Debevoise & Plimpton

Civil Litigation Annual Review: 2023

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4 March 2024

Introduction

Welcome to the fourth edition of our annual UK civil litigation review.

2023 was another busy year for the English courts. There was a surge of activity arising out of aviation and insurance disputes regarding the ownership and operation of aircraft due to sanctions imposed following Russia's invasion of Ukraine in 2022 (page 22). 2023 also saw the courts grapple with the first series of cases arising out of the sanctions imposed by the UK and other Western governments in relation to the ongoing invasion (page 24).

A challenging economic climate due to high interest rates and inflation has also led to increased contentious M&A activity, and we expect that trend to continue into 2024. The Supreme Court decision of *PACCAR* generated ripples of uncertainty in the litigation funding sphere, and we await the UK government's reaction in response to the decision with interest (page 85). 2023 was a significant year for collective actions, particularly as a result of the long-running "dieselgate" emissions scandal (page 43). Climate change and ESG litigation also featured in the English courts in 2023, with notable judgments being handed down in *ClientEarth v Shell Plc* and *McGaughey* (page 11). As with previous years, the English courts have continued to demonstrate their willingness to grapple with novel issues raised by cryptocurrency disputes (page 18). Readers may also be particularly interested to read about the Arbitration Act reforms contained in the Arbitration Bill, which is expected to become law in the first half of 2024 (page 95).

Looking ahead in 2024, we expect to see further innovative ESG and climate related actions being pursued in the English courts against UK companies and their overseas subsidiaries. Collective actions will continue to feature heavily in the English courts in 2024; the *BHP* case concerning the collapse of the Fundão Dam will be one to closely monitor, with a first stage trial scheduled to take place later this year. Aviation and insurance disputes relating to the Russian invasion of Ukraine are also likely to continue to dominate. The challenging economic environment may also lead to an increase in fraud claims. We also expect to see an uptick in disputes concerning generative AI, which have, to date, predominantly arisen in the U.S. Finally, it will be interesting to see how the courts continue to address claims under sections 90 and

90A of FSMA, following a number of judgments on interim applications in 2023 (page 16). We expect to see a steady rise in claims under section 90 and 90A in 2024 and beyond.

2023 was another successful year for Debevoise. We welcomed top arbitrator, Jeff Sullivan KC to the firm in the summer and we were absolutely delighted that Dr. Conway Blake was elected to the partnership in July 2023; this is a magnificent achievement and reflects the outstanding work that he has been doing over many years. There were many highlights over the year, but special mentions go to the victory for Shell at the Supreme Court on the issue of continuing nuisance (page 38), acting for XiO Fund 1 LP in its successful strike out application of a multimillion dollar claim for carry, and to the team who were involved in a high-profile, two-month trial in the Cayman Islands relating to the collapse of the Abraaj Group.

We look forward to another busy and fulfilling year ahead.

Finally, we would like to thank all members of the London litigation team for their contributions to this annual review. It is the culmination of considerable hard work from many individuals across the team. Special thanks in particular to our Editor-in-Chief Emily Mackenzie and to Natasha McCarthy, Emma Laurie-Rhodes, Julia Caldwell and Luke Duggan.

Patrick Swain & Chris Boyne
Partners

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Litigation Trends in 2023

ESG and Climate Change

As we look ahead at UK litigation trends for 2024, we expect to see a continued increase in the pace of climate and ESG related litigation.

In recent years we have seen claimant law firms find innovative and novel ways to litigate ESG issues, notably by attempting to hold UK companies liable for the acts of overseas subsidiaries and third parties for environmental harms. 2023 saw a distinct continuation of this trend, with the high-profile case of *Client Earth v Shell,* in which the environmental NGO attempted to bring a derivative action against the directors of Shell plc (and which is discussed in greater detail below).

We are continuing to monitor how the English courts will respond to the threats presented by climate change to fundamental rights, property rights, cultural rights and human rights, and the extent to which this may involve granting private law remedies against private companies. While climate action has traditionally been confined to the spheres of government at both a national and international level, domestic and international trends show that climate activists are looking beyond the instruments of government and seeking to hold companies accountable for their alleged contribution to climate change. The use of private law remedies to combat the threat of climate change faces many obstacles and it remains to be seen how the law will develop.

We published a series in 2023 on how climate change and ESG litigation is developing in the English courts here and our analysis of the rise in cases against UK parent domiciled companies here and supply chain litigation risk is here.

ClientEarth v Shell Plc

In *ClientEarth v Shell Plc* [2023] EWHC 1137 (Ch) and *ClientEarth v Shell Plc* [2023] EWHC 1897 (Ch), the High Court dismissed ClientEarth's attempt to launch a derivative action against the directors of Shell plc in respect of their alleged failures to properly address the risks of climate change. These decisions indicate that claims of this nature, at least insofar as they are brought by minority shareholders who are not typical investors (*e.g.*, NGOs and other non-profits such as the Claimant in these cases), will face significant challenges.

ClientEarth, a non-profit environmental law organisation and a minority shareholder in Shell, sought to bring a derivative claim against the Directors under s. 260 of the Companies Act 2006 ("**CA 2006**"). In its derivative claim, ClientEarth argued that the directors had breached their directors' duties by failing to: (i) act in a way to promote the success of the company (having regard

to a list of non-exhaustive considerations, including the impact of the company's operations on the environment (s. 172 CA 2006); and (ii) exercise skill and diligence that may reasonably be expected of them (s. 174 CA 2006).

Notably, in these cases, the Court held that:

1. Courts will place significant weight on the fact that directors (especially those of large multinationals) have to balance competing considerations when seeking to promote the success of the company for the benefit of the members as a whole. Claimants will have to overcome this hurdle by establishing a *prima facie* case that the directors have erred in balancing and weighing the many factors which should go into their consideration of how to deal with climate risk, amongst the many other risks that impact the company's business, such that "*no reasonable director could properly have adopted the approach that they have*." Courts will be extremely reluctant to interfere with the proper balancing of these factors, which is a "*classic management decision*." This means that it will be a particularly challenging task for claimants to succeed where defendants are large multinational corporations such as Shell, as its directors will have a myriad of factors to consider when assessing what decisions would be in the best interests of the company.
2. The court's emphasis on good faith dilutes the ability of environmental groups to acquire shares in large corporates for the purpose of instituting climate-change litigation. The court's expectation that such claimants provide "*sufficient evidence to counter the inference of collateral motive*" places the onus and burden on claimants to convince the court that the primary purpose of bringing the claim is not an ulterior motive, which is likely to be challenging where the claimant is an activist organisation with a policy agenda and a *de minimis* shareholder.

Our full analysis of the two cases can be found here.

McGaughey & Anor v Universities Superannuation Scheme Ltd & Ors [2023] EWCA Civ 873

In *McGaughey*, the Court of Appeal unanimously upheld the High Court's decision to refuse permission for a derivative claim to be brought by two members of a pension fund on behalf of the corporate trustee of the fund (the "**Trustee Company**") against its current and former directors.

The Claimants sought permission to bring four separate multiple derivative claims alleging that:

1. The directors have been in breach of their statutory and/or fiduciary duties concerning the valuation of the Scheme's assets (the "**Valuation Claim**");

2. The directors enacted changes in the benefit and contribution structure which amounted to discrimination on the basis of sex, age, and race, such

as to amount to a breach of the statutory and/or fiduciary duties of the Directors (the "**Discrimination Claim**");

3. The directors have been in breach of their statutory and/or fiduciary duties, having overseen dramatic increases in internal and external asset manager costs (the "**Costs Claim**"); and

4. The directors failed to establish a credible plan for disinvestment from fossil fuels after making a pledge to be carbon neutral by 2050, thus prejudicing the success of Trustee Company (the "**Fossil Fuels Claim**").

The Claimants sought declarations that the directors had breached their duties, causing loss to the Trustee Company in all four claims, and an injunction preventing the directors from implementing benefit reductions and contribution increases.

The case is significant as it was the first case in the UK in which Claimants have attempted to use the legal mechanism of derivative actions to attempt to hold directors of large corporate entities liable for alleged failures to meet their climate obligations (as the High Court case in these proceedings preceded *Client Earth v Shell*), and the first case in which the Court of Appeal has considered whether a director may have breached their duties in failing to take steps towards divestment in fossil fuels. The Court of Appeal also outlined the legal framework of derivative actions available in cases of this kind, highlighting the challenges of their use in climate litigation under English law.

An issue for the Court was whether the claim fell within any of the defined categories of derivative action. An "ordinary derivative action" (typically brought by shareholders against a director for breach of duty) is governed by statute. There is also a "double derivative action", where the minority shareholders are members of a holding company which wishes to bring an action on behalf of a subsidiary of the holding company, and "multiple derivative actions" where the minority shareholders of a holding company bring an action on behalf of an indirect subsidiary of the holding company. "Multiple derivative actions" are governed by common law rules.

The Claimants were not shareholders of the Trustee Company but beneficiaries of the pension scheme. While it was accepted that the category of "multiple derivative actions" is not closed, the question was whether the concept of a "multiple derivative action" could be developed to cover the claims brought by the two members of the Scheme.

In a judgment handed down on 24 May 2022, Leech J refused to grant the Claimants permission to bring the derivative claim, holding that the Claimants failed to make out a *prima facie* case on any of the four claims. Crucially, the Court held that three of the claims were not capable of being brought as derivative

claims, as the Claimants failed to show that the Trustee Company suffered loss and that this loss is reflective of their own loss. In respect of a claim concerning asset manager costs, Leech J held that although it could be brought as a multiple derivative claim, the Claimants failed to establish a *prima facie* case that the directors secured any personal benefit from the alleged breaches (*i.e.* the improper benefit test).

On 21 July 2023, the Court of Appeal unanimously upheld the High Court's decision to refuse the Claimants permission to bring the derivative action. In her judgment, Asplin LJ (with whom Sir Julian Flaux and Snowden LJ agreed) dismissed the appeal on all grounds, holding that:

1. Leech J was correct to determine that in order to bring any company law derivative claim, the Claimants must establish that the Trustee Company suffered loss and that the loss was reflective of their own. Notably, Asplin LJ commented that "*it was entirely inappropriate that the allegations should have been made*."

2. The improper benefit test did apply, as the fourth exception under *Foss v Harbottle* requires that the Claimants establish a *prima facie* case that the directors benefitted themselves from the alleged wrongdoing.

3. The Valuation Claim, the Discrimination Claim, and the Fossil Fuel Claim were not derivative claims. Rather, they would have been better suited to a beneficiary derivative action (a beneficiary bringing a claim on behalf of the trust against a third party) or an administration action (a beneficiary bringing proceedings to compel the trustee to pursue a claim), both of which require the beneficiary to establish "special or exceptional circumstances" and meet the representation requirements under CPR 19.8

4. In respect of the Costs Claim, Asplin LJ did not address Leech J's decision that it could constitute a multiple derivative claim (as this was not cross-appealed) but held that the Claimants nevertheless failed to establish a *prima facie* case that the directors breached their statutory duties by benefitting from the alleged wrongdoing.

5. Lastly, Asplin LJ held that the Discrimination Claim would have been better suited to an individual claim against the Trustee Company by those affected. Similarly, the Fossil Fuel Claim should have been brought as a claim for breach of trust. Notably, "*the derivative procedural mechanism is not intended to enable would be claimants to avoid other procedural hurdles.*" Therefore, Leech J was correct not to exercise his discretion to allow these claims to continue.

McGaughey demonstrates the courts' reticence to allow derivative actions, whether statutory or at common law, to be used to try to hold corporates to account for alleged climate harms and influence corporate policy towards climate change. Courts also continue to be wary of entertaining derivative actions that would involve second-guessing corporate decision making. Whilst this case is a good illustration of the novel approaches being deployed by claimants in climate/ESG cases, it also shows that they will encounter significant challenges trying to get claims of this nature off the ground.

Wolverhampton CC v London Gypsies and Travellers [2023] UKSC 47

The recent Supreme Court decision in *Wolverhampton CC v London Gypsies and Travellers* has considered the issue of when a court can grant an injunction against an unidentified and unknown person who has not yet committed or threatened an unlawful act in relation to use of land ("**Newcomer Injunctions**"). Although the facts of the case involved the unauthorised encampments of Gypsies and Travellers, it has wider significance for cases concerning protest rights and climate activists. The court has previously been asked to issue injunctions against "persons unknown" to prohibit climate and environmental activists from disrupting business activities of various energy and transportation companies. A number of high-profile decisions including cases involving Shell and Esso Petroleum were discussed in our 2022 Year in Review here.

The Supreme Court has confirmed that Newcomer Injunctions are a completely new type of injunction. Such injunctions are permissible but are only likely to be justified if:

1. There is a compelling need to protect civil rights or enforce public law that is not adequately met by any other remedies;

2. There are adequate procedural safeguards, including an obligation to take all reasonable steps to draw the application and any order made to the attention of those likely to be affected by it;

3. A high duty of disclosure is applied to ensure that the court is presented with everything that might have been said by the newcomers against the grant of injunctive relief;

4. The injunctions are appropriately constrained so they do not apply to an overly broad area or for an overly long time; and

5. The court is satisfied that it is just and convenient that a Newcomer Injunction be granted.

The Supreme Court also heard interventions on protester rights. It held that in appropriate circumstances, Newcomer Injunctions could also be used to target actions such as those deployed by climate activists to block motorways and

related activities, but that there must be a careful assessment on the facts of each case, including the rights which are, or may be, interfered with, and the proportionality of that interference.

s.90 and s.90A Financial Services and Markets Act Claims

FSMA Claims Likely to Increase

As we have previously written, securities litigation in England has been relatively uncommon until recently, despite the legal framework for these claims having been in place for decades. However, securities litigation has been picking up pace over the past few years, and we expect the trend to continue into 2024.

Provisions of the *Financial Services and Markets Act* ("**FSMA**") give claimants the chance to pursue listed companies and certain specified individuals for misleading or untrue statements in prospectuses (s.90 FSMA) and/or in other information published by the company (s.90A and Schedule 10A FMSA).

Claims under these provisions complement the existing claims available to shareholders, for example, through common law actions for deceit or negligent misstatement. They are, however, relatively untested. That element of uncertainty (and concomitant opportunity to develop new law), combined with a number of other factors, will in our view drive an increase in these types of claims.

Factors Driving Increase in Claims

We expect several key factors to contribute to the anticipated growth of ss.90 and 90A FSMA claims:

1. The UK's increasingly sophisticated approach to group litigation;

2. The attraction of litigation funding and mitigation of financial risk for claimants as a result of England and Wales becoming a better group litigation jurisdiction; and

3. The growth of shareholder activism in England and Wales.

On the group litigation front, England and Wales is catching up to jurisdictions like the US. There is a growing familiarity in the legal market with the Group Litigation Order procedure in CPR Part 19, and lawyers are recognising that claims under the relevant FSMA provisions would naturally lend themselves to large group actions—they are likely to involve a group of claimants who have all suffered loss stemming from the same cause (*i.e.*, a misleading or untrue statement by a listed company). There remain some procedural wranglings as to the best means for such claims to be brought. For example, in the *Wirral Council*

v Reckitt Benckiser Group plc and Indivior plc litigation, Representative Proceedings were struck out in favour of multi-party proceedings, which would better allow the court to exercise case management powers consistent with the Overriding Objective.

Alongside an increase in group litigation naturally comes an increase in litigation funding. Claims with a large number of individual shareholders, all of whom have suffered financial loss, are an obvious area for investment by litigation funders. If claimants are able to rely on litigation funders to mitigate the financial risk of bringing s.90 and 90A FSMA claims, this will no doubt encourage the growth of such claims.

Finally, we see the growth in shareholder activism in the UK as being a driver for more FSMA claims. Shareholder activism often takes the form of an acquisition of shares by activists, with a view to obtaining rights to vote in and ask questions at general meetings. However, it could also allow the same activist shareholders to pursue claims against the entities in which they have invested for misleading or untrue public statements under FSMA.

Although not directly a form of shareholder activism, the London market is also seeing a more proactive approach by institutional investors to challenging the companies in which they have invested. Accordingly, we expect to see an increase in FSMA claims started not by groups of individual retail shareholders, but by groups of institutional investors.

While 2023 did not see a substantive judgment under the FSMA provisions, the increase in claims seems clear from significant judgments on interim applications, namely: (i) *Wirral Council v Reckitt Benckiser Group plc and Indivior plc* (strike out stemming from underlying liabilities concerning the marketing of an opioid addiction treatment); (ii) the *Standard Chartered plc* litigation (strike out and reverse summary judgment applications concerning underlying liability relating to alleged non-compliance with sanctions and bribery); and (iii) *Barclays Bank plc* litigation (amendment and substitution applications concerning a claim arising out of settlements with US authorities regarding an alternative trading system).

Cryptoasset Disputes

The English courts have continued to demonstrate their willingness to grapple with the novel issues raised by cryptoassets. 2023 saw the English courts issue judgments concerning: (i) whether developers/controllers of the software of blockchain networks owe fiduciary or tortious duties to users of their networks; (ii) an application to transfer cryptocurrency into the jurisdiction; (iii) an application by a cryptocurrency exchange to discharge an interim proprietary injunction; and (iv) an application for an interim prohibitory injunction in respect of non-fungible tokens (so-called "NFTs").

***Tulip Trading Ltd v Bitcoin Association for BSV & Ors* [2023] EWCA Civ 83**

The Defendants were the developers/controllers of the software of four blockchain networks. Dr Wright, the beneficial owner of the Claimant, Tulip Trading Ltd, was a network user. He alleged that hackers stole his private network keys, meaning that he was no longer able to access his bitcoin, which was valued at approx. US$4 billion.

Tulip Trading brought a claim contending that the Defendants should be recognised as a new *ad hoc* class of fiduciary, owing fiduciary duties to the true owners of bitcoin (such as the Claimant). It was contended that the fiduciary duties owed should extend to implementing the necessary software patch to solve the Claimant's problem and safeguard its assets from the hackers. The Claimant also alleged the existence of certain tortious duties. All of the Defendants were resident outside the jurisdiction. The Claimant was given leave to serve the Defendants outside the jurisdiction. A number of the Defendants applied to set aside service on the basis that there was no serious issue to be tried.

The High Court found that the Claimant had not established a serious issue to be tried on the merits because there was no realistic prospect of establishing that the Defendant blockchain developers owed fiduciary or tortious duties to users of their networks.

The Court of Appeal overturned the High Court's decision. The Court of Appeal acknowledged that the Claimant's case required a "*significant development of the common law of fiduciary duties*". Nevertheless, the Court of Appeal concluded that the Claimant had a realistic argument along the following lines:

1. The developers of a given network are a sufficiently well-defined group to be capable of being subject to fiduciary duties;

2. The developers undertake discretionary decisions and exercise power for and on behalf of other people, in relation to bitcoin owned by those other people;

3. That bitcoin has been entrusted into the care of the developers;

4. The developers therefore are fiduciaries;

5. The essence of the developers' fiduciary duty is single-minded loyalty to the users of bitcoin software; and

6. The content of the developers' fiduciary duties includes a duty not to act in their own self-interest, and may also include a duty to act to introduce code so that an owner's bitcoin can be transferred to safety.

Further, in respect of the developers' potential tortious duties, the Court of Appeal observed that the "*duties in tort only arise if the defendants do owe a fiduciary duty*" and that there was a "*sufficiently close relationship*" between the two classes of duties for the appeal in relation to both duties to be decided together.

Our full discussion of the decision can be found here.

Joseph Keen v Persons Unknown & Huobi Global Limited [2023] 1 WLUK 577

In *Joseph Keen,* a worldwide freezing order was made against the First, Second and Third Defendants in relation to cryptocurrency assets contained in two offshore accounts maintained by the Fourth Defendant, Huobi Global Limited ("**Huobi**"). The Court was satisfied that the funds in both accounts had been obtained by defrauding the Claimant. The Claimant made an application for the funds to be transferred into England and Wales for the purposes of enforcing his judgments against the first three Defendants.

The Court observed that there are generally limited circumstances in which the English courts will order for the transfer of funds subject to a worldwide freezing order into the jurisdiction. That is because it is generally assumed that the party concerned will comply with the order. However, the facts in this case suggested otherwise. Specifically, the Court reasoned that while Huobi had not permitted the Defendants who had defrauded the Claimant access to the accounts, there remained a risk that it would not continue to do so. The Court added that it also had no control over any of the Defendants, all of whom were based exclusively outside of its jurisdiction.

The Court concluded that there was clearly a risk of the cryptocurrency being disposed of or interfered with, as the Claimant had already obtained a worldwide freezing order. The Court considered that it would be more appropriate for the funds to be delivered to the Court itself, rather than be held by the Claimant's solicitors. On that basis, the Court ordered for the cryptocurrency to be converted into fiat currency by one of two routes (either by Huobi or the Claimant's solicitors) and transferred into England and Wales to the Court Funds Office (via the Claimant's solicitors).

Our full discussion of the decision can be found here.

Piroozzadeh v Persons Unknown & Ors [2023] EWHC 1024 (Ch)

In late 2021, the Claimant (Mr Piroozzadeh (a Canadian resident)) was induced by a stranger with whom he had had unsolicited WhatsApp contact to transfer 870,818 Tether to four separate cryptocurrency wallets utilised by the Third Defendant, OA Capital Holdings Limited ("**OACH**"). In December 2021, the Claimant realised that he was a victim of a scam because his attempts to withdraw funds from his trading account with OACH (which itself was a sham) were unsuccessful. The Claimant asserted that it was possible to trace the Tether to five

cryptowallets held with the Eighth and Ninth Defendant exchanges, Binance Holdings Limited ("**Binance**") and Aux Cayes Fintech Co Ltd ("**Aux Cayes**").

In October 2022, Sir Anthony Mann made an order without notice against the First, Second and Third Defendants (*i.e.*, persons unknown category A and B, and OACH), restraining them from dealing with the Claimant's Tether which had been transferred into the crypto exchanges of Binance and Aux Cayes. Sir Anthony Mann also ordered Binance and Aux Cayes to preserve the Tether (or its traceable proceeds) that it had received, and made *Bankers Trust* disclosure orders against the exchanges.[1] In January 2023, Binance sought an order discharging the interim proprietary injunction made against it on the ground that the Claimant's legal representatives failed in their duty of fair presentation.

In March 2023, Trower J held that the matter was not objectively speaking fairly presented to the Judge, and that the interim proprietary injunction against Binance should be discharged. In particular, Trower J considered that the Claimant did not properly explain the defences likely to be available to Binance in respect of its alleged liability as constructive trustee.

As part of its application to discharge the proprietary injunction, Binance had adduced evidence that its users do not retain any property in Tether deposited with the exchange. This is because the user's account is credited with the amount of the deposit, and they are then permitted to draw against any credit balance as in a conventional banking arrangement. The Tether, like other cryptoassets, are then swept into a central unsegregated pool address known as a "hot wallet" where they are treated as part of Binance's general assets. They are not specifically segregated to be held for the sole benefit of the user from whose account they have been transferred.

Trower J held that Binance's explanation of the pooling system meant that the Defendants may be able to rely on the *bona fide* purchaser defence. Specifically, Trower J noted that "*although pooling was mentioned, its true significance was rather distorted by the fact that the evidence from the claimant's legal representatives was to the effect that the applicant's Tether was currently "in the Exchange Defendants' control." … this was obviously incorrect … it should have been apparent that the consequence of pooling was that the users' right to receive substitute assets from the exchange was at the very least likely to constitute the exchange a purchaser for value of anything that was transferred into the account in the first place*." Trower J also confirmed that crypto exchanges will not automatically be deemed to be constructive trustees over misappropriated assets without anything more (*i.e.*, without notice and control).

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[1] The *Bankers Trust* order revealed the identity of the users in whose names the accounts were held, although it was not suggested that they were parties to the fraud and they were not joined to the claim.

Although the English courts have proven themselves very willing to help victims of crypto fraud, this decision is a reminder that interim proprietary remedies will not be available against bona fide purchasers for value and also of the seriousness of the duty of full and frank disclosure in *ex parte* applications. This decision is also notable as it is the first decision where a cryptocurrency exchange has (successfully) challenged the grant of such an injunction, and is also one of the very few cases in which a cryptocurrency exchange (in this case Binance) was represented.

***Osbourne v Persons Unknown & Ors* [2023] EWHC 340 (KB)**

The Claimant, Ms Osbourne, opened an account with the cryptoasset management platform, MetaMask. Her account included four wallets. One of the wallets (the "**MetaMask Wallet**") was linked to Ms Osbourne's account with Ozone Networks Inc. (an online NFT marketplace trading as Opensea, which was incorporated in the US).

The case concerned two NFTs entitled "Boss Beauties #680" and "Boss Beauties #691", which were said to be worth between £3,000–£5,000. These NFTs were part of a set of 10,000 NFTs representing unique digital works of art depicting inspirational women. The two NFTs were deposited in Ms Osbourne's MetaMask Wallet on 25 September 2021, but on 17 January 2022 the NFTs were transferred out of the MetaMask Wallet without Ms Osbourne's knowledge or consent by an unidentified person(s). Ms Osbourne discovered this on 17 February 2022 and subsequently brought a without notice application seeking various interlocutory relief.

