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THIS MONTH'S CONTRIBUTOR

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THE CITY LAWYER - December 2012

The business law update from 3 Hare Court

3 Hare Court continues to lead the field in providing practical advisory and advocacy services to business clients. In these monthly updates we outline recent developments in litigation ranging from general contract law, to injunctions, to specialist areas such as banking and finance. In addition, we will provide either a commentary piece or a feature on a recent 3 Hare Court case. We hope you enjoy this December edition.

Case: Mir Steel UK Limited v Christopher Morris and ors [2012] EWCA Civ 1397

In *Mir Steel*, the Court of Appeal took the opportunity to revisit the well-known principles of the construction of exemption clauses, established by the Privy Council in *Canada Steamship Lines Ltd v The King* [1952] AC 192, namely: (1) If the lauguage of the clause expressly exempts the proferens from the consequence of his negligence, effect must be given to it; (2) if there is no express reference to negligence, the court must consider whether the words are wide enough, in their ordinary meaning, to cover negligence; (3) if the words are wide enough to cover negligence, the court must consider whether the head of damage may be based on some other ground.

The court concluded that whilst these principles offer helpful guidance, they must not be read as laying down a code. It does not provide a litmus test which yields certain and predictable results, and what the particular parties intended in their particular commercial contexts must be ascertained (*HIH Casualty and General Insurance Ltd and Others v Chase Manhattan Bank and Others* cited with approval).

Seminars & workshops

3 Hare Court members regularly provide seminars and workshops to individual firms or groups of practitioners. If you have a request for a seminar or lecture, or would like further information then please do not hesitate to get in touch with our marketing manager, Mika Thom.

Conferences

We are often invited to speak at conferences in the UK and abroad. If you have a query concerning a conference then please get in touch with our marketing manager, Mika Thom.

Clerks

We have an experienced and approachable clerking team who will be happy to assist with recommendations, fees, our service protocol or general enquiries. Please contact the clerks on 0207 415 7800. Alternatively you can contact our Senior Clerk, James Donovan.

Where the "*overall commercial purpose*" of the parties could readily be ascertained, and provided a solution to the construction of the clause, the court would be reluctant to render that purpose otiose, even if the *Canada Steamship* principles pointed against such a construction.

The approval of the *HIH Casualty* gloss imports an element of uncertainty for practitioners advising on the construction of such clauses, but also prevents the absurd or unjust consequences of the rigid application of the *Canada Steamship* principles.

Case: Dream Doors Limited v Martin Lodge [2012] EWCA Civ 1556

Dream Doors Limited sought an interlocutory injunction against two defendants, Lodgeford Homes Limited and Martin Lodge, to enforce the covenants in what the claimant alleged was a written franchise agreement. Whilst Mr Lodge had signed the document over the typed words "*AS A PRINCIPAL*", the Judge found that, as a matter of construction, Mr Lodge was not personally a party to the franchise agreement, and rejected the claimant's alternative claim for rectification as fanciful. The claim for an injunction against Mr Lodge accordingly failed, and the judge took it upon himself to proceed to strike out the claim of his own motion.

In relation to the rectification claim, the Court of Appeal found that the Judge had adopted an overly narrow view of the evidence. In particular, there was a failure to canvass the available evidence as to the circumstances surrounding the production, drafting and execution of the document. It was wrong to only examine the moment when "*Mr Lodge's pen was hovering over the page as he decided whether or not to sign*". There was accordingly a serious issue to be tried as to the rectification claim, and the injunction should have been granted. The Court of Appeal also found that there was substance in the complaint that the Judge had conflated the question of whether there was a serious issue to be tried, and whether the requirements of Part 3 of the CPR had been met, in striking out the claim.

This case again highlights the low burden established by the *"serious issue to be tried"* threshold, whilst also demonstrating that rectification claims require ventilation of the factual evidence pertaining to the formation of the contract before their disposal.

Feedback

As always at 3 Hare Court we welcome your feedback. In particular, any feedback or suggestions on this and forthcoming monthly updates will be gratefully received.

Please contact our marketing manager, Mika Thom, or alternatively the barristers:

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Feature: 3 Hare Court in practice: KC v MGN Ltd [2012] EWCA Civ 1382

James Dingemans QC appeared on behalf of KC, the father of Baby P, in his libel proceedings against MGN Ltd, the publisher of *The People* newspaper. In September 2010, *The People* published an article which contained the allegation that "*Peter's real father… had been convicted in the 1970s in Leicester for raping a 14 year old girl*". This statement was completely untrue and KC was a man of good character.

MGN Ltd made an unqualified offer of amends and published a full apology in a later edition of the newspaper. However, after failing to reach agreement, the quantum of the damages award was decided by Bean J. It was found that "*… with the possible exception of murder, or cruelly causing the death of a child in circumstances such as Peter's, it is difficult to think of any charge more calculated to lead to the revulsion and condemnation of a people's fellow citizens than the rape of a 14 year old girl*." A sum of £75,000 was accordingly awarded.

On appeal however, that sum was reduced to £50,000 by reason of the fact that KC's identity was never revealed by MGN Ltd, nor indeed in the proceedings. Bean J had accordingly placed too much emphasis on the circulation and readership figures for *The People* in reaching his decision. In the Court of Appeal's judgment, the revised award "*would nevertheless adequately reflect the abhorrent nature of the crime falsely alleged against KC and the damage to and its impact on him*".

The Court of Appeal's consideration of the authorities on the quantum of damages in such cases is topical in light of the Leveson Inquiry (in which James Dingemans QC appeared for Northern & Shell). Lord Justice Leveson's recommendation that exemplary damages should be available in such cases might see an alteration in the quantum of awards, whilst the proposed arbitration scheme might significantly reduce the costs of litigation.

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