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DISPUTES BRIEFCASE

Need-to-know disputes updates for General Counsel and their teams

OCTOBER 2023

/ INTRODUCTION

Welcome to the first edition of Slaughter and May's Disputes Briefcase, a regular digest of key developments in litigation and arbitration, produced by members of our market-leading disputes team. We hope you find this new publication useful. The **Disputes Briefcase team** would welcome any thoughts and feedback.

Richard Swallow
Head of Disputes and Investigations

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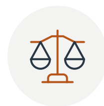

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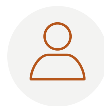

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COURT CLARIFIES DIRECTORS' DUTIES IN CONTEXT OF CLIMATE CHANGE – CLIENTEARTH V SHELL

HIGH COURT REFUSES PERMISSION TO CONTINUE CLAIM AGAINST SHELL PLC'S BOARD FOR ALLEGED BREACH OF DIRECTORS' DUTIES IN CONNECTION WITH THE BOARD'S MANAGEMENT OF CLIMATE CHANGE RISK

In July, the High Court, **confirming** its earlier (on the papers) **decision**, refused ClientEarth (an environmental NGO) permission to continue its derivative claim against Shell plc's board of directors in its capacity as a minority shareholder. ClientEarth argued the directors had breached their duties to promote the success of Shell for the benefit of its members as a whole (s172 Companies Act) and to exercise reasonable care, skill and diligence (s174 Companies Act) in relation to their management of Shell's climate change risk. The court held that ClientEarth had failed to establish a 'prima facie' case required to continue the claim for reasons including:

- The court could place very little weight on ClientEarth's evidence, which largely consisted of the opinions of a ClientEarth senior lawyer who could not give expert evidence on which the court could properly rely. In any event, ClientEarth's evidence failed to explain how Shell's directors were said to have gone so wrong in their balancing and weighing of the many factors that should go into the board's consideration of climate risk, amongst the many other risks to which Shell's business was inevitably exposed.

- There is no universally accepted methodology as to how Shell might achieve the 'net zero' target. English law respects the autonomy of Shell's board to decide on commercial issues and how best to achieve results that are in the best interests of Shell's members as a whole.

- Shell's directors were not subject to additional absolute 'incidental' duties in respect of climate change (which ClientEarth argued necessarily arose when the board identified its climate strategy as a commercial objective and likely to promote the success of Shell) as they cut across the basic principle that it is for directors themselves to determine how best to fulfil their section 172 duty.

- The fact that ClientEarth held only 27 shares in Shell whilst proposing it should be entitled to seek relief on behalf of Shell in a large, complex and important claim gave a clear inference that its real interest was not in how best to promote the success of Shell for the benefit of its members as a whole.

In addition, the judge considered a court would be unlikely to make the mandatory orders sought by ClientEarth, which included an order that Shell's board adopt and implement a strategy to manage climate risk in compliance with its duties, as they were too imprecise and would require constant court supervision. Unusually for a claim at this early procedural stage (when ClientEarth needed only to establish a *'prima facie'* case and Shell was not required to participate), the court **awarded** Shell its legal costs because of, among other things, the serious nature of the claims. The court also noted that Shell's voluntary submissions were of "material assistance" to the court, without which the court could not rule out the possibility it would have required a full substantive hearing of ClientEarth's application, resulting in additional time and cost.

The case, which has been closely followed by companies and their boards, as well as civil society, bears some similarities with ***McGaughey v Universities Superannuation Scheme***. In that case the Court of Appeal recently refused a multiple derivative claim against directors of a pension scheme for alleged breaches of duties for failing to implement a plan to divest from fossil fuel investments. Both cases illustrate the high bar that must be reached before a court is willing to wade into the commercial decision-making of boards, even in a climate change context.

ClientEarth has sought permission to appeal from the Court of Appeal (having had permission **refused** by the High Court). Slaughter and May, led by **Peter Wickham** and **Smriti Sriram**, act for Shell and its directors in the proceedings.

SUPREME COURT DEALS BLOW TO LITIGATION FUNDERS – R (PACCAR INC) V CAT AND OTHERS

SUPREME COURT SENDS SHOCKWAVES THROUGH THE LITIGATION FUNDING MARKET BY RULING THAT A TYPE OF FUNDING AGREEMENT UNDERPINNING MANY OF THE LARGEST ENGLISH CLASS ACTIONS IS INVALID

Third party litigation funding is big business; more than a dozen funders have significant UK operations and back many of the largest class actions in the English courts. Indeed, many of these claims would not be brought without third party funding. Funders agree to support claims they consider viable by covering the legal costs incurred by claimants in exchange for a (potentially sizeable) return on their investment. Funders calculate their returns in different ways. A popular mechanism has been to grant the funder a percentage of whatever damages are awarded to a claimant, or group of claimants. Where lawyers enter this kind of "no win, no fee" agreements with their clients, they are known as "damages-based agreements" (DBAs) and must comply with strict legal rules as to their form and content. Failure to comply with those rules makes the agreement invalid and unenforceable. But until now, it had generally been thought agreements entered into by funders were outside the scope of these rules.

