

COMMERCIAL LITIGATION IN THE UK WINTER NEWSLETTER 2021



2020 was a difficult and uncertain year, with unprecedented challenges across the globe, changing the world as we know it. At the start of 2021, the country remained in lockdown and Brexit materialised - with a deal - posing a further seismic shift. It remains unclear what the full effect of either will be on the economy. On the plus side, the active vaccination programme may offer us a route out of the pandemic. But one thing is clear, lawyers are resilient and our flexible fee structures and case funding options prove more important than ever. We are here, ready to help.

We take this opportunity to look back at the key legal topics and developments of 2020 and how these may influence commercial disputes into 2021 and beyond. Despite the challenges of 2020,

Hausfeld's Commercial Disputes team had a busy year which saw the continued

growth of the practice. Some highlights are also summarised below.

Data breach litigation

WM Morrison Supermarkets plc v Various Claimants [2020] UKSC 12

The Supreme Court's decision restates important principles governing vicarious (i.e. corporate) liability for the acts and omissions of employees. The Judgment confirms the limits of vicarious liability where a rogue employee acts against the interests of their employer. Andrew Skelton was employed in Morrison's internal audit team but harboured a grudge against his employer. During a transmission of payroll information to an external auditor, Mr Skelton copied the data and uploaded it to a publicly accessible filesharing website and forwarded it to several newspapers. Over 9,000 affected employees brought claims and the Supreme Court considered the overlap between the Data Protection Act 1998 and the doctrine of vicarious liability. The Hausfeld team reviewed this [decision](#).

Group claim against Marriott International

During the summer, Hausfeld filed a legal action in the High Court against Marriott International. The [claim](#), on behalf of millions of affected individuals, concerns a

major data breach of the systems of the Starwood hotel group with more than 300 million customer records hacked. The Hausfeld team's experience in running large collective actions and securing litigation funding ensured that this extremely sizeable and complex claim could be brought hot on the heels of the UK Information Commissioner's Office investigation which found that "*Marriott failed to undertake sufficient due diligence when it bought Starwood and should also have done more to secure its systems*".

COVID-19: Impact on Court hearings and timetables

Remote hearings

Whilst remote hearings were largely unheard of prior to the COVID-19 pandemic, the Court system was forced to react quickly following the onset of the pandemic and the need to ensure proceedings could continue to be heard. The Hausfeld team reflected on the Court's approach to hearings in the midst of the pandemic including our own experiences of virtual hearings and the added complications that they bring.

Procedural deadlines and adjournments

In *Municipio De Mariana v BHP Group Plc* [2020] EWHC 928, the Court considered extensions of time and adjournments in light of the pandemic and set out the relevant principles in determining what is appropriate during the pandemic. The Judgment highlights the need to balance the maintaining existing procedural timetables against ensuring the continued administration of justice.

Parties complaining of general inconveniences as a result of the pandemic will find it difficult to persuade a Court to alter a procedural timetable, or to adjourn a hearing, without putting forward a compelling and insoluble reason for needing to do so. [For more details.](#)

Service

Elsewhere, the Courts encouraged legal practitioners to recognise the changes brought about by the pandemic and think carefully when attempting to effect service. In *Stanley v London Borough of Tower Hamlets* [2020] EWHC 1622, the Court set aside a default judgment for multiple reasons, including the claimant's solicitors failure to consider whether it was still reasonable to serve proceedings by post during the first lockdown. [For a summary of the key points.](#)

Business interruption test case

As many businesses looked to their insurers to cover mandatory closures and other interruptions to their businesses, there was widespread uncertainty as to whether or not non-damage business interruption insurance policies cover losses sustained as a result of the pandemic. As discussed in our [Hausfeld Perspective](#), the Financial Conduct Authority (FCA) issued a test case in the High Court in relation to a representative sample of 21 policy wordings across eight insurers. The case is a good example of the FCA pursuing litigation in the public interest; it was estimated by the FCA that as many as 370,000 policyholders were affected by the impact of the pandemic with claims totalling approximately £1.2 billion.

The High Court handed down Judgment in September, articulating a number of principles and applying them to the sample policies, leading to a variety of outcomes dependent on the particular policy wording, as [the team reflected.](#)

Following an expedited 'leapfrog' appeal to the Supreme Court (which avoided the need for an appeal to be heard by the Court of Appeal in the first instance), Judgment was handed down on 15 January 2021. The Supreme Court's decision favours policy holders and it is hoped the clarity it provides will lead to swift pay outs under policies. [For more details.](#)

The Hausfeld Commercial Disputes team is advising on a number of business interruption insurance cases including on behalf of an entertainment venue which was forced to close temporarily in light of the restrictions.

