Debevoise & Plimpton

Civil Litigation Annual Review: 2021

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Introduction

Welcome to the second edition of our annual UK Civil Litigation Review.

In our previous review, we noted that we would probably all be glad to see the back of 2020. Unfortunately, a year on, the message is the same; we are all probably equally as glad to see the back of 2021!

Whilst the Covid-19 pandemic has had a profound impact across the world and disrupted so much of our lives, it has been impressive to see how the English Courts have adapted to the "new normal". Indeed, it is a testament to the English judiciary, and the flexibility that has been shown by the users of the English Courts, that the Courts can still function despite the obvious challenges presented by Covid-19. Whilst the outlook for 2022 remains uncertain, parties can at least be confident that they will nevertheless be able to progress their claims through the English Courts.

As with our previous review, we have provided updates on a variety of topics which we hope will be of interest. 2021 has been an eventful year for litigants, and we have tried to capture the key developments in this annual review. Readers may be particularly interested to read about the witness statement reforms (page 39), the growth of group litigation (page 13), further developments to disclosure (page 35) and changes to service outside of the jurisdiction (page 51).

2021 has also been a momentous and hugely successful year for Debevoise. You will be able to read about a number of cases in which we were involved in this annual review, but notable highlights this year include victories for Sberbank of Russia (page 51), Shell (page 15) and Petro Poroshenko (page 55).

We were also delighted to welcome Patrick Swain as a partner in the London Commercial Litigation Group in November 2021. Mr Swain is one of the leading litigators in the United Kingdom, a Band 1 ranked lawyer by *Chambers & Partners UK* and an established leader in commercial and corporate disputes. With Lord Goldsmith QC and Mr Swain at the helm, we look forward to another successful year in 2022.

Finally, I would like to thank all members of the London disputes team who have helped put this annual review together, with special thanks to Editor-in-Chief Emily Lodge.

Christopher Boyne

Partner

Company Law

Reflective Loss

Broadcasting Investment Group Ltd v Smith [2021] EWCA Civ 912

Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands) [2021] UKPC 22

The "rule against reflective loss" provides that shareholders cannot claim for damages merely because the company in which they hold shares has suffered damage. In particular, shareholders cannot claim for a diminution in the market value of their shares, which is merely a "reflection" of the loss suffered by the company, the proper claimant for which is the company.

Following the decision of the Supreme Court in *Sevilleja v Marex* [2020] UKSC 31, which limited the expanding principle of reflective loss, two recent decisions of the Court of Appeal in *Broadcasting Investment Group Ltd v Smith* and the Judicial Committee of the Privy Council in *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands)*, respectively, have clarified the scope of the principle further.

These recent cases have confirmed that:

- The reflective loss rule could apply to both direct and indirect shareholders in a company (*Broadcasting Investment Group v Smith*) as well as to former shareholders of a company (*Primeo Fund v Bank of Bermuda*).

- The rule is substantive rather than procedural. This means that the claimant's status as a shareholder is assessed as at the time the loss and damage is suffered, rather than at the time proceedings are commenced. For example, a person who suffers loss and damage in 2019 only to become a shareholder of the company in 2021 will not be barred by the rule against reflective loss because he or she was not a shareholder in 2019 when the loss and damage occurred.

- The relevant time to determine whether the reflective loss rule applies is when the claimant suffered the loss arising from the relevant breach of obligation by the relevant wrongdoer, not the time when proceedings are brought. Moreover, the rule cannot preclude a new shareholder from enforcing rights of action which had already accrued to it before it became a member of the company (*Primeo Fund v Bank of Bermuda*). In other words, the rule does not operate retrospectively.

We give further consideration to the issues of reflective loss here.

Directors' Duties

Burnell v Trans-Tag Ltd [2021] EWHC 1457

The High Court considered the scope of a *de facto* director's duty to avoid conflicts of interest under section 175 of the Companies Act 2006 insofar as it applies to a former director by virtue of section 170(2) of the Act. This issue was relevant in the context of a counterclaim brought as part of a dispute about the circumstances regarding the collapse of Trans-Tag Ltd.

The Deputy High Court Judge noted that section 170(2)(a) expressly provides that the duty in section 175 to avoid conflicts of interest *"continues"* after the relevant person ceases to be a director in certain circumstances. Therefore, the implication is that the conduct of a director after his or her resignation can give rise to a breach of that duty where there has been exploitation of any property, information or opportunity of which the person became aware whilst a director.

The Deputy Judge was of the view that, as a matter of statutory interpretation, he could not ignore the plain words of the statute despite the provision in section 170(4) to apply section 175 with *"necessary adaptations"*. The Deputy Judge found that, as the statute imposed a continuing duty, it is possible for a breach of a continuing duty imposed by section 170(2) to arise based on facts which take place after the director ceases to be a director.

In reaching his conclusion, the Deputy Judge noted that this was contrary to the reasoning in a number of cases relating to the common law rules and equitable principles upon which the general duty in section 175 is founded and which continue to remain relevant to the construction of section 175 under section 170(3) and (4).

Disqualification Proceedings

Re Pottinger Private Ltd [2021] EWHC 672 (Ch)

In *Re Pottinger,* the High Court considered whether members of a Limited Liability Partnership who were not designated members on a management board within the LLP could be disqualified under section 6 of the Company Directors Disqualification Act 1986.

The Court found that the distinction between designated members (i.e., those who perform certain duties for the legal administration of an LLP that would, in a company, be performed by a secretary or directors) and members of an LLP was irrelevant for the purposes of section 6 of the CDDA. Therefore, any member of an LLP is potentially liable to be disqualified under the CDDA.

Moreover, a person could be disqualified for any relevant conduct done in the capacity as a member of the LLP. The test for unfitness applicable to company directors also applies to members of LLPs. This test is referred to as the *"jury question"* and requires the Court to consider whether the conduct complained of means that the person is unfit to be concerned in the management of the LLP. The Court must establish (i) whether the misconduct actually happened, and if so (ii) whether the misconduct makes the person unfit.

The Corporate Insolvency and Governance Act 2020

The UK government's introduction of the Corporate Insolvency and Governance Act in June 2020 in response to the Covid-19 pandemic constituted one of the most significant reforms to insolvency law in recent years, imposing temporary restrictions on creditors' actions and a suspension of directors' liability for wrongful trading.

On 29 September 2021, in response to the reducing impact of the pandemic, the government introduced the Corporate Insolvency and Governance Act (Coronavirus) (Amendment of Schedule 10) Regulations 2021.

The Regulations, effective from 1 October 2021 until 31 March 2022, amend Schedule 10 of the Act so as to impose new restrictions on winding-up petitions, thus providing further protection to companies potentially facing creditor enforcement. In particular, the Regulations permit creditors to present winding-up petitions based on statutory demands, if four conditions are satisfied:

- *Firstly*¸ the creditor must be owed a debt for a liquidated amount by the company. That debt must have fallen due for payment, and not be an excluded debt within the meaning of the Regulations: Excluded debts include debts in respect of rent or other sums payable under certain business tenancies.

- *Secondly,* the creditor must have delivered a written notice to the company in accordance with paragraphs 1(4) to 1(6) of Schedule 10.

- *Thirdly*, the company must have failed to make a satisfactory proposal for payment of the debt within the 21-day response period stipulated by the notice.

- *Finally,* depending on the number of creditors presenting the petition, the debt must exceed certain thresholds. If presented by one creditor, that threshold is £10,000. If presented by multiple creditors, the sum of the debts must exceed £10,000.

These measures are expected to remain under review.

For a full overview of the effects of the Act as implemented in 2020, please click here.

Contract Cases

Restraint of Trade

Quantum Actuarial LLP v Quantum Advisory Limited [2021] EWCA Civ 227

The Court of Appeal in *Quantum Actuarial* set out the principles relevant to establishing whether covenants in a commercial contract engage the doctrine of restraint of trade, in particular:

- Where the doctrine of restraint of trade applies, the contractual restraints are *prima facie* unenforceable, unless they are reasonable.
- In order for a restraint to be reasonable, the restriction (i) has to afford adequate protection to the party in whose favour it is imposed, whilst (ii) at the same time not being injurious to the public in any way.
- A number of factors are relevant when assessing reasonableness, such as the nature of the business, standard forms of contract and inequality in bargaining power.
- Where sophisticated parties of equal bargaining power enter into a contract, Courts will be slow to find aspects of that contract unenforceable on the grounds of restraint of trade.

On the facts, the Court of Appeal held that the doctrine of restraint of trade did not apply to the commercial agreement at issue and that, in any event, the covenants in the agreement were reasonable.

Our full analysis of the decision can be found here.

Harcus Sinclair LLP v Your Lawyers Ltd [2021] UKSC 32

The doctrine of restraint of trade was considered again by the Supreme Court in *Harcus Sinclair LLP v Your Lawyers Ltd* [2021] UKSC 32. The case concerned a dispute between two law firms over which firm could act for group claimants in prospective Volkswagen diesel emissions litigation.

The Supreme Court held that:

- When considering whether a non-compete clause is reasonable, the parties' non-contractual intentions (assessed objectively at the time the contract was made) may be taken into account. This signifies a departure from a slavish contractual construction exercise and is to be contrasted with a number of previous authorities which had approached this question almost entirely through the lens of strict attention to the contractual provisions.

- Where two parties are of equal bargaining power, a Court should approach the question of whether or not the restraint clause is reasonable on the basis that such parties can generally be expected to look after their own interests and agree terms which are reasonable between themselves.

- The scope and duration of the contractual restrictions are also relevant in determining whether the restriction is reasonable.

In light of the above, the decision confirms that, when considering whether a non-compete clause is reasonable to protect the parties' legitimate interests, the extent of the legitimate interests that may be protected is not determined solely by reference to the wording of the contract itself but may also take into account the surrounding circumstances.

Our full discussion of this decision can be found here.

Liquidated Damages

Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29

The Supreme Court in *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29 addressed the extent to which a liability for liquidated damages survives the termination of the underlying contract.

PTT Public Company Ltd had contracted with Triple Point Technology Inc for the design, installation, maintenance and licensing of a commodity trading software system. The contract provided for the work to be delivered in phases, with payment to be made in accordance with certain milestones. The contract also included a liquidated damages provision in the following terms:

> "*If Contractor fails to deliver work within the time specified and the delay has not been introduced by PTT, Contractor shall be liable to pay the penalty at the rate of 0.1% of undelivered work per day of delay from the due date for delivery up to the date PTT accepts such work…*"

The above issue arose in the context of PTT's counterclaims for, *inter alia*, liquidated damages for the delays that had been incurred up to the date of PTT's termination of the contract.

Overturning the judgment of the Court of Appeal, the Supreme Court held that, absent clear words to the contrary, a party will be entitled to liquidated damages that have accrued up to the date of termination, and to general damages thereafter.

Whilst the Supreme Court approached the question as one of interpretation and not principle, the judgment signals a return to the orthodox view that parties' accrued rights and liabilities survive termination.

Our in-depth discussion of the Supreme Court's decision can be found here.

Fraudulent Misrepresentation

Ahuja Investments Ltd v Victorygame Ltd & Anor [2021] EWHC 2382 (Ch)

In *Ahuja Investments,* the High Court considered a claim of fraudulent misrepresentation brought by Ahuja Investments Ltd arising out of the sale and purchase of a freehold investment property known as The Himalaya Shopping Centre. The Court found that the defendants had made a fraudulent misrepresentation during the sale of this investment property. However, the Court agreed with the defendants that there was no reliance by the claimant on the (admittedly false) statements by the defendants. Therefore, the fraudulent misrepresentation at issue was not actionable given that it had not induced the claimant to enter into the contract.

This is a rather unusual case for a number of reasons including the fact that:

- the defendants successfully discharged the evidential burden in respect of showing the claimant's non-reliance on the representation at issue in circumstances where the representations were held to be fraudulent; and

- both parties' main witnesses were found to lack credibility. Moreover, the High Court drew adverse inferences from the parties' failure to call witnesses who could have given material evidence on an issue in dispute.

Mass Claims

Collective Proceedings Orders

Walter Hugh Merricks CBE v Mastercard Incorporated & Ors [2021] CAT 28

On 18 August 2021, the Competition Appeal Tribunal ("CAT") handed down its decision in *Walter Hugh Merricks CBE v Mastercard Incorporated and Others,* authorising the first application for a collective proceedings order ("CPO") since the competition class action regime was introduced in 2015.

By way of background to the case, in 2007, the European Commission found that Mastercard had acted in breach of EU competition law in restricting competition between acquiring banks through the setting of its multilateral interchange fees (fees charged between banks for transactions made by way of Mastercard), which the Commission found were likely to have been passed on to consumers.

