

REGULATORY NEWS AND CASE UPDATES FROM BROWN RUDNICK'S EUROPEAN LITIGATION PRACTICE

400 YEAR OLD PRINCIPLE OF EXPERT IMMUNITY ABOLISHED BY SUPREME COURT

In the recent Supreme Court decision of *Jones v Kaney* [2011] UKSC 13 it was held by a majority (Lord Hope and Lady Hale dissenting) that the immunity from suit for breach of duty that expert witnesses have enjoyed in relation to evidence given in the course of legal proceedings should be abolished. The decision has reversed a line of authority dating back 400 years.

The claimant in the underlying case brought a claim for personal injury against the defendant. The claimant's solicitors instructed the respondent, a clinical psychologist, to prepare a medical report. The respondent subsequently signed a joint statement with the defendant's medical expert which was highly damaging to the claimant's case. As a result, the claimant settled

the claim for significantly less than he might otherwise have obtained.



The claimant brought a claim in negligence against the respondent who, while not disputing negligence, relied on her immunity from suit as an expert witness and so applied to have the action struck out. Her application was successful in view of the fact that the judge in the High Court was bound by the Court of Appeal's decision in *Stanton v Callaghan* [2000] QB 75 to hold that, as an expert witness, the respondent was entitled to immunity from such a claim. The claimant's appeal against the order of the High Court was sent directly to the Supreme Court as a point of general public importance pursuant to section 12 of the Administration of Justice Act 1969.

The Supreme Court (by a majority) reversed the first instance decision holding that immunity from suit for breach of duty enjoyed by expert witnesses should be abolished. The majority held that no justification had been shown for continuing to hold expert witnesses immune from suit for breach of duty in relation to the evidence they give in court or for the views they express in anticipation of court proceedings.

IN THIS ISSUE:

- 400 YEAR OLD PRINCIPLE OF EXPERT IMMUNITY ABOLISHED BY SUPREME COURT
- INTRA-CORPORATE DISPUTES - CHALK UP ANOTHER WIN FOR ARBITRATION
- US GOVERNMENT BANS ENTRY TO RUSSIAN OFFICIALS ASSOCIATED WITH DEATH OF SERGEI MAGNITSKY
- WHAT NEXT FOR ALTERNATIVE DISPUTE RESOLUTION IN EUROPE? - UPDATE
- *JIVRAJ v HASHWANI*
- *LUCASFILM LIMITED AND OTHERS v AINSWORTH AND ANOTHER*

(cont. page 2)

(cont. from page 1)

The Court's main concern in reaching this decision was the potential for disappointed litigants to commence worthless but time-consuming claims against their experts, and the resultant disincentive for experts to give evidence. The majority of the Court were unconvinced by that concern and in considering the issues relied heavily on the fact that no such "floodgate litigation" and therefore "deterrent" had followed the abolition of barristers' immunity by the House of Lords in 2001. Nonetheless, expert witness groups have expressed concern that experts may be deterred from giving evidence, especially in child abuse cases where there has been a diminishing number of medical experts available in recent years.

Lord Hope and Lady Hale, dissenting, disagreed with the majority's approach of reviewing the justification for the immunity. They suggested that, in the absence of a secure principled basis for removing the immunity, and of reliable evidence to indicate what the effects of doing so might be, it was more appropriate to leave any necessary reform to Parliament.

While the case should not be construed as having removed the longstanding immunity of witnesses more generally, the extent to which the position of other witnesses may come under similar scrutiny in future is currently unknown. ■

INTRA-CORPORATE DISPUTES – CHALK UP ANOTHER WIN FOR ARBITRATION

On 21 July 2011 the Court of Appeal delivered its judgment in *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855 and in so doing provided some welcome clarity on the question of the arbitrability of corporate disputes. The judgment will likely be of particular interest to parties looking for ways of resolving internal corporate disputes outside of the local courts of the country of incorporation.

The case centered around an unfair prejudice claim (the "**Petition**") brought by Fulham FC under section 994 of the Companies Act 2006 in respect of allegations that the chairman of the Football

Association Premier League (FAPL), Sir David Richards, had acted to the detriment of Fulham FC in connection with Peter Crouch's transfer from Portsmouth to Tottenham Hotspur.

