Clyde & Co

Financial and Professional Lines

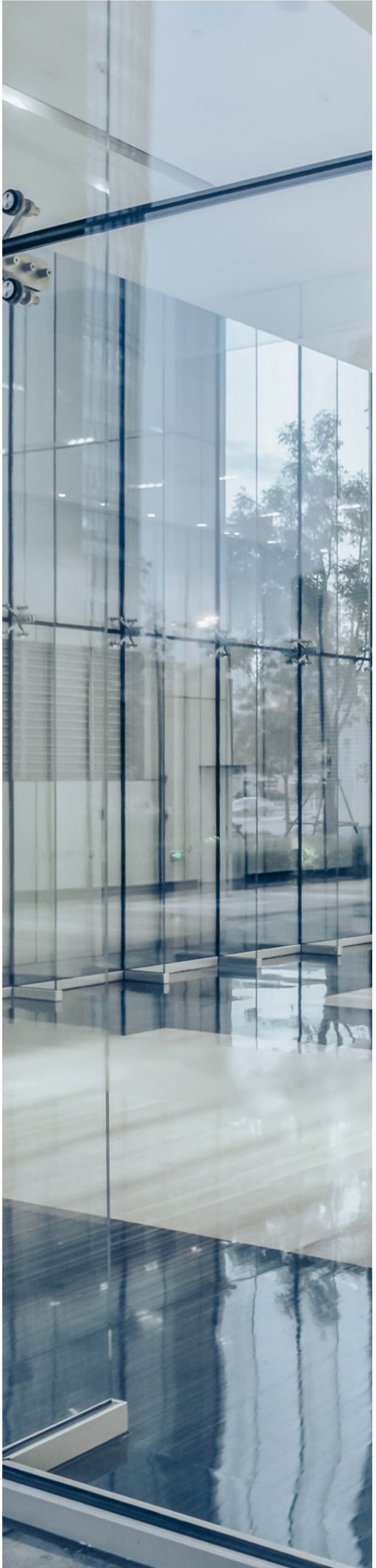
End of year review 2021: Part 2 – Case law

Contents

Introduction

In part 1 of our end of year review, we set out the key trends and developments impacting across financial and professional lines. In this part 2, we round up the key cases of interest handed down in 2021, starting with cases impacting across business lines before moving on to cases applicable to particular lines.

Law as at 11 January 2022



General

SAAMCo/Scope of Duty

Two important Supreme Court decisions were handed down together on 18 June 2021 considering the principle set out in SAAMCo that a Defendant is liable only for losses which fall within the scope of its duty of care to a Claimant – *Khan v Meadows* [2021] UKSC 21 (a clinical negligence case) and *Manchester Building Society v Grant Thornton* [2021] UKSC 21 (an auditors' negligence case).

These decisions recast this scope of duty principle – which has been a very significant tool in limiting the losses recoverable from professional Defendants – in a number of ways. The key findings are as follows:

- They set out a new general framework for dealing with all claims in the tort of negligence by reference to 6 questions.
- Questions 2 and 5 will determine whether losses fall within the scope of the D's duty of care to C:
  - The scope of duty question - *"What are the risks of harm to the claimant against which the law imposes on the defendant a duty to take care?"* (Question 2); and
  - The duty nexus question - *"Is there a sufficient nexus between a particular element of the harm for which the claimant seeks damages and the subject matter of the defendant's duty of care as analysed at stage 2 above?"* (Question 5)
- The scope of duty question for a professional adviser should be answered by reference to the purpose of the duty, judged on an objective basis by reference to the purpose for which the advice is being given.
- No real guidance was given on the duty nexus question.
- Those two questions replace the former approach, per SAAMCO, of deciding 1) If this was an "advice" or "information" case and 2) (for information cases) applying the SAAMCo counterfactual to identify the losses resulting specifically from that information being wrong. The SAAMCo counterfactual should now only serve to cross-check the result under the new test.
- The scope of duty principle applies also to clinical negligence cases. And the same principles apply equally to claims in contract for failure to act with reasonable care and skill.

The decisions leave a number of outstanding questions, including about adoption of the new framework, the facts/knowledge relevant to the purpose of the duty, the test for the duty nexus and the remaining value of any SAAMCo counterfactual cross-check if (as the judgment says) the results of the new test always prevail.

Against that background, its true impact remains to be seen. But these are our current observations:

- This may be more a change of form rather than substance as regards recoverable losses in PI claims – particularly given our view that construction of any contractual retainer will be key to assessing the purpose of the advice (as it was with determining the old SAAMCo distinction between advice and information).
- However, the new test for scope of duty (based on purpose) and duty nexus (undefined) seems looser and less rigid than the old advice/information distinction and counterfactual analysis and to give Courts more flexibility on outcomes.

- So in *MBS* itself, the new test applied by the Supreme Court did result in the auditors being liable for more losses than the Court of Appeal had found under the old test. Though note the particular circumstances of that case, which involved a highly complex accounting scenario and where the Supreme Court held the lower courts (and the parties themselves) had mischaracterised the losses and misapplied the counterfactual analysis under the old test.
- However, the lack of clarity in the new test will, for the most part, only help claimants, and not defendants, in marginal legal cases, and also as a matter of settlement dynamic in all cases.
- Risk management implications include considering the purpose of advice in the retainer and subsequently as a matter develops and recording changes in correspondence/ contemporaneous notes.

For further information, please see the following:

- Article produced by our accountants' team examining *MBS* and the implications for auditors: here
- Article produced by our solicitors' team on *MBS* and *Khan* and their implications for claims against lawyers: here
- Partners across the professional liability team held a webinar to discuss the *MBS* case – see here for a recording of that session and the presentation slides.
- Article by our healthcare team on *Khan*: here

A case that was handed down prior to *MBS* and *Khan* is *Hart v Large* [2021] EWCA Civ 24. Our briefing note on that case is here but, suffice to say, whilst the judgment was a key decision for surveyors and other professionals when first handed down, the case foreshadowed *MBS*, which now supersedes it, with the Court of Appeal there rejecting the SAAMCo binary distinction between advice and information in finding that a surveyor had given a hybrid of both.

Cases considering *MBS* have started to trickle through - see for example:

- *Knights v Townsend Harrison Ltd* [2021] EWHC 2563 (QB), an accountants' liability decision (more details here).
- *BDW Trading Ltd v URS Corp Ltd* [2021] EWHC 2796 (TCC), which concerned claims brought by against a structural designer (more details here) – note that other aspects of this case are considered further in the Construction PI and Surveyors section below.
- *Charles B Lawrence & Associates v Intercommercial Bank Ltd* [2021] UKPC 30, which concerned what damages a negligent valuer should pay for overvaluing a lender's security when there is no good title to the security because of a solicitor's negligence (see our briefing here).

We continue to monitor these cases and will be producing a full briefing in due course looking at where we are now as a result of *MBS* and these subsequent cases.

Abuse of process

Abuse of process is "*a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*" (*Attorney General v Barker* [2000] EWHC 453 (Admin)). This year saw two important decisions on abuse of process in relation to professional negligence claims.

***Allsop v Banner Jones* [2021] EWCA Civ 7**

In this case, the question was whether it was an abuse of process for a husband, criticised in his divorce proceedings, to sue the barrister and solicitor who appeared for him in those proceedings.

At first instance the judge had struck out the claim on the basis that it was an abuse of process, finding that the litigation was a collateral attack upon the financial remedies judgment in the matrimonial proceeding and that there was no reasonable case to answer. The judge had relied on the test in *Phosphate Sewage Co Ltd v Molleson (Res Judicata)* (1879) 4 App. Cas. 801, [1879] 7 WLUK 36, which allowed re-litigation of a point only where there was new evidence which entirely changed the aspect of a case.

