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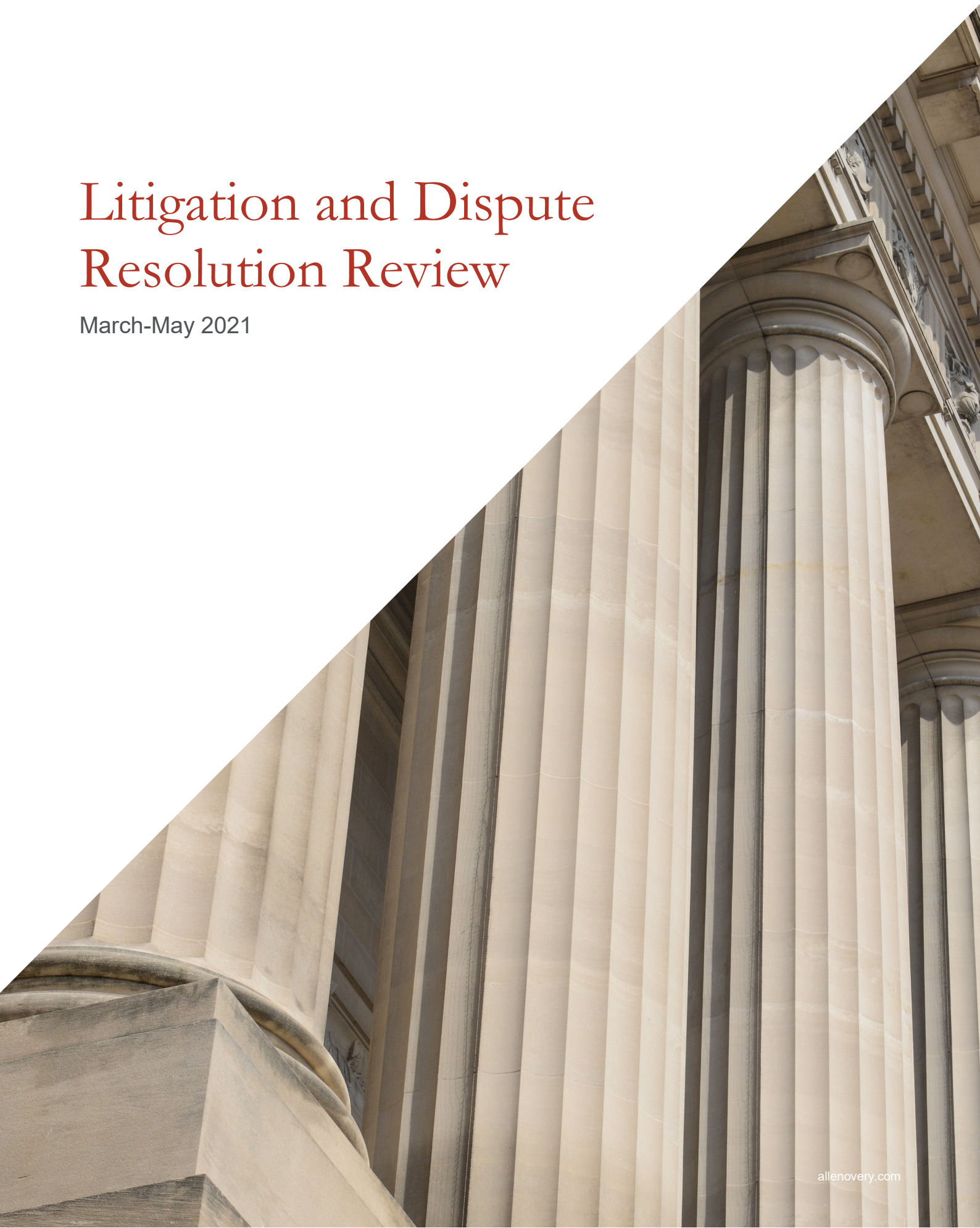
Litigation and Dispute Resolution Review

March-May 2021



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Arbitration

Judgment on challenge to arbitrator should be made public

Newcastle United Football Co Ltd v (1) The Football Association Premier League Ltd (2) Michael Beloff QC (3) Lord Neuberger (4) Lord Dyson [2021] EWHC 450 (Comm), 5 March 2021

A court judgment on challenging an arbitrator should be published in full. Any expectations of confidentiality and/or privacy were limited by the amount of information already in the public domain through press reports. The only significant confidential information in the judgment was the existence of the arbitration and the parties to it, but that did not materially expand on what was already in the public domain.