Despite the relevant rules governing Fulham FC's relationship with the FAPL and its officials (the "**Rules**") requiring all disputes to be referred to arbitration, Fulham FC chose to bring shareholder proceedings against Sir David and the FAPL (the "**Defendants**") in the High Court. Fulham FC was so entitled due to its status (along with each of the other football clubs in the Premier League) as a shareholder of FAPL, a situation which had been in place since the founding of the FAPL in 1992.

The issue before the appeal court was Fulham FC's appeal against a High Court stay of its Petition, an order that had been imposed following an application by the Defendants for the court to give effect to the arbitration provisions of the Rules. In making its decision the High Court had had to consider competing lines of authority. First, *Re Vocam Europe Ltd* [1998] BCC 396, where the High Court had stayed an unfair prejudice petition where a shareholders agreement had provided for all matters in dispute to be referred to arbitration; and second, *Exeter City Association Football Club Ltd v. Football Conference Ltd* [2004] 1 WLR 2910, where the High Court had refused a stay on the basis that the statutory rights conferred on shareholders to apply for relief could not be usurped or limited in any way whether by agreement (e.g. an arbitration agreement) or otherwise. After due consideration the High Court had followed *Re Vocam* and granted a stay.

On appeal Fulham FC argued that its Petition invoked the supervisory jurisdiction of the court and that the subject matter was therefore not arbitrable. In the alternative it argued that the arbitration provisions in the Rules should be construed so as to exclude an action for unfair prejudice.

The Court of Appeal, however, agreed with the High Court and unanimously dismissed Fulham FC's appeal. The court



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found that nothing in the Arbitration Act 1996 or the Companies Act 2006 expressly excluded unfair prejudice disputes from resolution through arbitration, and in terms of any implicit reasons or inherent difficulties militating against unfair prejudice claims being arbitrable, the court differentiated between on the one hand the "subject matter" of the dispute, i.e. the allegation of unfair prejudice, which was clearly arbitrable, and on the other the available remedies. In summary, it found that the inability of an arbitral tribunal to grant certain types of relief would not prevent members of a company agreeing to submit internal disputes to arbitration. The court also clarified that when deciding whether the "subject matter" of a dispute was arbitrable or not, the key question was whether or not the action was likely to involve "a degree of state intervention and public interest such as to make it inappropriate for disposal by anything other than judicial process".

The court went so far as to say that (i) there was no public policy reason for a general prohibition on the submission of disputes about the internal management of a company to arbitration; (ii) even if a claim might result in a remedy which would affect other shareholders who were not party to the arbitration, there was no reason in principle why their views could not be canvassed by the arbitrators before any final decision was made on the terms of any award; and (iii) (although obiter) even if a party was seeking a remedy which was only in the gift of the courts, an arbitration agreement should still enable an arbitrator to determine the subject matter of any claim, and whether a lesser remedy might be suitable before approving an application to the court.

The judgment maintains the recent and growing pro-arbitration trend of English court decisions and evidences a clear willingness to give effect to arbitration agreements even in the context of intra-corporate disputes affecting individual shareholders. ■

US GOVERNMENT BANS ENTRY TO RUSSIAN OFFICIALS ASSOCIATED WITH DEATH OF SERGEI MAGNITSKY

As we reported in our last edition, Brown Rudnick's London litigation team acts for Hermitage Capital Management Limited ("Hermitage") and for Hermitage's CEO, William

Browder, in relation to a series of complex frauds committed against it that resulted in the theft of US\$230 million from the State Budget of the Russian Federation. The frauds against Hermitage have received worldwide press coverage, in particular when one of Hermitage's Russian lawyers, Sergei Magnitsky, tragically died in pre-trial detention in November 2009.

Mr Magnitsky's death caused an outrage in the international community and, in April 2010, Senator Benjamin Cardin requested that the US government introduce a visa ban in relation to 60 Russian officials who were involved in the false arrest, torture and death of Mr Magnitsky and the \$230 million corruption scheme that he had uncovered. The list included Alexei Anichin, the Deputy Interior Minister, Victor Grin, the Deputy General Prosecutor and Viktor Voronin, the Head of Department 'K' of the FSB (the successor organization to the KGB).