The Court of Appeal found that the Judge had erred in a*pplying Phosphate. Stating that "[T]he jurisdiction to strike out proceedings as an abuse of process is one that should not be tightly circumscribed by rules or formal categorisation",* the Court held that *Phosphate* was of no application to civil anterior proceedings, as opposed to criminal anterior proceedings where there is a public interest in criminal convictions only being challenged by way of appeal. The test should be as follows: *"If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge in the earlier action if (a) it would be manifestly unfair to a party to the later proceedings that the same issues should be re-litigated or (b) to permit such relitigation would bring the administration of justice into disrepute."*

***PricewaterhouseCoopers LLP v BTI 2014 LLC* [2021] EWCA Civ 9**

The facts are complicated but, in essence, PWC had audited the accounts of AWA. BTI brought claims against (i) AWA's directors and AWA's parent company (Sequana) for the recovery of two large dividends paid by AWA to Sequana and (ii) PWC for professional negligence in its conduct of the audits. BTI sought to have a joint trial of both sets of proceedings but PWC resisted this (as it wanted to bring a strike out application) and the claim was stayed pending the decision in the first set of proceedings. These proceedings failed and the litigation against PWC was re-started and PWC sought the strike out, which was rejected.

The Court of Appeal held there was no abuse of process and suggested an abusive case would be comparatively rare -there is only abuse of process if there is manifest unfairness to a party or the case brings the administration of justice into disrepute. On *"manifest unfairness"*, this would be hard to establish where the parties to the second claim are different from the parties to the first claim. As regards *"bringing administration of justice into disrepute"* this encompasses situations where *"the purpose of the attempt to have [the issue] retried is not the genuine purpose of 3 obtaining the relief sought in the second action, but some collateral purpose"* (Flaux LJ quoting Sir David Cairns in *Bragg v Oceanus* [1982] 2 Lloyd's Rep 132). This was not the case here where the procedural history of the case showed, inter alia, that BTI had tried to obtain a joint trial, PWC had not indicated that it would suffer prejudice if tried separately and that the application for the joint trial had been abandoned with consent.

These cases demonstrate that it is very difficult for defendants to seek to strike out claims on the grounds of abusive collateral attack.

Cases of interest

Reflective loss

The recent Privy Council judgment in the Cayman Islands case of *Primeo Fund (in Official Liquidation) v Bank of Bermuda (Cayman) Ltd & Anor [2021] UKPC* 22 provides further clarification of the application of the so-called rule against the recovery of "reflective" losses and will likely be persuasive in the English courts. That rule, as restated by the Supreme Court in its landmark judgment in *Sevilleja v Marex Financial Ltd* [2020] UKSC 31 in July 2020, prevents a shareholder from claiming loss that is merely the consequence of a loss suffered by the company for which the company itself has a cause of action against the same defendant.

In particular, the Privy Council held that the assessment of whether losses were reflective should be made at the time the shareholder suffered the relevant loss, rather than at the time proceedings were commenced. It also confirmed that the rule only applies where the company and the shareholder have a cause of action against the *same* defendant. See this briefing for more information.

This case echoes the trend towards narrowing the scope and application of reflective loss defences, following the decision in *Sevilleja v Marex*, in which it should be noted that three of the seven Supreme Court Justices considered that the rule should be abolished altogether in favour of general protections against double recovery.

Contribution

Percy v Merriman White [2021] EWHC 22 (Ch) confirmed that in contribution proceedings the party seeking contribution only needs to ascertain that the underlying claimant had a reasonable cause of action against it on the basis of the assumed facts, not that it was in fact liable to the underlying claimant, and also that "collateral defences" may not be pursued in a contribution claim. See our full briefing on this case here.

Production of documents from foreign companies

The Supreme Court has unanimously ruled in R *(on the application of KBR, Inc) (Appellant) v Director of the Serious Fraud Office (Respondent)* [2021] UKSC 2 that a notice issued by the Serious Fraud Office (SFO) under section 2(3) of the Criminal Justice Act 1987 (CJA) could not require a foreign company to produce documents held entirely outside of the UK.

This judgment is of general interest but will be of particular interest to accountancy firms (particularly those with international networks), not only because it provides welcome clarity on the limits of the SFO's powers, but also as a timely reminder of the care which needs to be taken when considering requests from investigating authorities and regulators for documents held outside the jurisdiction, for instance where a request might concern access to overseas component audit file documents where such audits have been conducted by separate member firms over which the regulator has no authority. Our full briefing on the case can be read here.

Cases of interest

Limitation

Elliott v Hattens [2021] EWCA Civ 720 confirmed that a cause of action in tort accrues in a "flawed transaction" context as soon as the Claimant acquires rights of measurably less value than would have been the case in the absence of the flaw. This will be the case on entry into the transaction if what the Claimant acquired was *objectively* less valuable from the start, even if *subjectively* the Claimant had no intention to do anything to realise that (lower) value.

This decision, reversing the first instance finding, underscored the uncertainty of the distinction between (i) cases of purely contingent liability (not sufficient to constitute actionable damage) and (ii) cases involving the possibility of actual financial harm (in which that possibility is deemed sufficient to constitute "actionable damage", even if that harm had not yet materialised). For more information see our article here.

Witcomb v J Keith Park Solicitors [2021] EWHC 2038 saw the Court considering the knowledge required to start time running under s.14A Limitation Act 1980. The Court confirmed that time would not start to run until a claimant had both the types of knowledge referred to in s.14A(6) i.e. (i) knowledge of such facts about the damage as would lead a reasonable person to consider it sufficiently serious to justify instituting proceedings; and (ii) knowledge that the damage was attributable to the allegedly negligent act or omission. In some cases both types of knowledge will be acquired simultaneously, but in other cases they will not – such as in this one, where (ii) was only acquired some 8 years after (i). Where the essence of the allegation of negligence was the giving of wrong advice, time would not start to run until a claimant had some reason to consider that the advice might have been wrong. Similarly, where the essence of the allegation was an omission to give necessary advice, time would not start to run until the claimant had some reason to consider that the omitted advice should have been given. For more information, see here.

In *Mr Mohammed Ashraf v HDI Global Specialty SE* (before a Deputy District Judge in the County Court, June 2021) the Court held that (from August 2016 onwards) time does not stop running for limitation purposes against a company when it goes into liquidation in relation to a claim brought outside the liquidation - and a claim under The Third Parties (Rights against Insurers) Act 2010 was such a claim. As a result, an application to join insurers as additional defendants to an existing claim under the Act was time barred. For more information see here.

One of the points considered in *Dixon Coles & Gill v Baines, Bishop of Leeds and another* [2021] EWCA Civ 1097 was limitation in relation to claims against the innocent partners of a partner who had stolen client funds (for analysis of the aggregation issue, please see the 'Insurance' section below). The Court held that the Partnership Act 1890, which made the innocent partners in the firm's partnership jointly and severally liable for their dishonest partner's acts, did not make them "party or privy" to those acts in such a way as to deprive them of the benefit of a 6 year limitation period in relation to the claims. For more information see here.

Cases of interest

Experts' duties and conflicts of interest

At first instance in the case *Secretariat PTE Ltd & Ors v A Company,* the TCC found that the Secretariat companies owed a fiduciary duty of loyalty to an instructing company who had engaged their Singaporean entity to provide expert services in relation to an arbitration. This duty had been breached when their UK entity subsequently accepted an engagement to act for a third party who had brought separate arbitration proceedings against the company relating to the same project. This was the first time in the English jurisdiction that an expert had been found to owe a fiduciary duty to its client.

The Secretariat companies appealed but the injunction was upheld by the Court of Appeal, albeit on different grounds.

This judgment has implications for all professionals. For specific implications see:

- Here, for the implications for accounting firms
- Here, for arbitration considerations
- Here, for construction professionals

Court considers causes of action in relation to a cyber-attack

When data is lost, data subjects typically bring a claim for breach of Data Protection legislation alongside claims for misuse of private information, breach of confidence and negligence. However, breach of confidence and misuse of private information both require some positive action by the defendant i.e. deliberate activity that facilitated the breach, as opposed to the simple failure to prevent a cyber-attack so these claims are unlikely to be maintained.