Press reports about a high-profile dispute

Last year the MailOnline and Sky Sports reported that the proposed takeover of Newcastle United Football Co Ltd (**NUFC**), by a consortium whose members included the Saudi Public Investment Fund, had fallen through. The reports described a dispute between NUFC and The Football Association Premier League Ltd (**PLL**), resulting from PLL's determination in June 2020 that Saudi Arabia would become the controlling entity of NUFC if the deal went through.

A challenge to the impartiality of an arbitrator

Subsequently, NUFC challenged PLL's determination and started arbitration in September 2020, under the Arbitration Code in the PLL's Rules. NUFC unsuccessfully applied to the court seeking the removal of the chair on the ground of an appearance of a lack of impartiality, under s24 Arbitration Act 1996 (**Act**).

The question arose as to whether the court's decision on the challenge to the chair should remain confidential.

A reminder – confidentiality of court judgments made in connection with arbitration

Judgments in arbitration matters should generally be published where it can be done without disclosing significant confidential information, although publication may involve suitable redaction or anonymisation. Publication is particularly favoured when a judgment contains a significant point of law or practice, or involves questions of standards of fairness.

A party seeking to maintain confidentiality in the context of arbitration need only establish that it had an expectation that the subject matter would be confidential. If no such expectation exists, a party can seek to preserve confidentiality by establishing that publication would cause some other positive detriment.

The court rejected any broad principle that a party's expectation of confidentiality is destroyed as soon as the existence of an arbitration, and the issues in dispute, enter the public domain. An assessment of whether a court judgment should remain confidential is ultimately a fact-specific exercise, and involves a balance between: (i) the public interest in publishing judgments implicating standards of fairness in arbitration; and (ii) the parties' interests in preserving the confidentiality of the underlying arbitration.

Judge orders publication of judgment

The court identified that the facts that would enter the public domain upon publication of the judgment were limited and immaterial. This meant that it was unnecessary in this case to withhold publication or to redact or anonymise any information. The court reiterated the particular interest in publishing judgments arising from s24 applications because

they implicate the fairness and integrity of arbitration, and found that PLL's expectations of confidentiality and/or privacy were limited in this case because of the information already in the public domain (ie the press reports released before arbitration had been commenced). The only significant confidential information in the judgment was the existence of the arbitration and the parties to it, but that did not materially expand on what was already in the public domain and PLL had not demonstrated any positive detriment arising from the publication of these details.

The judge ordered the publication of the judgment without redaction or anonymisation.

Comment

Confidentiality has always been considered a defining feature of arbitration. However, it is important to bear in mind that there are a number of ways in which details of an arbitration can become public, particularly when parties seek relief from the courts. Such cases might involve, for example, applications to challenge or enforce an award issued by an arbitral tribunal.

When an arbitration matter comes before the court, issues of confidentiality should be considered from a number of angles: whether the hearing should be in private; whether the resultant judgment should be in public; and whether the publication of a judgment should be tempered by redactions or anonymisation.

The decision in this case is notable from a confidentiality perspective because the court issued a judgment while the arbitral proceedings were ongoing (and also happens to involve a dispute that has attracted more interest than most, given the parties and the subject matter). It provides useful insight into the balancing act between the general interest in publishing court decisions, and parties' expectations of privacy when it comes to arbitrating disputes. The balance in this case ultimately fell in favour of publication.

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Brexit

A lesson on English law post-Brexit from the Court of Appeal

Lipton & anr v BA City Flyer Ltd [2021] EWCA Civ 454, 30 March 2021

English lawyers and law students should be getting to grips with a whole new area of English law: Retained EU law. In this decision, the Court of Appeal explains all about Retained EU law and provides a roadmap for anyone having to consider it. The ruling also explains a rather unusual provision in the EU (Future Relationship) Act 2020 which can modify automatically English law that is not consistent with the EU/UK Trade & Cooperation Agreement (**TCA**).

This article focusses on the Retained EU law aspects of the decision rather than the detail of the underlying dispute, but for context the claimant, Mr Lipton, claimed compensation for a cancelled flight from Milan to London under an EU regulation, Regulation (EC) 261/2004. The airline claimed that no compensation was due as the 'extraordinary circumstances' exception applied due to the captain's illness. The airline lost and was ordered to pay compensation.

Roadmap for Retained EU law and impact of TCA

Green LJ took the opportunity to explain how the English court should approach Retained EU law and how English law can automatically be modified by a very broad provision in the EU (Future Relationship) Act 2020 (**EUFRA**). Based on Green LJ's nine basic principles (and slightly expanded for ease of understanding):

1. Consider whether the 'old' EU law is Retained EU law. This requires looking at the European Union (Withdrawal) Act 2018 to see if the 'old' EU law (eg EU legislation, CJEU case law, general principles of EU law) has been retained. In this case Regulation (EC) 261/04 was retained, as at 11pm on 31 December 2020, as direct EU legislation under s3.