The Supreme Court's decision in *R (PACCAR Inc) v CAT* changes all this. By a majority, the court said the provision of litigation finance constituted a "claims management service", one of the elements of the statutory definition of a DBA. There was no dispute that the funding agreements in question did not comply with the rules for DBAs and accordingly the effect of the court's decision was that they were invalid. That was particularly significant in *PACCAR* because it arose in the context of collective proceedings relating to alleged breaches of competition law. The Competition Appeal Tribunal (CAT) will only allow cases like these to proceed where the claimants' funding arrangements are adequate.

Claimants, funders and their lawyers have spent the summer assessing the implications of the Supreme Court's decision. Funding agreements which tie the funder's recovery solely to a percentage of damages will need to be amended either to alter the payment mechanic or, potentially and only in certain cases, to bring them into line with the rules on DBAs. The rules on competition collective actions mean any changes to funding in those cases will need to be disclosed to the CAT and the other parties. In other cases, there is no automatic disclosure requirement, but defendants may probe the robustness of funding arrangements, in particular as they relate to claimants' potential liability for adverse costs.

Slaughter and May, led by **Damian Taylor** and **Holly Ware**, act for MAN in the Trucks proceedings, in which this appeal arose. Read more in our **briefing**.

OVERHAULING THE RULES ON THE LAW OF THE ARBITRATION AGREEMENT?

A DEPARTURE FROM ENKA V CHUBB AMONGST THE LAW COMMISSION'S PROPOSALS TO FINETUNE THE ARBITRATION ACT 1996

Last month, the Law Commission published its final proposals on the Arbitration Act 1996, which are designed to preserve England and Wales's position as a leading destination for international arbitration.

While in many areas the Commission has concluded that "root and branch reform is not needed or wanted", it has recommended some important changes. Among the most significant of the proposals is the introduction of a new default rule in the Act that, unless the parties expressly agree otherwise, the law which governs the arbitration agreement is the law of the seat of the arbitration.

Significantly, this simplifies the position under the existing rule laid down by the Supreme Court in *Enka v Chubb* which was the culmination of a longstanding debate in the English courts on the issue. The *Enka v Chubb* rule is complex, but the headline principle is that where parties have not chosen a governing law for their arbitration agreement but have chosen a governing law for their main contract, in general, that law will apply to the arbitration agreement. The Commission's proposal therefore changes the emphasis by placing weight on the choice of the seat as being the decisive factor in determining the law governing the arbitration agreement.

Whilst the Commission's proposal will not resolve all practical difficulties in this area, the rule, if enacted, will provide some welcome clarity for parties. For certainty, however, it will still be advisable that parties to international contracts specify the law governing their arbitration agreements in their arbitration clauses.

See our **briefing** for more details on this proposal and the Law Commission's other proposed changes to the Act.

QUINCECARE DUTY KEPT WITHIN SENSIBLE LIMITS – PHILIPP V BARCLAYS BANK

SUPREME COURT PROVIDES MUCH-NEEDED CLARITY ON THE SCOPE OF THE QUINCECARE DUTY OF CARE BY CONFIRMING IT DOES NOT APPLY TO APP FRAUD CASES

The Supreme Court has provided clear guidance on the scope of the Quincecare duty (a duty on banks not to execute payments and to make appropriate inquiries where there are reasonable grounds to believe an agent is attempting to defraud the bank's customer). The Supreme Court has refused to extend the duty to cases of authorised push payment fraud (APP fraud), where a fraudster deceives a customer into directly authorising a payment from the customer's account to the fraudster's account. In doing so, the Supreme Court has kept the duty within sensible limits.

Key takeaways for banks include:

- Where a bank receives a valid and clear payment instruction directly from a customer, it will need to execute the instruction promptly. Any refusal or failure to do so will prima facie be a breach of duty by the bank.
- Where a bank receives a payment order that is unclear (or leaves the bank with a choice about how to carry out the instruction), the bank is under a duty to exercise reasonable care and skill when (i) ascertaining and interpreting what the instructions are and (ii) executing them.
- Banks must refrain from executing payments (and make appropriate inquiries) where there are reasonable grounds to believe an agent, purporting to give payment instructions on behalf of a customer, is attempting to commit fraud.
- The duty applies where one person is given authority to sign cheques or give payment instructions on behalf of another, including cases involving joint bank accounts and customers who lack mental capacity.
- Where banks are informed that a fraud has been committed, the speed with which they act, and the steps they take to claw back the monies lost are likely to be scrutinised closely and may form the basis of a loss of chance claim.