This position was confirmed by the High Court in August this year in the case of *Darren Lee Warren v DSG Retail Limited* [2021] EWHC 2168 (QB). The Court held that there was no liability to data subjects for loss of personal information other than under data protection laws for companies that are the victims of cyber-attacks. Further, as to the negligence claim, it was held that there was no common law duty of care (*Smeaton v Equifax Ltd* [2013]) and there is no need to impose a duty of care in negligence where statutory duties under the DPA 1998 operate. Further, a state of anxiety falling short of a clinically recognisable illness does not constitute damage sufficient to complete a tortious cause of action. It should be noted that this decision is not authority for the position that data protection cannot found a negligence action. The outcome may well be different where commercial, as opposed to personal, data is lost on the basis that there is not an equivalent statutory cause of action.

On the distress point, the Supreme Court decision in *Lloyd v Google* has just been handed down which confirms that a data subject may only recover damages for loss of control of personal data under s13 DPA 1998 if they can prove material damage/distress. See our briefing here.

Legal Professionals

Legal Professionals

Most of the significant lawyers' decisions have been included under other sections of this document, because they either have implications for all professionals (see the General section above) or concern a matter which fits naturally elsewhere (e.g. the Insurance – Aggregation section below). Please refer to those sections for cases relevant to legal professionals, along with this specific case of interest.

Solicitors' Undertakings

The Supreme Court judgment in *Harcus Sinclair LLP and another (Respondents) v Your Lawyers Ltd (Appellant)* [2021] UKSC 32, which was handed down in July 2021, requires specific mention. It concerned the nature and enforceability of solicitors' undertakings and the extent to which the Court has inherent jurisdiction to supervise corporate entities through which solicitors can and do practise.

This case concerned undertakings given by the Claimant to the Defendant as part of a non-compete clause in a Non-Disclosure Agreement which was signed "for and on behalf of the Claimant" by a solicitor and then member of the Claimant. The Supreme Court held, allowing the appeal, that the non-compete clause was not an unreasonable restraint of trade or contrary to the public interest – and therefore its terms could be upheld.

The Supreme Court also considered whether the non-compete undertaking amounted to a solicitor's undertaking. Considering two questions related to the subject matter of the undertaking and the reason for giving it, they concluded that the Claimant gave the undertaking in a business, rather than a professional, capacity and, as such, it was not a solicitor's undertaking.

See our full briefing here.

Construction PI and Surveyors

Construction PI and Surveyors cases

In addition to the decisions in *Hart v Large* and *Charles B Lawrence & Associates v Intercommercial Bank Ltd*, cases concerning surveyors and valuers which we have covered above, there have been a number of decisions which focus on construction professionals and surveyors.

Limitation issues in a supply chain

In *BDW Trading Ltd v URS Corporation Ltd and another* [2021] EWHC 2796 (TCC), a number of preliminary issues were determined. Whilst a lot of this judgment concerned scope of duty issues, which, as noted above, we will be developing more in a specific briefing, an interesting point was discussed in this case re limitation.

The claim arose out of fire safety inspections post Grenfell, where it was discovered that a number of buildings developed by Barratt many years ago had massive/catastrophic structural defects to the concrete frames/slabs, to the point where at least two of the buildings had to be evacuated. URS (now Aecom) were the engineers. Barratt had long since divested itself of any proprietary interest in the buildings. No claims against it by new owners/leaseholders/managing agents were intimated but, in any event, it seems those were likely time barred. Barratt nevertheless carried out emergency investigations, got the residents out and incurred remedial works. It then sought to recover its costs from URS as well as compensation for damage to its reputation.

URS sought to argue, amongst other things, that by neglecting to avail itself of a limitation defence, Barratt voluntarily incurred its losses. In most instances limitation is a procedural bar to a cause of action, but the underlying cause of action is not extinguished. It is a matter for the defendant to raise and it can choose not to do so, as Barratt did here - the fact that it might be motivated by self-interest is irrelevant. As fire-safety cases continue to emerge and as time passes, we may see more of these cases emerging where a developer, despite all claims against it under contracts of sale or the Defective Premises Act being out of time, can elect to carry out work/ignore any limitation defences and then bring a within time claim against its supply chain in tort, availing itself of s14a Limitation Act 1980.

Some other points of note from the judgment:

- Compensation for damage to reputation is generally outside of the scope of the duty which a structural engineer is under a duty to guard against. This element of the claim was struck out.
- URS argued that all of the losses were in fact only incurred to protect Barratts reputation. The court did not investigate whether that was true but explained that that was to mischaracterise the nature of the types of losses incurred (which, apart from the actual reputational loss head, were otherwise all normal losses of a type that would be readily foreseeable to result from a breach of duty by a structural engineer). URS was erroneously conflating the type of loss with the motive for performing the works.
- The judge helpfully ran through each of the 6 questions which arise when a claimant seeks damages for negligence (SAAMCo and, more recently, *MBS* – see General section above), confirming the type of harm that was actionable. In this case, physical damage was but reputational damage was not.
- Factual causation had to await trial and was not to be considered as a 'matter of law'.

- The loss here was not a contingent one, arising only on the discovery of the structural defects, by which point Barratt would itself have suffered no loss (*Co-operative Group Ltd v Birse Developments Ltd (In Liquidation)* [2014] EWHC 530 (TCC), [2014] B.L.R. 359, [2014] 2 WLUK 945 applied). The cause of action against URS accrued and measurable loss occurred at the point where there was reliance on the design and the construction was carried out, or, in any event, no later than the date of practical completion (per *Co-operative Group Ltd* and *New Islington and Hackney Housing Association Ltd v Pollard Thomas and Edwards Ltd* [2001] B.L.R. 74, [2000] 12 WLUK 218). The date when the claimant first knows of the defect, or ought reasonably to have done so, is <u>not</u> the date on which the cause of action accrues.
- The loss was not too remote. It was not unreasonable for Barratt to act as it did (in the face of an immediate catastrophic collapse). It did not have to await a formal claim. Acting as it did not <u>necessarily</u> mean that Barratt had failed to mitigate its loss (but this was a fact-sensitive causation question to be answered at trial).

Fundamental breach

In *Mott MacDonald Ltd v Trant Engineering Ltd* [2021] EWHC 754 (TCC) our firm secured summary judgment upholding the Claimant's limitation of liability clause. Despite the clause's wording referring to *"any claim"*, *"any and all causes of action"* and aggregate liability *"for all claims"*, the Defendant sought to argue that it would not apply if the Claimant had acted in "deliberate, wilful and fundamental" breach. The Court disagreed, holding that the clause was *"sufficiently clearly worded to cover any breach …whether deliberate or otherwise"*, even if that led to an uncommercial result for the Defendant.

For our full briefing on the case see <u>here</u>.

Pure omissions

We previously wrote on the first instance decision in *Rushbond PLC v The J S Design Partnership LLP* [2020] EWHC 1982 (TCC) – see our briefing <u>here</u> – where the Court struck out a property owner's tort claim against an architect's firm, and granted summary judgment to the firm, pursuant to a finding that the firm did not owe a duty of care to protect the property from fire damage caused by the deliberate or careless actions of an unknown third party for whom the firm was not responsible. The fire had been started after an intruder had entered the building via a door the architect had left open during a site visit.

The Court of Appeal has now allowed the developer's appeal against the decision, finding that this is not a "pure omission" case, as the High Court had held. As the architect actively did something which led to the loss, negligence may be able to be found at trial. As such the claim has been reinstated and will proceed to trial.

Pleading extrapolated claims

In *Building Design Partnership Ltd v Standard Life Assurance Ltd* [2021] EWCA Civ 1793, the Court of Appeal held that a professional negligence claim could be pleaded on an extrapolated basis at the outset.

Standard Life had engaged BDP as contract administrators of a construction project to build a mixed retail and residential development. Despite the agreed sum for the construction being £77.4m, the final account amounted to £146.6m, a lot of which, it was argued, resulted from 3,604 variations approved by BDP.

