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Recognizing and Minimizing the Potential Negative Impact of an Adverse Foreign Judgment on Settlement Discussions

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Introduction

At the panel discussion, Ben Aram, Partner at Kennedys Law LLP in London will examine how, and to what extent, plaintiffs in England and Wales ("E&W") and Europe use and rely upon adverse foreign judgments to advance their case and how defence counsel address the use of these judgments in practice and any negative impact arising. This note provides, as context, a short preliminary overview of UK product liability law and procedure and:

1. outlines the relevant legal principles governing precedent, the admissibility of previous judgments E&W and the principle of res judicata; and

2. discusses the impact and use of adverse foreign judgments in E&W and Europe.

The UK: preliminary overview

The UK comprises three jurisdictions: England & Wales (E&W); Scotland; Northern Ireland. There are different laws in some key areas e.g. contract and property law; but:

(i) They share the same law on product liability: the Consumer Protection Act 1987 ("CPA"), i.e. statute derived from and implementing pan-EU Product Liability Directive (85/374/EEC) ("the PLD") imposing strict liability (not absolute) on producers (including a manufacturer in the EU and an importer into the EU) for injury / damage caused by a 'defective product'. The definition of a 'defective product' is one that, at the date of supply, was 'less safe than persons generally were entitled to expect' (n.b. this differs from the U.S. definition of product defect).

(ii) As the PLD has been incorporated into UK law via the Consumer Protection Act 1987, it remains binding post-Brexit as it stood at 31 December 2020: any subsequent amendments or superseding Directive will not be binding.

(iii) The PLD is implemented by EU Member States whose national courts enforce the PLD in line with the relevant national laws that implement it. As a result, there are various nuances as to the implementation and operation of the PLD in each Member State.

(iv) There is a similar trial format for product/injury claims (judge alone, no jury) but different procedural rules pre-action and leading to trial.

(v) Higher and lower Courts hear cases according to value and complexity.

(vi) E&W has specialist Courts e.g., Admiralty, Patents, Construction and Technology. There are no specialist Courts for medical device / product claims but a high degree of specialism (in E&W) amongst leading law firms and trial advocates (known as barristers).

(vii) Judges are selected from ranks of experienced trial practitioners – not political appointments.

England & Wales: relevant legal principles

Doctrine of 'Stare Decisis': to stand by things decided.

There are two types of precedent:

(i) *Binding precedent:* previous court decisions that must be followed by the judge when deciding on a case. Typically, lower courts are bound by the decisions of higher courts.

(ii) *Persuasive precedent*: previous court decisions that can be taken into account by the judge when deciding a case. Examples of persuasive precedent include:

a. decisions from courts in neighbouring jurisdictions; and
b. dicta i.e., expression of opinion by a judge, in a decision by a higher court.

With respect to foreign judgments, the overarching principle is that foreign judgments (including judgments of the Scottish and Northern Irish courts), including findings of facts made by the judges of foreign courts, are not binding on courts in E&W. Similarly, judgments issued by courts in E&W, or any findings of facts made by judges in E&W, are not binding on foreign courts.

Foreign judgments may be persuasive where the underlying law is the same, e.g., a judgment of the court in E&W in respect of a product liability claim brought pursuant to CPA may have persuasive value in respect of a product liability claim in Northern Ireland, where the CPA also applies, and a judgment of a court in, say, Germany may be persuasive, given that the underlying EU law (i.e. the PLD) in Germany is the same as that which underpins the CPA. See below for more detail.

Preventing subsequent litigation

Res judicata and abuse of process – a second bite of the cherry?

The doctrine of res judicata prevents a party from re-litigating any claim, defence or issue which has already been litigated and decided. The doctrine preserves the finality of judgments and conserves judicial resources. Principles of res judicata include:

(i) *Issue estoppel*: prevents a litigant from raising an issue for a second time where the said issue has already been litigated and decided and is considered "fundamental" to a decision.

(ii) *Cause of action estoppel*: prevents a litigant from pursuing the same claim twice, where such claim has already been subject to a final determination.

(iii) *Henderson v Henderson*[1] prevents litigants from advancing causes of action or arguments that they had opportunity to, and should have advanced, in earlier proceedings. The court requires parties to advance their whole case.

