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The latest corporate law cases (2020)
19 June 2020

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The latest corporate law cases (2020)

The law as stated during this webinar is up to date as of **8 June 2020**

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Introduction and Agenda

- **Agenda**
 - Duty of good faith: an implied term in corporate contracts?
 - Vicarious liability: corporate liability for employee conduct
 - Contractual interpretation: Indemnity clauses in SPAs
 - Execution of corporate documents: resolving some of the practical difficulties

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Implied Terms
The implied duty to act in good faith in a corporate context

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Evolution of the implied term to act in good faith

- English law does not import a general concept of good faith into contractual relations. Exceptions include:
 - Relationships of trust (partnerships) and fiduciary relationships
 - Contracts which expressly provide for a party to act in good faith
- **Yam Seng Pte Ltd v International Trade Corp** [2013] EWHC 111 (QB)
 - Leggatt J held that a 'relational' contract included implied terms of:
 - an expectation of honesty
 - prohibiting commercially unacceptable or unconscionable behaviour
- Usual test of whether a term should be implied applies: **Marks and Spencer plc v BNP Paribas** [2015] UKSC 72
 - "Business efficacy"
 - "Officious bystander"

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Evolution of the implied term to act in good faith

- **What is a relational contract?**
 - One which requires ongoing communication and co-operation between the parties
 - **Yam Seng Pte Ltd v International Trade Corp:** Long-term distribution licence
 - **Al Nehayan v Kent** [2018] EWCH 333 (Comm): Joint venture agreement
 - **Bates v Post Office Ltd** (No. 3) [2019] EWHC 606 (QB): Sub-contractor agreements between The Post Office and sub-postmasters
- **Effect of Covid-19:**
 - Government published a document entitled *“Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency”*.

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Russel v Cartwright & Others [2020] EWHC 41

- **The facts**
 - Joint venture established by four individuals to develop properties within the Greater London region.
 - The individuals entered into a framework joint venture agreement (FJVA).
 - The JV pursued a number of development opportunities. Relations with one of the individuals (R) deteriorated.
 - R's exit package included continued carried interest rights in the JV investment vehicle.
 - The three individuals separately pursued a development opportunity through a different JV investment vehicle to the exclusion of R.
- **The claim**
 - The four individuals had set the JV up as a quasi-partnership, placing trust in each other. They therefore owed each other **fiduciary duties**.
 - The individuals owed each other **express duties of good faith** under the FJVA.
 - The individuals also owed each other an **implied duty of good faith**, because the FJVA was a “relational contract”.

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Russel v Cartwright & Others [2020] EWHC 41

- **The judgment**
 - The judge found that the individuals **did not owe each other any fiduciary duties** as shareholders in a company rather than partners.
 - There was **no applicable express duty of good faith** in the framework agreement.
 - The express obligations were not relevant to the events complained about.
 - There was **no implied duty of good faith:**
 - The FJVA did fall into the category of a relational contract.
 - But: implying such a duty would be inconsistent with the express terms of the FJVA.
 - Even if there *was* an implied duty of good faith, the three other individuals did not breach it – their conduct was not commercially unacceptable

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Vicarious liability
Corporate liability for employee conduct

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Testing the limits of vicarious liability

- **What is vicarious liability?**
 - Ordinarily a person is liable for his own acts or omissions where there is a duty of care owed to another.
 - However, there are exceptions. Vicarious liability is one such exception. For policy reasons liability can be imposed on a defendant for the wrongful acts or omissions of another. In these cases the defendant may not have breached its own duties, but is nonetheless held responsible.
 - The employer/employee relationship is the clearest example.
- **Two decisions from the Supreme Court in April 2020 testing two important questions concerning vicarious liability:**
 - What is the nature of the relationship which has to exist between a party and the defendant for liability to be imposed on the defendant vicariously.
 - What must the manner of the conduct be and how closely does that conduct need to be related to the relationship between the individual and the defendant.

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What relationship has to exist for liability to imposed?

- **Two earlier authorities provided a framework for establishing vicarious liability.**
- Supreme Court decision in the **Christian Brothers Case** [2012] UKSC 56 considered further in **Cox v Ministry of Justice** [2016] UKSC 10.
 - Court will consider whether relationship is akin to employment i.e. has the individual whose conduct has created potential liability carried out an activity which was assigned by the defendant and which is integral to its operation and for its benefit
 - Defendant must have some control over the activities of the tortfeasor
 - Whether it is just and equitable to impose liability

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Barclays Bank v Various Claimants [2020] UKSC 13

- **The facts**
 - 126 Claimants brought claims against Barclays in respect of sexual assaults carried out by a doctor hired by Barclays to carry out medical examinations.
 - The doctor was not employed by Barclays, but was contracted to carry out the examinations.
 - Claimants claimed that Barclays was vicariously liable for the doctor's tortious conduct.
- **First instance and Court of Appeal**
 - Both first instance and Court of Appeal agreed that Barclays should be vicariously liable for the doctor's misconduct following the criteria.