Standard Life did a detailed investigation of 167 of the variations and these were specifically pleaded in its claim against BDP. For the remaining variations, it sought to plead them on an extrapolated basis to assess BDP's total cost liability to it.

Noting that earlier cases had set the principle that claims could be pleaded on an extrapolated basis (*Amey LG Ltd v Cumbria County Council* [2016] EWHC 2856 and *Imperial Chemical Industries Limited v Merit Merrell Technology (No 2)* [2017] EWHC 1763), the Court of Appeal further stated that it was not an abuse of process and was, in fact, a proportionate method to tackle the large number of variations in this case. This proportionality was in line with the Overriding Objective, rendering the exercise cost effective and less time consuming for all involved.

Cladding

A defendant building inspector has failed in its attempt to strike out claims against it in relation to alleged failures to identify that cladding on a building breached fire safety requirements. In giving its judgment in *Crest Nicholson Operations Ltd v Grafik Architects Ltd* [2021] EWHC 2948 (TCC), the Court said that the claim had been particularised enough to understand it and that the threshold for strike out was high but added: *"In addition, this claim is made at a time when there are many similar claims for defects in buildings which have been identified as failing to meet the fire safety requirements of the Building Regulations following the tragic fire at Grenfell Tower. Many of those claims include allegations of defects resulting from inclusion in facades of materials that are not of limited combustibility and allegations of defects in fire barriers. Whilst that does not absolve Crest from the need to explain its case, BCS's ability to understand the case it has to meet has to be viewed in the context of the very high level of awareness in the construction industry of the issues surrounding the problems that have been identified in many buildings with facade systems that do not meet the fire safety requirements of the Building Regulations."* Arguably, this raises the bar even higher for strike out in cladding claims.

Whilst not an English case, Victoria's Supreme Court of Appeal in Australia handed down a decision in March 2021 which should send a warning to those thinking about how fire safety claims might be apportioned. At first instance, in the case of *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286, a contractor had been held liable for breach of implied warranties to the owners of apartments, which had suffered extensive fire damage as a result of the materials on the external face of the building.

However, the contractor was not held to be negligent and, of note, it was able to pass on its liability to the fire engineer, building surveyor and architect on the project for their respective breaches of the duty to act with reasonable care and skill and the contractor was reimbursed for the damages it owed to the owners.

The professional consultants appealed and in its March 2021 decision, the Victoria Supreme Court of Appeal refused to grant leave to appeal to the consultants on all but one ground.

Regulatory sanction following civil findings

In August 2021, the Architects Registration Board's (ARB) Professional Conduct Committee (PCC) ordered a 12 month suspension for an architect who had previously been held negligent by the courts (*Freeborn & Anor v Marcal (t/a Dan Marcal Architects)* [2019] EWHC 454 (TCC)) for failures in relation to his design of a home cinema in a luxury home. The judge in that case had criticised the architect's practices, including failing to put the initial brief and design into writing and maintaining insufficient records.

In an unusual step, the ARB, of its own volition, initiated an investigation into the architect after hearing about the case publicly and sought the cooperation of the claimants in the civil case for its disciplinary proceedings, despite the clients not having raised a complaint to the regulator.

Duty of care in the absence of a contract

The case of *Multiplex Construction Europe Ltd v Bathgate Realisations Civil Engineering Ltd and others* [2021] EWHC 590 (TCC) shows the difficulties faced when trying to assert that a party owes a duty of care in the absence of a contract.

Having reviewed the authorities, the Court concluded that it was not its place in this case to impose tortious duties on a party which had no contractual relationship with main contractor and where the parties had taken time to put a contractual framework in place. Further, the contractor still had a cause of action against its sub-contractor so there was no liability gap (though the sub-contractor's insolvency made actual recovery unlikely).

This decision was applied in the subsequent case of *Beattie Passive Norse Ltd v Canham Consulting Ltd* [2021] EWHC 1116 (TCC), where a shareholder had sought to claim for losses from a consultant engineer, arguing that the engineer owed it a freestanding duty of care because it had given it some instructions and paid some of its invoices. The Court held that this was insufficient to give rise to a duty of care in circumstances where the engineer had a contract with, and owed a duty of care to, the contractor not the shareholder.

Whilst these cases show that claimants face a hard time establishing tortious liability where contractual frameworks are in place, as is the custom on large projects, the Court of Appeal has previously held, in *Riyad Bank and others v Ahli United Bank (UK) plc* [2006] EWCA Civ 780, that no contractual relationship between the parties does not always mean that there was never any intention to assume responsibility; it will depend on the circumstances of each case.

Financial Institutions and D&O

FIDO cases

Self-invested personal pensions (SIPPs)

SIPPs continue to remain under scrutiny and more claims are expected in this area, particularly with third party funders and litigation specialists showing an interest in pursuing these complaints. The past year has seen the Court of Appeal hand down two important decisions in the cases of *Adams v Carey Pensions* [2021] EWCA Civ 474 and *FCA v Avacade* [2021] EWCA Civ 1206, both of which showed a clear desire by the Courts to protect consumers in respect of the regulation of SIPP introducers and providers and tighten the regulatory perimeter.

In *Adams v Carey,* Mr Adams was advised by an unauthorised intermediary, CLP Brokers Sociedad Limitada ("CLP"), to reinvest his pension fund into a store pod business and have the investment held in a SIPP.

CLP introduced Mr Adams to Carey, with whom he set up a SIPP and who instructed Carey to proceed with the proposed investment into the store pods. Mr Adams' investment subsequently lost value and he claimed against Carey seeking damages and/or to rescind his contract with them.

At first instance, Mr Adams was unsuccessful on all three grounds of claim, though he was granted permission to appeal in relation to two of them. Our briefing covering the first instance decision can be found here.

The Court of Appeal held the unregulated introducer carried out the regulated activity of making arrangements when it assisted Mr Adams to transfer his personal pension into a SIPP so that he could invest it into an alternative investment promoted by the introducer. The investment itself may not have been a regulated activity but arranging for the investment to be divested from Mr Adams' existing personal pension did engage regulated activity.

Our analysis of the case can be found in our full briefing here.

Turning to *FCA v Avacade*, Avacade's role was to facilitate the transfer of individuals' pensions into SIPPs from where individuals would then make specific investments. However, Avacade was not authorised by the FCA to provide advice nor actually to arrange the investments, which were themselves unregulated investments. The FCA considered Avacade to be in breach of the general prohibition in section 19 FSMA and, at first instance, the High Court held that Avacade had indeed "arranged" and "advised", which was in contravention of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544) (RAO), and in breach of the general prohibition.

Avacade appealed the findings on multiple grounds and was unsuccessful on all. The Court approved the Court's approach in *Adams v Carey* that the matter should be viewed as a *"single braided stream of advice" and "standing back and looking at the conduct of the unregulated activity holistically"*. When viewed in this way, it was clear that the steps in the transaction were connected and inseparable.

Quincecare duty

The Quincecare duty is defined as a duty for the financial institution to protect its customer from itself where circumstances are such as to put the bank on inquiry that there may be fraud on the account.

In 2021, the Court of Appeal handed down it's judgment in *Stanford International Bank Ltd (In Liquidation) v HSBC Bank Plc* ([2021] EWCA Civ 535), upholding the Bank's appeal against the first instance decision, finding that the Quincecare duty does not extend to protect creditors. The directors owe duties to the creditors once the company becomes insolvent, but the Bank does not. The Bank's duty was to the company/customer alone, as previously confirmed in the Court of Appeal's decision in *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84. Permission has since been granted for this decision to be appealed to the Supreme Court.

The extent of the duty was again examined in the case of *Philipp v Barclays Bank UK plc* [2021] EWHC 10 (Comm). Here the claimant, an individual, had been tricked by fraudsters into making transfers from her account and she sought to recover her losses from Barclays pursuant to the Quincecare duty. Granting the bank's strike out application, the Court held that the duty did not extend beyond the situation of attempted misappropriation of the customer's funds by an agent of the customer. In other words, it did not apply to individuals.

