

IN THIS ISSUE:



**P1/ THE BIGGER
PICTURE**

Key developments
worth noting



**P2/ DATES FOR THE
DIARY**

Make sure you
don't miss out



**P3/ CLAN NEWS
& EVENTS**

The latest updates
from CLAN



P4/ EDITORIAL

Commercial Contracts – “should there
be a duty to act in good faith?”
- Ruhi Sethi-Smith, Barrister, Forum
Chambers

MARCH 2017 NEWSLETTER

“
*Wan February with weeping cheer,
Whose cold hand guides the youngling year
Down misty roads of mire and rime,
Before thy pale and fitful face
The shrill wind shifts the clouds apace
Through skies the morning scarce may climb.
Thine eyes are thick with heavy tears,
But lit with hopes that light the year's*
”

Algernon Charles Swinburne, *A Year's Carols: February* –
emphasis added

Not the most promising description ... Fortunately, there has been plenty to divert dispute resolution lawyers during February. Beverley Barton, Senior Editor, Practical Law Dispute Resolution (www.practicallaw.com) provides a digest of some points of particular interest.

Subscribers to Practical Law Dispute Resolution can find detailed updates on all of the items mentioned, on the Practical Law Dispute Resolution website.

THE BIGGER PICTURE



Developments worth noting include:

Court Guides:

Amendments to the Chancery Guide took immediate effect in February. A revised version of the Queen's Bench guide was also published.

CPR:

The Civil Procedure (Amendment) Rules 2017 (SI 2017/95), which introduce amendments to the Civil Procedure Rules (CPR), were laid before Parliament on 3 February 2017. These rules, together with the accompanying practice direction making document, will implement the 88th update to the CPR. The amendments to the rules come into force on 6 April 2017, unless otherwise stated. The practice direction amendments come into force on several dates.

Fixed costs:

- **Clinical negligence claims:** The government has opened a consultation on proposals to introduce mandatory fixed recoverable costs for clinical negligence claims above £1,000 and up to £25,000 in the fast track and the multi-track.
- **Jackson LJ's review of fixed recoverable costs:** Jackson LJ is chairing a series of seminars. Events have already taken place in Leeds and Manchester. Further seminars will be taking place in London (Monday 13 March (afternoon)), Birmingham (Thursday 16 March (morning)) and Cardiff (Wednesday 5 April (afternoon)).

Justice matters:

On 8 February 2017, HM Courts & Tribunals Service (HMCTS) published "Justice matters", a paper outlining how its programme of changes to the justice system will improve services for everyone who uses them.

Government Response to consultation Transforming our justice system: assisted digital strategy, automatic online conviction and statutory standard penalty, and panel composition in tribunals: The Government Response was published during February.

Government Response to consultation Modernising Judicial Terms and Conditions: This was also published in February.

Litigants in person:

February saw the publication of a report of the Civil Justice Council's fifth National Forum on Access to Justice for those without means, which took place in December 2016.

Law Commission Consultation:

The Law Commission has published a consultation paper looking into

CLAN NEWS & EVENTS

- Did you attend the sold out Asset Tracing & Judgment Enforcement conference, London, March 23rd 2017? The feedback from those that did was excellent!
- Costs & Funding Breakfast, Manchester 31 May 2017 - email mark@comlit.co.uk for further info
- CLAN Annual Conference, London - June 15 2017
- For membership information please see: www.comlit.co.uk

IN THE COURTS

Plenty of judgments this month (handed down or made publicly available for the first time) – including, interestingly, a judgment on judgments, encouraging the use of "short form" judgments in appropriate cases in the Court of Appeal: something endorsed by the Master of the Rolls (see **BS (Congo) v Secretary of State for the Home Department [2017] EWCA Civ 53**).

Other key themes included:

Jurisdiction:

There was a veritable feast of cases considering jurisdiction issues this month, in an echo of a similar trend we saw last month.

Costs issues were also to the fore. Examples include:

- The Court of Appeal's decision that the fixed costs regime in section IIIA of CPR 45 applies to the costs of an application (under section 52 of the County Courts Act 1984) for pre-action disclosure in the context of claims which started, but no longer continue, under the EL/PL Protocol (**Sharp v Leeds City Council [2017] EWCA Civ 33 (1 February 2017)**).
- Several cases providing guidance on costs management points, including: **Sharp and others v Blank and others [2017] EWHC 141 (Ch) (27 January 2017)** (circumstances which may justify the court exercising its discretion to make a Costs Management Order/comments on the correct approach to proportionality), **Medac Gesellschafte Fur Klinische Spezialpreparate GmbH v Star Pharmaceutical**

Ltd [2015] EWHC 4063 (Ch) (21 October 2015) (defendant's application to revise costs budget following the claimant's amendment of its claim, even though the claimant had subsequently served a notice of discontinuance of its claim) and **Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust (unreported), 17 February 2017, (Senior Courts Costs Office)** (guidance on costs proportionality and ATE premiums).

Limitation:

a couple of judgments in February considered the principle of "relation back": see **Football Association Premier League Ltd v O'Donovan and another [2017] EWHC 152 (Ch)** and **Al-Rawas v Hassan Khan & Co (a firm) and another [2017] EWCA Civ 42**. Another decision concerned with limitation issues this month was **Burton and another v Bowdery and others [2017] EWHC 208 (Ch)**.