In March 2022, HHJ Pelling KC granted: (i) an interim proprietary injunction restraining the dissipation of the NFTs alleged to have been stolen by persons unknown (*i.e.*, the First Defendants) from the MetaMask Wallet; and (ii) a *Bankers Trust* order against Opensea requiring it to provide information enabling Ms Osbourne to trace or identify the First Defendants who controlled the wallets into which the two NFTs were transferred. [2]

Following the additional movement of Boss Beauties #691 (which was in breach of the interim injunction already in place), Ms Osbourne sought an additional injunction in a bid to restrain any further movement of her NFTs. As part of that process, permission was sought to serve the injunction and pleadings on several cryptowallets. In January 2023, Lavender J granted an interim injunction in relation to all Defendants, and permitted service out of the jurisdiction by alternative means via NFT. At the return date hearing, Mr Healy-Pratt (sitting as a Deputy High Court Judge) approved the interim order granted by Lavender J

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[2] In response to the *Bankers Trust* order, Opensea disclosed some email addresses, but Ms Osbourne received no answer to emails sent to those addresses. On 25 April 2022, Master Cook made an order by consent dismissing Ms Osbourne's claim against Opensea.

and allowed Ms Osbourne to serve via NFT on the Defendants.[3] This decision is significant as it is the first case in the English courts where the Claimant successfully obtained injunctive relief in respect of an NFT, as opposed to other classes of cryptoassets such as cryptocurrency.

Aviation Leasing Disputes

2023 has seen a steady stream of disputes regarding the ownership and operation of aircraft all over the world due to sanctions imposed following Russia's invasion of Ukraine in February 2022.

The difficulties flowing from the invasion have resulted in a notable increase in insurance/reinsurance disputes relating to aircraft, and have created opportunities for claims in breach or frustration of aviation leasing contracts.

On the insurance/reinsurance disputes front, there are a number of claims working their way through the High Courts against major insurers such as AIG, Lloyd's, Swiss Re, Chubb, Munich Re and Fidelis. The claimants in these cases include lessors, parts manufacturers and aviation service providers. Aircraft which were leased and located in Russia prior to the invasion are now effectively total losses to the lessors, leading to a range of insurance and other claims.

One such example are claims brought by AerCap Ireland Limited. The claims were commenced using the representative procedure under CPR 19.6, suing two insurers (AIG and Lloyd's) on the basis that they were representatives of other insurers under the same policy. The claims pursued AIG as representative insurer on the "All Risks" section of the policy, and Lloyd's as representative insurers on the "War Risks" section of the policy, and were worth around US$3.5 billion. Another insurer, Fidelis, applied to be added to the proceedings as a Defendant, including on the bases that:

1. The CPR 19.6 representative procedure was never intended to cut across the principle that a party against whom an enforceable judgment could be made should be entitled to defend that claim by its own lawyers at its own risk and exposure;

2. A claimant is not entitled by using CPR 19.6 to preclude a defendant, especially one with a large financial exposure, from defending the action in the way that it wishes; and

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[3] Whilst this is not the first time that service of a court order has been served via NFT for a crypto fraud case, this case is one of the first instances in the UK where sole service by NFT was allowed.

3. A distinction must be drawn between the right of a party to defend a claim against it as it chooses and with lawyers of its choice, and matters of case and trial management—duplication of evidence and unnecessary delays can be handled by the court's case management powers, and that was a different matter from whether Fidelis should be permitted to join the proceedings.

Notably, AIG objected to the joinder of Fidelis, though ultimately unsuccessfully (see *AerCap Ireland Limited v AIG Europe S.A.* [2023] EWHC 96 (Comm)). Though the substantive proceedings are due to come before the High Court in October 2024, it seems likely now that they may settle—in September 2023, AerCap reached a commercial deal with the Russian state-controlled insurance company NSK in respect of a number of aircraft leased to the Russian airline Aeroflot. The settlement had the effect of reducing AerCap's overall loss to around 25% of the sums claims from insurers in the High Court litigation, meaning AerCap and its remaining insurers may be more likely to reach a negotiated resolution outside of Court.

The other area in which we expect to see a growth of new claims is in the breach of contract space. The imposition of sanctions on Russian owners of aircraft leased elsewhere has meant that the status of aircraft in the hands of lessees outside of Russia is in question: whether they can lawfully be operated and maintained. We expect to see lessees arguing that lease arrangements have been frustrated by virtue of the imposition of sanctions, claims for the loss of quiet enjoyment normally warranted by lessors under aircraft leases, and lessors trying to enforce payment obligations under leases notwithstanding that lessees may have been unable to use the aircraft they have leased during the lease period. Aviation leasing disputes will therefore be an area to watch in 2024.

Sanctions

2023 saw the first series of cases in the English courts arising out of the sanctions imposed by the UK and other Western governments in relation to the ongoing Russian invasion of Ukraine, which started in February 2022. Although Western governments have continued to develop the nature and scope of sanctions measures against Russia, which now include extensive financial, trade and investment restrictions, the key sanctions measure that has to date given rise to most of the issues in the English courts is the designation of individuals and companies deemed to support or contribute to Russia's military activities in Ukraine.

As with most other sanctions, designations in the UK are imposed pursuant to the Sanctions and Anti-Money Laundering Act 2018 ("**SAMLA**") and the relevant implementing regulations, The Russia (Sanctions) (EU Exit) Regulations 2019 (the "**Russia Regulations**"). If a person or company is designated, and added to

the UK's Consolidated List, certain prohibitions apply in respect of that person or company. In particular, assets owned or controlled by designated persons must be frozen and it is a criminal offence to deal with such assets or to make funds available to designated persons. These restrictions also apply to companies owned or controlled by designated persons, and it may not be immediately obvious which companies are caught by that 'ownership and control' test. This means that UK persons must take care to ensure that they are not inadvertently dealing with a company owned or controlled by a designated person.

The sanctions cases in the English courts can be divided into two broad categories: (i) commercial cases involving designated persons; and (ii) challenges brought by designated persons under the SAMLA regime. This overview addresses the former category of cases.

PJSC National Bank Trust and another v Mints & Ors* [2023] EWHC 118 (Comm) *("Mints I")

The year started with a bang when Mrs Justice Cockerill handed down judgment in the *Mints I* case on 27 January 2023. The Claimants in *Mints I* had issued the claims in 2019 alleging that the Defendants had conspired to enter into uncommercial transactions with companies connected to them. After the invasion of Ukraine, one of the Claimants—Bank Otkritie—was designated by the UK government. The other Claimant—National Bank Trust ("**NBT**")—was allegedly owned or controlled by designated persons, namely Mr Vladimir Putin and Ms Elvira Nabiullina, the governor of the Central Bank of Russia. The Defendants applied for a stay of the proceedings, including on the basis that the Court could not enter judgment on behalf of the Claimants as designated persons because that would infringe the prohibition on making funds or economic resources available to a designated person and/or the prohibition on dealing with assets owned or controlled by a designated person. The Defendants also argued that various interlocutory stages could not be completed because of the designations.

Mrs Justice Cockerill held that the Court could enter judgment in favour of a designated person, including on the basis that the principle of legality militated against denying access to the courts, even for designated persons. The Court did not have to rule on the issue of whether NBT was owned or controlled by a designated person, but nevertheless opined on an *obiter* basis that it was not. In relation to the latter, Mrs Justice Cockerill adopted a narrow approach to the relevant provisions and found that the 'control' test—*i.e.*, the issue of whether the designated person could achieve the result that the relevant entity's affairs are conducted in accordance with its wishes—was essentially "*backstopping*" other forms of ownership. The Judge also noted that the relevant sanctions regime targeted individuals "*at a personal level*", and took into account the principle against doubtful penalisation, as well as the inherent uncertainty of adopting a

broader approach: "*commercial people also need to know if a particular company … is sanctioned*". Our full discussion of the decision can be found here.

PJSC National Bank Trust and another v Mints & Ors [2023] EWCA Civ 1132 *("Mints II")*

The *Mints I* decision was appealed to the Court of Appeal, which considered the issues at a four-day hearing in July, and judgment was handed down on 6 October 2023. The Court of Appeal upheld Mrs Justice Cockerill's substantive decision that the UK sanctions regime does not prohibit the entry of judgments in favour of designated persons. In so doing, the Court of Appeal confirmed that the "*clear intention was that the post-Brexit sanctions regime should maintain continuity with the 2014 EU Regulation and should not effect any substantive change*". The Court of Appeal also upheld the lower court's decision that the UK financial sanctions regulator—OFSI—is entitled to issue licences authorising litigation-related activities such as paying adverse costs orders and providing security for costs.

Although the Court of Appeal did not have to address the 'control' issue, it did so on an *obiter* basis given that the point was of "*general significance*" and had been "*fully argued*". Here, the Court of Appeal departed significantly from the first instance court and noted that the second condition of the control test did "*not have any limit as to the means or mechanism by which a designated person is able to achieve the result of control*". On that basis, the Court accepted that the second condition would be met for any entities in respect of which a designated person "*calls the shots*", with the result that "*Mr Putin could be deemed to control everything in Russia*". The Court noted that the drastic consequences this entailed were a result of the "*clear and wide meaning*" of regulation 7, coupled with the UK government's designation of Mr Putin "*without having thought through the consequences that […] Mr Putin is at the apex of a command economy*". Our full discussion of the decision can be found here.

Litasco SA v Der Mond Oil and Gas Africa SA & Locafrique Holdings SA [2023] EWHC 2866 (Comm) *("Litasco")*

Following the *Mints I* and *Mints II* decisions, the *Litasco* judgment—handed down on 15 November 2023—was the first to consider the 'control' test as a substantive and binding legal issue. The claim was brought by Litasco, which is a Swiss company wholly-owned by Russian oil company Lukoil PJSC, against Der Mond for a failure to satisfy payment obligations under a contract to supply Nigerian crude oil. Litasco filed an application for summary judgment, which Der Mond resisted, including on the basis that it was prohibited from paying Litasco under the Russia Regulations. In particular, Der Mond argued that Litasco should be treated as a designated person because it was controlled by one or more designated persons, including Mr Alekperov, the founder and former CEO of Lukoil, and Mr Putin.

Mr Justice Foxton rejected the argument that Litasco was controlled by Mr Alekperov for three reasons: (i) Mr Alekperov had stood down from Lukoil's board shortly after being sanctioned, (ii) Mr Alekperov's shareholding in Lukoil was only 8.5%, *i.e.*, not enough to amount to a controlling stake, and (iii) the Defendants had adduced no evidence to suggest that Mr Alekperov continued to exercise control over Lukoil.

Mr Justice Foxton also rejected the argument that Litasco was controlled by Mr Putin, including because Litasco was not a state-owned company and there was no evidence before the Court that it functioned as such. Moreover, the Judge emphasised that "*the issue of control has, as its central focus, the ability of the designated person to control the use of the funds made available*", and found that it was "*wholly improbable*" that the payment of the outstanding debt would be made available to Mr Putin or used in accordance with his wishes. In so finding, Mr Justice Foxton also noted that the control test required "*an existing influence*" by a designated person over the relevant company, as opposed to a theoretical influence. In Litasco's case, the Judge found that Mr Putin was "*wholly ignorant*" of the company's existence.

This approach to the control test is considerably narrower than the Court of Appeal's approach in *Mints II*, with the key point being the need to establish actual, as opposed to theoretical, control over a company. Adopting this approach, it is not enough, for example, to argue that a particular company is incorporated in a jurisdiction in which a designated public official holds broad decision-making power over the economy. Further, the approach in *Litasco* focuses on the ultimate control of the funds that are being made available to the company in question, not on control of the company more generally. For now, the *Litasco* decision remains the final word on the issue of control in the sanctions context. Our full discussion of this decision can be found here.

Celestial Aviation Services Ltd v Unicredit Bank SA [2023] EWHC 663 (Comm) ("Unicredit I") and [2023] EWHC 1071 (Comm) _("Unicredit II")_

These two decisions were handed down in March and May 2023, respectively. Both judgments concerned letters of credit that were issued by a designated person, Sberbank, and confirmed by the Defendant, Unicredit, in the context of lease agreements between certain Irish aircraft lessors (the Claimants) and Russian airlines. The key sanctions issue was whether the Defendant was prohibited from making payment to the Claimants pursuant to the Russia Regulations. In particular, the Defendant argued that compliance with its contractual payment obligations would constitute a criminal offence violating the prohibition on providing funds in pursuance of or in connection with an arrangement whose object or effect is the export of restricted goods to, or for use in, Russia, or to a Russian person (*see* regulation 28 of the Russia Regulations).

In *Unicredit I*, the Court adopted a narrow interpretation of regulation 28 and held that payment by the Defendant would not constitute the provision of funds in pursuance of, or in connection with, a relevant arrangement (albeit that the case did involve a relevant arrangement for the purpose of regulation 28). In so finding, the Judge held that the prohibition was only intended to operate prospectively, and did not apply to letters of credit that were confirmed by Unicredit before the prohibition came into force. In particular, the Court ruled that the autonomy principle meant that the claim on the letters of credit was "*wholly independent*" from any other element of the overall transaction: it could not be said that the payment was intended to benefit Russian entities that were involved in other elements of the overall transaction.

As for the separate argument that payment in U.S. dollars would constitute a violation of U.S. sanctions law (via the use of a correspondent bank in the U.S.), the Court held that, where the contract stipulated that payment had to be made in U.S. dollars, the customer was entitled to demand that the payment be made in cash to avoid any violation of U.S. sanctions law. On that basis, the Court held that the payment obligation did not necessarily give rise to a breach of U.S. sanctions law.

The *Unicredit II* judgment concerned a number of consequential issues arising out of the Court's decision in *Unicredit I*. The main issue was the interpretation and application of section 44 of SAMLA, which states that a person is not civilly liable in respect of any act or omission taken in the reasonable belief that it was done to comply with sanctions law. Unicredit argued that it was entitled to rely on section 44 because it had refused to make payment under the letters of credit based on a reasonable belief that regulation 28 of the Russia Regulations prohibited it from doing so. However, the Court held that Unicredit could not rely on the section 44 defence because its subjective belief regarding the interpretation and application of regulation 28 was not reasonable in the circumstances. Our full review of the decision can be found here.

Company Law—Directors' Duties

Hunt v Singh [2023] EWHC 1784 (Ch)

In *BTI v Sequana* [2022] UKSC 25, discussed in our 2022 Civil Litigation Review, the Supreme Court set out the test for when the "Creditor Duty" will apply. The Creditor Duty is the directors' duty to take into account the interests of company creditors when the company is insolvent or bordering on insolvency. As previously noted, the Supreme Court left many questions unanswered. It is clear that the courts are still grappling with the application of the Creditor Duty in different factual contexts.

In *Hunt v Singh*, the key question on appeal to the High Court was when, following the decision in *BTI v Sequana*, the Creditor Duty was triggered. In this case, the company was, at the relevant time, insolvent but its insolvency was due to a significant tax liability which the director (Mr Singh) believed (wrongly, as it later turned out) had been avoided pursuant to a valid tax avoidance scheme entered into by the company which was later challenged by HMRC.

Although questions still remain as to the precise trigger and scope of the Creditor Duty, *Hunt v Singh* sets out further considerations that directors should bear in mind following *Sequana*. In particular, *Hunt v Singh* considered the applicable test in circumstances where a company is faced with a claim to a current liability that is significant enough such that the company's solvency depends on successfully challenging that claim. In such "bet-the-company" scenarios, Zacaroli J held that the applicable test was by reference to the knowledge of the directors of a real risk that the company's challenge to the claim might fail. This in itself is perhaps problematic given the Supreme Court's rejection of the real, but not remote, risk trigger in *Sequana*.

Creditor Duty

The main question on appeal to the High Court was whether the Creditor Duty was triggered. Zacaroli J noted that the focus of the Supreme Court in *Sequana* was when the Creditor Duty arose where the company was not actually insolvent. Therefore in *Sequana* it was necessary to consider whether the company's directors ought to have realised that the company was likely to become insolvent. In contrast, in *Hunt v Singh*, there was no doubt that the company was in fact insolvent throughout the relevant period, and the fact that the company disputed that anything was due to HMRC did not change this.

One of the unresolved questions following *Sequana*—as Zacaroli J noted—was whether a company's actual insolvency was sufficient to trigger the Creditor Duty

irrespective of the directors' state of knowledge as to the company's insolvency. Given that the liquidator (Mr Hunt) did not contend that the Creditor Duty arose "*simply because the company was in fact insolvent*", Zacaroli J proceeded on the assumption that it was necessary to establish some form of knowledge (either actual or constructive) on the part of the directors for the Creditor Duty to arise, even where the company was, at the relevant time, actually insolvent.

Accordingly, the Court held that the relevant question in the present case was whether the directors knew there to be a "*real risk that the company's challenge to the claim* [*i.e.*, the HMRC proceedings] *may fail*". The Court concluded that the first instance Judge had applied the wrong test (*i.e.*, that the directors acted reasonably in taking and acting upon advice as to the merits of HMRC's claim and as to what provision, if any, should be made in the company's accounts) in deciding that the Creditor Duty was not engaged. Had he applied the right test, then the Judge should have held that the Creditor Duty had arisen at the latest in September 2005 and continued thereafter throughout the relevant period.

The Court refused to make any finding as to breach, but remitted the case to be reconsidered in accordance with the nuanced approach suggested (albeit *obiter*) in *Sequana*, which requires consideration of a range of factors.

Hunt v Singh is a cautionary tale for directors who are faced with a claim or other liability that, unless successfully challenged, would result in the insolvency of the company. In such cases, the directors must carefully assess the risk that the challenge might fail given that, should there be a "real risk" of that happening, the Creditor Duty may be triggered. As above, the real risk test is not without difficulties given the Supreme Court rejected it in *Sequana*. This case is unlikely to be the last word, not least because the High Court's approach gives rise to a degree of uncertainty as to when the test is triggered and on what basis.

Akkurate Ltd (In liquidation) & Ors v Richmond and another [2023] EWHC 2392 (Ch)

It is trite law that directors owe fiduciary duties to their companies. It is equally important to remember that even if a director's office comes to an end and the company goes into liquidation, that is not necessarily the end of the former director's fiduciary duties to the company. In *Akkurate*, the High Court considered, in the context of the Defendants' application for strike out and reverse summary judgment, the duties owed by former directors to their companies after compulsory liquidation.

The Court refused to grant the Defendants' application for reverse summary judgment, as the claims at issue were not suitable for summary determination. As to the allegations of breach of fiduciary duty against Mr Richmond (former director of Akkurate Ltd, "**Akkurate**"), Freedman J considered the relevant legal principles and held that there was a real prospect of establishing that even though the director's office had ceased after the compulsory liquidation of the company,

his continuing involvement in aspects of its management meant that he owed continuing fiduciary duties.

Directors' Duties Following Liquidation

The Defendants argued that upon the winding up order in 2015, Mr Richmond ceased to be a director of the company and with that, his main fiduciary obligations to the company fell away. Reliance was placed on *Measures Brothers Ltd v Measures* [1910] 2 Ch. 248. The assumption in that case was that the effect of a winding up order was to bring the office of the director to an end.

The Court, however, considered that it was arguable that *Measures Brothers* was about whether the appointment of a liquidator brought to an end the office as distinct from the fiduciary duties of a director, and that the question of whether any fiduciary duties continued thereafter notwithstanding the winding up order was not determined in *Measures Brothers*.

Although *"the law as regards the nature and extent of duties of directors to a company following a compulsory liquidation is part of a developing area of law"*, the starting point is the duties under ss. 170-177 of the Companies Act 2006 ("**CA 2006**").

In its deliberations, the Court considered that given that section 170 of the CA 2006 expressly refers to former directors, it was *"at least reasonably capable of argument"* that the former directors of a company in compulsory liquidation would still be subject to the duties in sections 175 (duty to avoid conflicts of interest) and 176 (duty not to accept benefits from third parties).

The Court further considered the possibility that directors' duties can arise in the absence of formal appointment (for example, *de facto* directors) and concluded that there were *"reasons of fact and law for finding that Mr Richmond was under a fiduciary duty of no conflict and of disclosure"* after the winding up had commenced. The application for strike-out/summary judgment was therefore dismissed.

Akkurate is a useful reminder that former directors should not consider that their fiduciary duties fall away entirely once they have been discharged from that role. The existence of fiduciary duties in the absence of formal appointment as director and in an insolvency context remains a mixed question of law and fact.

De Facto Directors

Aston Risk Management Ltd v Jones & Ors [2023] EWHC 603 (Ch)

The issue of whether an individual is a *de facto* director of a company is a matter of substance over form. Even in the absence of formal appointment as director, fiduciary duties can be owed by an individual in his or her capacity as *de facto* director. In *Aston Risk Management*, the High Court applied the principles set out in the case of *Smithton Ltd v Naggar* [2014] EWCA Civ 939 to determine whether a director of a holding company who exercised management powers over a

wholly-owned subsidiary should be considered a *de facto* director of that subsidiary.

Mr Jones was a director of the parent company of Audiological Support Services Ltd ("**ASSL**", its wholly-owned subsidiary). At all relevant times, ASSL had two de jure directors. Mr Jones was not one of them. ASSL then entered into administration. The administrators subsequently brought claims for breach of fiduciary duty against the duly appointed directors of ASSL, and against Mr Jones as *de facto* director.

De Facto Directors—Principles

The Court considered the broad definition of 'director' in section 250 of the Companies Act 2006, which "*includes any person occupying the position of director, by whatever name called*". The Court noted that this definition does not demand a director be formally appointed. The relevant consideration is whether the person carries out functions that could *only* be discharged by a director of that company.

The Court then set out the comprehensive principles from Arden LJ's judgment in *Smithton Ltd v Naggar*, of which the key principles are:

- There is no one definitive test for establishing *de facto* directorship. The question is whether the director is part of the "*corporate governance system of the company*" and whether he or she assumes "*the status and function of a director*."

- The Court will generally have to determine the corporate governance structure of the company to ascertain if the defendant's acts were "*directorial in nature*." This is a matter of substance, not form. The defendant's job title is not relevant, as the court is required to look at what the defendant actually did.

- The question whether or not the defendant acted as a director "*is to be determined objectively and irrespective of the defendant's motivation or belief*."

In holding that Mr Jones was a *de facto* director of ASSL, the Court pointed to examples of his "*extensive and intimate*" involvement in ASSL's affairs, such as (i) taking the lead at weekly management meetings and assuming a role akin to that of Managing Director of ASSL, (ii) instructing legal advisors on behalf of ASSL in relation to the potential administration of the company and (iii) the fact that Mr Jones had previously referred to himself as "partner" in ASSL. Having made this finding, the Court went on to consider the scope of the directors' duties and whether Mr Jones had breached these duties.

While *Aston Risk Management* does not lay down any new tests or principles in establishing a *de facto* directorship, it is a welcome consolidation of existing case

law and affirms the importance of *Smithton Ltd v Naggar* as a source of guidance in this area.

Contract Law

Barton v Morris [2023] UKSC 3

Mr Barton entered into an oral agreement with Foxpace Limited, to assist Foxpace with finding a buyer for a property that it owned and intended to sell. The parties agreed that Mr Barton would be paid £1.2 million commission for introducing a buyer to Foxpace, provided that the buyer bought the property for £6.5 million. The contract was silent as to what would happen if the property was sold to the buyer for less than £6.5 million. The buyer ultimately purchased the property for £6 million, and Foxpace refused to pay Mr Barton the £1.2 million commission. Mr Barton issued proceedings, demanding payment for a sum pursuant to the contract, or alternatively for a sum to be determined by the Court as restitution for unjust enrichment.

At first instance the High Court rejected Mr Barton's claim. The High Court held that the express terms of the contract provided that Mr Barton would only be paid in the event that the buyer purchased the property for £6.5 million, and as that had not occurred, Mr Barton had no contractual right to payment. As for Mr Barton's claim in unjust enrichment, the High Court applied the principle from *MacDonald Dickens & Macklin v Costello* [2012] QB 244 that a claim in unjust enrichment cannot succeed if it would undermine the parties' contractual agreement (the "**MacDonald Principle**"). As the parties had agreed that Mr Barton would not be paid if the property was purchased for less than £6.5 million, this agreement would be undermined if Mr Barton's unjust enrichment claim were to succeed.

On appeal, the Court of Appeal adopted a different interpretation of the contract. The Court of Appeal's view was that the contract was "*entirely silent*" as to what would happen if the buyer purchased the contract for less than £6.5 million. Accordingly, the MacDonald Principle had not been engaged, as allowing Mr Barton's unjust enrichment claim to succeed would <u>not</u> undermine the parties' contractual agreement. The Court of Appeal therefore awarded Mr Barton £435,000 as a reasonable fee for introducing the buyer to Foxpace. The Court of Appeal also suggested that it may also have been possible to imply a term into the contract that Mr Barton would receive a reasonable fee if the buyer purchased the property for less than £6.5 million.