In 2016, Mr Merricks, a former financial services ombudsman, lodged an application to commence collective proceedings on behalf of a class of over 46 million individuals and requested that the CAT permit him to act as the class representative. The proposed class consisted of individuals (UK residents, over 16 years old) who, between 22 May 1992 and 21 June 2008, purchased goods and/or services from businesses in the United Kingdom that accepted Mastercard cards. The aggregate damages were broadly estimated at around £14 billion, including a substantial amount by way of interest.

In 2017, the CAT ruled that the claim was not suitable for a collective proceeding. The Court of Appeal overturned the CAT's decision, and Mastercard was subsequently granted permission to appeal to the Supreme Court.

In 2020, a bare majority of the Supreme Court dismissed Mastercard's appeal, finding that the claim was "suitable" to be tried by way of a CPO (i.e., more appropriately brought as a collective proceeding than individual proceedings). Notably, the Supreme Court:

- held that, in order to bring a valid collective action, all that needed to be established was that the breach in question caused the individual in the class more than purely nominal loss;

- dismissed the argument that forensic difficulties in quantifying (or distributing) damages were a bar to bringing a claim on a triable issue and held that there was nothing in the Competition Act 1998 that would suggest that this principle of justice should be "watered down" for the purposes of collective proceedings; and

- emphasised that collective action is an important mechanism to secure access to justice, particularly where refusal to authorise a claim would make it certain that the rights of consumers arising out of a proven infringement (i.e, an infringement decision by the European Commission) would never be vindicated because individual claims are likely to be a practical impossibility.

The Supreme Court's ruling effectively granted a green light for authorisation in the CAT, and, on 18 August 2021, the CAT ruled that the claim could go forward. The CAT held that: (i) Mr Merricks should be authorised as the class representative under section 47(B) CA 1998, provided that a suitable undertaking as to liability for costs was given by his litigation funder; (ii) permission to amend the Claim Form to include claims of deceased individuals in the class would be refused; and (iii) the claims in the Claim Form would be eligible for inclusion in collective proceedings pursuant to section 47B(6) CA 1998, with the exception of claims for compound interest.

The claim will now proceed as the first competition class action and the largest mass claim ever brought in the United Kingdom.

Our full analysis can be found here.

Abuse of Process

Municipio de Mariana v BHP Group plc and BHP Group Ltd [2021] EWCA Civ 1156

In our 2020 Review, we considered the High Court's decision to strike out as an abuse of process a claim brought by 202,600 claimants in relation to the collapse of a dam in Brazil, which had resulted in severe flooding, multiple deaths and pollution.

Adopting the definition of abuse of process set out in *A-G v Barker* [2000] 1 FLR 759, that being "*a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process*", the Court had found that an abuse had been "*clearly proved*". It then turned to "*exercise its discretion in determining what, if any, procedural consequences should follow.*" In reaching its decision, the Court considered several factors, including the practical difficulties associated with managing a Group Litigation Order, which it likened to *"trying to build a house of cards in a wind tunnel"*, and the acute risk of irreconcilable judgments.

In January 2021, Turner J in *Muncipio de Mariana v BHP Group Plc (formerly BHP Billiton Plc) and Anor* [2021] EWHC 146 (TCC) handed down a reasoned judgment refusing the claimant's application for permission to appeal against the order to strike out, holding that the point of central importance was that "*these claims would be not merely challenging but irredeemably unmanageable if allowed to proceed any further in this*

jurisdiction". Turner J also held that it would seem impossible to imagine a situation in which the pursuance of such "*irredeemably unmanageable*" proceedings could be categorised as anything other than an abuse of the process of the Court.

The claimants filed an Appellant's Notice on 16 February 2021, with permission to appeal being refused on the papers. The claimants then applied for the appeal to be reopened pursuant to CPR Part 52.30, with the original appellate Judge recusing himself and the application being determined at an oral hearing.

In July 2021, the Court of Appeal granted the claimants permission to appeal. One of the principal reasons for the Court of Appeal's finding was that the appellate Judge had not addressed the point of principle that "*unmanageability*" was not a proper ground on which to strike out a claim for abuse of process. The centrality of the finding on "*unmanageability*" to Turner J's reasoning meant that the claimants were entitled to expect that their reasons for challenging that finding would be specifically addressed. The substantive appeal is pending determination.

Representative Actions

Jalla & Ors v Shell International Trading and Shipping Company Ltd [2021] EWCA Civ 1389

We also considered in our 2020 Review the High Court's decision in *Jalla v Shell* to strike out the representative aspect of a claim relating to a historic oil spill off the Nigerian coast on the basis that the claim had not been validly constituted as a representative action pursuant to CPR 19.6(1), in that the claimants did not have the "*same interest*".

In considering the facts of the case, the High Court had found that, whilst the claims clearly raised some common issues of law and fact (particularly in relation to duty and breach thereof) and there was no conflict between the claimants which would render representative proceedings inapplicable or inappropriate, the proceedings were ultimately made up of a large number individual claims. In particular, each claimant (or small group thereof) needed to "*go further*" and prove certain individual circumstances in order to establish a complete cause of action. The matters in which the claimants had a common interest were not, therefore, "*sufficient to enable the court to try the right*". Whilst the existence of individual claims does not, in itself, prevent the valid constitution of representative proceedings, the question is whether the individual claims can be regarded as "*subsidiary*" to the main issue forming the subject of the proceedings. In the circumstances, the Court found that they could not. Rather, they were "*just as critical… to any prospects of any success or relief at all*" and were "*an integral part of the overall issues that [were] raised*". On that basis, the Court struck out the representative elements of the proceedings, leaving only the personal claims of the two lead claimants.

Following a hearing in July this year, the Court of Appeal upheld the High Court's decision, finding that that "*this [was] not, and never could be, a representative action*" because the proceedings would have to be case-managed and tried as if they were more than 28,000 individual claims. Central to the Court's finding was the fact that issues such as damages, limitation and alternative causation would have to be addressed, in some way or other, on an individual basis. The Court of Appeal stated that the availability of remediation relief "*depends on damage to land…[t]hat in turn requires…an individual analysis of the individual parcels of land…to identify whether or not they suffered damage; whether or not that damage was at such a level that it justified remedial works and if so, the scope of the necessary works; when the oil first made landfall (and therefore whether or not the claim was statute-barred); and whether or not the damage was due to this or another oil spill…*". Thus, the Court found that the represented parties did not have the "same interest" as each other, nor the same interests as the lead claimants, as required by CPR 19.6.

Notably, the Court of Appeal also summarised the requirements and limitations of representative actions under CPR 19.6. In particular, the Court stated that "*[t]he starting point (or threshold) for any representative action is that the representing parties must have 'the same interest in a claim' as the parties that they represent*" and that "'*[t]he same interest' is a statutory requirement which cannot be abrogated or modified*". However, the Court noted that they would adopt a "common sense approach" to the "same interest" requirement, meaning that it must be the "same interest" "*for all practical purposes*" or it must be "*in effect the same cause of action or liability*". Finally, the Court noted that it "*only tries the claims of the representatives; it does not consider the individual claims of the represented parties*" and that "*[t]he whole point of a representative action is that it avoids such granularity; otherwise its principal benefit [to save time and costs] is lost.*"

Lloyd v Google LLC [2021] UKSC 50

In 2017, Mr Richard Lloyd, a consumer rights activist, with financial backing from Therium Litigation Funding IC, a commercial litigation funder, brought a claim on his own behalf, and on behalf of approximately four million other iPhone users against Google LLC in relation to alleged breaches of its duties under the Data Protection Act 1998 (the "DPA"). In particular, Mr Lloyd alleged that Google had breached its duties as a data controller under the DPA by tracking and using the browser-generated information of users without their consent between late 2011 and early 2012. Mr Lloyd initiated this claim by way of a representative action seeking £750 in damages from Google for himself and each of the iPhone users, which exposed Google to a potential liability of £3 billion.

Permission was required to serve the claim form out of the jurisdiction in the United States. Google challenged Mr Lloyd's application on the basis that the claim had no real

prospects of success, because: (i) damages could not be awarded under the DPA without proof of financial damage or distress; and (ii) the claim was ill-suited to proceed as a representative action. Google was initially successful before the High Court in 2018; however, this was overturned by the Court of Appeal in 2019.

The Supreme Court was asked to determine two issues:

- whether damages are recoverable by an individual for "loss of control" over his or her data under section 13 of the DPA without showing specific financial loss or emotional distress; and

- whether the iPhone users shared the "*same interest*" in the proceedings in accordance with CPR 19.6, so that Mr Lloyd could bring a representative action on behalf of over four million iPhone users.

The Supreme Court answered both questions in the negative, thereby overturning the Court of Appeal's decision and affirming the High Court's decision refusing permission for the representative claim to proceed against Google.

A key issue before the Supreme Court was whether compensation for the alleged breaches of the DPA had to be individually assessed in the case, given that section 13(2) DPA only allows compensation for individuals who suffer "*distress by reason of any contravention by a data controller of any requirements of this Act … if… the individual also suffers damage by reason of the contravention…*".

In light of the "*same interest*" requirement, Mr Lloyd sought to formulate the claim in such a way as to avoid the need for any individualisation. Mr Lloyd argued that the Court could award damages to each class member on the basis of the "lowest common denominator", because the class had suffered an "*irreducible minimum harm*" in the "loss of control" over their personal data by virtue of the mere breach of the DPA. Thus, a "*uniform sum*" of damages could be awarded to each individual for loss suffered.

The Supreme Court rejected Mr Lloyd's case on the basis that the language of the DPA made it clear that the damage for which compensation was sought had to be suffered *by reason* of the data controller's breach. The contravention of the DPA and the damage that resulted from it required two separate enquiries, and it was necessary to "*show <u>both</u> that Google made some unlawful use of personal data relating to that individual and that the individual suffered some damages as a result*" (emphasis added). This meant that a more extensive factual enquiry would have to be undertaken for individuals claiming damages from Google.

The Court's finding also proved fatal to Mr Lloyd's argument that by claiming a "*uniform sum*" of damages he had avoided the need for the Court to embark on an individualised assessment of damages in each case. The Court found that such a claim was not viable because each class member needed to prove damage, and the effect of Google's alleged breaches was not uniform across the represented class. It also could not be assumed that the exact same data was collected from each individual or that they were collated and stored in the exact same way.

Therefore, if liability was established, different awards of compensation would have to be made to different individuals to ensure that they would be adequately compensated and placed in the same position as if the breach had not occurred. Such an individualised approach was at odds with the operation and rationale of the representative action process—to efficiently dispose of claims by binding all members of a represented class with a single judgment

Our full analysis can be found here.

Pre-Service Joinder

Various Claimants v G4S Plc [2021] EWHC 524 (Ch)

On 10 July 2019, the claimants (initially numbering 43 in total) issued a claim against the defendant, G4S Plc, under section 90A of the Financial Services and Markets Act 2000. The claimants, who were shareholders of the defendant, alleged, *inter alia*, that from September 2011 the defendant had made false statements, which had elevated its share price and consequently caused the claimants to suffer loss when those statements proved to be untrue. Notably, the date of issue of the claim was significant because the defendant argued that this was the last day of the limitation period applicable to the pleaded claim.

After the claimant's claim had been issued, but before it had been served on the defendant, the claimants, in reliance on CPR 17.1, amended their claim so as to add further claimants with similar claims. Between the date of issue of the claim and date of service, there were no less than six sets of amendments. At its high point, the claim form contained 182 claimants before settling down (after the various deletions and additions) to 93 claimants.

On 13 July 2020, after the claim had been served, the defendant brought an application challenging the addition of further claimants after the claim had been issued. The defendant argued that the Civil Procedure Rules (the "CPRs") did not permit the addition of claimants before service (or at least not without permission of the Court), either generally or where, as in this case, there was said to be an arguable limitation defence. Thus, the defendant sought, *inter alia*, an order declaring that the addition of

claimants to the claim after 10 July 2019 was ineffective (i.e., an order striking out all the added claimants).

Mann J held that CPR 17.1 allows an existing party to amend *their* statement of case (i.e., the statement of case embodying the claim that *the existing claimants* were making), and it would "*distort[…] the words to take it any wider than that*". On this basis, Mann J ruled that "*[a]n amendment to plead another claimant's entirely separate case is not so much an amendment of the existing claimant's claim form by that claimant…it is bringing in a new person who is bringing in a separate and distinct claim*" (emphasis added). In short, Mann J reasoned that a claimant's amendment to include additional claimants with separate claims was not an amendment to *the claimant's* statement of case, and so it was not permitted under CPR 17.1. Thus, the additional claimants were all struck out.