Misrepresentation and reliance

In line with previous case law on this point, the *High Court in Leeds City Council & 6 Ors v (1) Barclays Bank Plc (2) Barclays Bank UK Plc : Newham London Borough Council v (1) Barclays Bank Plc (2) Barclays Bank UK Plc* [2021] EWHC 363 (Comm) has again confirmed that those seeking to demonstrate reliance on a misrepresentation have to demonstrate some form of awareness of the representation having been made – one cannot rely on an assumption.

This action was a strike out application by the bank in relation to claims brought by local authorities (LAs) for recission of loans taken out in 2006 and 2008. Following the LIBOR rigging scandal and public reports that the Bank had engaged in LIBOR manipulation, the LAs claimed that they had entered into the loans on the basis that the bank impliedly represented it was properly and honestly setting LIBOR rates. The main issue in this case was reliance. There was a body of case law providing powerful support for the argument that proof of understanding of the representation was a constituent part of a case in misrepresentation.

This was particularly so in the case of implied representations. For misrepresentations to be actionable, representees had to be aware of them and understand them in the sense that they later complained of them. The representation had to be "actively present" in their mind. Accordingly, these claims would be struck out.

Vicarious liability

NatWest Markets plc and another v Bilta (UK) Ltd (in liquidation) and others [2021] EWCA Civ 680 is a rare case of the Court of Appeal setting aside a High Court judgment on factual grounds, finding that the judge had failed to take into account key evidence, exacerbated by a delay of 19 months to hand down the judgment. In setting aside the judgment, the Court of Appeal ordered a re-trial of the dishonest assistance claim.

However, it upheld the finding as to dual vicarious liability so that both defendants would be vicariously liable for any dishonesty of the traders determined at the re-trial. On this vicarious liability point, RBS, its joint venture and the joint venture's subsidiary had traded carbon credits governed by a master agreement. The traders who had carried out the fraud were employed by the JV's subsidiary but had been seconded to RBS.

The test for vicarious liability remains a highly fact sensitive exercise, applying the following two stage test:

- There must be a relationship between the parties which makes it fair, just and reasonable for the law to make one pay for the wrongs committed by another ("1st stage").
- There must also be a close connection between that relationship, and the tortfeasor's wrongdoing ("2nd stage").

Having established vicarious liability, the question was whether both companies should be vicariously liable for the tortious acts of the traders. The High Court and the Court of Appeal said that they should. Both found that the traders were so much a part of the work, business and organisation of both companies that it was right both should be liable. It would be a rare situation where only the company to which the employees were seconded would be liable; the law imposes liability on employers for their employees' negligence for good policy reasons. Contractual arrangements (i.e. the Master Agreement) did not assist the companies in their argument that the transfer of this burden had shifted, something which financial institutions should note given the often complex corporate structures and agreements in place in large organisations.

Attribution and illegality

In *CPS v Aquila Advisory Ltd* [2021] UKSC 49 the CPS (pursuing a confiscation order under the Proceeds of Crime Act 2002) sought to argue that the secret profit the directors had made, in breach of their fiduciary duty to their company, VTL, could not be recovered by Aquila (the assignee of VTL) otherwise it would be profiting from monies illegally obtained. Aquila was claiming the funds (amounting to £4.55m) on the basis of a constructive trust it said it was the beneficiary of.

The main argument by the CPS was that the directors' conduct should be attributed to VTL (and therefore Aquila) so that the illegality principle (that one cannot profit from one's own wrongdoing) applied and that Aquila could not assert its constructive trust claim. This was rejected by the Supreme Court, applying the general principle in *Jetivia SA and another v Bilta* [2015] UKSC 23 that in civil proceedings brought by a company against its directors for breach of fiduciary duty, the dishonesty of those directors is not attributed to the company. The facts of this case could not found an exception.

As the directors' conduct could not be attributed to VTL, the illegality issue would not arise at all and the Court confirmed that illegality is to be looked at only after attribution has been established.

Limitation – fraudulent misrepresentation

A claimant group of over 70 institutional investors brought a s.90A claim against RSA, making allegations as to RSA Insurance's published statements, or omissions to disclose matters relating to financial conduct and corporate governance. These specifically relate to RSA Insurance's involvement in inappropriate accounting practices and the alleged deliberate manipulation of insurance claim reserves.

The original claims were brought in 2019 and further claims were brought in 2021 – RSA sought to strike out these later claims. Recently, the High Court (*Allianz Global Investors GmbH v RSA Insurance Group Ltd (formerly RSA Insurance Group Plc)* [2021] EWHC 2950 (Ch)) refused an application by RSA for summary judgment/strike-out application. Section 32 of the Limitation Act 1980 states that *"the period of limitation [of six years] shall not begin to run until the plaintiff has discovered the fraud [or] concealment […] or could with reasonable diligence have discovered it"*. The Court said there were two questions to ask (i) was there anything to put the claimant on notice of a need to investigate, and (ii) what would a reasonably diligent investigation have revealed? This was an objective test and personal characteristics of the individuals involved was irrelevant. However, the nature and business of the claimant, the resources reasonably available to it and the scale and impact of the losses may go to the question of reasonable diligence as these factors were not necessarily akin to personal traits. This was an open question and was better dealt with at trial than at a preliminary hearing.

Ultimately, RSA was unable to adduce sufficient evidence to answer these questions and the court held that it was reasonable that a full examination of the facts at trial might affect the court's decision. Further, in any event, the application should fail as the court held that there was arguably insufficient information to put the claimants on notice before the relevant date.

In another case, *European Real Estate Debt Fund v Treon & Ors* [2021] EWHC 2866, section 32 was again considered. Here, a reasonably diligent investor could have discovered the fraud before it invested by asking routine questions. While it accepted that s32(1) only applies once a cause of action had accrued, "*it does not follow that the court investigating the claimant's state of mind must ignore events, communications or things known to the claimant before then*". The start of the limitation period could not be postponed in this case – a reasonably diligent investor could have discovered the fraud before the investment was made so time ran from that date.

Class Actions

Class Actions

The market is seeing an increase in high value, high profile claims being instigated or threatened by large groups of claimants against both corporate defendants and D&Os and this looks set to continue, particularly as "conflict free" boutique litigation firms, akin to those of the US Plaintiff bar, establish themselves in the UK with a focus on corporate bodies and individuals. This year saw more developments on the opt out regime for competition claims.

The eagerly anticipated judgment in the ongoing *Merricks v Mastercard* claim was handed down in August 2021, with the Competition Appeal Tribunal (CAT) formally certifying the action for trial (*Walter Hugh Merricks CBE v Mastercard Incorporated and others* [2021] CAT 28).

Briefly, this action concerns attempts by Mr Merricks to bring collective proceedings under section 47B Competition Act 1998. After various setbacks before the CAT, which determined that the claims were not suitable for collective proceedings, Merricks was successful before the Court of Appeal in arguing that the CAT had been wrong in its approach and therefore had to reconsider the issue of suitability. This was affirmed by the Supreme Court following an appeal by Mastercard (our briefing on this is here).

The matter therefore came back before the CAT with a remittal hearing taking place in March 2021 and the Tribunal issued its judgment on 18 August. As a result of the Supreme Court decision, Mastercard did not oppose certification. However, certain outstanding disputes remained in relation to whether Merricks could amend the proceedings to include (i) deceased persons in the class; and (2) a claim for compound interest.

The CAT said no on both counts, thereby narrowing certain of the issues in dispute. According to Mastercard, this has reduced the value of the overall claim by around 35 per cent to just over £10bn, though Merricks maintains that the value of the claim is much higher.

