Legal and Financial Risk Newsletter – May 2019

May 2019

Legal and Financial Risk newsletter on legal developments impacting corporates and financial institutions. The May 2019 edition includes articles on recent court decisions and case reports.

UK class actions revived? The Court of Appeal breathes life into Merricks' £14 billion claim against MasterCard

The Court of Appeal has allowed Walter Merricks' appeal of the Competition Appeal Tribunal's (the "CAT") decision to refuse a collective proceedings order ("CPO"). The Court of Appeal found that in refusing a CPO in the £14 billion collective action against MasterCard, the CAT had erred on two fronts: (i) by requiring detailed information from the Applicant in relation to the extent of the breach of competition law rules; and (ii) in its interpretation as to whether the claim was suitable for an aggregate award of damages. The Court of Appeal ordered the CAT to re-consider the case on the basis that in order to get a CPO the Claimants only need to demonstrate that the claim has a real prospect of success.

Zambian farmers win right to sue UK parent company

In *Vedanta Resources plc and another v. Lungowe and others*, the Supreme Court considered whether forum shopping by foreign claimants was permitted when using a parent company as an anchor defendant. Four key issues were considered by the Supreme Court: (i) whether the choice of anchor defendant was an abuse of EU law; (ii) whether there was a real issue to be tried against the parent company; (iii) what was the proper place for the claim to be heard; and (iv) whether substantial justice would be served if the claim was heard in Zambia. The Supreme Court found in favour of the Respondents, concluding that Article 4(1) Recast Brussels Regulation effectively ties the hands of Member State courts if there is a genuine reason for bringing a claim against the parent company in that jurisdiction.

Court of Appeal confirms when evidence of pre-contractual communications can be adduced to aid contractual interpretation

In *Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council* (2019), the Court of Appeal considered key cases around interpretation of contracts, and in particular whether evidence of pre-contractual negotiations can be used to interpret a disputed clause.

A tip of the cap

In *Davey v Money* (2019), the High Court declined to apply the "*Arkin*" cap to limit a third-party commercial litigation funder's liability for adverse costs to the amount of funding that it had provided. Instead, the Court held the funder liable for the whole of the defendants' costs, which

were considerably in excess of the amount of the funder's investment. This decision is significant in confirming that defendants may be able to recover more of their legal costs from litigation funders backing claims. It also may lead to an increase in the cost of such funding for claimants, resulting from the increased risk faced by litigation funders.

Does Fraud always deliver the Knockout punch? Supreme Court weighs in on "Bare-knuckle fight" between Fraud and Finality

On 20 March 2019, the Supreme Court handed down its eagerly anticipated judgment in the case of *Takhar v Gracefield*. In what Lord Briggs described as a "*bare-knuckle fight*" between two longstanding public policy principles, "*fraud unravels all*" and "*there must come an end to litigation*", the Court was asked to adjudicate on whether a judgment procured by fraud could be reversed where the victim could have discovered evidence of the fraud before the original trial. In delivering the leading judgment, Lord Kerr stated that where a judgment had been obtained by fraud, and where no allegation of fraud had been raised at the trial that led to that judgment, the victim should not be required to have exercised reasonable diligence in uncovering the fraud.

The latest view: Enforcement of judgments post-Brexit in the event of a No Deal Scenario

Now that the UK Government and the EU have set out (at least in part) their respective positions in relation to enforcement of judgments in a No Deal Scenario, we have a much better idea of what potential mechanisms of enforcement are envisaged post-Brexit. This note sets out the position under the current regime and summarises the likely mechanisms of enforcement envisaged in the event of a No Deal Scenario.

A Collective Action for Damages in the Netherlands is a fact!

On 19 March 2019, the Dutch Senate finally approved the legislation introducing collective damages actions in the Netherlands (the "Legislation"). The Legislation introduces an option to claim monetary damages in a "US style" class action.

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