David Fisher

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Practice Overview

David Fisher has a strong commercial practice both in the UK and offshore and is an excellent and experienced trial and appellate advocate. David is frequently briefed as lead counsel against senior silks. Over the last 14 years David has been instructed in a string of commercial claims, including several shareholder disputes, in the Eastern Caribbean, primarily in the BVI. In that time he has been retained as lead counsel in several trials (at first instance and in the Court of Appeal) against senior UK silks. The exceptional experience that he has gained, from appearing before a range of specialised judges and against able and experienced advocates in jurisdictions that apply the same law as in the UK, makes him an obvious choice to represent clients in complex commercial litigation in the UK.

David is flexible and imaginative in advising on strategy and tactics. In recent substantial litigation in the BVI, David was briefed only shortly before the trial. He got on top of the case in 3 weeks and demolished the Claimant's case on the facts in cross examination, leading to a virtually unappealable judgment in his client's favour.

In legal argument, David reduces the issues to the simplest level to achieve maximum impact on the tribunal, particularly appellate courts.

David is also an experienced, effective and creative mediation advocate. Representing a defendant to a substantial claim, David advised on the viability of administration and a pre-pack, which would have left the claimant empty handed, and achieved an advantageous settlement for his client.

Commercial Litigation

David has experience of a broad range of commercial disputes. David understands that for business, litigation is a last resort, not a hobby. He works to identify and agree with his clients outcomes that are cost and time effective and plots efficient and effective pathways to those outcomes. His recent work in this area includes:

Acting for several Italian municipal authorities in complex litigation in the Financial List in which the authorities challenged the validity and enforceability of interest rate swaps transactions. The litigation raised conflict of laws issues as well as issues of Italian Law.
Representing the director of an insolvent property development company in an action brought against him by the liquidators.
Representing an Italian manufacturer against subrogated product liability claims brought by the insurers of a customer.
Representing the Claimant in an application by the Defendant to strike out the claim form, alternatively for a stay pursuant to s9 Arbitration Act 1996.
Advising Investment Managers in a dispute with payroll providers.
Advising shareholders in a listed mining group on aspects of their application in Hong Kong for leave to bring a derivative claim against current and former directors.
Acting for a US investor in litigation in Anguilla in relation to rights under a Settlement Agreement made in and subject to the laws of New York regarding property rights over land in Anguilla.

Offshore

David's extensive domestic litigation experience has led to him being frequently instructed in offshore and multi-jurisdictional litigation. He has arbitrated in South Korea, worked with Japanese lawyers on litigation in Tokyo, co-defended US/UK litigation with US lawyers and, over the last 15 years litigated extensively in the High Court and Court of Appeal of the Eastern Caribbean Supreme Court. David's offshore practice is now centred on the British Virgin Islands. In recent years David has been instructed as lead counsel, frequently against senior UK silks and before specialist judges, in several trials and subsequent appeals. David has gained invaluable experience in pre-trial and trial strategy, witness management and trial and appellate advocacy. David's recent offshore work includes:

- An appeal against the striking out of a substantial claim by the High Court in Anguilla, David identified the one good point in the case and advised that the many other arguments be abandoned, with the result that the appeal to the Eastern Caribbean Court of Appeal was allowed and the claim could proceed to trial.
- A factually complex unfair prejudice claim concerning a BVI holding company which held an operating subsidiary in China through a labyrinthine corporate structure. David successfully represented the Defendant against a Chancery silk in the High Court and in the application for leave to appeal to the Privy Counsel. David was led in the Court of Appeal
- a dispute as to title to a significant shareholding in the BVI holding company of a substantial international software company. (BVI Commercial Court and Eastern Caribbean of Appeal).
- an opposed application for leave to bring a derivative action in the BVI against the directors of the Company for breach of fiduciary duty. (BVI Commercial Court and Eastern Caribbean Court of Appeal).
- a claim for the return of shares in a Chinese operating subsidiary and other assets appropriated by the minority shareholders of a BVI holding company through misuse of their powers as directors. David successfully represented the Claimant at the trial of the action against a senior silk and in opposing the Defendants appeal to the Court of Appeal.
- an unfair prejudice claim in relation to the BVI holding company of a Chinese subsidiary which owns and operates a substantial resort hotel in mainland China. David successfully represented the Claimant at the trial of this action, which took place over 23 trial days in St Lucia, London (by video link) and the BVI, against a commercial silk. David was also instructed to represent the Claimant in the Eastern Caribbean Court of Appeal, where judgment is pending.

