Quarterly News

PCB BYRNE

A quarterly round-up of key dispute resolution developments

Q2 - July 2021

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Welcome to the seminal edition of PCB Byrne Quarterly – Q2 2021. This Quarterly series is a roundup of news and analysis of key market developments and court judgments in the last quarter, as well as internal firm insights.

This series will bring you up to speed with all the key developments in commercial litigation, fraud, insolvency, investigations and more.

PCB BYRNE ANNOUNCEMENT

Disputes and Fraud Litigation Specialists join forces to launch PCB Byrne

Byrne and Partners and PCB Litigation merged as of 1 April 2021, bringing together two like-minded, dynamic market leaders in fraud litigation to form a new top-tier firm specialising in all forms of dispute resolution: PCB Byrne LLP.

Read the full announcement >>

The curious case of the SpaceX engineer guilty of "insider trading"

The dark web is frequently linked to the illicit drug trade. However, following what appears to be a world first prosecution by the Securities and Exchange Commission ("SEC") and the Department of Justice ("DOJ") in the USA, it is now clear that it also facilitates the exchange of material non-public information in respect of Publicly Listed Companies.

In 2016 and 2017 James Roland Jones or, as he was known on the dark web, "Millionaire Mike" took part in the sale and exchange of purported "insider tips". It was this conduct that led him to plead guilty to conspiracy to commit securities fraud last month. Senior Associate Steven Bird examines the conduct of Mr Jones and his recent prosecution by the SEC and DOJ in the USA .

Read the full article >>

Better come clean – breach of warranty and misrepresentation claims (MDW Holdings v Norvill)

Partner Natalie Todd and lawyer Anastasia Tropsha review a recent High Court judgment in a claim for breach of warranty and misrepresentation following the sale of an overvalued company with a concealed history of significant environmental wrongdoing.

This article was first published on Lexis®PSL on 11 May 2021.

Read the full article >>

Enforcement of foreign judgments

Partners Jon Felce and Natalie Todd have written the latest post-Brexit update to the England and Wales chapter of "Enforcement of Foreign Judgements", published by Wolters Kluwer International Group.

For further information, please click here >>

Hot topics in enforcement in England and Wales (not just Brexit-related)

Partner Jon Felce gives us the latest insight into the enforcement of overseas judgments and arbitral awards in England and Wales, addressing a selection of hot topics including: (i) how and what do you serve on a State, (ii) enforcement of ICSID awards, (iii) resisting enforcement in fraud cases, (iv) jurisdiction agreements, (v) enforcement of judgments from certain EU Member States, and (vi) enforcement of judgments on judgments.

Notwithstanding the ongoing debate in relation to some of these topics, Jon explains that there is inevitably a way to cut through them and find a solution.

This article was published in the latest ThoughtLeaders4 FIRE magazine.

Read the full article >>

Living expenses and freezing injunctions

Partner Natalie Todd and Associate Richard Swan investigate whether expenses under a freezing injunction have become a further means to dissipate assets, in light of the recent judgment in National Bank Trust v Yurov & Ors, which further clarifies the position on the living, legal, and ordinary business expense exceptions for recipients of freezing injunctions in the post judgment context.

To read the full article please subscribe here >>

Litigation privilege: deception as to purpose of correspondence does not prevent claim to privilege (Ahuja Investments v Victorygame)

Partner Natalie Todd discusses a recent case where the question on appeal was whether a letter of claim sent under the pre-action protocol for professional negligence to the claimant's conveyancing solicitors, Stradbrooks, as well as the response from Stradbrooks' insurers, were within the scope of litigation privilege. The High Court, on appeal from the order of Master Pester, held that the dominant purpose of the correspondence was to elicit information to be used in the ongoing present proceedings and even though there was an element of deception as to the purpose of the correspondence, there was no principled reason why the protection of privilege should not be available in relation to that information. The decision also stresses that the privilege is that of the litigant, not the third party.

This article was first published on LexisPSL on 16 June 2021.

Read the full analysis >>

Haste makes English courts a forum non conveniens (Samsung Electronics v LG Display Co Ltd)

Partner Natalie Todd and lawyer Anastasia Tropsha review a recent Commercial Court judgment on an application challenging permission to serve out, which provides helpful guidance on jurisdictional gateways available to claimants in contribution proceedings, as well as to parties to cross-border litigation considering follow-on claims.

This article was first published on Lexis®PSL on 4 June 2021.

