BREXIT AND COVID: THE LASTING EFFECTS ON PROPERTY LITIGATION

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Introduction

On 31 January 2020, the UK left the European Union and entered a transition period during which it continued to participate in the EU Customs Union and European Single Market, meaning that for most purposes the immediate impact of Brexit was limited. On the same day, the Department of Health and Social Care confirmed that two members of the same family, Chinese nationals staying at the Staycity Hotel in York, had tested positive for novel coronavirus. Professor Chris Whitty, the Chief Medical Officer for England, said that the NHS was "*extremely well-prepared for managing infections*" and that there was minimal risk of infection to guests or staff at the hotel.

On 24 December 2020 the UK and the EU agreed a deal on their future trading and security relationship: seven days later the transition period ended. By this time Britain was caught in a rising second wave of the Covid-19 pandemic, with 53,285 new cases and 613 deaths reported on 1 Jan 2021[1].

These two seismic events have brought about radical changes in our lives and shaken our economy. But what will be the lasting impact, if any, on us as property litigators? This talk offers a personal perspective on changes in the law, in the property markets and in technology that have the potential to play out in the long term.

Legal Change

Retained EU Law after Brexit

Brexit involves very significant legal change, in particular through the European Union (Withdrawal) Act 2018 which repealed the European Communities Act 1972 but simultaneously cut and pasted large parts of EU law – retained EU law – into domestic law. Some retained EU law has already been amended; other parts will be subject to future domestic amendment. On the other hand, any amendments made by the EU to

[1] Covid-19 Data Repository by Center for Systems Science and Engineering, John Hopkins University.

its legislation after 31 December 2020 will not be incorporated into UK law, nor are UK courts bound by decisions of the CJEU after 1 Jan 2021: so gradually, over time, two divergent systems of EU law will emerge. However, property litigators are not much affected by this, since little property law derives from EU law or legislation.

Cross-Border Litigation

Of more significance is the impact of Brexit on the law relating to cross-border litigation and the enforcement of judgments. The present situation is complex, uncertain and evolving, and as there are many people better placed than me (and with more time) to explain the position, I will confine myself here to flagging a few key points that property litigators ought to be aware of.

1. The position as regards choice of law is not substantially changed. The relevant EU regulations, Rome I[2], which applies to contractual obligations from 17 December 2009 and Rome II[3], which applies to non-contractual obligations giving rise to damage from 11 January 2009, have essentially been retained in English law[4].

2. There are significant changes to the rules about jurisdiction.

   (1) Whilst the UK was a member of the EU, the Civil Jurisdiction and Judgments Act 1982 and CPR Part 6 applied the Brussels I Regulation (Recast)[5] to litigation with parties in the EU. This regulation sets out rules aimed at ensuring that only one court within the EU has jurisdiction over any particular claim and then provides for the judgment given by that court to be enforceable throughout the EU. Under CPR 6.33, proceedings could be served out of the jurisdiction without the permission of the court. Under the Withdrawal Agreement (Art. 67), these rules continue to apply to legal proceedings started before 1 Jan 2021 but otherwise do not apply in the UK.

   (2) Cross-border disputes with the EFTA countries (Switzerland, Norway, Iceland) were governed by the Lugano Convention, to which the UK was

[2] Regulation 593/2008 on the Law Applicable to Contractual Obligations
[3] Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations
[4] The Contracts (Applicable Law) Act 1990 and The Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008, as amended by The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment, etc)(EU Exit) Regulations 2019.
[5] Regulation 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (recast) – referred to in the Civil Procedure Rules as "the Judgments Regulation"

a party by virtue of its EU membership. With the ending of this membership on 31 January 2020, its accession to the Lugano Convention lapsed. Since then there has been no treaty in place with the EFTA countries, although the UK has decided to unilaterally apply Lugano provisions to litigation commenced before 1 January 2021.

(3) The Lugano Convention is open for accession by anyone, subject to the consent of all existing signatories. In April 2020, the UK applied to join Lugano independently of the EU, but on 4 May 2021, the European Commission recommended that the EU rejects that application.

(4) So the position on English jurisdiction is currently governed by (a) English common law rules and (b) the 2005 Hague Convention[6]. The 2005 Hague Convention only applies where there is an exclusive jurisdiction agreement, which was entered into after the relevant state joined the Convention. The UK and the EU appear to take different views on whether the Convention came into force for the UK on 1 October 2015 (when it was joined up via the EU) or on 1 January 2021 (when it joined in its own right), and the Hague Convention also does not apply where all the parties to the exclusive jurisdiction agreement are resident in the EU.