No date has yet been set for this trial of the first and largest class action to be brought under the Competition Act, following the changes made by the Consumer Rights Act 2015. One imagines that claimant lawyers and litigation funders will be actively seeking out new opportunities on behalf of consumers off the back of this decision, though it remains to be seen whether the pathway to the certification stage has been entirely smoothed out thanks to Merricks' efforts thus far.

Nonetheless, there are also a number of other large claims underway using the procedure (for example, relating to forex fixing), many of which were hinging on the outcome in the MasterCard case so we can expect those claims to proceed in earnest now.

See our full briefing on the CAT decision here.

Insurance

Non-disclosure under pre-Insurance Act 2015 principles

Niramax Group Ltd v Zurich Insurance plc [2021] EWCA Civ 590

The Court of Appeal dismissed Zurich's appeal, finding that the High Court had correctly applied the test for inducement, stating that in order to establish inducement, a non-disclosure had to be *"an efficient cause"* of the difference in terms offered, not merely a 'but for' cause. The Court of Appeal stated that it used the expression *"efficient cause"*, rather than *"effective cause"*, *"not because I detect any difference between the two in this context, but because it reflects the language used in [Financial Conduct Authority v Arch Insurance (UK) Ltd [2021] UKSC 1] of the difference between a but for test and what was historically called a proximate cause, in characterising the causative link between the insured peril and the loss in insurance cases."*

How the Judge approached the issue (confirmed by the Court of Appeal) may also be instructive for cases brought under the Insurance Act 2015, where, in the event of challenge, insurers can expect their underwriting processes, published guidance, interaction with colleagues and the personalities involved to be closely examined in order to determine what would have happened had there been a fair presentation of the risk.

ABN AMRO Bank NV v Royal and Sun Alliance Insurance Plc & Others

This was another case decided on pre-Insurance Act principles, which saw both the first instance decision ([2021] EWHC 442 (Comm)) and appeal decision ([2021] EWCA Civ 1789) handed down this year.

The claimant bank sought an indemnity of approximately £33.5m under a marine cargo insurance policy for losses suffered via a subsidiary when two major cocoa supplier customers (Euromar and Transmar) defaulted under a series of "repo" financing deals and became insolvent.

The policy was placed by the defendant broker (Edge) with 14 subscribing underwriter defendants. The policy was an "all risks" marine cargo and storage policy but it also contained extensions to the cover which went beyond ordinary physical loss or damage to the cargo, including a bespoke clause drafted by the Bank's external lawyers known as the Transaction Premium Clause (the TPC).

The first instance judgment addresses some important aspects of insurance law in the course of considering the various arguments advanced by the Bank, including non-disclosure, inducement and policy construction, which we discuss in more detail in our full briefing here.

Most of the findings were not appealed. However, all insurers disputed the Judge's construction of the TPC that it provided credit risk/financial default insurance to the insured Bank. The Court of Appeal found that the judge's approach to construction had been sound and it would have dismissed the appeal on this point had it not already have been settled shortly before trial.

The other point of appeal concerned the Judge's finding that the Bank was estopped by convention from relying upon the TPC against two of the 14 insurers, which had resulted in Edge being held liable to the Bank in contract and negligence.

The issue here was that when the policy had been renewed, the broker told two of the insurers that the policy was "as expiry". The broker thought this meant including the TPC and the non-avoidance clause (NAC), which had been inserted during the course of the previous policy whereas the underwriters thought this meant without the TPC and NAC i.e. how the policy had looked when they last saw it. The Judge found that the broker and the two underwriters were at cross purposes. The NAC prevented avoidance due to this misrepresentation but the Judge found that the representation had induced the underwriters to write the policy and so it constituted an estoppel by convention preventing the Bank from relying on the TPC to claim against those two underwriters.

Edge argued (i) that estoppel by convention could not arise where the two parties were at cross purposes (ii) that, in any event the estoppel by convention defence was not allowed by virtue of the NAC. The two underwriters contended that there had been an estoppel by convention based on acquiescence rather than any common assumption and now argued that there had been an estoppel by representation.

An estoppel by convention arises if (i) there is a relevant assumption of fact or law, either shared by both parties, or made by party B and acquiesced in by party A, and (ii) it would be unjust to allow party A to go back on that assumption. It is common ground that a representation could found estoppel by convention. The Court said that *"the real question is…whether acquiescence involves the party said to be estopped (here ABN Amro and its broker, Edge) knowing what it is said to be acquiescing in (namely that Ark and Advent were not bound by the July endorsement)."* Further, *"estoppel by convention based on acquiescence can only exist where the parties are subjectively in agreement; i.e. where in this case, the party making the representation knows that the other party has a different understanding."*

The Judge had previously held that there had been a misrepresentation by Edge so whether there had been common assumptions or acquiescence was not significant to the outcome, according to the Court of Appeal. It stated *"There is clear authority for the proposition that the meaning of a representation depends upon how a reasonable representee would understand it. Plainly, the reasonable representee in the position of Ark and Advent would understand the representations that the Policy was as expiry to mean what it said, namely that the Policy was indeed on the terms of the expiring policy, which did not, in their cases, include the TPC and the NAC."* As such, there had been estoppel by representation preventing the Bank from relying on the TPC and claiming against the two underwriters.

However, the NAC which prevented underwriters from avoiding or rejecting a claim other than for fraudulent non-disclosure or fraudulent misrepresentation. The "as expiry" misrepresentation had not been fraudulent so the NAC thereby prevented the two underwriters from rejecting the claim based on the estoppel argument, whether it was by virtue of estoppel by convention or representation (as both were based on the "as expiry" representation.

Accordingly, Edge was relieved of liability to the Bank and the two underwriters were found liable for their share of the loss to the Bank.

Our full briefing on the Court of Appeal decision is here.

Fair presentation of the risk under the Insurance Act 2015

In *Berkshire Assets (West London) Ltd v AXA Insurance UK Plc* [2021] EWHC 2689 (Comm), the first substantive judgment to be reported in the High Court under the Insurance Act 2015 (the Act), an insurer has been held to have validly denied liability for claims brought under a Construction All Risks (CAR) and Business Interruption (BI) policy.

The case involved insurers stating (in response to a flooding claim) that the claim was denied as Berkshire did not disclose as part of the presentation of the risk that one of its directors had had criminal charges filed against him by Malaysian prosecutors in relation to a scheme said to have defrauded the Malaysian government and other bond holders. Insurers argued that the criminal charges were a material circumstance under s.7(3) of the Act and it would have declined to provide cover had it known of the charges.

The Court held that a criminal charge would often be considered a material circumstance for the purposes of the Act. Even if the person in question is later acquitted, it is still information which an insurer is entitled to know when assessing the risk. It was relevant to consider what the insurer would have done had full disclosure been made at the time. At renewal, charges had already been filed and had been filed in relation to a large-scale fraudulent scheme. This fact should have been disclosed. On inducement, the Court found that had the charges been disclosed, the insurer would not have renewed the policy. It was aided in this regard by clear records of underwriting guidelines in place at the time which showed that the risk would not have been accepted under those guidelines had it been disclosed. The Court also commented that the insurer was not expected to accept assertions from Berkshire that the director had not been dishonest nor was it expected to undertake an investigation into the substance of the charges, providing some clarity as to the how far an insurer has to go to determine whether the circumstance is material.

This is a useful case on the Court's approach to claims under the Act. Further, whilst not a surprise, it was helpful to have it confirmed that pre-Insurance Act cases remain relevant to the assessment. See our full briefing here.

We reported previously on the Scottish case of *Young v Royal Sun Alliance Insurance PLC* [2019] CSOH 32 (in our 2019 update), which was the first case, albeit a Scottish decision, decided under the Insurance Act 2015, also centring on Section 3 of the Act and fair presentation of the risk. That decision was appealed to the Outer House of the Scottish Court of Session (equivalent to the Court of Appeal).