Further, the defendant had also argued that under CPR 19.4(4), a party could not be added as a claimant unless it consented in writing and the consent was filed with the Court, which the defendant contended the claimants had not done. The additional claimants asserted that CPR 19.4(4) did not require such consent for pre-service joinders (i.e., the joining of new claimants to the action prior to service of the claim). Alternatively, the claimants sought to rely on the statement of truth signed by their solicitor on the amended claim form as constituting a "filed consent". Mann J held that, whilst CPR 19.4(1), which requires a party to obtain the Court's permission to add additional parties, *only* applied to post-service joinders, CPR 19.4(4) applied to joinders whenever they take place. Moreover, Mann J ruled that the consent said to be impliedly expressed by the solicitor who signed the claim form could not count as consent under CPR 19.4(4). Instead, the rule required a separate document for the purpose of expressing the new parties' consent, which must be filed *before* the addition of the new parties. Consequently, regardless of Mann J's ruling on CPR 17.1, the claimants' failure to file prior signed consent meant that their pre-service joinders were an exercise in futility.

Group Litigation Orders

Weaver & Ors v British Airways Plc [2021] Costs L.R 121

This costs and case management conference (the "CCMC") arose out of claims for damages brought against British Airways Plc ("BA") by some its customers, following a cyber attack that affected systems containing the personal data of up to 500,000 BA customers. The damages claims brought against BA alleged that the cyber-attack resulted in hackers obtaining identifiable customer data and that it occurred as a result of BA failing to put in place sufficient security measures, which amounted to a breach of the GDPR and/or contractual obligations owed to the claimants, and/or a breach of confidence.

In June 2019, BA issued an application for a Group Litigation Order, which was granted by Warby J in October 2019. As of 1 February 2021, there were 22,230 claimants within the group litigation with a further 20,000 claimants expected to sign up by mid-March 2021. However, it was estimated that there were 500,000 potential claimants in total.

Some of the key terms of the GLO provided that:

- the claimant's lead solicitors must take reasonable steps to publicise the group litigation (in accordance with CPR 19.11(3)(c));
- in order for a claimant to be entered onto the Group Register (a register on which the claims managed under the GLO are entered), they must have issued and served a claim form (or have been named on an issued and served claim form); and
- the final date for entry onto the Group Register (the "cut-off date") was 17 January 2021 (this was subsequently extended by the parties to 3 April 2021).

At a case management conference ("CMC") in November 2020, Saini J had directed a split trial on liability and quantum issues, with the liability trial to take place in mid-2022. Subsequently, in this CCMC in early 2021, the claimants sought to:

- extend the cut-off date to a date expiring one year after the proposed liability trial; and
- include in their budget the advertising costs incurred by their solicitors in advertising the proceedings to seek new joiners.

As to the first point, Saini J noted that a cut-off date is not required by the CPR, which specifies only that a cut-off date "may" be ordered (CPR 19.13(e)). Further, Saini J held that deciding whether to impose, maintain or vary a cut-off date was a "*pragmatic case management decision*" that must focus on the advantages and disadvantages of such imposition or modification. Saini J stated that any such decision must be guided by the overriding objective and that the claimants must show some 'development' or 'feature' which justifies an extension of the cut-off date.

The claimants argued that an extension to the cut-off date would promote: (1) access to justice; (2) proportionality; and (3) cost savings. Saini J held that 'proportionality' and 'cost savings' spoke for themselves. Saini J considered the promotion of access to justice to be an important aspect of the overriding objective, and also part of the rationale for the existence of the GLO process itself, but noted that this must be considered against the principle that cut-off dates secure the good case management of claims and give parties some level of certainty.

The Judge found that such a long extension to the cut-off date would create a very substantial level of uncertainty on the part of BA and would work against the general principle that a defendant should know the level of its exposure and be able to "*cut its cloth*" appropriately (i.e., devote appropriate resources according to the potential level of liability). On balance, Saini J thought it would be appropriate and just to instead order a modest extension of two months to the cut-off date, until 3 June 2021, to allow the claimants' solicitor's recent burst of advertising to bear fruit. Saini J also noted that any potential claimants wishing to join the claim after the cut-off date would still be able to apply to join and were not permanently shut out.

Secondly, Saini J considered that the claimant's solicitor's past-advertising costs (£443,000) and purported future advertising costs (£557,000) were not being incurred pursuant to the GLO, but were costs incurred by the claimant's solicitors in "*getting the business in*" (i.e., general overheads as costs incurred in obtaining business), and were therefore not recoverable and fell out of the claimant's budget.

Arbitration

Service on Foreign States

General Dynamics v Libya [2021] UKSC 22

In *General Dynamics v Libya,* the Supreme Court dealt with service of process on Foreign States. The issue arose in the context of a 2016 ICC award in favour of General Dynamics, that constituting a New York Convention Award enforceable under section 101 of the Arbitration Act.

General Dynamics filed a Part 8 Arbitration Claim Form for enforcement of the award against Libya and asked the Court's permission to dispense with service of the arbitration claim form and any subsequent order made by the Court.

S12 of the State Immunity Act 1978 ("SIA") gives procedural privilege to States in respect of service of process, requiring any "*writ or other document required to be served for instituting proceedings against a State*" to be served through the FCDO to the Ministry of Foreign Affairs of the relevant State. It was common ground between the parties that s12 applies to the English Courts' enforcement jurisdiction.

At first instance, Teare J granted permission to dispense with service via the Foreign, Commonwealth and Development Office ("FCDO") as required under s12 of SIA. Teare J instead allowed the documents to be couriered to two addresses in Tripoli and one address in Paris. Libya applied to vary that order and asked the Court to require service

through the FCDO. Males LJ varied the order accordingly, holding that the Court did not have discretion to dispense with service via FCDO as this was contrary to s12 of SIA.

On General Dynamics' appeal, the Court of Appeal set aside Males LJ's order and held that it was not mandatory for an arbitration claim form to be served through the FCDO in this instance.

The issue went to the Supreme Court with the majority noting that s12 is based on principles of comity and international law. Amongst other things, it allows clear notice of a dispute to be brought to the attention of a State's senior officials without the potential for harassment that can arise if other methods of service are used. The majority considered that the only exception to s12(1) was in s12(6), which applies where a State has agreed to an alternative method of service.

The majority held that:

- An order regarding enforcement of an arbitral award falls within the purview of s12(1) of the SIA; and

- The CPR does not grant the Court the power to dispense with service in accordance with s. 12(1), that being a mandatory statutory requirement.

The minority disagreed. The minority decision was guided by the fact that Libya had consented to being part of the commercial marketplace by entering into a commercial contract with an arbitration agreement and Libya was now going out of its way not to pay the award. The minority invoked the "*rules of the marketplace*". It referenced the restrictive nature of the doctrine of State immunity in that that it only applies to States when they are acting within the scope of their sovereign authority and not when it comes to their commercial acts.

The minority considered the requirement in s12(1) of the SIA to be interpreted by reference to the CPR. The minority did not consider either the arbitration claim form or the enforcement order to be a "*writ or other document required to be served for instituting proceedings against a State*" because, as per the relevant procedural rules, there was no requirement to serve the arbitration claim form, and the enforcement order was not "*instituting proceedings*".

Public Policy

Betamax v State Trading Corporation [2021] UKPC 14

In *Betamax v State Trading Corporation*, the Privy Council ("PC") considered an appeal from the Supreme Court of Mauritius ("SCM") concerning a Singapore International Arbitration Centre (SIAC) award for US$115 million in favour of Betamax.

Betamax applied to enforce the award whilst the State Trading Corporation applied to set it aside. Both the applications were before the SCM as the arbitration was seated in Mauritius. The SCM set aside the award under s39(2)(b)(ii) of the International Arbitration Act of Mauritius on the basis that the award conflicted with the public policy of Mauritius. The SCM held that the contract between the parties was in violation of the public procurement legislation and regulations in Mauritius. The contract was therefore illegal, and the illegality was flagrant. Betamax appealed to the Privy Council.

The first issue considered by the PC was the scope of the SCM's power under 39(2)(b)(ii), i.e., whether the SCM was entitled to review the arbitrator's decision that the contract was not subject to the public procurement legislation and regulations and was not, therefore, illegal. The parties both agreed that the arbitrator had the jurisdiction to make these findings. The PC noted that there was no appeal on facts or law available against an award to the SCM. The PC did not consider that the question of the legality of the contract necessarily gave rise to public policy considerations regarding the award, noting that, if this premise were to be accepted, then it would, in effect, provide an appeal on an issue of law whenever one party alleged illegality in the arbitration, but the tribunal rejected the contention. This would be inconsistent with the International Arbitration Act, the Model Law on which it was based as well as modern international arbitration law, which upholds the finality of the arbitral tribunal's decision, whether right or wrong in fact or in law, absent specified vitiating factors.

The PC held that to invoke 39(2)(b)(ii), the SCM has to consider whether there is any conflict between the award and public policy. The SCM only had a limited supervisory role and could not reopen issues relating to the meaning and effect of the contract under the guise of public policy.

PC therefore held that the SCM had erred in reviewing the decision of the arbitrator that the contract was exempt from the provisions of the public procurement legislation and regulations. PC allowed the appeal and allowed Betamax's application to enforce the award.

Challenging an Award – Extensions of Time

STA v OFY [2021] EWHC 1574 (Comm)

In *STA v OFY*, the Commercial Court was concerned with an extension of time application by the Government of STA challenging an UNCITRAL Award in favour of OFY. The identities of the parties were not publicly disclosed.

The time limit to challenge an award under s70(3) of the Arbitration Act 1996 is 28 days. Accordingly, the time limit was to expire on 22 February 2021. STA applied on 19 February 2021 for an extension of time until 19 April 2021. In support, it provided a witness statement by its solicitors. In support of its application, STA relied on:

- The "painstaking and bureaucratic decision-making process" of the STA Government;
- A recent general election in STA that meant Parliament was still vetting the ministers, including the Attorney General;
- The disruption caused due to COVID-19; and
- The need to instruct external lawyers.

The Court granted STA an extension until 8 March 2021. STA did not issue a challenge by this date. On 1 April 2021, STA,—through new legal representatives,—issued a Claim Form requesting set-aside of the award under s68 of the Act for serious irregularity. At the same time, STA applied for a further extension of time to bring the challenge. A further witness statement from the new solicitors supported the application.

The Commercial Court referred to the principles in *Kalmneft v Glencore* [2001] EWHC QB 461 in deciding the application, emphasising the following "*primary factors*":

- Length of the delay (to be judged against the relative yardstick of 28 days in the Act);
- Whether the applicant was acting reasonably in the circumstances; and
- Whether the respondent to the application or the arbitrator caused or contributed to the delay.

The Court decided in this case that the delay of 38 days after the expiry of the 28-day period and 27 days after the expiration of the extended deadline was significant and substantial.

The Court was not satisfied with the evidence provided by STA in support of its application. It noted that STA did not provide the specificity required to explain the delay. The Court noted that, in the context of applications in respect of arbitrations, "*the fact that a party is a foreign state is a matter of little significance*", and an entity's bureaucratic decision-making processes do not justify delay.

On COVID-19, the Court judged the evidence "*wholly inadequate*" and stated that what was required was "*a detailed explanation of the way in which the pandemic has affected particular people or particular processes*". There was no suggestion that OFY or the tribunal caused or contributed to the delay. The Court also judged the merits of the application "*intrinsically weak*". The Court therefore dismissed STA's application to extend time.

The decision provides guidance parties applying to English Courts to extend time for challenges under s. 67, 68 or 69 of the Act. Applicants should be meticulous in providing detailed evidence and keep in mind that, in the context of the 28-day time limit, the Courts are likely to consider even a relatively short delay of days as considerable.

Challenging an Award – Jurisdiction

Schenker (Thai) Limited v The Shell Company of Thailand Limited [2021] EWHC 1730 (TCC)

In *Schenker (Thai) Limited v The Shell Company of Thailand Limited*, the Technology and Construction Court ("TCC") decided a s67 jurisdictional challenge to an award.

Shell had engaged Schenker to provide customs services. A dispute subsequently arose between the parties regarding Schenker's failure to make a customs refund claim properly and promptly for a shipment of gasoline imported to Thailand. Shell argued this was a breach of contract and commenced LCIA proceedings. The tribunal held that it had jurisdiction based on an arbitration agreement in the Purchase Contract that incorporated the terms (including the arbitration agreement) of an overarching Framework Agreement between Shell and Schenker.

Schenker, on the other hand, challenged the award on the ground that the dispute was governed instead by a subsequent Quotation sent by Schenker to Shell, which incorporated standard terms including a provision for disputes to fall within the exclusive jurisdiction of the Bangkok Civil Court.

The TCC considered the contentions in light of Thai law, the governing law of the contract, and ruled in favour of Shell's construction of the contracts in issue. Amongst other facts, the TCC considered that Shell had not signed the Quotation, and the

Quotation had been sent weeks after Schenker had started providing the relevant services. The TCC determined that the tribunal had correctly upheld its jurisdiction.

