HERBERT SMITH FREEHILLS
DISPUTE RESOLUTION

LITIGATION E-BULLETIN

A LITIGATOR'S YEARBOOK: 2015 (ENGLAND AND WALES)

In this bulletin we look back at some of the key developments of 2015 from the perspective of the commercial litigator, covering a range of topics including contract law, privilege, settlement, jurisdiction and various aspects of court procedure. We hope you will find something of interest, whether you just want a reminder of developments in a few areas, or you're trying to catch up on a year that's flown by.

Contract

This has been a big year for the development of English contract law, with significant Supreme Court decisions covering the law of penalties, contractual interpretation, implied terms, and the assessment of damages for breach of contract.

In November, the Supreme Court effectively rewrote the law on penalties, rejecting the traditional test of whether a clause is a "genuine pre-estimate of loss" and therefore compensatory, or whether it is aimed at deterring a breach and therefore penal. The new test is whether the clause is out of all proportion to the innocent party's legitimate interest in enforcing the counterparty's obligations under the contract (see Supreme Court rewrites English law rule on penalties). In June, the Supreme Court delivered a significant judgment on

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contractual interpretation, re-emphasising that commercial common sense should not be used to undervalue the importance of the actual words used. The decision reinforces the recent trend in favour of natural meaning, with the courts generally seeking to downplay considerations of commercial common sense unless there is some ambiguity or lack of clarity in the language used (see Supreme Court re-emphasises importance of "natural meaning" in interpreting contracts).

Earlier this month, the Supreme Court clarified the law on when the court can imply a term that the parties have not expressly included in their contract. It endorsed the traditional approach that the term either must be so obvious as to go without saying or must be necessary to give business efficacy to the contract, emphasising that reasonableness in itself is not sufficient (see Supreme Court clarifies test for implying terms into a contract).

In July, the Supreme Court gave strong support to the overriding compensatory principle of contractual damages, confirming that it applies in the case of an anticipatory breach of a contract for a one-off sale. This means that events occurring after the date of breach can be taken into account in assessing the claimant's loss, even if those events were not seen as inevitable or even likely at the date of breach (see Contractual damages: Supreme Court confirms overriding compensatory principle in case of one-off sale).

The past year has also provided a number of occasions for the courts to consider the extent to which contracting parties owe one another duties of good faith.

- In a decision in February, the High Court implied a duty of "honesty and integrity" into a vehicle recovery contract, applying the general principles summarised in the well-known 2013 decision in *Yam Seng* (see High Court implies duty of honesty and integrity into vehicle recovery contract).
- Also in February, the High Court held that an innocent party's decision whether to terminate or affirm a contract following a counterparty's repudiatory breach had to be exercised in good faith, arguably expanding the principle that an innocent party cannot affirm a contract unless it has a "legitimate interest" in performing and claiming the contract price rather than claiming damages (see Good faith principles applied to question of whether innocent party could keep contract alive following repudiatory breach).
- On the other hand, in a decision in March, the High Court refused to imply a duty of good faith in relation to a contractual right to amend a loan note instrument, where there was extensive and detailed contractual documentation and the parties were professionally advised and at arm's length (see High Court refuses to imply duty of good faith in relation to exercise of contractual right).

This year we have also launched our series of contract disputes practical guides, designed to provide clients with practical guidance on some key issues that feature in disputes relating to commercial contracts under English law. The first three editions, listed below, can be found on the home page for the series, together with information on how to access the accompanying webinar and podcast for each edition. Future editions will cover topics such as good faith, termination and remedies for breach.

- When do you have a binding contract? It may be more (or less) often than you think
- What does your contract mean? How the courts interpret contracts
- Pre-contractual statements: When can they come back to bite you?

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Privilege

In June, the Hong Kong Court of Appeal refused to follow the narrow

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interpretation as to who from within a client organisation constitutes the "client" for the purposes of legal advice privilege, as established in the (much criticised) English Court of Appeal decision in the *Three Rivers* case in 2003 (see Hong Kong Court of Appeal rejects narrow interpretation of "client" and adopts broader test for legal advice privilege). The Hong Kong Court of Appeal held that legal advice privilege is not restricted to communications between a lawyer and a client, but will protect internal confidential documents of the client organisation which are produced for the dominant purpose that they or their contents be used to obtain legal advice. Unfortunately, however, that is not the test in England and Wales, and *Three Rivers*remains binding authority here, for the time being at least.