Force majeure

As businesses reviewed their contractual obligations and the ability to fulfil them, disputes have arisen as to whether material adverse change clauses are invoked by the COVID-19 pandemic and whether COVID-19 constitutes a force majeure event. Under English law, these issues will largely be a matter of contractual interpretation, [as detailed](#).

International arbitration

International arbitration is one of the most flexible forms of dispute resolution. As [discussed by the team](#), it will remain a convenient, practical and accessible method of dispute resolution for both national and international disputes throughout the pandemic. This view has been supported through our own experiences of international arbitration in 2020, with a number of hearings taking place remotely and both the arbitral institutions and parties quickly adapting to the challenges posed by COVID-19.

The Court of Appeal recently provided guidance in relation to the function of the Court of the seat of arbitration, how that Court should determine anti-suit injunctions, and how the governing law of an arbitration should be determined. In *Enka Insaat ve Sanayi AS v OOO Insurance Co Chubb* [2020] EWCA Civ 574, the Court gave primacy to the express provisions of an agreement and a strong preference for the choice of seat agreed by the parties when granting anti-suit injunctions, as discussed in our [Hausfeld Perspective](#).

Insolvency law

The financial implications of the pandemic are widespread and well known. In response to this, the Courts introduced a Temporary Insolvency Practice Direction in relation to insolvency proceedings in the Business & Property Courts. Further details of this attempt to ensure the Court's time and resources are saved for urgent applications is set out in our [Hausfeld Perspective](#).

Separately, the UK Government announced the suspension of section 214 of the Insolvency Act 1986 which imposes personal liability on directors found to have over-traded while a company was insolvent (so-called 'wrongful trading'). The rationale for doing so was to provide directors with the personal protection they need to allow their businesses to continue trading through the pandemic. As the team [discusses](#), however, the suspension will be difficult to apply in practice as there will inevitably be disputes as to whether the genesis of a business's distress was the COVID-19 pandemic or something else, and whether or not, therefore, the suspension applies. In addition, the suspension could reduce creditor recoveries for those businesses that enter into an insolvency process in due course after the COVID-19 pandemic ends.

Technology

Whilst communities have rallied together during the ongoing COVID-19 pandemic, opportunistic fraudsters have sought to exploit the situation by targeting owners of cryptoassets, including Bitcoin. The [team warns of scams](#) and sets out what can be done to reclaim misappropriated cryptoassets.

Elsewhere, as contract tracing apps became part of everyday life, our data privacy and technology lawyers considered the [emerging concerns for consumers](#).

Brexit

With the UK-EU Trade and Cooperation Agreement finalised on Christmas Eve, the year drew to a close with the legal market debating its implications on English disputes. Legal services were one of the few services to expressly feature in the deal, with tighter rules on the ability of lawyers to practice in other jurisdictions. In addition, many procedural areas of law are affected, including the service of documents, choice of court agreements and the enforcement of foreign judgments. Practice and process in these areas will be dictated by a mix of previous conventions and legal agreements, in addition to case law.

The well-established laws and legal processes in England and Wales will, however, continue to make it an attractive jurisdiction for contracting parties. Our offices and expertise across Europe mean we are well placed to adapt and continue to provide effective legal solutions post-Brexit.

Litigation funding

Amongst the ongoing economic pressures caused by the pandemic, the role of litigation funding is expected to continue to grow. The International Legal Finance Association (ILFA) was recently established, as [commented on by Lianne Craig](#). Whilst Hausfeld has been at the forefront of litigation funding for over a decade, this newly established association demonstrates how much the litigation funding sector has grown in recent years. We expect the ILFA to ensure its members reach the necessary standards in much the same way national associations, such as the Association of Litigation Funders in England & Wales, have done.

Elsewhere, the High Court delivered a robust endorsement of litigation funding in *Akhmedova v Akhmedov* [2020] EWHC 1526 (Fam), as discussed in our [Hausfeld Perspective](#). As part of this multi-billion pound divorce case, the Court was asked to

consider an application for an injunction to prevent one of the parties from instructing lawyers financed by a litigation funder on the basis that such an arrangement was champertous and contrary to public policy. The judge denied the application and urged caution against “*undesirable satellite litigation to investigate funding arrangements in circumstances where the claim is bona fide and the inquiry into funding arrangements would afford no defence to the claim*”.

Hausfeld has championed the use of litigation funding for many years and we remain well placed to advise on and secure funding for appropriate cases.

