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1. Viegas & Ors v Cutrale & Anor [2024] EWHC 2609 (Comm) (22 October 2024) 2. The Pentagon Food Group Ltd & Ors v B Cadman Ltd [2024] EWHC 2513 (Comm) (09 August 2024)

1. *Viegas & Ors v Cutrale & Anor* [2024] EWHC 2609 (Comm)

Date: 22 October 2024

Summary

The defendants applied for a preliminary trial to address limitation issues before a full trial. The claimants argued for a single trial covering both limitation and liability. Judge Pelling KC sided with the defendants, reasoning that an early limitation decision could resolve the entire case or, at minimum, streamline proceedings and save time and costs.

Key Themes:

1. ***Preliminary Issue Trials:*** *The judgment discusses the criteria for ordering a separate trial on specific issues.*
2. ***Limitation in Delictual Claims:*** *Examines the application of limitation principles to delictual claims, focusing on when the limitation period starts under Brazilian law. (Note: Delictual claims arise under the law of delict, which addresses civil wrongs and offers remedies for harm or damage resulting from another party's wrongful actions, negligence, or intentional misconduct).*
3. ***Constructive Knowledge and Limitation:*** *Clarifies how publicly available information can trigger limitation periods by imputing knowledge to claimants.*
4. ***Brazilian Competition Law:*** *Considers Brazilian competition law and its limitation procedures in the context of alleged cartel activity.*

Background

Over 1,500 Brazilian orange farmers claimed damages, alleging that the defendants participated in a cartel from 1999 to 2006 [4, 5]. The claimants filed two claims in 2019, years after the alleged activity ended [5]. The defendants argued the claims were time-barred under Brazil's three-year limitation period [3, 5, 6]. They requested a preliminary trial, aiming to resolve the limitation issue first and potentially dismiss the case entirely, avoiding a costly full trial [9].

Legal Issues and Analysis

1. **Preliminary Issue Trial:** CPR r.3.1(2)(j) allows courts to direct separate trials. Caution is advised in ordering these trials, as shown in Wentworth Sons v Lomas [2017] EWHC 3158 (Ch), but they are beneficial for complex cases, particularly where limitation is in question [10, 11].
2. **Triggering the Limitation Period:** Both parties agree Brazilian law applies, with a three-year limitation period. The defendants claim the period started either:
    1. On the contract dates affected by the alleged cartel [14, 15], or
    2. In early 2006, following "Operation Fanta," which publicized the alleged violations [14, 15].
3. **Constructive Knowledge:** The defendants' expert, Professor Beneti, argued that publicity from "Operation Fanta" in 2006 provided constructive knowledge sufficient to start the limitation period [15]. He cited Brazilian Superior Court decisions, including the Ramos case, which supported that public information could establish "unequivocal knowledge" [15].
4. **Claimants' Argument:** The claimants contended the limitation period began no earlier than 2018, when CADE's "Final Decision" was published. They argued that:
    1. The TCCs (compromise agreements) marked a confession by the defendants [16].
    2. The "Final Decision" documented cartel activity [16].
5. **Analysis of the Claimants' Argument:** Judge Pelling KC rejected the claimants' contention that resolving the limitation issue necessitates a complete investigation into the factual specifics of the alleged cartel activities [17,18]. He deemed this approach incompatible with the principle of constructive knowledge based on publicly available information [19, 20]. The judge pointed out that the Brazilian court decisions relied on by the claimants did not involve the level of investigation they suggest is necessary, indicating that their approach is likely flawed [19]. Requiring such an investigation, according to the judge, would significantly diminish the practical utility of a limitation defence based on constructive knowledge in saving time and costs, particularly in this complex case [19]. He further emphasised that constructive knowledge, by its very nature, cannot hinge on materials that were inaccessible to those deemed to have possessed the supposed constructive knowledge [19, 20].
6. **Objective Assessment:** Judge Pelling KC stated that the determination of whether the claimants possessed constructive knowledge requires an objective evaluation of the information available to the public (specifically, CADE's "Final Decision" and potentially the TCCs) [18, 19]. This evaluation, according to him, does not require a subjective inquiry into each claimant's actual knowledge but rather focuses on what a reasonable person would have understood from the publicly available information [18, 19].

Conclusion

Judge Pelling KC ruled for the defendants, allowing a preliminary trial on limitation based on:

1. **Potential Case Disposal:** Resolving limitation could dismiss the case if the defendants' argument succeeded [9, 20, 21].
2. **Cost and Time Savings:** A focused trial on limitation would save time and costs versus a full trial [8, 9, 22].
3. **Efficiency:** The preliminary trial would take 3-4 days compared to 12 weeks for a full trial [22].
4. **Limited Factual Inquiry:** The limitation issue relies on public information, reducing the need for extensive fact-finding [22].
5. **Just Outcome:** If the limitation defence succeeded, the claim would be appropriately dismissed; otherwise, the case would proceed with limitation resolved [24, 25].

Key Takeaway:

Viegas & Ors v Cutrale & Anor illustrates that courts may favour preliminary trials for dispositive limitation defences, given the significant savings and procedural efficiency they provide [11]. This judgment emphasises constructive knowledge as a crucial factor in triggering limitation periods based on public information.

