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In This Update:

3 KEY DEVELOPMENTS

August 2022: This month's edition we have articles from Nathan Webb, Iain Shipley and Jon Lester. This edition will cover the new Chancery Guide, a greenwashing litigation update and more…

The new Chancery Guide: useful points for practitioners

Introduction

As many practitioners will be aware, a new version of the Chancery Guide came into force on 29 July 2022. It has been substantially rewritten and is significantly longer than its predecessor, at 278 pages rather than 157.

Unsurprisingly, the new version of the Guide covers much of the same subject matter as earlier versions. As previously, there are chapters which set out general guidance which will be universally applicable and there are chapters relevant to specific areas of law, which set out bespoke guidance applicable to that area.

The new version continues the approach in having chapters dedicated to the specialist lists and work within the Chancery Division, though the number of these chapters has increased. Alongside the Insolvency and Companies List, the Intellectual Property List and the Financial List, additional chapters now cover the Business List (chapter 18), the Competition List (chapter 19), probate (chapters 23-24), pensions (chapter 26), property (chapter 27) and the Revenue List (chapter 28).

Some points to note: general provisions

Chapter 8 on witness evidence now makes specific reference to PD 57AC and provides:

- That in all cases, parties are required by paragraph 8.5 to consider whether in addition to witness statements, judges would be assisted at trial by an agreed bundle of key documents and an agreed narrative chronology referencing those key documents. If they consider it appropriate parties are encouraged to seek directions at CMC stage.
- More detailed provisions on supplemental witness statements, corrections and amplifications. Paragraph 8.18 for example notes that parties are expected to have re-read their witness statements before being called and if any corrections are required they should be provided at least 24 hours before the witness is called.

Chapter 16 on orders provides that:

- Draft orders made after hearings should be both filed by CE-file and send by email in Word format to the relevant Judge's clerk (see paragraph 16.11).

- Draft orders should not recite that the court has read the documents recorded on the court file as having been read, as there is no such record (paragraph 16.15(f)).
- Consent orders must be CE-filed and should only also be emailed to the Judge's clerk if requested or if it is necessary for them to be considered urgently (see paragraph 16.37). A version signed by the parties should be provided in PDF format and a clean copy should be provided in Word format. Both need to meet drafting requirements set out in paragraphs 16.39 and 16.42 (if applicable).

Chapter 12 on trials provides that:

- Skeleton arguments for trials should be served and provided to the Court via CE-file (and by email to the Judge's clerk if known) not less than 2 clear days before the date or the first date on which the trial is due to come on for hearing, or if earlier one clear day before the Judge is due to begin pre-reading (see paragraph 12.50).
- Chronologies and lists of issues will generally be required and unless otherwise ordered, the claimant is responsible for preparing them and delivering them with the skeleton argument (see paragraphs 12.52-12.55).
- Aside from any reading list in the skeletons, there must be a separate reading list, ideally agreed between the advocates, which must be lodged with the trial bundles (see paragraphs 12.56-12.59).
- Agreed, single joint bundles of authorities should be provided by 4pm the day before the start of trial, or at least one clear day before pre-reading if it includes authorities (see paragraphs 12.59-12.60).

There are now separate appendices dealing with a range of matters, including preparation of bundles (Appendix X) and skeleton arguments (Appendix Y). There are also appendices providing a template McKenzie Friend Notice (Appendix J), freezing order (Appendix M) and delivery up order (Appendix N). Of note is the clarification in Appendix Y that skeleton arguments will not generally be required for short hearings of less than an hour which are uncontroversial. Paragraph 14.42 provides that for ordinary applications (defined in paragraph 14.26 as those listed for half a day or less with no more than 90 minutes judicial pre-reading), skeletons need to be filed and exchanged by 10am on the working day before the hearing.

There is an appendix dealing with remote and hybrid hearings (Appendix Z), which sets out rules for the giving of evidence, including:

- Where evidence is to be given from a legal representative's office, a requirement for those representatives to give notice

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with a view to a representative from the other party attending (see paragraph 34).
- Where evidence is to be given from a more informal venue, a statement that it might be appropriate to have more than one camera available (see paragraph 35).