Parliament has recognised the need to do more to tackle APP fraud. By early next year, it is anticipated that a new mandatory reimbursement scheme (which proposes a 50/50 liability split between the bank sending and receiving the money in APP fraud cases) will be in force. Although the scheme will operate within relatively narrow confines (it is limited to payments made under the Faster Payments Scheme and will not apply to payments made internationally), it is possible that policymakers may go further in the future. Banks should also watch out for Mrs Philipp's 'fallback' loss of chance claim which the Supreme Court has confirmed can go to trial.

Read more in our **briefing**.

NEW COURT GUIDANCE ON COMPETITION CLASS ACTIONS – THE FX AND TRUCKS LITIGATION

COURT OF APPEAL PROVIDES FURTHER USEFUL GUIDANCE ON OPERATION OF COLLECTIVE PROCEEDINGS REGIME IN THE CAT, HANDING DOWN DECISIONS IN TWO SEPARATE CLAIMS RELATING TO CARTELS IN THE FOREIGN EXCHANGE (FX) AND TRUCKS MARKETS

In the FX litigation, two proposed class representatives, O'Higgins and Evans, had begun collective proceedings against various banks seeking damages for losses allegedly caused by infringements of EU competition law in the spot foreign exchange market. Both sought to bring proceedings on an opt-out basis. The CAT held last year that both applications should be stayed and the applicants given permission to submit a revised application for certification on an opt-in basis; the CAT also said that, had it been minded to certify on an opt-out basis, it would have granted carriage of the proceedings to Evans.

On 25 July, the Court of Appeal partially allowed the appeals of both applicants and held that the collective proceedings should continue on an opt-out rather than opt-in basis. The Court dismissed O'Higgins' appeal relating to the CAT's decision on the dispute over carriage of the proceedings.

The judgment contributes to a growing body of appellate case law concerning the operation of the collective proceedings regime which the Court of Appeal has said it hopes will assist with the CAT's certification of future claims. Although it remains to be seen how the CAT will interpret this guidance in practice, the Court of Appeal's judgment forms part of a growing trend of claimant-friendly case law, while continuing to confer a broad discretion on the CAT as a specialist tribunal.

Slaughter and May, led by **Ewan Brown**, **Camilla Sanger** and **Tim Blanchard**, act for JPMorgan in these proceedings. Read more in our **briefing**.

In the Trucks litigation, the Road Haulage Association and UK Trucks Claims Ltd each sought to pursue collective proceedings for follow-on damages arising from the European Commission's 2016 decision which found that five European truck manufacturers had infringed EU competition law. The CAT decided last year to grant the RHA application for a collective proceedings order (and decline UKTC's competing application).

MAN and DAF, two of the prospective defendants to the RHA proceedings, challenged the CAT's decision to allow the RHA's class members to include both purchasers of new trucks and purchasers of used trucks, on the basis that this gave rise to an irreconcilable conflict of interest within the class. The second appeal was brought by UK Truck Claims Ltd. It agreed with MAN and DAF's conflict argument and argued that, for this and other reasons, their rival application for a collective proceedings order should have been granted.

The Court of Appeal agreed with MAN and DAF that there was a conflict of interest within the RHA's class, but said that the RHA could continue to act as class representative on the condition that the conflict within the class was managed appropriately. This will require separate sub-classes, with the RHA required to have separate lawyers, experts and funders for each; an information barrier within the RHA will separate the two sub-classes. UKTC's arguments that the CAT should have preferred its application were rejected. The judgment provides guidance as to the degree of diverging interests that is acceptable within a class, and how diverging interests may be managed. It has also provided some welcome clarity as to the Court of Appeal's jurisdiction to hear appeals from the CAT.

Slaughter and May, led by **Damian Taylor** and **Holly Ware**, act for MAN in these proceedings. Read more in our **briefing**.

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If you would like to discuss any of the above in more details, please contact your relationship partner or email one of our Disputes team.

Trusted to advise on our clients' most complex and strategically significant litigation and arbitration, we are recognised in particular for our expertise in heavyweight commercial litigation, major class actions and group litigation, banking disputes and competition damages actions.

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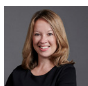

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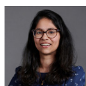

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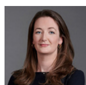

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