Debevoise & Plimpton

Civil Litigation Annual Review: Fifth Edition

Civil Litigation Annual Review: Fifth Edition

Introduction

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

It is now five years since we founded our *UK Civil Litigation: a Precis* blog, and started bringing our clients updates on key cases in the civil litigation space, which feels like a natural point to look back on market developments. What stands out most clearly is how much has changed since the first edition of our annual review. The COVID-19 pandemic came and went, leading to renewed judicial consideration of force majeure events and the impact of government regulation on contractual relationships. This continued through the 2022 Russian invasion of Ukraine, and the resultant sanctions imposed by the UK, US, EU and others. Commercial parties have been forced to grapple with the impact of sanctions on commercial arrangements (see page 18), and the doctrines of frustration and illegality have been front of mind for practitioners. Group actions have proliferated, with issues of parent company liability and ESG concerns coming to the fore (see page 51).

Perhaps the most remarkable shift has been in the tech sector, with the dramatic rise of AI and cryptocurrencies. Our first annual review did not include a single case on AI or cryptocurrencies; in the past year there have been multiple notable cases in each area, and we now have separate chapters on both in this year's review (see pages 9 and 20).

Looking ahead, we expect to see disputes relating to AI and cryptocurrencies continuing to increase. A number of existing securities group actions under s.90 and s.90A of the *Financial Services and Markets Act* (see page 8) will continue to move through the courts, leading to elements of those provisions which have remained untested finally being subject to proper judicial consideration. On the group action front, we expect actions in the ESG and supply chain spaces to continue to increase over the coming year (see page 52) with a number of law firms actively recruiting claimants in the market. As ever, 2025 is shaping up to be another busy year for civil litigators.

Finally, I would like to thank the members of the litigation team who have contributed to this annual review. Their hard work is very much appreciated. Special thanks in particular go to our editor-in-chief, Emma Laurie-Rhodes, and to our client updates team.

Chris Boyne
Partner
3 April 2025

Table of Contents

Page

Securities Litigation

Update on Claims Under s.90 and s.90A FSMA

We have written over the past couple of years about the rise of claims under the *Financial Services and Markets Act* 2000 ("**FSMA**") (see, for example, here and here), and our expectation that the use of these claims will continue to grow over the coming years. 2024 saw an important judgment in this space—the first decision dealing with the reliance element of s.90A FSMA.

To recap, ss.90 and 90A (with Schedule 10A) provide investors with a statutory cause of action in respect of untrue statements in listing particulars, prospectuses and other published information. Despite being in existence for many years, cases under these provisions have been relatively rare until recent years. As a result, there has been a marked absence of judicial consideration of many key areas of the law, though this is starting to change as investors increasingly look at claims regarding alleged greenwashing, bribery and corruption disclosures, modern slavery and supply chain violations, and poor financial accounting and regulatory disclosures.

In *Allianz Funds Multi-Strategy trust v Barclays Plc* [2024] EWHC 2710 (Ch) (which we previously wrote about here), the High Court dealt with a strike out and summary judgment application in respect of claims brought by 460 institutional investors against Barclays concerning their reliance on relevant published information. The Claimants alleged that they relied on false and misleading statements in numerous annual reports, interim results announcements and a prospectus issued by Barclays. The Claimant group was divided into three categories. First, Category A Claimants who had read and relied on the relevant published information directly—they had read and considered the information themselves. Second, Category B Claimants who relied on the relevant published information indirectly by relying on other sources which acted as a conduit for the substance of the contents of the published information. Third, Category C Claimants who alleged that they had suffered loss as a consequence of movements in the Barclays share price on the basis of "price/market reliance". In essence, Category C Claimants were investors in index or tracker funds.

Amongst other things, Barclays sought to have 241 of the Category C claims struck out or otherwise summarily dismissed because they did not allege and could not prove that they had relied on published information. The Category C Claimants relied on the "fraud on the market" theory more commonly used in US securities litigation to show that by relying on the market price of the Barclays' securities, they relied indirectly on the published information which would influence the price of that security in the market. Barclays, however, contended that the Claimants must show that they had each actually read the published information in order to show reliance.

