MACFARLANES

# WHAT DID I MISS?

## LITIGATION AND DISPUTE RESOLUTION

In this briefing, we provide a round-up of ten cases which are likely to be relevant to anyone interested in commercial litigation. Our selection includes high profile Supreme Court decisions on the interpretation of contracts, the appointment of arbitrators and the abolition of experts' immunity from suit. However, we have also included a number of less well known cases which are likely to have an impact on the day to day conduct of litigation in the High Court.

**JONES V KANEY [2011] UKSC 13 (ABOLITION OF EXPERTS' IMMUNITY FROM SUIT)**

The Supreme Court has abolished immunity from suit for breach of duty by expert witnesses who participate in legal proceedings.

Expert witnesses were previously immune from liability for evidence given in court and for views expressed in contemplation of proceedings. The policy behind the rule was that experts who are concerned about being sued by their clients might be less likely (i) to provide their services; and (ii) to observe their duties of independence to the court.

The majority of the Supreme Court held that experts' immunity from suit could no longer be justified for the following reasons:

- A party who has suffered a wrong should not be left without a remedy. Lord Dyson described this rule as "a cornerstone of any system of justice." Therefore, a party who has instructed and paid an expert to provide professional services should not be denied the opportunity to recover compensation for losses arising out of an expert's failure to provide those services with reasonable skill and care.

- There was no conflict between an expert's duties of independence to the court and those owed to clients. Expert witnesses are instructed by their clients to comply with their obligations to the court. Therefore, expert witnesses who give free and frank advice to the court will be fulfilling their duties to both the court and their clients.

- Barristers' immunity from suit had been abolished in 2000 and this had not led to barristers being unwilling to provide their services. There was no evidence that the position would be different for experts, who could protect their position by obtaining insurance (like any other type of professional).

This decision is of particular importance for those who act as expert witnesses, who should ensure that they have in place suitable insurance cover and that their standard terms of appointment contain appropriate limitations on their liability. The decision has no impact on the position of witnesses of fact, who continue to have blanket immunity from suit.

**EDWARDS-TUBB V J D WETHERSPOON PLC [2011] EWCA CIV 136**

The Court of Appeal has narrowed further the scope for "expert shopping" by parties to litigation.

In this case, the claimant sought permission to rely on the report of a different expert to the one named in pre-action correspondence. The defendant asked the court to require the claimant to disclose the first expert's report as a condition to granting leave to the claimant to rely on the second expert's report. The court granted the conditional order requested by the defendant.

On appeal, the Court of Appeal confirmed that, to prevent expert shopping, the courts should usually require a party to disclose the first expert's report, even if it was obtained during the pre-action protocol stage, as a condition to giving permission for that party to rely on a different expert's report in the proceedings.

Furthermore, Hughes LJ recognised that, as a result of his judgment, parties are likely to ask one another whether there has been a prior report and/or to ask the court to make any order giving permission to call expert evidence conditional on the disclosure of any earlier reports, whether or not there is some positive indication that there has been one.

This increases the importance of parties ensuring that they instruct the "right" expert witness at their first attempt. It also means that parties should, at the beginning of a dispute, consider instructing experts to act in an advisory capacity rather than to give evidence in proceedings. It should remain possible to retain privilege in reports prepared by expert advisors. However, this approach is likely to be more costly because it may not be possible for a party to recover the costs of instructing an expert advisor – even if it is eventually successful in the litigation.

**FIRST CONVICTION UNDER THE BRIBERY ACT 2010**

The Crown Prosecution Service (CPS) has secured its first conviction under the Bribery Act 2010 (the Act) against Mr Patel, an east London magistrates' court clerk. Mr Patel was arrested after he promised an individual summoned for a motoring offence that he could, for a payment of £500, "get rid" of the speeding charge by not entering it into the court's database. However, the individual told the Sun newspaper of the offer, and the tabloid secretly filmed the clerk arranging the bribe.

Mr Patel was subsequently prosecuted under section 2 of the Act for requesting and receiving a bribe intending to improperly perform his functions and for misconduct in public office. Having pleaded guilty, Mr Patel was sentenced to three years for bribery and six years for misconduct in public office, those sentences are to run concurrently.

In passing sentence the judge told Mr Patel that his position as a court clerk had at its heart a duty to engender public confidence in it and that "a justice system in which officials are prepared to take bribes in order to allow offenders to escape the proper consequences of their offending is inherently corrupt and is one which deserves no public respect and which will attract none."

**RAINY SKY S.A. AND OTHERS V KOOKMIN BANK [2011] UKSC 50 (SUPREME COURT PROVIDES GUIDANCE ON THE CONSTRUCTION OF CONTRACTS)**

In this case, the Supreme Court held that where a clause in a contract is capable of being interpreted in more than one way, the court will choose the meaning which is consistent with commercial common sense.

