

Dispute Resolution round-up

October 2020



FOREWORD

Welcome to the second edition of our quarterly disputes newsletter, which covers key developments in the dispute resolution sphere over the last three months.

The pipeline of COVID-19 related caselaw has slowed somewhat over the summer, as both courts and parties adjust to the new normal (although for those who want a recap of the key recent cases, please see [this round-up](#) prepared by our team). We have, however, seen a very important decision handed down in the last few weeks in the form of the first instance judgment in the FCA's seminal test case in the Financial List, which is aimed at providing clarity to insurers and policyholders alike as to whether certain common non-damage business interruption insurance policies have been triggered by the pandemic. Although the 156-page judgment requires careful reading, the general consensus is that it represents a victory for policyholders and the FCA. This case also represents the first time that the test claim procedure in the Financial List has been used, and it appears to have been a resounding success, moving through the various stages of the litigation quickly and efficiently to provide timely guidance to the market within a very compressed timeframe. That said, it certainly does not represent the last word on this matter and an appeal (possibly by way of a leapfrog to the Supreme Court) appears likely.

In other news, collective actions remain a hot topic as the courts in this jurisdiction seek to strike a balance between affording large groups of claimants a mechanism to obtain redress, and retaining the important link between redress

awarded and actual loss suffered. This can be seen in the recent commencement of a new collective data breach action against Marriott, an area where we expect to see a lot more activity over the coming months and years. It can also be seen in the High Court's recent judgment in [Jalla v Shell International Trading and Shipping Company Ltd \[2020\] EWHC 2211 \(TCC\)](#), which could be read as the court applying the brakes somewhat to the gradual judicial expansion that has occurred in recent times of the circumstances in which a representative action (i.e. an action brought by a representative on behalf of a wider pool of claimants) may be brought.

Finally, as Brexit looms and the English courts seek to shore up their position as a global forum of choice for international disputes, this month has also seen the publication of two important sets of proposals aimed at revising the current rules in this jurisdiction relating to disclosure and witness evidence, to ensure that they remain relevant and appropriate for the modern world.

We hope that you continue to enjoy reading this round-up, whether a litigator by trade or a generalist, and whether in-house or in private practice, and that you will share it with any of your colleagues who may also find it useful. In the meantime, please stay safe.



Rob Fell

Head of Dispute Resolution

1 NEWS

COVID-19



FCA TEST CASE CONCLUDES, BUT THE SUPREME COURT BECKONS

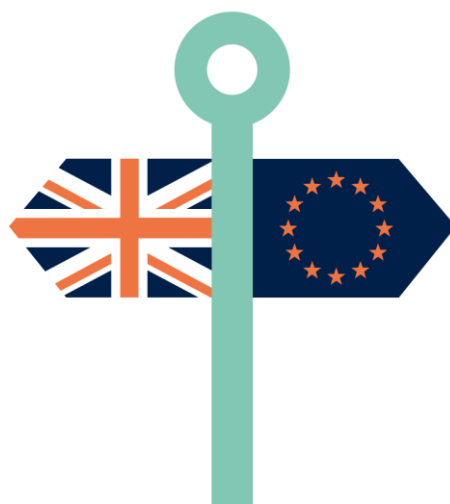
On 15 September 2020, the English High Court handed down [judgment](#) in the FCA's seminal test case against eight insurers on the question of whether certain types of non-damage business interruption insurance policies cover COVID-19 related losses.

The 156-page judgment provides guidance as to how the "Disease" and "Prevention of Access/Public Authority" clauses in the 21 representative policy wordings before the court are to be construed in the context of the COVID-19 emergency and the UK government and public's response to it. While insurers and the 370,000 affected policyholders will still need to look at the judgment in detail to see how the guidance it provides applies to individual policies and claims, the FCA considers the judgment a success as the court has accepted a number of its arguments, in particular on the trigger for "Disease" coverage.

The FCA and the insurers have agreed that any appeals against the judgment (which may be a "leap-frog" appeal to the Supreme Court) are to be made expeditiously.

For further information on the background to the judgment, please read [this article](#) prepared by Anne Foster, a Consultant in our Dispute Resolution team.