2. Consider whether the Retained EU law has been amended or even revoked. In this case, the EU regulation took effect in English law as amended by one of a raft of Brexit statutory instruments that came into force at the end of last year: the Air Passenger Rights and Air Travel Organisers' Licensing (Amendment) (EU Exit) Regulations 2019.

3. Apply a purposive construction. This requires taking into account recitals and other principles referred to in the retained regulation and recitals.

4. To the extent necessary, use provisions of international law which are incorporated by reference in the regulation as an aid to interpretation.

5. Apply CJEU case law pre-1 January 2021 to determine the meaning and effect.

6. Apply general EU law principles, as recognised in pre-1 January 2021 CJEU case law and as derived from the Charter of Fundamental Rights and the TFEU, as an aid to interpretation.

7. The Court of Appeal (and Supreme Court) may depart from retained CJEU case law or any retained general principles "if it considers it right to do so".

8. The TCA and EUFRA may be relevant to the effect of existing English law if the subject matter of the English law overlaps with the subject matter of the TCA and/or EUFRA, and insofar as domestic law does not already cover the subject matter of the TCA.

9. If the English law does not already reflect the substance of the TCA then the English domestic law "takes effect in the terms of the TCA".

This final limb is perhaps the most striking. It reflects s29 EUFRA.

Section 29 EUFRA modifies 'existing domestic law' if not consistent with the TCA

Section 29 EUFRA modifies existing English law insofar as it is not the same as the TCA. 'Modify' includes amend, repeal and revoke. Green LJ called s29 a 'sweeping up mechanism'.

Green LJ explained that s29 is not just a principle of interpretation. Section 29 has the ability to modify automatically existing English law where there is 'inconsistency, daylight, lacuna' between the existing English law and the TCA.

There are some limitations to s29. For example, it only applies to 'existing domestic law'. This is defined to mean (in summary) English 'enactments' that were passed or made before, and 'any other domestic law' as it has effect on, the coming into force of the TCA. It would therefore appear not to apply to any new enactment passed after this date.

Green LJ refers, in addition, to two statutory clarifications:

- s29 only applies to the extent necessary. It does not modify a domestic law that is already consistent with the TCA; and
- s29 only applies where necessary for complying with the international obligations of the UK under the TCA.

Comment

Anyone needing to look at Retained EU law will want to refer to Green LJ's judgment to cross-

check their analysis. It is likely that many judges will also be referring to it, so advocates may want to order their submissions accordingly.

The ruling reminds us how the terms of the TCA can impact on private disputes where the subject matter of the dispute overlaps with the subject matter of the TCA. The TCA is wide-ranging. It covers many areas in which we see commercial disputes – for example public procurement, energy, IP, and transport.

The impact of an overlap could be most acute where the broad sweeping-up provision in s29 is engaged. It is not a surprise to see such a provision, but it has the capacity to introduce uncertainty and argument. If s29 applies, in order for a private party to know what English law says, it demands that the party interpret the UK's obligations in the TCA (some of which are phrased in extremely broad terms), determine whether existing English law is 'the same', and if not, read across the TCA into the existing English law. It is not hard to imagine disputing parties reaching different conclusions when conducting that exercise.

It is difficult to predict exactly how often we will see s29 apply, although we may see parties running arguments that it should, including for purely tactical reasons in some cases. It should only apply where existing English law is not consistent with the TCA. To the extent that the TCA is based on shared ideals which underpin existing EU law, in many cases it may be possible to assume that existing English law as at the end of last year was largely compliant with the TCA. The scope of application of s29 may therefore be slim.

Finally, the events in this case occurred in 2018, while Mr Lipton's claim originally commenced around 2019. As the events took place prior to the end of the Brexit transition period it is not entirely clear why the Court of Appeal decided to look at Retained EU law, rather than just apply the original EU regulation. However, this does not detract from useful principles in Green LJ's judgment, even if they are *obiter*.

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Contract

No intimidation and economic duress in loan restructuring

Oliver James Morley (t/a Morley Estates) v Royal Bank of Scotland Plc [2021] EWCA Civ 338, 11 March 2021

A bank had threatened, during negotiations to restructure a loan, that it would appoint a receiver if no agreement was reached. That threat did not amount to intimidation or economic duress on the facts of the case. A vital ingredient of any claim of intimidation or economic duress is that the threatened party had in fact been coerced, which it had not been here: the claimant had freely agreed to the arrangement. The bank was also not subject to an implied duty to provide banking services with reasonable care and skill given the expiry of the loan agreement, following which the relationship was one of mortgagor and mortgagee. Nor had the bank breached any duties of good faith, with its actions at all times rationally connected to its commercial interests.