Read the full analysis >>

Effective cause terms and repudiation defences – effective courses? EMFC v The Resort Group

Jon Felce considers the recent case of EMFC v The Resort Group in relation to (i) contractual construction and implication of terms in the context of effective cause terms, and (ii) repudiation.

This analysis was first published on Lexis®PSL on 21 June 2021.

Read the full analysis >>

Protecting your business from financial failure – tips and advice

As businesses embark on the road to recovery, what challenges do company financial directors need to be most aware of and how can they best prepare and protect themselves and their companies?

Natalie Todd, partner and committee member of the London Solicitors Litigation Association (LSLA) explains here.

Articles and Publications

SFO's investigation into ENRC

"What does the SFO stand for, the Serious Failings Office?" Lawyer Ben Brocklehurst considers the potential impact on the Serious Fraud Office's long-running criminal investigation into ENRC arising from the allegations levelled at the SFO in ENRC's various civil claims; one of which is currently being heard in the High Court.

Read the full article >>

Recent Court of Appeal Judgment on litigation privilege

Natalie Todd and Anastasia Tropsha analyse a recent decision where the widely publicised decision of Mr Justice Vos in Victorygame v Ahuja was upheld, confirming that a controversial tactical rationale behind a letter of claim does not deprive the prospective litigant of privilege in connected proceedings over pre-action correspondence and its enclosures.

This article was first published on Lexis®PSL on 13 July 2021

Read for full article >>

CPR and PD Updates

Witness Statement Reforms: PracticeDirection 57AC

Significant reforms have been introduced to the rules governing the preparation of trial witness statements in Business and Property courts, following concerns reported by a 2019 witness evidence working group that evidence had become "over-lawyered". These the changes have now been incorporated into Practice Direction 57AC and the accompanying Statement of Best Practice in relation to Trial Witness Statements.

Associate Clara Browne outlines these recent reforms, which apply to trial witness statements signed on or after 6 April 2021, in an article which can be found here. The key changes are highlighted below and the new Practice Direction 57AC is available here.

Key Changes as of 6 April 2021

(a) A trial witness statement must contain only matters which: the witness has personal knowledge of, are relevant to the case and the witness would be asked (and allowed) to give in evidence-in-chief (PD 3.1 and 3.2).

(b) The requirement that the trial witness statement and statement of truth be in the witness's "own language" is defined as "any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination) if required, and is not limited to a witness's first or native language" (PD 3.3).

(c) Any documents the witness has referred to, or been referred to, for the purpose of providing the evidence set out in their witness statement, must be listed (PD 3.2). Documents should be referred to in a trial statement only where necessary.

Quoting at length from documents, taking the court through documents or setting out a narrative derived from documents are prohibited (Appendix, paragraph 3.6). On important disputed matters of fact, a witness statement should, if practicable, state how well the witness recalls the matters addressed and if / how that recollection has been refreshed by reference to documents (Appendix, paragraph 3.7).

(d) Preparation of witness statements should involve as few drafts as possible (Appendix, paragraph 3.8).

(e) Where parties are represented, a witness must be made aware of the rules at the outset (Appendix, paragraph 3.9). Representatives should obtain evidence from witnesses through interview, avoiding leading questions where practicable and not in relation to important contentious matters (Appendix, paragraphs 3.10 and 3.11). Where evidence is not obtained by interview, that (and the alternative process used) must be stated at the beginning of the statement (Appendix, paragraph 3.11).

(f) The statement of truth must include prescribed wording, as set out at PD 4.1. The statement requires confirmation from the witness that: "This witness statement sets out only my personal knowledge and recollection, in my own words", unlike paragraph 18.1 of PD 32, which requires the witness statement to be "if practicable" in "the intended witness's own words".

(g) The "relevant legal representative" must endorse the statement with a signed certificate of compliance, as set out at PD 4.3.

(h) Sanctions for failure to comply with the PD include: refusing to give or withdrawing permission to rely on, or strike out part or all of a witness statement; an order that the statement be redrafted; an adverse costs; and an order that a witness give some or all of their evidence in chief orally (PD 5.2).

Use of the new CPR 6.33(2B) - Service out of the jurisdiction

Partner Ben Davies and Senior Associate Alice Roberts recently served a claim on a claimant who was out of the jurisdiction using the new CPR 6.33(2B) by obtaining permission to serve by alternative method (specifically by email and WhatsApp message).

The material amendments that were made to CPR 6.33 on 6 April 2021 include a new 6.33(2B)(b) which provides: "The claimant may serve the claim form on a defendant outside the United Kingdom where, for each claim made against the defendant to be served and included in the claim form – (b) a contract contains a term to the effect that the court shall have jurisdiction to determine that claim".

