PROSPECTIVE IMPACT OF BREXIT ON JURISPRUDENCE AND COSTS

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SEMINAR NOTES

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1. There are few areas of law that have remained unaffected by EU law. employment rights, health and safety at work, consumer rights, data protection are just a few of the areas where much of the foundation of UK law is based on EU law. Section 2 of the European Communities Act 1972 made the EU treaties directly effective in UK law and provided for the implementation of EU Directives etc. by Regulations. Section 3 made the European Court of Justice the final arbiter of EU law.

2. The Government made it one of its first tasks to table the European Union (Withdrawal) Bill, also known as the "*Repeal Bill*" or the "*Great Repeal Bill*", one of the main aims of which is to repeal the 1972 Act so as to "*Cut off the source of EU law in the UK…and remove the competence of EU institutions to legislate for the UK*" (see House of Commons Library Briefing Paper on second reading).

3. The aim of the bill is to remake into UK law those Regulations that have been made pursuant to EU Directives etc. There are many hundreds of these. The bill has not been without controversy in the Houses of Parliament, but it is not the place of this talk to investigate that.

4. It is, of course, the hope of many who support leaving the EU that, once unshackled from EU law, it will be open to the UK, or its constituent parts where the area of law is devolved, to diverge from EU law. The extent to which this will be, as a matter of practicality or as a matter of fact pending what is finally agreed, is far from clear.

5. One "*red line*" for the Government has been the jurisdiction of the European Court of Justice. Leaving aside any transition or implementation period, it seems at least probable, if not certain, that hereafter a litigant will no longer be able to seek a referral of a matter to the ECJ. It may be, however, that in areas where the UK has agreements with the EU, there will be a body that will decide disputes arising out of those agreements. Those agreements will, of necessity, cover trade, citizens' rights and so on, and it remains to be seen what type of body will determine disputes and how, if at all, litigants other than governments will be able to access that body.

6. As regards decisions already made or to be made by the ECJ in relation to EU law where it has become part of UK law and will, hereafter, be re-enacted as a new Regulation, where there is no divergence, it must be likely that litigants will, at least, refer to past and future decisions of the ECJ as, at least, persuasive and, it must be likely that the courts here will treat them as such, although will not be bound by the decisions. To the extent, therefore, whether as a matter of convenience or newly undertaken obligation, Regulations in the UK do not diverge from and, indeed, replicate or mirror as a matter of detail or substance EU law, then the influence of the EU law will persist, as will the influence of EU jurisprudence, whether it comes from the ECJ or otherwise.

7. Turning now to various specific areas, one recent illustration of EU law having specific reference to costs is Section VII of CPR Part 45 that deals with costs limits in Aarhus Convention claims. On 25th June 1998, the UK, the EU and other national and international parties entered into the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, known as the Aarhus Convention. The main objective of the Convention was to ensure that litigants were not deterred from bringing claims for judicial review or statutory appeals in relation to environmental matters by the prohibitive costs of so doing in terms of the exposure to adverse costs that they would face if they lost.

8. CPR 45.43 implemented the main part of the Convention by providing a limit of £5,000 for a claimant to pay costs where the claimant was claiming only as an individual and not as or on behalf of a business or other legal person, and £10,000 in all other cases; and a defendant, £35,000.

9. CPR 45.44 provided a mechanism by which the limits could be varied (upwards or downwards) and in a recent decision (*R(o/a The Royal Society for Protection of Birds) v the Secretary of State for Justice* [2017] EWHC 2309 (Admin)), it was determined that the claimant's own costs can be taken into account when considering whether or not to vary upwards or downwards the caps, so that if, for example, the claimant's own costs are high, the claimant could ask for a nil cap on the defendant's costs.

10. Another area of costs law directly affected by EU is security for costs. CPR Part 25.13 provides for the court to make orders for security for costs against claimants who are resident out of the jurisdiction but not resident in, amongst others a EU state. This derives from EC Regulation 44/2001.

11. In the field of consumer rights, there were the late, and decidedly unlamented, Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008. Those Regulations, which were passed in order to implement Council Directive 85/577 EEC, were intended to protect consumers in respect of contracts negotiated away from business premises and required, in certain circumstances, notices of rights of cancellation to be given in order for such contracts to be enforceable.

12. The Regulations set a trap for an unwary solicitor who visited his client in his home, the client perhaps being, by virtue of disability, unable to come to the solicitor's office, and signed a retainer (often a conditional one in relation to an injury claim) there and then without giving notice of cancellation rights.

13. Those Regulations, despite being repealed in relation to contracts entered into on or after 13th June 2014, had an outing in the Court of Appeal in 2017. In *Ozlem Kupeli & Ors v Cyprus Turkish Airlines & Ors* [2017] EWCA Civ 1037, the Court of Appeal dismissed an appeal against a decision to the effect that where contracts had been signed with solicitors at a community centre, the Regulations did not apply and notices of cancellation were not required.

