

COMMERCIAL DISPUTES WEEKLY – ISSUE 82

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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

Arbitration

The Commercial Court has permitted service out of an application to join third parties to proceedings to enforce an arbitration award, finding that there were strong arguments that where the English court had granted a judgment to enforce the award, it had power to join parties under CPR 19.

Devas Multimedia Private Ltd v Antrix Corporation Ltd

"The purpose of agreeing in advance on a sum payable as liquidated damages for each day of delay caused by the contractor would be defeated if the stipulated sum was payable only if and when the contractor chose to complete the contract."

Triple Point Technology, Inc v PTT Public Company Ltd

Liquidated damages

In a significant decision, in which WFW acted for the successful party, the Supreme Court has returned to an orthodox interpretation of liquidated damages clauses, commenting that the Court of Appeal's earlier judgment (that liquidated damages were not available in respect of delayed works that had not been completed prior to termination) was inconsistent with commercial reality and accepted law. Read more about the decision, and the Supreme Court's additional comments on limitation clauses, in our article [here](#).

Triple Point Technology, Inc v PTT Public Company Ltd

Oil and gas

Noting that English courts are increasingly inclined to classify terms as innominate rather than as conditions, the Commercial Court has rejected arguments that a contractual specification in an agreement for the sale of oil was a condition giving rise to a right to terminate. While the oil delivered by the defendant was off-spec, the breach of contract was not sufficiently serious to give rise to a right to reject, meaning that the claimant was not entitled to claim for wasted expenditure in dealing with the cargo.

Galtrade Limited v BP Oil International Limited

Privilege (1)

The Court of Appeal has upheld a decision that a letter of claim sent to a third party to elicit information for use in separate litigation was covered by legal professional privilege, rejecting arguments that a claim to privilege can be lost if the third party has been deliberately misled as to the purpose for which the information is sought, and holding that even if such a principle did exist this was not a case in which anyone was deliberately deceived.

Victorygame Limited & Anr v Ahuja Investments Limited

Privilege (2)

In an unusual case on the scope of joint retainer privilege, the Court of Appeal has confirmed that where a party was entitled to disclosure of documents under the joint retainer privilege principle, its successor in title was also so-entitled, even if the other party with the benefit of the joint retainer privilege opposed the disclosure.

Travelers Insurance Company Ltd v Armstrong & Ors

Privilege (3)

In a final decision on privilege, a majority of the Court of Appeal has refused to grant an injunction restraining the use of a document produced in settlement discussions in US proceedings, holding that the applicant had failed to show to a high degree of probability that English law principles of without prejudice privilege covered the relevant document, rather than US law rules.

Autostore Technology AS v Ocado Group Plc & Ors

Third party costs orders

Explaining that, for a director of an insolvent company to be made liable for the company's costs of litigation where they are controlling or funding the litigation, it will usually be necessary to establish either that the director was seeking to benefit personally from the company's pursuit of or stance in the litigation, or that they were guilty of impropriety or bad faith, the Court of Appeal has rejected an application for a third party costs order, adding that it would be absurdly unjust for the director to be liable for monies paid to the company as a payment on account on costs which had to be returned only because it now lacked the funds to proceed to detailed assessment.

Goknur Gida Maddeleri Enerji Imalet Ithalat Ihracat Ticaret ve Sanayi As v Aytaccli

"An order against a non-party is exceptional and it will only be made if it is just to do so in all the circumstances of the case."

Goknur Gida Maddeleri
Enerji Imalet Ithalat
Ihracat Ticaret ve
Sanayi As v Aytaccli

Unjust enrichment

In an interesting decision on the "counter-restitutionary principle", which provides that in certain circumstances a party seeking a restitutionary remedy for unjust enrichment must give credit for benefits received from the other party, the Court of Appeal has commented that it is only where the benefits are sufficiently closely connected that credit must be given.

School Facility Management Limited & Ors v Governing Body of Christ the King College

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Witness statements

Recent rule changes have had a significant impact on the preparation and purpose of trial witness statements in commercial litigation in England and Wales, but the Commercial Court has emphasised that the new rules have not changed the law on the admissibility of evidence, and do not overrule previous authorities as to what may be given in evidence, so a claimant's witnesses were entitled to give opinion evidence as to what would or could have happened by reference to the factual evidence they were giving.

MAD Atelier International BV v Manes

Should you wish to discuss any of these cases in further detail, please speak with a member of our London dispute resolution team below, or your regular contact at Watson Farley & Williams:

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