(5) CPR Part 6 and CPR PD 6B have been substantially amended to bring them up to date. For property litigators, the points to note are:

    (1) jurisdiction agreements have become much more important;

    (2) it will be necessary to seek permission to serve out of the jurisdiction more often;

    (3) when applying for permission to serve out of the jurisdiction it remains the case that where the claim relates wholly or principally to property in the jurisdiction this is a gateway to the court giving permission: CPR PD 6B para 3.1(11); and

    (4) it may be more important than before to "get in first" before proceedings are commenced in other jurisdictions.

[6] Convention on Choice of Court Agreements concluded on 30 June 2005 at The Hague

4. The Brussels I (Recast) Regulation and Lugano Convention are concerned with the enforcement of judgments as well as with the jurisdiction of the courts which make them. For litigation commenced before 1 January 2021, Art 67 of the Withdrawal Agreement continues to apply the old regime within the EU. However, as noted above, there are no equivalent provisions for EFTA countries as there has been no "withdrawal agreement" in respect of the Lugano Convention. The 2005 Hague Convention allows for enforcement of an English judgment, but the circumstances in which that applies are narrower than under the pre-Brexit rules: not only must there be an exclusive jurisdiction agreement entered into after the UK joined the Convention, but also the 2005 Hague Convention does not apply to interim measures such as injunctions. If the 2005 Hague Convention does not apply, enforcement of English judgments will depend on the relevant local law, absent a specific treaty.

5. It might be thought that the increased uncertainty over enforcement of judgments would have led to a strengthening of the security for costs regime, with a greater opportunity for orders for security for costs against claimants in EU countries. Not so. The old rule (CPR 25.13(2)(a)) prevented an application for security being made against a claimant resident in a state within the Brussels I Regulation (Recast) or Lugano Convention on the sole ground that they were resident out of the jurisdiction. The new rule prevents an application being made (on the sole ground of being resident outside the jurisdiction) where the claimant is resident in a state bound by the 2005 Hague Convention, whether or not the 2005 Hague Convention applies to the dispute: i.e. there are circumstances in which security for costs is not available despite the fact that any judgment is not enforceable under the Convention.

Legal Professional Privilege in the EU

After Brexit, the EU Lawyers' Directives no longer apply to UK lawyers, one consequence of which is that EU jurisdictions no longer have to recognise legal professional privilege: this depends on local law, which differs from state to state. The Law Society has produced a helpful guidance note[7].

Covid Law

[7] https://www.lawsociety.org.uk/topics/brexit/eu-lpp-after-brexit

Covid has brought about much more new law of obvious relevance to property litigators, but most of it can assumed to be a temporary sticking plaster which will not endure beyond the pandemic. The stay on possession proceedings under CPR PD 51Z and CPR 55.29 ended on 30 September 2020, with CPR PD 55C providing for the resumption of proceedings. For the moment, there remain significant constraints on landlords' remedies for recovery of rent from commercial tenants in the form of forfeiture, CRAR and winding-up petitions, but these come to an end on 30 June 2021, subject to the Government's call for evidence[8]. Minimum notice periods for repossession of residential properties are being reduced and the prohibition of bailiff-enforced evictions ended on 31 May 2021.

Legislation announced in the Queen's Speech of 11 May 2021 of interest to property litigators includes a bill to establish a new Building Safety Regulator; a bill to abolish ground rents for new leasehold properties and reforms to the Electronic Communications Code. There are also proposals on reforming s.21 "no fault" evictions for assured shortholds and to allow residential tenants to passport their deposits from one tenancy to the next. However, none of these can really be said to relate directly to the pandemic.

More power to the Government?

One of the things that is striking about law-making in relation to both Brexit and Covid is how much has been achieved through secondary legislation. This has of course been a feature of much of our law for some considerable time, but the major shift of power, from Parliament to Government, that secondary legislation represents, looks unlikely to be reversed.

Market Change

Brexit and Covid have both had an enormous economic effect, with the latter probably masking some of the immediate impact of the former. Unsurprisingly, that has impacted the property market, though much more strongly in some sectors than others. The pandemic, in particular, has accelerated pre-existing structural changes, particularly in retailing, with shops struggling to cope with prolonged mandatory closures, a move to online sales and, in our city centres, a lack of commuters and international visitors. The long-term impact on the office market is unknown, with

[8] https://www.gov.uk/government/consultations/commercial-rents-and-covid-19-call-for-evidence/commercial-rents-and-covid-19-call-for-evidence--2

some predicting a permanent shift towards working from home/hybrid working and others forecasting the return of the 5-day week in the office within a couple of years.