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Barclays Bank v Various Claimants [2020] UKSC 13

- **The decision**
 - Supreme Court overturned the Court of Appeal
 - Lady Hale gave the leading judgment (unanimously approved) and at paragraph 27 said:

"The question therefore is, as it has always been, **whether the tortfeasor is carrying on business on his own account or whether he is in a relationship akin to employment with the defendant.** In doubtful cases, the five "incidents" identified by Lord Phillips may be helpful in identifying a relationship which is **sufficiently analogous to employment to make it fair, just and reasonable to impose vicarious liability.** Although they were enunciated in the context of non-commercial enterprises, they may be relevant in deciding whether workers who may be technically self-employed or agency workers are effectively part and parcel of the employer's business. But the key, as it was in *Christian Brothers, Cox and Armes*, will usually lie in understanding the details of the relationship. **Where it is clear that the tortfeasor is carrying on his own independent business it is not necessary to consider the five incidents.**"

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Barclays Bank v Various Claimants [2020] UKSC 13

- **Key points**
 - Where it is clear that a party is an independent contractor then no liability.
 - However, not clear where there is some grey area e.g. gig economy workers.
 - Court did not try to align the more complex principles of employment law with the principles which impose vicarious liability.
- **Outcome for Barclays**
 - Supreme Court held that Barclays was not liable for the doctor's misconduct.

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What conduct can lead to vicarious liability?

- **The position before Morrisons was that set out in Mohamud v WM Morrison Supermarkets plc [2016] UKSC 11**
 - What is the nature of the employee's job?
 - Is there sufficient connection between the position in which the employee was employed and the wrongful conduct so as to make it just and reasonable for there to be vicarious liability?
- **The facts**
 - Employee worked as a petrol station attendant – his job was to serve customers.
 - Employee assaulted customer and told him not to come back after having been asked whether he might print some documents.
- **Outcome**
 - In this case the Court held the employee was to serve customers.
 - Employee was purporting to represent Morrisons when telling the customer not to return, reinforced by violence.

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WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondent) [2020] UKSC 12

- **The facts**
 - An employee in the internal audit team of supermarket chain Morrisons was tasked with sending the payroll data of approximately 126,000 Morrisons' employees to the external auditor, KPMG.
 - However, the employee had a grievance arising out of an unrelated matter and made a personal copy of the data and uploaded it to a publicly accessible file-sharing site.
 - He went on to disclose the personal information of around 100,000 Morrisons' employees on the internet. This included payroll data.
 - The employee was convicted of offences under the Data Protection Act 1998 (DPA) and Computer Misuse Act 1990 and sentenced to eight years in prison.

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WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondent) [2020] UKSC 12

- **The decision**
 - Lord Reed summarised the law on this second element of vicarious liability as follows:
 - **First**, what functions or "field of activities" had been entrusted by the employer to the employee (identifying the "acts the... employee was authorised to do"), and
 - **Second**, whether the wrongful conduct was so closely connected with the acts the employee was authorised to do that it may fairly and properly be regarded as done by the employee while acting in the ordinary course of the employee's employment.

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WM Morrison Supermarkets plc (Appellant) v Various Claimants (Respondent) [2020] UKSC 12

- **Key points**
 - Cases are fact sensitive
 - Liability is more likely to be imposed when an employee is engaging in conduct while purporting to act for the employer
 - However, where the employee is acting for his own personal motives then less likely that vicarious liability will be imposed
 - Many cases may turn on whether it is fair and equitable to impose that liability.

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SPAs: Indemnity Clauses

The law on contractual interpretation in the context of Share Purchase Agreements

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Contractual Interpretation in the context of SPAs

- General principles of contractual interpretation:
 - Literal approach
 - Purposive/Commercial approach
- Supreme Court decision in **Wood v Capita Insurance Services Ltd** [2017] UKSC 24
 - "Contextualism" (applying business common sense) and "textualism" (adopting a literal approach) are both valid interpretation tools.
 - A textual analysis / literal approach might be more appropriate where there is a sophisticated and complicated contract, which has been drafted with the help of legal advisers.
 - Where a contract is short, informal or drafted without professional assistance, the court may place a greater emphasis on commercial common sense.
 - Important to look at the terms of the contract as a whole.

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Damoco (Bermuda) Limited v Atlanta Bidco Limited
[2020] EWHC 501 (Comm)

- **The facts**
 - The issues concerned the obligation on the buyer to draw up “Deferred Consideration Accounts” under a mechanism set out in the SPA. The SPA required the buyer to deliver a draft of those accounts:

“... within 30 days after the date upon which the audited financial statements of the Company ... are in such condition as could be formally signed off by the Auditors and in any case no later than 30 June 2019.”
 - The buyer delivered draft accounts on 5 August 2019 stating:

“the clear effect of the SPA is that the draft Deferred Consideration Accounts are to be provided after completion of the Company’s audit”.
 - The seller treated this draft as the draft Deferred Consideration Accounts and accepted the figures within them and demanded payment of Deferred Consideration on that basis.

