HERBERT SMITH FREEHILLS KRAMER

BULLETIN

Litigation quarterly update

ENGLAND AND WALES – MARCH 2026

Welcome to our latest quarterly bulletin, which contains updates on commercial litigation developments over the past three months. Other updates are available on our Litigation Notes blog, which you can visit any time, or subscribe to be notified of the latest updates: http://hsfkramer.com/notes/litigation/.

In February we also published an episode of our Commercial Litigation Update podcast, which discusses some of the developments covered in this bulletin.

AI

The Civil Justice Counsel (CJC) has published an interim report and consultation on whether rules are needed to govern the use of AI by legal representatives for preparing court documents. In summary, the CJC proposes that legal representatives should be required to declare that AI has not been used to generate the content of trial witness statements, and that expert witnesses should explain what use has been made of AI in preparing their reports. Administrative uses for transcription, spell checking etc would not require a declaration, and nor would the use of AI for documents such as statements of case and skeleton arguments so long as it is clear who is taking professional responsibility for the document in question. We will be submitting a response to the consultation: Civil Justice Council publishes consultation on use of AI for preparing court documents.

The Upper Tribunal of the Immigration and Asylum Chamber has observed that uploading confidential documents into an open-source AI tool such as ChatGPT placed this information in the public domain, and so breached client confidentiality and waived legal privilege. The court also noted that closed source AI tools, such as Microsoft Copilot, which do not place information in the public domain would not pose these risks. We believe this to be the first reported case in England and Wales to consider the possible impact on privilege of using public AI tools: Upper Tribunal observes that uploading confidential documents into open-source AI tools waives client confidentiality and legal privilege.

Both of these developments are covered in our new podcast series on disputes and AI: Cross-examining AI – Episode 1: Civil Justice Council AI consultation and latest developments in AI and privilege.

The UK Jurisdiction Taskforce (UKJT) has published a draft legal statement on liability for AI harms under the private law of England and Wales. The statement seeks to address in what circumstances, and on what legal bases, English common law will impose liability for loss that results from the use of AI (defined as "technology that is autonomous"). The core focus of the statement is on the application of the law of negligence to physical and economic harms caused by AI. The UKJT sought input on: whether the statement sufficiently addresses the key issues of uncertainty; whether the areas addressed are appropriate and useful; and whether the definition of AI used is appropriate. We have submitted a response to the consultation: UK Jurisdiction Taskforce consults on draft legal statement on liability for AI harms.

DISCLOSURE AND PRIVILEGE

In a dispute between a company and its former director, the High Court has held that the company could not withhold its privileged legal advice that the director had seen, in that capacity, at the time it was obtained. The decision is a reminder that privilege may be lost between certain parties, as the material in question is not confidential between them, even though privilege can be maintained against the rest of the world. The decision also contains a broad statement that there can be no privilege in legal advice as against a party who is already lawfully aware of its contents, although previous case law suggests the position is more nuanced: High Court finds company could not assert privilege against former director over legal advice she had seen at the time.

The High Court has dismissed an appeal against an Insolvency and Companies Court (ICC) judge's decision on what liquidators need to demonstrate in an application under section 235 and 236 of the Insolvency Act 1986, which give office-holders broad powers to obtain information and documents concerning the company and its affairs. The High Court agreed with the ICC judge that these powers could not be used to obtain everything relevant to the company without limitation of time (ie "everything forever") merely on the basis of an entitlement to reconstitute all the documents of the company in liquidation. Office-holders must evidence a reasonable requirement for the documents sought: High Court upholds ICC Judge's decision dismissing wide-ranging application for disclosure of "everything forever" in relation to company in liquidation.

RELIEF FROM SANCTIONS

The Court of Appeal has refused permission to appeal an order striking out a claim for failure to provide security for costs. The decision illustrates that the mere fact that a claim (or defence) is *bona fide* will not necessarily be sufficient to avoid strike-out for procedural failures, regardless of the extent to which the party in question has flouted court rules or orders and regardless of the other circumstances of the case.

The decision also serves as a useful reminder of the application of the three-stage test for relief from sanctions established in *Denton v White*, which requires the court to consider the seriousness of the breach, the reasons for it, and whether in all the circumstances it is just to grant relief: Court of Appeal refuses relief from sanctions following breach of unless order to provide security for costs.

JURISDICTION AND ENFORCEMENT

The Court of Appeal has held that the English courts do not have jurisdiction as of right over a sanctioned individual who used to reside in London, continues to own a home there and has expressed a desire to live in that home, but is currently banned from entering the UK for an indefinite period. It concluded that presence within the jurisdiction at the time of service is essential for the English courts to assume jurisdiction as of right over an individual. While presence is a flexible concept that will not be negated by temporary absence, the notion of temporary absence "must be kept within relatively narrow bounds": Court of Appeal finds English courts lack jurisdiction over sanctioned individual who is not permitted to enter the UK.

