HAUSFELD
FOR THE CHALLENGE

UK COMMERCIAL DISPUTES WINTER NEWSLETTER 2022

2021 closed in much the same way it started: with uncertainty around a COVID variant forcing many back to working from their living rooms! It was nonetheless an eventful and dynamic year in the world of commercial dispute resolution, with a number of important decisions in key areas of English law and procedure.

Despite the challenges posed by the pandemic, 2021 saw a return to some in-person assisted by the accelerated use of video and audio technologies, users of the courts continued to adapt to remotely-held hearings and new and agile ways of working, many of which look set to stay.

Which were the key developments which shaped the 2021 legal landscape? What do we think is ahead in 2022? We also take the opportunity to reflect on the highlights of another busy year for the Hausfeld's Commercial Disputes group.

Damages Based Agreements

Early in 2021, litigators widely welcomed the Court of Appeal's decision in *Zuberi v Lexlaw* Ltd [2021] EWCA Civ 16, which clarified the law in relation to damages-based agreements (DBAs) and put paid to some of the prevalent concerns around their use. The Court of Appeal held unanimously that the Damages-Based Agreement Regulations 2013 (the Regulations) do not prevent termination payments from being made to solicitors operating under DBAs. This dispelled concerns that any provision for fees to be paid on early termination would render the whole arrangement unenforceable.

By a majority, the Court also adopted a narrow interpretation of the word DBA in the context of the Regulations, holding that the DBA is not the entire solicitor-client retainer but only those parts of it which provide for the sharing of claim recoveries, thereby lowering considerably the threshold for enforceability of hybrid DBA arrangements.

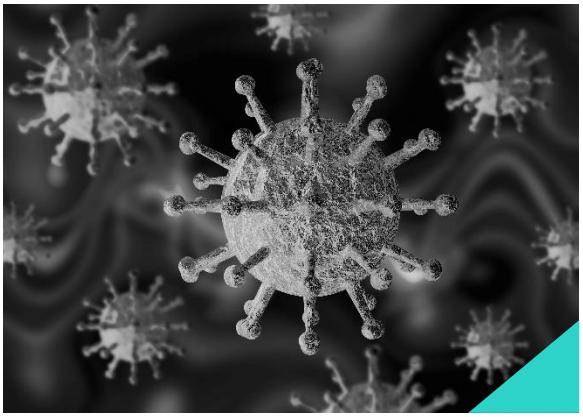
The decision in Zuberi paves the way for a new era of contingency fee arrangements and greater access to justice through the use of hybrid DBA models. The Hausfeld team reviewed the implications of the Court of Appeal's decision.

COVID-19 and its continued impact

Throughout the year, COVID-19 continued to make its presence felt in the courts, as further claims arising out of the myriad pandemic-related disruptions to commercial arrangements filtered through to the courts.

Business Interruption insurance

In January 2021, following an expedited 'leapfrog' appeal, the Supreme Court handed down its highly anticipated judgment in the Business Interruption insurance test case brought by the Financial Conduct Authority. This determined issues of causation and coverage under sample non-damage business interruption insurance policy clauses, in respect of losses sustained by policyholders as a result of the COVID-19 pandemic, with the Supreme Court finding largely in support of policyholders. More info.



Frustration

In the second reported judgment on pandemic-related rent arrears in one week in April 2021, the decision in *Bank of New York Mellon (International) Ltd v Cine-UK Ltd* [2021] EWHC 1013 (QB) considered whether national lockdowns could give rise to a "temporary frustration" of commercial leases, such that they should be treated as suspended or terminated.

The Court found that while there was no such thing as "temporary frustration" in law which could lead to a suspension of contractual obligations for a period of time only, COVID-19 disruptions could nevertheless, in principle, qualify as "supervening events" sufficient to frustrate a commercial lease, but only if rendering the situation so "radically different" from what would have been in the reasonable contemplation of the parties on signing the lease that it would be unjust for the contract to continue.

Force Majeure

In May 2021, the High Court considered in *Dwyer (UK) Franchising Ltd v Fredbar Ltd & Bartlett* [2021] EWHC 1218 (Ch) whether an enforced period of self-isolation could give rise to a force majeure event under a franchise agreement. The Court held that, in failing to designate the franchisee's need to self-isolate for 12 weeks in order to protect his son's health as a force majeure event under the agreement, the franchisor had breached its Braganza-duty to exercise discretion reasonably.