Law of the Arbitration Agreement

Kabab-Ji SAL v Kout Food Group [2021] UKSC 48

In October 2021, the Supreme Court handed down its highly anticipated decision upholding the Court of Appeal's refusal to enforce a Paris-seated award on grounds that the tribunal had wrongly asserted its jurisdiction.

The underlying dispute arose from a Franchise Development Agreement between the claimant and a Kuwaiti company, Al Homaizi Foodstuff Company ("AHFC") which, following a corporate reorganisation in 2005, became a subsidiary of the defendant. In 2015, the instant dispute arose, and the claimant commenced proceedings, referring the matter to ICC arbitration.

The Franchise Development Agreement provided that it was governed by English law, and the arbitration clause specified Paris as the seat of the arbitration, but made no express reference to the law governing the agreement to arbitrate. The defendant participated in the arbitration, though objected to the ICC Tribunal's jurisdiction on various grounds, including that it was not a party to the arbitration agreement.

The ICC Tribunal handed down its decision upholding jurisdiction in September 2017, finding that, whilst English law governed the parties' rights and obligations under the FDA, French law governed the arbitration agreement by which Kout was bound as a matter of French law. The Tribunal found Kout to be in breach of its obligations under the contract, awarding the claimant US$6.7m plus interest.

On 13 December 2017, Kout filed an annulment application before the Paris Court of Appeal, which later agreed that the arbitration agreement was governed by French law (though an appeal is now pending before the French Court of Cassation).

Eight days later, on 21 December 2017, Kabab-Ji issued proceedings in the Commercial Court in London to enforce the award, and later sought an adjournment of the application pending determination of the French proceedings. Kout made a cross-application for enforcement of the order to be set aside under s103(2)(a) and (b) of the Arbitration Act 1996. Both the High Court and Court of Appeal found the arbitration agreement to be governed by English law, meaning that Kout was not bound by it.

The Supreme Court, having considered article V(1)(a) of the New York Convention, its own decision in *Enka Insaat ve Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38, and the terms of the Franchise Development Agreement, found the arbitration

agreement to be "*unambiguously*" governed by English law: its governing law provision referred to all provisions incorporated into the contract, including the arbitration clause, and there was *"no good reason to infer that the parties intended to except"* the arbitration clause from their choice of English law to govern the other terms of the contract.

In light of that, the Court went on to consider whether there was a real prospect of an English Court finding at a later hearing that Kout had become a party to the arbitration agreement as a matter of English law. Finding that there was no real prospect of that occurring, it found summary judgment refusing recognition and enforcement of the award to be justified.

Our full analysis of the decision can be found here.

Privilege

Litigation Privilege – The Dominant Purpose

State of Qatar v Banque Havilland SA & Anor [2021] EWHC 2172 (Comm)

In *State of Qatar v Banque Havilland SA,* the Court considered whether a report prepared by a professional services firm setting out the findings of an internal investigation was covered by litigation privilege.

In 2017, various media outlets reported that Mr Bolelyy, an employee of Banque Havilland SA (the "Bank"), had prepared a slide presentation that set out a strategy for manipulating Qatar currency and bond markets. In response, in November 2017, the Bank instructed PwC to perform a "*forensic*" investigation. The findings of this investigation were set in a report that PwC provided to the Bank in July 2018 (the "Report"). The State of Qatar then commenced proceedings against the Bank and Mr Bolelyy for conspiring to attack the Qatari economy and demanded disclosure of the Report. The Bank refused on the basis that the Report was covered by litigation privilege.

In considering whether the Report had been prepared for the dominant purpose of litigation, the Court proceeded on the basis that the Bank's state of mind at the time it instructed PwC to commence its investigation is the most important factor. The evidence showed that, at the time that the Bank instructed PwC, it considered the two primary purposes of the investigation to be: (i) establishing the full facts of the matters that had been reported in the media and (ii) enabling the Bank to answer any questions asked by banking regulators. In regards to the first purpose, although the Bank considered the reports of Mr Bolelyy's conduct to be a serious matter, it did not have

significant concerns at that stage about the risk of litigation. As for the need to respond to questions by banking regulators, the Court noted that it was well established that the existence of a regulatory investigation would only constitute a valid basis for asserting litigation privilege if the regulator had adopted an adversarial position, which was not the case here.

The Bank also argued that, in December 2017 (one month after PwC's investigation commenced), it received a letter from lawyers acting for the Qatar Central Bank which asked the Bank to preserve all documents relevant to any "*potential claims*" that it may have. Though the Court accepted that the purpose of an investigation could change over time, the evidence showed that the letter had not caused the Bank to anticipate litigation being commenced by the Bank of Qatar, meaning that the original purpose of the investigation remained unchanged, and the Report not privileged.

Finally, the Court noted that, as it had ruled that the Report was not privileged, it did not need to consider whether the provision of the report by the Bank to the Luxembourg banking regulator and the FCA constituted a waiver of privilege. The Court commented, however, that it would have needed "*a good deal of persuading*" that the disclosure of a privileged document to a regulator would amount to a waiver.

Our full analysis of the decision can be found here.

Victorygame Ltd v Ahuja Investments Ltd [2021] EWCA Civ 993

In *Ahuja,* the Court of Appeal confirmed that legal litigation privilege could be maintained over a communication even if the recipient of the communication was misled as to the purpose of the communication.

The underlying dispute concerned certain alleged misrepresentations made in relation to a commercial property purchase. The claimant requested information from its former solicitors who had represented it in relation to the transaction. The solicitors refused. In response, the claimants sent their former solicitors a pre-action letter threatening litigation and demanding responses to a series of questions. Unbeknownst to the former solicitors, the claimant had no intention of commencing litigation against them, the sole purpose of the letter being to obtain information to use in proceedings against the defendant. The former solicitors' indemnity insurers then sent a reply with the information requested.

The defendants sought disclosure of those letters, which the claimant resisted on the basis that it was subject to litigation privilege, with the real purpose of the claimant's letter being to obtain information necessary for the proceedings.

The Master hearing the application initially found that the dominant purpose of the letter would need to be considered from the perspective of both the sender and the recipient. In this case, from the perspective of the former solicitors and their indemnity insurers, the purpose of the letter was to intimate a professional negligence claim against the former solicitors, meaning that the documents were not privileged.

The High Court took a different approach on appeal, holding that, when assessing the dominant purpose of a document, the main focus should be on the purpose of the instigator of the document, in this case the claimant. The Judge concluded that the purpose for which the claimant had instigated the letter was to obtain information to use in relation to the proceedings against the defendant. On that basis, it was privileged.

The main argument advanced by the defendant in the Court of Appeal was that, because the claimant had deceived its former solicitors as to the purpose for which the information was required, the claimant therefore could not assert privilege over the information received in response. The Court of Appeal rejected this argument, finding that there was "*no good reason why there should be a principle that a party that is otherwise entitled to claim litigation privilege over correspondence with a third party should lose it simply because in order to obtain the information it needed, it was forced by the third party's behavior to bring pressure on them by threatening litigation*". In support of its finding on this point, the Court of Appeal noted that, on the facts, the deception was very limited (as the former solicitors were aware of the claimant's dispute with the defendant) and, in all likelihood, the defendant probably had a right to the information held by the former solicitors who were unreasonably refusing to provide it.

The Court of Appeal therefore upheld the claim to privilege, though the absence of the relevant documents at trial, coupled with the claimant's failure to call a certain key witness to speak to those issues, resulted in adverse inferences being drawn against it.

Communications in Both Parties' Possession

ConocoPhillips CO v Chrysaor E&P Ltd [2021] 3 WLUK 524

In *ConocoPhillips*, the Court considered the position as to privilege in cases where the relevant documents were already in the defendant's possession. In this case, the claimant and defendant were parties to a contract, pursuant to which the claimant was obliged to provide the defendant with various documents.

The claimant commenced proceedings seeking rectification of the contract. In the course of those proceedings, in early 2020, an issue arose as to whether certain of those documents, which had in fact been provided to the defendant pursuant to the contract terms, were privileged. The defendant's position, faced with the claimant's assertions of privilege in relation to those documents, was that confidentiality (and therefore

privilege) over the documents between the parties had been lost when the documents were provided to the defendant.

The defendant did not pursue this issue any further for over a year in correspondence, in the course of settling the disclosure review document, or in the course of the Case Management conference. The defendant finally raised the issue by way of a disclosure application brought a few months before the start of trial.

Following an expedited application, the High Court rejected the application on two main bases:

- Firstly, confidentiality over the documents had not been lost. It was common ground between the parties that confidentiality could be preserved impliedly, and not simply expressly, when sharing documents. With that in mind, the High Court assessed the terms of the contract pursuant to which the documents were shared and concluded that, although the purposes for which the documents were provided were broad, they were not "*so broad as to allow access for any purposes or for the purpose of use in this type of litigation between a buyer and a seller*". The High Court did not consider that the large volume of documents shared detracted from the confidential basis on which the documents were shared, finding that *"the access was wholesale but the purpose was not*".

- Secondly, the defendant had waited far too long to bring the application. The claimant had clearly set out its position in February 2020, but the defendant had failed to bring the matter to the Court's attention until over a year later, meaning that, if the application had been successful, it would have caused significant disruption to the preparation for the trial. The High Court noted that "*the very purpose of case management in this court, [is] to avoid that type of disruption*" and said that even if privilege over the documents had been waived, the application would have been rejected due to the defendant's failure to make the application earlier.

Assignment of Privilege

Travelers Insurance Company Ltd v Armstrong [2021] EWCA Civ 978

In *Travelers Insurance,* the Court of Appeal reaffirmed the principle that a successor in title to rights under a joint solicitor retainer arrangement is entitled to access documents created pursuant to that retainer. The strength of this principle was demonstrated by the unique facts of the case.

Group litigation had been commenced against the cosmetic surgery company Transform Medial Group (CS) Ltd (the "Company") after it provided customers with faulty cosmetic surgery products. The Company and its insurers jointly engaged

solicitors in regards to the litigation. Around two years into the proceedings, the Company revealed that only those claimants who had exhibited signs of personal injury, which was around 1/3 of all the claimants, were covered by the Company's liability insurance policy. The Company was not insured in regards to any liability to the remaining 2/3 of the claimants, who had not exhibited signs of personal injury.

Following this revelation, a settlement agreement was reached with the insured claimants. The uninsured claimants subsequently obtained summary judgment against the Company, but this was a hollow victory in circumstances where the Company, which had been placed into administration, had insufficient assets to pay any damages. This also meant that the claimants' solicitors, who were operating under a contingency fee arrangement, were left out of pocket.

In an attempt to rescue the situation, the claimants switched their attention to the Company's solicitors and counsel. The administrators of the Company assigned any claims that the Company had against its solicitors and counsel to Hugh James Involegal ("HJI"), which was an affiliate of the claimants' solicitors. HJI then sought access to the documents held by the insurers and the Company's joint solicitors. The insurers objected on the basis that the documents were covered by joint retainer privilege.

The Court of Appeal held that it is well established that by operation of law, a successor in title stands in the shoes of the predecessor and therefore inherits their rights in full. Here, the terms of the deed of assignment were sufficiently broad to transfer to HJI the Company's rights to the retainer files. This meant that the insurers were unable to assert privilege against HJI, as joint privilege holders are not entitled to claim privilege against each other, but only against third parties. The Court of Appeal noted that, although this might appear to be an "*unusual*" and "*odd*" outcome in light of the circumstances in which HJI came to be a successor in title, there was no principled basis for denying HJI access to the documents. In particular, the Court of Appeal stressed that the existence of a conflict of interest was not a basis for denying HJI access to the documents.

Without Prejudice Correspondence

The Unambiguous Impropriety Exception

Motorola Solutions Inc v Hytera Communications Corporation Ltd [2021] EWCA Civ 11

In *Motorola Solutions,* the claimants sought to rely on statements made in "without prejudice" settlement discussions as evidence in support of an application for a domestic

freezing order and an order for provision of information about the respondents' assets. Specifically, during the course of those meetings, the CFO of the first respondent had argued that its intention was to remove assets from jurisdictions which may be amenable to enforcement so as to frustrate the enforcement of any judgment against them. In the context of an application for a freezing order, such statements would provide clear evidence of a real risk of dissipation of assets. The respondents asserted that the evidence in question was inadmissible on the basis that it was protected by without prejudice privilege. In response, the claimants asserted that the "unambiguous impropriety" exception applied.

In [2020] EWHC 980 (Comm), the High Court found that, whilst the "*exception is a narrow one which is to be applied only in the clearest cases of abuse of a privileged occasion*", the nature of the threat made on this occasion "*unambiguously exceeds what is permissible in the settlement of hard fought commercial litigation*" and would "*fall outside the scope of the protection of without prejudice privilege*". The statements in question were therefore admissible and, on the facts of the case, justified the conclusion that there was a real risk of dissipation of assets.