BREXIT



A REMINDER TO CONSIDER DISPUTE RESOLUTION CLAUSES IN CONTRACTS

The end of the post-Brexit transition period, 31 December 2020, is fast approaching, with no sign as yet of any agreement between the EU and the UK as to their future trading relationship. If that remains the case, then both the way in which the English and the EU courts allocate jurisdiction between themselves over cross-border disputes, and the way in which EU courts recognise and enforce English court judgments, will change as from the end of this year. This in turn has a bearing on the appropriate dispute resolution mechanism to include in any contracts with an EU element.

This [short article](#) and this [longer briefing](#) by our Dispute Resolution team contain a timely reminder of the options in this regard, and of the potential risks and benefits that each one entails.

CONSULTATION ON DEPARTURE FROM RETAINED EU CASELAW

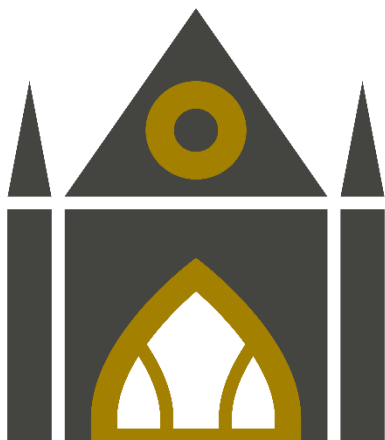
The UK government has recently announced that it is consulting on proposals to allow lower courts to diverge from EU caselaw which predates the end of the transition period. The

current position is that only the Supreme Court may do so, and the proposals are therefore potentially significant for many areas of law as they could speed up the process of divergence between UK and EU law after the transition period ends.

Many legal bodies, including the Law Society and the Bar Council, oppose the proposals as they currently stand (largely, it would seem, on the basis that they will generate uncertainty), but the government does appear to be in favour of allowing this divergence to take place, and for it to be driven by private litigation rather than by requiring the government to take the initiative and legislate.

For further information on the pros and cons of the proposals, and their likely impact, please read [this article](#) produced by our DR and Commercial departments.

GENERAL



SINGAPORE CONVENTION ON MEDIATION COMES INTO FORCE

On 12 September 2020, the [Singapore Convention on Mediation](#), a new international convention aimed at ensuring the quick and easy enforcement of settlement agreements concluded in the course of cross-border mediations, came into force. The Convention is ultimately intended to do for mediated settlement agreements what the New York Convention has done for arbitral awards.

The Convention's impact in the short term will be limited as it has, as yet, only been ratified or approved by five states (Singapore, Fiji, Qatar, Saudi Arabia and Belarus). However, given that it has already been signed by a further 48 countries, including China and the US (although not yet the UK), its longer-term impact is likely to be considerable.

NEW COLLECTIVE DATA BREACH ACTION AGAINST MARRIOTT

Collective actions are a hot topic in this jurisdiction at present as the courts struggle to balance the need to provide meaningful redress to the large numbers of claimants impacted by, for example, a data breach, with the historic requirement to maintain a link between the damages granted and the actual loss suffered by those individuals (and a decision is expected soon from the Supreme Court in the [Mastercard v Merricks litigation](#) clarifying when collective actions should be allowed to proceed in the competition litigation sphere).

Such actions continue to be brought in the English courts at a steady pace, including most recently an action filed in the High Court against Marriott International by a technology journalist, on behalf of individuals whose personal data was exposed as a result of a breach of a guest reservation database. The Information Commissioner's Office (ICO) announced last year its intention to fine Marriott £99.2m in respect of the same breach.

The action against Marriott reflects new rights which the General Data Protection Regulation (GDPR) and the Data Protection Act 2018 granted for individuals to mandate organisations to bring claims on their behalf for compensation for both material and non-material damage. It follows hot on the heels of a similar action issued against British Airways, in which the High Court gave the go-ahead last Autumn for a Group Litigation Order enabling a collective action to proceed against the airline in relation to a data breach which it suffered in June 2018.

CIVIL PROCEDURE



NEW LCIA ARBITRATION RULES

The London Court of International Arbitration (LCIA) has recently published a new 2020 edition of its Arbitration Rules, which came into force on 1 October 2020 and apply to any LCIA arbitration commenced on or after that date.

The new Rules include a number of procedural changes which address recent developments in good practice, including in light of the COVID-19 pandemic. The default position under the Rules is that electronic communications should be utilised, and the use of virtual hearings has also been recognised.