Foxpace then successfully appealed the Court of Appeal's decision. A 3-2 majority of the Supreme Court ruled that that no sum was payable to Mr Barton as:

- **No 'reasonable fee' term could be implied into the contract:** In applying the leading authority for implied terms (*Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72) the Supreme Court refused to imply a term into the contract requiring Mr Barton to receive a reasonable fee for his services if the buyer purchased the property for less than £6.5 million. The trial Judge had found that the express terms of the agreement were that Mr Barton would only be paid if the property was purchased for £6.5 million. Accordingly, there was no scope to imply a term into the contract providing for payment in the event the property was purchased for a lower amount, as such a term would directly contradict the parties' express agreement. The Supreme Court also refused to imply a term to give 'business efficacy' to the contract, noting at [35] that: "*an agreement whereby someone contracts for a higher than normal payment on the fulfilment of a condition and is prepared to take the commensurate risk of getting nothing if the condition is not fulfilled is not a bizarre or uncommercial contract.*"

- **The MacDonald Principle barred the unjust enrichment claim:** The Supreme Court rejected the Court of Appeal's conclusion that the contract was "*entirely silent*" as to what would happen in the event that the property was purchased for less than £6.5 million. On the contrary: "*When parties stipulate in their contract the circumstances that must occur in order to impose a legal obligation on one party to pay, they necessarily exclude any obligation to pay in the absence of those circumstances*" (see [96]). Therefore, it was a clear component of the parties' agreement that Mr Barton would not receive payment if the property sold for less than £6.5 million, and therefore his unjust enrichment claim was barred by the MacDonald Principle.

The judgment is a reminder that English courts will generally be reluctant to rewrite parties' contracts by implying terms or allow non-contractual remedies that are inconsistent with the parties' bargain (although note the contrasting approach taken in *Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd* as summarised below). The judgment also demonstrates that there is potential for reasonable minds (and courts) to disagree as to whether an agreement is 'silent' as to a particular issue. Parties should therefore carefully consider whether to include express terms covering all possible situations that may foreseeably arise.

Sara & Hossein Asset Holdings Ltd v Blacks Outdoor Retail Ltd [2023] UKSC 2

In *Sara & Hossein v Blacks*, a 4-1 majority of the Supreme Court adopted a contractual interpretation of a provision in a lease agreement that was different to those being advocated for by both parties. In reaching this conclusion, the Supreme Court also arguably applied an approach to contractual interpretation that prioritised achieving a 'commercially sensible' outcome over giving effect to the plain meaning of the words used in the contract.

The parties' lease agreement required the tenant to pay to the landlord "*a fair and reasonable*" proportion of the costs incurred by the landlord arising out of various

services required under the lease. The lease provided that in order to calculate the amount payable by the tenant, the landlord would provide the tenant with "*a certificate as to the amount of the total cost and the sum payable by the tenant and in the absence of manifest or mathematical error or fraud such certificate shall be conclusive*". After the landlord issued a certificate stating that the tenant had to pay £400,000 (a seven-fold increase over the previous year's fee of £55,000), a dispute arose as to whether a certificate issued by the landlord was conclusive in regards to the costs to be paid by the tenant.

The landlord and tenant advanced two different interpretations as to the certificate clause of the lease:

- The landlord argued that the natural meaning of the wording of the clause was that a certificate furnished by the landlord is conclusive as to both the costs that had been incurred by the landlord and the "*fair and reasonable*" proportion of these costs that is payable by the tenant (subject to any "*manifest or mathematical error or fraud*"). In support of this interpretation the landlord noted that cashflow is very important for landlords, and the clause therefore served the commercial objective of enabling landlords to be compensated quickly for costs they had incurred by limiting the scope for tenants to delay payment by raising disputes

- The tenant argued that the certificate was conclusive as to the costs incurred by the landlord, but was not conclusive as to the "*fair and reasonable*" proportion of these costs to be paid by the tenant. In support of this interpretation, the tenant argued that under the landlord's interpretation, the landlord was allowed to be the "*judge in* [their] *own cause*" that could charge whatever amount they decided, which was a commercially absurd outcome. The tenant also noted that the contract contained various provisions that enabled disputes to be referred to expert determination, and argued that these provisions would be rendered meaningless if a certificate issued by the landlord was treated as conclusive as to the amount the tenant had to pay.

The Supreme Court decided that neither party's interpretation was satisfactory, and instead preferred a third approach (which had not been argued for by either party). The Court concluded that the clause imposed a "*pay now, argue later*" regime whereby the tenant was obliged to pay the amount specified in the certificate, but would then be able to subsequently dispute liability.

Lord Briggs dissented. Whilst he accepted that the majority's "*pay now, argue later*" solution was the "*plainly commercial solution*", the wording of the service charge provision was irreconcilable with that interpretation. In Lord Briggs's view, the court does not "*have carte blanche simply to make up a solution of its own. It must choose between genuinely available constructions, rather than mending the parties' bargain*". Lord Briggs held that the correct interpretation was the one advanced by the landlord, as neither the tenant's nor the majority of the Supreme Court's

proposed interpretations were reconcilable with the wording used in the contractual provision.

The Supreme Court's decision is an example of the courts adopting a 'commercially sensible' approach to interpretation even where doing so heavily strains (or arguably departs entirely from) the plain wording of the contract.

Tort Law

Quincecare Duty

As we reported in our 2022 Year in Review, in recent years several *Quincecare* duty cases have been filed in English courts, some of which are making their way to the appeal courts. The *Quincecare* duty—which was first articulated in *Barclays Bank v Quincecare* [1992] 4 All ER 363—is a fairly narrow duty owed by banks (and other payment entities) to their customers requiring banks to refrain from executing a payment instruction from an agent of a customer where it has reasonable grounds to suspect the transaction may be an attempt to defraud the customer.

In the years that followed *Barclays Bank v Quincecare*, the duty had not been widely tested or discussed. However, in 2017, a breach of the *Quincecare* duty was proved in *Singularis Holdings v Dalwa Capital Markets Europe* [2017] 2 All ER (Comm) 445, and upheld on appeal to the Court of Appeal and Supreme Court. The decision showed for the first time that the duty could be an effective vehicle to recover against a well-resourced defendant (*i.e.*, a bank) in the case of fraud, and spurred on new claims in the English courts. As explained in further detail below, in 2023 the Supreme Court put the brakes on an attempt to expand the *Quincecare* duty to apply to instructions issued directly by a customer.

Philipp v Barclays Bank UK plc [2023] UKSC 25

In March 2018, a Barclays customer had been deceived by a third party into authorising two international payments from her bank account. The particular fraud that had been inflicted on the Barclays customer, known as APP fraud, is a widespread issue in personal banking and follows a similar pattern. A customer is deceived by a fraudster, often on the pretense that their money is at risk, to instruct their bank to transfer their money into an account controlled by the fraudster. It is "authorised" from the bank's perspective because the payment is made at the request of the customer.

The defrauded customer claimed that Barclays should be responsible for her loss on the basis that Barclays was under a duty not to carry out her payment instructions if it had reasonable grounds for believing that she was being defrauded. Barclays applied to have the claim summarily dismissed on the grounds that, as a matter of law, no such duty existed as in contrast with the

Quincecare duty; in this case the customer itself (rather than an agent of the customer) had authorized the payment. The High Court granted summary judgment in favour of Barclays. However, in 2022, the Court of Appeal held that it is at least possible in principle that a relevant duty of care could arise in the case of a customer instructing their bank to make a payment when that customer is the victim of APP fraud.

The Supreme Court granted permission for Barclays to appeal, and considered:

1. whether the *Quincecare* duty applied in a case where the relevant payment instruction was not issued to the bank by an agent of the bank's customer; and

2. if not, whether the *Quincecare* duty should be extended to such cases of APP fraud, or whether the law should impose such obligations on a paying bank as incidents of its duty to exercise reasonable care and skill in and about executing an instruction.

The Supreme Court held that *Quincecare* duty does not extend to cases of APP fraud, and granted Barclays' appeal and restored the High Court's order for summary judgment. The Supreme Court held that the Court of Appeal's decision was inconsistent with the first principles of banking law. In particular, banks have a strict duty and mandate to carry out payment instructions authorised by a customer, and this strict duty does not allow banks to perform an assessment of "*the wisdom or risks of its customer's payment decisions*." The Supreme Court also clarified that the *Quincecare* duty is "*simply an application of the general duty of care owed by a bank to interpret, ascertain and act in accordance with its customer's instructions*", which only arises where the validity or content of the instructions are unclear. The *Quincecare* duty arises specifically when an agent of a customer purports to give payment instructions. Where a bank has reasonable grounds for believing that a payment instruction given by an agent purportedly on behalf of the customer is an attempt to defraud the customer, the *Quincecare* duty requires the bank to refrain from executing the instruction without first making inquiries to verify that the instruction has actually been authorised by the customer. The Supreme Court concluded that such duties do not arise in cases of APP fraud, as the validity of the customer's instruction is not in doubt and no further inquiries are needed.

Continuing Nuisance

Jalla and another v Shell International Trading and Shipping Company and another [2023] UKSC 16

In *Jalla*, the Supreme Court considered whether pollution caused to land and waterways by an offshore oil spill constitutes a continuing nuisance, with fresh causes of action accruing until such time that the oil is cleared up.

The case concerned an oil spill in December 2011, which occurred at an offshore platform located 120km off the Nigerian coast. In December 2017, two Nigerian citizens brought an action in the tort of private nuisance against the Shell group companies operating the platform. The Claimants alleged that oil from the spill reached the shoreline and unduly interfered with the use and enjoyment of their land. The issue of limitation arose when the Claimants amended their claim form and particulars of claim more than six years after the spill occurred. To address questions of limitation, the Claimants argued that because oil remained on their land, there was a continuing nuisance, and thereby fresh causes of action that accrued from day to day.

The High Court and the Court of Appeal rejected the Claimants' argument, and the Claimants appealed to the Supreme Court. While the Defendants maintained that the offshore spill was successfully contained and dispersed at sea, it was assumed for the purposes of the appeal that some quantity of oil reached the shoreline within the weeks of December 2011.

The Supreme Court unanimously dismissed the Claimants' appeal. The Supreme Court held that a continuing nuisance is one where, outside the Claimant's land and usually on the Defendant's land, there is repeated activity by the defendant or an ongoing state of affairs for which it is responsible, which causes continuing undue interference with the use and enjoyment of the Claimant's land. In other words, the impact of noise, smell, smoke, vibrations or being overlooked (as in *Fearn v Board of Trustees of the Tate Gallery* [2023] UKSC 4) will be continuing nuisances where the interferences are continuing on a regular basis. In such cases, fresh causes of action will accrue on a continuing basis. In contrast, the Supreme Court held that there was no continuing nuisance in this case because the spill was a one-off event, and there was no repeated activity by the Defendants, or state of affairs for which it was responsible for, that was causing undue interference with the use and enjoyment of the Claimants' land. On the assumed facts, the cause of action accrued once the Claimants' land had been affected by the oil. Further, the Supreme Court reasoned that by accepting the Claimants' case, it would undermine the law on limitation of actions, as it would result in the limitation period running indefinitely until the land is restored. Debevoise & Plimpton represented the successful Defendants in this case.

Liability of an Employer to Protect an Employee from the Risk of Criminal Conviction

Benyatov v Credit Suisse (Securities) Europe Ltd [2023] EWCA Civ 140

In *Benyatov*, the Court of Appeal upheld the High Court's decision, finding that an employer does not have a duty to take reasonable care to avoid the risk of their employee being convicted of a criminal offence.

Mr Benyatov served as the Head of European Emerging Markets in Credit Suisse's London office. In 2006, Mr Benyatov was advising a client on the purchase of a

Romanian state-owned electricity company, and while on a business trip in Romania, he was arrested and charged with "*economic or commercial espionage*" and "*the initiation and establishment of an organised criminal group*". The allegations were thoroughly investigated by Credit Suisse, which found no evidence of wrongdoing. However, in 2013 Mr Benyatov was found guilty by the Romanian courts and sentenced to 10 years' imprisonment. In the same year, Mr Benyatov was placed on gardening leave and his employment was eventually terminated in 2015. Although Mr Benyatov never served his sentence, his conviction effectively prevents him from working in the financial services industry.

Mr Benyatov sought to recover loss of earnings as a result of his conviction under negligence and contractual indemnity. In respect of the negligence claim, Mr Benyatov submitted that, as his employer, Credit Suisse had a duty of care to take reasonable care to protect him from criminal conviction and the resulting losses by performing his duties. The bank argued that there was no duty to protect the economic interests of its employees, and that recognising a new duty of care would not be fair, just or reasonable.

The High Court dismissed the negligence claim. Mr Benyatov challenged the decision on the grounds that the Judge erred in his approach in the law in determining whether such a duty of care arose, and failed to consider relevant factual evidence establishing a duty of care. Specifically, Mr Benyatov submitted that the Judge had failed to draw an analogy from the audit duty found in *Rihan v Ernst & Young Global Ltd* [2020] EWHC 901 (QB). In that case, Kerr J found that there was a duty on the auditor to take reasonable steps to prevent the claimant suffering financial loss due to the auditor's professional misconduct and unethical behaviour when conducting the audit.

The Court of Appeal dismissed the appeal, holding that the Judge had not erred in his approach in the law or on the evidence:

- The Court rejected Mr Benyatov's argument that the principle in *Rihan* should be applied in this case, and held that *Rihan* had no application. The Court reasoned that *Rihan* dealt with the duty of an employer not to engage in misconduct itself, as opposed to the fact pattern in this case, where the alleged employer duty was to protect the employee from the wrongdoing of third parties.

- The lack of foreseeability that Mr Benyatov would be exposed to a conviction (as determined by the Judge) undermined his arguments that the bank should have assumed responsibility and had failed to do so adequately.

- The fact that Mr Benyatov provided no new evidence of the foreseeability of the events made it all the more difficult to convince the Court to find that a novel duty was owed by Credit Suisse to take reasonable care to avoid the risk

of an employee being convicted in the performance of their work for their employer.

Our full discussion of this decision can be found here.

'Bannerman' Disclaimers and Auditors' Duties to Detect Alleged Fraud

***Amathus Drinks plc & Ors v EAGK LLP and another* [2023] EWHC 2312**

In *Amathus Drinks*, the High Court refused to grant summary judgment on a claim brought by buyers of a company against auditors preparing statutory accounts and a completion certificate, on the grounds that the auditors had failed to detect alleged fraud committed by the company. Despite the presence of a 'Bannerman' disclaimer on liability to third parties in the auditors' schedule of engagement, the High Court found that there was a realistic prospect of success that the auditors had an assumed duty of care to the buyers to exercise reasonable care and skill in preparing the company's statutory accounts and completion certificate.

The Claimant buyers entered into a sale and purchase agreement ("SPA") to acquire a company. Before completion, the buyers retained the Defendant auditors to conduct acquisition due diligence. Following completion, the auditors prepared the completion accounts and issued a completion certificate to the buyers, which would be used to determine the adjusted acquisition price under the SPA. The auditors also prepared statutory accounts for the company. The buyers later discovered alleged accounting fraud committed by the company, which they argued had the effect of inflating the acquisition price.

The buyers contended that the auditors owed a common law duty to exercise reasonable care and skill in preparing the company's statutory accounts and completion certificate, which had been breached by failing to uncover the alleged fraud. The buyers relied on a number of factors in seeking to establish that there had been an assumption of responsibility by the auditors, including:

- the existing business relationship between the buyers and the auditors;
- the SPA required the buyers to procure completion accounts as soon as practicable after completion;
- the auditors knew that the buyers would use the completion certificate to calculate the adjusted acquisition price; and
- the completion certificate was addressed to the buyers and sellers, not to the company.

The auditors' schedule to the engagement letter included a 'Bannerman' clause which disclaimed the assumption of responsibility by the auditors for its audit work to anyone other than the company and its members. While the auditors accepted that, save for the 'Bannerman' disclaimer, it was reasonably arguable that responsibility could be assumed, the presence of the disclaimer presented an "*insuperable barrier*" to the buyers' claim, and the auditors sought summary judgment. The auditors relied on *Barclays Bank Plc v Grant Thornton UK LLP* [2015] 1 CLC 180, in which the High Court held that a 'Bannerman' clause in Grant Thornton's audit reports prevented the auditor from incurring any liability to a third-party lender to the company for failing to detect alleged fraud by company employees.

The High Court, however, distinguished *Barclays* as in that case there had been no direct communications between the parties from which it could be said that a direct assumption of responsibility from the auditor to the third-party lender could arise. In comparison, in this case there had been multiple direct communications between the auditors and the buyers' solicitors whilst the auditing process was underway, which conveyed the sense that there existed a "*continuing and direct commercial relationship*" of a kind that had not existed in *Barclays*. The High Court therefore held that the buyers' claim had a realistic prospect of success and allowed the claim to proceed to trial.

Procedural Developments

Consultations and Changes to Rules/Guidance

Updates to the Commercial Court Guide

An updated version of the 11th edition of the Commercial Court Guide was published on 3 October 2023, to ensure that "*the Guide remains a current and comprehensive statement of the Court's practice and procedure*".

While there are some substantive changes to the rules on Admiralty claims, the revisions largely concern non-substantive edits, such as minor updates to the CPR and Practice Directions in effect and confirmation that the Disclosure Pilot Scheme has become permanent pursuant to PD 57AD.

Updates to the Chancery Guide

A revised version of the Chancery Guide was published on 29 June 2023. The updated Guide includes a limited number of changes to the 2022 edition.

Some of the targeted revisions include:

- Applications for preliminary issues and split trials should include information about the likely effect on costs, the scope of disclosure and evidence.
- Pre-trial reviews will be held in every claim where a trial is estimated for more than five days (rather than five days or more).
- Tighter timeframes and page limits on skeleton arguments for dealing with consequential matters following the handing down of judgments.
- Parties should consider whether ADR will assist in resolving their dispute before and after the issue of any claim.
- Additional guidance on contempt applications governed by CPR 81.

New Edition of the King's Bench Guide

The 9th edition of the King's Bench Guide was published on 18 May 2023, which introduced further amendments to the fully revised Guide that was published in 2022.

Some notable changes include:

- Guidance on what is expected of parties before completing directions questionnaires.

- Further guidance concerning joint statements by expert witnesses.
- Updated guidance on remote hearings.
- Updated guidance on embargoed judgments and the remote hand down of judgments.
- Additional guidance with regard to evidence for use in cross-border proceedings.
- Information about notification of GLOs for inclusion on a Group Litigation Register.

Artificial Intelligence Guidance for Judicial Office Holders

The Courts and Tribunals Judiciary also published Guidance for Judicial Office Holders in December 2023 on the use of AI. The guidance is considered to be the "*first step*" in a proposed "*suite of further work to support the judiciary in their interactions with AI.*"

In brief overview, the Guidance sets out the key risks associated with judicial office holders using AI, as well as suggestions for mitigating those risks, such as being aware of the limitations of AI tools and taking steps to ensure data privacy and security.

The Guidance also details the potential uses of AI tools for the judiciary, such as summarising large bodies of text, writing presentations, and for administrative tasks like composing emails. However, the Guidance makes clear that current AI tools should not be used for legal research or analysis. This is the first time such guidance has been published to judicial office holders, and it is a clear signal of the awareness of the judiciary to ensure that the courts continue to adapt and develop in line with fast paced technological developments in the sphere of AI.

Collective Actions

2023 has been another significant year for collective actions in the UK. The UK now has its own well-developed collective actions mechanisms through: (i) representative actions brought under CPR 19.8; (ii) individual claims managed using a Group Litigation Order; and (iii) competition claims brought by way of a Collective Proceedings Order. This year has seen a continued increase in collective actions activity, and that trend is expected to continue into 2024 and beyond.

The Courts are observing the increase of collective actions and the suitability of the tools that they have to address them. These comments come at a time when claimants are showing increased creativity in stretching the boundaries of the

procedural rules to bring collective actions with reduced cost and risk. The High Court in *Commission Recovery Ltd v Marks and Clerk LLP* (summarised below) has observed in 2023 that "*we are still perhaps in the foothills of the modern, flexible use of [representative actions], alongside the costs, costs risk and funding rules and practice of today and still to come. In a complex world, the demand for legal systems to offer means of collective redress will increase not reduce*." The High Court has also noted in that case that it may be time for further legislative development in this area. Collective actions remain a much-watched area of legal development.

Representative Actions

Representative actions brought under CPR 19.8 (formerly CPR 19.6 before April 2023), allow a claim to be brought by or against a party as representative of other persons with the 'same interest' in the claim. Representative actions are usually considered as an 'opt-out' procedure which allows claimants to represent the interests of other individuals without identifying the representative parties or joining them to the action. While an opt-out claim has considerable administrative advantages, there are more stringent requirements regarding the nature of the shared (*i.e.*, same) interest that must be established between the representative parties and those they represent.

Commission Recovery Ltd v Marks and Clerk LLP [2023] EWHC 398 and [2024] EWCA Civ 9

The High Court in *Commission Recovery Ltd v Marks and Clerk LLP* handed down a notable decision in its approach to the 'same interest' requirement to bring a representative action under CPR 19.8. The case concerned claims by clients or former clients of the Defendants related to the payment of undisclosed commission fees for IP renewal services.

The decision is notable for potentially creating a path for more claims to be brought on a representative basis, including the ability for a representative claim to be progressed by a corporate vehicle which has acquired the rights of a single claimant. The High Court adopted a more flexible approach to the 'same interest' test than has previously been assumed following the Supreme Court decision in *Lloyd v Google* [2021] UKSC 50. We covered this Supreme Court decision in our 2021 Year In Review which can be found here.

In *Commission Recovery*, the High Court allowed a representative claim to proceed under CPR 19.8, despite the clients or former clients facing different issues with different complexities and difficulties with their claims. Those differences included different dates and terms of each client's relationship with the First Defendant, the knowledge and expertise of the Claimant(s), each client's introduction to, and instruction of, the Second Defendant, and the relief sought. Knowles J considered that what matters is whether the 'same interest' requirement is met, and in particular whether the issues raised by the Defendants

meant that advancing the claims of class members affected by an issue would prejudice the position of others. In his view, none had that effect.

Knowles J held that none of the differences between the claims would prejudice the position of other class members. Each was capable of resolution and none was fatal on jurisdiction. Knowles J considered that a claim for undisclosed or secret commission is perhaps a "*reasonable example*" of a claim where an "*entitlement can be calculated on a basis that is common to all the members of the class*". Differences in claims including a potential issue of limitation was not fatal. Even if some issues required individual determination, Knowles J considered there would be advantages in terms of justice and efficiency if common issues of fact or law were decided through a representative claim.

The decision is also interesting in its examination of a mechanism to assign claims to a lead representative party which was not itself a client of the Defendants. The High Court considered whether a claimant which acted as an assignee of claims against a defendant constituted an unlawful champertous assignment of a bare right to litigate. Knowles J considered the nature of the assignment (an assignment of rights to undisclosed or secret commissions which are property rights), and determined that the law of champerty did not apply to an assignment of property. It was therefore not necessary to go on to consider whether the assignee had a "*genuine commercial interest*" in the enforcement of the claim.

The Court of Appeal recently upheld the decision of Knowles J in *Commission Recovery Ltd v Marks and Clerk LLP* [2024] EWCA Civ 9.

Andrew Prismall v Google UK Limited & Ors [2023] EWHC 1169

In *Andrew Prismall v Google UK Limited & Ors,* the Court considered the use of representative actions in a claim concerning misuse of private information. The case is a further example of the difficulties of seeking to bring an opt-out claim in relation to misuse of private information through representative actions following the Supreme Court decision in *Lloyd v Google.*

The Claimant, Mr Prismall, sought to bring a representative action on behalf of approximately 1.6 million individuals alleging that the transfer of patient-identifiable medical records to DeepMind (a Google group company) without specific patient consent was a misuse of private information.

The Defendants successfully sought to strike out the claim. Williams J considered that if an individualised assessment of damages was required in relation to the Claimants' entitlement to damages, that would preclude a representative action following *Lloyd v Google*. However, even if the claim could be reduced to the basic common facts, or only to damages for loss of control, it could not be said that any member of the class had a viable claim for more than trivial damages. Accordingly, the claim was struck out.

The High Court did note that the existence of a defence for some members of the class but not others, did not preclude the "same interest" test from being met where there was no conflict of interest.

***Wirral Council v Indivior plc* [2023] EWHC 3114**

In *Wirral Council v Indivior plc*, the High Court struck out a representative claim brought by Wirral Council on behalf of certain investors in two pharmaceutical companies, Indivior plc and Reckitt Benckiser Group plc.

The case is the first time that the courts have considered the use of the representative procedure under CPR 19.8 in the context of a securities claim under ss. 90, 90A and Schedule 10A of the Financial Services and Markets Act 2000 ("**FSMA**"). There have been a number of other securities claims brought under these provisions, but by way of ordinary Part 7 proceedings by investors who have opted in to the proceedings.

Through the mechanism of representative procedure, Wirral Council sought to try what it considered to be a number of "common issues", which are those related to the Defendants and which are not dependent on any issue that is particular to an individual investor. Wirral Council argued that there are legitimate advantages to the representative proceedings in terms of efficiency and access to justice and that it was therefore entitled to bring representative proceedings. The Defendants sought to strike out the representative proceedings on the basis that they are not the appropriate procedure for claims under FSMA.

Michael Green J considered that the institutional investors may prefer to minimize their risks, costs and expenditure of resources to wait and see if they were successful on the common issues related to the Defendants before providing evidence and disclosure. However, this was not a legitimate basis for depriving the Court of its powers to case manage such claims. The Court was concerned that a judge would have no power to decide the best way to case manage the claims from start to finish, and in particular, was concerned that the Court would have no control over whether the proceedings were bifurcated, as this would simply have to happen in a representative action (*i.e.*, the Court would have to determine the common issues first).