That decision was appealed on two bases: (i) that the statements were not evidence of unambiguous impropriety and (ii) that the first instance Judge had been wrong to apply the "*good arguable case*" test set out in *Dora v Simper* [1999] 3 WLUK 273.

On the first ground, the Court found that the without prejudice rule was one which fell to be "*scrupulously protected*" and that, even in a case where the "*improper*" interpretation of something said at a without prejudice meeting is "*possible, or even probable… that is not sufficient to satisfy the demanding test that there is no ambiguity*". In such cases, evidence put forward would need to be "*rigorously scrutinised*".

In reaching this conclusion, the Court of Appeal rejected the "*good arguable case*" test from *Dora v Simper*, which imposed a lower threshold for overturning without prejudice privilege than the "*unambiguous impropriety*" test applied by the Court of Appeal.

The Court of Appeal found that the claimant's evidence as to what had occurred at the mediation was "*at least equally*" as plausible as the defendant's evidence. There was therefore no possibility of establishing unambiguous impropriety, and the freezing order was set aside.

See our full analysis of this decision here.

The Fraud Exception

Berkeley Square Holdings & Ors v Lancer [2021] EWCA Civ 551

This is a second judgment relating to a number of applications made by the parties. See also *Berkeley Square Holdings & Ors v Lancer* [2021] EWHC 849 (Ch).

Last year, we discussed the High Court's decision in *Berkeley Square Holdings & Ors v Lancer* [2020] EWHC 1015 (Ch). The underlying dispute concerned a fraud claim brought by Berkeley Square Holdings and others against the manager of their London property portfolio, Lancer. In 2012, a dispute arose as to the amount of the defendant's entitlement to management fees. Shortly thereafter, this dispute was settled by mediation. The claimants then brought proceedings against the defendant alleging that they had known or suspected that the claimant's agent had used the settlement arrangements between the claimants and the defendant to misappropriate £26 million from the claimants. One of the defences raised by the defendants was that the claimants had been aware of the relevant payments, and had gone so far as to affirm them, some six years earlier when they were referred to in the defendants' position paper for the mediation. The claimants applied for strike out of references to the without prejudice statements on the basis that they were inadmissible.

The High Court found that statements made in a without prejudice mediation paper were admissible for the purposes of rebutting allegations of fraud made by the claimants, on the basis that it fell within two of the exceptions to *"without prejudice privilege"*: (i) to set aside an agreement vitiated by a misrepresentation; and (ii) under the rule in *Muller v Linsley & Mortimer*, to assist with determining whether or not losses had been reasonably mitigated in prior proceedings.

The High Court's decision was upheld by the Court of Appeal, which found that the facts of the case permitted a *"principled extension"* to be made to the misrepresentation exception, so as to avoid what would otherwise be an *"unprincipled asymmetry"*, favouring the claimants. The Court reiterated that the purpose of the extension was to allow without prejudice material to be used to uphold or invalidate a contact and also noted the *"serious risk"* of the Court being misled if the material was not admitted.

On the facts, it was also material that the relevant statements had not been made in the context of the same dispute and were peripheral to the dispute in the context of which they had been made. There was, therefore, no risk of undermining the public policy justification for enforcing the without prejudice rule.

Asserting Without Prejudice Privilege

Jones v Lydon [2021] EWHC 2322 (Ch)

In this case, the High Court considered two related issues:

- Whether the latest email in an email chain benefits from the privilege attaching to prior emails labelled "*without prejudice*", even where that particular email has no such marking; and

- Whether an email containing both statements regarding without prejudice negotiations, and statements regarding matters unrelated to those negotiations, could be partially disclosed.

The principal issue in the case concerned the effect and enforceability of the "Band Members Agreement" (the "BMA") between members of The Sex Pistols. If the BMA was effective, its terms required band members to take decisions regarding the use of their music by majority vote. The claimants, band members Mr Jones and Mr Cook, as well as the second and third defendants, Mr Matlock and Mr Button, wished to give permission to use The Sex Pistols' music in a TV series. The first defendant, Mr Lydon (The Sex Pistols' lead singer), opposed such permission, arguing that the BMA was not binding.

Mr Lydon asserted that the claimants had never relied on the BMA in the past and had always made decisions unanimously. Importantly, Mr Lydon also argued that the band members were estopped from relying on the BMA on the basis of the contents of an email sent by his solicitor, Mr Grower, to which the claimants failed to reply and which was not marked "*without prejudice*" (the "Unmarked Email"). Mr Lydon also sought to rely on portions of another email, which was contained within the relevant chain and was marked "*without prejudice*" (the "Marked Email").

Firstly, the Judge considered that because the Unmarked Email expressly stated that it was a reply to a previous "*without prejudice*" email, it too was "*without prejudice*" as part of the chain—especially since it continued to deal with the extant dispute.

Secondly, the Judge held that it would not readily, and without special reason, seek to dissect without prejudice correspondence into privileged and non-privileged parts. Thus, in the absence of a "special reason", the Judge found that no part of the Marked Email could be relied on, as all of it was privileged.

See our full analysis here.

The Disclosure Pilot Scheme

Following an initial term of two years, the Disclosure Pilot Scheme ("DPS") has been extended until the end of 2022. Set out in Practice Direction 51U ("PD51U"), the DPS aimed to make disclosure in proceedings more proportionate, to facilitate greater co-operation between parties, and to assist the Court in determining the scope of disclosure.

Following mixed reviews from practitioners, and subsequent to the Disclosure Working Group's request for feedback on five key areas of the DPS, a number of further amendments have been adopted, including:

- The creation of a separate regime for "Less Complex Claims", that being a claim which, "by virtue of its nature, value, complexity, and the likely volume of Extended Disclosure may not benefit from the full procedure set out in the main body of PD51U", but which is, in any event, likely to apply to claims with a value below £500,000.

- Amendments to paragraphs 1.12 and 13.5 to reflect the possibility of a bespoke approach needing to be adopted in multiparty cases.

- Modifications to the provisions in paragraphs 7 to 10 relating to the list of issues for disclosure and Model C and D of Extended Disclosure aimed at simplifying the process and discouraging excess.

- Amendments to paragraph 11 to remove the emphasis on the need for disclosure guidance hearings and to confirm that the Court may still resolve certain issues in the traditional way by way of an application hearing.

Aside from these developments, the past 12 months have seen a number of decisions handed down which provide further guidance and clarity on the DPS. As the scheme continues to "*bed down*", and litigants begin to make use of the recently added provisions, further developments are to be expected.

We consider a handful of the key decisions clarifying PD51U below.

Compliance with Disclosure Duties

*Eurasian Natural Resources Corp v Qajgeldin [*2021] EWHC 462 (Ch)

The decision of the High Court in *Eurasian Natural Resources Corp* suggests that the Court will not readily exercise its powers to require a party to provide documents which evidence how and whether it has complied with its disclosure duties.

The claimant brought proceedings alleging breach of confidence by the defendant. During the course of the proceedings, the Court was required to consider whether it should order disclosure of electronic documents which the defendant claimed were irretrievable. The defendant had identified these documents in the Disclosure Review Document, but the claimant was not satisfied with this response and sought an order requiring the defendant to write to both Google LLC and the defendant's German lawyers and/or the German police to obtain information about the documents.

In his decision, the Master observed that, whilst the Court had the power to order disclosure of these documents under PD51U, the requirements under PD51U did not oblige a party to provide documents that are irretrievable.

Further, the "*fundamental objection*" of the Court in this case was that the claimant was seeking orders for disclosure in respect of the defendant's compliance with his disclosure obligations. Whilst the Court accepted that it was bound by the recent decision in *Revenue & Customs Commissioners v IGE USA Investments Ltd* [2020] EWHC 1716 (Ch) (discussed further below), in which it was held that the Court did have jurisdiction to order disclosure in relation to issues which do not arise on the statements of case, here, the Master noted there to be "*strong policy reasons*" for the Court's reluctance to exercise that power, as the parties' and the Court's resources should be directed to matters which the Court needs to decide "*in order for there to be a fair resolution of the claim*".

The Court dismissed the claimant's application and was satisfied that the defendant need only undertake a reasonable and conscientious search for disclosable documents.

Lists of Issues for Disclosure

Revenue & Customs Commissioners v IGE USA Investments Ltd [2020] EWHC 1716 (Ch)

This dispute concerned a series of settlement agreements entered into between the GE group and HM Revenue & Customs ("HMRC") in relation to GE's tax liability. These were then rescinded by HMRC on the basis of misrepresentation and/or material non-disclosure by GE. HMRC brought proceedings to confirm this, as well as to recover around £650 million. GE subsequently applied for an order under paragraph 18.1 PD51U for specific disclosure of documents by HMRC relating to its interactions with the Fraud Investigation Service.

The disclosure application was initially dismissed. On appeal, the Court held that the Deputy Master had been wrong to find that he did not have jurisdiction to make a disclosure order under paragraph 18 of PD51U in a case where there was no List of Issue for Disclosure and the disclosure sought related to matters that were not identifiable on

the face of the statements of case, and ultimately concluded that an order for specific disclosure should be made.

The Court made two notable observations:

- In interpreting paragraph 7.3 PD51U, references to "*those issues in dispute*" and to the fair resolution of "*the proceedings*" meant that Issues for Disclosure were not confined to the issues identifiable within the statements of case; and

- The power to vary an order for Extended Disclosure under paragraph 18 did not require there to be a List of Issues for Disclosure, only an order for Extended Disclosure. The List of Issues for Disclosure was an "*important tool*", but ultimately only a tool, and the key requirement is that there already exists an order for Extended Disclosure.

Availability of Extended Disclosure

Performing Right Society Ltd v Qatar Airways Group [2021] EWHC 869 (Ch)

The Performing Right Society brought proceedings against Qatar Airways for copyright infringement, alleging that the airline had made its works available as part of its inflight entertainment system. The claimant sought an order for Extended Disclosure in relation to nine issues identified in its List of Issues for Disclosure.

In considering whether to grant the order for Extended Disclosure, the Court considered paragraph 2.4 of PD51U, which provides that the scope of disclosure should not be "*wider than is reasonable and proportionate…in order to fairly resolve those issues*" and paragraph 6.4 of PD51U, which states that, in determining whether an order for Extended Disclosure is "*reasonable and proportionate*", the Court should have regard for factors such as the nature and complexity of proceedings and the number of documents involved.

Here, the Court ordered Extended Disclosure for several of the items on the Disclosure Review Document, summarising the key considerations for doing so:

- **Para 7.3, PD51U**: Whether it is a key issue in dispute that will need to be determined by the Court with some reference to contemporaneous documents in order for there to be a fair resolution of the preliminary issues;

- **Para 6.3, PD51U**: Whether the Model of Disclosure proposed is appropriate in order to fairly dispose of the preliminary issues; and

- **Para 6.3, PD51U:** Whether the proposed order for Extended Disclosure is reasonable and proportionate.

Document Control

Berkeley Square Holdings & Ors v Lancer [2021] EWHC 849 (Ch)

This is the third judgment relating to a number of applications made by the parties. See also *Berkeley Square Holdings & Ors v Lancer* [2021] EWCA Civ 551.

In this case, the High Court considered the meaning and scope of "*control*" under PD51U, ultimately finding that where there is an arrangement or understanding in place between two parties, it is likely that the documents of one party are, for these purposes, in the practical control of the other.

The underlying claim in this case was one of fraud. The claimants alleged that the defendants made several fraudulent payments to the claimants' representative without the claimant's authorisation.

The defendants sought disclosure of documents held by a number of parent entities of the claimants and individuals associated with those entities. The defendants argued that, even if the documents were not under the claimants' legal control (as would be expected, if the documents were held by the subsidiary of a party), they were under the practical control of the claimants "*as a matter of factual reality*", and that this amounted to control for disclosure purposes.

Citing *Pipia v BGEO Group Limited* [2020] 1 WLR 2582, in which it was held that an arrangement or understanding may be sufficient to give a parent company control over documents held by a subsidiary even if that arrangement is not legally enforceable, the Court in *Berkeley Square* considered there was "*no reason in principle why such an arrangement cannot exist whatever the relationship between the parties*". The Court observed that:

- the relationship between the parties is "*irrelevant*";
- there must be an arrangement or understanding that the holder of the documents will search for relevant documents or make documents available to be searched;
- the arrangement may be general or can be limited to a particular class or category of documents;
- there does not need to be an agreement over how the documents will be accessed; and

- evidence of such an arrangement can be implied by the circumstances, for example, if the company had previously enjoyed the ability to access the third party's documents with its cooperation and consent.