On 26 July 2011 it was confirmed that US Secretary of State, Hillary Clinton, has imposed visa sanctions on Russian government officials associated with Mr Magnitsky's death.



USA is the first country to officially impose sanctions on the Russian officials involved in the Magnitsky case.

Those that worked with Mr Magnitsky were pleased with the result, but made it clear that they

were not going to stop there. A Hermitage representative said: "The facts are so shocking about the false arrest, torture and death of Sergei Magnitsky that countries are now starting the act to prohibit the people who killed Sergei from coming into their territories. The first domino has fallen and many more will follow soon".

Russian President Dmitry Medvedev, on the other hand, has ordered his Foreign Ministry to investigate a response to the U.S. action. In a statement, the ministry warned that the U.S. visa ban "could introduce a serious irritant to Russian-U.S. relations." The extent to which this will have an impact on the Russia-US relations is, however, yet to be seen. ■

WHAT NEXT FOR ALTERNATIVE DISPUTE RESOLUTION IN EUROPE? - UPDATE

Following on from the article in our last newsletter, the deadline for implementing Directive 2008/52/EC of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters ("the Directive") has now passed. The Directive applies to all EU member states apart from Denmark and its purpose is "to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings".

For the most part, states across the EU appear to have taken the necessary steps to integrate the Directive's provisions into their national law, bringing a measure of harmony to EU citizens' access to alternative dispute resolution.

Although the UK was found by the Ministry of Justice to comply with most of the provisions of the Directive, an update to procedural rules and additional legislation was still needed to bring particular aspects into force. These included ensuring the enforceability of agreements reached through mediation, and protecting confidentiality of proceedings. Changes were therefore made to the Civil Procedure Rules, in particular Part 78, that will allow parties to apply to court for a new type of order called a 'mediation settlement enforcement order', and a statutory instrument, 'The Cross-Border Mediation (EU Directive) Regulations 2011' (the "Regulations") came into effect on 20 May 2011. As well as implementing confidentiality protection the Regulations provide for a suspension of limitation periods whilst a relevant mediation is on foot.



Since 21 May 2011 seventeen Member States have confirmed that they have the appropriate rules in place to implement the Directive. Denmark has opted not to enforce the Directive pursuant to its prerogative under the EU Treaties.

Elsewhere in the EU the implementation process may not have been quite as diligently adhered to, as it was announced on 22 July 2011 that the European Commission had begun legal proceedings by sending "letters of formal notice" to several EU Member States including Spain, France, Cyprus, the Netherlands and Finland. However, given that the United Kingdom was also listed

amongst the recipients of the legal proceedings it may be that these countries had just not yet notified the EU Commission of all of the national measures introduced to fully implement the Directive. This question will soon be resolved, however, as the "offenders" only had two months (i.e. until around 22 September 2011) to satisfactorily respond to the Commission. Whether or not they have done so will soon become clear depending on whether the Commission continues its proceedings against these countries. ■

WHERE NEXT FOR MEDIATION IN THE UK?

In addition to the efforts required of the UK to implement the Directive, there is a suggestion that its provisions may be taken much further in England and Wales and applied not only to cross-border disputes but also to domestic mediations. On 29 March 2011, the Ministry of Justice published a consultation paper entitled "Solving disputes in the county courts: creating a simpler, quicker and more proportionate system". The consultation made a series of proposals designed to encourage the use of mediation. Perhaps most controversially it suggested introducing a compulsory element, with participants in claims below a certain value threshold

being required to pursue mediation before being entitled to a court hearing. The proposals were said to be designed to (i) "tackle the perceived compensation culture"; (ii) "restore proportionality in costs for court users - particularly businesses"; and (iii) "promote quicker, cheaper alternative dispute resolution where appropriate". The consultation closed on 30 June 2011 and a response is due to be published in October.

As further evidence of the UK's move towards giving greater emphasis to alternative methods of dispute resolution, in June 2011 the UK government announced its "Dispute Resolution Commitment".