The High Court ultimately agreed with Barclays and concluded that the common law test for reliance in the tort of deceit should be applied to the FSMA claims. Accordingly, the Category C Claimants were required to establish that: (*i*) they had read or heard the representations in the sense which they

now alleged was false or misleading; (*ii*) they understood the representations in that manner; and (*iii*) the representations caused them to act in a way which caused their loss. Naturally, the Category C Claimants could not satisfy this test, and their claims were struck out, together with approximately £330 million of the total value of the claim.

Claims may also be brought for dishonest delay of publication of information under the FSMA provisions. Significantly, such claims do not require reliance to be shown. The Court found that the provision is triggered only when there is a delay in publication, not where the publication is never made. Logically, this makes sense, but the perhaps unintended consequence of the decision is that issuers may have an incentive to delay indefinitely publishing particular information to the market which they might otherwise have published.

Many of the key legal principles underpinning FSMA claims will need to be the subject of further judicial scrutiny before there is greater certainty in the longer term. For now, though, public companies and those with relevant tradeable securities should exercise extreme care in making (or not making) any public representations, particularly in respect of ESG compliance given the increased interest of investors—both activist and traditional big player—in FSMA claims.

Artificial Intelligence

The back end of 2023 delivered a strong health warning regarding the use of artificial intelligence ("**AI**") in the civil litigation arena. This came in the form of judicial guidance for the use of AI and a First-tier Tribunal decision involving non-existent, AI-generated case authorities. By contrast, 2024 saw senior members of the UK judiciary openly embracing AI, and in September 2024, the United Kingdom signed the first-ever legally binding treaty on the safe use of AI—a step with potentially significant ramifications for the future conduct of civil litigation.

Use of Non-Existent Cases in Court Proceedings

UK case law on AI has so far been scant. However, *Felicity Harber v The Commissioners for HMRC* [2023] UKFTT 1007, decided at the very end of 2023, serves as an important reminder of the dangers of relying on AI (without appropriate checks and balances) in civil litigation.

Mrs Harber, a litigant in person, disposed of a property and failed to notify HMRC of her liability to capital gains tax. HMRC issued her with a "failure to notify" penalty, and Mrs Harber appealed the penalty on the basis that she had a reasonable excuse. In preparing her appeal, Mrs Harber provided the First-Tier Tribunal ("**FTT**") with the names, dates and summaries of what she asserted were nine FTT decisions in support of her case. HMRC could not locate any of the nine cases and drew this to the attention of the FTT. Mrs Harber later said the cases had been found for her by an unnamed friend, who worked in a solicitor's office. The FTT found that the cases had in fact been generated or "hallucinated" by AI, though it accepted that Mrs Harber had been unaware that the AI cases were not genuine.

This case demonstrates perhaps the greatest risk in using AI-assisted legal research: the generation of plausible-sounding but non-existent legal authorities. Had HMRC not drawn their inability to find

the nine cases to the attention of the FTT, the FTT may never have realised the cases were non-existent and generated by AI. It is one thing to expect lawyers (who are under a duty not to mislead the court and to draw the court's attention to relevant cases) to verify that cases are real, but as *Harber* shows, it is perhaps unrealistic to expect that a litigant in person could do so.[1] As Geoffrey Vos MR noted in June 2023, judges will not always go to the trouble of looking up the cases cited, and so the risks of litigants in person using Chat GPT to create plausible submissions is "palpable".

Other complaints regarding the use of fictitious authorities related to wasting the court's time and resources, the potential harm to judges and courts to whom these decisions are falsely attributed, and the development of a cynicism around judicial precedents. *Harber* serves as an early cautionary tale of how things can go wrong when using AI in civil litigation.

Artificial Intelligence (AI): Guidance for Judicial Office Holders

A defining moment for AI in civil litigation came with the publication of the Judicial Guidance for the use of AI on 12 December 2023. Nominally addressed to judges, the guidance is nevertheless instructive for all legal practitioners. Having been in force for all of 2024, it gives the first indication of how judges will view and/or use AI in UK courts. The three main takeaways from the guidance, as summarised by Sir Geoffrey Vos (Master of the Rolls and Head of Civil Justice in England & Wales),[2] are as follows:

1. Before using generative AI, judges and lawyers must be aware that its responses may be inaccurate, incomplete, misleading or biased.

2. Judges and lawyers must not feed confidential information into public large language models ("LLMs").

3. If a judge or lawyer has used an LLM to summarise information or to prepare a draft document, the judge or lawyer must check the responses before using them for any purpose. The AI is not responsible for the work product; the practitioner is.