In striking out the claim, the Judge noted that the Court is required to actively manage claims so as to further the overriding objective, but the representative proceedings effectively prevent the Court from doing that. A relevant factor in the Judge's consideration is that the existence of multi-party proceedings shows that institutional investors have not been deterred from pursuing their claims in the English courts by the costs and effort in preparing their claims: "*The fact that they would prefer not to expend cost and effort in preparing and putting forward their case until after the first trial has been completed is unsurprising but contrary to the way litigation is normally conducted in this jurisdiction and will necessarily mean that the proceedings will not be brought to a final conclusion expeditiously*." Michael

Green J further emphasised that claimants in group actions must properly plead and particularise their case from the beginning. It should not be as simple as subscribing to litigation with no cost or risk being incurred.

Group Litigation

The Court may make a Group Litigation Order ("**GLO**") where there are likely to be a number of claims giving rise to common or related issues. CPR 19.23 provides that where a GLO has been made, a judgment or order in a claim on the group register in relation to one or more GLO issues is binding on the parties to all other claims on the group register at that time, unless the court orders otherwise. The GLO mechanism allows the Court to actively case manage claims which involve common as well as individualised issues. However, the regime is opt-in and requires that individual claims are properly pleaded and particularised.

Cavallari & Ors v Mercedes Benz Group AG & Ors [2023] EWHC 512 (KB)

The case of *Cavallari & Ors v Mercedes Benz Group AG & Ors* arises out of the long-running "dieselgate" emissions scandal. In these proceedings, 300,000 individual claims have been filed against Mercedes-Benz and its subsidiaries which allege that Mercedes and its subsidiaries deceived customers by placing vehicles on the market containing a number of defeat devices that meant that the vehicles produced more diesel emissions than advertised.

In March 2023, the Senior Master confirmed that she would recommend to the President of the King's Bench Division that a GLO be granted. This will be the largest GLO brought before the courts to date. The Senior Master also considered whether individual claimants should be entitled to join the GLO without first agreeing to cost sharing provisions. She considered that it would not be appropriate as a matter of principle to prevent a claimant with a claim that falls within the scope of the GLO to be prevented from joining the group litigation and entering onto the group register because they could not agree on costs contributions with the steering committee. Instead, if any claimant who meets the standard minimum requirements for joining a group litigation cannot reach agreement on contribution to common costs, the matter can be referred to court and a "pay as you go" order be imposed if the Managing Judge considers it appropriate. This would enable such claimants not to be "free riders" to the group litigation and provide a mechanism for such claimants to contribute to common costs.

Abbott & Ors v Ministry of Defence [2023] EWHC 2839 (KB)

In *Abbott & Ors v Ministry of Defence*, the High Court has refused a GLO for noise-induced hearing loss claims. The Court held that the threshold requirements for a GLO were not met. A significant feature of this case, is that the application for a GLO was opposed by approximately 5,000 Claimants in other proceedings represented by 18 other firms of solicitors.

In considering the impact that granting the GLO would have on access to justice, Garnham J was concerned that the Claimants' solicitors had failed to consult with other Claimant law firms representing almost 5,000 additional Claimants. This meant that there was no common approach to this application from the solicitors acting for the Claimants in the cases likely to be caught by the GLO.

The Court was also unpersuaded that a GLO would be beneficial to the administration of justice, or an effective means of saving costs in these proceedings. Although it was not disputed that a GLO may be suitable for "*industrial disease or accident*" claims in some cases, the Court observed that this case seems like a much less obvious candidate for a GLO. Actions for noise-induced hearing loss have a long history going back many decades. The circumstances in which the thousands of individual Claimants sustained their injury varied considerably and the allegations of breach of duty appeared diverse. In these circumstances, it was decided that there may be limited utility to a decision of common issues of fact or law which are decided under the framework of a GLO.

Competition Claims Brought by Way of Collective Proceedings Order

A notable claim filed in 2023 is an environmental collective action filed in the Competition Appeal Tribunal ("**CAT**") brought against water companies over pollution incidents. The Claimants allege that water companies have abused their dominant positions by misreporting the numbers of pollution incidents they have caused to regulators, resulting in higher customer bills. The decision to bring the claim as a competition claim is presumably to take advantage of the opt-out procedure in the CAT without incurring the expense or risk of bringing a group claim for loss or damage which has a significant individualised component.

Other notable claims concerning the competition regime include:

1. *Evans v Barclays Bank PLC & Ors* [2023] EWCA Civ 876. In this case, the Court of Appeal reversed the decision of the CAT and held that the claims could proceed on an opt-out basis. The decision contains helpful guidance on opt-in versus opt-out considerations.

2. *UK Trucks Claim Limited v Stellantis NV (formerly Fiat Chrysller Automobiles NV) & Others and Traton SE & Others v Road Haulage Association Limited* [2023] EWCA Civ 875. In this case, the Court of Appeal considered important issues including how conflicts of interest within a class might be addressed, and the assessment of opt-in versus opt-out procedure.

Other Group Actions

Município de Mariana & Ors v BHP Group (UK) Limited & Anor

The High Court has heard a number of applications in the *Município de Mariana & Ors v BHP Group (UK) Limited & Anor* proceedings which have been brought by more than 720,000 individuals in Brazil against the BHP Group for damages arising from the collapse of the Fundão Dam in Brazil.

The claim is not being pursued as a representative action and is also not being case managed under a GLO. The High Court has instead been asked to exercise general case management powers to manage one of the largest group actions in English court history. In 2020, the High Court had initially refused jurisdiction of these claims, considering them to be "*irredeemably unmanageable*" due to their size and complexity, and have "*a very significant deleterious impact indeed upon the scarce resources of the English Courts*". The High Court has nevertheless been required to find ways to case manage these sprawling claims after a decision of the Court of Appeal in 2022 which ruled out as a matter of principle that findings of abuse could be made where the litigation became unmanageable. Our update on the Court of Appeal decision can be found here.

The High Court issued group litigation directions following a hearing in December 2022 and fixed a first stage trial to determine threshold liability issues which is currently scheduled for October 2024. O'Farrell J handed down four judgments in 2023 in connection with the proceedings, including determining the issues for a first stage trial, hearing a jurisdiction challenge brought by the mine's co-owner, Vale, following an application by BHP to join Vale as a party to the proceedings (see further in the chapter on service and jurisdiction below), and a hearing in connection with applications related to pleadings requirements and extensions of time. The case will be one to watch in 2024.

Security for Costs

***Santina Ltd v Rare Art (London) Ltd (trading as Koopman Rare Art)* [2023] EWHC 807 (Ch)**

In *Santina*, the High Court considered an appeal against an order for security for costs (the "**SFC Order**"), and a challenge to an *ex parte* freezing injunction (the "**Freezing Order**"). Marcus J dismissed the Claimant's appeal against the SFC Order on the basis that the Deputy Master had properly exercised his discretion to order security for costs, and upheld the Freezing Order on the ground that the Court had jurisdiction to make it. This case is of particular interest because the Court considered that the Claimant's failure to comply with the SFC Order was capable of triggering the freezing injunction jurisdiction. This required the Court to view the unsatisfied SFC Order as the equivalent of a cause of action that may (or may not) in due course convert into a money judgment.

The SFC Order

Marcus J considered that the SFC Order "*made by the Deputy Master was a discretionary one, which could only be interfered with if plainly wrong*". Accordingly, the mere fact that Marcus J might disagree with the decision was "*not enough to permit the setting aside of his order*" (at [23]). The Judge held that the Deputy Master had appropriately considered the matters raised by the Claimant in its grounds of appeal and the parties' respective conduct, and so the Claimant's appeal against the SFC Order failed.

Freezing Order

Marcus J observed at the outset that a freezing order would only be granted if the applicant is also a Claimant with a cause of action vested in it. The Judge noted that this ought to have been fatal to the Defendant's application for relief, as it was not a Claimant in the proceedings. Notwithstanding, Marcus J referred to the decision of the Court of Appeal in *Jet West Ltd v Haddican* as authority for the proposition that "*a costs order in favour of a defendant (as well as a claimant) is sufficient to found jurisdiction to make a freezing order*." In making his decision, Marcus J considered that "*the failure to comply with the* [SFC Order]*, resulting in an automatic stay of these proceedings and a right in* [the Defendant] *to apply to strike out the proceedings*" and "*obtain* [...] *an order in their favour of their costs of the entire proceedings*" was capable of triggering the freezing order jurisdiction. Notably, Marcus J accepted that an unsatisfied security for costs order is the equivalent of a cause of action that may—or may not—convert into a money judgment.

Our full analysis of this decision can be found here.

Lazarichev & Ors v Lyndou **[2024] EWHC 8 (Ch)**

In *Lazarichev*, the High Court considered an appeal against an order dismissing the Defendants' application for security for costs.

By way of background, the Defendants/Appellants issued an application for security for costs against the Claimant, Mr Lyndou, on the basis that he was resident out of the jurisdiction and lived in Belarus, a non-Hague Convention State pursuant to CPR 25.13(2)(a). Although Mr Lyndou lived in Belarus at the time his claim was issued, he had subsequently emigrated to Poland. The Defendants/Appellants contended that Mr Lyndou had obtained permission to reside in Poland by making a false declaration, and that resultantly, his residency was 'unlawful'. The Defendants/Appellants submitted that gateway (a) required 'lawful residence' and the Court was therefore asked to consider whether the word "resident" for the purposes of CPR 25.13(2)(a) meant "lawfully resident". The Defendants' application was dismissed at first instance and an appeal was brought.

Dismissing the appeal, HHJ Keyser (sitting as a High Court Judge) held that gateway (a) was not established, as "residency" for the purposes of CPR 25.13(2)(a)

should not mean "lawfully resident". The case provides useful guidance as to the meaning of "resident" for the purposes of CPR 25.13(2)(a):

1. *"As a matter of ordinary usage, the question of a person's residence is a factual question. A person is resident in the place where he dwells permanently or for a considerable period of time"* (see [23(1)]);

2. "*The lawfulness of a person's presence in a particular State was not itself the relevant question. It might be relevant to the factual question, because clear evidence that a person was at immediate risk of deportation from a State could lead to the conclusion that he was not in fact resident there; however, save in a very clear case the court should not determine questions of lawfulness itself but should rely on the determination of the immigration authorities of the relevant State"* (see [4]);

3. *"…absent good reason, "resident" ought to be given its ordinary and natural meaning, not some special meaning"* (see [28]); and

4. *"the rule does not say "lawfully resident", though it could easily have done so. Although it might nevertheless be possible to imply the word that could have been but has not been used, one ought to be cautious before making such an implication"* (see [29]).

***Rajabieslami v Tariverdi* [2023] EWHC 455 (Comm)**

In *Rajabieslami*, the Defendants' security for costs application relied on three gateways set out in CPR 25.13(2): (a) (resident out of the jurisdiction in a non-2005 Hague Convention state (*i.e.*, Qatar); (e) (failure to provide a correct address in the claim form); and (g) (taking steps in relation to assets that would make it difficult to enforce a costs order).

Mr Salter KC (sitting as a Deputy High Court Judge) concluded that the evidence provided by the Defendants was insufficient to establish that gateways (e) and (g) were satisfied. Mr Salter KC did, however, note that it was common ground that the factual requirements of gateway (a) were satisfied, as the Claimant was resident in Qatar. The Judge noted at [46] that it was also common ground "*that the court has to ensure that its discretion to make an order by virtue of this condition is exercised in a non-discriminatory manner for the purposes of Articles 6 and 14 of the ECHR.*" The Judge noted that this required, as per Hamblin LJ in *Danilina v Chernukhin* [2019] 1 WLR 758 at [51], the Court to be satisfied of "*objectively justified grounds relating to obstacles to or the burden of enforcement in the context of the particular foreign claimant or country concerned*", and that such grounds exist where there is a "*real risk of substantial obstacles to enforcement or of an additional burden in terms of cost or delay.*" The evidence on this point primarily concerned the ease of enforcing any cost judgment in Qatar, and the reciprocity between the English and Qatari courts as to the enforcement of foreign judgments.

Having considered the evidence, the Judge held at [63]-[64] that there was a "*real risk of serious obstacles to enforcement*" *in Qatar of any costs judgment given in the Defendants' favour*" under gateway (a). The Judge accepted that enforcement of a decision from the English courts in Qatar would be challenging in the absence of: "*concrete examples*" of English courts having recognised Qatari judgments; and/or a governmental declaration that Qatari judgments would be recognised in the English courts without re-examination.

The decision provides useful guidance on the evidence required to establish a "*real risk*" of non-enforcement under gateway (a).

Service and Jurisdiction

In 2023, the English courts have issued a number of judgments which provide helpful guidance on serving a claim on parties outside of the jurisdiction of England and Wales. These legal developments include consideration of the new "gateways" for service out of the jurisdiction introduced by Practice Direction 6B of the Civil Procedure Rules which have been in force since October 2022. The courts have also considered a number of jurisdiction challenges on the grounds of *forum non conveniens*, which is a common law doctrine that has been unavailable to Defendants while the Brussels Recast Regulation remained in force pre-Brexit.

We provided details of the amendments to the jurisdictional service gateways contained in PD 6B in the 2022 Year in Review which can be found here.

Cases Examining the New Jurisdictional Gateways

Pantheon International Advisors Limited v Co-Diagnostics Inc [2023] EWHC 1984 (KB)

In *Pantheon*, the High Court has provided helpful guidance in respect of new CPR 6.33(2B)(b) on service outside the jurisdiction in circumstances where there is a non-exclusive jurisdiction clause in a contract.

The decision is an important reminder of the need to carefully identify the proper gateways for service in mixed claims (*i.e.*, where a case involves multiple causes of action where permission to serve out may be required for some claims, but not others).

The case concerned unpaid fees due under an unsigned written contract said to have concluded in 2018. The Claimant brought proceedings for breach of contract, and alternatively by way of claim for *quantum meruit* (*i.e.*, a claim for a reasonable sum in respect of the services provided). The Claimant served the Defendant in the U.S., relying on CPR 6.33(2B)(b).

Master Stevens provided a detailed judgment on the proper interpretation and approach to CPR 6.33(2B)(b). In particular, a party will need a "*plausible evidential basis*" to assert that the contract contains a valid and effective jurisdiction agreement in favour of the English courts. The Master accepted that the burden was on the Claimant to establish that there is a good arguable case that the contract being sued upon contains a term to the effect that the court shall have jurisdiction to determine the claim in respect of the contract. The Master also accepted that the *quantum meruit* claim is not a "*contract claim*", and therefore did not fall within CPR 6.33(2B)(b). Our full analysis can be found here.

Osbourne v (1) Persons Unknown Category A (2) Persons Unknown Category B (3) Thembani Dube [2023] EWHC 39 (KB)

As discussed above, the decision of the High Court in *Osbourne* is notable for allowing service via a Non-Fungible Token on a defendant as the sole means of service.

The decision also contains an examination of the gateways allowing service out of the jurisdiction for claims relating to property in the jurisdiction, and for claims in constructive or resulting trust related to assets in the jurisdiction. The decision suggests that the test for whether assets are within the jurisdiction for the purpose of deciding whether a claim relates to such assets, requires the court to focus on where the assets are located at the time of the application for permission to serve out of the jurisdiction. The High Court expressed doubts about the proposition in *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm), namely that the court must focus on where the assets were located before the justiciable act occurred.

CA Indosuez (Switzerland) SA v Afriquia Gaz SA [2023] EWCA Civ 1072

The Court of Appeal held in *CA Indosuez* that in cases where the Lugano Convention continues to apply in the UK, the service of a claim form outside the jurisdiction does not require the court's permission. The Court of Appeal upheld the decision of the High Court which found that the changes to the CPR did not introduce a requirement that permission be obtained to serve transitional claims (i.e., those commenced before the UK ceased to be a party to the Lugano Convention) out of the jurisdiction.

Challenges to Jurisdiction—*Forum Non Conveniens*

While the UK was an EU member state, it was subject to the EU's framework governing jurisdiction over civil and commercial matters, known as the "Recast Brussels Regulations". Under that framework, the English courts effectively lost their power to decline jurisdiction over claims against a UK-based defendant on the basis of *forum non conveniens*, *i.e.*, that England was not the most natural or appropriate forum, because a defendant could be sued in England 'as of right.'

Post Brexit, English defendants are again able to rely on the principle of *forum non conveniens* to challenge the English court's jurisdiction. In 2023, the English court decision in *Limbu & Ors v Dyson Technology Limited & Ors* (summarised below) suggests that forum challenges will become more prevalent and depending on the facts, could be a useful tool for English defendants.

Limbu & Ors v Dyson Technology Limited & Ors [2023] EWHC 2592

In *Limbu & Ors v Dyson Technology Limited & Ors*, the High Court refused to allow group supply chain claims to proceed further in the English courts against Dyson, on the basis that the foreign jurisdiction (Malaysia) where the alleged acts and omissions occurred was a more appropriate forum, and justice did not otherwise require that the claims be tried in England.

The Judge held that Malaysia was "*clearly and distinctly more appropriate*" to hear the claim. He considered several factors to reach this decision including: (i) that Malaysian law was the applicable law, (ii) Malaysia was the jurisdiction in which the alleged harm occurred, and (iii) there was no overriding reason requiring the claim to be heard in England. The High Court rejected a number of arguments that were said to constitute special circumstances requiring the claim to be heard in England, including alleged difficulties in obtaining access to justice in Malaysia. Our full analysis of this decision can be found here. Of particular note is the extensive commitments and undertakings the Defendants were prepared to give in order to satisfy the Court that Malaysia was the appropriate forum.

Mercedes-Benz Group AG & Ors v Continental Teves UK Limited & Ors [2023] EWHC 1143

In *Mercedes-Benz Group AG & Ors v Continental Teves UK Limited & Ors*, Butcher J set aside permission for service outside the jurisdiction in a follow-on damages claim following the European Commission's finding that certain companies had infringed Article 101(1) TFEU by exchanging information regarding hydraulic braking systems for passenger cars. The decision is significant in that it raises questions about the ability of claimants to rely on a UK domiciled anchor defendant to found jurisdiction in follow-on litigation. The decision is also the first to consider the principles of *forum non conveniens* in a follow-on damages claim post-Brexit.

Butcher J considered arguments brought by the UK Defendants to stay the proceedings on *forum non conveniens* grounds and by the German Defendants to set aside service of the proceedings on them in Germany on the same basis. Butcher J held that the forum with which the dispute has its closest and most real connection is Germany, which is the natural forum for the dispute. He considered that the case has, in reality, very little connection with England and Wales, and is not one where the parties have consensually chosen England and Wales as the forum for their dispute. He considered a number of factors in reaching this decision, including: (i) that the majority of the parties are domiciled in Germany;

(ii) that the infringing conduct and various matters at issue took place in Germany; (iii) that relevant agreements were negotiated between individuals employed by German-domiciled companies; and (iv) that it is likely that the great majority of any damage was suffered in Germany. Although the European Commission's decision found that the infringement was EEA-wide, that does not alone establish any significant connection with the UK.

Butcher J also considered the practicalities of trial, including that most, if not all, factual witnesses relevant to the issues are likely to be located in Germany, and that the case was governed by German law. He noted that "*[t]he English courts are very used to applying foreign law to many disputes before them. Generally, however, it is preferable that a case should be tried in the country whose law applies to the dispute in question.*"

The Public Institution for Social Security v Ruimy [2023] EWHC 177

In contrast, in *The Public Institution for Social Security v Ruimy*, the High Court rejected *forum non conveniens* arguments in a case brought by two Defendants to an alleged bribery claim advanced by a Kuwait pension fund.

The Defendants sought to argue that Switzerland was clearly the more appropriate forum on the following four grounds: (i) the torts/wrongs took place in Switzerland; (ii) Switzerland was the centre of gravity and evidence; (iii) relevant evidence would be heard in Swiss civil proceedings, and there was a risk of irreconcilable judgments; and (iv) Swiss law may be the law governing the claims.

Jacobs J rejected those arguments, and held that the Defendants had not established that Switzerland was a more appropriate forum. A significant factor in this case was that claims relating to the relevant investments were already being heard in England. Jacobs J considered the authorities which are concerned with the avoidance of fragmentation and the risk of inconsistent judgments in the *forum non conveniens* analysis. He considered that the desirability of avoiding fragmentation and inconsistent judgments may therefore result in proceedings being commenced or continuing in England, notwithstanding substantial links with another jurisdiction. In this case, the existing English proceedings was a factor with very significant weight. Jacobs J further held that there were other strong factual connections with England including that the Defendant lived in England during the relevant period and was likely in England when negotiating and arranging the bribes.

Município de Mariana & Ors v BHP Group (UK) Limited & Anor [2023] EWHC 2030 (TCC)

In *Município de Mariana & Ors v BHP Group (UK) Limited & Anor*, the High Court found that England is "*clearly the appropriate forum*" for the trial of a dispute between BHP and Vale, who are co-owners of a dam at the centre of the *Município*

de Mariana group litigation (see a further analysis of these proceedings in the Collective Proceedings chapter above). In December 2022, BHP applied under Part 20 to have Vale join the case and contribute to damages alleged to have been caused by a 2015 mining disaster in Brazil as a co-defendant.

Vale challenged the English court's jurisdiction to hear the case against Vale, arguing that Brazil was the natural forum for claims made under Brazilian law. Vale challenged jurisdiction on the grounds that:

1. There was no serious issue to be tried in respect of the Part 20 claims; and

2. England and Wales was not the appropriate forum for such claims.

The High Court rejected Vale's jurisdictional challenge on both grounds.

When considering whether there was a serious issue to be tried, the Court noted that the relevant legal principles were broadly similar to the test for summary judgment, but the burden rested on BHP to demonstrate that the test was met. In particular, the Court had to consider whether BHP had a "realistic" prospect of success, meaning the claim was more than "merely arguable".

Mrs Justice O'Farrell concluded that BHP had clearly established that there was a serious issue to be tried against Vale. Amongst other matters, the Court would have to determine whether Vale had accrued liability to contribute to BHP under Brazilian law, and whether this liability was time-barred or limited by pre-existing settlement agreements. This would require significant scrutiny, evidence and consideration, and was not suitable for summary determination.

On the question of whether England was an appropriate forum for the claims, the Court noted that, if the Part 20 claims had been standalone proceedings, the natural forum would have been Brazil. However, given the significant factual overlap between the class action which was to proceed in the English courts and the Part 20 claims, the fact that both claims related to the same regulatory/constitutional framework and that England was now the only possible forum for a single trial of both claims, England was clearly the appropriate forum to try both matters.

Vale subsequently sought permission to appeal the decision of the High Court on both grounds, arguing that Mrs Justice O'Farrell had failed to properly apply the relevant legal principles to these facts and that the Judge was wrong to conclude that Vale could be ready to participate in the threshold liability issues which were due to be tried in autumn 2024. In response, Lord Justice Coulson (with whom Lady Justice Elisabeth Laing agreed) reaffirmed the very high bar for interfering with a judge's conclusions on primary facts, and determined that Vale's application failed to reach this bar. Lord Justice Coulson concluded that Vale had

no real prospect of success on either ground of appeal and, therefore, the application was refused.

Evidence

Non-Compliant Witness Statements

The English court has delivered several judgments in 2023 criticising trial witness statements for their failure to comply with CPR Practice Direction ("**PD**") 57AC. These decisions build on the numerous judgments delivered in 2022 addressing the very same topic, as detailed in our 2022 Annual Review (accessed here).

Mackenzie v Rosenblatt Solicitors (a firm) and another [2023] EWHC 331 (Ch)

In the case of *Mackenzie*, the High Court raised a number of issues with both parties' trial witness statements and, in particular, their failure to comply with PD 57AC. The case serves as a good reminder that the rules are intended to "*eradicate the improper use of witness statements as vehicles for narrative, commentary and argument*" (*Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2747 (TCC)) and have led to greater judicial scrutiny of witness statements that appear overly lawyered and/or fail to reflect a witness's evidence.

In respect of the Defendant's trial witness statements, Fancourt J's concerns in *Mackenzie* included:

1. the witnesses' failure to identify the documents from which they had refreshed their memory, or at which they had otherwise looked at in the course of preparing their statements;

2. the witnesses' inclusion of passages in the statements that argued the Defendant's case, rather than setting out the witnesses' recollection of the facts; and

3. the fact that the witnesses had not stated how well they recalled certain matters that were understood to be important in the case.

Although these concerns were not fatal to the Defendant's evidence at trial, they demonstrate the increasingly vigilant approach taken by the Court in monitoring a party's compliance with PD 57AC.

Fancourt J's criticisms of the Claimant's witness statements were, however, more serious in nature. At [145], Fancourt J noted that the "*true voice*" of the witnesses did not emerge from their witness statements when compared with the oral testimony provided at trial.

At [146], the Judge went on to note that:

"*The four witness statements are the careful work of a legal team, contrary to the requirements of Practice Direction 57AC that a statement should be so far as possible in the witness's own words. Each statement works by making assertions about what happened, at a level of generality or summary, rather than setting out the facts as recalled in detail, and resembles a position statement seeking to advance a case more than a witness statement. The summary of what happened is often an exaggeration of what is shown by the documents or just inaccurate. There were many instances in the course of the cross-examination of the four witnesses called on behalf of* [the Claimant] *where it was evident that the witness could not in fact recall what they stated in their statement, or where what was stated in the statement was contradicted in cross-examination, or was shown to be an untenable interpretation of a document.*"

The nature of these issues left the Judge "*with real doubt about the reliability of the content of these witness statements.*" The conclusions reached by Fancourt J on the Claimant's witness evidence should be a lesson for all practitioners in ensuring that witness statements: (i) are clearly drafted in a witness's own words; and (ii) fairly and accurately depict the level of recall or detail that an individual witness can speak to. Our full discussion of the decision can be found here.

