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BITE SIZE KNOW HOW FROM THE ENGLISH COURTS

> "...save in exceptional cases, the merits threshold for the iniquity exception is a balance of probabilities test..."
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> Al Sadeq v Dechert LLP and others

Legal Professional Privilege

The claimant had been deputy CEO of the Ras Al Khaimah Investment Authority ("RAKIA") in the UAE. He was imprisoned for fraud against RAKIA. He brought proceedings against the law firm that had assisted with investigating the fraud alleging that they had used unlawful methods in their investigations. The claimant now appealed against his earlier unsuccessful challenge to claims of legal professional privilege by the defendants. The Court of Appeal clarified the test for when iniquity prevents legal professional privilege arising and ordered that the defendants re-undertake the disclosure exercise as there had been a misapplication of the iniquity exception. The defendants' evidence was sufficient to indicate that litigation was in contemplation at the relevant time such that litigation privilege could be claimed if the other aspects were satisfied. The court further confirmed that the *Three Rivers (No.5)* principle had no application to litigation privilege and held that there was nothing which allowed an inference that legal advice privilege had been wrongly claimed in relation to aspects of the investigation.

Al Sadeq v Dechert LLP and others [2024] EWCA Civ 28, 24 January 2024

Real Estate

Messenex Property Investments Limited ("Messenex") was tenant of a building that it wished to convert from business to residential use. The landlord refused permission to carry out works to add three floors to the building and other works to the ground floor of the premises. Messenex sought a declaration that its obligations as the tenant to seek consent from the landlord for alterations to the demised premises did not preclude it from carrying out the works. Messenex asserted that the landlord had unreasonably withheld consent to the works, so Messenex was discharged from the covenant requiring the tenant to seek approval. The court found that some of the reasons advanced by the landlord for withholding its consent were reasonable and others were not, but that overall, the decision to withhold consent was reasonable, as all of the reasons were self-standing.

Messenex Property Investments Limited v Lanark Square Limited [2024] EWHC 89 (Ch), 23 January 2024

Arbitration – State Immunity

An ICSID award was made against the Republic of Zimbabwe ("Zimbabwe"). Zimbabwe failed to pay the award and then sought to set aside the order to register the award in England on the basis of state immunity. The ICSID convention contemplated that every contracting state would recognise an ICSID award as binding and would give it the same status as a final judgment of its own courts, although questions of execution were left to national courts. Article 54(1) of the convention was a waiver of state immunity by contracting states in respect of recognition and enforcement but not in relation to processes of execution against assets. This general waiver of immunity in article 54 did not mean that Zimbabwe had submitted to the jurisdiction of the English courts, nor was the submission to arbitration exception applicable. State immunity was only engaged after registration of the award when the state was served with notice attempting execution of the award against its assets. Only then could Zimbabwe assert immunity.

Border Timbers Ltd v Zimbabwe [2024] EWHC 58 (Comm), 19 January 2024

Construction – Building Safety

In the developing case law around Remediation Contribution Orders under section 124 of the Building Safety Act 2022 ("BSA"), this recent decision of the First-tier Tribunal ("FTT") has provided useful guidance. The FTT concluded that it was just and equitable to grant the order in relation to buildings that were formerly part of the Olympic village in east London. In reaching that conclusion, the FTT dismissed an argument that any costs incurred before the BSA came into force could not be subject to such an order. It also confirmed that the order was not limited to costs incurred just to remedy a 'relevant defect'. It included any measures that causes a building defect to cease being a relevant defect or reduces it to the point where it no longer presents a risk to the people in the building.

Triathlon Homes LLP v Stratford Village Development Partnership and others [2024] UKFTT 26 (PC), 19 January 2024

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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