Ratio Decidendi & Obiter Dicta:

Ratio: Courts favour preliminary trials for significant limitation issues in complex cases, aligning with judicial efficiency and cost-effectiveness [20, 21].
Obiter: Judge Pelling KC's remarks on preliminary trial complexities provide procedural commentary, not a binding legal principle [10, 11].

Parting Thoughts

In Viegas & Ors v Cutrale & Anor, Judge Pelling KC delivers a textbook exercise in judicial pragmatism, snipping through procedural thickets with the elegance of someone who's seen one cartel claim too many and has no intention of presiding over a twelve-week evidential decathlon if three days on limitation will do the job.

Faced with over 1,500 Brazilian orange farmers, a raft of allegations spanning a decade-old cartel, and litigation materials threatening to drown in their own translation footnotes, the court opted for something refreshingly radical: efficiency. The claimants wanted a full trial on limitation and liability, a sort of legal buffet with everything on the table. The court, unimpressed, suggested the starter might be enough to spoil the appetite for the rest of the meal—particularly if the limitation defence proves fatal.

And why not? If a claim might be years out of time based on documents available to anyone with a search engine and a passing interest in fruit cartels, then surely we don't need to summon economists, call for dead witnesses' files and crowd the Rolls Building with multilingual evidence handlers just yet. Constructive knowledge, after all, is not supposed to involve spelunking through confidential archives in São Paulo.

Judge Pelling KC's reasoning is grounded in sound law, sharp logic, and a commendable suspicion of litigation bloat. This was not, as the claimants feared, a premature decapitation of their claim. Rather, it was triage: a quick cut to see if there's any life left in the case once limitation is properly examined.

So the message is clear: if your claim might be stale, don't expect the court to humour you with a banquet. You'll be getting a starter—and only if it passes the sniff test will you be invited to stay for mains. Efficient, sensible, and executed with a scalpel, not a sledgehammer.

2. *The Pentagon Food Group Ltd & Ors v B Cadman Ltd* [2024] EWHC 2513 (Comm)

Date: 9 August 2024

Summary

The case involves a damages claim for alleged misrepresentation and breach of a settlement agreement concerning a fire-damaged commercial property. The Claimants sought to enforce a settlement requiring the property sale to them. The Defendant, BCL, argued it wasn't the property

owner and couldn't fulfil the agreement. Judge Tindal found BCL liable for both breach of contract and misrepresentation, concluding that the settlement implied an obligation for BCL to sell the property and that BCL's representation as the owner was actionable.

Key Themes:

1. ***Settlement Agreement Enforcement:*** *Focuses on the interpretation and enforceability of settlement agreements, especially those from mediation.*
2. ***Implied Terms in Contracts:*** *Examines when terms not expressly stated can be implied to ensure contract coherence.*
3. ***Misrepresentation in Litigation:*** *Addresses the actionability of misrepresentations in court pleadings and mediation.*
4. ***Without Prejudice Rule and Exceptions:*** *Considers the rule protecting settlement discussions from admissibility and its exceptions.*

Background

The Claimants, including Pentagon Food Group and Mr. Khan, had a tenancy agreement with BCL, run by Mr. Cadman, for Portland House. Following a fire, several legal disputes arose. First, SSAS (the true property owner) pursued a rent claim against Pentagon, which settled in 2019. Later, BCL brought a fire damage claim against Pentagon, which settled in 2022 through mediation.

During the fire damage litigation and mediation, BCL inaccurately presented itself as the property owner. The settlement required BCL to sell Portland House to Khan Estates, but issues arose when BCL's ownership claim proved false, as SSAS owned the property. The Claimants alleged BCL's failure to complete the sale breached the settlement agreement, and its ownership misrepresentation induced them into the settlement.

Legal Issues and Analysis

1. **Actionability of Statements in Litigation and Mediation:** Judge Tindal examined the legal principles of "judicial proceedings immunity" and the "without prejudice" rule [50]. He concluded that while BCL's misstatement of ownership in the Fire Claim's Particulars of Claim was misrepresentation, it was not independently actionable due to judicial proceedings immunity [56]. However, these statements were admissible as contextual evidence to interpret the Settlement and assess misrepresentation during mediation [56]. Statements made in mediation were also admissible under exceptions to the "without prejudice" rule, allowing their use to prove the Settlement's existence and misrepresentation claims [55, 56, 61, 63].
2. **Breach of Express Term:** The Claimants argued that BCL breached an express term in the Settlement requiring it to sell Portland House. Although clause 3 required Khan Estates to enter into a purchase contract with BCL, Judge Tindal interpreted this as implying an obligation on BCL to sell, considering the full context of the agreement, litigation, and mediation history [67, 73]. This relied on principles from Marks & Spencer v BNP Paribas and Oceanbulk Shipping v TMT, which allow "without prejudice" material to interpret terms [63, 65, 66, 69]. BCL breached this obligation by failing to complete the sale and proposing different terms [74].
3. **Breach of Implied Term:** Judge Tindal agreed with the Claimants that even if not expressly stated, an obligation on BCL to sell should be implied. This was based on Marks & Spencer v BNP Paribas and Shirlaw v Southern Foundries, which allow terms necessary for business efficacy or those "going without saying" to be implied [70, 76, 77, 78]. He identified two implied terms: (1) that BCL could sell or compel the sale, and (2) that BCL would sell to the Claimants [78, 86, 87]. These terms were breached, as BCL lacked the authority to sell independently [80, 90].