Collective redress

It was a seismic year in the world of group litigation with a number of key developments shaping the landscape for class actions and collectives in England and Wales.

Business Interruption insurance

In January 2021, the Supreme Court handed down its decision in the Business Interruption insurance case, referred to above, which was the first case brought under the Test Case Scheme in the Financial List. Hausfeld reviewed the Scheme and the important role it has to play in facilitating access to justice.

Parent company duty of care

In February 2021, the Supreme Court handed down its judgment in *Okpabi & Others v Royal Dutch Shell & Another* [2021] UKSC 3. Hausfeld's client, Corner House Research, was granted permission to intervene in support of the claimants' appeal, which was unanimously allowed by the Supreme Court. The Court held that the group claims brought against Royal Dutch Shell plc (RDS), a London-headquartered parent entity, and its Nigerian subsidiary, were sufficiently arguable against RDS so as to establish jurisdiction in England and Wales. The Court affirmed that where a claim is challenged on the grounds that a claimant has no arguable case, the issue should ordinarily be addressed by reference to any written pleadings and, when focusing on the pleaded case at an interim stage, facts set out in the pleadings in support of the claim should be accepted "*unless, exceptionally, they are demonstrably untrue or unsupportable*". More info.

CAT Collectives

In August 2021, in a huge milestone for the opt-out regime, the Competition Appeal Tribunal certified its first application for a collective proceedings order in 1266/7/7/16 *Walter Hugh Merricks CBE v Mastercard Incorporated and Others*. Hausfeld's Competition team offers an

in-depth analysis of this seminal, and reviews its wider implications in what was undoubtedly a breakthrough year for opt-out collective actions in the CAT.

Representative actions

In October 2021, in its second judgment in *Jalla and others v Shell International Trading and Shipping Company* ([2021] EWCA Civ 1389), the Court of Appeal analysed the requirements and limitations of the representative action procedure under CPR 19.6 in a claim arising out of an oil spill in the Bonga oilfield, located off the coast of Nigeria. The decision suggests that the courts will be cautious in certifying the use of the representative action procedure in environmental damage and other 'mass tort' contexts, but the Court supported the use of other group action mechanisms, such as Group Litigation Orders, in such cases. Interestingly, in reaching its decision, the Court of Appeal drew comparisons with the case of *Lloyd v Google* LLC [2019] EWCA Civ 1599, standing by its decision in that case and describing it as the "paradigm example" of a representative action. More info.

Hot on the heels of Jalla, in November 2021, the Supreme Court handed down its widely-anticipated decision in *Lloyd v Google* [2021] UKSC 50. The appeal concerned the question of whether compensation could be awarded under s13 of the Data Protection Act 1998 where data subjects suffer a 'loss of control' over their personal data as a result of infringements of their data protection rights. Overturning the Court of Appeal, the Supreme Court held that s13 cannot be interpreted as conferring on data subjects a right to compensation without proof of material damage or distress having been suffered: a loss of control over personal data is not enough.

While many in the data privacy sphere viewed the decision as a missed opportunity to provide a much-needed route to redress for individuals affected by mass data breaches, at least on the facts of that case, it is noteworthy that the Supreme Court expressly confined its decision to the 1998 Act and did not consider the post-GDPR regime under the Data Protection Act 2018.

The judgment was largely upbeat about the representative action procedure under CPR 19.6, effectively endorsing its use in appropriate cases. The Court recognised the need, in the modern age of digital technologies and mass provision of goods and services, for a flexible tool to facilitate access to justice. Its overarching approach was to make the rule in CPR 19.6 more permissive, holding that the 'same interest' requirement is to be interpreted pragmatically in light of the overriding objective of the CPR of dealing with cases justly, and that it is not a bar to a representative action that each person represented has in law a separate cause of action, nor that the relief claimed includes damages or some other monetary relief.

Brexit – jurisdiction and enforcement

Meanwhile, while Britain's departure from the EU may have taken a backseat in the headlines, its impact was nonetheless felt in 2021 following the expiry of the transition period on 31 December 2020. In a disputes context, at least for those cases with a European dimension, Brexit has had an impact on the rules concerning which courts have jurisdiction to hear claims and also affects the cross-border recognition and enforcement of judgments.

Notably in 2021, the European Commission made clear its opposition to the UK's accession to the Lugano Convention. The Brussels Recast Regulation ceased to apply in the UK on 1 January 2021 and it had been hoped that accession to the Lugano Convention would provide a post-Brexit alternative to govern jurisdiction and enforcement issues between the UK and EU.