[1] [1843-1860] All ER Rep 378

(iv) *Abuse of process*: the court has power to prevent misuse of its procedure where the process would be manifestly unfair to a party or would otherwise bring the administration of justice into disrepute among right-thinking people.

Issue estoppel and cause of action estoppel apply in E&W in respect of foreign judgments where the judgment is (i) given by a court of competent jurisdiction; (ii) final and conclusive on the merits and clearly determines the issue; (iii) concerns the same issue which is sought to be raised in England; and (iv) is made in proceedings between the same parties or their privies. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors*[2], the House of Lords held that courts should proceed with caution when considering issue estoppel in relation to foreign judgments, asserting that it may be necessary to examine the pleadings, evidence and other material on the court record to determine whether the particular issue was raised in the foreign proceedings.

It is generally uncommon for plaintiffs in E&W or Europe to seek to re-litigate a claim or issue in another jurisdiction in the context of multi-party product liability litigation.

Admissibility of a previous judgment

A civil judgment cannot have any evidential effect on subsequent parallel civil proceedings. The starting point is found in *Hollington v F Hewthorn & Co Ltd*[3] which holds that findings of fact by earlier tribunals and inquiries are inadmissible in subsequent civil proceedings because they are hearsay and merely opinion evidence. Lord Goddard CJ stated at pp. 594-595:

"The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision…"

Section 11 of the Civil Evidence Act 1968 reversed the decision in *Hollington v Hewthorn* as to the admissibility of criminal convictions in civil proceedings only; it does not affect the application of the rule to findings made in earlier civil proceedings.

Although the decision has been criticised by high authority, it remains good law that, in principle, a judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to an issue in other proceedings between different parties.

The decision in *Hollington v Hewthorn* was subject to extensive scrutiny by Leggatt J in *Rogers v Hoyle*[4], whose first instance decision was upheld by the Court of Appeal[5]. The Court of Appeal distinguished the rule in *Hollington v Hewthorn*, clarifying that:

(i) Given the abolition of the hearsay rule in civil proceedings, a record of the evidence given in an earlier case is in principle admissible in later proceedings. One can

[2] [1967] 1 AC 853
[3] [1943] KB 587
[4] [2013] EWHC 1409
[5] [2015] QB 265

therefore no longer object to admitting the findings of the earlier court on the basis that the evidence on which the findings were based is not admissible (Leggatt J, para 100).

(ii) The rule in *Hollington v Hewthorn* preserves the fairness of a trial in which the decision is entrusted to the trial judge. The trial judge must make his or her own independent assessment of the evidence that they have heard. Such assessment must not be attached to the conclusions reached by another judge.

"The trial judge must decide the case for himself on the evidence that he receives, and in the light of the submissions on that evidence made to him. To admit evidence of the findings of fact of another person, however distinguished, and however thorough and competent his examination of the issues may have been, risks the decision being made, at least in part, on evidence other than that which the trial judge has heard and in reliance on the opinion of someone who is neither the relevant decision maker nor an expert in any relevant discipline, of which decision making is not one. The opinion of someone who is not the trial judge is, therefore, as a matter of law, irrelevant and not one to which he ought to have regard".

The principle in *Hollington v Hewthorn* continues to apply in respect of previous judicial findings and attempts by plaintiffs to adduce judgments as evidence of these findings.

Admissibility of evidence referred to in earlier judgments

The rule in *Hollington v Hewthorn* does not, however, apply to evidence (e.g. witness statements) referred to in earlier judgments:

JSC BTA Bank v Ablyazov[6]:

"*There can be no objection to reliance on the evidence referred to in earlier judgments, such as the contents of documents or the evidence of witnesses. In fact, in this case the witness statements and affidavits, hearing transcripts and underlying documents from previous trials were available, so that recourse to the previous judgments for this purpose was largely unnecessary*".