4. **Actionable Misrepresentation:** The Claimants argued BCL's representations, both in the Fire Claim's pleadings and mediation, that it owned Portland House and could sell it, were actionable misrepresentation [91]. Judge Tindal agreed, finding BCL's conduct, including Mr. Cadman's failure to clarify ownership, implied an ability to sell [82, 93, 94, 95]. These representations, which induced Mr. Khan to enter the Settlement and provide a guarantee, were material and at least negligent, meeting the criteria for recklessness and fraud under Ludsin Overseas v Eco3 Capital and Raiffeisen Zentralbank v RBS [88, 100, 101]. The judge emphasised that, given the materiality of the misrepresentations, the question of whether Mr Khan genuinely believed them was irrelevant, per Zurich Insurance v Hayward [106].
5. **Causation of Loss:** Judge Tindal found BCL liable but required the Claimants to prove direct loss from the breaches [107]. He rejected BCL's argument that a draft sale contract negated loss, as it deviated significantly from the Settlement terms [108]. While the Claimants showed "some loss" [110], Judge Tindal cautioned Mr. Khan about proving full loss extent, especially under Hadley v Baxendale and Smith New Court v Citibank standards for remoteness and direct causation [112, 113].

Conclusion

Judge Tindal held BCL liable for breach of contract and misrepresentation, interpreting the Settlement as implying an obligation for BCL to sell the property. He found that BCL's conduct during litigation and mediation amounted to actionable misrepresentation of ownership. The Claimants were shown to have suffered "some loss" due to these breaches, with damages to be quantified at a later remedies hearing.

Key Takeaway:

The case emphasises the importance of accurate representations in legal proceedings and the need for contractual obligations, whether express or implied, to be fulfillable. Courts may interpret agreements made in mediation by considering the parties' intentions to reach commercially viable outcomes. Misrepresentations, even in pleadings, can have legal consequences if they induce agreements.

Ratio Decidendi & Obiter Dicta:

Ratio: Judge Tindal established that contractual obligations, explicit or implied, must be based on a genuine ability to fulfil them. Misrepresenting such capacity can result in liability for breach of contract and misrepresentation, protecting the enforceability and integrity of contracts.

Obiter: The judge's discussion of potentially applying the Oceanbulk exception to imply terms using "without prejudice" material and his advice to Mr. Khan on proving losses were not essential to the decision, serving as guidance rather than binding legal principles.

Parting Thoughts

In Pentagon v BCL, HHJ Tindal masterfully unpicked a legal tapestry woven from misapprehensions, misstatements, and mediatory mayhem. The case confirms that while contracts made in mediation may lack the polish of a commercial deal, courts will nevertheless polish them up if necessary—especially where one party has committed to sell something it does not own, could not sell, and had no realistic plan to acquire.

The judgment is a clinical dissection of legal fictions posing as commercial realities. BCL, through the late Mr Cadman, sought to have its settlement cake and disclaim any ingredients—offering to sell a property it never owned, then expressing shock when asked to deliver the deed. HHJ Tindal was

unimpressed. So too was the law, which turned to that old duo—breach and misrepresentation—to restore order.

We are reminded, perhaps a little gleefully, that misrepresentations made during mediation are not immune to consequences simply because they were uttered in a cloakroom of confidentiality. The 'without prejudice' rule is a shield, not a suit of armour. When deployed as a Trojan horse for falsehoods—however unwitting—the law opens the gates.
HHJ Tindal's reasoning is sharp, modern and lucid. The deployment of *Oceanbulk*, *Unilever*, *M&S v BNP Paribas*, and *Shirlaw v Southern Foundries* was more than legal choreography—it was a quietly scathing lesson in commercial honesty. If you agree to sell the Eiffel Tower, you'd better either own it or have a very persuasive letter from the Mayor of Paris.

The judgment is also a gentle but pointed nod to litigants who collapse the boundaries between themselves, their companies, and their pension funds. The ghost of Salomon v Salomon hovers—wagging its Victorian finger at those who confuse beneficial control with legal ownership.

In the end, BCL was held liable not because the law is pedantic, but because it is precise. Contracts—even those made under the weary eye of a mediator—require more than good intentions and creative letterheads. They require the truth. And if one cannot manage that, then at the very least, a workable plan for delivering what one has promised.

#LegalUpdate #ConstructionLaw #Adjudication #CommercialLaw #FridayBriefing #CaseLaw #LegalInsights #November2024 #DandDUpdates #EWHC #withoutprejudice #preliminarytrial #limitationperiod #constructiveknowledge #actionablemisrepresentation #mediation #litigation

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