With effect from 1 January 2021, the UK re-joined the 2005 Hague Convention on Choice of Court Agreements in its own right, having previously been a party in its capacity as an EU member state. The 2005 Hague Convention offers some protection to exclusive choice of court agreements, but is narrower in scope than the Brussels (Recast) Regulation and Lugano Convention and, in particular, does not afford

the same protections in respect of non-exclusive or asymmetric jurisdiction clauses.

The 2019 Hague Convention may go some way to plug the gap in the future, providing a global framework for the recognition and enforcement of civil and commercial court judgments given in accordance with parties' choice of court clauses, including non-exclusive and asymmetric jurisdiction clauses. However, it is not yet in force and while the EU notably indicated an intention to accede in 2021, the UK has not yet made its position clear.

Economic Duress

In August 2021, the Supreme Court handed down its judgment in *Pakistan International Airline Corporation Corp v Times Travel (UK) Ltd* [2021] UKSC 40, establishing the existence of and test for lawful act economic duress for the first time, and narrowing the application of the doctrine. Hausfeld acted for the All Party Parliamentary Group on Fair Business Banking, which intervened in the appeal to explain its experience of bank customers being placed under lawful but illegitimate pressure. We offered a full account of this milestone decision and its wider implications - including on consumer banking - in a dedicated article, first published by Practical Law, Dispute Resolution Blog.

SAAMCO duty of care

Another landmark ruling was that of the Supreme Court in 2021, in the case of *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, which restated the long-established "SAAMCO principle", which governs the scope of recoverable loss in professional negligence claims. The Court also laid down a general framework for damages sought in the tort of negligence by way of a six-stage test.

Arbitration

DIFC-LCIA no more

In September 2021, Dubai's Decree No. 34 of 2021 was published, abolishing the Dubai International Financial Centre (DIFC) Arbitration Institute (DAI), which had operated the DIFC-LCIA Arbitration Centre (the DIFC-LCIA). The DIFC-LCIA was the leading MENA arbitral institution, formed through an agreement with the London Court of International Arbitration (LCIA). The Hausfeld team explores the implications and the expected continued success of the DIFC seat, with a likely initial move in caseload to institutions such as the LCIA and International Chamber of Commerce in Perspectives.

Governing law of arbitration clauses

Meanwhile the UK Supreme Court handed down its widely-welcomed judgment in *Kabab-Ji SAL v Kout Food Group (Kuwait)* [2021] UKSC 48 in October 2021, confirming that the principles set out in its earlier, seminal decision in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38 will apply when assessing the governing law of an arbitration clause at the enforcement stage. The decision serves as helpful clarification that there is only one approach that will be taken by the English courts to this question, regardless of when it arises in the arbitration life cycle, and this certainty can only be good news for arbitration users. For further details.

Law Commission review of the Arbitration Act 1996

To round off the year, the Law Commission announced in December 2021, almost a quarter of a century after the Arbitration Act 1996 came into force, that it would be conducting a review of this key piece of legislation, which governs arbitrations seated in England and Wales. The review will be launched during the first quarter of 2022 and with a consultation paper to be published later this year. Hausfeld's arbitration team considers the scope of the review in a Perspectives.

Procedural developments in the Business & Property Courts

Witness Evidence

2021 saw the coming into force of the new Practice Direction 57AC on witness evidence at trial, applicable to all trial witness statements signed on or after 6 April 2021. The new PD introduces significant changes to the way in which factual witness evidence must be obtained and presented in commercial litigation and has, in practice, necessitated a wholesale shift in parties' and their representatives' approach to the preparation of witness statements.

The scheme has been met with mixed reactions within the profession and, as the first contested applications found their way before the courts, a

suite of High Court judgments provided judicial clarification on the scope of the new rules:

- In July 2021, the Commercial Court confirmed in *Mad Atelier International BV v Manes* [2021] EWHC 1899 that PD 57AC does not affect the rules on admissibility of evidence, and that pre-existing authorities on the circumstances in which opinion evidence may be permitted are not impacted by the introduction of the new PD. The team considered the decision.
- Later in the year, two successive decisions of the Technology and Construction Court in October and November 2021 addressed the question of sanctions for failure to comply with the new rules. *In Mansion Place Limited v Fox Industrial Services Ltd* [2021] EWHC 2747 (TCC) and *Blue Manchester Ltd v Bug-Alu Technic GmbH and SimpsonHaugh Architects Limited* [2021] EWHC 3095 (TCC) the court directed the re-drafting of and redactions to certain passages in parties' witness statements.