14. New Regulations, namely the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, replaced the 2008 Regulations. The 2013 Regulations were required because the EU had repealed Council Directive 85/577/EEC with new Directives, thus rendering out of date the 2008 Regulations. The new Regulations do not have the draconian penalty of making a contract that does not

comply therewith unenforceable but, instead, significantly modify and extend in certain circumstances the period during which a consumer can cancel such a contract.

15. It is not the place of this talk to delve into the intricacies of the new Regulations, but merely to signal the way in which European law can affect consumer contracts and, in particular, solicitors' retainers.

16. Another area where European law has had a recent and dramatic effect is in relation to Employment Tribunal fees. It is well known that until the coming into force of the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013, the claimant could bring and pursue proceedings in an employment tribunal and appeal to the EAT without paying any fees. The new Fees Order split claims into two types: (defined either as "Type A" or "Type B"). Those in Type A are straightforward claims which could be resolved at a hearing taking approximately one hour. Type B claims are more complex, including unfair dismissal claims, equal pay claims and discrimination claims. For Type A claims, the fee was £390 and Type B, £1,200. This contrasts with County Court fees where in the lowest claims the fee starts at £50.

17. For reasons that need not trouble us, the Supreme Court in ***R(o/a Unison) v The Lord Chancellor*** [2017] UKSC 51 held that the Fees Order was unlawful, both at common law and under EU law (to the extent that the rights asserted before the Employment Tribunals are rights contained in EU law). So far as EU law was concerned, the decision was based on the conclusion that the Fees Order imposed limitations on the exercise of EU derived rights which were disproportionate.

18. That finding shows the breadth of the impact of EU law in that not only does it show that the citizen is able to enforce EU derived rights in the courts and tribunals of the UK, but that the cost to him of so doing must not be disproportionate. So far as the finding that the Fees Order contravened common law rights is concerned, that represents a degree of judicial activism that is quite novel and possibly far-reaching, and independent of EU law. To that extent, therefore, departure from the EU might coincide with the courts developing remedies that will, in effect, cut down the executive's power to curtail citizens' rights in substitution for remedies available directly through EU law.

19. So far as the enforcement of judgments is concerned, there is a mass of foreign obligations, all conveniently discussed in The White Book at Part 74, the main one of which concerning the EU is the "*Judgments Regulation*", which is Regulation EU No. 1215/2012 and covers jurisdiction and recognition and enforcement of judgments in civil and commercial matters. Again, it is no place of this seminar to delve into the technicality of the Judgments Regulations, save to say that the Regulations provide a complete code for where proceedings can be commenced within the EU and the enforcement of EU judgments.

20. A new data protection law, General Data Protection Regulation (EU) 2016/679, comes into force on 25th May 2018. It is a Regulation and not a Directive and, therefore, is directly applicable.

21. The effect of this new Regulation will not so much be on costs law as on costs lawyers to the extent that a costs lawyer is either a controller or a processor of personal data. Again, it is no part of the aim of this seminar to discuss the content of these new

obligations, merely to signpost that this is another area that affects costs lawyers that comes directly from the EU and, therefore, may hereafter be changed by the UK so that the law of the UK diverges from that of the EU in this regard.

22. The future nature of the UK's relationship with the EU remains to be determined. The extent to which EU law will continue to influence UK law will, in part, depend on the extent of divergence hereafter. In many areas, divergence is likely to be slow and limited. In others, it may be more dramatic One thing is certain, the influence of EU law, at least, will be with us for many decades to come..

23. Lastly, a word about human rights. The European Convention on Human Rights is, of course, entirely separate from the EU. It is clear, however, that if the UK wanted to join the EU, adherence to the ECHR would, more or less, be mandatory.

24. There is a difference of view amongst lawyers as to whether adherence to the ECHR is a continuing condition of EU membership. In 2007, the EU commission said:

> "*Any member state deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures could, in certain circumstances, raise concern as regards the effective protection of fundamental rights by its authorities.*"

25. In theory, in such circumstances, the Commission would have to decide whether whatever replacement a country withdrawing from the Convention decided to enact in its place demonstrated sufficient respect for human rights to allow for continued membership, although quite what the Commission could do about that is not clear.

26. In terms of the law affecting costs, an attempt was made, unsuccessfully of course, in *Coventry v Lawrence* [2015] UKSC 50, to invoke the ECHR to seek a ruling that the

whole CFA regime, introduced from 2000 onwards, was unlawful (this despite the fact that by then it had already been substantially altered by LASPO). The attempt was unsuccessful but perhaps now the common law principles from the ***Unison*** case could also be invoked.

27. Could withdrawal from the EU, therefore, enable or encourage withdrawal from the ECHR or, as a first step, the repeal of the Human Rights Act?

28. As a "*pub quiz*" question: Who, in April 2016, said:

> "*It isn't the EU we should leave, but the ECHR and the jurisdiction of its court.*"

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