Closer to home, the *Property Alliance Group v RBS* case, relating to alleged LIBOR manipulation, has provided lots to consider in relation to privilege:

- In June Mr Justice Birss confirmed that, in principle, a right analogous to without prejudice protection applies to communications that are part of genuine settlement discussions with the FCA (and therefore presumably other regulators). He also confirmed that the principle of "limited waiver" applies where privileged documents are provided to a regulator so that privilege is not lost more widely. However, rather surprisingly, the court held that the defendant bank had waived both legal professional privilege and without prejudice protection in material provided to the regulators and communications with them because of the bank's reliance on the subsequent regulatory decisions (seeImportant High Court decision on waiver of privilege and without prejudice protection). This decision is subject to a pending appeal.
- In early November, Mr Justice Snowden confirmed that legal advice privilege will protect not only actual legal advice, but also factual information contained in a lawyer's communications to the client (see High Court confirms legal advice privilege can include lawyer's summary of facts). That should not really have been in doubt, but in the previous decision referred to above Birss J had commented, somewhat unhelpfully, that he could not see why factual summaries in a lawyer's notes to the client would be privileged, even if the advice set out in the notes was privileged.
- Later in November, Mr Justice Birss rejected the claimant's claim to assert litigation privilege over secret recordings of meetings with potential witnesses (who were former employees of the defendant), because the witnesses were deceived into believing that the meetings were to discuss business opportunities rather than evidence for litigation. In the circumstances, the court was not persuaded that the meetings were for the dominant purpose of litigation (see No litigation privilege where witnesses were deceived as to true purpose of meetings).

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Disclosure

The use of predictive coding for disclosure document review has received a boost with a decision of the Irish High Court in March endorsing its use (see Irish court endorses use of predictive coding for disclosure). Predictive coding uses software to help prioritise documents for review, thereby potentially saving time and costs. To date there is no reported English decision endorsing the technology, but its use in this jurisdiction is becoming more widespread and Herbert Smith Freehills has used the technology in a number of matters on behalf of our clients.

A High Court decision in June underlines the importance of appropriate quality control procedures where hard copy documents are scanned and searched by reference to OCR copies (see Party in breach of unless order for disclosure due to failures in OCR process). In this case the failure to ensure the OCR copies were of sufficiently high quality meant that the court was not satisfied that a reasonable search had been conducted; as a result, the relevant party was in breach of an

“unless order” for disclosure and the claim was struck out.
Important changes to the US Federal Rules of Civil Procedure, which govern the conduct of civil proceedings in US federal district court, took effect on 1 December 2015. The most significant amendments limit the scope of civil discovery and reduce the potential for sanctions for the unintentional loss or destruction of e-mails and other electronically stored information (see Amended US Federal Rules of Civil Procedure narrow availability of civil discovery and sanctions).

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Court fees and procedures

This year has brought huge increases in court fees, and unfortunately there are indications of more to come. In March, in the face of widespread opposition, the government implemented new percentage-based issue fees for money claims over £10,000. These are calculated as 5% of claim value, subject to a cap of £10,000, so that any claim worth more than £200,000 costs £10,000 to issue - roughly a fivefold increase over the previous maximum fee. Then in July, the government announced that it was consulting on a second round of increases, most significantly to increase the cap from £10,000 to "at least £20,000" or possibly to remove it altogether (seeAnother round of massive court fee hikes proposed). The consultation closed on 15 September and the government's response is awaited.
On a more positive note, in an effort to streamline court procedures in response to demands of court users, two new pilot schemes (the "Shorter Trials Scheme" and the "Flexible Trials Scheme) have been introduced for claims commenced from 1 October and will run for a period of two years (see New pilots of streamlined procedures for claims in the main business courts).
Also from 1 October, there is a new specialist Financial List in the High Court to deal with financial markets claims for more than £50 million, or which require particular expertise or raise issues of general importance in the financial markets. There is also a new test case scheme, which will be piloted for a period of two years. The scheme is intended to deal with claims that raise issues of general importance to the financial markets in relation to which immediately relevant authoritative English law guidance is needed (see New specialist Financial List and pilot of Financial Markets Test Case Scheme).