The Commercial Court has dismissed an application for a stay of proceedings on the grounds of *forum non conveniens*, as the defendants had failed to show strong reasons to depart from their contractual agreement on jurisdiction. The court also held that the defendants were contractually estopped from denying that England was the most appropriate forum, as the jurisdiction clause included a positive agreement that the English courts were the most appropriate and convenient courts to settle disputes – and not merely an agreement not to argue the contrary: Commercial Court dismisses application for stay on basis of English jurisdiction clause and forum non conveniens waiver clause.

The Court of Appeal has upheld the enforceability of contractual provisions that purported to limit a party's ability to challenge enforcement action following default. The decision illustrates the court's approach to contractual waivers of rights to challenge enforcement, particularly in agreements negotiated between sophisticated commercial parties. The decision emphasises that freedom of contract is a basic principle of common law and the courts will, so far as possible, give effect to contractual terms that the parties have agreed – including where they have agreed to curtail or exclude what would otherwise be their right of access to the court: Court of Appeal upholds contractual limits on challenging enforcement action in cross-border finance transaction.

CONTRACT

The Privy Council has provided guidance on assessing reasonable notice for terminating a distribution agreement where there is no express termination clause. The decision underlines that the purpose of an implied term requiring reasonable notice is to enable contracting parties to wind down their relationship in an orderly way, and to give the recipient of the notice a reasonable opportunity to adjust and make progress towards alternative arrangements. Reasonable notice is not a mechanism for protecting the recipient's profits or giving them sufficient time to rebuild an equivalent business. Further, businesses should not assume that the long duration of their contractual relationship will necessarily entitle them to a long notice period: Privy Council gives guidance on assessing reasonable notice for terminating a distribution agreement where there is no express termination clause.

The Supreme Court has held that a contractor cannot terminate its employment under clause 8.9.4 of the JCT Design and Build Contract 2016 for a repeated default where the right to give a termination notice for the original default had not previously accrued under clause 8.9.3. Aside from the specific implications for those in the construction industry, the decision is of interest more generally for the Supreme Court's guidance on the interpretation of industry-wide standard form contracts which have been negotiated by representatives of contracting parties in a particular trade or industry: Supreme Court considers approach to interpretation of industry-wide standard form contracts.

The High Court has dismissed appeals against arbitral awards arising from shipbuilding contracts, holding that the seller's obligation to provide refund guarantees within 120 days was not a strict contractual condition, breach of which would automatically entitle the innocent party to terminate and claim loss of bargain damages at common law. Instead, it was an innominate term, meaning that a breach would only justify termination at common law if it was sufficiently serious to be repudiatory. The court emphasised that whether time is "of the essence" in relation to a contractual deadline, so as to make the term a strict condition, is always a question of interpretation of the term in the light of the surrounding circumstances: Commercial Court finds time was not of the essence for provision of a contractual refund guarantee.

Our Corporate team has published their annual contract law update, which considers cases from 2025 that deal with formation, interpretation, exclusion and limitation clauses, penalties, good faith and termination: Drafting contracts – key lessons from 2025.

LIMITATION

The Supreme Court has held that statutory limitation periods under the Limitation Act 1980 do not apply to petitions for relief from unfair prejudice under ss. 994 and 996 of the Companies Act 2006. As a result, there is no statutory time bar for bringing an unfair prejudice petition. This conclusion avoids the difficulty that would otherwise arise in applying a limitation to s. 994 petitions, where the state of affairs occasioning the petition is often the product of an accumulation of long-running historical complaints. Nevertheless, as the court's power to grant relief is discretionary, unjustified delay with an adverse effect on a respondent or third party may prompt the court to deny relief: Supreme Court holds that no statutory limitation period applies to unfair prejudice petitions.

The Court of Appeal has held that it is not possible to substitute a defendant sued by mistake, after the relevant limitation period has expired, unless the mistake is merely one of name rather than identity. The court also has discretion to add or substitute parties after limitation expires if "any claim already made in the action cannot be maintained by or against an existing party unless the new party is joined or substituted". The court held that the second gateway requires the original claim and the new claim to be the same in substance, which means that it cannot apply where the wrong defendant had been sued by mistake: Court of Appeal refuses permission for new defendant to be substituted after expiry of limitation period.

ADR

The Court of Appeal has held that an expert's interpretation of a contractual clause that determined a party's share of gains arising from a qualifying transaction was not manifestly in error. The decision confirms that the test for manifest error requires the court to consider whether the error was "so obvious and obviously capable of affecting the determination as to admit of no difference of opinion". The nature of the issue to be determined does not affect the test. It applies both to questions of contractual interpretation and to the interpretation and application of contractual mathematical formulae: Court of Appeal finds expert's determination was not manifestly in error.

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