In addition to those changes, certain amendments have been introduced with a view to improving the efficiency and expediency of arbitral proceedings, including: (a) prescribing that the parties and tribunal shall make contact as soon as practical and no later than 21 days from receipt of notification of formation of the tribunal; (b) provisions for early determination; and (c) placing a greater emphasis on the timely delivery of awards, with a new target deadline of three months from final submissions.

To read the new Rules, please click [here](#).

WITNESS EVIDENCE WORKING GROUP PRODUCES DRAFT NEW RULES

There have long been complaints from judges that the current rules in this jurisdiction relating

to witness evidence require amendment, and in particular that witness statements are often "over lawyered" and/or vehicles to advocate for a party's case, and not truly representative of the witness's own voice and knowledge of events. Those complaints culminated in the setting up of a Witness Evidence Working Group (WEWG) chaired by the Chancellor of the High Court, Sir Geoffrey Vos, which released a [report](#) in December 2019 setting out recommendations for change.

Following up on those recommendations, the WEWG has recently released (on a limited basis) a new draft Practice Direction 57AC, which is intended to implement them. The new Practice Direction contains a detailed "Statement of Best Practice" as to how witness statements should be prepared. It also requires witnesses giving statements to sign a new, more detailed Statement of Truth, focusing their attention on the implications of what they are doing, and requires lawyers overseeing statements to sign a new Certificate of Compliance confirming that those statements have been prepared in accordance with the rules. Most controversially, it also imposes a new requirement for witnesses to identify within the body of their statements the documents to which they have referred or been referred while preparing it.

While the new draft Practice Direction may still be subject to change, and while there is no news as yet as to when it will be finalised and come into force, it is certainly the case that there is continued focus by the judiciary on this area, and both those assisting in the preparation of, and those giving, witness statements, would do well to bear the new requirements in mind from now on.

DISCLOSURE PILOT SCHEME UPDATE

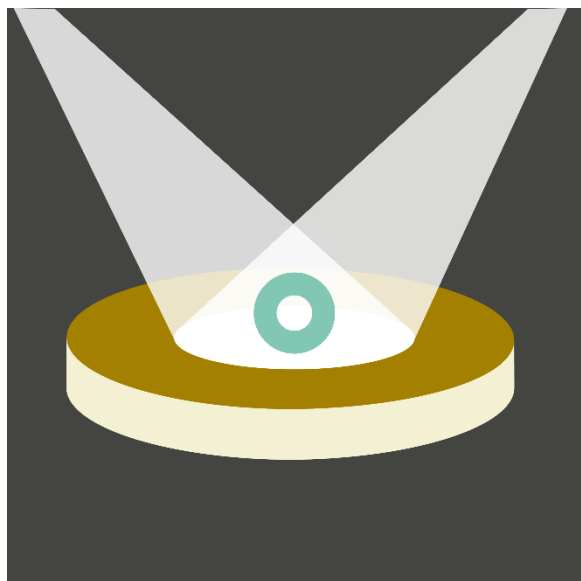
A new Disclosure Pilot Scheme (DPS) came into force in the Business and Property Courts on 1 January 2019, originally for a two-year period. The DPS was the brainchild of a Disclosure Working Group chaired by Lady Justice Gloster, and its aim was to streamline and reduce the

costs of disclosure in this era of vast quantities of electronic documents.

During the time that the DPS has been live, a significant amount of feedback has been garnered on it, much of it negative, with concerns that the requirements it imposes are overly complex, particularly for smaller matters, and that the frontloading of work which it entails increases, rather than decreases, overall costs.

The DPS has recently been extended for a further year, to 31 December 2021. In the meantime, the Disclosure Working Group has recently published a [series of proposals](#) aimed at making it more user friendly. These include: (i) clarifying when the new, specific obligation the scheme imposes to disclose "known adverse documents" arises; (ii) limiting the requirement it contains to serve document preservation notices on former employees; and (iii) limiting the circumstances in which "Initial Disclosure" (early disclosure of key documents relevant to the case) must be given. However, the proposals do not represent the wholesale revision of the DPS that some would like to see, and it remains to be seen what impact they will have if implemented. They will in any event not come into force until they have been considered and approved by the Civil Procedure Rules Committee, and a date for such consideration is yet to be set.