This renewed and replaced the previous "Alternative Dispute Resolution Pledge" of 2001. Although primarily limited to government departments and agencies one of its aims is to provide a 'best practice' example to businesses on how disputes should be approached, thereby promoting the use of flexible, creative and constructive approaches to dispute resolution generally.

It remains to be seen quite how far the government and judiciary is willing to go, but if the response to the Ministry of Justice consultation is overwhelmingly positive we may see mediation taking a far more central role in domestic litigation, and England and Wales will continue to be at the forefront of developing the use of mediation as a viable and popular alternative to more traditional forms of litigation. ■

JIVRAJ V HASHWANI

On 27 July 2011 the Supreme Court clarified the position of arbitrators in the context of Employment Law and more importantly re-asserted the legal validity of arbitration clauses requiring the appointment of arbitrators of specific nationalities or of specific religious beliefs.

Background To The Case

The dispute in *Jivraj v Hashwani* arose from a joint venture agreement entered into in 1981 (“the Agreement”) between the appellant and respondent. Article 8 of the Agreement specified that any dispute arising from the Agreement could be resolved by arbitration before three arbitrators. Under the Agreement both parties would appoint one arbitrator, the third would be “The President of the HH Aga Khan National Council for the United Kingdom”. Within this arbitration clause there was a requirement that all arbitrators appointed under the Agreement were to be “Respected members of the Ismaili community and holders of high office within the community.” The Ismaili Community comprises Shia Imami Ismaili Muslims, led by the Aga Khan.

“Given the Court of Appeal’s principle that an arbitrator could not be selected for his religious background without being discriminatory, it followed that there was serious doubt as to whether an arbitrator could be appointed based on his nationality without being discriminatory and causing the arbitration clause to fail.”

The joint ventures governed by the Agreement ended in 1988 and the substantial assets arising from the Agreement were largely settled and dispersed by a three-man arbitration panel appointed in accordance with the Agreement and later by a jointly appointed sole arbitrator. There remained in dispute a sum in excess of \$4.4m that was disputed at length between the parties. By 2008 matters were still not resolved and on 31 July 2008 Mr Hashwani sought to appoint Sir Anthony Colman as arbitrator. Sir Anthony Colman is not a member of the Ismaili Community, a fact never disputed. The Appellant sought a declaration that the appointment of Sir Anthony

Colman was invalid, while the respondent sought an order that Sir Anthony Colman be appointed as sole arbitrator.

The Respondent sought to rely on the Employment Equality (Religion and Belief) Regulations 2003 (SI2003/1660) as amended by the Equality Act 2006 (“the Regulations”) to set aside the requirement that any arbitrator be a member of the Ismaili community. The Respondent argued that this

requirement, though valid at the time of writing, was now discriminatory following the introduction of the Regulations. The Appellant argued that Sir Anthony Colman was not a person employed under a contract to do work within the meaning of the Regulations, and so the Regulations did not apply, and consequently Sir Anthony Colman’s appointment was invalid.

Judicial Progress

The High Court agreed with the Appellant, and held that the appointment of arbitrators fell outside the scope of the Regulations. The High Court went further to explain that, even if the Regulations did apply, the permitted exception that allows for appointments that would otherwise be discriminatory in situations where there is a

genuine occupational need would allow for the requirement in this case to be valid.

The Court of Appeal overturned the High Court’s decision, finding that arbitrators in general are employed within the meaning of the Regulations. The Court of Appeal further found that it was impossible to sever the requirement that the arbitrator be a member of the Ismaili community from the arbitration clause within the Agreement. Consequently the appointment of Sir Anthony Colman was invalid as the clause that allowed for the appointment of an arbitrator was void. In other words, where an arbitration clause prescribed the religion of an arbitrator, and where this was not severable from the arbitration clause then that arbitration clause was invalid.

