## *Welcome to this month's edition of the Round Up*

## *Urgent Information for Our Clients - Covid-19*

During this time of uncertainty, our concern is the health and safety of everyone that we work with – clients, employees and suppliers. Lamb Chambers is open for business as per usual (albeit remotely), and we are committed to continuing in retaining/building relationships with you during this period in a sustainable way. Lamb Chambers has technology in place that allows us to be in contact with you during this time. We are still contactable by the usual telephone and email and we also have conferencing facilities such as Zoom, Skype and even Whatsapp face time to cater for all needs.

During this period, Lamb Chambers has created a multidisciplinary task force to assist law firms who may be short staffed or overwhelmed with instructions, both domestic and international, in tackling the myriad of challenges posed by this pandemic. If you have any work that needs a legal opinion please contact our Senior Practice Manager, Cliff Alderson who will be able to assist you with any requests you may have.

## *This month's edition includes:*

James Tunley explains how employers can avoid redundancies by introducing lay-off's and short-time working during Coronavirus (COVID-19).

Lucy Keane discusses the likely impact of COVID-19 on commercial business which will lead to an increase in international disputes.

Dominic Bright analyses how far civil proceedings for injunctive relief against "persons unknown" can be used to restrict public protests in light of the case of Canada Goose UK Retail Ltd & Anor v Persons Unknown & Anor [2020] EWCA Civ 303.

## *Employment: Coronavirus (COVID-19): Lay-off and short-time working*

James Tunley

Laying off employees or switching to short-time working are two measures employers can take to avoid redundancies.

Employers can lay someone off without pay where there is an express contractual right to do so). It cannot be imposed unilaterally. Therefore, and in the unlikely event that an implied right has arisen though a long-established custom and practice, it will be a matter of negotiation and agreement, which may be forthcoming where there is a stark choice between being laid off and redundancy.

In the absence of a contractual term or agreement, employees are entitled to their full pay. To assist, the Government's Coronavirus Job Retention Scheme, which is backdated to cover the cost of wages from 1 March 2020, will cover the cost of 80% of employees' wages. This is subject to a cap of £2,500 per month. Employers will need to designate affected employees as 'furloughed workers' and submit pay information to HMRC through a new portal to be set up imminently.

Even businesses that remain open will see a downturn in business as a result of this pandemic. They may seek to reduce their business costs by putting employees on 'short-time' working and reducing their hours.

As with laying off employees, the employer needs a contractual right to do so otherwise they may face claims for unlawful deductions from wages, breach of contract, or constructive dismissal and a redundancy payment on the basis that they are dismissed by reason of redundancy.

For the purposes of redundancy under the Employment Rights Act 1996, short-time working is defined as being on less than half of the normal week's pay (Section 147). If that definition is met, then the employee is eligible for a redundancy payment if there have been six or more weeks of short-time working in any 13-week period. Ultimately the employee must resign but to seek a payment they must, after the relevant eligibility has arisen, give written notice to their employer of their intention to claim a redundancy payment in short-time.

An employer can serve a counter-notice within seven days, but to avoid liability for a payment they must be able to show they reasonably expected to provide at least 13 weeks' continuous work within the following four weeks. No-one knows how long the current public health measures will remain in place but from every perspective, one can but hope that any such expectations prove reliable.

## *International Dispute Resolution in the Age of COVID-19.*

Lucy Keane

There are many ways in which the coronavirus, officially known as COVID-19, is likely to impact on the commercial activities of businesses operating internationally. The challenges inherent in maintaining global supply chains will be pushed to breaking point in the current COVID-19 crisis. This, in turn, will inevitably lead to an upsurge in international disputes.

International commercial arbitration offers parties a flexible means of obtaining the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense. Even if the parties did not include an arbitration agreement in their original contract, it is still possible for them to agree that an existing dispute be referred to arbitration. Party autonomy, a fundamental principle of international

arbitration, allows parties to agree how their dispute is to be resolved. It is therefore an attractive option for parties facing challenges in the COVID-19 world.