Mr Morley, a commercial property developer, appealed against the first instance decision dismissing his claims against the respondent bank in which he alleged intimidation and economic duress and breaches of the bank's claimed duties to provide banking services with reasonable care and skill, and to act in good faith.

Mr Morley had borrowed GBP75 million from the bank in 2006, secured on his portfolio of properties. The value of that portfolio had drastically declined during the financial crisis and Mr Morley was unable to repay the loan upon the expiry of its term in December 2009. Rather than enforce its security, the bank engaged in negotiations with Mr Morley to restructure the loan, eventually agreeing a "split deal" by which some of the loan was written off, some of the properties were transferred to a subsidiary of the bank, and Mr Morley retained the remainder in exchange for a payment to the bank.

Five years later, Mr Morley claimed that:

- He had been coerced into concluding the agreement so that the agreement was voidable for economic duress. The relevant coercion was said to be a threat from the bank that it would exercise its rights as mortgagee to appoint a receiver and sell the properties if an agreement was not reached.
- The bank breached the duties owed to him under s13 Supply of Goods and Services Act 1982 to provide banking services with reasonable care and skill.
- The bank had breached its duty of good faith.

Upholding the **first instance decision** of Kerr J, the Court of Appeal dismissed the appeal.

No intimidation or economic duress without coercion

The court held that there could be no intimidation or economic duress where there had been no coercion. Mr Morley had not been coerced by the bank's threat: the parties had continued to negotiate and eventually reached an agreement initially proposed by Mr Morley himself.

Males LJ repeated the essential ingredients of the tort of intimidation: (i) a threat by the defendant to do something unlawful or "illegitimate"; (ii) that is intended to coerce the claimant to take or refrain from taking some course of action; (iii) which in fact, coerces the claimant to act or not act; (iv) causing the claimant to suffer loss or damage. The court emphasised coercion as a key ingredient of intimidation. This was also the case for economic duress, regardless of whether the threat was to do an unlawful or lawful act.

Rather than being the result of coercion, the agreement was the result of a robust negotiation between commercial parties, each of which had legal advice. Mr Morley never submitted to the bank's demand and the bank did not carry out its threat. This was supported by the fact that MrMorley took no steps to set aside the agreement until five years later, which both demonstrated his affirmation of the agreement and negated any argument of coercion.

No duty to provide banking services with reasonable care and skill in a mortgagee/ mortgagor relationship

Mr Morley argued that the bank was in breach of a duty to provide banking services with reasonable care and skill, which he claimed was an implied term of the loan agreement, derived from s13 Supply of Goods and Services Act 1982. The court concluded that no such duty could be implied.

Upon the expiry of the loan term, the original services provided for under the loan agreement (ie making funds available for drawdown), and any terms which might be implied into providing those services, had come to an end. After the expiry of the loan term and Mr Morley's failure to repay the sums advanced, he was in default and the only question was whether the bank would forbear to enforce its security while the parties negotiated a solution or whether it would exercise its undoubted right to appoint a receiver under the mortgage. That relationship was governed by the express terms of the mortgage and by the equitable principles applicable to that relationship. It was not appropriate to imply a contractual term into a mortgage (which, in any event, is not a contract for the supply of services). Moreover, a point not addressed by the court at first instance was that any receiver appointed by the bank would have been the agent of the mortgagor (Mr Morley), not the bank. Any sale of the properties would therefore have been a decision of the receiver, conducted in accordance with the receiver's duties, owed to Mr Morley (and not the bank).

Even if the bank had owed a duty of reasonable care and skill to Mr Morley, the Court of Appeal upheld the dismissal of the two alleged breaches of that duty. The first was that the bank's dealings had failed to follow its own internal policy guidance, which emphasised the bank's objective to support viable businesses. It was held that the aspirational language of a purely internal document provided no secure foundation for any breach of duty. The second was that the bank failed to act as a lender in its dealings with Mr Morley, and instead acted as a potential buyer of the property portfolio. This was rejected on its facts: the bank's objective throughout had been to recover as much as possible of the amount which it had loaned to Mr Morley. It was unnecessary that a mortgagee have a "purity of purpose", meaning that its only motive was to recover (in whole or in part) the debt secured by the mortgage.

No duty to act in good faith

Mr Morley claimed that the bank was under a duty to act in good faith, or not to act vexatiously or contrary to its "legitimate commercial interests", under an implied term of the loan agreement. The court held that it would not necessarily accept the bank was under such a duty but, even if it had been, the argument failed on the facts. All of the bank's actions were rationally connected to its commercial interests and there was therefore no breach of any duty.