This is a departure from the previous position, intended no doubt to avoid a deluge of applications for service out post-Brexit. Before late April, the fact a contract conferred jurisdiction on the English courts was merely a gateway through which one could obtain the Court's permission to serve out of the jurisdiction (the rule was previously at PD 6B para 3.1(6) (d) but has been deleted).

Now, the position appears to be that if the contract contains an English Court jurisdiction clause, permission to serve out is not required.

CPR 6.33(2B) was used with CPR r.6.40(3)(c), which provides that you can serve out by any method "permitted by the law of the country in which it is to be served" and r.6.40(4) provides that you cannot serve out in such a way that contradicts local law.

Local legal advice was therefore sought in relation to service (in this case, Taiwanese), and the permission of the English court was then obtained to serve the defendant (who was very active on email and WhatsApp) via those methods.

The new CPR 6.33(2B) can be found here.

Case Round-Up

Bank of New York Mellon (International) Ltd v Cine-UK Ltd [2021] EWHC 1013 (QB).

The Court granted summary judgment for rent arrears against commercial tenants who had pleaded that the terms of their leases had been overtaken by wholly unforeseeable events (COVID-19) which forced them to close their premises, resulting in the temporary frustration of the lease. The Judge found that there is no such thing is as “temporary frustration” as a matter of legal principle and that the rent cesser clauses in the leases were not operative because they required physical damage or destruction. As a result of this, the tenants were not permitted to rely on the landlords’ insurance for loss of rent. This decision demonstrates that the courts remain consistent with the requirements needed to establish frustration. >>

Berkeley Square Holdings Ltd & Ors v Lancer Property Asset Management Ltd & Ors [2021] EWCA Civ 551

The Appellants appealed against the dismissal of their application to strike out parts of the Respondents' defence on the grounds that the paragraphs contained statements made without prejudice in a mediation between the parties and should therefore be considered inadmissible. The Court held that statements made in mediation were admissible under the second and sixth exception to the without prejudice rule as set out by Robert Walker LJ in Unilever plc v The Proctor & Gamble Co [2000] 1 WLR 2436.

For reference, these are:

(2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence; and (6) in Muller's case (which was a decision on discovery, not admissibility) one of the issues between the claimant and the defendants, his former solicitors, was whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him against a software company and its other shareholders. Hoffmann LJ treated that issue as one unconnected with the truth or falsity of anything stated in the negotiations, and as therefore falling outside the principle of public policy protecting without prejudice communications. The other members of the court agreed but would also have based their decision on waiver. >>

General Dynamics United Kingdom Ltd v State of Libya [2021] UKSC 22

The Supreme Court handed down its judgment on the issue of whether diplomatic service of proceedings under section 12(1) of the State Immunity Act 1978 (the “SIA”) was required in proceedings to enforce arbitral awards. The SIA governs the process for instituting court proceedings against a foreign State and provides that “any writ or other documents required to be served for instituting proceedings against a State shall be served by being transmitted through the Foreign, Commonwealth and Development Office [the "FCDO"] to the Ministry of Foreign Affairs of the State…”

The Respondent successfully obtained an arbitration award of £16 million plus interest and costs made by the ICC against the Appellant which it sought to enforce in England.

The Respondent was subsequently granted an enforcement order which dispensed the requirement of formal service of the arbitration claim form and enforcement order on Libya owing to the civil and political instability. Libya applied to set aside the dispensation of service and to require a formal service through the FCDO, in accordance with SIA. Libya’s application was successful at first instance but failed before the Court of Appeal. The Supreme Court overturned the unanimous decision of the Court of Appeal and held that (i) in cases where the SIA

applies, service on a state through the FCDO is mandatory and exclusive; (ii) the court cannot dispense with service of the enforcement order under CPR 6.16 or CPR 6.28, even in exceptional circumstances; and (iii) SIA provides workable means of service conforming with international law and comity. >>

Manchester Building Society v. Grant Thornton UK LLP [2021] UKSC 20

In this case, the Supreme Court handed down the most significant decision on the scope of liability in professional negligence since South Australia Asset Management Corp. v York Montague Ltd [1997] AC 191 (SAAMCO). The Defendant, the Claimant's auditors and financial advisers provided incorrect financial advice which resulted in a loss of £32m. Both the High Court and the Court of Appeal held that the Defendant did not owe a duty of care and were therefore not accountable for the loss. The Claimant appealed the decision which was unanimously allowed by the Supreme Court. The Supreme Court stated that the correct approach is to identify the purpose to be served by the duty of care assumed by the Defendant and then determine whether there is a sufficient nexus between the Claimant's loss and the purpose of that duty. It was held that the Claimant had suffered a loss which fell within the scope of the duty of care assumed by the Defendant. >>

Matthew v Sedman [2021] UKSC 19

The Supreme Court has held that where a cause of action accrues at the midnight hour (a "midnight deadline case") the following day will count towards the calculation of the limitation period for commencing proceedings.

