (SICC) has refused an attempt to set aside an arbitral award for a breach of natural justice1. It was the applicants' case that the tribunal improperly and unfairly denied them a right to be heard on an issue that the tribunal considered it was prevented from raising because the issue had been considered previously. The court held that even if the tribunal had been wrong to conclude that "collateral estoppel" applied to prevent the issue from being reopened, this would amount to no more than an error on the merits of the claim, and would not ground any challenge to the award.

1 *Sanum Investments Limited and Lao Holdings NV v The Government of the Lao People's Republic, San Marco Capital Partners LLC and Kelly Gass* [2022] SGHC(I) 9

What are the practical implications of this case?

- Whilst a party to arbitration who is denied a right to be heard on a particular issue might in some instances be able to set aside the award for breach of natural justice (since everyone must have a full opportunity to present their case);
- the party is unlikely to succeed in setting aside the award on that basis if the tribunal has given reasons as to why the party was denied the right to be heard on the issue and such reasons are merits-based determinations of fact or law; and
- this is so even if the reasons given by the tribunal for denying the party a right to be heard are errors of fact or law.

What was the background?

The decision is the latest in long-running dispute between the Laos Government and two investors, a Chinese company called Sanum Investments Limited and a Dutch company called Lao Holdings N.V. The investors had planned to operate a casino under a joint venture with the Laos Government. However, the plan failed and the investors commenced arbitration against the Laos Government claiming there had been an infringement of their rights under certain Bilateral Investment Treaties between Laos and China and the Netherlands (**Arbitration No.1**).

In an effort to resolve the dispute, the parties entered into a settlement deed under which it was agreed that Arbitration No.1 would be stayed and the investors would attempt to sell the casino within 10 months, failing which a third party would be appointed to manage and operate the casino and complete the sale.

The investors failed to sell the casino in the time allowed and therefore appointed San Marco Capital Partners LLC (**SM**) and Kelly Gass (**Gass**) to manage and operate the casino and complete the sale. However, the Laos Government was unhappy with the decision and commenced arbitration against the investors pursuant to the arbitration clause in the settlement agreement (**Arbitration No.2**). The investors counterclaimed and argued that the Laos Government had breached the settlement agreement when it issued a decree transferring the gaming assets to a new entity solely owned by the Laos Government, which then sold the casino to a third party. However, the investors lost their counterclaim in Arbitration No.2 and the Laos Government was awarded damages for breach of contract.

The investors subsequently commenced an arbitration against SM and Gass pursuant to an arbitration clause in the contract appointing SM and Gass to manage the casino (**Arbitration No.3**). The investors claimed SM and Gass had breached their fiduciary duties to the investors. The investors joined the Laos Government to Arbitration No.3 in an attempt to reopen some of the issues that it had raised in its failed counterclaim in Arbitration No.2 (the **relevant issues**).

However, the tribunal issued an award declining to determine the relevant issues in Arbitration No.3 on the basis that the investors were prevented from reopening these issues owing to a New York law principle known as "collateral estoppel". (New York law was the governing law of the contract appointing SM and Gass to manage the casino.)

Whilst SM and Gass were not parties to Arbitration No.2, the tribunal found that they were in privity with the Laos Government for the purpose of the "collateral estoppel" and therefore the investors were also barred from raising the relevant issues against SM and Gass.

The investors applied to the SICC to set aside the tribunal's award in Arbitration No.3 on the grounds that the effect of the award was to deny them a right to be heard on the relevant issues in breach of natural justice. They also argued the award was in conflict with Singapore's public policy of access to justice.

What did the court decide?

The SICC refused to set aside the award. Whilst the court agreed that each party must have a full opportunity to present its case, the judges rejected the investors' argument that the tribunal's decision to deny them the right to be heard in relation to the relevant issues was a breach of natural justice.

The court pointed out that the tribunal had given reasons for its decision, namely that the doctrine of "collateral estoppel" applied. The judges accepted the respondents' argument that the application was a thinly veiled attempt to appeal the tribunal's decision on whether "collateral estoppel" applied to the relevant issues.

The court said the tribunal's determination as to the application of the doctrine of "collateral estoppel" was not a determination as to the scope of the tribunal's procedural powers. It was a merits-based determination of fact and law, which was final and binding on the parties. It was not open to the court to examine the correctness of that determination. Accordingly, the award could not be set aside even if the tribunal made an error of law or fact in applying the doctrine of collateral estoppel.

The court also concluded that the tribunal's decision to deny the investors the right to be heard due to "collateral estoppel" was not contrary to public policy in Singapore.

Case details

- Court: Singapore International Commercial Court
- Judge: Philip Jeyaretnam J, Vivian Ramsey IJ and Douglas Jones IJ
- Date of judgment: 01/6/2022

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