Comment

The ruling confirms the limited scope of duties owed by a bank to a borrower once the loan agreement has come to an end. It also restates the legal tests involved in claiming intimidation or economic duress. It emphasises that the threat must have in fact coerced the claimant, which will be a matter of fact in each case. Although the court did not consider the issue, even if coercion had been demonstrated, Mr Morley would nevertheless have needed to demonstrate that the bank's undoubted right to appoint a receiver was unlawful or "illegitimate", a further key ingredient of the legal tests for intimidation and economic duress. That would likely have been a challenging argument.

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Liquidated damages clause in aircraft purchase agreement not an unenforceable penalty

De Havilland Aircraft of Canada Ltd v SpiceJet Ltd [2021] EWHC 362 (Comm), 23 February 2021

The claimant aircraft manufacturer claimed damages under an aircraft purchase agreement for the non-payment of pre-delivery payments (**PDPs**) following the defendant's failure to pay the PDPs and to take delivery of a number of aircraft. The court granted summary judgment in favour of the claimant, and found that the liquidated damages clause in the agreement was not an unenforceable penalty.

The defendant entered into an aircraft purchase agreement with the claimant, under which it agreed to buy 25 aircraft. The defendant paid for and took delivery of the first five aircraft, but failed to pay the PDPs in respect of the remaining aircraft and failed to take delivery of the next three aircraft that were due to be delivered.

As a result, the claimant terminated the purchase agreement and, in reliance upon a liquidated damages clause, sought damages in respect of all of the undelivered aircraft for USD42.95m.

The claimant sought summary judgment.

The defendant raised three main defences:

1. The defendant's obligation to pay the PDPs had been suspended by agreement.
2. The claimant was in breach of its contractual obligation to assist the defendant in arranging finance and such breach rendered the defendant's compliance with its contractual payment obligations impossible.
3. The liquidated damages clause contained in the purchase agreement amounted to an unenforceable penalty.

Suspension of the obligation to pay the PDPs

The defendant argued that its contractual obligation to pay the PDPs for the undelivered aircraft had been suspended due to the wording used in a later document, Change Order 6 (**CO6**), which amended the terms of the purchase agreement. CO6 provided that the Scheduled Delivery Months for aircrafts 9-25 would be suspended and that the parties would make good faith efforts to agree a delivery date in the future.

The defendant argued that the way the purchase agreement was drafted meant that the liability for payment of the PDPs was linked to a specified Scheduled Delivery Month (as they were prescribed as being due a certain number of months prior to the Scheduled Delivery Month) and therefore if the Scheduled Delivery Months had been suspended, so had the obligation to pay the corresponding PDPs. The defendant argued that it did not make business sense for it to pay for aircraft when there was no agreement as to when they would be delivered.

The judge held there should be summary judgment for the claimant on this issue because, inter alia, CO6 expressly provided that all terms of the purchase agreement would remain unchanged and would continue to be binding on the parties. The judge was also persuaded by the claimant's argument that there was a long stop date of August 2023 for delivery of the aircraft, so the PDP payment was not suspended indefinitely and the claimant remained under an obligation to manufacture and deliver the aircraft, and so required the security of the PDPs to do so.

The claimant's obligation to provide assistance in arranging finance

The defendant also sought to argue that the claimant was in breach of its contractual obligation to assist in arranging finance for the PDPs and this breach rendered the defendant's compliance with its payment obligations impossible.

The judge, again finding for the claimant, held that due to the wording of this provision, any assistance given by the claimant would have been very limited and, even if the claimant was obliged to do something more than just consult with third parties and the defendant to develop financing procedures, the obligation was too uncertain to be enforceable. Therefore, it was not arguable that a breach of this obligation could amount to a defence to non-payment of the PDPs. The judge also drew attention to the fact that the defendant's arguments were inconsistent with the terms of the purchase agreement, which provided that all of the defendant's payments thereunder were unconditional.

Penalty clause

Finally, the defendant argued that the liquidated damages clause in the purchase agreement was an unenforceable penalty clause and unsuitable for determination on a summary basis because more evidence of the factual matrix was needed to assess the reasonableness of the bargain reached. This included the price of the aircraft and the regularity with which liquidated damages clauses are used in the industry. Further, the defendant pointed to the fact that no evidence had been adduced by the claimant quantifying the maximum conceivable loss suffered in respect of each aircraft (in breach of the fourth proposition set out by Lord Dunedin in ***Makdessi v Cavendish***).

In response, the claimant argued that no evidence is required as to the actual loss suffered as that would subvert the purpose of the liquidated damages clause, which was to avoid having to go through the time and expense of proving the actual loss suffered. The judge agreed with the claimant, noting that the defendant had not been able to cast doubt on the liquidated damages figure in the purchase agreement, which had been agreed by the parties at the time, and therefore the liquidated damages clause was not an unenforceable penalty.