Hausfeld Commercial Disputes Team: 2020 Highlights

Despite the challenges posed by lockdown, the Hausfeld team continued to grow. In October we welcomed Partner [Sarah Moore](#) who is recognised in the leading legal directories for her expertise in product liability claims, followed by the hire of Partner [Ned Beale](#), named the UK’s Litigator of the Year at Legal Week’s Litigation & Arbitration Awards in 2019. Our commercial disputes practice now comprises 7 partners and 22 qualified lawyers. Earlier in the year, the firm also opened [Hausfeld Advocaten](#) in Amsterdam, strengthening our international offering and capabilities. Hausfeld now has offices in seven countries including multiple offices in the US and across Europe.

The Commercial Disputes team continues to be active in a range of areas including international arbitration, financial services litigation, general corporate disputes, judicial reviews and collective actions, acting for both individuals, corporates and multinational companies on a wide range of disputes.

International arbitration

The firm has continued to expand its international arbitration practice over the past 12 months. The firm has, for example,

been instructed on multiple complex consolidated LCIA arbitrations in the aerospace industry (acting for a state-owned entity against another state-owned entity).

Financial services

The team's expertise in banking litigation was again acknowledged in the [Chambers UK Rankings 2021](#). We continue to act on behalf of various regional government authorities against Barclays Bank relating to the bank's manipulation of the LIBOR benchmark rate between 2005 and 2010, in *Leeds City Council and Ors v. Barclays Bank Plc and Anor*, with a virtual directions hearing taking place in Spring 2020, [as discussed](#). The team begins 2021 defending an application to strike out the claim.

General corporate disputes

Throughout 2020, the firm has continued to represent a wide range of clients in commercial disputes across multiple areas including technology, public procurement, insurance, employment, and mergers and acquisitions.

For example, we have acted for:

- a Spanish technology start-up which was the alleged victim of copyright infringement after American Express allegedly misappropriated its airfare costs saving software (*Trappit S.A. v American Express*);
- the founder of a global group of companies which sold for more than £90 million in defending a potential claim from former minority shareholders in relation to their proportion of the proceeds of sale. This claim was settled at a pre-action mediation, which was conducted remotely;
- a class of beneficiaries under the Will of Dame Zaha Hadid in relation
- to an application for the approval of a settlement between the trustees of the estate by the Court. The action proceeded from instruction to final

hearing in less than four weeks, resulting in a favourable decision for our clients; and

- Dr Philip Comberg in his successful High Court claim against VivoPower International PLC and its subsidiary arising from their failure to meet payment obligations under an oral agreement and the repudiatory breach of Dr Comberg's CEO service agreement (*Comberg v VivoPower International Services Ltd & Anor* [2020] EWHC 2787 (QB)).

Collective actions

Hausfeld's ongoing [FX Claim UK opt-out collective action](#) was featured in the *The Lawyer's Top 20 cases of 2020*.

The firm also represents a group of elite gymnasts in the widely reported action [against British Gymnastics](#), concerning allegations of physical and emotional abuse.

Judicial review proceedings

Hausfeld was instructed by The Good Law Project and EveryDoctor to challenge the lawfulness of the Secretary of State for Health and Social Care's decision to award a US\$83.3 million public supply contract for Personal Protective Equipment to a Florida based entity with no prior experience in the sector. This case has been widely reported by the media, and is the subject of our [Hausfeld Perspective](#).

The team was also instructed by The Good Law Project and a number of non-profit organisations and individuals to [challenge the UK Government to revise its Clean Air Strategy](#) in light of the emerging impact that the COVID-19 pandemic has had on air quality.

These cases demonstrate our expertise in public interest litigation and our willingness to engage in legal processes that have the ability to shape our society.

£1 Million COVID-19 Commitment

In April 2020, Hausfeld London announced its commitment of up to £1 million of its lawyers' time to enable businesses impacted by the COVID-19 outbreak to investigate significant commercial claims they may have arising out of the pandemic. This allowed eligible organisations to seek advice in relation to disputes caused by COVID-19 and remains open to new enquiries.

Personal perspectives

Further tragic events acted as a catalyst for the Black Lives Matter movement and highlighted the need for change and the increased role of diversity and inclusion. We encouraged our team to educate themselves on these issues and launched a number of D&I initiatives, for example, with John McElroy and Ingrid Gubbay sharing their experiences of the LGBT+ community in Law.

Remote working

As a majority of the year was spent working remotely, some of our lawyers reflected on their experiences of working from home, including Managing Partner of Hausfeld in London and Vice-Chair of the firm globally, Anthony Maton sharing his insight into Managing a Law Firm Remotely.

Amongst the terrible impact COVID-19 has had and is continuing to have on the world, the Hausfeld team sought to identify some of the positives of the unique opportunities working from home has presented by sharing their #RemoteSilverLinings, including Head of Commercial Disputes, Lianne Craig.

By John McElroy, Partner, Duran Ross, Senior Associate and Samantha Hewitt, Associate – Hausfeld London.

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