Damages:

In **MacInnes v Gross [2017] EWHC 127 (QB) (3 February 2017)**, the court declined to make an order allowing the defendant to recover any loss suffered as a result of fluctuations in the exchange rate between the pound and the euro since the defendant had paid its solicitors.

Mediation: Advocate General Saugmandsgaard delivered an Opinion that Directive 2013/11/EC on ADR for consumer disputes (ADR Directive) does not preclude national legislation from requiring consumers to mediate as a precondition to litigation. (**Menini and another v Banco Popolare Società Cooperativa (Case C-75/16) (16 February 2016)**).



DATES FOR THE DIARY

Court electronic filing system – Rolls Building Courts:

From 25 April 2017, the use of the electronic working will be compulsory in the Rolls Building courts, that is:

1. the Chancery Division of the High Court
2. Commercial Court
3. Technology and Construction Courts (TCC)
4. Mercantile Court and Admiralty Court.

This applies to both new claims and certain existing proceedings.

Information and user registration guide here:

<http://www.ce-file.uk/>

Law Society events

Friday 24 Mar 2017

Risk and Compliance annual conference 2017: shaping the future of compliance

Commercial Contracts – should there be a duty to act in good faith?



As English law currently stands, there is no general overriding principle of good faith in contractual performance which will be applied by the UK courts in the absence of an express term of good faith.

Therefore, if there is no express term of good faith in a contract, an aggrieved party must look to implied terms if it is to succeed in a claim. Where contracts are of a relational nature i.e. long-term relationships which rely on loyalty and co-operation, the U.K. courts will routinely imply a duty for parties to act in good faith (see *Johnson v Unisys Ltd* [2003] 1 AC 518, *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch) and *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat)).

In all other contracts, the U.K. courts are prepared to imply a term of good faith only where a contract confers a discretion upon a party. This approach was first considered in the case of *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116 in which the Court of Appeal found that such an implication was necessary by reason of “*concepts of honesty, good faith and genuineness, the need for the absence of arbitrariness, capriciousness, perversity and rationality*”. Since then a number of cases have applied this approach to contracts which confer a discretion upon a party, most recently in *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 and *Property Alliance Group Limited* [2016] EWHC 3342 (Ch).

In the Supreme Court case of *British Telecommunications Plc v Telefonica O2 UK Ltd* [2014] UKSC Lord Sumption said: “*As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that, in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously. This will normally mean that it must be exercised consistently with its contractual purpose*”. The effect of this is akin to a default rule to act in good faith in every contract which confers a contractual discretion.

Whilst the U.K. courts are increasingly prepared to imply a term of good faith where a contract confers a discretion, there is considerable reluctance towards introducing a default duty of good faith applicable to all commercial contracts which are silent on good faith.

This question of introducing such a duty was first addressed four years ago by Mr Justice Leggatt in the case of *Yam Seng Pte Limited v International Trade Corp Ltd* [2013] EWHC 111 (QB). Since then, a number of judges have expressed a degree of scepticism of introducing an overriding duty of good faith. For example, in *MSC Mediterranean Shipping Co v Cottonex* [2015] EWHC 283 (Comm), Lord Justice Moore-Bick argued against introducing a general duty of good faith: “*the better course is for the law to develop along established lines rather than to encourage judges to look for what the judge in*

this case called some ‘general organising principle’ drawn from cases of disparate kinds”. He warns that a general principle of good faith could be used to undermine the terms of an agreement reached between contracting parties rather than to support it (see [2016] EWCA Civ 789).

In *Hamsard 3147 Ltd v Boots UK Ltd* [2013] EWHC 3251 (Pat), Mr Justice Norris puts forward the concern that an obligation of good faith would require a party to elevate the interests of the other party above its own commercial interests.

However, good faith requires loyalty to the agreement rather than to the other party in contrast to fiduciary duties. Therefore, it would seem that objections to a duty to act in good faith on this basis are misconceived.

In a recent lecture given by Mr Justice Leggatt to the Commercial Bar Association, he set out a number of advantages of introducing a duty of good faith. Firstly, he argues that values of loyalty to common purpose of contract and abiding by reasonable commercial standards of fair dealing are key to protecting the integrity of the contractual and that a duty to act in good faith would both preserve these values and heighten their importance. Secondly, it could reduce the cost of contracting by reducing the need for complex documents and the risk for parties entering into short form contracts. Thirdly, a number of common law and civil systems around the world have introduced a duty to perform contracts in good faith namely, the U.S., Canada, Australia and France and the U.K is ‘swimming against the tide’.

In spite of Mr Justice Leggatt’s persuasive arguments, it seems that the only hope for introducing a duty to act in good faith in all commercial contracts comes from Lord Sumption’s comments in *British Telecommunications Plc v Telefonica O2 UK Ltd* [2014] UKSC which, if supported by other senior commercial judges, could result in a default duty to act in good faith when exercising a contractual duty. This in turn could lead to backing for a default duty to perform all commercial contracts in good faith.

For more information and advice on this topic, please contact Ruhi Sethi-Smith, a commercial barrister at Forum Chambers, on 0203 735 8070 or at rsethi-smith@forumchambers.com.

For Newsletter feedback or if you would like to include anything in a future edition please contact Alexandra Carr (or Beverley Barton at PLC) —CLAN Newsletter Editors: alexandra.carr@howardkennedy.com