By way of reminder, the insured completed a market presentation in which it was asked whether any proposer had either personally, or in a business capacity, been declared bankrupt or insolvent. The insured replied in the negative (believing the question applied only to the company that was to be insured itself or himself personally, not to any other company with which the director had been associated), and did not disclose that he had been a director of four other companies that had become insolvent in the previous five years. A subsequent email from the insurer indicated that cover was subject to confirmation that the "Insured has never been declared bankrupt or insolvent'.

The Outer House of the Scottish Court of Session held that the Act did not alter the prior law on waiver which can arise in two ways:

- Where information provided should have prompted the insurer to make further enquires; and
- Where the insurer has asked a limiting question, such that a reasonable person reading the proposal form can be justified in thinking that the insurer had restricted its right to receive all material information and consented to omission of the particular information.

The First Division Inner House Court of Session rejected the insured's appeal ([2020] CSIH 25). It was clear that an insurer could impliedly waive an insured's duty to disclose certain information by virtue of the questions it asked. However, a reasonable reader of the insurer's email would not have construed it as an expression of limited concern about the insured's past experience of insolvency such as to exclude the undisclosed information. As such, the insurer was entitled to avoid the policy. Although the case is only persuasive as regards the English court, it is likely that the English court would have come to a similar decision.

A point to note - there was some confusion as to what had been disclosed and whilst the insurer was successful, the case does serve as a reminder of the need for insurers to use clear proposal forms, to be careful when drafting quotation letters and to keep clear records of decision-making processes.

Aggregation

Solicitors' Minimum Terms and Conditions (MTC)

Dixon Coles and Gill (A firm) and others v Baines, Bishop of Leeds and another [2021] EWCA Civ 1211 is one of two separate Court of Appeal judgments this Summer on different aspects of claims against a solicitors' firm resulting from its former senior partner's theft of clients' money *"over a long period and on a vast scale"* (the other is set out in the 'Limitation' section above).

The Court held, dismissing insurers' appeal, that claims against the firm arising from the thefts could not be aggregated under the firm's professional indemnity policy (which followed the MTC) as arising from *"one series of related acts or omissions"*. It was not sufficient for these purposes that the thefts were all underpinned by the partner's dishonest treatment of her clients' money.

Applying *Lloyds TSB*, the Court held they could only be so if the acts together resulted in each of the claims. Per Lord Justice Nugee (with whom the others agreed) *"if there is a series of acts A, B and C, it is not enough that act A causes claim A, act B causes claim B and act C causes claim C. What is required is that claim A is caused by the series of acts A, B and C; claim B is also caused by the same series of acts; and claim C too"*. That was not the case here.

For more discussion of this case and its implications, see our briefing note here

Aggregation in combined liability policy

The Court of Appeal handed down its decision in *Spire Healthcare Limited v Royal & Sun Alliance Insurance Plc* [2022] EWCA Civ 17 in January 2022, allowing the insurer's appeal and finding that the claims all arose out of the same source or original cause, namely, the consultant's conduct in disregarding the welfare of his patients and performing operations on them without their informed consent.

Claims had been brought by patients who had suffered negligently performed and/or unnecessary breast surgery carried out by a consultant breast surgeon at two hospitals operated by Spire. Spire claimed under its combined liability policy with RSA and whilst the insurer accepted the insured was entitled to an indemnity, it argued that the aggregation wording in the policy, *"…all claims during any Period of Insurance consequent on or attributable to one source or original cause…"*, operated to mean that the policy indemnity limit of £10m applied. Spire argued that there were two separate groups of claims (those arising from negligent surgery and those arising from unnecessary surgery) such that two limits of indemnity of £10 million applied.

At first instance, the High Court agreed with Spire and held that the £20 million aggregate limit applied but the Court of Appeal disagreed. Looking first at the approach to the wording in question, it made the following observations:

- The usual principles of contractual construction apply and aggregation clauses are to be construed in a balanced fashion without a predisposition towards a narrow or broad interpretation: *Lloyds TSB General Insurance Holdings v Lloyds Bank Group Insurance Co Ltd* [2003] UKHL 48, *AIG Europe Ltd v Woodman* [2017] UKSC 18.
- The clause in question was a standard wording and *"it is appropriate to follow the construction of identical or materially similar provisions in earlier cases, unless there is a clear contextual distinction or other strong reason that suggests it would be inappropriate to do so."* The phrasing *"consequent on or attributable to one source or original cause"* was well-known to mean that the clause was very broad (per Longmore J in *AIG Europe Ltd v OC320301 LLP and others* [2016] EWCA Civ 367 and earlier authorities). Further, as per Lord Mustill in *Axa Reinsurance UK Ltd v Field* [1996] 1 WLR 1026, *"a cause is…something altogether less constricted [than 'event']. It can be a continuing state of affairs; it can be the absence of something happening. Equally, the word "originating" was in my view consciously chosen to open up the widest possible search for a unifying factor in the history of the losses which it is sought to aggregate."* And "original cause" in this context does not mean "proximate cause", but instead connotes a considerably looser causal connection (*Beazley Underwriting Ltd v The Travelers Companies Incorporated* [2011] EWHC 1520 (Comm)).

The Judge at first instance had not applied the correct test to find the unifying factor in the history of the claims, with the Court of Appeal noting: *"he appears to have noted the factors that were common to all the claims but then disregarded them, in the course of searching for what he termed a "single effective cause," which is not the correct test."* Looking at the circumstances of the case in question, the Court referred to *Cox v Bankside* [1995] 2 Lloyd's Rep 437, where the negligence of one individual underwriter was held to be the originating cause for the purpose of an aggregation clause of this type, even though his negligence took different or multiple forms. The claims made against Spire, whilst differing in some respects, arose from a pattern of deliberate (and dishonest) behaviour by one individual. This was sufficient under the wide aggregation wording in the policy to be the unifying factor, irrespective of which group the patient claims fell into.

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Costs

Costs cases of interest

Non-party costs awards

In a blow to funders, where there is found to be high degree of control by a third party, a court may be more likely to use its discretion under section 51 of the Senior Courts Act 1981 to grant a non-party costs order against a third party. This was the case for the funder in *Laser Trust v CFL Finance Ltd* [2021] EWHC 1404.

Whilst such orders are exceptional and will not be exercised against "pure funders", the Court found that the terms of the funding agreement showed that the funder was granted a *"considerable degree of control over the litigation"*.

For the same reasons, the Court also held that the so-called "Arkin cap", which limits the order to those costs actually paid by the funder, should not apply, furthering the message that the Arkin cap is only guidance and not a rigid rule (*ChapelGate Credit Opportunity Master Fund Ltd -v- Money & others* [2020] EWCA Civ 246 – a case in which our firm acted for the defendant insolvency office-holders).

Security for costs

Rowe and others v Ingenious Media Holdings plc and others [2021] EWCA Civ 29 concerned claims brought by hundreds of investors against Ingenious and others for losses they had sustained, with many of the investors funded by Therium, a large litigation funder. The defendants had sought a security for costs order and the claimants sought a cross-undertaking for damages. A limited undertaking was ordered at first instance but the Court of Appeal unanimously ruled that, when making an order for security for costs, it should only be in "a rare and exceptional case" that the court should require the Defendant to give a cross-undertaking in damages in the Claimant's favour. And only in "even rarer and more exceptional cases" that it should do so in favour of commercial litigation funders.

The case is significant as it overturned a body of first instance case law in which cross-undertakings in damages were required as a condition of ordering security for costs where there was some prospect that the claimant or a third party may suffer loss as a consequence of the order.

Privilege

Privilege

Legal professional privilege can be a complex area and it generates a lot of case law. We set out some of the most significant cases from the last 12 months below.

Litigation privilege

Litigation privilege protects: (a) confidential communications between a client and a lawyer, or (b) between a client or lawyer (on the one hand) and third parties (on the other), or (c) other documents created by or on behalf of the client or their lawyer which (i) come into existence once litigation is in contemplation or has commenced, and (ii) which are for the sole or dominant purpose of use in the litigation.