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Damoco (Bermuda) Limited v Atlanta Bidco Limited
[2020] EWHC 501 (Comm)

- **The judgment**
 - Buyer was successful. The whole thrust of the mechanism in the SPA was that the deferred consideration would be determined on the basis of audited financials.
 - Date of previous year’s audit was June 2018 – judge held this strongly suggested that the 30 June 2019 date was predicated on the parties anticipating a similar timescale for the financial year just ended, and not as imposing an absolute deadline.
 - It was clear that the parties had placed crucial value on the audit process as a means of providing independent oversight of the target company’s financial statements.
 - The buyer had made it clear that the draft accounts were subject to future adjustment and did not amount to the “draft Deferred Consideration Accounts”.

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Damoco (Bermuda) Limited v Atlanta Bidco Limited
[2020] EWHC 501 (Comm)

- **Takeaways:**
 - **Context is important.** In this case, the court found the wording sufficiently ambiguous to enable it to take the surrounding circumstances, including the commercial background, into account.
 - If you are intending to **impose a deadline** for some action under a contract, make it clear that the deadline is not subsidiary to or dependent on some other action.
 - **State the consequences** of failing to comply with the deadline.
 - And, above all, **avoid ambiguity.** This is especially important for key provisions that depend on the action of a third party (in this case, the auditor) or are outside the parties’ control.

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Towergate Financial (Group) Ltd v Hopkinson
[2020] EWHC 984 (Comm)

- **The facts**
 - The sellers agreed to indemnify the buyer and its group companies against any claims arising out of investigations launched by the FCA.
 - The SPA also contained a limitation on the sellers' liability:

"6.7 The Purchaser shall not make any Claims against the Warrantors nor shall the Warrantors have any liability in respect of any matter or thing unless notice in writing of the relevant matter or thing [...] is given to all the Warrantors as soon as possible and in any event [...] in relation to a claim under the indemnity [...] on or before the seventh anniversary of the date of this Agreement."
 - The buyer served notice under this indemnity shortly before the seventh anniversary. It argued that any requirement to give notice of an indemnity claim "as soon as possible" was not a condition precedent and failing to comply with it would not render the notice invalid.

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Towergate Financial (Group) Ltd v Hopkinson
[2020] EWHC 984 (Comm)

- **The judgment**
 - The words "as soon as possible" did introduce a condition precedent.
 - The buyer had to satisfy two conditions in order for the notice to be effective: it had to serve it "as soon as possible", and that service had to occur on or before the seventh anniversary of the SPA.

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Gwynt y Môr OFTO plc v Gwynt y Môr Offshore Wind Farm Ltd
[2020] EWHC 850 (Comm)

- **The facts**
 - The SPA contained an indemnity covering damage to the assets of the business:

"If any of the Assets are destroyed or damaged prior to Completion (Pre-Completion Damage), then, following Completion, the [sellers] shall indemnify the [buyer] against the full cost of reinstatement of any Assets affected by Pre-Completion Damage."
 - The SPA was signed on 11 February 2015 and completed on 17 February 2015. On 2 March 2015, one of the sub-sea cables failed.
 - Cause of the failure was identified as corrosion to the cables dating back months or years. Buyer claimed for the repair costs under the indemnity.
 - The sellers alleged that the indemnity only covered damage to assets that occurred between the date on which the SPA was signed (11 February 2015) and completion (17 February 2015), and not damage that had occurred before the parties had signed the SPA.

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•The judgment

- The judge acknowledged that the indemnity did not set a “starting point” for the period during which any damage would be covered by the indemnity.
- Important to look at the clause as a whole and interpret it at the point the parties signed the SPA. The indemnity appeared in the SPA immediately after the clause dealing with signing and before the clause dealing with completion.
- The tense of the verb in the indemnity was relevant – “are” v “have been”.
- The SPA already contained a warranty by the sellers confirming there had been no damage to any assets (including the cables).

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• Takeaways

- When drafting a contractual indemnity on a business sale, consider the following:
 - What period of time should the indemnity cover?
 - What loss is the indemnity seeking to cover?
 - When should the indemnity kick in?
 - How does the indemnity sit alongside other contractual provisions?
 - What is needed to claim under the indemnity?
 - Should the indemnity be phrased as a “covenant to pay”?

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Execution of documents

The challenges in lockdown

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Executing documents against the backdrop of COVID-19

- **Two cases:**
 - **Wood v Commercial First Business Ltd (In Liquidation)** [2019] EWHC 2205 (Ch) concerning whether a deed had been validly executed where the witness did not sign in the presence of the executing signatory. The Court held that the witness did not need to sign the deed at the same time, though did need to witness the signature.
 - **Neocleous v Rees** [2019] EWHC 2462 (Ch) whether the electronic signature in an email was sufficient to constitute a valid signature for the purpose of a land contract. The Court held that the electronic signature in the email was a valid signature for the purpose of the contract in land.

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Executing documents against the backdrop of COVID-19

- **Key points:**
 - A form of remote signing is possible even where there are formalities such as in the case of deeds and contracts relating to land.
 - This is an area of active consideration by the Law Commission.
 - However, the current guidance is that deeds still need to be signed in the physical presence of a witness albeit that the witness's signature does not need to be applied at the same time (*Wood*).

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