Finsbury Food Group Plc v Axis Corporate Capital UK Ltd & Ors [2023] EWHC 1559 (Comm)

In *Finsbury* (discussed in further detail below), Mr Persey KC (sitting as a Judge of the High Court) made several notable comments in respect of the witness statements that the Claimant filed in support of its claim.

At [17], the Judge noted that the six witnesses called by the Claimant to give evidence "*each signed witness statements in an almost identical format.*" The Judge went on to state that in each statement, the witnesses "*listed a short number of documents that they had been asked to consider. The statements covered a very selective and limited number of matters.*" Mr Persey KC concluded by stating that he was not assisted by the trial witness statements; that much of the written evidence provided by the Claimant's witnesses was unreliable; and that he did not accept the evidence provided, save where it accorded with contemporaneous documents.

This case (as with *Mackenzie*) serves as a useful reminder of the importance of ensuring witness statements are compliant with PD 57AC. Our full discussion of the decision can be found here.

Cost Consequences Relating to Non-Compliant Witness Statements

Parties can also face serious cost consequences when failing to prepare compliant witness statements pursuant to PD 57AC.

Kieran Corrigan & Co Ltd v Onee Group Ltd & Ors [2023] EWHC 649 (Ch)

In the case of *Kieran Corrigan*, the Defendants' witness statements had not been prepared in a manner that was compliant with PD 57AC. The Defendants requested permission from the Court to submit revised witness statements and also applied for relief from sanctions as a result of its failure to file witness statements that were compliant with PD 57AC. Hilliard KC (sitting as a Deputy Judge of the High Court) permitted the Defendants to rely on its revised witness statements at trial, but also ordered the Defendants to pay 100% of the Claimant's costs (assessed on the indemnity basis) that were incurred in responding to the Defendants' application for relief from sanctions given the serious breaches of PD 57AC.

In doing so, Hilliard KC held at [377] that the Defendants' breaches of PD 57AC were serious. The breaches included: (i) the witness statements contained significant passages of common text on substantive points, which suggested "*there necessarily must have been a degree of coordination between some of the witnesses in generating their statements*"; (ii) some elements of the statements were not in the witnesses' own words; (iii) the statements did not include the right statement of truth, or confirmation of compliance as required by PD 57AC paragraph 4.1; (iv) the statements did not list the documents that each witness had been referred to pursuant to PD 57AC paragraph 3.2; and (v) the witnesses had reviewed a common bundle of documents that "*included significant material*" not seen by the witness at the time, which risked "*contaminating the witness's recollection with the views expressed by others*."

After detailing these breaches, Hilliard KC held at [377(5)] that these failings were "*not merely procedural ones*" as they "*go to the reliability of the evidence, which PD 57AC is concerned to protect. The prejudice to the Claimant caused by the statements not being prepared properly in the above respects cannot be undone, because it gives rise to the danger that the Defendants' evidence is unreliable in respects that it may not be possible for the Court to detect from the oral and written evidence of the witness.*"

Drafting Witness Statements for Witnesses Whose Native Language Is Not English

In 2023, the courts have continued to consider the appropriate language to use when drafting a non-native English speaker's witness statement to ensure compliance with CPR PD32 paragraph 18.

Afzal v UK Insurance Ltd [2023] EWHC 1730 (KB)

In *Afzal v UK Insurance Ltd*, the High Court considered whether, for the purposes of preparing a witness statement (and pursuant to CPR PD32), a witness's "*own language*" includes any language in which the witness is sufficiently fluent.

The underlying proceedings related to a road traffic accident. In advance of trial, the Claimant filed a witness statement that was drafted in English. At trial, the Judge asked Claimant's counsel what his "*client's own language*" was. In response, Claimant's counsel stated that his client speaks both English and Urdu. However, after subsequent instructions, it transpired that his client's "*own language*" was Urdu, but that all instructions received from the client (both via telephone and in person conferences) had been conducted in English. The Judge submitted that in such circumstances, the statement should have been drafted and signed in Urdu, and then translated into English. As a result, the Judge refused the Claimant permission to rely on his English witness statement, and refused permission for an adjournment to allow the witness statement to be translated into Urdu. Mr Afzal appealed this decision on the basis that the Judge had misconstrued PD 32.18.1, which provides:

"*The witness statement must, if practicable, be in the intended witness's own words and must in any event be drafted in their own language.*"

On appeal, Freedman J considered the decisions in *Correia v Williams* [2022] EWHC 2824 (KB) and *Bahia v Sidhu* [2022] EWHC 875 (Ch) (both discussed in our 2022 Annual Review, accessed here) and, *inter alia*, the guidance in the Business and Property Courts Guide which states:

"*A trial witness statement must comply with paragraphs 18.1 and 18.2 of Practice Direction 32, and for that purpose a witness's own language includes any language in which the witness is sufficiently fluent to give oral evidence (including under cross-examination) if required, and is not limited to a witness's first or native language*" [paragraph 3.3].

Freedman J concluded that the Business and Property Courts Guide "*spelled* out" the meaning of PD 32 paragraph 18.1, and that in his judgment, the Judge was therefore wrong to conclude that the language of the witness statement had to be drafted in the first language of the Claimant. In reaching his decision and granting the appeal, Freedman J noted the following points:

1. It seemed unlikely that the Business and Property Courts intended to introduce a separate regime as opposed to that which would apply in other Courts not governed by the Business and Property Courts Guide; and

2. PD 32 intended to address concerns about what would happen to witnesses who were not proficient in English, and that it was not intended "*that those who were bilingual, or those who were sufficiently fluent in English to give oral evidence including under cross-examination, should not be able to give their evidence in English*" (at [40]).

The case serves as a useful reminder for practitioners to assess a witness's proficiency to provide witness evidence in English before any statements are prepared and drafted.

Alam v Alam and another [2023] EWHC 1460 (Ch)

In *Alam*, the High Court excluded certain witness evidence as a result of irregularities involved in the preparation of such evidence.

In *Alam*, the majority of witnesses, including Mr Rafiq (a long-standing family acquaintance of the Defendant), had provided evidence through translations and the use of interpreters during cross-examination. During Mr Rafiq's cross examination, substantial irregularities became apparent regarding the preparation of Mr Rafiq's witness statement. For example, it emerged that Mr Rafiq did not speak Urdu and was not able to read or understand the Urdu script (the language that his witness statement was prepared in) and could not therefore read his signed witness statement.

It transpired that his witness statement had been prepared following a highly unusual process in which Mr Rafiq provided his account of events in Punjabi (using a translator) to a solicitor who could not speak Punjabi. The witness statement was prepared in English, translated into Urdu and then translated back into English. The statement was accompanied by a translator's certificate of compliance with PD 32 18.1, 23.2 and PD 57AC. However, a certificate under PD 22 paragraph 3A.1 was not filed, which is required when a statement of truth is signed by a witness who is unable to read their statement, other than by reason of language alone.

During his cross-examination, Mr Rafiq further admitted that he had accepted whatever had been read to him or put in front of him as evidence and that he was prepared to accept that as his evidence.

HHJ Halliwell (sitting as a High Court Judge) excluded the evidence of Mr Rafiq, acknowledging at [378] that "*the irregularities in connection with the preparation and admission of Mr Rafiq's witness statement have tainted his testimony and I cannot safely rely on his evidence as an accurate and reliable account. I have thus excluded his evidence altogether from consideration*."

This case serves as a stark reminder of the importance of ensuring a witness's evidence is prepared in a language in which they are sufficiently fluent, as failure to do so could lead to such evidence being excluded or seriously tainted.

Opinion Evidence in Witness Statements

Polypipe Ltd v Davidson [2023] EWHC 1681 (Comm)

In *Polypipe*, HHJ Hodge KC (sitting as a High Court Judge) refused the Defendant's application to strike out the witness statement of a factual witness,

in circumstances where the witness was originally intended to be instructed as an expert and his statement contained opinion evidence.

The claim concerned alleged breaches of warranties in an agreement for the sale of shares in a group of companies involved in building protection products and systems. The breaches of warranty related to three projects in Ireland and a sum in excess of £1.7 million was claimed. Directions at the case management conference included provision for expert evidence, however no expert in the field of ground engineering was identified, nor was any provision made for such an expert to be identified at any particular period of time.

Before the exchange of expert reports, the Claimant identified Mr Wilson as its intended ground engineering expert, but instead of submitting an expert report, it submitted a witness statement on his behalf. The Claimant intended to use a different expert, considering Mr Wilson to be insufficiently independent of the investigation due to his close association with the Claimant's business and interests (see [62]). The statement described the investigations he undertook in relation to failures at the three sites and the advice he provided to the Claimant in relation to such failures.

The Defendant applied to strike out the witness statement, contending that it was "*framed entirely as a quasi-expert report and it would not be practicable to separate out any factual matters to which Mr Wilson can properly attest*" (see [36]).

HHJ Hodge KC refused to strike out the witness statement, noting at [38] that "*the status of Mr Wilson as an expert does not prevent him from giving factual evidence, and from expressing permitted opinions in the course of doing so*." The Judge considered that Mr Wilson was using his relevant expert knowledge in his witness evidence, and was therefore "*entitled to put that expertise before the Court, not as an independent expert, but as a witness of fact*" (at [44]). The Judge was therefore satisfied that "*Mr Wilson's witness statement contains a mixture of both factual matters and permissible opinion on those facts of which he has direct or hearsay knowledge, and permissible commentary on matters arising from those facts within his own particular expertise*" (at [39]). HHJ Hodge KC did, however, acknowledge that such opinion should not be given the same status as formal expert opinion evidence permitted under CPR 35.4, and held that the weight to be given to such opinion evidence was entirely a matter for the trial judge.

Disclosure

In 2023, the English courts issued a significant number of judgments addressing disclosure. Below, we summarise some of the highlights and key developments.

Consequences of Disclosure Failures

Finsbury Food Group Plc v Axis Corporate Capital UK Ltd & Ors [2023] EWHC 1559 (Comm)

In *Finsbury*, the High Court ordered that all costs incurred as a result of the Claimant's disclosure failings were to be paid to the Defendants on the indemnity basis.

This case concerned a claim against the Defendant insurers under a Buyer-Side Warranty and Indemnity Insurance Policy (the "**Policy**"). The Policy was issued in connection with the Claimant's acquisition of a specialist manufacturer of gluten-free bread, Ultrapharm Ltd ("**Ultrapharm**") for £20m under a Share Purchase Agreement dated 31 August 2018 (the "**SPA**"). The Claimant alleged that Ultrapharm had breached certain warranties in the SPA that were provided by its CEO, for having failed to adequately disclose that there had been price reductions and recipe changes to some of Ultrapharm's products prior to the acquisition. They alleged that the reductions and changes reduced the overall value of Ultrapharm's business by over £3m and claimed against the Defendants under the Policy.

At trial, the Claimant's claim was dismissed in its entirety. Mr Persey KC (sitting as a judge of the High Court) made several noteworthy comments in respect of the Claimant's disclosure failings in the lead up to trial and the standard of the witness statements filed in support of its claim. As a result of the Claimant's disclosure failings, the Court ordered that all costs incurred as a result of the Claimant's late disclosure during the trial and consequent adjournments of the trial were to be paid to the Defendants on the indemnity basis.

Attention was first drawn to the Claimant's disclosure failings during the Defendants' written opening submissions; during the Claimant's oral opening, the Court was told that a further four relevant documents had just been disclosed and that it was suspected that there might be more. Mr Persey KC adjourned the trial by one week and made orders for disclosure. It subsequently became clear that the scope of the undisclosed documents by the Claimant's legal representatives was wider than had first been appreciated.

Approximately 2,000-2,200 further documents were disclosed by the Claimant after the trial had commenced, which the Court was satisfied were directly relevant to the issues in the case. The Claimant's legal representatives accepted that the shortcomings in the disclosure process were their responsibility. They attributed these shortcomings to: (i) a failure to properly instruct and oversee paralegals who carried out the initial disclosure on the issues in the case; and (ii) a failure of the subsequent Technology Assisted Review ("**TAR**") to discover additional relevant documents because the training set of documents skewed the TAR from finding documents relevant to the issues.

Mr Persey KC noted that this was "*profoundly unsatisfactory*", commenting that the solicitors' approach to disclosure "*fell far below that which was required. The initial discovery should not have been left to paralegals who had no real understanding of the issues in the case. The Training Set for the TAR should have been properly prepared and directed towards the full range of issues*". The Judge concluded on the matter that it was fortunate the Court and parties were able to accommodate the postponed hearing date so that the further disclosure exercise could be carried out.

The case serves as a salient reminder to parties and their legal advisors about the cost consequences of failing to diligently conduct the disclosure process. Our full discussion of the decision can be found here.

***Terre Neuve SARL & Ors v Yewdale Limited & Ors* [2023] EWHC 677 (Comm)**

In *Terre Neuve*, the High Court made an 'unless' order, requiring the Defendants to disclose various data sources and hard copy documents to a court-appointed independent e-disclosure provider (the "**EDP**"), in circumstances where they had failed to conduct their disclosure exercise properly.

The case concerned the alleged misappropriation of monies paid by the Claimant to the Defendants as part of a "*tax optimisation*" scheme. Following a Case Management Conference addressing disclosure issues, the Defendants produced approximately "*1,800 pages in the form of one continuous PDF, with the result that there were no native documents or original metadata*". Following correspondence between the parties in which the Claimant was highly critical of the Defendants' production, the Claimant applied to the Court seeking an extensive disclosure order. The Claimant requested, *inter alia*, that: (i) all relevant devices, data sources and access to all relevant email and/or phone accounts were handed over to an independent EDP to be appointed by the Court; (ii) all documents identified as responsive by the EDP to the existing search terms would be provided to a court-appointed independent lawyer who would review the relevant documents for production, such that disclosure could be conducted in the usual way; and (iii) unless the Defendants complied with these disclosure requests, they would be debarred from defending the proceedings. The Claimant made the application on various grounds, including on the bases that: "*there had been a wholesale failure to conduct disclosure*", native files had not been provided, not all data sources had been reviewed, the Defendants had not understood their obligation to disclose adverse documents, and allegations of fraud were present.

The Court held at [30] that an extensive disclosure order such as that sought in this case would "*necessarily introduce a significant additional cost into the litigation, and the potential for satellite litigation*" and therefore "*should not be seen as simply another tool in the box of a litigant with legitimate complaints about the other party's disclosure*." In light of this, the Court noted at [31] that it would consider the following factors in determining whether such an order would be proportionate:

1. "*Whether the disclosure* is *being sought for the purposes of the court's adjudicative jurisdiction, where it is possible for adverse inferences from deficiencies in disclosure to make good some of the adverse effects of inadequate disclosure …*";

2. "*How significant the documents are in the litigation, and whether there are alternative means of addressing the issues to which the documents related*";

3. "*Whether the documents have been subject to no review at all … or whether one party believes (as is frequently the case) that the job has not been done as well as it should have been…the usual remedy in the latter case will usually stop far short of the order sought here*";

4. "*The degree of intrusion the order represents*";

5. "*How compelling the case is that the relevant party has failed properly to conduct the disclosure exercise, and how widespread or significant the apparent failure is*"; and

6. "*The cost of the exercise, having regard to the amount of the claim*".

In considering these factors, the Court found that (with the exception of electronic devices and email accounts containing personal information) an 'unless' order was proportionate, and that it was appropriate for numerous data sources and hard copy documents to be provided to an EDP for review. This case provides welcome guidance as to the factors the Court will consider when an application is made for an EDP to be appointed on the basis of a party's inadequate disclosure.

Agency in the Disclosure of Third-Party Documents

Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe) Ltd [2023] EWHC 548 (Comm)

In *Loreley,* the High Court affirmed the legal principles which govern the question of when a third party's documents are sufficiently within the control of a litigant party.

In the case, the Defendant applied for disclosure from KfW, a creditor of the Claimant, of documents held by two of KfW's employees who had acted as agents for the Claimant. The application was made on the basis that such documents were to be regarded as within the Claimant's control.

Cockerill J first provided a helpful restatement of the law in relation to control of documents in the possession of third parties noting, in particular, that:

1. Disclosure against a third party is exceptional, or, at least, not normal.

2. The authorities reveal a degree of "*stringency*" to the test of control.

3. There needs to be evidence of the requisite degree of control—a right of access that is "*unfettered*" (*Ardila Investments v ENRC* [2015] EWHC 3761). An expectation of a third party's compliance with a request to produce documents is not sufficient.

4. It is not sufficient generally to show simply a close legal or commercial relationship between the party to the litigation and the third party being asked to produce documents. Something more (*i.e.*, specific and compelling evidence) is necessary.

5. There is a need to show that there is not simply a specific but a general right for the litigant party to ask the third party for access to the relevant documents (*Berkeley Square Holdings v Lancer Property Asset Management case* [2021] EWHC 849 (Ch)).

6. The right can be predicated on an agency relationship but also applies more broadly than that. There must be an arrangement or understanding that the holder of documents will search for relevant documents or make documents available to be searched (*Berkeley Square*), and in that context it may be key to consider whether access has been permitted in the past (*Ardila*).

Applying these principles to the facts, Cockerill J held that the requisite hallmarks of control were not satisfied and rejected the Defendant's request for disclosure by the Claimant of documents held by KfW. Cockerill J highlighted that the essential consideration was whether there was a specific nexus or link between the scope of the third party's agency and the documents requested. The fact that an individual acted as an agent does not mean that there is a "*reaching back*" to infer control over documents that the individual held in its capacity as an employee at the time of the agency relationship. Our detailed note of this case can be found here.

Failure to Explain Discrepancies in Disclosure Amounts to Failure to Comply with Disclosure Obligations

Adams & Ors v FS Capital Ltd & Ors [2023] EWHC 1649 (Ch)

In *Adams*, the High Court held that a Defendant had not complied with its disclosure obligations due to its failure to adequately explain why certain documents disclosed electronically contained a different metadata date to those evident on the face of the disclosed documents.

Johnson J noted at [111] that the metadata for a number of documents disclosed electronically by the Defendants stated that they had been created at a later date to the respective dates shown on the documents themselves. When asked about

this discrepancy in cross-examination, the director of the Second Defendant "*speculated*" that the metadata may have been changed because the document management system of the Second Defendant's corporate services provider "*allowed documents to be lifted out of the system, to be worked on, and then to go back into the system when the work on the document was complete.*"

Johnson J commented at [112] that this was not an adequate explanation of the discrepancy because the director "*did not himself have the necessary knowledge, either of* [the corporate services provider]'*s document management system or of the relevant IT processes, to explain the discrepancy between the documents and their metadata.*" This led the Judge to conclude "*that the Second Defendant had not properly complied with its disclosure obligations in this respect.*" He went on to note that if the central issue in the case had been the date on which the particular documents had been created, "*the consequences … might have been serious for the Second Defendant.*"

This decision serves as a reminder of the importance of disclosing original, unaltered metadata, and providing fulsome explanations in circumstances where relevant metadata no longer exists or has been irretrievably altered. These steps are clearly even more important (and the potential consequences even more "*serious*") where the provenance of the documents is a central issue in the dispute.

Disclosure of Work-Related Content on Employees' Personal Devices

Republic of Mozambique v Credit Suisse International & Ors [2022] EWHC 3054 (Comm)

In *Republic of Mozambique*, Knowles J held that the Court had jurisdiction under PD 51U (now PD 57AD) to make disclosure orders in respect of materials held on employees' personal devices in circumstances where the employer has "control" of those documents.

The Court held that where English law applies to the relationship between the party (*i.e.*, an employer) and the 'non-party' (*i.e.*, the past or present employee or office holder), it will "*readily find that the party has "control", in the form of a right to possession or to inspect or take copies of documents*" (see [63]). Where a law other than English law governs the relationship (which may be a different law to that which governs the underlying dispute), the situation may be more complicated. The Court accepted that where "control" is required to make the orders sought, that issue will need to be determined as a first stage. However, the Court is also able to make orders under its general case management powers (CPR 3.1(2)(m)) which would "*help illuminate what would and would not be just and proportionate in dealing with the litigation*" (see [72]).

Pursuant to these powers, Knowles J ordered the Claimant to identify each individual from whom it had already sought consent to search and give disclosure of relevant documents on that individual's personal email accounts or devices in

the litigation. It also ordered that the Defendant was entitled to know which individuals had given their consent. However, the Court held that the Defendant was not entitled to know whether, for the individuals who did not give their consent, that request had been expressly refused (and on what grounds) or whether the request had simply been ignored. The Court indicated that if the Defendant wanted to pursue a further order requiring the Claimant to make a request to secure access to relevant documents on individuals' personal email accounts or devices, it would expect to make directions for expert and other evidence to deal with the question of "control" as a matter of Mozambique law.

This case establishes that in circumstances where the question of "control" is contested, the court can make orders which ask a party to explain what steps have already been taken to seek consent from current and former employees on their personal emails and devices, and whether consent has been given. These orders can be made exercising the court's broad case management powers in order to ensure that litigation is managed efficiently and at proportionate cost. This judgment also serves as a timely reminder that litigants are increasingly seeking disclosure from employees' personal devices. Companies should therefore be cognisant of this risk, and ensure that they have clear policies on the use of personal devices for business communications in the event of any future litigation. Our full discussion of this case can be found here.

High Court Orders Disclosure of Best Available Contemporaneous Evidence of an Issue

***Merrill Lynch International v Citta Metropolitana Di Milano* [2023] EWHC 1015 (Comm)**

The High Court rejected an application for specific disclosure of a document under CPR PD 57AD but granted disclosure of this document under its general case management powers under CPR 3.1(2)(m), on the basis that it was the "*best available evidence*" in the "*exceptional circumstances*" of an important issue to be determined in a jurisdictional challenge.

Disclosure under CPR PD 57AD

The Claimant applied for specific disclosure of an unexecuted version of an executed contract that was allegedly mentioned in a factual witness statement pursuant to CPR PD 57AD paragraph 21. For context, the witness statement stated that no executed version of the contract had been located. Mr Houseman KC (sitting as a Deputy Judge of the High Court) rejected this application on the basis that the document had not been "*mentioned*" in the witness statement, and because the unexecuted contract could not be held to be a "*copy*" of the executed contract (*i.e.*, the document explicitly mentioned in the witness statement).

Disclosure under CPR 3.1(2)(m)

The Claimant made an alternative application requesting that the Court exercise its acknowledged residual power under CPR 3.1(2)(m) to order disclosure of the unexecuted contract. The Court noted at [38]-[39] that it would be "*unusual*" for it to order specific disclosure in the context of a jurisdiction challenge on the basis that a "*jurisdiction challenge is not an opportunity for a detailed or exhaustive factual investigation*." However, it held that a jurisdiction challenge should "*proceed on as equal a footing as achievable within the applicable procedural regime*" and that a court could make an order for specific disclosure in "*exceptional circumstances*" (see [40]).

Houseman KC held that such exceptional circumstances applied in the present case, noting that "*the key feature which drives me to this conclusion is the fact that the jurisdictional analysis concerns factual events dating from 2001-2002 in circumstances where there is a paucity of direct witness or contemporary documentary evidence*" and that the unexecuted contract was the "*best available evidence*". Houseman KC went on to note at [46] that this finding did "*not cut across or sidestep the regime prescribed in PD57AD*" as "[s]*pecific disclosure which is reasonable and proportionate can, in exceptional situations, be ordered even where the document is not "mentioned" in a formal sense and even if it proves to be "adverse" to the disclosing party as a matter of jurisdictional analysis.*"

Although Houseman KC made an order for disclosure of the unexecuted contract, he highlighted that "[t]*here are unlikely to be jurisdictional challenges which resemble this one; and each case, even ones involving factual nexus evaluations in respect of events over two decades old, must and will turn on their own particular circumstances and evidential landscapes*." As such, litigants should note that orders for specific disclosure made using the court's case management powers are the exception rather than the norm. This decision has recently been approved in *Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies PLC* [2023] EWHC 2506 (TCC), in which Smith J found (at [66]) that she should "*accept the existence of a residual jurisdiction but … take a restrictive view of its reach*". Rejecting the Claimant's application for specific disclosure, Smith J noted that "*specific disclosure pursuant to the residual jurisdiction in CPR 3.1(2)(m) will only be granted where it is reasonable and necessary and where it does not undermine the integrity of PD57AD*."

High Court Grants Early Disclosure in Group Litigation Claim

***Aurora Cavallari & Ors v Mercedes Benz Group AG & Ors* [2023] EWHC 1888 (KB)**

The High Court granted an application for early disclosure in a group litigation, finding that: (i) early disclosure does not require an applicant to show it cannot plead its case without the disclosure; and (ii) early disclosure will not more readily be ordered in group litigation, but the "*something important or significant*" required for an application to be granted may more readily be satisfied.

In *Cavallari*, the proceedings relate to the Defendants' allegedly unlawful activity concerning diesel engine emissions. The First Defendant was an addressee of unredacted decisions by the European Commission and the South Korea Fair Trade Commission (the "**KFTC Decision**") which imposed fines on other car manufacturer groups for anti-competitive cartel arrangements; however, none of the Defendants had been fined under either decision. Only redacted copies of these decisions were available for the Claimants to view on the European Commission's and KFTC's websites. The Claimants applied for early disclosure of documents arising out of these decisions, including unredacted versions of the decisions themselves.