Ahuja Investments Ltd v Victorygame Ltd & Ors

The High Court and Court of Appeal decisions in *Ahuja Investments Ltd v Victorygame Ltd & Ors* [2021] EWHC 1543 (Ch) (June 2021) and [2021] EWCA Civ 993 (July 2021) focused on the dominant purpose element of litigation privilege, in circumstances where the form of the documents in question indicated one purpose but witness evidence was given as to a different "real" purpose. As there was deliberate deception involved in the presentation of an apparent purpose to disguise the real purpose, the Courts considered whether such deception prevented the documents being privileged or the claim to privilege being maintained (by reason of public interest/estoppel/waiver). Ultimately, on the facts, the High Court and then the Court of Appeal held that the documents were protected by litigation privilege.

In this case, the Claimant had sent a pre-action protocol Letter of Claim to its former solicitors and received a protocol Letter of Response in return. It had not pursued its former solicitors further but instead commenced proceedings against the current Defendant for alleged misrepresentations in a property transaction. The Defendant sought disclosure of the protocol correspondence with the former solicitors and the Claimant asserted litigation privilege. A Master initially ruled the documents should be disclosed but on appeal the High Court and the Court of Appeal reversed this.

<u>Dominant purpose</u>

The High Court said that the dominant purpose of a document should be assessed by reference to the purpose of the person who was its "instigator" and should be assessed objectively on the basis of all the evidence, including the subjective intention of the instigator.

Here the Claimant was the instigator of the protocol correspondence and it said that its real purpose was not to intimate proceedings against the former solicitors but to elicit information from them to be used in the present proceedings against the Defendant. The Defendant countered that the protocol form of the correspondence suggested that it was for the different or additional purpose of advancing a potential claim against the former solicitors. The Judge in the High Court accepted the Claimant's position that the dominant purpose of the correspondence was for use in the proceedings against the Defendant and therefore that the correspondence was privileged.

There was an element of deliberate deception in the sense that the claimant had wanted information for the purposes of the proceedings against the Defendant, had anticipated that it would not get that information if it was requested on that basis and so sent a protocol letter of claim to seek it that way.

The Court did not condone such tactics – but they, and the fact that the former solicitors/their insurers might have been misled as to the purpose for which the information was sought - did not prevent the correspondence from being privileged. The Court of Appeal condoned this decision.

Public interest, estoppel and waiver

In the Court of Appeal the Defendant also argued that the Claimant had lost the right to maintain the privilege on a public interest basis as it had deliberately misled its former solicitors as to the purpose of the correspondence. The Court rejected this argument – legal professional privilege, once acquired, was absolute unless waived by the party entitled to claim privilege or overridden by statute (applying *Three Rivers (No 6)* [2004] UKHL 48)

The Court of Appeal also considered whether the Claimant's conduct estopped it from claiming privilege or amounted to a waiver of privilege. Estoppel was theoretically possible but establishing detrimental reliance where the representee was obliged to provide the information anyway would be very difficult. Here the deception was not about the Claimant's entitlement to the documents/information but rather as to their onward use. Here (1) there was a strong basis for inferring that the solicitors would have realised that the information would be used for the purpose of litigation against the Defendant (the letter of claim made reference to that litigation); and (2) it seemed highly likely that the Claimant was entitled to the information from the solicitors anyway as its legal adviser at the time of the property transaction. The Court also suggested the Claimant had effectively been forced to use the protocol to put pressure on the former solicitors because of their own uncooperative behaviour. Accordingly, there was no basis for denying the Claimant's right to privilege. Nor did any of the Claimant's subsequent conduct amount to a waiver of privilege.

***State of Qatar -v- Banque Havilland SA and others* [2021] EWHC 2172 (Comm) (July 2021)**

This was an important - and in our view rather harsh decision - which concluded that a forensic investigators' report into an issue of regulatory and legal concern (and earlier drafts/related communications) prepared by an accountancy firm for the Defendant did not attract litigation privilege. This was notwithstanding that the Defendant was liaising with its regulators on the issue at the time of the instruction, that the investigators were instructed via lawyers and that their engagement letter specified that they would be working under the cloak of litigation privilege.

The Court considered in particular (i) whether litigation was in contemplation/underway at the relevant time and (ii) the dominant purpose of the report.

As to (i), the Court held that litigation was not in the Defendant's reasonable contemplation at the relevant time. The Claimant had not intimated its claim at this stage, even though it did go on subsequently to bring proceedings. Nor was the regulators' involvement sufficient to qualify - litigation here means adversarial rather than investigative proceedings and at this stage the Court held that the regulators were merely asking questions which were not adversarial. For this aspect of the test to be met, the Court held that more than a distinct possibility of litigation/adversarial proceedings was required, and this burden had not been discharged by the Defendant.

As for (ii), as litigation was not in reasonable contemplation when the forensic investigators were instructed (as per (i) above) it follows that their instruction was not for the sole or dominant purpose of litigation. The Court also held that there were other reasons for instructing the investigators, such as investigating how the underlying issue had been leaked to the press and to answer the regulators' questions.

The fact that the forensic investigators were instructed via the bank's lawyers did not 'cure' the claim to litigation privilege, nor did the provision in their engagement letter that they would be working under the cloak of litigation privilege. Quite the reverse – the Court noted that engagement letter did not say that they were preparing their report for the sole or dominant purpose of use in litigation. For our full article on the case and our discussion of its implications please see here.

Joint privilege

Travelers Insurance Co Ltd v Armstrong [2021] EWCA Civ 978 confirmed that where a law firm is engaged jointly by two clients, each of those clients has a right to see the documents on the joint retainer file and to claim privilege in those documents as against the rest of the world but not against the other. If one of the clients assigns to a third party its claims against the law firm relating to the joint retainer, then that third party was entitled to the same rights as the assignor to access the documents – and the other client could not assert privilege against the third party.

This principle was not affected by the terms of the assignment. Nor was it affected by a potential conflict of interest caused by the fact that the third party/assignee in this case had acted against the other client/joint privilege holder in the litigation which gave rise to the assigned claims – albeit that strict safeguards to protect confidentiality would have to be put in place.

Waiver of privilege

PJSC Tatneft v Bogolyubov & Others [2020] EWHC 3225 (Comm) considered whether reference to privileged material (there to legal advice in a party's witness statements) amounted to a waiver of privilege.

It did so against the background of the refined test set out by the same Court in *PCP Capital Partners LLP v. Barclays Bank plc* [2020] EWHC 1393 a few months earlier. So the Court looked at the nature of the reference to the privileged material (i.e. whether it was sufficiently direct /whether it was to the content of the privileged material or merely to its effect) but also in particular at whether it was relied on to support the relevant party's case on an issue before the Court and on the particular context of the case in question.

The Court here drew a distinction between a party relying on privileged material (1) to support a positive case which it is choosing to make (which may include a negative proposition e.g. as to something which was not said/done) and (2) merely to deny an assertion as to it made by the other party. In the case of (1) there may well be waiver (which would then invite questions as to the scope of that waiver/any collateral waiver of privilege in all other material which forms part of the same "transaction" or issue if fairness requires it) but in the case of (2) there will be no waiver as in the relevant sense there has been no voluntary disclosure.

A case looking at similar issues of waiver which went the other way was *Scipharm SARL v Moorfields Eye Hospital Foundation Trust* [2021] EWHC 2079 (Comm), in which the court focused in particular on the nature of the reference to the privileged material. Here it was a reference in the Claimant's witness statement to confirmations given to its solicitor by one of the Defendant's employees. The Court held that this amounted to a sufficient reference to the Claimant solicitor's attendance note (or notes) of the discussions in which the confirmations were given. It was to be inferred that the witness had access to such an attendance note and could not be relying on memory alone, due to the passage of time. Further, the Court held that privilege in the note had been waived because the Claimant was relying on it in support of its case. Finally, it would be unfair not to require its disclosure in circumstances where the Claimant's witness statement differed on the relevant point from the evidence of the Defendant's employee.

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