Hausfeld's 2019 Review – Commercial Disputes

Related Lawyers:

Related Practice Areas: **Commercial Disputes**

2019 has been another eventful year for commercial litigation in the UK. As 2020 begins, Brexit implications on English litigation remain at the forefront of discussions in the legal world, but there is life beyond Brexit. We take this opportunity to look back at what 2019 had in store and how this may continue to impact commercial litigation in the UK in 2020. 2019 has also been a busy year for Hausfeld's growing commercial disputes practice with new instructions in our established financial services litigation team which acts against the largest global investment banks as well as our growing, and now well recognised, commercial litigation and arbitration practice. Some highlights are summarised below.

Commercial Disputes Highlights 2019

Disclosure pilot scheme

The main development relating to disclosure this year has been the Disclosure Pilot Scheme (DPS) in the Business and Property Courts which began on 1 January 2019.

Amidst some confusion as to the applicability of the DPS in circumstances where the court has already made a standard disclosure order, in April 2019, Sir Geoffrey Vos, Chancellor of the High Court, offered clarity in the case of *UTB LLC v Sheffield United & Others [2019] EWHC 914 (Ch).* Despite the claim having been issued and an order for standard disclosure having been made prior to the commencement of the DPS (i.e. before 1st January 2019), the Chancellor held that the DPS applied in this case and to *"…all relevant proceedings subsisting in the Business and Property Courts, whether started before or after 1st January 2019, even in a case where a disclosure order was made before 1st January 2019 under CPR Part 31*" ([17]).

Of relevance to practitioners is the fact that the Chancellor also held that the note to CPR 51.2.10 in the latest edition of the "White Book" was wrong, and in light of this judgment, is now redundant. The note stated that the DPS did not apply to any proceedings where a disclosure order had been made before it came into force, unless that order is set aside or varied. To his mind, although a pre-existing disclosure order will not be disturbed by the commencement of the DPS, the DPS will nonetheless apply to all existing and new proceedings in the Business and Property Courts. More details in our Hausfeld Perspective.

In a further, more recent decision in June 2019, involving circumstances where the court has made a disclosure order under the DPS, the High Court in Vannin Capital PCC v RBOS Shareholders Action Group Ltd [2019] EWHC 1617 (Ch) provided further clarification with respect to varying a disclosure order under the DPS rules. Further, the Court encouraged parties to make use of the 30-minute disclosure guidance hearings (under the DPS provisions) which could save litigants both time and costs. Anecdotally, disclosure guidance hearings are not widely used, but we suspect that this will change as cases falling within the DPS proceed through the litigation stages.

Shareholder litigation

Some of this year's key developments in the shareholders' dispute sphere include the first judgment in a shareholder class action in England and Wales and an important judgment in the ongoing shareholder action against Tesco plc.

The first judgment in a shareholder class action in England and Wales was handed down in November 2019 in the case of *Sharp v Blank [2019] EWHC 3078 (Ch)*. The judge, Sir Andrew Norris, accepted that the directors owed the shareholders a duty in respect of the contents of the shareholder circular, although not for regulatory announcements. In reaching this judgment, the court has shown its continued reluctance to reassess retrospectively commercial decisions in finding that it was not unreasonable for Lloyds Bank's directors to recommend the Bank's takeover of HBOS during the financial crisis. The judgment provides useful guidance on the duties of directors of listed companies as well as illustrating some of the hurdles in pursuing such claims successfully, including issues of causation and quantum.