The Defendants agreed to provide early disclosure of the European Commission decision and certain documents from the Commission file. However, the Defendants objected to the early disclosure of the KFTC Decision on the basis that it was inadmissible, meaning the Claimants "*cannot rely upon those findings in this litigation*" and would therefore "*still have to prove the matters in respect of which the KFTC Decision makes findings*". The Defendants also objected to the Claimants' request on the basis that (i) the amount of disclosure sought was disproportionate, as many documents on the KFTC file would be provided in the disclosure relating to the European Commission decision; and (ii) no KFTC index of documents relating to the KFTC Decision existed. The Defendants also placed reliance upon the fact that the Claimants had already pleaded their case in considerable detail to demonstrate that the test for early disclosure had not been made out.

The Court made various notable findings in its judgment. Namely, the High Court:

1. accepted that that it is well-established that the scope of any disclosure ordered by the Court "*must be reasonable and proportionate at the point in time at which it is ordered*" (see [23]);

2. noted that it had considered the application in light of the CPR and the Damages Directive 2014/104/EU, which require that disclosure must be proportionate to "*the legitimate interests of all parties*", taking into particular consideration: (i) the nature of the available evidence; (ii) the scope and cost of disclosure; and (iii) whether the disclosure sought contains confidential information and what arrangements exist for protecting any such information;

3. noted that applications for disclosure of documents held on file by the EU competition authority must be specific to prevent "*fishing expeditions*";

4. held that there is no mandatory requirement for an early disclosure application that a party must be able to show it cannot plead its case without the disclosure. However, Fraser J noted that such a point would be a "*powerful factor*" in ordering early disclosure; and

5. found that it was "*verging on extraordinary*" that no index or contents page existed of the KFTC file containing thousands of pages of documents (see [22]). Fraser J ordered the Defendants to create an index of documents related to the KFTC Decision on the basis that this was required to ensure "*the efficient case-management of this group litigation*".

Further, the Court noted that when general disclosure principles are applied to group litigation, "*a different outcome might occur*" due to the scale of such litigation. Fraser J noted at [36] that "*in group litigation … if a particular discrete document is known to exist, and to be directly relevant to the issues … it would be more usual to order early disclosure of it, than if the litigation were more conventional involving very few parties*". The Court commented that this does not mean that early disclosure will more readily be ordered in group litigation but that "*the "something important or significant" in group litigation may more readily be satisfied in group litigation than otherwise*", because refining the issues between the parties, case management and co-operation by the parties "*is even more important in group litigation*".

The Court ordered disclosure of the KFTC decision but rejected the Claimants' request for other documents in relation to it on the basis that the request was too wide and not sufficiently narrowly focused for early disclosure. The Court also held that the preparation of the KFTC index by the Defendants would enable the Claimants to make more focused requests going forward.

Privilege

Jones v Tracey & Ors [2023] EWHC 2256 (Ch)

In *Jones v Tracey*, the Court gave helpful guidance on when without prejudice privilege applies. The underlying proceedings related to probate under a contested will and this decision concerned the costs of those proceedings.

Ms. Cano, the Third Defendant ("**D3**"), was the estranged sister of the deceased and opposed the grant of probate sought by the Claimant, Mr. Jones, under her brother's will. D3 contested the validity of the will (which left her nothing) claiming that because the original will could not be located and only a copy was available, the presumption was that the original had been destroyed and her brother had died intestate. The Claimant was successful, probate was granted and he sought costs from D3.

One issue which arose was whether a letter from D3 to Mr. Jones dated 7 June 2023 (the "**7 June letter**"), was covered by without prejudice privilege, having been marked as such. In the 7 June letter, D3 asked the Claimant why he was unwilling to attend mediation in circumstances where D3 had confirmed her agreement to attend some form of ADR.

D3 contended that the Claimant's costs should be reduced due to his refusal to attend ADR, and sought to rely on the 7 June letter. The Claimant objected because the 7 June letter purported to be subject to without prejudice privilege. Whilst other communications between the parties had been marked "without prejudice save as to costs" the 7 June letter was marked only "without prejudice". The Judge reviewed the letter and concluded that it was not properly covered by without prejudice privilege. In doing so, he provided the following helpful guidance:

1. it will normally be the case that the writer of a letter can be taken to have intended to mark a letter in a particular way, or otherwise to have intended to write an open letter. However, if it is clear from the context that a letter was intended to be open, or without prejudice or without prejudice as to costs, it will be treated as such;

2. a letter which is not marked 'without prejudice' that falls within a chain of communications in the context of settlement negotiations will be treated as being without prejudice unless the opposite intention is obvious. The converse may also be true;

3. the true nature of the communication must be established objectively without regard to evidence of subjective intention; and

4. communications between parties about the possibility of, for example, participating in a mediation do not need to be 'without prejudice' and it will usually be preferable for both parties to be able to rely upon such communications. They are more likely to be open than without prejudice.

Further, the Judge held that the 7 June letter did not contain an offer and did "*not relate to communications about a specific offer […]. It is right therefore that I have regard to it*".

The case provides a helpful summary of the guiding principles for without prejudice privilege and is a reminder to litigants to give careful thought as to whether to mark communications as being subject to privilege.

Taylor & Ors v Evans & Ors [2023] EWHC 935 (KB)

In *Taylor*, the Court considered the approach to obviously-privileged material being inadvertently disclosed in the context of an investigation rather than typical adversarial litigation.

The claim arose from the publication of a report prepared by Labour Party staff in relation to anti-semitism allegations (the "**Report**"). The Claimants were individuals who had been named in the report and they claimed that inclusion of their personal data was, *inter alia*, a breach of GDPR, a misuse of their private information and a breach of confidence. The Defendant, a representative of the

Labour Party, said that the Report was not published under its authority and had been leaked by third parties. Part 20 proceedings had been issued against certain third parties.

There were three applications before the Court, one of which concerned privilege. The privileged document in question was an email from Ms. Murphy (a third-party subject to a Part 20 claim) to a lawyer, Mr. Howe, who had previously provided legal services to both Ms. Murphy and the Labour Party. The email came into the possession of the Labour Party when, as part of its investigation into the leak of the Report, it found the email on Ms. Murphy's laptop (which belonged to the Labour Party).

In his judgment, Chamberlain J noted that a party who has a document to which privilege attached is entitled to deploy that document in legal proceedings, however, if it has not yet done so, "*the party whose privilege it is can require all copies of the document to be delivered up and can restrain* [the other party] *from making use of the information*". Ms. Murphy had not made any such application but the Labour Party had pre-emptively sought a declaration that the email was not confidential and therefore not privileged.

Having reviewed the email, Chamberlain J concluded that there could "*be no real doubt that had it not been disclosed to the Labour Party, Ms Murphy would be entitled to withhold it from disclosure in this litigation, i.e., it is prima facie privileged. The real question is whether the circumstances of its discovery by* [the Labour Party] *were such as to mean that the email ceased to be confidential as against the Labour Party*".

The Judge set out the principles on the confidentiality of privileged material as recently summarised by Simon Salzedo KC in *Jinxin Inc. v Aser Media Pte Ltd* [2022] EWHC 2856 (Comm) including: (a) confidentiality is an essential prerequisite of a claim to privilege; (b) there is a presumption that a communication between a client and lawyer will be confidential, but if the communication is shared with a third party, the confidence may be lost as against that party; (c) the critical question is whether the information has been imparted "*in circumstances importing an obligation of confidence*"; (d) the question whether the information was imparted in circumstances importing an obligation of confidence requires an intensive focus on the facts to assess what a reasonable person in the position of the party seeking to use the information would have understood from all the circumstances in which the information was received; and (e) the principle that information can be confidential as against certain persons, and in relation to certain uses of it, as opposed to having to be absolutely secret or else unrestricted, is important in the law of privilege.

Chamberlain J concluded that the circumstances in which the email had come into the possession of the Labour Party were not such as to destroy its confidentiality and privilege had not been lost.

Eurasian Natural Resources Corp Ltd v Director of the Serious Fraud Office [2023] EWHC 2488 (Comm)

In this case, the Court considered an application by the Claimant requesting it to look under redactions made by the Defendant or alternatively, to require the Defendant to provide more information as to the purpose of the redactions. The case is a good example of the Court's reluctance to exercise its discretion to look behind claims to privilege.

In April 2013, the Serious Fraud Office (the "**SFO**") launched a criminal investigation into Eurasian Natural Resources Corporation Limited ("**ENRC**"). ENRC alleged that sensitive information about it was leaked by SFO staff to third parties during the investigation. The SFO conducted an internal investigation and produced a redacted report (the "**Report**") on its findings. ENRC challenged the redactions on three bases, one of which was privilege. ENRC applied for an order that, pursuant to PD 57AD, the Court should inspect the unredacted Report to determine if the redactions on the basis of privilege had been rightly made. Alternatively, ENRC sought an order that the SFO provide "*a description of the general nature or purpose of the information (and its corresponding relevance to the reasoning of the* [Report])".

Dame Clare Moulder DBE (sitting as a Judge of the High Court) set out the test under PD 57AD, noting that the Court may inspect documents if that is necessary to determine whether the claimed right or duty exists, or the scope of that right or duty.

The Court refused to exercise its discretion to review the unredacted version of the Report, holding at [54] that "*whilst the* [Report] *is a single document and the number of challenged redactions on the grounds of privilege are limited this is not of itself sufficient to warrant an inspection of a document absent other factors which tend to support inspection. Whilst the power of the Court to inspect documents is not limited to cases in which (without sight of the documents in question) the court is "reasonably certain" that the test has been misapplied, the Court has to be cautious and mindful of the danger of looking at documents out of context at the interlocutory stage. […] the nature of the challenges raised in this case would in my view require the Court to have knowledge of the context which […] would probably not be apparent merely by reading the relevant sections in the* [Report] *in order to assess the claim to privilege*".

The Court also refused to order that the SFO provide more information regarding the redactions. Citing Butcher J in *ENRC v Dechert LLP, Gerrard & the Director of the SFO* [2020] EWHC 1002 (Comm), the Judge noted at [61] that in certain cases "*it may also be desirable for an additional 'clear explanation' […] of the claim of entitlement to redact also to be provided. This may well be appropriate in cases where the basis for redaction is unlikely to be apparent*". However, the Judge held at [65] that it was "*difficult to see*" how further information could be provided without defeating the SFO's claim to privilege, as it would have required the SFO to disclose the substance of the communications. Even if it were possible to provide

further information without defeating the claim to privilege, the Judge found that the SFO had already provided further information as to the basis of the redactions and there was no entitlement to more information.

Cocoa SDN BHD and another v Maersk Line AS **[2023] EWHC 2168 (Comm)**

In *Cocoa SDN BHD*, the Court considered whether privilege could be waived over documents which had been referred to in correspondence but not "deployed" in the proceedings.

The underlying dispute related to the alleged damage to a cargo of Nigerian cocoa beans carried by the Defendant on its vessel under a bill of lading. Expert evidence had been adduced and the Claimants' expert had noted in their report a discrepancy between a stuffing and loading report (issued by a third party, JLB), and other documents. The Claimants' solicitors informed the Defendant, via email, that they had contacted JLB requesting an explanation for the discrepancy identified by the experts and, without waiving privilege, that JLB had confirmed that the discrepancy was an error. The Claimants asserted privilege over the communication with JLB and the Defendant applied for disclosure of the email correspondence between the Claimants and JLB.

The parties agreed that privilege could attach to communications with third parties with the purpose of gathering evidence for existing proceedings, however, the Defendant argued that privilege had been waived when the Claimants' solicitors referred to what they had been told by JLB in an email. They also argued that the Claimant should not be permitted to 'cherry pick' evidence without the remainder being provided, citing Elias J in *Nea Karteria Maritime Co Ltd v Atlantic Great Lakes Steamship Corporation No.2* [1981] Com LR 138: "*Where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. This is frequently referred to as the 'cherry picking' principle. A party cannot seek to gain an advantage in litigation by placing part of a document before the court and withholding the remainder*".

The Claimants argued that the email from their solicitors to the Defendant was not in evidence in the proceedings and still less could it be said to have been 'deployed' as evidence. They asserted that waiver only arose if the document had been deployed. "Deployed" meant deploying in the strict sense, as per Hobhouse J in *The Zephyr* [1984] 1 Lloyd's Rep 58 where it was noted that when looking at whether evidence has been deployed, one considers "*what is in evidence and what is not in evidence*". The Claimants also argued that the email they sent to the Defendant was in the trial bundle because the parties had agreed to include *inter-partes* correspondence and not for any other reason.

The Judge refused to order disclosure of the material sought, holding at [53] that the email from the Claimants' solicitors to the Defendants: "*has yet to be deployed in evidence. The privilege in relation to the communications which lay behind it has not been waived. I am told that it will not be deployed, so, the question of waiver may not arise at any stage. I hold, therefore, that, certainly at this stage, privilege has not been waived. I cannot order the documents to be disclosed*".

***Mond v Insolvency Practitioners Association* [2023] EWHC 477 (Ch)**

In *Mond*, the Court adjudicated on a summary judgment application which required it to consider the extent to which a waiver of privilege can be limited in the course of proceedings. The Court noted that the law in this area is still developing.

The Claimant, Mr. Mond, is a licensed insolvency practitioner and chartered accountant and the Defendant is his regulatory body (the "**IPA**"). The claim arose in relation to a disciplinary decision of the IPA which upheld certain complaints made about Mr. Mond's conduct. Mr. Mond instructed new counsel in order to appeal the disciplinary decision to the Appeals Committee of the IPA (the "**AC**"), and one of his grounds of appeal was that his original counsel had a serious conflict of interest which prejudiced his case. In his witness statement in support of the appeal, Mr. Mond exhibited instructions to, and advice from, his former counsel. In his witness statement, he stated that where materials were disclosed, they had been disclosed with the proviso that they remain confidential and that any waiver of privilege was limited to what is strictly necessary for the appeal.

The Defendant sought disclosure of all written communications and notes of oral communications between Mr. Mond and his former counsel contending that he could not 'cherry pick' the privileged material he chose to put in evidence. The AC ordered the disclosure and it was provided, again with the proviso that it was only being provided for the purposes of the appeal. The AC allowed the appeal and remitted the matter back to the disciplinary committee. In correspondence regarding next steps for the re-hearing, Mr. Mond explained that the privileged material had been disclosed for the purposes of the appeal only, and could not be used in the re-hearing by the disciplinary committee. He also insisted that the IPA use different counsel who had not seen the privileged material. The IPA did not agree to change its counsel and Mr. Mond made an application for a declaration that he had not waived privilege, among other things. The IPA applied for summary judgment in the declaratory action.

The IPA argued that Mr Mond's conduct was not consistent with the maintenance of privilege.

It was submitted by the Claimants that there "*is no case that deals specifically with the circumstances in which the limits expressly placed by the disclosing party on a waiver of privilege can be departed from, and the relevant test was therefore unclear*". The Court considered a number of authorities and concluded that there was room

for argument that privilege had been maintained, and the Judge declined to grant the summary judgment application. In doing so, the Judge found at [61]: (i) the limits of Mr. Mond's waiver had been clearly stated; (ii) Mr. Mond had made the disclosure in order to vindicate his Article 6 rights because he had not received a fair trial which was not to be characterized as simply obtaining a litigation advantage; and (iii) the re-hearing was capable of taking place without the privileged material. The matter should therefore be decided on the basis of fuller argument and evidence, which would allow for "*greater consideration of the case law that might assist*" and could not be determined summarily.

***Flowcrete UK Ltd & Ors v Vebro Polymers UK Ltd & Ors* [2023] EWHC 22 (Comm)**

In *Flowcrete*, the Court provided helpful guidance on inadvertent disclosure of privileged material, confirming that in certain circumstances, the Court will intervene to limit, or prevent, the use of mistakenly disclosed privileged documents. The Court refused, however, to intervene in this instance.

The Defendants were former employees of the Claimants against whom a claim was brought for misappropriation and misuse of confidential information, and breach of covenants in employment contracts. The Defendants provided disclosure, which included two lengthy PDFs consisting of numerous different documents. One month later, the Defendants asserted both litigation and legal advice privilege over the PDFs, and requested that they be destroyed. They did not provide any explanation as to why the PDFs were privileged or why they had been disclosed. When their request was refused by the Claimants, the Defendants sought injunctive relief preventing the use of the documents and requiring their destruction. By the time of the application, the Defendants had identified certain individual documents within the composite PDFs as being subject to litigation privilege, rather than asserting privilege over the entire PDFs themselves.

For the purposes of the application, the parties agreed that the identified documents were privileged. Both parties agreed that the governing principles on inadvertent disclosure were those set out in *Al Fayed v Commissioner of the Police of the Metropolis* [2002] EWCA Civ 780, which include that the Court may intervene if the documents have been disclosed by obvious mistake. A mistake is likely to be considered obvious where the documents are received by a solicitor, and the solicitor appreciates a mistake has been made, and/or it would be obvious to a reasonable solicitor that a mistake had been made.

The Court did not accept that the documents had been disclosed by mistake, but noted that even if they had, the relief would not have been granted because it would not have been an obvious mistake. Had they been disclosed on a standalone basis, it may have been obvious that it was by mistake, but the documents were contained within a PDF compilation of other, obviously not privileged documents. The fact that the Defendants had not immediately raised the issue also went to the 'obviousness' of the mistake.

Part 36 Offers

When Is a Part 36 Offer Not a 'Genuine Attempt to Settle'?

***Yieldpoint Stable Value Fund, LP v Kimura Commodity Trade Finance Fund Ltd* [2023] EWHC 1512**

In *Yieldpoint*, the Judge held that the Claimant's offer to settle its claim for a sum equivalent to 99% of the principal claim was not a 'genuine attempt to settle the proceedings' for the purposes of CPR 36.17(5)(e). Therefore, it would be 'unjust' for the Claimant to benefit from the costs enhancements provided for by CPR 36.17(4)(a)-(d).

The Claimant, Yieldpoint Stable Value Fund, LP, succeeded against the Defendant, Kimura Commodity Trade Finance Fund Ltd, in its debt claim for repayment of US$5 million plus interest. During the proceedings, the Claimant had made an offer under CPR Part 36 to settle the dispute in exchange for US$4.95 million, inclusive of interest (the "**Part 36 Offer**"). The Claimant was awarded judgment for a higher sum than the Part 36 Offer and so applied to the Court for the costs enhancements provided for by CPR 36.17(4)(a)-(d).

The Judge concluded that it would be 'unjust' for those enhancements to apply. The Judge first considered that the Part 36 Offer was for a sum that represented 99% of the principal claim. This was considered to be a '*very high claimant offer*' (see [16]). The Judge also observed a theme arising out of the key authorities: that a '*very high claimant offer*' (*i.e.,* an offer involving a very small or negligible discount against the gross value of the claim and/or waiver of accrued interest) may only be vindicated where the claim itself was "*obviously very strong*", and could be so characterised at the time of the relevant offer. In *Yieldpoint*, this was not the case; the outcome of the case remained "*up for grabs to the end*" (see [23]).

In his closing remarks, the Judge noted at [29] that his conclusion "*should not be taken as any kind of discouragement to claimants making Part 36 offers. It is, if anything, an encouragement to make offers at a level not so perilously close to the full value of the claim in a case of such adversarial intensity*".

The English court has made clear that Part 36 tactical offers are "*both encouraged and supported in the interests of promoting settlement of disputes*". However, a '*very high*' Part 36 offer will only be appropriate where the claim itself is "*obviously very strong*" at the time of the relevant offer. The question of whether a Part 36 offer is 'too high' (*i.e.,* whether it constitutes a genuine attempt to settle), will involve an objective assessment of the specific facts of the case at the time of the relevant offer, and, so far as possible, be conducted without the benefit of "*hindsight gifted by a trial and its known outcome*". Our full discussion of the decision can be found here.

Colicci & Ors v Grinberg & Anor (Re Costs) [2023] EWHC 2075 (Ch)

The question as to whether a Part 36 offer was a 'genuine attempt to settle the proceedings' (CPR 36.17(5)(e)) arose again this year in *Colicci*.

Colicci concerned a dispute over shares in an ice-cream van business. The Claimants claimed to beneficially own the shares, and sought an order for their transfer. Ultimately, they succeeded and the Court had to decide the question of costs. The Court noted that the standard basis was the default approach. In deciding whether to depart from this approach and make an order for the Defendant to pay the Claimants' costs on an indemnity basis, the Court was required to consider, amongst other points, whether the Claimants' Part 36 offer of £150,000 (representing 9.4% of the shares' value, although the Claimants' primary claim was that they owned the shares) represented a 'genuine attempt to settle the proceedings' under CPR 36.17(5)(e).

The Court held that the outcome of the litigation was at least as advantageous to the Claimants as the proposals contained in their Part 36 offer. However, the Defendant denied that the Claimants were entitled to the cost enhancements provided for by CPR 36.17(4)(a)-(d), arguing that the disparity between the amount offered and the actual value of the shares—the offer was for £150,000, which represented 9.4% of the value of the shares when the offer was made—meant that it was not a 'genuine attempt to settle' the proceedings. On this basis, the Defendant asserted that there was no genuine element of concession in this offer.

The Court, however, rejected the notion that there was a threshold at which an offer would no longer be a '*genuine attempt to settle*'. The Court would consider each offer with regard to factors including the strength of the offeror's case. At [29], the Judge approved the remarks of Mr Houseman KC in *Yieldpoint*: the stronger the offeror's case, the less likely it is that an offer to settle at a small discount will be stigmatised as non-genuine.

Validity of Part 36 Offers in Insolvency Proceedings

Laverty v Greensill Bank AG (Re Greensill Capital (UK) Ltd (In Administration)) [2023] EWHC 2429 (Ch)

In *Laverty*, the High Court considered whether Part 36 offers could be made in insolvency proceedings. The administrators of two Greensill group companies, Greensill Capital (UK) Ltd (the "**UK company**") and Greensill Bank AG (the "**German company**"), applied to the High Court for directions under the Insolvency Rules 2016. The administrators disagreed as to which company legally and beneficially owned funds arising from the liquidation of group assets.

The German company purported to make a Part 36 offer (the "**Offer**"). The UK company initially rejected the Offer on the basis that it was not a valid Part 36 offer. Later, however, it changed its mind and purported to accept the Offer.

In an about-turn, the German company denied that its Offer was a valid Part 36 offer. It argued that the rejection of the Offer extinguished it. Had the Offer been a valid Part 36 offer, it would have remained open for the UK company to accept despite their initial rejection of it under CPR 36.11(2). The German company argued:

1. Applications to the Court for directions by officeholders in insolvency proceedings, even where entitlement to assets was disputed, cannot be characterised as a 'claim, counterclaim or other additional claim' for the purposes of CPR 36.2(3)(a); and

2. It would be unjust for the Court to apply the draconian costs consequences of Part 36 to administrators who were doing their best to administer an overall fund to the benefit of those entitled to it.

The Court rejected both arguments, on the following grounds:

1. The directions application before the Court was, in fact, a substantive dispute, and "*form cannot trump substance*" for the purposes of CPR 36.2(3)(a);

2. CPR Part 44, which applies to insolvency applications, itself refers to Part 36 at various points (such as at CPR 44.9); and

3. The Court has discretion when deciding whether to apply the costs consequences of Part 36 in their entirety. Where it would be inappropriate to do this, there is "*enough flexibility in the operation of Part 36 to provide the necessary adjustments*" (see [23]).

Was the Offer a Valid Part 36 Offer?

Having held that Part 36 *could* apply, the Court made short shrift of the German company's arguments that: (i) a finding as to the applicability of Part 36 was a 'condition precedent' of any settlement, as this was incompatible with the invitation to accept the offer, and (ii) there was mismatch between offer and acceptance because the offeror and offeree understood the provision for interest differently, as a "*subjective mismatch of intention… is irrelevant*" to whether a settlement is concluded. The German company was held to be bound by the Offer.

Making Liability-Only Offers under the Part 36 Regime

Mundy v TUI UK Ltd [2023] EWHC 385 (Ch)

In *Mundy*, the High Court provided much-needed clarity to those making liability-only Part 36 offers and considered the practice of having multiple active Part 36 offers as insurance against Part 36 costs consequences.

Mr Mundy suffered from food poisoning during an all-inclusive holiday in Mexico which he had booked with TUI UK. He claimed £25,000–£30,000 in damages and made two Part 36 offers at first instance, in the following order:

1. To accept £20,000 in full and final settlement of his claim; and

2. To settle liability on a 90/10 basis in his favour (an offer to concede 10% contributory negligence).

Mr Mundy was awarded £3,805.60. The County Court interpreted the second offer as an offer to accept 90% of the amount claimed, which would have been £18,000. Accordingly, the Claimant had not beaten either offer and so was not entitled to the costs benefits under Part 36. The Claimant appealed.

On appeal, the High Court concluded that the second offer to settle liability was an attempt by the Claimant to recoup a substantial premium for winning the case in circumstances where he had failed to beat his initial £20,000 offer. The Court considered this to be "*an attempt to use CPR 36.17 against itself, contrary to both its letter and spirit*" (see [41]). Mr Mundy's appeal was, therefore, not allowed.

