

Reflections from the Wilberforce Chambers Commercial Conference 2022

Insights - 24/05/2022

Ogier recently ventured across the Channel to London to attend the Wilberforce Chambers Commercial Conference 2022 in full force with Alex Horsbrugh-Porter, Mathew Newman, Margeaux Malherbe and Gareth Parr joining from Guernsey, and Charlie Dessain and Charlotte Finley from Jersey. David Welford also joined from the BVI team, with Jeremy Snead and Anna Snead joining from the Cayman team.

The conference's collection of seminars and workshops tackled highly relevant and thought provoking topics, and provided a clear and practical toolkit to approach issues which may arise from the same. In this article, the team share a short overview of the seminars and workshops they attended.

Unfair prejudice petitions and derivative claims

Clare Stanley QC, Jessica Brooke and Jamie Holmes delivered an instructive overview of unfair prejudice petitions and derivative claims including insightful commentary about the distinctions between the two, the circumstances in which each may apply, as well as the key practical issues and potential pitfalls which may arise as a result of a court ordered buyout.

This was of particular relevance to Ogier's Jersey team after the momentous ETFS trial, the first instance judgment and the Jersey Court of Appeal judgment (which considered many of the English cases referred to by Wilberforce) saw the Jersey Royal Court find that the Defendant/majority shareholder had conducted the affairs of the Company in an unfairly prejudicial manner. The Royal Court also ordered that, it was appropriate, following an extensive analysis of conflicting English case law, for the plaintiff shareholders to have their shareholdings purchased by the Defendant with a minority discount and marriage uplift. This ruling contributed to the development of unfair prejudice remedies in Jersey by the Court of Appeal's statement (albeit obiter) that if it had set aside the buyout order, it would have then concluded that it was just and equitable to make a winding up order.

Shareholder agreements and joint venture agreements: giving effect to the vibe of the agreement

We thoroughly enjoyed Tom Robinson and Sri Carmichael's comical reference to the 1997 Australian movie, "The Castle", to support the notion of giving effect to the "vibe" of a joint venture agreement where acts outside the terms of a contract are prohibited or must be performed in a certain way. As Triel Mora's character eloquently justifies the basis of his submissions to the court: "It's the vibe of it. It's the constitution. It's Mabo. It's justice. It's law. It's the vibe and ah, no that's it. It's the vibe. I rest my case."

Detailed discussions regarding "relational" contracts followed, with the benefits and pitfalls of obligations being read into contracts, agreements and even Articles of Association where the behaviour or actions of one party are deemed to be different from the "vibe" envisioned at the outset or the relationship.

Manchester Building Society v Grant Thornton: a new start or just a different set of Emperor's New Clothes?

Tiffany Scott QC and Graeme Halkerston gave a technical and insightful discussion in relation to the "scope of duty principle" and explained a significant theoretical revision to the version of the principle laid down in Supreme Court case *South Australia Asset Management Corp v York Montague Ltd* [1997] 1 AC 191 (which remains good law in England). It remains to be seen whether that revision will lead to any substantive difference of outcomes of cases or improved predictability of outcomes of disputes.

WFOs after the Privy Council decision in *Broad Idea*

Tim Penny QC, Bobby Friedman and Caspar Bartscherer gave an interesting session which delved into the impact of *Convoy Collateral Ltd v Broad Idea International Ltd and Cho* [2021] UKPC 24 and a debate as to whether the majority decision was obiter or ratio. The importance of the issues raised in that case was clearly demonstrated by the Privy Council manning itself with a seven-member Board and will be an interesting debate to follow.

Tracing the proceeds of fraud

Jack Watson's engaging talk on "Tracing the Proceeds of Fraud" was another topic which we listened to with interest, as it is a common area on which Ogier's teams advise across jurisdictions. Key shifts in issues involving international freezing injunctions, proprietary claims and enforcement were discussed, as well as an examination of recent cases in these areas.

This is an area of law that relies heavily on evidence, but the legal principles of tracing, the burden of proof and even the applicable governing law are always evolving. The one constant however is that in any claim involving fraud, thought needs to be given early on in the matter as

to whether it is possible to bring a proprietary claim over any relevant assets. If successful, the claimant will gain the important advantage of priority over other creditors, as well as an advantage in being able to consider claims against third party recipients of any allegedly misappropriated assets. It was interesting to re-examine these ever-shifting issues.

Workshop: Post-Brexit cross-border litigation issues

Fenner Moeran QC, Zoë Barton QC and Francesca Mitchell eloquently tackled several complex issues and considerations which are likely to arise during the course of cross-border commercial litigation post-Brexit. The workshop took its participants through the chronology of a fictional (but standard) set of facts with questions and answers relating to: choice of law, jurisdiction and issuing proceedings; interim measures and service; evidence & privilege; and enforcement. It was particularly interesting to learn that the "EU Lawyers Directives", which required local justifications to recognise UK lawyers privileges (including legal privilege), no longer applies and therefore the European Commission may (in certain situations) override that privilege where that correspondence is sent to clients within the EU who are subject to the EU's jurisdiction. The key point to take away? Consider seeking the assistance of local lawyers. The workshop also highlighted how many issues have been left as unresolved since the UK left the EU.

Workshop: Contractual obligations of good faith – and why we can ignore them

John McGhee QC, Rachael Earle and Jia Wei Lee lead an engaging discussion on expressed and implied good faith obligations in contracts, to which a lively and interactive discussion ensued (both in and out of the workshop).

The advantages, disadvantages and pitfalls of using a good faith clause in a contract as a key hole through which to re-examine the parties' obligations to one another is as unpredictable as you can imagine, and evoked strong legal opinions amongst the attendees.

Conclusion

Thank you to Wilberforce for putting on such an informative and interactive event. We're looking forward to next year's conference and, in the meantime, to continuing Ogier's close relationship with Wilberforce.

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Meet the Author



[Alex Horsbrugh-Porter](#)

Partner

[Guernsey](#)

E: alex.horsbrugh-porter@ogier.com

T: [+44 1481 752272](tel:+441481752272)

Key Contacts



[Mathew Newman](#)

Partner

[Guernsey](#)

E: mathew.newman@ogier.com

T: [+44 1481 752253](tel:+441481752253)



Margeaux Newman

Associate

Guernsey

E: margeaux.newman@ogier.com

T: [+44 1481 752215](tel:+441481752215)



Gareth Parr

Senior Associate

Guernsey

E: gareth.parr@ogier.com

T: [+44 1481 752313](tel:+441481752313)



Charlie Dessain

Associate

Jersey

E: charlie.dessain@ogier.com

T: +44 1534 514425



Charlotte Finley

Associate

Jersey

E: charlotte.finley@ogier.com

T: +44 1534 514129



David Welford

Partner

Dubai

E: david.welford@ogier.com

T: +971 4 450 1901



Jeremy Snead

Partner

London

Cayman Islands

British Virgin Islands

E: jeremy.snead@ogier.com

T: +44 20 3835 9470



Anna Snead

Counsel

London

E: anna.snead@ogier.com

T: +44 203 835 9478

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