FromCounsel: Judgments in Brief

March – April 2018

Okpabi v Royal Dutch Shell plc [2018] EWCA Civ 191

The Court of Appeal dismissed the appeal against the High Court's decision that there was no arguable duty of care under English law on the part of an English holding company for its Nigerian subsidiary. Proximity was the key question. The evidence did not demonstrate a sufficient degree of control by the parent company of its subsidiary's operations to establish the necessary degree of proximity. The existence of the corporate structure (a network of overseas subsidiaries with their own management structures) militated against the requisite proximity.

See FC Feature here for analysis on the CA judgment and here for further analysis of the High Court judgment in ***Okpabi*** and other cases addressing English parent company liability for actions of foreign subsidiaries.

Burnden Holdings (UK) Ltd v Fielding [2018] UKSC 14

The Supreme Court held that the director shareholders who received an unlawful dividend in specie could *not* rely on the exception to the statutory time bar on claims under s 21(1)(b) Limitation Act 1980 in relation to a claim arising from that unlawful dividend. This was because the directors were regarded as 'trustees in possession of trust property which they had converted to their own use' for the purposes of s 21(1)(b).

Ben Griffiths considers the judgment here. The application of limitation periods to claims for breach of directors' duties and circumstances in which they will not apply are explained in FC Q&A here and here.

Ball (PV Solar Solutions Ltd) v Hughes and another [2017] EWHC 3228 (Ch)

The High Court addressed whether the directors of an insolvent company had breached their duties under s 172(3) CA 2006. It held that the point at which the s 172 duty becomes one where the interests of the company are to be equated with the interests of the creditors (rather than the members) is where there is a real as opposed to a remote risk of insolvency. In addition, the court considered the application of the subjective test for assessing directors' conduct in an insolvency context. On the facts, s 172(3) was applicable and the directors had failed to comply with their duty.

Edward Davies QC considers the judgment here, and see FC Q&A here, here and here.

Re Domestic & General Insulation Limited [2018] EWHC 265 (Ch)

The High Court held that failure to give notice of a special resolution for a company's voluntary winding up to a qualifying floating charge holder does not invalidate the liquidation. See FC Feature here and related FC Q&A here and here.

020 7242 9993
info@fromcounsel.com
www.fromcounsel.com

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Re Bowe Watts Clargo Ltd (in liquidation) [2017] EWHC 7879 (Ch)

The Companies Court considered the duty to promote the success of a company in s 172 CA 2006, the limitation period applicable to a claim for breach of that duty and the application of the relief from liability in s 1157 CA 2006. In this case, the court held that there was a breach of the s 172 duty (post-insolvency) and the statutory time bar on claims did *not* apply due to the application of the exception under s 21(1)(b) Limitation Act 1980. Relief under s 1157 was also not available because the director had not acted reasonably in the circumstances.

Ben Griffiths considers the judgment here, noting the position as regards the s 21(1)(b) exception following the Supreme Court's decision in Burnden.

Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd [2018] EWCA Civ 84

The Court of Appeal held that a director's knowledge and fraudulent conduct should not be attributed to the company meaning that an illegality defence could not be established to a claim by the company. The court stated that attribution in the context of the illegality defence depends on why, and in what circumstances, a party is seeking to attribute knowledge or conduct. See FC Feature here and FC Q&A here.

Re Easynet Global Services Ltd [2018] EWCA Civ 10

The Court of Appeal affirmed that, provided the requirements of Companies (Cross-Border Mergers) Regulations 2007 (CBMR 2007) are met, the mere fact that a dormant or shell company incorporated in another EEA jurisdiction is included in the arrangements solely to introduce a cross-border element (and so engage the cross-border merger regime) will not deny the court jurisdiction to sanction the merger. Ben Shaw considers the judgment here. For further analysis see FC Q&A here and here.

Persimmon Homes Ltd v Hillier [2018] EWHC 221 (Ch)

The High Court held that both a share purchase agreement and a disclosure letter should be rectified on the basis of common mistake in order to give effect to the parties' common intention. The heads of terms, which did not tally with the rest of the negotiations, did not need to be given 'additional weight' in considering the rectification claim. See FC Feature here.

Breeze v The Chief Constable of Norfolk Constabulary [2018] EWHC 485 (QB)

The High Court applied the principle of reflective loss and held that as the company could have sued for the loss of its value as reflected in the share price, the no reflective loss principle meant that the claimants were debarred from suing for that loss. See FC Feature here and FC Q&A here for an explanation of the concept of reflective loss and exceptions to it.

020 7242 9993
info@fromcounsel.com
www.fromcounsel.com

Re SHB Realisations Ltd [2018] EWHC 402 (Ch)

The High Court held that a provision in a company voluntary arrangement (**CVA**) providing for certain landlords to accept a reduced rent which, if the CVA terminated, reverted to the pre-CVA sum and all unpaid rent remained due as if the CVA had never been in place (less sums actually paid during the time that the CVA was in force) was not an unenforceable penalty as the CVA was *not* subject to the law on penalties. See FC Feature here and related Q&A here.

Re ABM Amro Commercial Finance plc (unreported)

In the FC Feature here, Ben Shaw considers this case and other recent decisions which have dealt with recurring cross-border merger issues.

1. ***ABM Amro*** is a further example of the court holding that, where a merging company fell within one of the exemptions to the requirement to hold a members' meeting to approve the merger (so that no such meeting had to be held), the procedural requirements set out in CBMR 2007 by reference to that meeting date did not, as a jurisdictional matter, apply. For further analysis see FC Q&A here.

2. The English courts have expressed differing views as to whether, in deciding whether or not to sanction a cross-border merger, the court should review the decision of another competent authority to grant the pre-merger certificate. For further analysis see FC Q&A here.

Panel on Takeovers and Mergers v David Cunningham King [2018] CSIH 30

The Inner House of the Court of Session refused an appeal by David Cunningham King against a court order made by the Outer House requiring him to make a Rule 9 mandatory bid for those shares in Rangers International Football Club plc not already controlled by him and his concert party. See FC Feature here and FC Q&A here.

Cash Generator Ltd v Fortune and others [2018] EWHC 674 (Ch)

The High Court decided that failure to comply with the process to nominate a liquidator required by s 100 IA 1986 and IR 2016 did not invalidate the subsequent appointment of the liquidator. See FC Feature here.

This publication notes FC Features covering judgments which have been published by FC during the period March – April 2018.

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www.fromcounsel.com

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