The Application of the Henderson Principle to Part 36 Offers to Settle

Warburton v The Chief Constable of Avon and Somerset Constabulary [2023] EWCA Civ 209

In *Warburton*, the Court of Appeal considered whether the settlement of a claim through acceptance of a Part 36 offer, where the settlement omitted claims that *should* have been pleaded, would bar the Claimant from commencing new proceedings in respect of the omitted claims. The Court applied the *Henderson v Henderson* principle, which is the principle that a party must bring the whole of its case at the appropriate time or risk non-pleaded claims being barred.

The appellant, Mr Warburton, had claimed damages and injunctive relief against the respondent, the Chief Constable of Avon and Somerset Constabulary, for breaching the Data Protection Acts 1998 and 2008. Mr Warburton settled his claim relating to those breaches by accepting a Part 36 offer made by Avon and Somerset Constabulary. That Part 36 offer was an offer to settle "*the whole of the claim*" (see [23]).

However, the claim which Mr Warburton had settled related only to post-July 2019 breaches of the Data Protection Acts. Following the settlement, Mr Warburton claimed damages for pre-July 2019 breaches in new proceedings; this new claim was struck out by Bloom J on the basis of the *Henderson v Henderson* principle. Mr Warburton appealed this decision.

On appeal, the Court of Appeal first considered the scope of the settlement. Ambiguity arose because Mr Warburton had '*mentioned'* his potential claims for

pre-July 2019 breaches in pre-settlement correspondence concerning the claim for the post-July 2019 breaches, but had not included the earlier breaches in that claim.

As to whether the offer to settle "*the whole of the claim*" included the pre-July 2019 breaches, Lord Justice Phillips confirmed at [41] that such an offer "*is to be construed as relating only to the pleaded claims and therefore excludes from its scope any other claims, even if clearly articulated in a draft amended pleading which had been served but in respect of which the required permission to amend had not yet been obtained*".

Since the offer related only to the pleaded claims, which did not include the pre-July 2019 claims, the *Henderson* principle fell to be considered: although Mr Warburton's pre-July 2019 claims were not, strictly, included in the settlement, would his failure to plead the earlier claims when he could have done so bar his present claim?

The Court of Appeal concluded that it would. To exclude claims which had been raised, but not formally brought, from the scope of the *Henderson* principle would allow parties to bring claims later, of which they were aware at the time of the original proceedings, with impunity (see [52]). A settlement which did *not* include those second claims would not prevent the application of this principle [61]. Lord Justice Males went further, noting that the settlement amount itself reflected the totality of the claims, and that Mr Warburton's attempt to "*obtain further damages for a claim for which he has already accepted compensation*" was "*abusive*" of the Court's process.

Conduct of Parties

***Morgan Sindall Construction and Infrastructure Ltd v Capita Property and Infrastructure (Structures) Ltd & Anor* [2023] EWHC 166 (TCC)**

In *Morgan Sindall*, the High Court considered the distinction between, and consequences of: (i) unavoidable delays in a claim; and (ii) deliberate delays in a claim.

In the proceedings, the Defendant accused the Claimant of deliberately 'warehousing' its claim—in other words, abusing the legal process by commencing litigation with no real intention of pursuing the claim, as evidenced by the Claimant's alleged delay and inaction. The Defendant applied for the claim to be struck out for abuse of process, asserting that the Claimant had engaged in a three-year stalling exercise in order to avoid pursuing and resolving the claim.

The Court held in favour of the Claimant and refused the strike-out application. It accepted the Claimant's argument that the intention underlying the delay arose

out of, amongst other things, the Claimant's desire to streamline the legal process by running the claim against the Defendants concurrently with its claim against the Second Defendant's insurer. The Judge noted, at [95], that resolving the action with the Second Defendant's insurer was commercially sensible, and importantly was "*acknowledged by the First Defendant to be such*". The fact that the reason for the delay was related to increasing the efficiency of the proceedings was evidence of the lesser offence of delaying the proceedings, not 'warehousing' the claim. The Claimant's overall conduct, though slow, showed sufficient intention to engage in the legal process and properly pursue its claim.

The decision confirms that parties should pursue litigation in the most time-efficient manner to avoid the risk of successful strike out applications. However, where there are genuine reasons for delay, a party should always show continued engagement with the legal process to demonstrate that they are prosecuting their claim.

Our full discussion of the decision can be found here.

Costs/Funding/Interest

We summarise below some of the key developments and decisions on funding, interest and costs from 2023.

Funding

PACCAR Inc & Ors v Competition Appeal Tribunal & Ors [2023] UKSC 28

In *PACCAR*, the Supreme Court held that litigation funding agreements ("**LFAs**") which afford funders a share of any damages recovered, fall within the statutory definition of "*claims management services*" under s. 4(1) of the Compensation Act 2006 (the "**CA 2006**"), and so must comply with the statutory requirements for damages-based agreements ("**DBAs**").

The appeal arose from the second and third respondents' (UK Trucks Claim Ltd ("**UKTC**") and Road Haulage Association Ltd's ("**RHA**")) applications to bring collective proceedings before the Competition Appeal Tribunal ("**CAT**") against the appellants. The proposed collective proceedings comprised follow-on damages claims for compensation for loss caused by a 'cartel' between DAF Trucks N.V. and other truck manufacturers in breach of EU competition law.

UKTC and RHA had to show that they each had adequate funding arrangements to meet their own costs and any adverse costs orders made against them. Each relied on a separate LFA, affording the respective funder a percentage of any damages recovered in the litigation.

The issue was whether these LFAs: (i) constituted DBAs within the statutory definition under s. 58AA Courts and Legal Services Act 1990 (as amended, "**CLSA 1990**"); and (ii) in turn, were "*claims management services*" under s. 4(1) of the CA 2006.

The CAT held that the LFAs were not DBAs, and were therefore lawful and enforceable funding arrangements. The appellants in the underlying EU proceedings appealed the CAT's decision to the Supreme Court.

The appellants argued before the Supreme Court that the LFAs were "*claims management services*" because they provided "*other services in relation to the making of a claim*" in the form of "*financial services or assistance*" under Part 2 of the CA 2006 and s. 419A FSMA 2000. UKTC and RHA argued that the quoted wording applied only to the active management of a claim and that, under the LFAs, the funders had no active role in claim management.

The Supreme Court found in favour of the appellants. The LFAs fell within the definition of "*claims management services*" and were unlawful, because they did not comply with the formal requirements for DBAs. This was because, *inter alia*: (i) from its natural meaning and context, Part 2 of CA 2006 clearly intended to define "*claims management services*" broadly, rather than merely as active management; and (ii) there was no absurd result in finding that the term "*claims management services*" was not tied to the concept of active claim management.

PACCAR immediately rendered many LFAs unlawful under English law as they did not comply with the statutory requirements for DBAs. As a result, litigation funders had to renegotiate LFAs: (i) to provide for a return that is not based on a percentage of any damages recovered by the client (e.g., a return based on a multiple of the amount advanced by the funder); or (ii) to meet the statutory requirements for DBAs.

There have been policy concerns that the ruling in *PACCAR* weakens public access to justice by complicating the rules around LFAs and rendering many pre-existing LFAs unenforceable. In early 2024, the UK government announced it would reverse the "*the damaging effects of*" *PACCAR* "*at the first legislative opportunity*".

Therium Litigation Funding A IC v Bugsby Property LLC [2023] EWHC 2627 (Comm) ("*Therium*")

In the case of *Therium*, the High Court considered the implications of *PACCAR*, which held that LFAs affording funders a share of any damages recovered must comply with the statutory requirements for DBAs. The significance of *Therium* is the finding that LFAs which do not meet the statutory requirements for DBAs are not necessarily unenforceable. Instead, the only unenforceable provisions of the LFA would be those detailing the funder's purported entitlement to a percentage of any damages recovered.

Therium involved an application for an asset preservation/freezing order by a litigation funder against a company which had entered an LFA to fund its claims against Legal & General. The LFA provided that the funder's payment would not only be a (non-compliant) percentage of damages recovered by the company, but also a (compliant) multiple of the initial funding amount.

Though the company agreed to settle the claims, the litigation funder made the application to prevent the release of the settlement sum from Legal & General to the company, given the company appeared to be insolvent. The litigation funder argued that, under the LFA, any settlement sums payable to the company should be held by the company's solicitors on trust for the litigation funder, pending completion of the contractual mechanisms for distribution of the proceeds.

The issue in *Therium* was whether, following the *American Cyanamid* principles, there was a 'serious issue to be tried' that justified granting the litigation funder's application for an asset preservation/freezing order. The company maintained that there was not, since *PACCAR* rendered the LFA unenforceable because it did not meet the statutory requirements for a DBA.

The High Court granted the injunction. Notwithstanding *PACCAR*, the Judge held that there were serious issues to be tried regarding the enforceability of the LFA, including whether: (i) a DBA can be seen as an "*agreement within an agreement*", such that only the non-compliant damages-based payment provisions of the LFA would be unenforceable; and (ii) the non-compliant damages-based payment provisions were severable from the rest of the LFA.

Therium suggests that *PACCAR* does not necessarily mean the courts will find *all* the provisions of a non-compliant LFA unenforceable, simply because it contains provisions which are non-compliant with a DBA. The Judge cautioned that "*this is a developing area of law*" and that it would be appropriate for any court interpreting *PACCAR* to "*tread carefully*". Although permission to appeal was refused, further cases in 2024—together with the UK government's plan to reverse the "*damaging effects of*" the decision in *PACCAR*—may provide further guidance.

Diag Human SE v Volterra Fietta [2023] EWCA Civ 1107

In *Diag*, the Claimant—Diag Human SE ("**Diag**") instructed solicitors (Volterra Fietta, "**Volterra**") on an investment treaty arbitration claim against the Czech Republic. Diag and Volterra entered into a conditional fee agreement ("**CFA**"), whereby the fee paid to Volterra was increased by a 'success fee' worth over 100% of the discounted base fee in certain circumstances.

Though it was agreed that the success fee provisions of the CFA breached the relevant rules under section 58 of the Courts and Legal Services Act 1990 ("**CLSA**"), Volterra argued that: (i) they were entitled to sever the offending success fee provisions from the rest of the CFA, and instead recover just the

discounted base fee; (ii) alternatively, they were entitled to recover fees for services performed on a *quantum meruit* basis; and (iii) in any case, they were entitled to keep money already paid by Diag on account of costs. The High Court held against Volterra on each point, and Volterra appealed.

The Court of Appeal upheld the High Court's ruling. On (*i*), severance "*would fundamentally change the nature of the contract so that […] it would cease to be the sort of contract into which the parties had originally entered*". The Judge also held that severance was prohibited as a matter of public policy since, should Diag ultimately lose the arbitration, Volterra would effectively recover the same amount of fees as if the entire CFA had been held to be enforceable. The Judge applied the same public policy analysis to reject Volterra's claim on (*ii*). On (*iii*), the Judge found that the High Court's judgment meant that "*no sums at all should have been paid to the solicitors at any stage pursuant to the [CFA]*", and that as a result it would be an "*absurdity*" to allow Volterra to retain money on account of costs.

Interestingly, if the *Diag* reasoning were extended to LFAs as well as CFAs, the overall effect would be opposite to that in *Therium*, which found that the only unenforceable provisions of an LFA would be those detailing the funder's purported entitlement to a percentage of any damages recovered.

Interest

Rolls-Royce Holdings plc v Goodrich Corporation [2023] EWHC 2002 (Comm)

In *Rolls-Royce Holdings plc v Goodrich Corporation*, the High Court confirmed that it is inappropriate to award statutory pre-judgment interest where parties have agreed a contractual provision dealing with pre-judgment interest, and the conditions for claiming that contractual interest are not satisfied.

This issue arose in the context of whether Goodrich Corporation, as Claimant, was entitled to pre-judgment interest on $112,285,440 awarded to it in earlier proceedings. The Defendant argued that there was a provision in the relevant contract dealing with pre-judgment interest, which the Claimant had neither invoked, nor satisfied the conditions necessary to invoke (*i.e.*, providing the other party with evidence of loss).

The Judge found that the Claimant was precluded from recovering statutory interest under the Senior Courts Act 1981 (the "**SCA**"). The Judge interpreted the SCA as preventing "*interest being awarded […] when it is already "running" for some other reason on the debt*" and that it "*avoids interest being recovered twice on the same debt*". A contractual interest rate "*will itself condition the exercise of the statutory discretion*", as it is a "*powerful factor when determining whether the court should exercise its procedural discretion and on what basis*".

The Judge concluded that no award of statutory interest should be made in circumstances in which there has been no attempt to assert or prove a contractual interest claim. However, he acknowledged that this conclusion was "*not particularly satisfying*", and that the Claimant would be permitted to appeal. This appeal is pending.

Palmat NV v Bluequest Resources AG [2023] EWHC 2940 (Comm)

In the case of *Palmat*, the High Court set aside part of a London Court of International Arbitration ("**LCIA**") award, which granted interest on arbitration and legal costs to the Claimant, where the Claimant had not claimed interest on these costs in the first place.

The case concerned LCIA proceedings brought by Bluequest Resources AG ("**Bluequest**") against Palmat NV ("**Palmat**"). Palmat had entered into an agreement with two third parties in Venezuela to supply them with liquid caustic soda ("**LCS**") in exchange for aluminium. Bluequest in turn entered into an agreement with Palmat to supply LCS. Following failure by Palmat to pay an outstanding invoice to Bluequest in respect of a shipment of LCS, the claim was referred to arbitration. An award in Bluequest's favour was made in May 2022.

Palmat sought to challenge the award in the High Court on a number of bases, *inter alia*: (i) on jurisdictional grounds—arguing that the arrangement between the parties was a "*single barter agreement*" rather than a contract; (ii) under s. 68 Arbitration Act 1996—arguing that parts of the award either pre-judged the substantive issues in dispute, reflected decisions based on arguments not advanced by either party, or failed to deal with all the issues put to the tribunal; and (iii) on the grounds that "*interest was awarded on arbitration and legal costs when the defendant had not sought interest on either*". Though limbs (*i*) and (*ii*) above were rejected by the Court, the Judge found in Palmat's favour on limb (*iii*), since Bluequest had not made any claim for interest on these costs. It was therefore "*common ground that interest on arbitration and legal costs was not in play in the relevant sense at the final hearing*".

The key takeaway from this case is that, even though tribunals frequently have the discretion to award interest, arbitrating parties should nevertheless explicitly claim interest, in order to ensure that it is "*in play*" before the tribunal.

Pre-Judgment Interest

Mitchell v Al Jaber [2023] EWHC 1239 (Ch)

In *Mitchell v Al Jaber*, the High Court clarified several issues in relation to awards of pre-judgment interest, resulting in a significant reduction in the amount of interest awarded to a claimant.

The Defendant was the director of a BVI company in liquidation. He caused the company to transfer shares to another Guernsey company owned by the

Defendant, for his own benefit. The Guernsey company held them for 15 months before selling them to a third party. The liquidators of the BVI company claimed against both the Defendant and the Guernsey company, seeking compensation for the lost value of the shares.

The initial judgment held that the Defendant and Guernsey company were liable, as constructive trustees, to account to the BVI company for the value of the shares, and the Claimants were awarded damages of around €67 million. Following the judgment, the Claimants sought pre-judgment interest of up to 6.5% per annum, calculated on a compound basis from when the shares were first transferred to the Guernsey company. The issues at the consequentials hearing were: (i) whether the Court should award pre-judgment interest; and (ii) if so, how it should be calculated.

On issue (*i*), pre-judgment interest can be awarded either to compensate the Claimant for loss, or to reverse any profits the Defendant may have made through its wrongdoing. The Judge found that the first basis was inapplicable given the Claimants could not prove that the BVI company would have used the shares to generate profit had it retained them. On the second basis, the burden of proof was on the Defendant to provide clear evidence that it did not profit, and failing this, it would be liable to pay pre-judgment interest.

On issue (*ii*):

1. pre-judgment interest should be calculated on a compound, rather than simple basis in circumstances where the Defendant has misapplied company assets in breach of trust and has behaved dishonestly. However, compound interest is only payable for the period when the Defendant had ostensibly benefitted from the misappropriation of the shares. From when the Guernsey company sold its shares to a third party, the Claimants were entitled to interest on a simple basis only.

2. the interest rate should be calculated consistently with the contemporaneous economic conditions, in this case a rate of 1% above the base rate.

The result was that the Claimants received a much smaller amount of pre-judgment interest than they had initially claimed; a situation the Judge attributed to poor preparation and failure to adequately justify their reasoning. Our in-depth discussion of this case can be found here.

Detailed Assessment

Deutsche Bank AG v Sebastian Holdings Inc. and Alexander Vik [2023] EWHC 9 (SCCO)

The case of *Deutsche Bank AG v. Sebastian Holdings Inc. and Alexander Vik* dealt with which party should be liable for the costs of detailed costs assessment proceedings.

Deutsche Bank AG ("**DBAG**") brought a claim against Sebastian Holdings for damages, with Mr Vik joined to the proceedings for costs purposes. DBAG was successful following trial in 2013, and was awarded 85% of its costs on the indemnity basis.

Upon commencement of detailed costs assessment proceedings, DBAG applied for directions in relation to its preferred bill of costs, submitting that to produce a compliant bill would take two years and cost £2.5 million. DBAG therefore sought directions that the detailed assessment be heard in two tranches: the first dealing with preliminary issues (including counsel and expert fees); and the second dealing with a three-part "hybrid bill", divided chronologically. DBAG's application was refused, on the basis that the paying party is entitled to know the amount being claimed at the outset.

DBAG subsequently served its bill of costs, which was followed by points of dispute from Mr Vik. There were a number of preliminary issue hearings to deal with the rate of interest, scope of the costs order, the exchange rate to be applied, the recoverability of Deloitte expert fees and the assessment of counsel's brief and refresher fees. These were followed by hearings in 2021 and 2022 which dealt with the chronological part of the bill (*i.e.,* solicitor fees).

The Judge found that Mr Vik was entitled to the costs of the Claimant's initial application for detailed assessment directions on the standard basis, given that the application sought a departure from the usual procedure. However, the Judge granted the Claimant its costs on the other preliminary issues (*i.e.,* interest, scope of the costs order, *etc.*). Significantly, the Judge also reduced the amount of costs of the detailed assessment recoverable by the Claimant, holding DBAG responsible for prolonging the proceedings due to "*the absence of attendance notes and other documents and by the way in which time was recorded by the Claimant's solicitors (vague and composite entries)*". The Judge therefore ordered that Mr Vik pay only 70% of the Claimant's costs of the detailed assessment, on the standard basis.

This is a reminder of the importance of detailed narratives divided by task when recording time, as well as the importance of keeping attendance and file notes. It also highlights the fact that while the court cannot impose a settlement, it will take a dim view of parties who do not behave reasonably and take account of the court's apparent "*direction of travel*". Crucially, parties should always consider

protecting themselves against the costs of detailed assessment proceedings with a Part 36 offer.

Looking Ahead to 2024

Harrison Jalla & Ors v Shell International Trading & Ors

In October 2023, the High Court heard, among other matters, the Defendants' application for disclosure from the Claimants' solicitors (Rosenblatt Law Limited, "**Rosenblatt**").

The wider case involved a large-scale group claim by Claimants in the Niger Delta against Shell companies for alleged damages caused by an offshore oil spill in December 2011. Earlier in 2023, both the High Court and the Supreme Court had ruled in favour of the defendants on all the substantive issues in these proceedings. The Defendants' disclosure application aims to release documents from Rosenblatt concerning its internal financing and wider management arrangements for the litigation, based on the allegation that Rosenblatt has funded the litigation.

The Defendants argue that Rosenblatt went beyond the role of instructed solicitors for the Claimants during the substantive litigation, and in so doing played an active role both in funding and directing the litigation. Solicitors' firms have generally been insulated from costs orders following unsuccessful litigation, including for public policy reasons. Third-party funders providing financial support to claimants to proceed with claims have, by contrast, traditionally been held liable for costs orders in the event the claimants are unsuccessful. While the Defendants' application is, at this stage, for disclosure, it trails the question of whether a solicitors' firm which itself provides funding or receives funding through an entity in its corporate group to carry out the litigation, should be liable for costs on that basis.

A judgment on this issue is expected during 2024.

Anti-Suit Injunctions

English Courts Split over Anti-Suit Injunctions in Foreign-Seated Arbitrations

The English courts' power to grant anti-suit injunctions ("**ASIs**") has recently been tested in the context of arbitrations seated in foreign jurisdictions. The Commercial Court and the Court of Appeal have issued five decisions in three related cases. Recent Russian countersanctions legislation gives Russian courts exclusive jurisdiction over cases involving parties affected by sanctions. RusChemAlliance ("**RusChem**"), the Defendant in all three cases, took advantage of this legislation.

All three cases relate to an LNG plant in Ust-Luga, Russia. RusChem, a Russian company, entered into an EPC contract with Linde relating to the LNG plant. Linde suspended work after the EU imposed sanctions on Russia following the Russian invasion of Ukraine. RusChem consequently terminated the EPC contract and pursued the banks—Deutsche Bank, Unicredit and Commerzbank—who had issued on demand bonds and guarantees. The banks contended that they could not pay RusChem because of sanctions. In each case, despite arbitration agreements providing for ICC arbitration seated in Paris, RusChem commenced proceedings in Russia. As the underlying contracts were governed by English law, the Claimant banks sought ASIs from the English courts. For a more detailed analysis of these decisions, see our detailed update here.

Deutsche Bank AG v RusChemAlliance LLC [2023] EWCA Civ 1144

In *Deutsche Bank AG v. RusChemAlliance LLC*, Deutsche Bank initiated a Paris-seated ICC arbitration seeking: (i) a declaration that the arbitration agreement was valid and enforceable; and (ii) an order for RusChem to cease the Russian proceedings and to refrain from enforcing any decision made by the Russian Court. Deutsche Bank also applied to the English Commercial Court without notice to RusChem seeking an interim ASI to maintain the *status quo* until the arbitral tribunal was constituted.

The High Court acknowledged that RusChem's commencement of Russian proceedings was in breach of an otherwise valid arbitration agreement. Bright J stated that if this case involved an arbitration with its seat in England, he would likely grant an ASI. However, on the basis of French law evidence, he considered that a French court would be unlikely to enforce an interim ASI granted by an English court. Bright J emphasised the differences in approaches to ASIs under English and French law and stated that it is not the role of the English courts to support arbitration in France by granting ASIs.

On appeal, the Court of Appeal overturned the decision of Bright J and granted the ASI. The Court of Appeal noted that its task was to "*identify the forum in which the case can be suitably tried for the interest of all parties and for the ends of justice*". Given that the claim for interim injunctive relief could only be obtained in England and could not be given effect to in France, the Court of Appeal found that the English court was the proper forum in this instance.

Commerzbank AG v RusChemAlliance LLC [2023] EWHC 2510 (Comm)

In the second of the three applications, Commerzbank sought an *ex parte* urgent ASI under section 37(1) of the Senior Courts Act in relation to RusChem's commencement of Russian court proceedings.

Bryan J was satisfied that the requirements for an ASI were fulfilled, noting that this was an "*archetypal*" case for granting ASIs. He went on to consider that the seat of the arbitration was in Paris, not in London, and whether that amounted to exceptional circumstances that meant an ASI should not be granted.

Bryan J was satisfied that English courts had jurisdiction and that England was the proper place to bring the claim for an ASI because:

1. both the arbitration agreement and the underlying financial instrument were governed by English law;

2. English law provided a juridical advantage in the form of an ASI, which the French courts did not have available; and

3. neither Russia nor France were the proper places to obtain the type of relief sought.

Bryan J noted that if Bright J had access to the French law advice presented by Commerzbank and had accepted it, it would have had a substantial impact on various parts of his judgment's reasoning. Bryan J considered the evidence on French law and concluded that there was no clash or conflict with the law of the seat that could justify refusing the injunction. He went on to opine that the seat of arbitration is of "*very limited relevance*" in the granting of an ASI under section 37 of the Senior Courts Act.

Unicredit v RusChemAlliance (formerly known as G v. R) [2023] EWHC 2365 (Comm); _G v R (In an Arbitration Claim)_ [2023] EWHC 2365 (Comm)

Similar to *Deutsche Bank* and *Commerzbank*, Unicredit sought an *ex parte* interim ASI under section 37 of the Senior Courts Act until the *inter partes* final ASI hearing.

Knowles J acknowledged that the necessary elements for granting such relief were present. While he considered the approach of French courts with respect to

ASIs as a "*factor in the exercise*" of its discretion, he found that it could not "*deprive the court of all jurisdiction*". Addressing Bright J's decision in *Deutsche Bank,* Knowles J further noted that granting the interim injunctive relief served the agreement between the parties to arbitrate the dispute. He also highlighted the comity between the English and French courts and their shared objective of making the parties' agreement work. Knowles J, therefore, decided to grant the interim ASI.

The High Court held the *inter partes* final hearing approximately a month later. In a decision dated 22 September 2023, Teare J declined to issue the final ASI, deciding that he had no jurisdiction to hear the claim on two bases. Teare J found that:

1. based on French law evidence before him, French substantive rules on international arbitration governed the dispute, and, therefore French law governed the arbitration agreement. The English courts did not, consequently, have jurisdiction; and

2. on the question of proper forum, the parties had not chosen English courts to have supervisory jurisdiction over the arbitration. He did not accept the proposition that substantial justice could not be done in France because ASI relief was not available there. He also noted that the availability of ASIs in English courts, but not in French courts, was not a sufficient reason to intervene.