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Given the Court of Appeal's principle that an arbitrator could not be selected for his religious background without being discriminatory, it followed that there was serious doubt as to whether an arbitrator could be appointed based on his nationality without being discriminatory and causing the arbitration clause to fail. This subsequently left the huge number of parties to agreements where the nationality of an arbitrator was prescribed, or prescribed to be neutral between two international parties, in a situation where they did not know if their arbitration clauses in their agreements were valid. This was especially concerning as the LCIA, ICC and UNCITRAL rules all required nationally neutral arbitrators unless excluded by agreement

The Supreme Court's Decision

Following careful consideration of the case law and regulations the Supreme Court looked at the role that an arbitrator plays, the services provided by an arbitrator and in particular the fundamental role of an arbitrator's neutrality. The Supreme Court concluded that an arbitrator "Does not perform those services for and under the direction of the parties", and that "The dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties". Consequently the role of an arbitrator was not one that was intended to be covered by the Regulations, the requirement to appoint a member of the Ismaili community was not made void by the Regulations, and the appointment of Sir Anthony Colman contrary to the Agreement was invalid.

The Supreme Court's decision to overturn the Court of Appeal's decision has been widely welcomed by arbitrators and the arbitration community as a whole. The Supreme Court emphasized that "One of the distinguishing features of arbitration that sets it apart from proceedings in national courts is the breadth of discretion left to the parties and the arbitrator to structure the process of the resolution of the dispute." The freedom and ability to influence the composition of the arbitral tribunal to ensure that the parties to an arbitration agreement have complete confidence in their agreement is reinforced by the Supreme Court's judgment. The decision can be seen as a wholesale endorsement of arbitration in

general and in particular of the concept that arbitration can be used to do more than purely apply English Law as an English court would. Most importantly the Supreme Court's decision has resulted in the removal of the uncertainty caused by the Court of Appeal's earlier decision, provided certainty for those drafting arbitration clauses and has reinforced the UK's position as one of the primary destinations for international arbitration. ■

LUCASFILM LIMITED AND OTHERS V AINSWORTH AND ANOTHER

On 27 July 2011, the Supreme Court handed down its judgment concerning the intellectual property rights in various artefacts (and in particular the Imperial Stormtrooper helmet) made for use in the first Star Wars film, "Star Wars Episode IV – A New Hope". The Supreme Court held that the Stormtrooper helmets were not sculptures, because they were utilitarian. As such, they were not artistic works under the Copyright, Design and Patents Act 1998 (CDPA). More importantly however, the Supreme Court found that US copyright infringement claims were justiciable before the English Courts.

The Facts

Between 1974 and 1976 Mr George Lucas's concept of the Imperial Stormtroopers as threatening characters in "fascist white-armoured suits" was given visual expression in drawings and paintings by an artist, Ralph McQuarrie, and three dimensional form by Nick Pemberton and Mr Andrew Ainsworth. Mr Ainsworth produced several prototype vacuum moulded helmets and, once the final version was approved, he made 50 helmets for use in the film.

In 2004, Mr Ainsworth sold some of the helmets and other artefacts that he made from his original moulds in the United States. In 2005, Lucasfilm brought copyright and trade mark infringement proceedings against Mr Ainsworth in the US District Court in California and judgment was ordered against Mr Ainsworth for \$10 million for copyright

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and trade mark infringement. Lucasfilm also commenced proceedings against Mr Ainsworth in the Chancery Division of the English High Court for infringement of English copyright and claims under US copyright law. Under section 4 of the CDPA, copyright subsists in, amongst other things, original “artistic works”, which include a “sculpture”, irrespective of artistic quality. Mr Ainsworth relied on section 51 of the CDPA which states that it is not an infringement of any copyright in a design document in respect of anything other than an artistic work to make an article to the design or to copy an article made to the design.

The High Court dismissed the claims for infringement of English copyright; the helmet was not a work of sculpture and therefore Mr Ainsworth had a defence under section 51 CDPA. It also held that the US copyright claims were justiciable and that US copyright had been infringed. The Court of Appeal allowed Mr Ainsworth’s appeal on the latter point. It agreed that the helmet was not a work of sculpture but held that the US copyright claims were not justiciable and Lucasfilm appealed to the Supreme Court.

The Supreme Court had to decide two distinct legal issues:

- (1) The definition of “Sculpture” in the CDPA and in particular the correct approach to three-dimensional objects that have both an artistic purpose and a utilitarian function;
- (2) Whether an English court may exercise jurisdiction on a claim against persons domiciled in England for infringement of copyright committed outside of the European Union in breach of the copyright law of a country outside of the European Union.