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Relief from sanctions

This year has offered a welcome respite from the previous flood of case law considering applications for relief from sanctions for breaches of court rules and orders. The Court of Appeal’s November 2013 *Mitchell* decision had set down a very tough approach, which led to a flurry of decisions in which harsh sanctions were imposed for relatively minor breaches. Calm was restored following the Court of Appeal's further decision in *Denton* in July 2014, which replaced the*Mitchell* guidance with a more flexible three-stage test (see Court of Appeal softens Mitchell guidance but insists no return to old culture of non-compliance).
Overall the position we seem to have reached is that the courts are prepared to be tougher where it is warranted, so there is less scope for parties to get away with bad behaviour than there was before the Jackson reforms introduced tighter rules. However, the court is less likely than in the immediate post-*Mitchell* period to take drastic measures where there is a mere slip-up by a party who is genuinely trying to comply – though each case will turn on its facts and the only safe course is of course careful compliance.
But the dangers don't just lie in breaking the rules – in the post-*Denton*environment there are also very serious risks in trying to hold your opponent to account for a breach. In *Denton* the Court of Appeal made it clear that the courts would penalise parties who act unreasonably in trying to take advantage of an opponent's breach to get some tactical benefit. In May this year there was a decision that illustrates the risks (*Viridor v Veolia* - see Relief from sanctions: how far has the pendulum swung back?). In that case, a defendant refused to

consent to an extension of time for service of particulars of claim, in circumstances where a new claim would have been time barred. The defendant was penalised in indemnity costs for seeking to take "opportunistic and unreasonable advantage" of the claimant's mistake when it was obvious, the court said, that an extension of time was appropriate.

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Costs budgeting

Following the expansion of the costs budgeting regime in April 2014 to cover all claims for less than £10 million (subject to the court's discretion to apply, or disapply, the rules in any appropriate case) we have continued to see the courts taking a tough line in reviewing and reducing parties' budgets. In March, for example, the Technology and Construction Court criticised a claimant's costs budget as "unreliable, disproportionate and unreasonable" and set, in effect, a composite budget for both past and future costs which was less than the claimant had already incurred (see High Court highly critical of claimant's costs budget).

Further changes to the costs budgeting rules are expected to be introduced next year, aimed at encouraging parties to agree one another's costs budgets, or as many phases as possible. In particular, based on papers released by the Civil Procedure Rule Committee, it seems that budgets will need to be filed earlier (at least 21 days before the first case management conference, rather than 7 as currently) and there will be a new requirement to file "budget discussion reports" which indicate what is agreed, what is not agreed, and the grounds of dispute.

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Funding and fee agreements

In July, the Supreme Court held (by a majority of five to two) that a claimant's right to recover a conditional fee agreement (CFA) success fee and after-the-event (ATE) insurance premium from an unsuccessful defendant, under the pre-Jackson regime governing CFAs and ATE insurance, did not breach the defendant's right to a fair trial under Article 6 of the European Convention on Human Rights (see Supreme Court rules recoverable success fees / ATE premiums do not breach Article 6 rights). The Supreme Court had opened that can of worms the previous year, saying it was open to the Court to reconsider the issue, but has now firmly closed it again.

That is probably just as well, since the government announced early this year that the exception to the Jackson reforms for insolvency claims, which was due to end in April, would continue for the time being (see Jackson reforms will not be extended to insolvency proceedings from this April as planned). This means that CFA success fees and ATE insurance premiums will continue to be recoverable in proceedings brought by liquidators, administrators, trustees in bankruptcy, and companies in liquidation or administration (though recoverability was abolished for most other claims from April 2013).