Teare J referred to the decision of the Court of Appeal in *Deutsche Bank*, where an interim ASI was granted. However, Teare J noted that the *Deutsche Bank* decision was given on an *ex parte* basis, without the Defendant's presence or submissions. In contrast, in the current case, Teare J had the benefit of submissions made on behalf of the Defendant. Therefore, he considered that only limited assistance could be derived from the Court of Appeal's decision in *Deutsche Bank*. Teare J's decision in Unicredit has been appealed and a decision is pending following a hearing on 25 January 2024, which may provide clarity on the proper approach to the determination of ASIs in respect of foreign-seated arbitrations.

Arbitration

Arbitration Bill Updating the Arbitration Act 1996 to Continue through the UK Legislative Process in 2024

On 6 September 2023, the Law Commission of England and Wales (the "**Law Commission**") published its Final Report on its review of the Arbitration Act 1996 (the "**Act**"). The Law Commission's general message was that the Act did not require 'root and branch' reform. Instead, a small number of amendments

were proposed in an Amendment Bill, aimed at improving certainty and efficiency of arbitration in England and Wales.

The UK government has since accepted the Law Commission's recommendations for reforms and published the draft Arbitration Bill in November 2023, after which it received its first reading in the House of Lords. In the Arbitration Bill's Impact Assessment, the government underscored the importance of the economic benefit created by domestic and international arbitration (generating approximately £2.5 billion in fees alone across at least 5000 arbitrations each year). The government further highlighted that a failure to modernize the Act could lead to international arbitration in London becoming less competitive, with businesses potentially choosing to move their disputes to other jurisdictions such as Singapore.

There are six key updates in the Arbitration Bill, which closely correlate to the main reforms proposed by the Law Commission:

1. Introducing a provision stipulating that arbitration agreements are to be governed by the law of the seat of the arbitration, unless there is an express agreement to the contrary. This effectively reverses the decision of the UK Supreme Court in *Enka v Chubb* (reported on here), which had held that the law governing the arbitration agreement is the law 'most closely connected' to the arbitration agreement.

2. Codifying arbitrators' duties to disclose any fact or circumstance which, from the perspective of a reasonable third person, would give rise to justifiable doubts as to their impartiality or independence.

3. Providing arbitrators with the express power to summarily dispose of any claim, defence or jurisdictional objection that has no real prospect of success.

4. Introducing a more stringent framework for challenges to the tribunal's jurisdiction under s.67 of the Act, such that where the tribunal has already ruled on its jurisdiction, the courts will only undertake a review and not a full, *de novo* rehearing (unless necessary in the interests of justice);

5. Strengthening arbitrators' immunity in the event they resign or are removed by order of the court (unless the resignation was unreasonable or if the arbitrator acted in bad faith in removal proceedings); and

6. Clarification of court powers in support of arbitral proceedings against third parties, and in support of emergency arbitration by enforcing peremptory orders of emergency arbitrators.

The passing of the Arbitration Bill is unlikely to be controversial and the Bill is expected to become law within the first half of 2024.

$11 Billion Awards Set Aside for Fraud and Corruption—*Process & Industrial Developments v Federal Republic of Nigeria* [2023] EWHC 2638 (Comm)

Successful challenges to arbitral awards on grounds of serious irregularity under s.68 of the Arbitration Act 1996 are rare. The Commercial Court's Report for 2021–2022 (published in April 2023) noted that of the 23 s.68 applications received by the Commercial Court in 2020–2021, only one was successful. The remainder were either dismissed or discontinued.

The decision in *P&ID v Nigeria* is remarkable not only for being a successful s.68 challenge, but also for the scale and seriousness of the wrongdoing that took place, implicating both government officials and lawyers.

The underlying dispute arose out of a Gas Supply and Processing Agreement ("**GSPA**") between P&ID and Nigeria, pursuant to which P&ID would construct gas processing facilities and Nigeria would supply 'wet' gas necessary for processing. The gas would be converted into 'lean' gas by P&ID and delivered back to Nigeria for use in power generation. The dispute resolution mechanism in the GSPA provided for arbitration in London.

P&ID commenced arbitration against Nigeria alleging a repudiatory breach of contract by Nigeria for its failure to arrange for the supply of 'wet' gas. Following an award on liability in 2015 and a final award in 2017, the tribunal awarded P&ID $6.6 billion in damages (plus interest at 7%), reflecting P&ID's anticipated profits over a 20-year period.

Nigeria pursued several actions against P&ID in foreign courts to obtain discovery of certain documents, including P&ID's financial statements from numerous banks in the U.S. Its pursuit of that discovery provided Nigeria with an extension of time to file its s.68 application, in place of the usual strict 28-day deadline to file challenges to awards.

In its challenge, Nigeria alleged extensive corruption by P&ID, tainting civil servants, Nigeria's internal legal team at the Ministry of Petroleum Resources, and its own counsel in the arbitration proceedings. Nigeria relied on substantial evidence of bribes and communications showing corruption in relation to P&ID's procurement of the GPSA. Much of the evidence marshalled by Nigeria was yielded by the foreign disclosure proceedings.

The Court upheld Nigeria's challenge, relying in particular on two critical instances of wrongdoing:

1. The Court found that there was sufficient evidence showing that P&ID had paid bribes to a former legal director at the Ministry of Petroleum Resources, who had participated in the drafting and negotiation of the GSPA on Nigeria's behalf. Not only did P&ID tender evidence from the director in the arbitration proceedings that concealed the payment of these bribes; but P&ID had in fact continued to pay bribes throughout the arbitration to ensure the director's ongoing silence.

2. The Court also found that P&ID had improperly obtained, retained and misused Nigeria's privileged legal documents, including advice on the arbitration proceedings. This meant that P&ID effectively had insider access to Nigeria's legal strategy in the arbitration proceedings, which it used to monitor whether Nigeria (and the tribunal) had become aware of P&ID's corrupt activities. P&ID's English solicitors and counsel, who had also come into possession of these legal documents (and who stood to gain significant amounts of money in the event the arbitration was resolved in P&ID's favour), were held to be in serious breach of their professional obligations to inform Nigeria or to return the documents, and the Judge indicated that he would refer a copy of his judgment to the Bar Standards Board and the Solicitors' Regulation Authority.

The Court concluded that serious irregularities, causing substantial injustice to Nigeria, were made out. In a later decision in December 2023, the Court decided to set aside the awards in their entirety.

The Interplay between Issue Estoppel and State Immunity—*Hulley Enterprises & Ors v Russian Federation* [2023] EWHC 2704 (Comm)

Many will be familiar with the *Yukos* arbitration saga, which has now entered its 17th year.

In 2007, the former majority shareholders in OAO Yukos Oil Company pursued arbitration before the PCA in the Hague against Russia, alleging that the latter had illegally expropriated Yukos' assets in breach of the Energy Charter Treaty ("**ECT**"). In 2014, a tribunal found in favour of the investors, leading to record-setting damages awards of $50 billion.

Following the awards, the investors commenced enforcement proceedings in the UK. Russia challenged the jurisdiction of the English courts on the basis that it was immune from proceedings under s.1 of the State Immunity Act 1978 ("**SIA**"). Exceptions to a State's immunity under s.1 of the SIA are found in s.9 of the SIA, which allows for a waiver of immunity for proceedings relating to arbitration where a State has entered into a valid arbitration agreement.

Russia's arguments were effectively identical to those it advanced in the underlying PCA arbitration and in the set-aside proceedings in the Netherlands (see below). In a nutshell, Russia argued that: (i) on a proper construction of the

ECT, Russia had not consented to arbitration of disputes arising under the ECT; (ii) the Claimants were not 'investors', nor had they made valid 'investments' in Russia, such that they were not entitled to protection under the ECT; and (iii) the Claimants' claims fell outside of the scope of the ECT as they complained of Russian taxation measures, and the ECT carved out taxation.

The enforcement proceedings were stayed upon the commencement of set-aside proceedings in the Netherlands. The awards were first set aside in their entirety by the Hague District Court in 2016, reinstated in full by the Hague Court of Appeal in 2020, and finally upheld in large part by the Dutch Supreme Court in 2021, remitting one ground (that the awards were procured by a fraud on the tribunal) to the Amsterdam Court of Appeal to be decided on the merits.

Following the decision of the Dutch Supreme Court, the investors applied to lift the stay which was granted solely for the purpose of resolving Russia's jurisdiction challenge. In responding to that application, the investors argued that the doctrine of issue estoppel precluded Russia from reopening the issue of whether it had consented to arbitration under the ECT. Russia had challenged the tribunal's jurisdiction before the Dutch courts. With the final decision of the Dutch Supreme Court, that challenge had conclusively failed.

Russia countered that under the SIA, the English courts were required to conduct their own analysis of whether a State had waived immunity for the purpose of s.9, and could not apply the doctrine of issue estoppel on the basis of a foreign judgment. Russia also argued that the English proceedings raised issues different to those in the Dutch proceedings, and that the Dutch proceedings were not final.

The Court found there was nothing in the SIA that prevented the doctrine of issue estoppel from being applicable. The Court further held that the issues raised in the English proceedings were identical to those in the Dutch proceedings, in that both were concerned with the question of whether there was a valid arbitration agreement. Further, the Dutch judgments were final and conclusive. Russia's assertion of immunity was rejected and its jurisdiction challenge dismissed.

Staying Court Proceedings in Favour of Arbitration—*Republic of Mozambique v Privinvest Shipbuilding SAL (Holding) & Ors* [2023] UKSC 32

s.9 of the Arbitration Act 1996 (the "**Act**") provides that parties to an arbitration agreement against whom court proceedings are brought can apply to the court to stay those proceedings in respect of 'matters' that should properly be referred to arbitration. Stays under s.9 are not discretionary and must be granted, unless the court is satisfied that the arbitration agreement is void, inoperative or incapable of being performed.

The dispute in *Republic of Mozambique v Privinvest* arises out of the so-called 'tuna bonds' scandal. In 2013-2014, Mozambique, through certain special purpose

vehicles, entered into contracts with Privinvest companies for the supply of ships, aircrafts and other infrastructure to develop Mozambique's maritime exclusive economic zone. The supply contracts were governed by Swiss law and provided for disputes to be resolved by arbitration.

To finance the goods and services acquired under the supply contracts, Mozambique borrowed funds from Credit Suisse (among others), secured by sovereign bonds guaranteed by Mozambique. The bonds were governed by English law and subject to the exclusive jurisdiction of the English courts.

Mozambique commenced proceedings in the English courts in 2019 against the Privinvest and Credit Suisse entities (directly and against certain of their employees), bringing claims in various economic torts and alleging that the Defendants had conspired against Mozambique, exposing it to potential liabilities of US$2 billion arising out of the bonds. The Privinvest Defendants applied under s.9 of the Act to stay the proceedings, on the basis that the claims were 'matters' falling within the scope of the arbitration agreements in the supply contracts between the Mozambique special purpose vehicles and the Privinvest entities. While Mozambique was not directly a party to the supply contracts, the Privinvest Defendants argued that it was a party under Swiss law as a beneficiary of those agreements. The Privinvest Defendants' application was refused at first instance but allowed by the Court of Appeal. Mozambique then appealed to the Supreme Court.

The Supreme Court referred to a two-stage test in assessing whether a 'matter' falls within the scope of an arbitration agreement:

1. The Court begins with identifying the 'matters' that the parties have raised or foreseeably will raise in the proceedings. A 'matter' is a substantial issue legally relevant (or foreseeably relevant) to a claim or defence, and it must be an essential element of the claim or defence.

2. The Court must then determine in relation to each 'matter' whether it falls within the scope of the arbitration agreement.

The Supreme Court accepted Mozambique's argument that none of its claims were 'matters' falling within the scope of the arbitration agreements. Importantly, the substance of Mozambique's claims in the English courts did not relate to the validity or commerciality of the supply contracts themselves (which issues might have been captured by the arbitration agreements). Rather, the dispute arose out of allegations of bribery and other misconduct in the procurement of the supply contracts (and related agreements), and whether Privinvest had knowledge at the relevant times of the alleged illegality of the underlying transactions. The Supreme Court accordingly overturned the stay on proceedings.

Waiver of Right to Challenge an Award—*Radisson Hotels Aps Danmark v Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi* [2023] EWHC 892 (Comm)

In *Radisson Hotels*, the Court dismissed an application under s.68 of the Arbitration Act 1996 (the "**Act**") on the basis that the applicant failed to raise the allegation concerning serious irregularities in the arbitral process at the time it first uncovered the grounds for its objection.

In October 2018, Hayat Otel Isletmeciligi Turizm Yatirim Ve Ticaret Anonim Sirketi ("**Hayat**") commenced a London-seated ICC arbitration against the Danish arm of the Radisson Hotels Group ("**Radisson**"), alleging that Radisson had mismanaged its Turkish hotel. Hayat is an indirect subsidiary of Bilgili Holding AS ("**Bilgili**"). The three-person tribunal included a Turkish hospitality professional who was appointed by Hayat and referred to as "CD" in the judgment. The arbitration proceedings were bifurcated into a liability and causation phase and a quantum phase.

Over the course of the arbitral proceedings, CD had contact with Mr Önkal, an expert consultant then-employed by Hayat. In March 2019, CD forwarded Mr Önkal two chains of internal tribunal correspondence containing impressions of the parties' case ("**March Emails**"). In April and May 2019, CD had further email contact with Mr Önkal, as well as other employees of Bilgili ("**April and May Emails**"). In August 2019, Mr Önkal ceased providing services to Hayat. The evidential hearing on liability and causation took place in October 2020. In March 2021, the tribunal issued a Partial Award on liability and causation in Hayat's favour following the October 2020 hearing.

In September and November 2021, Radisson was made aware of Hayat's ex parte correspondence with CD, and was put in contact with Mr Önkal. Mr Önkal provided Radisson with a USB drive of his work for Hayat, which contained a Word document apparently reproducing the text of the March Emails. Radisson was aware of this Word document on or around 13 January 2022, a day prior to filing its rejoinder submission in the quantum phase of the proceedings. On 25 January 2022, Radisson obtained native copies of the March Emails but not the April and May Emails, which were only made available several weeks later during the course of the set-aside proceedings.

On 27 January 2022, Radisson issued the arbitration claim form challenging the Partial Award pursuant to s.68 of the Act, alleging a serious irregularity on the basis of the contact between CD and Hayat. Hayat claimed that Radisson had waived its right to challenge the Partial Award pursuant to s.73 of the Act (detailing the circumstances in which parties may lose the right to raise objections as to jurisdiction and/or the manner in which the arbitration has been conducted) by continuing to participate in proceedings after becoming aware of *ex parte* communications between CB and Hayat representatives. Radisson countered that s.73 was not applicable: because the proceedings had been

bifurcated, the Partial Award was a 'final' award relating to a concluded phase of the proceedings; whereas the subsequent steps Radisson had taken in the arbitration (the filing of the rejoinder) related to a separate, quantum, phase. There had therefore been no waiver of the right to challenge the Partial Award.

The Court agreed with Hayat, finding that s.73 applies to an arbitral process as a whole, not merely to phases of proceedings. If it were otherwise, parties would participate in subsequent phases of the proceedings while keeping challenges 'up their sleeve', only to be deployed at a later date. In the court's view, any grounds for objecting to the arbitral process must be raised promptly, not only to avoid unnecessary costs by continuing to participate in proceedings that will later be challenged, but also as a matter justice and fairness.

The Court further held that the question was not when Radisson had cogent evidence to bring a s.68 challenge, but rather the point at which Radisson believed it had grounds for objecting. Once Radisson believed it had grounds for objecting, it was obliged to raise them promptly.

On the evidence, the Court concluded that Radisson believed it had grounds for objecting by 13 January 2022 (at the latest) when it discovered the Word document said to reproduce the text of the March Emails. Rather than raising the concerns immediately, Radisson chose to sit on the evidence to find the right time to deploy it strategically. Specifically, Radisson did not want to reveal the involvement of Mr Önkal at that stage. Radisson continued to participate in the proceedings, including by filing its rejoinder on quantum, and it was only until two weeks later, on 27 January 2022, that its s.68 challenge was filed.

The Court also found that Radisson had failed to show that it could not with reasonable diligence have discovered the grounds. In particular, Radisson could have properly investigated the allegations or procured witness statements from Mr Önkal (among others) after Radisson had contact with them. On that basis, the Court held that Radisson was precluded by s.73 of the Act from raising its objection to the Partial Award.

Alternative Service of Execution Proceedings upon a State—*GPGC Limited v. The Government of the Republic of Ghana* [2023] EWHC 2531 (Comm)

In *GPGC Limited v Ghana*, the Court dismissed a challenge brought by Ghana against service of execution proceedings pursued by GPGC arising out of the enforcement of an arbitral award of US$140 million.

In November 2021, GPGC had obtained an *ex parte* order granting GPGC leave to enforce the award. That order had to be served on Ghana in accordance with s.12(1) of the State Immunity Act 1978 ("**SIA**"), requiring documents instituting legal proceedings against a State to be transmitted through the Foreign, Commonwealth and Development Office to the Ministry of Foreign Affairs of

the relevant State. s.12 of the SIA provides further for deemed service once the writ or other document is received at the Ministry.

Service was effected in May 2022 through the relevant diplomatic channels. The *ex parte* order provided a deadline of 1 August 2022 for challenge, but no challenge was made by that date.

As the award debt continued to be unpaid, in March 2023, GPGC successfully applied for charging orders over five London properties owned by Ghana. GPGC further applied for, and was granted, permission to effect service by alternative means; namely, to post the application to Ghana's London High Commission addresses, and to send the application by email to a number of relevant contacts.

The charging orders were made on an interim basis, with a hearing to take place at a later date to determine whether they should be made final. In June 2023, Ghana applied to set aside the order for alternative service, on the basis that applications seeking post-judgment execution process fell within s.12(1) of the SIA ("*other document required to be served for instituting proceedings*"). Alternatively, the applications fell to be served via diplomatic channels pursuant to CPR 6.44, and there was insufficient reason to permit service by alternative method.

The court dismissed Ghana's applications. The key determinant was the language in s.12(1) of the SIA, referring to documents required to 'institute' proceedings. The court accepted GPGC's argument that the documents that had to be served in that manner were those that first seised the court of jurisdiction over the relevant State party, bringing the State before the court for the first time. The alternative construction argued by Ghana would be highly impractical, as executing arbitral orders requires multiple (legal) steps. If each required service through diplomatic channels it would prolong the enforcement process and leave interim orders in place for an extended period of time.

The court further found that CPR 6.44 was coterminous with s.12(1) of the SIA, and, as such, that part of Ghana's application also failed. In any event, there was good reason to permit service by alternative method (post and email), including that if service through diplomatic channels were required, it would generate multiple periods of serious delay.

Enforcement of Foreign Judgments

Hague Convention of 2 July 2019

On 23 November 2023, the UK government announced that the UK will join the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the "**2019 Hague Convention**").

The 2019 Hague Convention is a multilateral convention designed to provide a framework of common rules to facilitate the recognition and enforcement of judgments between signatories to the Convention. This development is of particular significance given that the UK ceased being a party to EU instruments on the recognition and enforcement of judgments between EU member states such as the Recast Brussels Regulations and the Lugano Convention at the end of 2019. This has resulted in a more complicated process to enforce English judgments in EU member states and vice versa.

The UK joining the 2019 Hague Convention will provide a set of common rules for the recognition and enforcement of civil and commercial judgments between the UK and other contracting parties including the EU. This is a welcome development to those involved in cross-border disputes in ensuring that English judgments will be recognised and enforced by contracting parties to the Convention.

The 2019 Hague Convention, together with the 2005 Hague Convention, will ensure the recognition of any qualifying judgment handed down in the English courts in other contracting states. However, there are gaps left by the Hague Conventions which mean that it is not as comprehensive as the prior-EU regime. A notable gap is created by Art. 5.1(j) which provides that "*the act or omission directly causing such damage* [must have] *occurred in the state of origin*." This would make judgments obtained using the tort gateway (where the tort occurred outside the state of origin) unenforceable via the 2019 Hague Convention. It is also notable that the Convention will only apply to 'proceedings instituted' after the Convention has taken effect.

On 12 January 2024, the UK signed the Hague Convention, and it is now working towards joining the Hague Convention "*as soon as practicable*" following a public consultation. It will enter into force 12 months from the date on which the UK deposits its instrument of ratification.

Enforcement of Foreign Judgments

Invest Bank PSC v El-Husseini [2023] EWHC 2302

In *Invest Bank PSC v El-Husseini*, the High Court has held that a foreign judgment may be enforced in England and Wales in circumstances where the judgment is not presently enforceable in the relevant foreign jurisdiction. This case arises in circumstances where the foreign judgment is not governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933 (which applies to enforcement of judgments from certain countries including Australia, Canada and India). Under the 1993 Act, a foreign judgment cannot be registered if it could not be enforced by execution in the country of origin. However, the High Court has highlighted a difference in approach to recognition of judgments obtained from the counties listed in the 1993 Act and other countries such as the UAE where the common law rules continue to apply.

It was argued that the Abu Dhabi judgments are not capable of enforcement in England and Wales because: (i) they no longer have *res judicata* effect in Abu Dhabi in light of a change to UAE law; and (ii) they are not enforceable in Abu Dhabi and therefore cannot be enforced in England as a matter of English private international law.

The High Court held that the Abu Dhabi judgments had at all material times had *res judicata* effect in Abu Dhabi, regardless of the change in UAE law which resulted in the judgments becoming unenforceable. That did not change the final and binding status of the judgments.

As a matter of English private international law, the High Court rejected an argument that it could be presumed that the Foreign Judgments (Reciprocal Enforcement) Act 1933 codified the position at common law that a foreign judgment should not be enforced in England if it is unenforceable in the foreign jurisdiction itself. The High Court cited Professor Adrian Briggs in Civil Jurisdiction & Judgments: "*As the common law does not enforce the judgment as such, as distinct from the obligations which arise from the adjudication, whether the foreign judgment is enforceable under the law which gave it is a matter of foreign procedure, [is] not relevant to a court in England*". This reflects the true nature of the proceedings whereby a foreign money judgment is enforceable at common law by suing on the judgment as a debt rather than by registration of the judgment itself. The Judge therefore held that there was no impediment to the enforcement of the Abu Dhabi judgments in England.

Enforcement of ICSID Arbitral Awards

Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar v Kingdom of Spain [2023] EWHC 1226

In *Infrastructure Services Luxembourg S.A.R.L. and Energia Termosolar v Kingdom of Spain,* the English courts have considered arguments of jurisdiction in proceedings seeking to enforce an ICSID arbitral award against a state. The Kingdom of Spain applied to set aside an order granting registration of an ICSID award including because it claimed entitlement to immunity from the jurisdiction of the English courts.

The Claimants argued that Spain had either submitted to the jurisdiction of the English courts on the basis of a prior written agreement waiving immunity (pursuant to s. 2(2) of the State Immunity Act 1978 ("**SIA 1978**")); or that Spain had given its consent in writing to arbitrate disputes between the Claimants and Spain (thereby waiving immunity pursuant to s. 9 of the SIA 1978). The Claimants relied, as evidence of Spain's submission or consent, on (i) Article 26 of the ECT, which provides for the settlement of disputes under the ECT through investor-State arbitration under the ICSID Convention; and (ii) Article 54 of the ICSID Convention, which provides that each State party to the ICSID

Convention is required to recognise arbitral awards as final and binding, and to enforce that award "*as if it were a final judgment of a court in that State*".

Fraser J agreed with the Claimants, and rejected Spain's immunity defence, making two key findings:

1. **Spain's intra-EU objection did not "trump" the UK's treaty obligations**: The CJEU's judgments in Achmea and/or Komstroy only reflected the CJEU's stance, as a matter of EU law, on the question of validity of intra-EU ICSID awards. They did not override or "*dilute*" the UK's own international treaty obligations under the ICSID Convention, including the obligations to recognise and/or enforce international arbitration awards.

2. **Spain had waived its State immunity**: Fraser J agreed with the Claimants that Article 54 of the ICSID Convention and Article 26 of the ECT constituted a "*prior written agreement*" of Spain's submission to the English jurisdiction for the purposes of s. 2 SIA 1978. The same provisions also amounted to an agreement in writing to submit disputes to arbitration and, therefore, a waiver of immunity under s. 9 SIA 1978.

Fraser J further noted that if an ICSID annulment committee had already considered and dismissed objections regarding the award, then there would be "*no grounds for repetition or rehearing of those in the* [English] *Court.* [...] *To do so would be contrary to the ICSID Convention and the 1966 Act, and is exactly what international arbitration is designed to avoid.*" Fraser J has made it clear that, absent some exceptional circumstance, it is not open to Spain to re-argue that the awards are not valid or binding against Spain. The decision sets out in clear terms that the English courts will recognise an ICSID arbitration award obtained against Spain, notwithstanding a series of unsuccessful objections raised by Spain.

Spain has received permission to appeal the decision and a hearing is scheduled before the Court of Appeal in June 2024. Our full analysis of this decision together with comparable cases in the Australian High Court, the U.S. District Court of Columbia can be found here.

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Please do not hesitate to contact us with any questions.

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