Some points to note: the Insolvency and Companies List

Aside from general points, some particular points to note from as regards the Insolvency and Companies Court List (chapter 21) are:

- Chapters 3 to 6 of the Guide are disapplied for cases proceeding in London, on the basis directions will be given by ICC Judges (see paragraph 21.3).
- The position as regards costs management (or the lack of it) is confirmed in paragraph 21.39, which provides that it does not usually apply to proceedings in the list, but is routinely ordered for unfair prejudice petitions.
- As regards the ICC Judge's Applications List (which was previously known as the ICC Interim Applications Court), an interesting change is that certificates of urgency must now be signed "*…by counsel or other advocate appearing or by a litigant acting in person*" (see paragraph 21.49). This differs from the previous position, which also provided that certificates of urgency could be signed by solicitors[1].
- A general rule has been introduced that hearings with a time estimate of half a day or less will be dealt with remotely unless otherwise ordered (see paragraph 21.64). However, this does not apply to the first hearing of bankruptcy and winding up petitions, which are in person (see paragraph 21.32). It also may not apply to the Applications List (as to which see paragraph 21.50).
- Bundles are required for all hearings save for winding up petitions (see paragraph 21.65).

Conclusion

The new and improved Guide looks to be more easily navigable than its predecessor and provides some helpful additional information to those less familiar with certain procedures (for example, there is a helpful section explaining the workings of the Winding Up Court from paragraph 21.57). As such, it looks to be a useful development which will assist practitioners and litigants in person alike.

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[1] See paragraph 25.30 of the previous Chancery Guide.

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Greenwashing Litigation Update: Commodore v H&M in the New York Southern District Court

Those watching the *"greenwashing"* litigation space will find the case of *Chelsea Commodore v H&M Hennes & Mauritz LP*, recently brought in the New York Southern District Court, worth following.

Although brought in the State of New York, the case will be of interest both generally and to English practitioners specifically, because of the novelty of greenwashing claims and the lack of any real guidance from the English courts as to how they will be dealt with.

Commodore v H&M is a test case brought by the plaintiff on behalf of herself as well as all other consumers who purchased purportedly sustainable clothing sold by H&M within the State of New York. The plaintiff's case is that H&M engaged in a greenwashing campaign in respect of their clothing, comprising a number of elements, including the following.

H&M marketed its clothing with reference to *"sustainability profiles"* giving specific information comparing the environmental impact of the clothing versus other clothing. For example, the sustainability profile would set out the water usage of a garment compared to other similar garments.
According to the plaintiff, there were two problems.

To begin with, H&M incorrectly transcribed the information from the research data and presented each 'negative' finding / figure as a 'positive' finding / figure. So, for example, H&M would state that a particular garment used 30% *less* water than a comparable garment, when in fact the results of the analyses showed that it used 30% *more* water. H&M was therefore misrepresenting environmentally *worse* clothing as environmentally *better* clothing. In addition, the methodology used to compile the scorecards was allegedly problematic and misleading, as it only took into account certain aspects of the garment lifecycle and not the full lifecycle.

H&M also publicly emphasised its recycling programme, placing recycling bins in its stores with the suggestion that consumers could place their old and unwanted clothes in the bin to be recycled. However, it appears that in reality only a very small proportion of the clothing placed in those bins is actually recycled. The plaintiff estimates that only approximately 35% of the clothing is

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recycled, with the remainder either being sold second-hand or being incinerated or placed in landfill. H&M's recycling campaign gave no indication that this was the true picture.

The plaintiff's case is that H&M's greenwashing practices were deceptive and it has benefitted by (falsely) differentiating itself from its competitors, and selling its clothing to consumers who chose H&M over other alternatives on the basis of the greenwashing campaign. The plaintiff's case is brought on the basis of New York State legislation dealing with deceptive acts and practices, false advertising, and based on an unjust enrichment claim.

Were a similar case to be run in England and Wales, similar causes of action would probably be available. A case could be advanced by consumers in, for example, misrepresentation, negligent misstatement, and breach of contract, as well as under the Consumer Protection from Unfair Trading Regulations 2008.

The main difference between this test case in New York and the position that would apply in England and Wales is that New York's procedure is far friendlier to this sort of litigation. First, the plaintiff is seeking to bring a class action on an 'opt-out' basis, which would not be available here. Second, the plaintiff is seeking to have the matter tried before a jury, which would also not be available.

The primary difficulty in running consumer greenwashing claims in this jurisdiction is that although greenwashing creates a very large amount of harm and loss to society in aggregate, on an individual level it is unlikely to cause a great degree of loss. For that reason, individual claims are generally difficult to run, and there is no scope for an 'opt-out' basis class action to simplify matters.
As a result, at least for now, most legal combating of greenwashing tends to be through regulators.