Comment

This decision highlights the importance placed by the courts on the bargain reached by the parties at the time the contract was entered into, particularly with regard to liquidated damages clauses. It also reinforces the importance of ensuring that any contractual obligations are drafted in such a way as to provide certainty and shows the continued importance of hell or high water clauses within contracts.

The defendant has appealed and the hearing is currently listed for Spring 2022.

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Evidence

Reforms to witness statements (PD 57AC): sense, finally, after a century of psychological research; or, a triumph of form over substance?

In 1995, Elizabeth Loftus and Jacqueline Pickrell published a **paper** showing that it was possible to implant an entire false memory of something that never happened. In one of the first successful cases of memory implantation, the subject was supplied with three true events that happened in his childhood and one false one: that he had been lost in a mall as a child. The subject came to believe he had in fact been lost in the mall.

The Witness Evidence Working Group was born, in Spring 2018, out of a concern on the part of the judges of the Commercial Court that factual witness statements were often not effective in performing their core function of achieving best evidence at proportionate cost in Commercial Court trials. The **Working Group's Final Report** was published in late 2019. A year later, in October 2020, the Working Group published its **Implementation Report** including a draft of a new Practice Direction. That Practice Direction, memorably named 57AC, came into force today, 6 April 2021.

The comments of Mr Justice (now Lord) Leggatt, in ***Gestmin v Credit Suisse***, form the foundations: human memory is not a simple mental record of a witnessed event that is fixed at the time of the experience and fades over time. It is a fluid and malleable state of perception concerning an individual's past experiences that is vulnerable to being altered by a range of influences, such that the individual may or may not be conscious of the alteration.

Practice Direction

The Practice Direction reminds us that we have drifted from the core principle that a written witness statement should only be used where the evidence of the witness is needed on a disputed issue and where it represents the equivalent of oral evidence-in-chief.

Statement of Best Practice – key points

A Statement of Best Practice forms an appendix to the Practice Direction. Among other things, it serves as a reminder that:

- the content of a trial witness statement should only cover what that witness would have said as oral evidence-in-chief;
- many matters of fact do not require witness evidence;
- the facts in the statement must be known to the witness personally: either because they were experienced by one of their primary senses or were internal to their mind; and
- if given orally as evidence-in-chief, no leading question would be permitted and you could only show a document to refresh the witness' memory if the witness saw or created the document while the facts were still fresh in their mind.

The Statement of Best Practice also provides that those helping a witness to draft their statement should:

- try to avoid anything that might alter or influence recollection;
- remind the witness to be concise;
- let the witness use their own words;
- ensure that the trial witness statement states whether the witness' recollection has been refreshed and lists any documents that have been "*referred to for the purpose of providing the evidence set out in their trial witness statement*"; and
- aim for as few drafts as possible to avoid corrupting the witness' recollection.

Referring to documents in a witness statement

The Statement of Best Practice provides that documents should only be referred to where those documents are necessary, for example, to prove the content, date or authenticity of the document or to explain the witness' contemporaneous understanding of the document. Documents should not be exhibited to the trial witness statement unless they have not previously been disclosed. The trial witness statement should not quote at length from documents, argue the case, set out a narrative that is already in the contemporaneous documents, or include commentary on other evidence.

A new compliance certification/statement

Finally, there is a statement the witness must make to confirm compliance with the Practice Direction (in addition to the Statement of Truth) and the legal representative must also certify compliance.

Getting it wrong – sanctions

The sanctions for non-compliance include the court:

- refusing to rely on all or part of a trial witness statement;
- ordering the re-drafting of a trial witness statement;

- making an adverse costs order; and
- ordering the witness to give oral evidence-in-chief at trial.

Comment: Missing the narrative?

While very well intentioned, the reforms are not without controversy.

They will have practical implications: on time estimates for trial, on what happens at pre-trial reviews, on there being less cross-examination generally, if witness statements are shorter, and on how witnesses deal with being cross-examined on what documents they have used to refresh their memory and why.

The most significant change, though, is that trial witness statements have traditionally, albeit inappropriately, been the place for providing some form of narrative arc to a party's case. They have been the place where the party's account of what happened was recorded. What the new Practice Direction and Statement of Best Practice do not explain is where the place is for this narrative advocacy, if it is not in witness statements. At trial, it may be that advocates may move to longer opening submissions for this purpose.

For those hoping to negotiate a settlement, this is far too late. The Working Group even considered, with rose tinted glasses donned, including a requirement that parties should be able to agree certain facts before trial (which, despite ultimately not fitting within their witness statement reforms, was something they thought judges ought to order where appropriate). Even this approach does not deal with how the parties will set out their narrative as to facts which are not agreed. The most likely place seems to be via inter-solicitor correspondence. This may not necessarily be as persuasive for the recipient, given it will lack the formality and Statement of Truth of an exchanged witness statement.