Civil Fraud

David has acted for and against many alleged fraudsters. He is aware of and able to advise on the tactical

issues of a fraud claim, where the disclosure obligation of both parties is frequently the battleground on which a fraud claim is won or lost.

David was junior counsel in *SITA v Serruys*, a claim for in excess of £100 million which gave rise to extensive satellite litigation around the freezing injunction, including a 3-day application to discharge for substantial material non-disclosure. In conjunction with forensic accountants, David led an extensive investigation into his client's records and pre-freezing order conduct to establish the extent of and reasons for non-disclosure. This facilitated full corrective disclosure, the mitigation of the consequences of the non-disclosure and the retention of the freezing injunction.

Cases

Name: Best Nation Investments Limited v Antow Holdings Limited

Reference: BVIHCMAP2017/0010

Date: 21st September 2018

Court: Court of Appeal, Eastern Caribbean

Facts:
Best Nation, a BVI company, held a majority 60% shareholding in a Chinese operating subsidiary, ZG. Best Nation was itself owned as to 60% by East Crown, also a BVI company and as to 40% by Antow. J was the majority shareholder of East Crown. The directors of Best Nation, who, together with others with whose interests they were aligned, were the minority shareholders in East Crown and controlled Antow and also XG, a Chinese company which owned the other 40% of ZG. In an attempt to end J's control over ZG, through his majority shareholding in East Crown, the directors of Best Nation devised and implemented a scheme whereby Antow surrendered its shares in Best Nation in return for 40% of Best Nation's assets in specie, i.e. 24% of the issued shares in ZG and a substantial sum in cash. Following this transaction, best Nation held 36% of the shares in ZG, Antow held 24% and XG held 40%. As the directors and their cronies controlled Antow and XG, they gained control of ZG and best Nation's interest was reduced to a minority shareholding. The directors of Best Nation followed this with a second series of transactions the effect of which was to transfer from Best Nation to Antow a further 16% of the shares in ZG and more of Best Nation's cash.

J, having gained control of the board of Best Nation, caused Best Nation to bring proceeding against Antow on the ground that the actions of the former directors of Best Nations were in breach of their fiduciary duties and that Antow had received the shares and the cash with knowledge of those breaches.

Although the evidence given on behalf of the directors was confused, it appeared to be their case tht they were acting in the greater good, in that conferring a greater element of control on the senior management of ZG (who were all beneficially interested in the shares of Antow) would bring happiness and harmony which would contribute to improve the performance of ZG. The court held that, notwithstanding that the directors were acting within the powers conferred upon them by the Articles of Association, they had failed to give any consideration to the best interests of Best Nation. Further, on the application of the test in Charterbridge v Lloyds Bank [1969] 2 All ER 1185, no reasonable director, in the circumstances that pertained, could have honestly believed that the actions taken by the directors were in the best interests of the company. The judge also held that the directors had exercised their powers for an improper purpose, i.e. to gain personal control of ZG.

The director's appeal to the Court of Appeal was dismissed.

View High Court judgment here

View Court of Appeal judgment here

Judge: Wallbank J; Pereira CJ, Michel and Webster JJA

Comment:
The decision reinforces the well-established principle that the directors of a company must focus on the best interests of that company when exercising their powers. An honest belief that their actions will bring about benefits elsewhere is not, absent an honest belief that those actions will benefit the company in some way, enough.

Interestingly, the Court of Appeal was invited by the Appellant to follow the statement of Lord Sumption, in **Eclairs Group v JKX Oil & Gas** [2015] UKSC 71, that the substantial purpose test propounded in **Howard Smith v Ampoil** [1974] AC 821(and followed ever since) (i.e. the substantia purpose test) should be substituted by a "but for test": i.e. where there are concurrent purposes for the exercise of the power, one of which is improper and the other(s) proper, absent the improper motive would the director(s) still have exercised their powers in the way that they did? If so then the exercise of the power is valid, notwithstanding the presence of the improper purpose. The remainder of the panel expressly did not concur in this statement, preferring to reserve what they described as a major development in the law to a case where the issue arose squarely and was fully argued. The Court of Appeal declined to adopt Lord Sumption's formulation and affirmed the continued applicability, in the Eastern Caribbean, of the Howard Smith test.