Berkeley Square followed another recent decision of the Court of Appeal, *Phones 4U Limited v EE Limited* [2021] EWCA Civ 116, which confirmed the Court's jurisdiction to order a party to request a third party to assist in the search for relevant documents.

Witness Statements

Practice Direction 57AC

Earlier this year, Practice Direction 57AC and its Appendix (Statement of Best Practice in relation to Trial Witness Statements) were introduced, setting out new rules that would be applicable to trial witness statements signed on or after 6 April 2021, in the Business and Property Courts.

The introduction of the PD followed a flurry of judicial criticism of approaches to witness evidence and the 2019 Report of the Witness Evidence Working Group, which noted concerns about "*over-lawyered*" witness statements.

PD 57AC and its Appendix should be read closely by practitioners involved in preparing trial witness statements in the Business and Property Courts, but notable themes include preservation of the witness's recollection, limited recourse to contemporaneous documents, and avoidance of statements being used to advance a party's case. Key requirements include:

- The requirement to list documents that the witness has referred to or been referred to for the purpose of providing the evidence set out in their statement;

- The requirement to include a specific confirmation of compliance signed by the witness (unless the Court orders otherwise); and

- The requirement to include a specific certificate of compliance signed by the relevant legal representative (unless the statement is signed when the relevant party is a litigant in person or the Court orders otherwise).

The Appendix sets out detailed guidance on the preparation of trial witness statements, including that statements should not quote at any length from any referenced document or seek to argue the case, and that statement preparation should involve as few drafts as practicable.

Our full analysis of PD 57AC can be found here.

Our discussion of judicial criticism of witness evidence can be found here.

Mad Atelier International BV v Manes [2021] EWHC 1899 (Comm)

Mad Atelier International BV v Manes was the first published judgment to address the reformed regime under PD 57AC. The judgment related to an application by the defendant to strike out passages of the claimant's witness statements under paragraphs 3.1, 3.3, 4.1 and 5.2 of the Practice Direction, arguing that they represented inadmissible opinion evidence.

The judgment considered various issues and importantly confirmed that PD 57AC did not change the law on admissibility of evidence. Sir Michael Burton GBE sitting as a Judge of the High Court, stated: "*the Practice Direction is obviously valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it, which is expressly abjured by the statement which is now required under paragraph 4.1 of the Practice Direction. But it was not in my judgment intended to affect the issue of admissibility.*"

The Judge also noted that "*reference in witness statements to documents does not necessarily amount to 'commentary', because paragraph 3.2 of the Practice Direction requires identification of documents to which the witness has been referred for the purpose of giving his statement.*"

As regards the admissibility of opinion evidence, having considered the authorities relied upon by the parties, the Judge noted that "*witnesses of fact may be able to give opinion evidence which relates to the factual evidence which they give, particularly if they have relevant experience or knowledge.*"

Our full discussion of the decision can be found here.

Mansion Place Ltd v Fox Industrial Services Ltd [2021] EWHC 2747 (TCC)

Guidance on PD 57AC was also provided by O'Farrell J in *Mansion Place Ltd v Fox Industrial Services Ltd*, in the context of applications made by both parties in relation to the other's trial witness statements. Both applications raised issues regarding the interpretation and requirements of PD 57AC. In considering them, O'Farrell J made various points regarding the new PD, including noting that:

- *"The purpose of the new Practice Direction is not to change the law as to the admissibility of evidence at trial: per Sir Michael Burton GBE, sitting as a Judge of the High Court in Mad Atelier International BV v Manes [2021] EWHC 1899 at [9]; rather*

it is to eradicate the improper use of witness statements as vehicles for narrative, commentary and argument."

- *"Anyone involved in producing a witness statement for a trial in the BPC is urged to read PD 57AC and follow the Statement of Best Practice. It should be used as a checklist by parties and their legal representatives to ensure that they do not unwittingly offend against the rules that restrict the use of trial witness statements for their proper purpose, that is, providing in writing the evidence that the witness would give as oral evidence in chief."*

- *"As explained above, the Practice Direction does not change the approach that should be taken to the preparation of witness statements. Even prior to introduction of the Practice Direction, a proper approach to preparation of a trial witness statement would result in compliance with the Statement of Best Practice."*

The judgment also considered:

- Issues relating to the preparation of witness statements;

- Appropriate procedure to be followed for a party to address concerns about compliance with PD 57AC, noting that "*the sensible course of action*" is to try to reach agreement on the issue with the other side but, if that is not possible, parties should seek the Court's assistance. O'Farrell J noted: "*this should be done at a time and in a manner that does not cause disruption to trial preparation or unnecessary costs. The court does not wish to encourage the parties to engage in satellite litigation that is disproportionate to the size and complexity of the dispute*";

- Whether specific parts of particular witness statements served for the trial should be redacted; and

- The requirement to list documents that the witness has referred to or been referred to for the purpose of providing the evidence set out in their statement (paragraph 3.2 of PD 57AC). In respect of this requirement, O'Farrell J observed: "*This does not require the witness statement to list every document which the witness has looked at during the proceedings. The purpose of the rule is to provide transparency in respect of documents used to refresh the memory of the witness so that the court and the other side can understand the extent to which, if at all, the witness might have been influenced by the contemporaneous documents, including those not seen at the time.*"

Blue Manchester Ltd v Bug-Alu Technic GmbH & Anor [2021] EWHC 3095 (TCC)

Yet further guidance was provided on PD57AC in *Blue Manchester Ltd v Bug-Alu Technic GmbH & Anor*, in which the Court considered an application by the claimant to strike out paragraphs of trial witness statements served by the Second defendant for non-compliance with PD 32 or PD 57AC.

HHJ Stephen Davies, sitting as a High Court Judge, was satisfied that the non-compliance did not justify striking out the witness statements, explaining that strike out *"is a very significant sanction which should be saved for the most serious cases."* He did, however, examine PD 57AC in detail and specifically addressed, in an Appendix, how the relevant witness statements needed to be re-drafted.

The judgment should be read by practitioners involved in preparing trial witness statements in the Business and Property Courts for its wealth of guidance on PD 57AC. This included the following key points:

- *"A number of the witness statements contain identical or very similar statements in respect of particular issues. It is difficult to see in my judgment how this could ever occur if the requirements of PD57AC are conscientiously complied with."*

- *"It is difficult to see any justification for any part of any witness statement not being expressed in the first person."*

- *"Since par. 3.2 quoted above requires that the trial witness statement itself must identify by list the documents referred to, it cannot be acceptable in my view for a list which is not even referred to in the witness statement simply to accompany the witness statement. Whilst there may be cases where a composite list could be justified, that would be the exception rather than the rule."*

- *"I would accept that in principle it may be necessary to refer to a document or documents in order to explain other evidence, but this should be no more than is necessary."*

- *"As to compliance with SBP par. 3.7, I accept that the obligation to state how well the witness recalls the matters addressed and providing details of documents used to refresh memory is only in relation to important disputed matters of fact and is qualified by the words "if practicable". However, in my view a witness cannot glibly assert that it is not practicable to comply so as to justify wholesale departure from this important requirement. If there is apparent non-compliance the witness would have to justify why it is not practicable to do so."*

Expert's Duties

Bux v The General Medical Council [2021] EWHC 762 (Admin)

The High Court judgment in *Bux v The General Medical Council* considered the duties of expert witnesses and provided guidance on conflicts of interest in respect of expert witnesses.

The judgment highlighted the position under CPR 35.3 that the duty of an expert witness in civil proceedings is to assist the Court on matters within the expert's field of expertise, and that this overrides any obligation to the party from whom they have received instructions or by whom they are paid.

Considering passages from other cases, Mostyn J stated that "*there is a high duty of candid disclosure imposed on an expert witness who has any degree of belief (other than a belief which is unreasonable or de minimis) that he may be under a conflict of interest. He must disclose details of a potential conflict of interest at as early a stage in the proceedings as possible. He must disclose any associations or loyalties which might give rise to a conflict. He must disclose any material that is suggestive of a conflict of interests, and will not be pardoned, if he fails to do so, by a later finding that there is no conflict of interest.*"

Our full analysis of the decision can be found here.

Beattie Passive Norse Ltd & Anor v Canham Consulting Ltd (No. 2 Costs) [2021] EWHC 1414 (TCC)

Similar observations as to compliance with duties were made by Fraser J in the costs judgment in *Beattie Passive Norse Ltd.*

In that judgment, Fraser J found that the conduct of the claimants' expert did not, of itself, justify an award of indemnity costs, but noted that there are cases where the conduct of experts would give rise to such an award, as exemplified by *Williams v Jervis* [2009] EWHC 1837 (QB).

The Judge commented on there being *"a worrying trend generally which seems to be developing in terms of failures by experts generally in litigation complying with their duties*", and noted that PD 35 makes the position very clear. The case is a stark reminder that "*[p]arties to litigation who rely upon expert evidence that fails to comply with the rules should not be encouraged by…this case [where] the approach of the claimants' expert was not sufficient, alone and of itself, to justify an award of indemnity costs.*"

Alternative Dispute Resolution

Alternative Dispute Resolution, and the Court's powers in relation thereto, have been under increasing focus in recent years, and more so since the Court of Appeal's decision in *Lomax v Lomax* [2019] EWCA Civ 1467, in which it held that the Court did in fact have the power to order parties to refer disputes to alternative dispute resolution. That was so despite previous conflicting authority (namely, the decision in *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576).

In the preface to the edition of the White Book published just after the *Lomax* appeal decision was handed down, Sir Geoffrey Vos stated that: "*Lomax lays the basis for a principled and overdue reconsideration of the court's approach to mediation. As a matter of principle, it is difficult to see how, in the light of Lomax, Halsey can continue to be relied upon as justifying a rejection by the court of judge-led mediation….There is an increasing emphasis on ADR generally.*"

In light of that, and numerous other decisions last year considering the obligation on parties to attempt settlement, and the possible costs consequences of a failure to do so, it is hardly surprising that the Civil Justice Council undertook a review of compulsory ADR, which was published in June this year.

The Report considers the legality of compulsory ADR (particularly with regard to its compatibility with the European Convention on Human Rights), as well as when it may be desirable for Courts to compel parties to attempt it.

On legality, the Report finds that compulsory ADR will be compatible with the right to a fair trial which is guaranteed by Article 6 of the European Convention on Human Rights, provided that the ADR procedure is not unduly onerous, and it remains proportionate in terms of cost and time. Importantly, it must also allow the parties the freedom to continue to trial if they wish to do so.

The Report considers two key concerns in relation to desirability: (i) firstly, that parties forced to partake in ADR may not properly engage, and (ii) secondly, that attempting to keep cases from the Courts will have the effect of undermining the Court's constitutional role. In relation to the first issue, having compared settlement figures from jurisdictions with compulsory and non-compulsory ADR, the CJC found no significant differences. It also received feedback from mediators that parties initially reluctant to mediate would often become more engaged as matters proceeded. The Report also suggested that the constitutional point should be of limited focus so long as parties retained the option of returning to the Court if the ADR was unsuccessful.

Finally, the Report sets out a number of factors that may increase the likelihood of compulsory ADR succeeding, including:

- The form of ADR being proportionate, in terms of cost and time;
- Certain types of dispute being more inclined towards settlement via ADR due to the presence of a skilled, neutral third party;
- The stage at which ADR is compelled (with Early Neutral Evaluation being required in the majority of cases); and
- The imposition of sanctions for failing to comply or failing to engage effectively, most likely including strike-out or costs sanctions.

On 9 December 2021, Master Davidson, in the Queen's Bench Division, made an order staying proceedings with number QB-2020-003450 for three months to enable parties to attempt resolution of the proceedings via mediation. That order also sets a deadline by which the parties are to agree the appointment, and sets out the process to be followed in the event that the parties are unable to agree a mediator and need to apply to the Court to do so. The Order also obliges the parties to engage meaningfully in the process, and makes provision for the mediation to be carried out on a "without prejudice save as to costs basis", with either party being at liberty to make an application relying on evidence as to the conduct of the parties at the mediation. This is thought to be the first order of its kind providing for compulsory ADR, and may well, jointly with the CJC's Report, pave the way for such orders to be made more frequently in the future.

The full Report can be found here.

Contempt of Court

Court's Power to Initiate Contempt Proceedings

Isbilen v Turk & Ors [2021] EWHC 854 (Ch)

The introduction in October 2020 of CPR 81.6, which gives the Court the power to commence contempt proceedings of its own motion, became the subject of significant commentary. *Isbilen v Turk*, handed down in April, was one of the first cases in which the Court has considered the exercise of its new power, providing some comfort to those initially concerned about its potential effects.

The underlying dispute centred on alleged deceit and breaches of fiduciary duties by the defendant who, at the request of the claimant, an elderly Turkish lady, had assisted her with moving assets out of the Turkish jurisdiction at a time when her husband had been imprisoned in Turkey owing to his political affiliations.