However, this is very much a developing area of law and practice, and it is to be hoped that the experiences of other jurisdictions which are taking a different approach to greenwashing claims will provide a fertile learning ground for this jurisdiction. If the *H&M* case does not settle, it may well be one such useful case study.

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Al Assam v Tsouvelekakis [2022] EWHC 2137 (Ch): the proper costs order for a successful freezing injunction

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A freezing injunction may be awarded where the claimant fears the defendant will unreasonably dissipate his assets to put them beyond the reach of enforcement once the claimant has his judgment. Whilst it can be obtained after judgment, the freezing injunction is most well known as an interim remedy, obtained at the very beginning of the claim process before the defendant has had a chance to take significant steps to dissipate. The freezing injunction is therefore routinely obtained at a time long before the Court has finally determined the merits of the claim which the injunction is obtained to support. It may of course turn out that the claimant has no claim, and that the defendant has had his assets frozen for no good reason.

If the Court awards a freezing injunction at the outset of a claim, it will have to decide what costs Order to make. Should the costs be reserved until the outcome of the claim is known, or should costs follow the event, so that the claimant gets his costs of the freezing injunction regardless of whether he goes on to succeed in the claim?

Where a freezer is obtained as an interim remedy, it might seem obvious that the proper Order should be for costs to be reserved. After all, it is not yet known whether the claimant will win his claim and, if he should lose, he will have had no justification for freezing the defendant's assets in the first place. The 2001 case of *Picnic of Ascot v Kalus Derigs* decided that costs in interim injunctions where the "balance of convenience" is in issue would normally be reserved.

However, in *Bravo and Others v Amerisur Resources Plc* [2020] EWHC 2279 (QB), reported in [2020] Costs LR 1329, Martin Spencer, J declined to follow *Picnic of Ascot*, highlighting the distinction between injunctions which aim to provide the claimant with an advanced version of his final remedy (for which "balance of convenience" is the touchstone), and a freezing injunction, which does not. The Judge considered that a freezing injunction application is more akin to a claim in its own right, and that "*even if at the subsequent trial it turns out that the claims fail on the basis of the evidence due to that trial, it does not at all follow that this means that the court was wrong to find that there was a good arguable case. On the contrary, those two findings are wholly consistent with each other, or maybe wholly consistent with each other. Nor is there any reference to the balance of convenience. The question is whether it is just and convenient to make an order*." The Judge therefore made an Order that the costs of the successful freezing injunction should follow the event, without regard to the outcome of the substantive claim.

On 11 August 2022, His Honour David-White KC (sitting as a High Court Judge) handed down his judgment in *Al Assam v Tsouvelekakis* [2022] EWHC 2137 (Ch). Judge Davis-White gave a thorough consideration of the recent cases dealing

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with the question of costs upon a successful interim injunction including *Picnic at Ascot*, *Bravo*, and subsequent cases. Against the recent trend for costs to follow the event in freezing Order applications, the Judge opted to return to the principle in *Picnic at Ascot*, that costs should be reserved. The Judge considered that, whilst there are differences between freezing injunctions in fear of unreasonable dissipation and interim injunctions giving the claimant his final remedy pending the outcome, both are essentially holding the ring. He said: "*As regards interim injunctions granted under the American Cyanamid principle, it is no answer to an application for the costs of the application to be reserved to say that the respondent failed to establish that there was not a serious issue to be tried and that whatever the position at trial the respondent has failed on the assessment of the merits test as they stand and apply at the interim stage* [...] *The reason is because the claim has not then been established. In my judgment, the same is true in principle as regards a freezing injunction. The court has simply decided that there is an arguable claim, not that the claim succeeds. If the claim fails at trial, then the freezing injunction should (with the benefit of hindsight) not have been made*." After all: "*is it fair that the defendant should pay the cost of an injunction against him to assist in preserving assets and preventing improper dissipation so as a possible judgment against him will be satisfied, if at the trial it turns out there is in fact nothing for which he is liable and no judgment against him? My answer is "No"."*

Al Assam v Tsouvelekakis swims against the recent tide of decisions providing for costs to follow the event, and so will be a helpful decision for defendants who have a freezing Order made against them. However, as it is a High Court decision, it does not settle the debate. Claimants who obtain a freezing Order can still argue that they should have their costs in any event according to the logic of *Bravo* and subsequent cases.

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