Mid-year review 2017—substantive law relevant to dispute resolution lawyers

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Dispute Resolution analysis: Adam Kramer and Emmanuel Sheppard, barristers at 3 Verulam Buildings, consider developments in substantive law (and related procedure) relevant to dispute resolution so far this year and look ahead to the next 12 months.

What do you think has been the biggest development to affect substantive law relevant to dispute resolution in the past six months?

There is no seismic quake of a development in the last six months, more a gentle shifting of the tectonic plates of contract construction in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] All ER (D) 182 (Mar). The case concerned the meaning of an indemnity clause but the Supreme Court took yet another opportunity to comment generally on contractual interpretation. Here the court eschewed the recent retreat from Lord Hoffmann's legacy in *ICS v West Bromwich* (for which see *Arnold v Britton* [2015] UKSC 36, [2015] All ER (D) 108 (Jun), *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2015] All ER (D) 24 (Dec) and Lord Sumption's recent Harris Society Annual Lecture available on the Supreme Court website, see: LNB News 09/05/2017 109.) and tendency for judges to have to take sides in a war between textual and purposive interpretation. Instead, Lord Hodge in *Wood* returned to the more measured approach of earlier cases, observing that (consistently with *ICS*) there is a 'unitary' 'iterative' exercise balancing respect for the drafting of the text with the assumption that the parties intended a commercially sensible result. As the latest word from the Supreme Court, this is (at least for now) the first port of call when considering contract construction. For more information, see News Analysis: Reconciling differences in the interpretation of contracts (Wood v Capita Insurance Services) and Practice Note: Rules of contract interpretation.

What do you think will be the biggest anticipated reform and/or development to affect substantive law relevant to dispute resolution in the next 12 months?

We are going to sit on the fence and tell you about two anticipated developments.

First, we have the Competition Appeal Tribunal (CAT) decision on whether the competition law opt-out collective class action against Master Card (*Merricks v Mastercard Inc*) will be approved. If it is, this means that qualifying consumers who have used Master Card (including most of the readers of this interview) will be assumed to be in the class of claimants unless they chose to opt-out, making way for the first American-style class action, with a value of £14bn. If this use of the competition law opt-out collective action in section 47B of the Consumer Rights Act 2015 succeeds, it may possibly pave the way for reforms of group actions more generally.

Second, Supreme Court judgment is awaited in the appeal from *Goldtrail Travel Limited v Onur Air Tasimacilik AS* [2016] EWCA Civ 20, [2016] All ER (D) 199 (Jan). It addresses the relevance of third party funders when the court is considering whether a security for costs application will stifle the claim. It is part of a string of case law on the court's regulation of funders through its case-management powers (see further the *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), [2017] All ER (D) 173 (May)below). For a detailed analysis of the Court of Appeal's decision in this case, see News Analysis: Appeal condition not stifling—role of appellant's funding shareholder considered (Goldtrail v Aydin).

Have there been any CPR updates in the past six months that affect substantive law relevant to dispute resolution?

There are two points of importance. First, from 25 April 2017, it is no longer possible to issue claims, applications or file documents on paper for any of the courts in the Rolls Building. Instead the mandatory electronic filing must be used.

Second, the 88th CPR update came into effect from 6 April 2017 which introduced by the new CPR 3.7A1(7) an automatic strike out for non-payment of the trial fee.

Are there expected to be any CPR updates in the next 12 months that may affect substantive law relevant to dispute resolution?

On 1 October 2017, the Pre-Action Protocol for Debt Claims will come into force.

And from 4 July 2017 the new Business and Property Courts launched in London (see Business and Property Courts launched in London, LNB News 05/07/2017 99). The Business and Property Courts will act as a single umbrella for business specialist courts in England and Wales, covering the Commercial Court (including the Admiralty and Mercantile Court), the Technology and Construction Court and the various courts of the Chancery Division.

How has case law in this area developed in the past six months?

There have been a variety of developments in areas spanning from bank duties to injunctions.

Thomas & Anor v Triodos Bank NV [2017] EWHC 314 (QB), [2017] All ER (D) 59 (Apr) concerned the scope of a lending bank's duty of care to a retail customer. In some circumstances there could be a 'mezzanine duty' (see also the earlier *Crestsign* decision (see *Crestsign Ltd v National Westminster Bank plc* [2014] EWHC 3043 (Ch), [2014] All ER (D) 183 (Sep))) between a full advisory duty and the basic duty not to mis-state, by which the bank was required to explain the product in response to the customer inquiries, in this context to indicate the cost of early repayment, see Practice Note: Negligence—when does a duty of care arise?.

In *Persimmon Homes v Ove Arup* [2017] EWCA Civ 373, [2017] All ER (D) 175 (May), the Court of Appeal reconsidered the correct approach exemption clauses. Deprecating the contra proferentem rule and previous judicial tendencies to construe exemption clauses narrowly even in the commercial context, it considered that such clauses will generally cover negligence in major construction contracts, see News Analysis: Court of Appeal considers limitation and exclusion clause (Persimmon Homes v Arup) and Practice Note: Exclusion and limitation of liability.

AIG v Europe Limited (Appellant) v Woodman [2017] UKSC 18, [2017] All ER (D) 151 (Mar) is the new leading cases on aggregation clauses in insurance contracts, the Supreme Court, in one of Lord Toulson's last judgments, giving some guidance on the correct approach to these clauses.

In *RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch), the court ordered security for costs against a litigation funder, developing the picture of the risks and role a third party funder takes, see News Analysis: In brief: Security for Costs Against Litigation Funders (The RBS Rights Issue Litigation).

In *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195, the Court of Appeal gave judgment on the effects of CPR 36 in respect to court powers to award enhanced interest. It was held that such interest on both damages and costs (at up to 10% over base) need not be confined to compensating the other party for the loss of use of money and disruption of litigation, and could also be used to create an appropriate incentive towards settlement and/or to mark the court's disapproval of improper or unreasonable conduct, see News Analysis: Claimant Part 36 enhanced interest not limited to being compensatory in nature (OMV Petrom v Glencore).

In *Abela and others v Baadarani (Third Party: Fakih)* [2017] EWHC 269 (Ch) the High Court confirmed that search orders could be made against third parties, and granted the first one.

Candy v Holyoake [2017] EWCA Civ 92, [2017] All ER (D) 41 (Mar) concerned the boundaries between freezing and notification injunctions. The Court of Appeal rowed back from a notification injunction being a free-standing injunction with a lower risk of dissipation requirement, confirming that a risk of dissipation to the usual freezing order level was necessary. It also confirmed that the burden fell on the applicant and there could be no bootstrapping by relying on the respondent's refusal to explain confidential financial circumstances to build on what would otherwise not be a strong enough case of risk of dissipation, see News Analysis: Have you been notified—exploring the law on freezing and notification injunctions (Candy v Holyoake) and Practice Note: Freezing injunctions—'real risk' (of dissipation).

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