Hourani v Alistair Thomson[7]:

"*The rule in Hollington v Hewthorn does not exclude reliance on hearsay statements of fact, of whatever degree, which are made or recorded in investigative reports, or in court judgments. So where a report or judgment records that a witness made a particular statement of fact to an investigator or to the court, that record can be relied on as evidence not only that the statement was made but also (if so desired) as evidence that what the witness said was true. Both sides have sought to rely on statements of this kind in relation to the issue of truth. That is legitimate. But the court has to consider what weight to attribute to such material. And that process is governed by the Civil Evidence Act 1995 and the CPR*"

[6] [2017] EWHC 2906
[7] [2017] EWHC 432 (Ch)

Impact and use of adverse foreign judgments in E&W

Foreign judgments are not binding on E&W courts. Judges in E&W will make a decision based on the facts of each case and the evidence before them. It is generally uncommon for English claimants to argue that re-litigation of the findings of a court in another jurisdiction would be an abuse of process etc**.** Foreign judgments may, however, have some persuasive value, depending upon the jurisdiction in the judgment was made and how the judgment is being used. For example:

(i) *Judgments in US actions*: Whilst US litigation tends to permeate across the globe, E&W courts tend to have little, if any, regard to verdicts and settlements given the fundamental differences in procedure and law. e.g. trial by jury delivering verdict v rationalised judgment by single judge. Accordingly, claimants in E&W do not typically rely on US litigation outcomes when presenting their case.

e.g. *Colin Gee & Others v DePuy International Limited – The Pinnacle Metal on Metal hip litigation*[8] ("Gee"): There was no reference in the English claimants' submissions to the earlier 2016 verdict in US multi-district litigation against DePuy Orthopaedics resulting in $500 million award to US class action plaintiffs nor, consequently, in the landmark judgment of Andrews J in *Gee*.

(ii) *Judgments in Australian actions*: The outcome of Australian litigation may have some persuasive value in E&W (and potentially EU Member States – see below) given that there are similarities in respect of the law, procedure and judiciary. In particular, a judge in E&W may have regard to an Australian judgment in a complex product liability class action involving a similar product given that the product liability framework in Australia is similar to that in E&W.

(iii) *Judgments in European actions:* E&W courts will have regard to judgments of the European courts, and in particular, those of the Court of Justice of the European Union ("CJEU") when considering the approach to EU law that underpins similar law in E&W. English claimants will often refer to such EU law in submissions. In product liability actions brought pursuant to the CPA, English claimants have referred to CJEU case law in relation to the court's approach to product defect under the PLD. e.g. in *Gee*, the English claimants sought to rely on the decision in *Boston Scientific Medizintechnik GMbH v AOK Sachesn-Anhanlt-Die Gesundheitskasse*[9] when seeking to argue that there is nothing in the PLD or CPA that precludes a defect from being characterised as a product's potential for damage.

Impact and use of adverse foreign judgments in European jurisdictions:

Foreign judgments are not binding on European courts although may have persuasive value. The extent to which foreign judgements are persuasive often differs in each European jurisdiction and is subject to local laws and procedure.

In many European jurisdictions, the judge's decision is based on the findings of a court appointed expert(s) who will consider all of the evidence put before them. Such evidence

[8] [2018] EWHC 1208 (QB)

[9] (Case C/503/13, 504/13) [2015] 3 CMLR 173

may include foreign judgments. The decisions of the European courts are typically fact based, with significant focus on an individual plaintiff circumstances, particularly in product liability claims involving injury.

Plaintiffs typically refer to, and submit as evidence, adverse foreign judgments as part of their 'case narrative'. For example, in jurisdictions such as Ireland and Israel, plaintiffs have a tendency to refer to US verdicts and settlements in pleadings and/or submissions although the judges in these jurisdictions care little for such judgments and will make their own decisions based on the facts and evidence before them, in accordance with local law.

The same principles outlined above apply to defendants seeking to rely on favourable foreign judgments. For example, in the Scottish claim of *Hastings v Finsbury Orthopaedics Limited v Stryker (UK) Limited*[10] *("Hastings")*, Lord Tyre had regard to the landmark E&W judgment of Andrews J in *Gee* when finding in favour of the defendant manufacturers in respect of the pursuer's product liability claim brought under the CPA[11]. As above, whilst *Gee* is not binding on the Scottish Court, it had some persuasive value given that both claims were brought pursuant to the CPA and concerned allegedly defective metal on metal hip replacements.

By comparison, European courts typically have little, if any, regard to *Gee* and *Hastings* in respect of claims brought in respect of similar hip replacement products, despite defence counsel submitting the judgments as evidence. European courts tend to rely solely on the findings of the court appointed expert.

[10] [2019] CSOH 19

[11] The CPA applies in E&W and Scotland