Practice Area: Commercial Litigation

Name: Yao Juan v Kwok Kin Kwok Re: Crown Treasure Limited

Reference: BVIHC(COM)162 of 2013

Date: 13th March 2018

Court: High Court, British Virgin Islands

Facts:
J and K were both 50% shareholders in CT, a BVI company which, through SN, another BVI company, held a majority shareholding in XRVH, a Chinese trading company that owned and operated a hotel in Xiamen, China. K was the sole director of CT and SN and was the chairman of the board of XRVH. The joint venture commenced in 2005 but by 2010 the parties were at loggerheads.

J alleged an agreement or understanding that she would be entitled to participate equally with K in the management of the companies and the hotel and that K would not take any major decisions without the knowledge and consent of J. She alleged serious breaches of the agreement or understanding by K. At trial, virtually every aspect of the history of the project and the relationship between the parties was in dispute.

Following a trial lasting over six weeks, J was constrained by the evidence to abandon her allegation of quasi partnership and improper exclusion. Nevertheless, the judge held that there had been persistent and serious failure by K to inform and consult J in relation to a number of major decisions that impacted severely on J as a shareholder in CT and ordered the winding up of CT on the just and equitable ground.

View judgment here

Judge: Adderley J

Comment:
This case is a salient reminder that a case is not lost until judgment. J's case was in disarray after the conclusion of the evidence. The decision to abandon the case on quasi partnership enabled J to put her case on failure to inform and consult to the judge without the baggage of what had become a hopeless argument.

The decision has been appealed and a decision is awaited.

Practice Area: Commercial Litigation

Name: Holling v Aman Resorts Group Ltd

Date: 27th April 2017

Court: High Court, British Virgin Islands

Facts:
This was spin off litigation from the lengthy and acrimonious Aman Resorts litigation conducted between Vladislav Doronin and Omar Amanat. H claimed to be a creditor of ARGL, a BVI company, to the extent of several million US$ mainly for fees for advising it on the purchase of Aman Resorts, and sought an order for the appointment of a liquidator. ARGL was, on any view, insolvent and had been struck off for non-payment of fees. The company was restored to the register at the behest of Mr Doronin. The company opposed the application on the grounds that it disputed H's claim in good faith and on substantial grounds. In particular, the authority of Mr Amanat to bind ARGL was put in issue. The judge held that three was substantial reason to question H's claim to be a creditor and that the claim was, therefore, disputed on substantia grounds. The application was dismissed.

Judge: Roger Kaye J

Comment:
This is a useful reminder that the insolvency of the company is not, by itself, grounds for making a winding up order. The petitioner must also establish that he has locus to make the application, usually by establishing on that he is, indeed, a creditor of the company for a sufficient amount to support a petition.

Practice Area: Commercial Litigation

Name: Re: Accufit Investments Inc

Reference: BVIHCMAP2014/0020

Date: 9th November 2015

Court: Court of Appeal, Eastern Caribbean

Facts:
Receivers had been appointed of the assets of Basab (B), the holding company of Accufit (A). The receivers appointed themselves as directors of A and acting in that capacity, sold A's only asset, a substantial shareholding in KHL, a Chinese manufacturing and trading company. KHL was listed on the Hong Kong Stock Exchange but trading in its shares had been suspended. The receivers/directors did not obtain any valuation of the shares, nor did they take any steps to market the shares. B contended that the sale was at an undervalue and sought leave to bring a derivative action in the name of Accufit against the receivers/directors.

The receivers/directors applied to be joined as parties to the application so that they could submit evidence. The judge dismissed that application on the ground that joinder was unnecessary.

B adduced expert evidence in the form of written reports from forensic accountants and a financial adviser. The judge dismissed the application, holding that the requirement in s184(C)(2)(c) of the Business Companies Act that the court, when determining whether to grant leave, must take into account, inter alia, "whether the proceedings are likely to succeed", meant that the applicant must show that there was a high likelihood that the proceedings would succeed and that it should be obvious on a cursory examination that the proceedings were likely to succeed. He also observed that the court should not undertake any detailed examination of the evidence and the merits where the case was not an obvious one.

Judge: Baptiste, Blenman and Gonzalves JJA

Comment:
Appeal 1: The Court of Appeal dismissed the appeal of the receivers/directors against the order dismissing their application to be joined as parties, holding that such joinder was unnecessary and would simply increase the costs. The directors had control of Accufit, which was itself a party to the application and was able to submit evidence.