Changes to the Disclosure Pilot Scheme

The Disclosure Pilot Scheme continued into its 3rd year in the Business and Property Courts, and further rounds of changes came into force in April 2021 and November 2021 respectively, in response to practitioners' feedback on the scheme. The changes are aimed at clarifying and streamlining the new disclosure models and the procedural steps in Practice Direction 51U.

Changes introduced in November 2021 create a new, separate regime for "less complex" claims (usually those valued at less than £500,000), which is described in a new appendix to PD51U. Revised wording explicitly recognises that, while the pilot continues to apply in multi-party cases, disclosure will usually require a "bespoke" approach to be adopted by the courts in those kinds of claims.

The scheme has been extended for a further year until the end of 2022, and it is widely anticipated that this will be the final extension, with the scheme becoming permanent and ultimately universal across the civil courts following the end of the pilot period.

Expert evidence

The TCC provided a salutary reminder to parties in June 2021 of the importance of compliance with the relevant rules on instructing and controlling communications with expert witnesses. The team explored the decision in *Dana UK AXLE Ltd v Freudenberg FST GmbH* [2021] EWHC 1413.

In another notable decision, the *Court of Appeal in Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 allowed an appeal by the travel agency TUI against a decision that the County Court should not have rejected uncontroverted expert evidence. In reaching its decision, the Court considered how to approach so-called "uncontroverted" expert evidence and what that means for burden of proof at trial. We reviewed in Perspectives.

Hausfeld Commercial Disputes team: 2021 Highlights

Growth and recognition

Notwithstanding the upheavals caused by the pandemic, Hausfeld's commercial disputes team continues to grow.

In January 2021 we welcomed Partner Ned Beale, a leading litigator and commercial arbitration specialist whose arrival brought Hausfeld London's dedicated commercial dispute resolution team to 7 partners, whilst in May 2021 we were joined by Counsel Aqeel Kadri, an experienced competition and commercial arbitration lawyer. During Summer, Head of Knowledge Management Rebecca Warder, who brings a wealth of legal and knowledge management experience, joined - as did Counsel and qualified mediator Faye Moore. She is recognised in the leading legal directories for her expertise in complex commercial disputes.

In December 2021, the firm announced that with Lianne Craig stepping up as Managing Partner in London, John McElroy would be taking up the reins as Head of Commercial Disputes. More info.

The team received recognition in a variety of awards and accolades, with Hausfeld named 'Boutique Law Firm of the Year' at the British Legal Awards 2021 and winning an 'Innovation in Sustainability & ESG' award at the FT Europe Innovative Lawyer Awards 2021. The firm was also listed in The Times' 'Best Law Firms' for 2022.

Case highlights

The Commercial Disputes team continued to represent our clients in complex and high-value litigation and commercial arbitrations across multiple sectors in 2021, bringing to bear our depth of expertise and experience in financial services disputes, M&A and post-completion disputes, boardroom and shareholder disputes, insurance, intellectual property, restructuring and insolvency, civil fraud and more.

Highlights include:

Representing the UK's All Party Parliamentary Group on Fair Business Banking as intervener in the Supreme Court's hearing of *Pakistan International Airline Corp v Times Travel (UK) Ltd*, concerning the scope of the legal doctrine of economic duress.

Acting for Spanish technology group Trappit S.A. and others in their ongoing copyright infringement claims against American Express for alleged misappropriation of airfare costs saving software, with the team successfully defending jurisdictional and strike-out challenges in May 2021.

Defending a solar power-focused energy group against a multimillion-dollar claim brought by an investment bank relating to foreign exchange swaps.

Representing a number of elite gymnasts in a widely-reported action against British Gymnastics concerning allegations of physical and emotional abuse.

Successfully obtaining a summary judgment on behalf of our client, the claimant in Commercial Court proceedings in *Iris Helicopter Leasing Limited v Elitaliana Srl [2021] 7 WLUK 499*.

Representing our client, a multinational corporation, in ongoing Commercial Court proceedings brought against insurers under a Warranty and Indemnity insurance policy relating to alleged breaches of commercial warranties given under an SPA.

Acting in a number of confidential and high-value cross-border commercial arbitrations under ICC and LCIA rules.