Volatility in the property markets brings with it a trend towards particular types of litigation and the testing of new arguments or resuscitation of old ones. Whilst the conditions which create these cases may not last for a long time, the law that they produce does endure. Over the next little while we can probably expect more litigation about:

(1) unexpected events and how the risks of them should be borne as between landlords, tenants and insurers, like *Canary Wharf v European Medicines Agency* (no forfeiture of EMA's lease despite Brexit); *Financial Conduct Authority v Arch Insurance (UK) Ltd*[9] (business interruption insurance for Covid-19 risks) and *Bank of New York Mellon (International) Ltd v Cine-UK Ltd*[10] (landlord's claim for rent arrears; tenants defend on basis of rent cesser and temporary frustration);

(2) business failures, restructuring and insolvency, such as *Lazari Properties 2 Ltd v New Look Retailers Ltd*[11] (landlords' challenge to CVA of retailer) and *Re Virgin Active Holdings Ltd*[12] (use of restructuring plans to restructure liabilities to landlords);

(3) business rates and schemes to avoid them, like *Hurstwood Properties (A) Ltd v Rossendale BC*[13];

(4) specific performance and forfeiture of deposits, as sellers of property try to keep buyers to the deals done in better times;

(5) break clauses, as landlord try to keep tenants to leases agreed in better times; and guarantees, rent deposits and other security, as tenants fall into debt;

(6) how you value property during a pandemic, when there are no/few comparables; and

(7) professional negligence claims, as businesses count their losses and look around for somebody to blame.

[9] [2021] UKSC 1
[10] [2021] EWHC 1013
[11] [2021] EWHC 1209
[12] [2021] EWHC 1246
[13] [2021] UKSC 16

We are also likely to see transactions being structured differently, in a response to the challenges of Brexit and Covid and that too, in time, will bring new issues for litigators. Jurisdiction clauses are a ripe source of future litigation, given the issues discussed above. Turnover rents are becoming much more common in retail: how will Judges determine appropriate rents for new tenancies of shops under the Landlord and Tenant Act 1954, if that becomes the norm? Pandemic rent cesser clauses are apparently the new rage (see e.g. *WH Smith v Commerz Real*[14]), with the potential for some interesting arguments next time a pandemic hits (next time? I can hardly bear thinking about it!).

Technological Change

Crises, like war, fuel technological change and both Brexit and Covid have done that too. In particular, the move from paper to electronic contracts and documents has gained speed. In December 2020 the Law Commission launched a call for evidence on smart contracts[15] and on 30 April 2021 it announced a consultation on proposals to allow for the legal recognition of electronic versions of documents such as bills of lading and bills of exchange[16]. In time we as property litigators will have to grapple with these concepts and the new law enabling them.

More prosaically, but of more immediate relevance, has been the adoption of e-bundles and remote hearings in response to lockdown restrictions. I expect e-bundles to stay, and over time to supersede paper bundles altogether. In this the Supreme Court is way ahead of the lower courts and its guidance on preparation of electronic bundles[17] is much more comprehensive than Practice Direction 51O on the Pilot Scheme for Electronic Working. There is a lot of training still needed in the preparation of e-bundles and we are going to somehow have to work out how not to produce a new version of the bundle each time a new document needs to be added: for an advocate preparing a case, that is a nightmare!

Remote hearings will be kept for shorter hearings without witnesses: case management conferences, pre-trial reviews and the like. I doubt that trials will be held remotely once the pandemic is over, although international arbitrations might well continue that way. Hybrid trials bring their own challenges and whilst they might be

[14] Unreported, Winchester County Court, 25 March 2021
[15] https://www.lawcom.gov.uk/law-commission-seeks-views-on-smart-contracts/
[16] https://www.lawcom.gov.uk/proposals-to-allow-electronic-documents-would-revolutionise-trade/
[17] https://www.supremecourt.uk/procedures/electronic-bundle-guidelines.html

attractive in the short term, with social distancing measures in place and international travel restricted, I am not convinced that parties will be keen for their key witnesses or advocates to be out of the court room, if the other side's are in there.

Conclusion

If Brexit and Covid have taught us anything, it is to expect the unexpected. If January 2020 was complacent, and January 2021 brought crisis, what do January 2022 or January 2023 have in store? Perhaps we will start to have a clearer idea of the real advantages and disadvantages of Brexit, as we emerge from the pandemic. I suspect that for a long time to come – perhaps all our lives – we will measure time as "before Covid" and "after Covid". But whatever challenges are thrown our way, I feel confident that property litigators will tackle them with relish, as they always have done.

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