The lengthy lockdown on business and communities in China has already impacted on the ability of the supply chain to service outbound contractors. Production and movement of materials has been delayed and there may be obstacles to the shipping and landing of Chinese materials in foreign ports depending on a foreign government's efforts to contain the virus.

With such adverse impacts on supply chain contracts looming large, parties will be considering ways of deferring the performance of contractual obligations without penalty.

The most likely justification for doing so will be under the concept of "force majeure". Originating in French law, this means literally "superior force". Its principles can reduce or eliminate a party's liability where performance of the contract is prevented or hindered by an event or circumstances that it cannot control.

There are differences of approach to "force majeure" depending on whether a jurisdiction belongs to the civil or common law tradition.

In the civil law tradition, followed in the European countries and China, the principles of "force majeure" are implied into contracts. Common law jurisdictions, such as England & Wales and the USA, have no general definition, or concept, of "force majeure", rather it is a creature of contract. It is therefore important to carefully consider the terms of the "force majeure" clause if the contract is governed the law of a common law jurisdiction.

The potential culture clash between parties and contracts from differing jurisdictions can have an impact on the means of resolving a dispute. Rather than litigating in a state court with a legal tradition different to the party's own and a potential for bias in favour of a local party at a time when national borders are being reinforced as never before, parties may well favour international arbitration with its inherent flexibility and access to a final, binding decision that is easily enforceable worldwide.

## *Commercial property: Canada Goose UK Retail Ltd & Anor v Persons Unknown & Anor [2020] EWCA Civ 303*

Dominic Bright

How (far) can civil proceedings for injunctive relief against "persons unknown" be used to restrict public protests? Helpfully, the President of the Civil Division of the Court of Appeal, David Richards and Coulson LJJ recently handed down helpful procedural guidelines and guidance on interim and final injunctions, respectively, in protestor cases.

*Parties*

The appellant claimants – 1) the UK trading arm of an international retail clothing company, selling mostly coats containing animal fur and down ("Canada Goose"), that opened a store in Regent Street, London ("the Store"); and 2) the manager of the Store – sought injunctive relief and damages, following their complaint that the respondent defendants engaged in a campaign of harassment, acts of trespass and / or nuisance.

The first respondent defendants were described in the claim form as: "Persons unknown who are protesters against the manufacture and sale of clothing made of or containing animal products and

against the sale of such clothing". The second respondent defendant was People for the Ethical Treatment of Animals (PETA) Foundation.

*Facts*

The Store was the site of many protests by animal rights activists against the use of animal fur and down, especially the method that the former is procured from coyotes. In short, the appellant claimants complained that, at the Store: staff were insulted; security guards were allegedly subject to insults and homophobic comments; and offensive and threatening language was used against customers, who also reported being hit and kicked when entering the Store.

Nicklin J made a number of findings, including that: 1) there were "three main occasions – 11, 18 and 24 November 2017 – on which the sheer number of protestors [400, 300, and 100, respectively] seriously impacted upon the operation of the Store"; 2) "there is evidence of incidents where paint or dye has been thrown on customers, which (if done deliberately) would appear to constitute assault and/or criminal damage"; and 3) there was "evidence of the commission of criminal offences by certain individual protestors, including offences of violence".

Further: there was "evidence of incidents of trespass in the Store on several occasions"; there was no evidence of "any wrongdoing by PETA or its members or representatives at any demonstrations"; and there was "no suggestion that the police lack powers to deal effectively with any of the matters". There was also no evidence as to economic impact of the protests.

*Interim injunction*

On 29 November 2017, Teare J granted an interim injunction restraining the respondents from, amongst other acts: 1) assaulting, molesting or threatening employees, security guards, customers and any other person visiting or seeking to visit the Store ("Protected Person") ; 2) behaving in a threatening, intimidating, abusive and/or insulting manner directly at any Protected Person or group of thereof; and 3) entering, blocking or otherwise obstructing the entrance to the Store.