2 CASES UNDER THE SPOTLIGHT



FRAUD

SOFER V SWISSINDEPENDENT TRUSTEES SA [2020] EWCA CIV 699

In this judgment, the Court of Appeal clarified that, in cases where dishonesty by a corporate body is pleaded, it is not necessary specifically to identify in the Particulars of Claim the individuals within the corporate body whom it is alleged had the relevant knowledge of the dishonesty (and which knowledge is to be attributed to the corporate defendant). Claimants must instead simply provide the best particulars that they can in this regard, pending disclosure.

To read the judgment, please click [here](#), and to read a more detailed briefing produced by Stephanie Lee and Conor Redmond, Partner and Senior Associate respectively in our Dispute Resolution department, please click [here](#).

PRIVILEGE

A V B AND THE FRC [2020] EWHC 1491 (CH)

In this judgment, the High Court clarified the process that a professional services provider should follow when faced with a regulatory request for client documents, in circumstances where a party contends that all or a portion of those documents are privileged.

The Court concluded that in the face of such a request, the professional services provider must make its own determination of whether the documents at issue are privileged, rather than simply relying on an assertion by another party that that is the case. If that determination subsequently proves to be wrong, the remedy for the party to whom the privilege belongs is to bring a claim against the service provider.

To read the judgment, please click [here](#), and to read a more detailed briefing produced by Angela Taylor, Senior Counsel in our Dispute Resolution department, please click [here](#).

PJSC TATNEFT V GENNADY BOGOLYUBOV & ORS [2020] EWHC 2437 (COMM)

In this judgment, the Commercial Court clarified for the first time that communications with foreign lawyers, including in-house foreign lawyers, will be protected by legal advice privilege regardless of whether and how those lawyers are regulated in their home jurisdiction (i.e. there is no requirement for the foreign lawyer to hold the equivalent of an English Practising Certificate or membership of the Bar before the protection will apply). Instead, the only requirement in order for legal advice privilege to attach is that the foreign lawyer must be acting in their capacity or function of a lawyer in connection with the provision of legal advice.

To read the judgment, please click [here](#).

PROFESSIONAL NEGLIGENCE

ASSETCO PLC V GRANT THORNTON UK LLP [2020] EWCA CIV 1151

This case centred on a challenge by Grant Thornton to a first instance decision that it was liable to pay AssetCo damages for losses *"sustained through AssetCo's (continued) trading in a fundamentally dishonest manner, in reliance on [a] negligent audit"*. Grant Thornton sought to persuade the Court of Appeal (amongst other things) that the Judge erred in finding that such losses (in particular substantial sums provided by AssetCo to support its subsidiaries) fell within the scope of Grant Thornton's duty and that its admitted breaches of duty were the legal or effective cause of those losses (as opposed to merely the occasion for them).

The Court of Appeal confirmed that in most cases the "SAAMCO" principle - which established, typically in the context of a particular transaction or course of action, the importance of determining whether the defendant was providing information or giving advice - should be applied to determine whether particular losses fall within the scope of the auditor's duty when signing an unqualified audit report.

In largely dismissing the appeal, the Court of Appeal held that, while a negligent auditor will not be held liable for losses suffered simply because a company remains in existence and carries on trading, in circumstances where an auditor negligently fails to detect management's dishonest concealment of the claimant company's insolvency (which is the only basis on which the business was seemingly sustainable), the auditor will be liable for losses suffered by the company in continuing to conduct its loss-making business (since it has been deprived of the opportunity to call senior management to account and cease its loss-making activities).

To read the judgment, which also helpfully addresses the courts' approach to assessing loss of a chance claims, please click [here](#).

COMPANY LAW

SEVILLEJA V MAREX FINANCIAL LTD [2020] UKSC 31

In this landmark decision, the Supreme Court fundamentally restated the rule against recovery of reflective loss first established nearly 40 years ago in *Prudential Assurance v Newman Industries (No 2)* [1982] 1 Ch 204, namely that a shareholder cannot recover damages simply because the company in which that shareholder has an interest has suffered damage. In such circumstances, sums equal to the diminution in the market value of the shares held or in dividends to be received are considered to be merely a reflection of the loss suffered by the company and therefore not independently recoverable.

