

COMMERCIAL DISPUTES WEEKLY – ISSUE 172

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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

"Funding of litigation... is widely acknowledged to play a valuable role in furthering access to justice."

R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others

Litigation Funding

The claimants entered into litigation funding agreements which provided for the funder to receive a percentage of any damages recovered. The claimants needed the funding agreements in relation to an application for a collective proceedings order, to demonstrate that they had adequate funding arrangements to meet their costs and adverse costs orders made against them. In a majority decision on a leapfrog appeal, the Supreme Court held that the funding agreements fell within the definition of Damages Based Agreements as provided by the Courts and Legal Services Act 1990. In particular, litigation funding was covered by the natural meaning of "claims management services" because it included the provision of financial services or assistance. However, the agreements did not comply with the formal requirements necessary for the agreements to be valid and were therefore

unenforceable and unlawful.

R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28, 26 July 2023

ESG – Derivative claim

ClientEarth has sought, as a minority shareholder of Shell PLC, to bring a derivative claim against the directors of Shell on behalf of the company for alleged breaches by the directors in relation to the company's climate change risk management strategy. Permission of the court is required to bring such a claim. Permission was refused on paper and ClientEarth exercised its right to have the decision reconsidered at an oral hearing, however the application was again dismissed. ClientEarth had not established a *prima facie* case for permission to continue the claim. It had not provided evidence which established that the directors got their balancing exercise so wrong as to be actionable, nor that the way in which Shell's business was being managed could not properly be regarded as in the best interests of Shell's members as a whole.

ClientEarth v Shell Plc [2023] EWHC 1897 (Ch), 24 July 2023

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Arbitration

Following a Czech arbitration, the defendants began a London-seated investment arbitration against the Czech Republic alleging that it had obtained the decision in the Czech arbitration through corruption. The tribunal decided in the defendants' favour but when the Czech Republic challenged the decision, the defendants sought security for costs and the award under the Arbitration Act 1996, section 70. The judge dismissed the application holding that the appropriate test was not that under the Civil Procedure Rules, but rather to consider the assets of the Czech Republic and whether those were readily available to satisfy any order for costs. The defendants had failed to establish that the challenge was "flimsy" and the Czech Republic had given a formal undertaking to comply with any costs order made against them.

The Czech Republic v Diag Human SE and Stava [2023] EWHC 1691 (Comm), 7 July 2023

Adjudication

A dispute as to alleged repudiatory breach of a JCT Measured Term Contract for maintenance and repair works was referred to adjudication. The first adjudication determined that the contractor had repudiated the contract. The second adjudication referral for the employer's losses included a substantial amount of documentation. The contractor contended that it had insufficient time to digest the material served and this was a breach of natural justice. The court rejected the contractor's submissions. Complexity and constraint of time were inherent in the process of adjudication and were not a bar to enforcement. In the circumstances there had been no breach of natural justice, such circumstances including that the contractor had been given a draft copy of the expert report several weeks prior to the referral, it appeared to have been able to properly and thoroughly engage on the substance of the claim in the time available and had provided no evidence of what more they could have done with extra time.

Home Group Limited v MPS Housing Limited [2023] EWHC 1946 (TCC), 25 July 2023

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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