The reforms are admitted not to be about saving costs. The question is whether they will save the truth.

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Sanctions

New guidance on monetary penalties and new UK corruption sanctions regime

The Office of Financial Sanctions Implementation (**OFSI**) has updated its guidance on the monetary penalties which it can impose for breaches of financial sanctions, and the UK Government has announced a new global corruption sanctions regime which may impact companies dealing with certain individuals (and related parties) involved in notorious corruption cases abroad.

OFSI Monetary Penalty Guidance

Key updates include:

- a suggestion that OFSI may no longer engage in correspondence requiring details of how a party will improve compliance practices as a first level of enforcement: in the first instance OFSI may issue a warning;
- an indication that confusion over obligations under other international sanctions regimes will be treated with less leniency where there is a failure to comply with UK sanctions regulations;

- the removal of a distinction between direct and indirect provision of funds to sanctions targets: any provision of funds may now be treated equally;
- a potential willingness to impose financial penalties even if the case has been prosecuted through the criminal process;
- that OFSI will objectively assess the level of knowledge about the sanctions regime an individual or company ought to have when considering what enforcement action to take – the prior guidance suggested a more lenient approach to knowledge of the sanctions regime;
- removing prior guidance that acting swiftly to remedy the cause of a breach was an important factor in avoidance of a penalty, suggesting that quickly remedying a problem may be given less credit in the future; and
- in regards to calculation of any penalty: although the revised guidance essentially adopts the same approach as the former guidance, especially regarding the importance of voluntary disclosure, in considering the proportionality of a penalty, OFSI has indicated that it will look at a holistic assessment of all the other factors present in the case.

While drawing lessons from the updated guidance is somewhat of an uncertain business and requires the parsing of OFSI's intent behind the deletion of certain statements from the prior guidance, the overall impression does seem to be a noticeable shift in OFSI's approach and suggests that we may see more active sanctions enforcement in the UK and a more aggressive pursuit of financial penalties.

New global corruption sanctions regime

On 26 April 2021, the Government introduced a new global corruption sanctions regime. Under this regime, a Minister has the ability to designate individuals and companies who are suspected of involvement in corruption, and in fact there have already been sanctions made against 22 individuals involved in corruption cases in Russia, South Africa, South Sudan and Latin America. These new sanctions may impact companies operating across riskier jurisdictions, for example those with a presence in jurisdictions scoring poorly in Transparency International's corruption index.

What does this mean?

The form of the UK's approach to international sanctions was uncertain immediately following its departure from the EU. By signalling OFSI's potentially tougher stance on sanctions enforcement and developing a new global corruption sanctions regime, the UK Government may be setting a more ambitious agenda, with OFSI potentially poised to act more aggressively.

Given the potentially severe consequences for businesses and individuals in the event of breach of sanctions, developments in this area should continue to be followed closely – particularly if OFSI does begin to engage in enforcement that is more frequent, more aggressive, or both.

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Tort

Claim against parent company in tort for inducing breach of contract by subsidiary has no real prospect of success

Kawasaki Kisen Kaisha Ltd v James Kemball Ltd [2021] EWCA Civ 33, 18 January 2021

A claim for inducing breach of contract had no real prospect of success, despite the fact that a subsidiary's breach of contract was the known and inevitable result of its parent company's decision to form a joint venture. The court's consideration of the tort of inducing a breach of contract in the context of a parent/subsidiary relationship is interesting as it is not uncommon for a subsidiary's business dealings to be impacted by decisions made at group/parent level.

Performance of subsidiary's obligations dependent on business from its parent

The claimant (**KKK**) is the Japanese parent of an international transport and shipping company (the **K-Line group**). The K-Line group ceased to operate its own container liner business in 2018 after KKK decided to merge that business through a joint venture (the **Joint Venture**). This meant that KKK no longer required haulage services from **K-Euro** (its indirectly owned UK subsidiary). In turn, K-Euro was no longer able to provide the defendant (**JKL**) with the minimum number of road haulage jobs it had outsourced to them under a **Service Agreement**.

JKL sued: (i) K-Euro for breach of contract under the Service Agreement; and (ii) KKK in tort for inducing breach of that contract by K-Euro.

This decision concerned JKL's attempt to show that its claim against KKK satisfied the merits test in order to get permission to serve proceedings on KKK in Japan.