The dispute turned on the meaning and effect of several refund guarantees which were issued by the defendant and related to advance payments made by the claimants to a shipbuilder. In broad terms, the question was whether the insolvency of the shipbuilder triggered an obligation on the defendant to refund instalments paid by each claimant to the shipbuilder. Overturning the decision of the Court of Appeal, and reinstating the decision of the first instance judge, the Supreme Court found in favour of the claimants and held that the refund guarantees did cover the insolvency of the shipbuilder.

Lord Clarke, who gave the only reasoned judgment in the Supreme Court, noted that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. A reasonable person is one who has all the background knowledge which would reasonably have been available to the parties at the time of the contract. The court must look at the relationship between the literal meaning of the words and the meaning consistent with commercial common sense in order to determine the intention of the parties. Where the parties have used unambiguous language, the court must apply it, even if that produces an improbable commercial result. However, if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other construction.

In general terms, it is to be welcomed that the court will try to give a commercial meaning to commercial documents and to avoid being overly influenced by linguistic or semantic niceties. Critics of this approach, however, would point out that it is not always easy to predict what a judge's view of business common sense will be; nor to guarantee that this view will correspond to the parties' views at the time the contract was entered into. This can make it harder to predict the outcome of a dispute with any degree of certainty.

**MOTTO & ORS V TRAFIGURA [2011] EWCA CIV 1150 (ON COSTS – PROPORTIONALITY, NECESSITY AND RECOVERABILITY OF FUNDING COSTS)**

In June 2011, the Court of Appeal heard multiple leapfrog appeals and cross-appeals from judgments given by the Senior Costs Judge, Master Hurst in relation to the detailed assessment of the claimants' Bill of Costs. The Court of Appeal considered, among other things, the application of the principles of proportionality and necessity in costs proceedings and the recoverability of the costs of funding litigation.

In a unanimous judgment, the Court of Appeal confirmed the approach it took in Lownds v The Home Office [2002] EWCA Civ 365. Overturning the Cost Judge's decision, the Court of Appeal held that if an overall Bill of Costs is, or appears to be, disproportionate, the items in that Bill will only be recoverable where the court is satisfied it was necessary to incur them.

The Costs Judge had held that he retained the discretion not to apply the necessity test, despite having found that the overall Bill was or had the appearance of being disproportionate.

The Master of the Rolls, Lord Neuberger, also confirmed that the necessity test is a "higher hurdle" that applies in addition to the normal requirement that only sums that are proportionately incurred and that are reasonable and proportionate in amount are recoverable and stated that it is a "good way of maintaining a degree of discipline in the thinking and actions of lawyers when advising or acting for clients."

The Court of Appeal held that the costs of funding an action are not recoverable and concluded that until a conditional fee agreement (CFA) is signed, not only is the potential claimant not a claimant; he or she is not a client.

Accordingly, the Court of Appeal held that the costs of "getting business", including the costs of advertising to or identifying potential clients, the costs associated with arranging or advising on conditional fee agreements or After The Event (ATE) insurance and the costs of liaising with ATE insurers before and

after the ATE policy has been entered into, are not recoverable from the paying party.

**ARACI V FALLON [2011] EWCA CIV 668 (INTERIM INJUNCTIONS)**

On 4 June, the Court of Appeal granted an injunction preventing Kieren Fallon, the flat-racing jockey, from racing in the Epsom Derby. In coming to this decision, the Court of Appeal indicated that there will be circumstances where the established American Cyanamid guidelines for granting injunctions will not apply.

Pursuant to an agreement by which Fallon agreed to ride Mr Araci's horses (and no other horse) when requested to do so, Araci asked that Fallon ride his horse in the Derby. Less than a week before the race, and in breach of the agreement, Fallon informed Araci that he would be riding a rival horse. Araci, therefore, applied for a prohibitory injunction, restraining Fallon from riding the rival horse.

At first instance, Mr Justice MacDuff declined to grant an injunction. Araci issued an appeal and the Court of Appeal gave judgment at 9am on the day of the Derby.

In granting an injunction to prevent Fallon from racing that afternoon, the Court stated that where a respondent is proposing to act in clear breach of a negative covenant (i.e. the agreement not to ride a rival horse), there must be "special circumstances" before the Court will exercise its discretion to refuse relief. Elias LJ also commented that, where there is such an intentional breach, inadequacy of damages is not "generally" a relevant consideration.

Following Araci v Fallon, it may be the case that, in such circumstances, the familiar "balance of convenience" and "inadequacy of damages" tests, derived from American Cyanamid, will not come into play. However, it also appears from the judgment that the burden of establishing a "clear" breach is a high one. This suggests that, whilst Araci v Fallon will be helpful to claimants when it applies, it will require a relatively unusual set of circumstances.

**C V D [2011] EWCA CIV 646 (ON PART 36 OFFERS)**

In C v D, the Court of Appeal considered whether it is possible to make a time-limited Part 36 offer. The claimant made an offer which was described as a Part 36 offer, which would be "open for 21 days". The defendant purported to accept the offer after the 21 day period had elapsed and the claimant argued that it was not entitled to do so.