In early September the Civil Justice Council issued its report and recommendations on damages-based agreements (or DBAs), which were introduced by the Jackson reforms but so far have failed to gain significant traction in the market. The report makes a number of drafting and policy recommendations aimed at improving and clarifying the statutory regime governing DBAs. The report and recommendations are currently being considered by government; the timing of any amendments is uncertain. See our post on Practical Law's Dispute Resolution blog entitled "A future for Damages-Based Agreements? Civil Justice Council recommendations for reform".

The third party litigation funding market has continued to expand in the past year, with existing funders raising new funds (eg Harbour's new £230 million fund in March and Therium's new £200 million fundraising in May) and opening new offices (eg Harbour's Hong Kong launch in September), and new participants entering the market (eg Balance Legal Capital which set up shop in the summer). On the other hand,

AIM-listed funder Juridica Investments Ltd announced in November that it is withdrawing from the market.

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Settlement / ADR

In a decision in January, the High Court struck out claims for phone hacking on the basis that they were compromised by settlement agreements previously agreed between the claimants and the defendant newspaper group. The decision is a useful reminder that even if a settlement agreement appears on its face to be drafted narrowly, by reference to a specific claim number, it may be found to have a broader effect, depending on the extent of the claims made in the original statements of case (see Settlement held to release further phone hacking claims that were not known about at the time).

In March, the Court of Appeal considered the principles governing when a settlement agreement can be set aside for fraud. The decision confirms that a fraudulently advanced case will not necessarily entitle a defendant to rescind a settlement agreement – particularly where the evidence suggests that, at the time of settlement, the defendant had at least some indication of the possibility of fraud and therefore settled "with its eyes wide open" (see Court of Appeal refuses to set aside settlement agreement despite new evidence of fraud). The Supreme Court has however granted permission to appeal against the decision.

From 1 October, almost all UK businesses selling goods or services to consumers in the EU need to comply with new requirements to provide consumers with information about ADR options, under legislation implementing the new EU ADR Directive. The new rules include obligations (in respect of complaints handling procedures) that apply to all traders regardless of whether they are committed to using ADR or intend to use it. See our Alternative Dispute Resolution briefing for details.

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Part 36 offers to settle

A new version of CPR Part 36 was introduced from 6 April and applies to offers made on or after that date. The key changes include: allowing "time-limited" Part 36 offers; clarifying the application of the rules to counterclaims and appeals; allowing the court to be told of existence of Part 36 offer following a split trial; addressing perceived difficulties relating to very high claimant offers; and clarifying the effect of Part 36 where sanctions are imposed for failure to file a costs budget. For more detail on the changes see Significant changes to CPR Part 36 from April 2015.

Although one of the changes introduced in April was to allow Part 36 offers to be automatically withdrawn once the initial offer period expires, that does not mean it's a good idea to make a "time-limited" offer in this way. If an offer is withdrawn, or if the time limit has expired in a time-limited offer, the Part 36 costs consequences will not apply. The court will take the offer into account in exercising its discretion on costs, so it may have some impact - but it will not be as predictable as under Part 36, where the costs consequences must be applied unless the court thinks it would be unjust to apply them. This point was illustrated by two cases during the year - see Think twice before withdrawing a Part 36 offer and The dangers of time-limited Part 36 offers.

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Jurisdiction

New EU rules on jurisdiction and the enforcement of judgments apply to proceedings commenced from 10 January 2015, under the recast Brussels Regulation (Regulation (EU) 1215/2012). The key practical implications for parties based both within and outside the EU are outlined here: New EU jurisdiction rules apply from 10 January: Do you know where you can sue and be sued?. Or see our Handy client guide to jurisdiction under recast Brussels Regulation: England and Wales, which includes a decision tree to help determine whether the English