Over the years since the *Prudential* decision the application of the rule has broadened, and its scope extended to the point where the Court of Appeal in *Marex* applied it to bar claims advanced by Marex Financial as an unsecured creditor.

Seven justices heard Marex Financial's appeal in May last year and took the opportunity to provide some welcome clarification and containment of the no reflective loss rule. They unanimously allowed the appeal (although were split as to the basis for doing so). The majority confirmed the ambit of the rule was limited to *"claims by shareholders that, as a result of actionable loss suffered by their company, the value of their shares, or of the distributions they receive as shareholders, has been diminished. Other claims, whether by shareholders or anyone else, should be dealt with in the ordinary way."*

It is clear, following this decision, that the rule: (i) does not extend beyond shareholders; (ii) does not apply where a shareholder suffers loss of a

different type than stated above (which is to be considered distinct from the company's loss); and (iii) does not apply where the company, as a matter of law, has no cause of action of its own.

To read the judgment, please click [here](#).

DODIKA LTD V UNITED LUCK GROUP HOLDINGS LTD [2020] EWHC 2101 (COMM)

This judgment provides yet another cautionary tale for those seeking to serve notice of a claim under an SPA.

The SPA in question contained a tax covenant given by the sellers in favour of the buyer to reimburse the buyer for any tax liabilities of the target group arising out of events that occurred prior to completion (as is commonly provided for). The parties had placed a portion of the purchase price into an escrow account to cover such claims, should they arise, with an agreement to release sums at various intervals after completion in the event they did not. One week prior to the release date for the final tranche of escrow monies (and the deadline for notification of claims), the buyer sent the sellers written notice of a claim under the tax covenant (relating to an investigation then on foot by the Slovenian tax authority into the transfer pricing policies of one of the target group's subsidiaries). The notice provisions of the SPA required the buyer to provide "*written notice...stating in reasonable detail the matter which give [sic] rise to such Claim, the nature of such Claim and (so far as reasonably practical) the amount claimed in respect thereof...*".

The Court held that the notice served did not comply with the above requirements and consequently that the remaining escrow monies could be released to the sellers. This was despite the fact that (amongst other things) the notice referred to the relevant tax covenant, explained that the claim related to an investigation by the Slovenian tax authority (of which the sellers had been kept informed) and

set out a timeline of events relating to that investigation. In doing so, the Court considered that typically the purpose of such notice provisions is to achieve commercial certainty, and to allow the recipient of the notice to understand the claim that is being advanced against them to enable them to consider their exposure and how to address it.

It was not fatal (at least at summary judgment) that the buyer had not set out the amount being claimed, as the notice provision itself provided for a scenario where it was not yet possible to quantify the claim. Its downfall was that it failed to explain, in reasonable detail, the matter giving rise to the claim, which the Court said referred to the "*facts, events or circumstances on which the Claim is based*". Instead of referring only to the investigation by the authorities, which itself did not give rise to any tax liability, the notice should have set out (for example) details of the transfer pricing practices in question, or of specific transactions. Importantly, the information about the investigation provided to the sellers prior to receipt of the notice could not in some way be imported into the written notice to make it compliant with the notice provisions under the SPA.

To read the judgment, please click [here](#).

AXA SA V GENWORTH FINANCE INTERNATIONAL HOLDINGS LLC [2020] EWHC 2024

This judgment helpfully considers the meaning of a number of phrases which commonly occur in Sale and Purchase Agreements. This includes clarifying that: (i) a reference to costs and losses "*incurred*" should be read as meaning costs and losses which the relevant party has come under an obligation to pay (rather than costs and losses which that party has actually paid); and (ii) a reference to amounts "*subject to taxation in the hands of the receiving party*" in a gross-up clause should be read as meaning amounts actually taxed in the hands of the receiving party

(rather than simply amounts within the scope of a tax and not exempt).

To read the judgment, please click [here](#).

CONTRACT LAW

APACHE NORTH SEA LIMITED V INEOS FPS LIMITED [2020] EWHC 2081 (COMM)

This judgment considered the question of whether a counterparty to a contract could make its consent to an amendment to a schedule to the contract conditional on a revision to the tariff payable under that contract, in circumstances where the contract stated that consent to revise the schedule was not to be unreasonably withheld.