Meaning of Sculpture

Walker and Collins LLJ held that the helmet was not a sculpture. They agreed with the decision of Mann J in the

High Court that the helmets were a “mixture of prop and costume” in order to contribute to the artistic effect of the Star Wars film. They were part of the production process. It would not accord with the normal use of language to apply the term “sculpture” to a 20th century military helmet used



in the making of a film, whether it was the real thing or a replica made in different material, however great its contribution to the artistic effect of the finished film. It was the Star Wars film that was the work of art that Mr Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film. The Supreme Court held that Mann J did not err in law or reach an obviously untenable conclusion, and the Court of Appeal was right to uphold his decision on this

point.

US copyright claims justiciable in the UK

Walker and Collins LLJ held that, in the case of a claim for infringement of copyright of the present kind (i.e. where the claim does not involve a dispute regarding the registration or validity of a foreign IPR required to be deposited or registered), the claim was one over which the English court has jurisdiction, provided that there was a basis for in personam jurisdiction over the defendant.

The Supreme Court considered a number of the key cases on jurisdiction and noted that the leading cases all involved unusual factual situations in which the claim had major political ramifications, and in which, therefore, issues of international law and comity were engaged. The key common law rule arising out of the decision in *British South Africa Company v Companhia de Moçambique* was considered. The *Moçambique* case is the authoritative foundation for the rule that the English court has no jurisdiction to entertain an action for the determination of title to, or the right of possession of, foreign land, or the recovery of damages for trespass to such land.

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The Supreme Court held that section 30(1) of the Civil Jurisdiction and Judgment Act 1982 abolished that part of the rule which precluded actions for damages for the infringement of immovable property rights in jurisdictions outside of the UK from being justiciable in the English courts, unless the proceedings were principally concerned with questions of title or right to possession of property. It was noted that there was a parallel development in European law, under Article 22(1) of the Brussels Regulation (44/2001/EC), which states that, “proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated shall have exclusive jurisdiction”, regardless of the domicile of the defendant. Furthermore, it was noted that Article 22(4) of the Brussels Regulation only assigned exclusive jurisdiction to the country where an intellectual property right originated (i.e. where the registration of the IPR has been applied for) in cases which concerned registration or the validity of intellectual property rights that are required to be deposited or registered.

The Supreme Court found that there were no issues of policy which militated against the enforcement of foreign copyright. Instead, they found that States had an interest in the international recognition and enforcement of their copyrights. The Court dismissed the concerns relied on by the Court of Appeal to justify the application of the Moçambique rule as follows:

(1) The Court of Appeal's concern that questions of foreign law would have to be decided apply to many international cases over which the English courts have jurisdiction;

“It was the Star Wars film that was the work of art that Mr Lucas and his companies created. The helmet was utilitarian in the sense that it was an element in the process of production of the film.”

(2) The Court of Appeal's concern that enforcement of foreign intellectual property law might involve a clash of policies, such that a defendant might be restrained by injunction from doing lawful acts in this country, was rejected; such an injunction would be granted only if the acts were anticipated to achieve fruition in another country, and there was no objection in principle to such an injunction;

(3) There was no objection in principle to a restraint on acts in another country; extra-territorial injunctions are commonly granted here against defendants subject to the in personam jurisdiction;

(4) The fact that there was no international regime for the mutual recognition of copyright jurisdiction and of copyright judgments was no reason for the English courts to refuse to take jurisdiction over an English defendant in a claim for breach of foreign copyright.

Implications of the Supreme Court decision

The decision of the Supreme Court means that Mr Ainsworth can continue to sell the helmets in the UK as no copyright subsists in the helmets under English law. However the Supreme Court also found that Lucasfilm's infringed US rights were enforceable in the UK. As such he is still facing liability with regard to the US copyright infringement claims.

The Supreme Court's acceptance of jurisdiction over foreign copyright infringement claims means it will now be possible to sue in England for infringement of copyright which occurred in another jurisdiction provided that the defendant is domiciled in England. However, the decision by no means opens the doors to all foreign intellectual property right infringement claims being heard in the English courts, since the decision only concerns copyright infringement, given the narrow scope of the issue the Supreme Court had to decide on. ■

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