court will have jurisdiction over a dispute under the new rules.
The Hague Convention on Choice of Court Agreements also came into force this year, on 1 October. The Convention aims to uphold jurisdiction clauses and make judgments obtained under those clauses easier to enforce. At the moment the Convention is of limited application, applying only as between Mexico and the EU member states (other than Denmark). However, the Convention has also been signed by the US and Singapore, and there are signs that it is gaining momentum so that ultimately it may be of far greater significance. See our article published in the November 2015 edition of PLC Magazineentitled "Hague Choice of Court Convention: gaining momentum".
Also from 1 October, a number of new “gateways” for service out of the jurisdiction at common law were introduced, expanding the circumstances in which English proceedings can be served on non-EU domiciled defendants who have no presence in England and Wales. The most significant is the new general gateway which enables claims against a defendant to be tried together in this jurisdiction where they are arise out of the same or closely connected facts, even if the further claim would not by itself fall within any gateway, subject to the court's discretion (see New “gateways” for serving proceedings on defendants out of the jurisdiction at common law).
This year also brought further case law on one-way or unilateral jurisdiction clauses (in which one party can bring proceedings in one jurisdiction only, whilst the other has the option to bring proceedings in other jurisdictions), following a 2012 decision of the French *Cour de Cassation* which cast doubt on the enforceability of such clauses in France. In March this year the same court again refused to apply a unilateral clause (see French Supreme Court refuses to apply a unilateral jurisdiction clause). However, in a decision in October, it upheld a unilateral clause where it was possible to identify objectively which courts might have jurisdiction in the case of a dispute (seeFrench Supreme Court upholds unilateral jurisdiction clause where the countries with jurisdiction could be objectively identified).

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Class action reform
A new collective action for competition claims in the Competition Appeal Tribunal (“CAT”) was introduced from 1 October 2015 (seeNew “opt-out” class action for competition claims). It allows collective proceedings to be brought on behalf of a class (whether consumer or business) on either an opt-in or an opt-out basis, subject to certification by the CAT. In opt-out cases the claim can be brought on behalf of a defined group, and aggregate damages awarded to the group, without the need to identify all the individual claimants and specify their losses. To date, there have been no proceedings commenced under the new rules.

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Other
There have been a number of interesting developments in other areas such as fraud, directors' duties and illegality.

In a decision earlier this month, the Supreme Court confirmed that the exercise of an apparently unfettered discretionary power given to directors under the articles of association of a company must only be exercised for a proper purpose. The decision is likely to be particularly relevant to battles for control of a company in circumstances where the directors may have allegiance to a particular shareholder group (seeSupreme Court confirms that company directors’ powers must be exercised for a proper purpose).
Also in relation to directors' duties, in a decision in November in the Lloyds shareholder litigation, the High Court confirmed that, in general, directors owe fiduciary duties to the company rather than directly to shareholders when providing information to shareholders about a transaction. Although broader fiduciary duties can arise in exceptional circumstances, there must be a "special relationship" over and above

the usual relationship that any director of a company has with its shareholders (see Directors' duties owed to company not shareholders when seeking shareholder approval for transaction).
In April, the Supreme Court confirmed that a company in liquidation is not prevented from claiming against its directors on the basis that the fraud of the directors is also attributable to the company (see Supreme Court confirms company in liquidation not prevented from claiming against directors on the basis of fraud attributable to the company). In that case, the court signalled the need for a review of the law of illegality by the Supreme Court in an appropriate case, with the benefit of full argument on the topic. The call for clarity in this area was repeated by the Court of Appeal in a decision in November. In that case the court held that a liquidator of a company that was the vehicle for a VAT fraud could not rely on the illegality defence in defending a claim for breach of duty under section 212 of the Insolvency Act 1986 (see Court of Appeal rejects illegality defence in claim against liquidator).
In February the Court of Appeal clarified the court's jurisdiction to make wide-ranging ancillary disclosure orders in support of freezing injunctions, ordering the defendant to provide detailed information about certain discretionary trusts, including any trust documents within his control, where the defendant's interests in the trusts (but not the trust assets themselves) were subject to the freezing order (see Court of Appeal clarifies jurisdiction to order disclosure in support of freezing injunctions).
In August, the Privy Council confirmed the availability of "backward tracing", which enables claimant beneficiaries under a trust (including victims of a fraud relying on a constructive trust) to avoid the strict rules of equitable tracing by pointing to the substance of the overall transaction rather than its form (see Privy Council confirms availability of backward tracing).

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