In an important decision for securities litigation in the UK, the High Court has dismissed a strike out application made by Tesco plc in the group litigation brought by its shareholders under section 90A of the Financial Services and Markets Act 2000 (FSMA), relating to the false and misleading statements made by Tesco regarding its commercial income and trading profits in 2014. In *SL Claimants v Tesco plc [2019] EWHC 2858 (Ch)*, Tesco argued that the claimants do not have a claim under section 90A/Schedule 10A because (a) where the custody chain involved more than one intermediary, the claimant's interest was not an "*interest in securities*" within the meaning of Schedule 10A, and (b) whether or not the custody chains involved multiple intermediaries, none of the claimants could be said to have "*acquired, continued to hold or disposed of*" any interest in securities, as required by the statute. The court rejected both arguments and dismissed Tesco's strike out application providing helpful clarity as to the circumstances in which an issuer may be liable to holders of intermediated securities under section 90A of FSMA.

Hausfeld's team is regularly approached to investigate bringing shareholder group actions and is heavily involved in developing this area of law having acted for a number of clients in shareholder disputes over the last few years.

Data breach

In the data breach sphere, the Court of Appeal's ruling in *Lloyd v Google* [2019] EWCA Civ 1599 signals a potential change in the UK court's approach to damages claims based on data privacy infringements.

The claim is pursued by Mr Richard Lloyd, former Executive Director of Which?, on behalf of more than four million Apple iPhone users who had their browser generated information (BGI) taken, without their consent, by Google who then monetised that data for profit. The ruling is particularly important as it established that to be compensated in damages under data protection law (either under the DPA 1998 and the Data Protection Directive 95/46/EC, or under Article 82 of the GDPR), a claimant does not need to prove material loss or distress. The Court of Appeal characterised the non-material loss in the following terms: *"the key to these claims is the characterization of the class members' loss as the loss of control or loss of autonomy over their personal data"* [45]. This is particularly so where the data lost has economic value. Google has sought permission to appeal the Court of Appeal's ruling to the Supreme Court; that decision is awaited.

We anticipate an increase in the number of consumer-based data breach claims against the tech giants and other online businesses as a result of the *Lloyd v Google* decision. For example, "*monetisation cases*" where users' personal data has been harvested by search engines and/or social media platforms wholesale without consent and made available to advertisers, app developers and other third parties for commercial profit. More details in our Hausfeld Perspective.

Brexit

Brexit's implications on different aspects of English litigation have been at the forefront of discussions in the legal world.

In the February 2019 decision of *Canary Wharf (BP4) T1 Limited and ors v European Medicines Agency [2019] EWHC 335 (Ch),* the High Court judge, Mr Justice Marcus Smith, found that the European Medicines Agency (EMA) could not rely on the doctrine of frustration to abandon its lease with Canary Wharf for its headquarters in London, despite the fact that Brexit was not "*relevantly foreseeable*" when an Agreement to Lease had been entered into. The Court held that although it was inconvenient for the EMA to remain in the UK after Brexit, it retained the legal capacity to do so. The judgment does not exclude the possibility of a frustration argument succeeding where, post-Brexit, contractual obligations become illegal under English law, or radically different from what the parties originally contemplated.

In anticipation of increased Brexit related litigation, we reviewed the legal mechanisms available under English law to parties that, as a result of Brexit, are no longer able to perform their contractual obligations. The New Law Journal published our findings in 'Brexit a Contract?'.

Looking to the future: Cryptocurrency

In an important interim decision in *Robertson v Persons Unknown [2019]*, the High Court acknowledged that there is a serious issue to be tried in relation to whether cryptocurrency could be classified as property. It did so whilst granting an Asset Preservation Order (APO) over Bitcoins fraudulently obtained in a "*spear phishing*" attack. This judgment was highly significant and demonstrated the willingness of the English courts to tackle the growing problem of cyber fraud and the question of whether cryptocurrency is property. Further clarity was provided in a legal statement which was released by the UK Jurisdiction Taskforce (UKJT) of the LawTech Delivery Panel. In the legal statement, the UKJT declared that cryptocurrency can, in principle, be treated as property. Although the Legal Statement does not bind the Courts, it is likely to influence their future approach. The legal statement does not cover several important issues affecting cryptocurrency such as data protection, intellectual property rights and anti-money laundering, therefore there remains a need for further legal clarity.