The instant application arose from an *ex parte* order granted to Mrs Isbilen, which comprised a worldwide freezing and disclosure order, a proprietary injunction and disclosure order, and an order for delivery up of the defendant's travel documents.

The order was not complied with and Mrs Isbilen applied for their continuation, as well as for an order that Mr Turk attend Court to be cross-examined. Importantly, she also raised the possibility of the Court commencing contempt proceedings under CPR 81.6.

The first two issues were ultimately resolved, but both parties made submissions on CPR 81.6. It was submitted on behalf of Mrs Isbilen that the applicable order, under CPR 81.6(3), amounted to no more than a directions hearing, which was an *"aid to compliance"* as opposed to a *"nuclear weapon"*. It was submitted on behalf of Mr Turk that adopting CPR 81.6 would be premature, and would constitute a significant and unnecessary distraction from the main issues in the case that should be reserved for *"situations of real need."*

The Judge made a number of points in considering the applicability and adoption of CPR 81.6:

- That the appropriate party for bringing such an application would, in most cases, be the other party to the litigation. The Court should only exercise its power where the other party had not done so (but might have been expected to do so), and when the Attorney General had not done so. In the hierarchy of applicants, the Court was the *"least well placed"* for commencing these proceedings.

- The Court should only commence proceedings of its own initiative in exceptional circumstances, where *"the contempt is clear, where there is urgency, and where it is imperative to act immediately."*

- When considering whether contempt proceedings are appropriate, the Court should have regard to the overriding objective, including the proportionality requirements set out in CPR 1.1(2)(c), meaning that the commencement of contempt proceedings are likely to be appropriate only for *"serious rather than technical"* breaches, when the proceedings are *"directed at the obtaining of compliance with the order in question"*, when they *"have a real prospect of success"*, and when they *"involve something of sufficient gravity to justify the imposition of a serious penalty"*.

On the facts, the Court found that issuing a summons under CPR 81.6(3) would be inappropriate, and not in accordance with the overriding objective.

Discharge of Committal Orders

Re Lueshing [2021] EWHC 1928 (Ch)

In *Re Lueshing*, the Court considered whether or not it had the power, under CPR 81.9 and CPR 81.10, to discharge a committal order and to replace it with a suspended order.

The defendant had originally been committed to prison for 10 months. After serving two months of the sentence, the defendant had applied under CPR 81.10 for an order discharging the committal or varying it so as to suspend the sentence. The defendant applied for a variation of the length of imprisonment in the alternative.

Morgan J, hearing the application, varied the term of imprisonment to six months and, in the course of his judgment, considered whether the Court had jurisdiction to substitute a suspended committal order for the original committal order, finding that it did not, following *Harris v Harris (Contempt of Court: Application to Purge)* [2001] EWCA Civ 1645.

The Judge explained that the applicable provision in this case was not CPR 81.10, but CPR 81.9 and subrule (2), which provide that an *"order for committal has immediate effect unless and to the extent that the court decides to suspend execution of the order or warrant."* He found that the Court's decision in *Harris v Harris*, that there was no power to suspend the unreserved part of a sentence when ordering discharge from prison, was, at that time, a correct statement of law, and that it had not been superseded by amendments to Part 81 of the CPR.

On that basis, it was not open to the Judge to make the order sought, though he noted that he *"would have been attracted by that possibility"*, which he thought would have *"real advantages"*.

Sentencing & Credit for Admissions of Contempt

Su v Lakatamia Shipping Company Ltd [2021] EWCA Civ 1355

In *Su v Lakatamia,* the Court considered an appeal against a two-year custody order imposed on the appellant, Mr Su, in relation to 20 contempts of court.

The appellant was a *"serial contemnor"* known to the English Courts, with the instant occasion being the third occasion on which he had been sentenced for contempt, in what was described by the first instance Judge as *"the most serious campaign of contempt in the English Courts."* The breaches were numerous, ranging from non-disclosures,

presentation of false affidavits of assets to purge, failure to provide access to email and social media accounts, non-compliance with a search order, and dissipation of an interest in a vessel and cash and funds. The breaches spanned a period from 2011 to 2020.

Considering the Court's previous decisions in *Crystal Mews Ltd v Metterick* [2006[EWHC 3087 (Ch) and *Asia Islamic Trade Finance Fund Ltd v Drum Risk Management Ltd* [2015] EWHC 3748, the Judge set out the factors relevant to his sentencing, including that:

- Lakatamia had been prejudiced by the contempt and it was incapable of remedy;
- Mr Su had not acted under pressure, the breach was deliberate and there was high culpability;
- Mr Su had not appreciated the seriousness of the breach;
- Mr Su had "far from" cooperated; and
- Mr Su had failed to show any remorse or acceptance of responsibility: specifically, that "*meaningless apologies have been given in the past and are still repeated, but [Mr Su] is simply paying lip service to the orders.*"

Two years' custody was the maximum sentence available under s14(1) of the Contempt of Court Act 1981.

The appeal was brought on three bases:

- that the Judge had erred in principle by adopting a starting point above the two-year period, before allowing for mitigation;
- that the Judge had failed to pay adequate heed to the mitigation available to Mr Su: namely his admissions of contempt and 305 days spent in the jurisdiction whilst restrained by the injunction; and
- in all the circumstances, the Judge imposed a sentence that was "*manifestly excessive*" and outside of the decisions reasonably open to him.

The Court of Appeal rejected the first ground, on the basis that the remarks relied upon in support of it were no more than concluding remarks to the effect that the Judge would have imposed a greater sentence than 24 months, had he been able to do so.

As to the second ground, the Court found that the weight to be given to an admission would always be fact-specific, with timing being an important factor. There was no obligation on the Court to award credit for an admission of contempt, though in many situations some credit will be appropriate, so as to incentivise contemnors to accept their breaches. The Court recognised, however, that in certain exceptional circumstances, as these were, the Judge would be entitled to consider credit to be inappropriate. In this case, Mr Su's admissions had come a year late, following "*vigorous denials*", meaning little time or money had been saved. The admissions were also incomplete and ambiguous. Finally, the Judge found that Mr Su had not only remained non-compliant, but "determinedly so", and there was no obligation on the Judge to treat the period over which Mr Su was required to stay in England as mitigation.

The Court went on to find that the third ground was hopeless: the sentence of two years' custody not being capable in any way of being said to be "*plainly wrong as outside the range of decisions reasonably open to the Judge given… Mr Su's long history of flagrant contempt of court orders, the sheer number, duration and blatant nature of the index contempts, and Mr Su's continued non-compliance*." The appeal was therefore dismissed.

Relief from Sanctions

Finvest Holdings Sarl v Lovering [2021] EWHC 748 (Comm)

In *Finvest Holdings v Lovering*, the Court granted relief from sanctions in circumstances where the applicant alleged that COVID had impacted their ability to comply with an unless order.

The proceedings relate to a series of transactions made to finance a development project. At the CMC in February 2021, the Court had ordered for further information to be provided by the second claimant. The defendant considered the subsequently provided disclosure defective and the response incomplete and applied for an unless order. The Court granted the application and made an order directing that the claim be stuck out unless the further information was provided by the second claimant by 24 February. Further information was provided by the second claimant on 24 February, which the defendant contended was still insufficient. On 25 February, the second claimant applied to set aside the unless order or, alternatively, for relief from sanctions.

The Court refused the second claimant's application to set aside the unless order, holding that the initial response had failed to provide the necessary information and the unless order had been properly sought and granted.

Turning to the application for relief from sanctions, the Court applied the three-stage test established by *Denton v. TH White Limited* [2014] EWCA Civ 906. The Court considered that, whilst it was satisfied that the deficiencies in the supplied information amounted to a serious and significant breach of the unless order, the second claimant's family difficulties and health issues due to COVID-19 were potentially good reasons for explaining the delay. In particular, the court noted that: "*Where one is concerned with an allegation of Covid infection, a court will generally take a rather more benevolent attitude towards proof of whether or not the condition has been contracted or not*", and that "*it would be wrong to dismiss out of hand the suggestion that someone has contracted Covid when that is asserted in a witness statement supported by a statement of truth.*"

Given the above circumstances, and where the trial date was not endangered, where only a modest period of time to comply was being sought and where, if relief was not granted, there would be an unfair advantage conferred on the defendants if the claim were struck out, the Court granted relief from sanctions.

SGI Legal LLP v Karatysz [2021] EWHC 1608 (QB)

In *SGI Legal LLP v Karatysz*, the defendants appealed against a district judge's assessment of its bill of costs in relation to acting for the claimant in a road traffic accident claim for damages. Shortly before the hearing and after the deadline for filing a respondent's notice, the claimant purported to file a respondent's notice that introduced new issues and applied for an extension of time in respect to the filing of the notice. The Court refused to grant the application.

It was accepted that the test for whether the application would succeed was in substance the test for an application for relief from sanctions. The claimant argued that the reason for the delay in filing a respondent's notice was that it was awaiting the handing down of a judgment in a different case that dealt with a relevant issue for the appeal.

The Court found that the claimant's breach was both serious and significant because the points raised in the respondent's notice could have been raised months earlier and were only raised at a time when the claimant's own representatives were concerned that the defendant would not have adequate time to respond.

It further held that there was no good reason for the failure to file the respondent's notice, in particular due to the fact that it appeared to be a deliberate decision by the claim to file the respondent's notice late: "[t]*he appeal in Belsner v Cam Legal Services Ltd was not a good reason for delaying the filing of a respondent's notice. The purpose of a respondent's notice is to identify the issues in the appeal. That is important for the proper management of the appeal, whether or not those issues are subsequently narrowed as a result of a decision in another case.*"

Jurisdiction

Service Out – Amendments to CPR PD 6B

The general position as regards claims against defendants outside of the jurisdiction is that the Court's permission is required for service unless certain exceptions apply. Prior to Brexit, this included circumstances where the defendant was domiciled in an EU member state, where the defendant was domiciled in a Lugano Convention State or where the Hague Convention on the Choice of Court Agreements 2005 applied.

The effect of Brexit was that the first two exceptions fell away, meaning that permission to serve out would still be required unless the Hague Convention applied, which is only the case in narrow circumstances (namely, where there is a commercial contract containing an exclusive jurisdiction clause, and the defendant is domiciled in a Hague Convention signatory state).

The effect of this has, however, been mitigated to an extent by the introduction of a new rule CPR 6.33(2B)(b), which provides that the claimant may serve out of the jurisdiction without permission where, *"for each claim made against the defendant to be served and included in the claim form… a contract contains a term to the effect that the court shall have jurisdiction to determine that claim."*

Not only does the exception contain no geographical restriction, or restriction on the type of contract, but there is no requirement for the jurisdiction conferred by the clause to be exclusive. Though this is potentially likely to give rise to an increased number of applications by defendants on the basis of *forum non conveniens*, it does have the effect of permitting claimants to serve claims out of the jurisdiction much more expediently, which is presumably in line with what parties would have intended at the time of concluding the jurisdiction clause.

Forum Non Conveniens

VTB Commodities Trading DAC v Sberbank & Ors [2021] EWHC 1758 (Comm)

The decision of the High Court in VTB Commodities Trading DAC v Sberbank & Ors provided welcome clarification of the English Courts' approach to jurisdiction, upholding in full a challenge brought by Sberbank of Russia to the jurisdiction of the English Courts to hear additional claims brought by VTB Commodities Trading DAC.

The factual background to the case was complex, following from a series of London-seated LCIA arbitrations commenced by VTB against JSC Antipinsky Refinery, and English Court proceedings commenced under s44 Arbitration Act 1996 for interim relief

in support of those proceedings. That interim relief included a worldwide freezing order and a specific injunction preventing transfer of certain cargoes of gas oil to third parties.

A Swiss oil trader, Petraco Oil Company SA, intervened in VTB's Court proceedings, and applied to vary the freezing order and the injunction on the basis that they were entitled to delivery of the cargoes affected by the injunction. It was ordered at an interim hearing that the disputed cargoes be sold and payment made into Court, with an expedited trial as to entitlement to the cargo.

VTB then sought to invoke Part 20 of the CPR to introduce additional claims against two parties, Sberbank and a trading company, JSC VO Machinoimport, allegedly involved in a conspiracy to "double sell" the cargoes. Those additional claims were advanced almost entirely under Russian law and related to events alleged to have occurred in Russia.