This judgment clarifies the position for parties calculating limitation periods in cases where accrual falls at midnight. The Court held that midnight deadline cases form an exception to the general rule that the day on which a cause of action accrues is excluded for limitation purposes, as the law rejects fractions of a day. In a midnight deadline case, a claimant may start proceedings on the day following the midnight deadline.

Satyam Enterprises Ltd v Burton [2021] EWCA Civ 287

In this case, the Court of Appeal followed the Privy Council's decision in Ciban Management Corpn v Citco (BVI) Ltd [2020] UKPC 21 and confirmed that the Duomatic principle applies to beneficial shareholders, provided they are taking all of the decisions in the relevant transaction.

The Duomatic principle (which derives from Re Duomatic Ltd [1969] 2 Ch 365) allows the shareholders of a company to informally approve the company's actions, i.e. by articles of a company.

The Judgment has settled the uncertainties as to whether the assent of the beneficial owner (rather than the registered holder) of a Duomatic principle to apply. >>

PCB Byrne guest writes in the first edition of ThoughtLeaders4 Disputes Magazine:

The inaugural edition of the ThoughtLeaders4 Disputes Magazine was published in June 2021 and PCB Byrne is extremely proud to highlight the contributions of members of its dispute resolution team Natalie Todd, Uliana Cooke, Dave Johnson and Eamon Khorsheed.

Find the full edition >>

THE HUB

The latest updates from the Firm

Win for PCB Byrne's client Tatiana Akhmedova with US$650m judgment

On 21 April 2021 the Family Division of the High Court handed down the latest judgment in this long-running litigation, following applications made by PCB Byrne's client under s. 423 of the Insolvency Act 1986 and/or s. 37 of the Matrimonial Causes Act 1973 to set aside transfers made by ex-husband Farkhad Akhmedov to third parties.

The court found for the applicant in each of the claims, granting relief of (i) US$650m and US$546m against two Liechtenstein trustee entities; (ii) over US$100m against the couple's son, Temur; and (iii) Euro 27m against a Cypriot company owned by the couple's sons.

The PCB Byrne team for the trial comprised Senior Partner Anthony Riem, Senior Associates Rachel Turner and Cath Eason, Associate Andrew McLeod and Trainee Caitlin Foster. Alan Gourgey QC of Wilberforce Chambers and James Willan (now QC) of Essex Court appeared as counsel for the applicant.

Read the full judgment >>

- We are extremely proud and pleased to announce that the recent rankings in Chambers and Partners have placed PCB Byrne LLP in Band 1 for Global Wide Asset Tracing & Recovery and have also placed Partners Anthony Riem and Nicola Boulton in Bands 1 and 2 respectively.
  Please see the ranking table >>

- Partners Trevor Mascarenhas and Jon Felce have been shortlisted for the Client Choice Awards for Asset Recovery in the UK. Results awaited.

- Partner Priyanka Kapoor, an appointed officer of the Anti-Corruption Committee of the IBA, is heading the IBA project on ESG compliance and anti-slavery compliance for global corporations. In addition to industry consultations, she is drafting the white paper on "Leveraging anti-corruption compliance programs to address modern slavery".

- Partner Uliana Cooke has become a member of the Silicon Valley Arbitration and Mediation Centre as spotlighted in the Spring Newsletter 2021.
  Please see details >>

PAST SPEAKING ENGAGMENTS

- ART FRAUD WEBINAR – 24 MARCH 2021
  Jon Felce spoke at an art fraud webinar hosted by ThoughtLeaders4 FIRE on 24 March 2021.

- ASSET RECOVERY WEBINAR – INDIA. WORLDWIDE STRATEGY FOR ASSET RECOVERY: TIME TO LOOK BEYOND JURISDICTIONAL BOUNDARIES – 15 APRIL 2021
  Anthony Riem and Priyanka Kapoor were on the expert panel of Worldwide Strategy for Asset Recovery on 15 April 2021.
  They discussed issues related to multi-jurisdictional and cross-disciplinary solutions to the challenge of mounting non-performing loans faced by Indian banks.