The court essentially held that the changes proposed by the counterparty to the tariff amounted to a fundamental revision of the bargain the parties had struck when they entered in to the contract, and that, as a result, it was not open to the counterparty to make its consent conditional on those changes being accepted. The court did, however, also acknowledge that in other, different circumstances, where the parties' bargain would not be fundamentally affected, it could have been reasonable and within the bounds of the contract for the counterparty to make its consent conditional on receiving something else in return.

To read the judgment, please click [here](#).

CFH CLEARING LIMITED V MERRILL LYNCH INTERNATIONAL [2020] EWCA CIV 1064

In this appeal against the dismissal of CFH's claim on a summary basis, the Court of Appeal considered whether it was arguable that the effect of Merrill Lynch's T&Cs (which sat alongside an ISDA 2002 Master Agreement) was to incorporate into FX transactions conducted between the parties a contractual obligation to

comply with "market practice" (such that Merrill Lynch was required to re-price the transactions in question or otherwise to cancel them).

The relevant wording in the T&Cs stated that "*All transactions are subject to all applicable laws, rules, regulations howsoever applying and, where relevant, the market practice of any exchange, market, trading venue and/or clearing house and including the FSA Rules (together the "applicable rules"). In the event of any conflict between these Terms and any applicable rules, the applicable rules shall prevail...*"

In dismissing the appeal, Lord Justice Phillips concluded that CFH's contention that market practice had been incorporated into the contract had no real prospects of success. First and foremost, he found that the T&Cs were (expressly stated to be) subject to any documentation relating to the specific transactions between the parties, including the ISDA Master Agreement which contained express pricing and settlement provisions. Second, he determined that the wording of the clause in question did not give rise to an arguable case of incorporation. In arriving at that conclusion, he considered that the words "subject to" do not necessarily result in incorporation and that each clause must be considered in its own context. In this case it was relevant that one of the items included in the list of matters which CFH argued were incorporated was elsewhere in the same T&Cs expressly stated not to be incorporated.

The decision serves as a helpful reminder to bear the ejusdem generis rule of construction in mind when drafting, i.e. the rule that says that general words which follow specific words in a list will be construed more narrowly by reference to the specific words which have come before it. In applying the rule in this case, the Court of Appeal held that the clause in question could not be read as referring to practice in the FX market generally (as CFH argued), but rather as covering specific markets, such as the EBS platform.

Importantly, even if the clause had referred to broader FX market practice, Lord Justice Phillips considered that the alleged market practice was too vague and uncertain to be incorporated as a term of the contract.

To read the judgment, please click [here](#).

TARGET RICH INTERNATIONAL LIMITED V FOREX CAPITAL MARKETS LIMITED [2020] EWHC 1544 (COMM)

This judgment, while not making any new law, provides a useful illustration of the difficulties in arguing that a set of regulatory rules (in this case, the FCA's COBS rules) should be implied into a contract in the absence of express wording to that effect. The court emphatically rejected any suggestion that there should be a mandatory implication of such rules into relevant contracts as a matter of law, and also found that the particular contract at issue simply did not contain sufficiently clear wording to support an argument that they had been expressly incorporated.

To read the judgment, please click [here](#).

REPRESENTATIVE ACTIONS

JALLA V SHELL INTERNATIONAL TRADING AND SHIPPING COMPANY LTD [2020] EWHC 2211 (TCC)

This judgment concerned an attempt to bring a

representative action against Shell on behalf of various individuals and communities in Nigeria which have allegedly suffered damage as a result of a 2011 oil spill. In it, the High Court considers the thorny question of when such an action should be allowed to proceed under the representative action procedure in CPR 19.6, which provides that such actions can only proceed where the members of the proposed claimant group can be said to have the "same interest" in the claim.

The mood music from the judiciary recently has been that CPR 19.6 should be interpreted broadly, leading to more representative actions being allowed to proceed. However, in this case, Mr. Justice Stuart-Smith reached the opposite conclusion. In holding that the members of the proposed claimant group did not have the requisite "same interest" in the proceedings, and that there instead existed a large number of individual claims requiring individual consideration and proof of damage and generating individual defences, he highlighted once again the difficulties in getting representative actions off the ground under the current rules in this jurisdiction, notwithstanding the incremental widening of those rules in recent years by the judiciary.

To read the BAILII judgment, please click [here](#).

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