The Court of Appeal held that an offer limited by time is not capable of being a Part 36 offer. However, it also took the view that, where an offer is expressed to be a Part 36 offer, it should be construed as such wherever possible. Therefore, it interpreted the phrase "open for 21 days" as meaning that the offer would not be withdrawn for 21 days rather than that it would lapse after 21 days (which is arguably the more natural interpretation). The offer was, therefore, a valid Part 36 offer. As the offer had not been withdrawn, the defendant had validly accepted it.

Valid Part 36 offers remain capable of acceptance unless and until they are withdrawn – irrespective of whether they are rejected or whether subsequent offers are made. It is important, therefore, to keep Part 36 offers under constant review and, if circumstances change, to consider whether they should be withdrawn.

**MR ROBERT MCKIE V SWINDON COLLEGE [2011] EWHC 469 (ON DUTIES OF CARE TO FORMER EMPLOYEES)**

The Court's decision in McKie v Swindon College is a stark warning for all employers about the risks of poor communication concerning former employees.

Mr McKie, who had previously worked at Swindon College, was employed by the University of Bath. Part of Mr McKie's job was to liaise with local colleges, including Swindon College. The HR manager at Swindon College, however, sent an email to the University of Bath, stating that Mr McKie would not be welcome back at Swindon College. The email referred to "safeguarding concerns for students" and "serious staff relationship problems". Still in his probationary period, Mr McKie was summarily dismissed by the University of Bath.

This was a novel situation for the Court. Applying the test set out in Caparo v Dickman, the Court determined that an employer (Swindon College) can, outside of a reference situation, owe a former employee (Mr McKie) a duty of care when communicating with that employee's new employer (the University of Bath).

In this case, the Court held that the email sent by Swindon College was inaccurate and amounted to a breach of the duty of care that it owed to Mr McKie.

**JIVRAJ V SUDDRUDDIN HASHWANI [2011] UKSC 40 (ON THE CHOICE OF ARBITRATORS)**

The Supreme Court overruled the decision of the Court of Appeal and held that arbitrators are not employees and are not, therefore, subject to anti-discrimination legislation.

Mr Jivraj and Mr Hashwani entered into a commercial agreement that contained an arbitration clause. Both parties were members of the Ismaili community and agreed that, in the event of a dispute, the three arbitrators should be respected members of the Ismaili community.

A dispute arose and Mr Hashwani sought to appoint an arbitrator who was not a member of the Ismaili community. Mr Jivraj argued that the appointment was invalid. Mr Hashwani countered that the arbitration provision was void because it contravened the Employment Equality (Religion and Belief) Regulations 2003. In particular, the Regulations state that it is unlawful for an employer to discriminate against an employee on grounds of religion or belief.

The Court of Appeal decided that arbitrators are employees and are, therefore, subject to such anti-discrimination legislation. This led to concerns that parties would no longer be able to agree, for example, that arbitrators must be of a certain nationality, have a certain level of experience or have specified qualifications. Many existing arbitration agreements that had been carefully drafted and negotiated would be unenforceable.

The decision of the Supreme Court was clear and unanimous. Arbitrators have a quasi-judicial role that is entirely inconsistent with the concept of being an "employee". The Supreme Court stated that, whilst anti-discrimination legislation is extremely important, it is not intended to prevent parties from making sensible decisions about the sort of arbitrators they wish to appoint.

**R (FORD) V FINANCIAL SERVICES AUTHORITY [2011] EWHC 2583 (ADMIN) (JOINT PRIVILEGE)**

This case provides useful clarification of a previously obscure area of the law of privilege, that of joint privilege which arises in cases where two separate parties can claim a joint interest in communications with a particular lawyer.

The question was whether the directors of a company could claim joint privilege in advice given by solicitors in respect of an FSA investigation at a time when the solicitors were formally retained by the company, and not by the directors. The issue was important because the company had been put into administration and the administrator had waived the company's claim to privilege in legal advice, some of which related to the position of the directors. Ignoring the directors' claims that the advice attracted joint privilege, and that their consent was required before privilege could be waived, the FSA relied upon the advice in formal investigation reports and warning notices served on the directors pursuant to the statutory regulatory scheme.

The Court held that a person will not be able to claim joint privilege in a communication just because the advice had an impact on his personal position; he must be able to show that the advice was given to him as a client. The person claiming joint privilege must establish that:

- he communicated with the lawyer in question for the purpose of seeking legal advice in his personal capacity;
- he made clear to the lawyer that he was seeking legal advice in that individual capacity (as opposed to merely as a representative of a corporation);
- those with whom joint privilege was claimed knew or ought to have appreciated the legal position;
- the lawyer knew or ought to have appreciated he was communicating with the individual in that individual capacity; and
- the communication with the lawyer was confidential.

On the facts of this case, the Court held that this test had been satisfied. The communications were privileged and the FSA could not rely on them in regulatory proceedings against the directors.

The case highlights the need to clarify the scope of retainers, particularly the identity of the client in situations where joint privilege may arise, and review them on an ongoing basis in order to avoid disputes of this kind.

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