- Priyanka Kapoor spoke at GAR CONNECT: MOSCOW WORKSHOP ON 21 APRIL 2021.
  Priyanka discussed the impact of EU and US sanctions and new legislation on dispute resolution in Russia.

- ACTING FOR THE DEFENDANT WEBINAR SERIES – MAY AND JULY 2021 (ONLINE)
  This innovative and free of charge series, designed by Jon Felce, takes the audience on a tour through the lifecycle of a dispute from the principal vantage point of the defendant's lawyer:
  In the first webinar of the series Jon chaired an expert panel on "To Hear or Not to Hear, That is the Question – Challenging Jurisdiction and Service: The Defendant's Toolkit". The recording of the event from 19 May 2021 can be found here: https://youtu.be/KycFX95_ITM.
  The second episode of the series "Defeating the Queen's Gambit: How to Play Your Opening Moves", addressing the opening skirmishes in a dispute, took place on 13 July 2021.
  Find out more >>

FUTURE SPEAKING ENGAGMENTS

- ACTING FOR THE DEFENDANT WEBINAR SERIES – NEXT EPISODE - 30 SEPTEMBER 2021 (ONLINE)
  On 30 September 2021, Jon Felce will be chairing and Natalie Todd is speaking at "Defusing the Court's Nuclear Weapons: 13 Ways to Save Your World (Part 1)". Further episodes of the Acting for the Defendant series will follow in due course.
  Find out more >>

- IWIRC / THOUGHTLEADERS4 WEBINAR - 14 SEPTEMBER 2021 (ONLINE)
  Natalie Todd will be a panellist discussing contentious insolvency and the insolvency practitioner's toolkit in Europe and beyond.

- XIII ABA CONFERENCE ON THE RESOLUTION OF CIS-RELATED BUSINESS DISPUTES (22 SEPTEMBER 2021, MOSCOW, RUSSIA)
  Anthony Riem and Uliana Cooke will be participating.
  Please see details of the conference >>

- THOUGHTLEADERS4'S FIRE UK SUMMIT – RELIGHT THE FIRE! (23-24 SEPTEMBER 2021, IN PERSON, LONDON)
  Jon Felce designed and is co-chairing the next generation asset recovery practitioners' element of the FIRE UK 2 Day "Welcome Back" Summit at Syon Park, London on 23 and 24 September 2021. With 10% discount on booking using code FIREUK21SPK.
  Find out more >>

- PCB BYRNE WILL BE PARTICIPATING IN AND SPONSORING GAR LIVE CONFERENCE – 12 OCTOBER 2021 – MOSCOW, RUSSIA
  Please see details of the conference >>

FUTURE SPEAKING ENGAGMENTS

- THOUGHTLEADERS4'S FIRE STARTERS CONFERENCE (20 OCTOBER 2021, IN PERSON, LONDON)
  Jon Felce designed and is co-chairing the "FIRE Starters: Rising Stars of Asset Recovery" 1 Day Conference in London on 20 October 2021. With 10% discount on booking using code FIRESTART21UK.
  Find out more >>

- THOUGHTLEADERS4'S INDIAN DISPUTES EVENT – OCTOBER 2021 (IN PERSON, LONDON)
  Priyanka Kapoor, leader of the firm's Indian practice, is on the advisory board of ThoughtLeaders4's first ever Indian Disputes event which is due to take place in October.

- LEXOLOGY LIVE SINGAPORE 2021 – FACING THE FUTURE OF LEGAL AND COMPLIANCE - OCTOBER 2021 (IN PERSON)
  Priyanka Kapoor will be chairing the panel discussion on "Controlling third party risks in cross-border disputes", focusing on issues of bribery, corruption and economic sanctions in disputes involving global supply chains.

- THOUGHTLEADERS4 FIRE 'QC SURGERY: FRAUD' (MERCHANT TAYLORS HALL, LONDON, 2 NOVEMBER 2021)
  Jon Felce and Natalie Todd designed and will be co-chairing this unique QC surgery on fraud, which will delve into the technical issues dealt with by FIRE (Fraud, Insolvency, Recovery and Enforcement) practitioners day-to-day.
  More details >>

- FIRE STARTERS GLOBAL SUMMIT, DUBLIN – 23-25 FEBRUARY 2022 (IN PERSON) Jon Felce is on the advisory board of this unique new event for rising star practitioners within asset recovery, fraud and insolvency.
  More details >>

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