Personal perspectives

At Hausfeld we nurture diversity, inclusivity and collegiality within the firm, striving continually to learn and improve in order to produce the best results for our clients and the communities we serve.

To mark UK Black History Month, Professor David Olugosa OBE spoke with the global team about Black British History and its impacts worldwide, providing valuable insights with his unique historical perspective. The session reiterated the importance of pro-actively fostering an environment where real positive change can happen.

In November 2021, a panel from across the Hausfeld offices presented 'Women's Advocacy at Hausfeld: Fight Like a Girl'. In this event organised by Hausfeld Women's Alliance Working Group, we discussed the firm's ongoing efforts to bring women's legal causes and issues to the fore. For Pride month, the firm's the LGBTQ+ Alliance Working Group hosted a webinar with the American Civil Liberties Union to discuss the difference between gender identity and sexual orientation, why pronouns matter, and the ACLU's fight to secure accurate gender identity markers on official identification documents.

What's on the horizon for 2022?

2022 promises to be an interesting year for commercial disputes with a number of high-profile cases in the pipeline.

The courts are set to consider further the principles underlying the so-called "*Quincecare* duty", which requires banks to exercise reasonable skill and care in carrying out customer instructions. The duty has been the

subject of much judicial attention in recent years, with 2022 expected to produce a number of key decisions which examine its scope and application.

In *Stanford International Bank Limited v HSBC Bank plc*, the Supreme Court is expected to clarify whether the Quincecare duty extends to a customer's creditors, while the Court of Appeal will consider whether the duty protects individual customers as well as corporates in *Philipp v Barclays Bank UK PLC*. Given the increasing pervasiveness of cyber fraud in particular, the developing case law will no doubt be of interest to banking customers and financial institutions alike when assessing their risk profiles going forward.

The wide-ranging fallout from the pandemic will continue to play out in the courts in 2022. We expect force majeure provisions to remain firmly in the spotlight, with the Court of Appeal set to hear an appeal from the decision in *Dwyer* (mentioned above) whilst, in an insurance context, the High Court will address issues surrounding coverage for business interruption losses caused by the pandemic in *Stonegate Pub Company Ltd v MS Amlin Corporate Member & Ors*, which follows the Supreme Court's findings in favour of policyholders in the FCA's ground-breaking test case as summarised above.

We expect the upwards trend in ESG and climate-related litigation to continue in 2022, with COP 26 having thrown the spotlight anew on the (existential) risks and challenges posed by climate change. Whilst governments and state entities historically have made up the majority of defendants in such cases, following the Hague District Court's ruling against Royal Dutch Shell in May 2021 and with an increasing focus on reporting requirements, fiduciary duties and investor expectations around ESG, as well as allegations of "greenwashing" and failure to manage climate risks, we anticipate an uptick in strategic litigation against corporates.

Following the Supreme Court's decision in *Okpabi* in 2021 addressing parent company liability (referred to above), UK-headquartered corporates can also expect proceedings related to overseas environmental issues increasingly to be brought in the English courts. The Okpabi v Shell litigation moves forward to trial in 2022.

Elsewhere in the world of collectives, litigators will be keeping a close eye on the progression of opt-out claims through the Competition Appeals Tribunal in 2022, with Hausfeld at the vanguard of a number of key actions. More info.

On the procedural side, following the publication of a report by the Civil Justice Council (CJC) in July 2021 which concluded that the introduction of elements of compulsory alternative dispute resolution would be both lawful and a "positive development", we expect to see a shift in this direction in the months to come. The report does not set out a concrete road map to introduce compulsory ADR in this jurisdiction, and we will therefore be keeping our eyes peeled in 2022 for any proposals for legislative reform following the CJC's consultations. We also predict a steady trickle of further decisions around the requirements of the Disclosure Pilot Scheme and the new PD57AC on trial witness statements in 2022, as practitioners continue to grapple with the rules and disputes find their way before the courts.

With special thanks to John McElroy, Rebecca Warder and Josie Green. If you would like to discuss anything in this newsletter, please contact John McElroy, Head of Commercial Disputes, on jmcelroy@hausfeld.com or your usual Hausfeld contact.

"The team which is 'very user- friendly and accustomed to risk in a way many firms are not, stands out for high profile disputes on behalf of claimants, and is experienced in disputes involving competition law, arbitration, fraud and insolvency'.
Legal 500 UK, 2020