Hausfeld is keeping up to date with the developments in this area. You may find this series of updates on cryptocurrency of interest: "*Cryptocurrency: is it property*?" Part I, Part II and Part III.

Hausfeld Commercial Disputes Team: 2019 Highlights

2019 was of off to a good start with David Lawne's promotion to Partner in January, expanding the team, now comprising 6 partners and 15 counsel/associates working on commercial disputes here at Hausfeld. We continued to be active in the financial services, arbitration and general corporate disputes sphere in 2019 which included acting for New Balance in their sponsorship agreement dispute with Liverpool FC and the filing of the 'FX Claim UK' towards the end of the year against Barclays, Citibank, The Royal Bank of Scotland, JPMorgan, UBS and MUFG Bank. Our 2019 highlights are:

Financial services

In the financial services sphere, the team remained highly active in 2019 working on:

- A claim on behalf of various English regional government authorities against Barclays Bank relating to the bank's manipulation of the LIBOR benchmark rate between 2005 and 2010[1].
- An £80million claim on behalf of an insolvency practitioner against the Bank of Scotland relating to complex financial instruments[2].

General corporate disputes

Over the past 12 months, the firm has represented clients on a wide range of corporate disputes involving areas of law such as employment, breach of confidence and breach of contract.

- Currently acting for a former CEO in a high value dispute for sums due from his former employer. The case[3] is listed for a 12-day trial to be heard in the Queen's Bench Division in March 2020.

- Acted for New Balance in a high-profile claim[4] against Liverpool FC arising out of a sponsorship agreement related to the provision of playing kit and other licensed products. The case, which went to trial in the Commercial Court in October 2019 on an expedited basis (less than two months from issuing the Claim Form to judgment), was the first time the English courts considered the operation of a matching provision which provides the incumbent party (New Balance) with an opportunity to match the "*material, measurable and matchable*" terms in a third party offer (Nike in this case).

Arbitration

The firm has also been expanding its international arbitration practice over the past 12 months which has led to Hausfeld acting on three major pieces of arbitration for the respondents:

- In a London Maritime Arbitrators Association arbitration in the energy sector.
- In a London Court of International Arbitration in the aerospace industry.
- In a London Metal Exchange arbitration involving a contractual dispute in the energy sector.

Innovative adjudication scheme for technology disputes introduced

In June 2019, the Society for Computers & Law (SCL) announced an innovative adjudication scheme which was the result of a 2-year collaboration between Hausfeld's technology partner Michael Bywell, Matthew Lavy from 4 Pump Court, Michael Lazarus from 3VB and David McIlwaine from Pinsent Masons with the SCL's support.

This three-month procedure, using an adjudicator from a pre-selected panel of adjudicators to be set up and maintained by SCL, will result in a provisionally binding decision. If the parties wish to reopen the dispute in subsequent litigation or arbitration, they must do so within 6 months (i.e. the consequences are the same as in the UK statutory construction adjudication). The aim is to offer a timely and cost-effective procedure. The key features summarised.

With technology disputes on the rise, the imminent launch of a new, innovative adjudication procedure for the resolution of contractual technology disputes in England & Wales could not be more timely.

Judicial review

Another example of the firm's versatility and breadth of experience involved Hausfeld acting for the claimants in judicial review proceedings against the Secretary of State for Business, Environment and Industrial Strategy relating to the UK's energy capacity market regime[5]. The claim was a State Aid challenge and involved corresponding with over 300 interested parties (including many of the main energy suppliers in the UK) on complex matters of energy policy in the UK.

Collective action

Last but not least, on 11 December 2019, Hausfeld filed an opt-out collective action in the Competition Appeal Tribunal against a number of banks (Barclays, Citibank, RBS, JPMorgan, UBS and MUFG) in relation to their participation in unlawful foreign exchange spot trading cartels.

Printable version.