View judgment here

Appeal 2: The Court of Appeal clarified the law of the BVI s it applies to an application for leave to bring a derivative action. Agreeing with Counsel for the Applicant that the judge's interpretation of the law would make the BVI one of the most restrictive jurisdictions in the common law world as regards derivative actions, the court reversed the judge on the test to be applied. The court held that, on the true interpretation of s184(C)(2)(c), the applicant was required to demonstrate only that it was more probable than not that the proceedings would be successful. The court also held that it was incumbent on the judge hearing the application to conduct as detailed an enquiry into the evidence as was necessary to enable the court to determine whether, on the evidence before it, it was more probable than not that the proceedings would be successful. The Court of Appeal undertook an evaluation of the evidence and, in the event, held that it did not satisfy the lower threshold.

View judgment here

Practice Area: Commercial Litigation

Name: Comodo Holdings Limited v Renaissance Ventures & Anor

Reference: BVIHCMAP2014/0032

Date: 3rd May 2015

Court: Court of Appeal, Eastern Caribbean

Facts:
The Defendants had both purchased shares in the Claimant and had been issued with share certificates. Many years after the issue of the certificates and following the death of the individual Defendant (who also controlled the corporate Defendant) the Claimant asserted that the shares had not been properly issued and that payment had not been made for them, alternatively, such payment as had been made was with moneys received by the Defendants from individuals wishing to invest directly in the Claimant in their own names. There were wide ranging allegations of fraud and dishonesty on the part of the deceased shareholder.

On an application by the Defendants the judge granted summary judgment for the rectification of the share register. This was set side by the Court of Appeal mainly on the basis that the judge had (of his own volition) speculated about what may or may not have been agreed between the individual Defendant and the other co-venturers in the Claimant about sweat equity.

View High Court judgment here

View Court of Appeal judgment here

Judge: Bannister J; Blenman, Michel and Kentish-Egan JJA

Comment:
This is a good example of how an over enthusiastic judge can sink a case! There was no need for the judge to speculate on the sources of payment at all. The Defendants had established allotment of the shares followed by the issue of the share certificates. The speculation as to how the parties may have agreed that the shares should be paid for was a hostage to fortune that came home to roost in the Court of Appeal.

Practice Area: Civil Fraud

Name: Zhongyong v Jin

Reference: BVIHCMAP2013/0024

Date: 19th January 2015

Court: Court of Appeal, Eastern Caribbean

Facts:
Chinese pharmaceuticals company held in a complex BVI based corporate structure by 8 Chinese nationals (who together constituted a minority) and the Defendant majority shareholder (who had inherited his shares on his father's demise). Claim by the minority for an order for the purchase of D's shares on the basis that there was a quasi-partnership and they had been excluded by D. C's also sought a winding up order on the just and equitable ground. The judge, rejecting the contention that there was a quasi-partnership, held that there had been exclusion of the minority but that they had failed to establish that the exclusion was unfair in the sense that

it transgressed some agreement or understanding that formed the basis of the parties' association in the company. There were no grounds for a winding up on the just and equitable basis because the exclusion was not unconscionable, there being no equitable restraint on the exercise by the Defendant of his legal rights and powers in this regard.

View High Court judgment here

View Court of Appeal judgment here

Judge: Bannister J; Pereira CJ, Blenman JA and Morrison JA

Comment:
The trial judge affirmed the principle that it is not sufficient to demonstrate prejudicial conduct. That conduct must also be unfair in the sense that it runs contrary to the basis on which the corporators entered into the venture or (to justify a winding up on the just and equitable ground) the conduct must be unconscionable.

The Claimant's appeal to the Eastern Caribbean Court of Appeal was dismissed.

The Claimants application for leave to appeal to the Privy Council was refused.

Practice Area: Company

Name: Williams Motors (CWMDU) Ltd v Powys CC

Reference: [2012] EWCA Civ 1892

Date: 2nd May 2012

Court: High Court

Comment:
Fraud, misfeasance in public office, breach of contract.

Practice Area: Commercial Litigation

Name: Sita UK Group Holdings Ltd v Serruys

Reference: [2010] EWHC 698 (QB)

Date: 10th February 2010

Court: High Court

Comment:

Fraud, freezing injunction, material non-disclosure.

Practice Area: Commercial Litigation

Name: Leeward isles Resorts Limited v Hickox

Reference: HCVAP 2008/003

Date: 2nd January 2008

Court: Court of Appeal, Eastern Caribbean

Comment:
Directors' duties, self dealing, validity of transactions between a director and the company.

Practice Area: Company

Articles

Date	Title	Contributors
30th September 2015	No no fault for shareholders Published In *New Square Chambers*	David Fisher
5th June 2011	Non-disclosure - managing the fall-out Published In *New Square Chambers*	David Fisher