The order was stated to continue in force, unless varied or discharged by further order, albeit that a further hearing was to take place on 13 December 2017. On 15 December 2017, Maloney J continued the interim injunction, but with important variations. This order was stated to continue in force, unless varied or discharged, until no later than 1 December 2018.

This was the date when Canada Goose was to apply for a case management conference or summary judgment, in default of which, proceedings would be dismissed and the injunction discharged, without further order.

*Summary judgment*

On 29 November 2018, Canada Goose applied for summary judgment against the respondents for a final injunction, however, further written submissions purported to make clear that summary judgment against PETA was no longer pursued ("the further submissions").

On 30 September 2019 – upon receipt of the further submissions, *Cameron v Liverpool Insurance Co Ltd* [2019] UKSC 6, [2019] 1 WLR 147 ("*Cameron*"), and *Ineos Upstream Ltd v Persons Unknown* [2019] EWCA Civ 515, [2019] 4 WLR 100 – Nicklin J handed down judgment. The application for summary judgment was refused. Further, a finding was made that, in view of the failure of the interim injunction to comply with the relevant principles, and fundamental issues concerning the validity of the claim form and its service, the interim injunction then in force, could not be allowed to continue.

*Grounds of appeal*

The appellant claimants had three main grounds of appeal, namely that Nicklin J erred in: 1) refusing to amend the interim order of Teare J to provide that service by email was permissible, and adopting a procedurally unfair practice in refusing to consider an application to dispense with service of the claim form; 2) holding that the proposed re-formulation of the description of the first respondent defendants was impermissible; and 3) the approach to summary judgment.

Service

The Master of the Rolls, David Richards and Coulson LJJ held that:

> "Canada Goose can only succeed if Nicklin J, in refusing to exercise his discretionary management powers, made an error of principle or otherwise acted outside the bounds of a proper exercise of judicial discretion. We consider it is plain that he made no error of that kind."

The crux of the reasoning was as follows:

> "49. Nicklin J referred in his judgment to the evidence that 385 copies of the interim injunction had been served between 29 November 2017 and 19 January 2019, and that they had been served on a total of 121 separate individuals who could be identified (for example, by body-camera footage). The claimants have been able to identify 37 of those by name, although Canada Goose believes that a number of the names are pseudonyms. None of those who can be individually identified or named have been joined to the action (whether by serving them with the claim form or otherwise) even though there was no obstacle to serving them with the claim form at the same time as the order. Moreover, Canada Goose is not just asking for dispensation from service on the 121 individuals who can be identified. It is asking for dispensation from service on any of the Persons Unknown respondents to the proceedings, even if they have never been served with the order and whether or not they know of the proceedings. There is simply no warrant for subjecting all those persons to the jurisdiction of the court.
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> 50. Furthermore, it would have been open to Canada Goose at any time since the commencement of the proceedings to obtain an order for alternative service which would have a greater likelihood of bringing notice of the proceedings to the attention of protesters at the shop premises, such as by posting the order, the claim form and the particulars of claim on social media coverage to reach a wide audience of potential protesters and by attaching or otherwise exhibiting copies of the order and of the claim form at or nearby those premises. There is no reason why the court's power to dispense with service of the claim in exceptional circumstances should be used to overcome that failure."

Interim injunctions

On *interim* injunctions, the following seven procedural guidelines were given:

> "(1) The 'persons unknown' defendants in the claim form are, by definition, people who have not been identified at the time of the commencement of the proceedings. If they are known and have been identified, they must be joined as individual defendants to the proceedings. The 'persons unknown' defendants must be people who have not been identified but are capable of being identified and served with the proceedings, if necessary by alternative service such as

can reasonably be expected to bring the proceedings to their attention. In principle, such persons include both anonymous defendants who are identifiable at the time the proceedings commence but whose names are unknown and also Newcomers, that is to say people who in the future will join the protest and fall within the description of the 'persons unknown'.

(2) The 'persons unknown' must be defined in the originating process by reference to their conduct which is alleged to be unlawful.

(3) Interim injunctive relief may only be granted if there is a sufficiently real and imminent risk of a tort being committed to justify *quia timet* relief.