Sberbank challenged jurisdiction on four bases:

- The Part 20 procedure is only available to defendants, and the Court proceedings had been started as an arbitration claim in which VTM was the claimant;
- Even if VTB could use Part 20, the Court should not exercise its discretion to add Sberbank as a party: the existing proceedings were an arbitration claim and the function of the Court was to support or supervise those proceedings. VTB was trying to use the expedited cargo trial to pursue unrelated damages claims against third parties;
- There was no applicable gateway under the CPR pursuant to which VTB could obtain permission to serve its claims out of the jurisdiction on Sberbank; and
- England was not the *forum conveniens:* the actions almost all took place in Russia, evidence would come from Russian witnesses, and the claims were almost all brought under Russian law, certain provisions of which were subject to considerable debate.

Cockerill J, hearing the application, found for Sberbank on all grounds:

- The Part 20 procedure was only available to defendants and, even if it had been available to VTB, she would not have exercised her discretion to add Sberbank to the proceedings, doubting that it would ever be appropriate to use Part 20 to add a third party to proceedings in support of arbitration. In any event, it was not appropriate to add VTB's proposed wide-ranging and freestanding claims against Sberbank to the narrow injunction proceedings;

- The parties were in agreement that there were a number of factors pointing to Russia as the *forum conveniens*, with the Judge concluding that the additional claims were *"truly a Russian case"*, and the risk of irreconcilable judgments was not a "*trump card"* and was merely one factor to be considered.

- There was limited overlap between the additional claims and the issues in the expedited cargo trial, and there was no good basis for the additional claims to be pursued in England, finding that: *"the tail of the proceedings accessory to a now defunct arbitration should not wag the dog of a substantive dispute which is truly a Russian case."*

Common Law Tort Gateway

FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45

In *FS Cairo (Nile Plaza) LLC v Lady Brownlie*, the Supreme Court dismissed an appeal by FS Cairo (Nile Plaza) LLC challenging the English Court's jurisdiction to serve the proceedings on them in Egypt. Importantly, the Supreme Court confirmed that a claimant may serve proceedings out of the jurisdiction under the common law tort gateway in CPR Practice Direction 6B, paragraph 3.1(9)(a) where direct or indirect damage was suffered within England and Wales.

The dispute arose from a road traffic accident that had occurred on an excursion in Egypt, run by FS Cairo. The accident injured the claimant, Lady Brownlie, and killed her husband: the claimant alleged negligence and/or breach of an implied term of reasonable care and skill in the contract for provision of the excursion.

The defendant challenged the jurisdiction of the English Courts, with the challenge eventually finding its way to the Supreme Court. The appeal raised a number of issues, including whether the claims in tort fell within the common law tort gateway set out in CPR PD 6B paragraph 3.1(9)(a).

The gateway provides that a claimant may serve proceedings out of the jurisdiction with the Court's permission if the claim is in tort and the *"damage was sustained… within the jurisdiction."* The defendant argued that this meant that it should only apply where initial or direct damage was sustained in the jurisdiction: in the case of a road accident, it said this occurred at the time of the accident. The claimant contended that all that was required was for some significant damage to be sustained in England and Wales, which includes any continuing, indirect damage suffered because of personal injury and wrongful death abroad: that would include pain, suffering, loss of amenity and other financial consequences.

The Court found that "*damage*" within the meaning of the gateway, in a case of personal injury or wrongful death, would extend "*both in its natural and ordinary meaning and on a purposive reading, to the actionable harm caused by the tortious act, including all the bodily and consequential financial effects which the claimant suffers.*" The Court also noted that it was unnecessary and inappropriate to seek to limit "*damage*" by distinguishing between the "direct" and "indirect" effects of the harm suffered, and that it did have jurisdiction.

The Court did, however, note an important difference between physical damage and pure economic loss, holding that more remote economic repercussions of a tort would not found jurisdiction.

Manek v IIFL Wealth [2021] EWCA Civ 264

The Court of Appeal also considered the scope of the CPR PD 6B para 3.1(9) tort gateway in *Manek v IIFL* Wealth.

The substantive dispute involved a claim in the tort of deceit relating to an alleged fraudulent scheme by which two minority shareholders in an entity, Hermes i-Tickets Private Limited, had been convinced to sell their shareholdings to an entity controlled by the defendants, two of whom were domiciled in India, at lower than fair value.

The claimants had been granted permission to serve the claim form out of the jurisdiction on those defendants in India. The defendants applied to have the permission to serve out set aside, with this appeal centering on the tort gateway. The key issue here was what would happen in circumstances where the alleged damage results from acts committed partly within and partly outside of the jurisdiction, with the claimants alleging that four meetings where misrepresentations had been made had taken place within the jurisdiction.

At first instance, the Court found that the four acts relied upon had not been sufficiently substantial and efficacious so as to meet the paragraph 3.1(9)(b) requirements, with the causative acts taking place abroad.

The Court of Appeal disagreed with this, focusing on a meeting which had occurred in London and which was important in that it was the first face-to-face meeting between the parties, and the meeting at which many of the express representations going to the heart of the fraud were made. On a fair reading of the evidence, it found, it was clear that the meeting in London had resulted in *"substantial and efficacious acts"* being committed within the jurisdiction, that being the test set out in *Metall und Rohstoff v Donaldson* [1990] 1 QB 437 E-G.

State Immunity and Act of State

Immunity of State Officials and Act of State Doctrine

Igor Surkis and others v Petro Poroshenko and Valeria Gontareva [2021] EWHC 2512 (Comm)

The High Court found that it did not have jurisdiction to hear claims brought against Mr Petro Poroshenko (the Fifth President of Ukraine from 2014-2019) and Ms Valeria Gontareva (the former Governor of the National Bank of Ukraine, "NBU").

The claims arose from events that allegedly occurred during the nationalisation of PrivatBank, Ukraine's largest consumer bank, after it was discovered to have a multi-billion dollar shortfall in its capital balances in 2014. The claimants alleged that the defendants conspired to wrongfully cause monies held by the claimants in PrivatBank accounts to be used in the (otherwise legitimate) recapitalisation of the bank.

The defendants challenged the Court's jurisdiction on the basis of (i) state immunity and (ii) the foreign act of state doctrine. Mr Poroshenko and Ms Gontareva successfully argued that the claims were barred by state immunity because the relevant act—the alleged conspiracy—would have been done by them in their public capacity as the President and NBU Governor, respectively. It was a "*wholly artificial construct*" to argue —as the claimants did—that the defendants would have been "*doing no more than any other private citizen could do, the only difference being that they happened to have more connections and influence within the Ukrainian government*". It was irrelevant that the purported acts would have been motivated by a private or improper purpose; immunity attached so long as the conduct was done under colour of public authority.

Calver J also found that a letter sent by the "acting State Secretary" of the Ukrainian Ministry of Foreign Affairs—stating that he did not consider the claim triggered issues of state immunity capable of being waived by Ukraine—did not constitute a waiver of the defendants' immunity. The claimants had also failed to demonstrate that the state of Ukraine had in fact authorised the letter.

With respect to the act of state doctrine, Calver J found that the various acts performed in the course of the PrivatBank nationalisation were executive acts of the state of Ukraine, which had to be recognised by English Courts. In rejecting several objections raised by the claimants, Calver J made an important contribution to defining the scope of the act of state doctrine under English law, including in relation to issues that had been left open in the Supreme Court's decision in *Belhaj v Straw* [2017] AC 964. In particular, Calver J held that the act of state doctrine applies to executive acts other than a seizure of property; it applies to executive acts even where they have some extra-

territorial effects, and it is not open to English Courts to examine the legality of the executive acts under the law of the foreign state. A Ukrainian Court decision declaring the executive acts null and void, which is as yet of no legal effect in Ukraine, has no bearing on the application of the act of state doctrine.

Our press release can be found here.

Recognition of Governments and Act of State Doctrine

"Maduro Board" of the Central Bank of Venezuela v "Guaidó Board" of the Central Bank of Venezuela [2021] UKSC 57

The Supreme Court considered the issue of recognition of foreign governments in the context of legal proceedings in England, and the related question of the application of the act of state doctrine.

The case arose following the May 2018 presidential elections in Venezuela, in which the incumbent Nicolás Maduro declared victory. However, the elections were considered to be "deeply flawed" by the international community and the Venezuelan National Assembly declared Maduro's opponent, Juan Guaidó, the interim President, pursuant to the Venezuelan Constitution. A significant number of states, including the United Kingdom in February 2019, recognised Mr Guaidó as the legitimate President of Venezuela. At the same time, Mr Maduro remained in control of much of the government apparatus, resulting in two competing regimes claiming authority to act on behalf of the state. This included the right to appoint the board of the Central Bank of Venezuela ("BCV"). Both the board appointed by Mr Maduro (the "Maduro Board") and the board appointed by Mr Guaidó pursuant to the so-called Transition Statute (the "Guaidó Board") claimed authority to act on behalf of the BCV. The legal issues were further complicated by the fact that the Supreme Tribunal of Venezuela ("STJ") declared the Transition Statute, and all appointments made thereunder, including Mr Guaidó's BCV appointments, null and void. The Guaidó administration considered that the STJ had been acting corruptly in support of Mr Maduro, and its judgments were in violation of due process of law.

Deutsche Bank and the Bank of England, both of whom had dealings with the BCV, including in relation to Venezuela's gold reserves held in England, brought proceedings in England, seeking guidance on who had the right to give instructions on behalf of the BCV. The Commercial Court ordered a trial of two preliminary issues:

- The "recognition issue": whether Her Majesty's Government ("HMG") recognised Mr Guaidó as the President of Venezuela and if so, in what capacity, on what basis and from when; and

- The "act of state issue": whether the English Courts can consider the validity under Venezuelan law of (among others) Mr Guaidó's appointment of the BCV board, including by reference to the STJ judgments, or they must regard such acts as being valid and effective without further enquiry pursuant to the act of state doctrine.

Teare J at the first instance concluded that HMG's formal recognition of Mr Guaidó in February 2019 was conclusive and had to be followed by the Courts pursuant to the "one voice" principle. The Court of Appeal ("CoA"), however, considered that HMG's February 2019 statement left open the possibility that HMG may still recognise Mr Maduro as the *de facto* President of Venezuela because of the control he exercises in the state, in addition to recognising Mr Guaidó as the *de jure* legitimate President. The Supreme Court overturned the CoA's decision, agreeing with Teare J that the February 2019 statement was conclusive. The Foreign, Commonwealth and Development Office ("FCDO") intervened in the proceedings and confirmed that HMG recognised Mr Guaidó exclusively as the President of Venezuela and did not recognise Mr Maduro in any capacity.

This finding by the Supreme Court had direct implications for the act of state issue, i.e., it meant that Mr Guaidó's appointment of the BCV board was an executive act of the Venezuelan state. However, the precise scope of the act of state doctrine under English law is unclear. The counsel for the Maduro Board argued that Mr Guaidó's appointments were not subject to the act of state defence because (inter alia) they did not involve a seizure of property, had extraterritorial effect, and were unlawful under Venezuelan law, as declared by the STJ. The Supreme Court's decision brings welcome clarity to these complex questions, and also aligns with the decision of Calver J in the *Poroshenko* proceedings summarised above. The Court held that:

- The act of state doctrine covers executive acts other than seizure of property, such as appointments of public officials.

- Executive acts are covered by the act of state doctrine even where they produce some extra-territorial effects, as long as they were performed within the proper jurisdiction of the state.

- The act of state doctrine mandates that English Courts cannot inquire into the validity of the executive acts under domestic law. However, if a competent domestic Court such as the STJ declares the executive acts null and void, the English Courts will assess whether to recognise the decision on the basis of the ordinary principles applicable to recognition of foreign court judgments. The Supreme Court remitted the case to the Commercial Court to consider that issue.

Our full analysis of the decision can be found here.

Covid-19

Covid-19 continues to impact the way in which litigation is carried out in the United Kingdom, with remote hearings and e-bundles seemingly having become the norm. Despite some ongoing uncertainties as to hearing conduct and the applicable protocols, the Judiciary, on 15 September 2021, published updated guidance on hearings in the Business and Property Courts, confirming that:

- Whilst the mode of hearing would ultimately be a judicial decision, the default position for hearings under half a day would be for hearings to take place remotely. The Court will consider a live hearing if there is a particular reason why it is more appropriate, including in relation to the Chancery Division's Applications Court, the Commercial Court and Technology and Construction Court's Friday Applications Lists, and adjudication enforcement in the Technology and Construction Court.

- The approach in relation to longer application hearings and trials will be a matter for decision by a Judge, though Parties will be asked by the Listing Office to express a reasoned preference.

- The overall criterion for reaching that decision will be what is in the interests of justice in all the circumstances of the case.

- Remote and hybrid hearings may range from proceedings that are fully remote and accessible to anybody with a link to proceedings where remote access is afforded to a single participant and all others are in Court.

The default position remains that bundles will need to be produced electronically, and hard copy bundles should not be lodged unless specifically requested by the Judge. All bundles are to follow the relevant guidance.

The full guidance can be found here.

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Please do not hesitate to contact us with any questions.

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