A reminder – tort of inducing breach of contract

The four key elements of the tort of inducing breach of contract are:

1. **Breach of contract**: B must breach its contract with C;
2. **Inducement**: A must induce B to breach that contract with C by persuading, encouraging or assisting B to do so;
3. **Knowledge**: A must know of the contract between B and C and know its conduct will have the effect of inducing B to breach that contract; and
4. **Intention**: A must intend to procure the breach of contract by B either as an end in itself or as the means by which it achieves some further end.

To satisfy the merits test to serve out of the jurisdiction, a claimant must establish that there is a serious issue to be tried. In other words, the case must have a real as opposed to fanciful prospect of success.

Inducement and intention

It was the second and fourth elements, namely inducement and intention, which were primarily in dispute.

Lord Justice Popplewell (with whom David Richards LJ and Henderson LJ agreed) emphasised three key aspects of the elements of the tort relevant to the case:

1. Conduct cannot qualify as inducement if it does no more than prevent B from performing the contract with C as one of its consequences. There must be some conduct by A amounting to persuasion, encouragement or assistance of B to break the contract with C.

2. The participation by A in B's breach must operate on the mind and will of B so as to qualify as causative participation as an accessory to B's breach. A's conduct is not capable of amounting to inducement if it is not capable of influencing a choice by B whether or not to breach the contract.

3. The mental element of the tort requires that there must be an intention that the breach of the contract must at least be the means to an end, rather than simply the foreseen or intended consequence of the tortious conduct.

No inducement to breach contract

JKL was not able to convince the Court of Appeal that there was a serious issue to be tried relating to the allegation that KKK had induced K-Euro to breach the Service Agreement.

The Court of Appeal found that K-Euro did not have a choice as to whether it breached the Service Agreement; it was wholly dependent on KKK for its performance or non-performance. K-Euro's breach of the Service Agreement was simply a consequence of the establishment of the Joint Venture, which KKK was free to do in its own commercial interests.

Nor was JKL able to convince the court that there was encouragement or persuasion amounting to inducement by KKK. Even though K-Euro was a subsidiary of KKK, they shared certain senior management and KKK knew of the Service Agreement and that the Joint Venture would cause K-Euro to breach it, this did not surmount the obstacle that in reality K-Euro had no choice as to whether or not it breached the Service Agreement. In order for KKK to have done something that could constitute inducement, "it must do something capable of influencing whether or not K-Euro breached the Service Agreement so as to operate on its mind and will". This was not the case. K-Euro was entirely dependent on what KKK chose to do in respect of the Joint Venture and had no choice whether to breach the Service Agreement.

JKL also failed in its argument that KKK's withdrawal of container haulage business to K-Euro amounted to inconsistent dealings and that this was sufficient to constitute inducement. The court found that not only was the conduct concerned not capable of operating on the mind or will of K-Euro, but there were no 'dealings'. On the contrary, the complaint was that KKK provided no business to K-Euro, but neither was it under any obligation to do so. Popplewell LJ did not accept that lawful inactivity is conduct which can attract accessory liability.

No intention to procure a breach of contract

JKL was unable to meet the necessary merits threshold that KKK had intended to procure the breach of the Service Agreement by K-Euro. Popplewell LJ found that the breach of the Service Agreement was neither the end being pursued by KKK in setting up the Joint Venture nor intended as a means to its end (namely, the commercial and economic benefits of its restructuring of the container liner business). KKK was able to set up the Joint Venture whatever the wishes of K-Euro and JKL. The breach of the Service Agreement was merely the consequence of doing so, "not an end or a means to that end".

Merits test not satisfied

The Court of Appeal therefore allowed the appeal and set aside the order granting permission for JKL to serve the claim on KKK out of the jurisdiction on the basis that the claimant had failed to meet the necessary merits threshold that the claim had a real prospect of success.

Comment

The judgment is a helpful reminder of the legal principles applicable to a tortious claim for inducing breach of contract. Liability in this tort requires conduct amounting to persuasion, encouragement or assistance to induce the contract breaker to breach its contract and an intention that the breach of contract is, at least, a means to an end rather than simply the foreseen or intended consequence of the conduct. In order to establish the inducement element of the tort, the conduct must operate on the mind or will

of the contract breaker so as to be capable of influencing a choice as to whether or not to breach the contract. Simply preventing performance of a contractual obligation is not enough.

The judgment makes clear that the circumstances in which a parent company will assume liability under this tort for decisions which impact its subsidiary's contractual relationships are limited, even where a subsidiary's breach of contract is the known and inevitable result of its parent company's business decision. This is a risk to be considered if contracting with a subsidiary whose ability to meet its contractual obligations is dependent on the actions of other companies within the group.

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Key contacts

If you require advice on any of the matters raised in this document, please call any of our Litigation and Dispute Resolution partners, your usual contact at Allen & Overy, or Karen Birch.

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