(4) As in the case of the originating process itself, the defendants subject to the interim injunction must be individually named if known and identified or, if not and described as 'persons unknown', must be capable of being identified and served with the order, if necessary by alternative service, the method of which must be set out in the order.

(5) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights.

(6) The terms of the injunction must be sufficiently clear and precise as to enable persons potentially affected to know what they must not do. The prohibited acts must not, therefore, be described in terms of a legal cause of action, such as trespass or harassment or nuisance. They may be defined by reference to the defendant's intention if that is strictly necessary to correspond to the threatened tort and done in non-technical language which a defendant is capable of understanding and the intention is capable of proof without undue complexity. It is better practice, however, to formulate the injunction without reference to intention if the prohibited tortious act can be described in ordinary language without doing so.

(7) The interim injunction should have clear geographical and temporal limits. It must be time limited because it is an interim and not a final injunction."

Final injunctions

The court also gave the following helpful guidance on *final* inunctions:

"89. A final injunction cannot be granted in a protester case against 'persons unknown' who are not parties at the date of the final order, that is to say Newcomers who have not by that time committed the prohibited acts and so do not fall within the description of the 'persons unknown' and who have not been served with the claim form. There are some very limited circumstances, such as in *Venables v News Group Newspapers Ltd* [[2001] EWHC QB 32,] [2001] Fam 430, in which a final injunction may be granted against the whole world. Protester actions, like the present proceedings, do not fall within that exceptional category. The usual principle, which applies in the present case, is that a final injunction operates only between the parties to the proceedings: *Attorney-General v Times Newspapers Ltd* [1992] 1 AC 191, 224. That is consistent with the fundamental principle in *Cameron* (at [17]) that a person cannot be made subject to the jurisdiction of the court without having such notice of the proceedings as will enable him to be heard.

…

91. That does not mean to say that there is no scope for making 'persons unknown' subject to a final injunction. That is perfectly legitimate provided the persons unknown are confined to those within Lord Sumption's Category 1 in *Cameron*, namely those anonymous defendants who are identifiable (for example, from CCTV or body cameras or otherwise) as having committed the relevant unlawful acts prior to the date of the final order and have been served (probably pursuant to an order for alternative service) prior to the date. …

93. As Nicklin J correctly identified, Canada Goose's problem is that it seeks to invoke the civil jurisdiction of the courts as a means of permanently controlling ongoing public demonstrations by a continually fluctuating body of protesters. It wishes to use remedies in private litigation in effect to prevent what is sees as public disorder. Private law remedies are not well suited to such a task. As the present case shows, what are appropriate permanent controls on such demonstrations involve complex considerations of private rights, civil liberties, public expectations and local authority policies. Those affected are not confined to Canada Goose, its customers and suppliers and protesters. They include, most graphically in the case of an exclusion zone, the impact on neighbouring properties and businesses, local residents, workers and shoppers. It is notable that the powers conferred by Parliament on local authorities, for example to make a public spaces protection order under the Anti-social Behaviour, Crime and Policing Act 2014, require the local authority to take into account various matters, including rights of freedom of assembly and expression, and to carry out extensive consultation: see, for example*, Dulgheriu v Ealing London Borough Council* [2019] EWCA Civ 1490, [2020] 1 WLR 609. The civil justice process is a far blunter instrument intended to resolve disputes between parties to litigation, who have had a fair opportunity to participate in it."

*Disposal*

Applying the guidelines on *interim* injunctions, it was held that "the claim form is defective and that the injunctions granted by Teare J on 29 November 2017 and continued, as varied, by Judge Moloney on 15 December 2017, were impermissible." The description of "persons unknown" was too wide – it would include a peaceful protestor in Penzance – and the specified prohibited acts were not confined to unlawful acts.

Applying the guidance on *final* injunctions, the wording proposed by Canada Goose was not limited. Nicklin J correctly dismissed the application for summary judgment for this reason, as well as non-service of the proceedings.

Accordingly, the appeal was dismissed.