These guidelines are likely to be amended as judges become more familiar with AI, as more matters impacted by the use of AI are litigated before English courts and tribunals and, above all, as the technology itself evolves and becomes more advanced.

Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law

The Council of Europe Framework Convention on Artificial Intelligence and Human Rights, Democracy and the Rule of Law (the "**AI Convention**") is the first-ever international legally binding treaty in this field. The AI Convention commits parties to collective action to manage AI products and protect the public from potential misuse.

---

[1] Mrs Harber herself indicated that she was unaware judgments were publicly accessible on websites such as that of the FTT and the British and Irish Legal Information Institute.

[2] https://www.judiciary.uk/speech-by-the-master-of-the-rolls-ai-transforming-the-work-of-lawyers-and-judges/.

The United Kingdom signed the AI Convention on 5 September 2024, and current signatories include the European Union and United States (among others).

Definition of AI

The AI Convention defines "artificial intelligence system" as a "*machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations or decisions that may influence physical or virtual environmental*".

Scope

The scope of the AI Convention covers activities within the life cycle of AI systems that have the potential to interfere with human rights, democracy and the rule of law, as follows:

1. Each party shall apply the AI Convention to the activities within the life cycle of AI systems undertaken by public authorities, or private actors acting on their behalf.

2. Each party shall address risks and impacts arising from activities within the life cycle of AI systems by private actors in a manner conforming with the object and purpose of the AI Convention.

The AI Convention offers parties two choices to comply with its principles and obligations when regulating the *private sector*: (*1*) parties may opt to apply the principles and obligations in the AI Convention; or (*2*) parties may take "other appropriate measures".

The scope of the AI Convention excludes activities within the life cycle of AI systems relating to the: (*a*) protection of national security interests; (*b*) R&D activities regarding AI systems not yet made available for use; and (*c*) matters relating to national defence.

Fundamental Principles

The AI Convention is principles-based and therefore formulated in open-ended terms. In respect of activities within the life cycle of AI systems, parties must adopt or maintain measures:

- to respect human dignity and individual autonomy;

- to ensure adequate transparency and oversight requirements tailored to the specific risks are in place (including with regard to the identification of content generated by AI systems);

- to ensure accountability and responsibility for adverse impacts on human rights, democracy and the rule of law;

- to respect equality, including gender equality and the prohibition of discrimination;

- to ensure privacy rights of individuals and their personal data are protected;

- to promote the reliability of AI systems and trust in their outputs; and

- to foster innovation to enable the establishment of controlled environments for the development and testing of AI systems.

Remedies and Procedural Safeguards

Each party shall (to the extent remedies are required by its international obligations and consistent with its domestic legal system) adopt or maintain measures, including:

1. measures to ensure relevant information regarding AI systems is documented, provided to bodies authorised to access that information and made available to affected persons;

2. measures to ensure the information referred to in subparagraph (a) is sufficient for the affected persons to contest the decision(s) made or substantially informed by the use of the system, and the use of the system itself;

3. an effective possibility for persons concerned to lodge a complaint to competent authorities;

4. effective procedural guarantees, safeguards and rights to affected persons; and

5. provision of notice that one is interacting with an AI system and not with a human being.

Risk and Impact Management Requirements

Each party must also adopt or maintain measures for the identification, assessment, prevention and mitigation of risks posed by AI systems considering actual and potential impacts to human rights, democracy and the rule of law.

Further, parties must assess the need for a moratorium or ban in respect of certain uses of AI systems where it considers such uses incompatible with the respect for human rights, the functioning of democracy or the rule of law.

Commentary

The UK government has indicated that once the AI Convention is ratified and brought into effect in the United Kingdom, existing laws and measures will be enhanced, although the precise contours of which areas will be impacted first are still unclear.

It remains to be seen what impacts the AI Convention will have on civil litigation, but given the increasing significance and relevance of AI in virtually all industries, including the legal industry (see some judicial commentary on this below), we expect increasing developments in this space.

Key Judicial Statements Regarding the Current and Future Use of AI

Senior figures in the judiciary have actively commented on AI since 2023, when the Sir Geoffrey Vos MR first queried whether judicial decisions would come to be taken by machines rather than judges.[3]

[3] https://www.judiciary.uk/speech-by-the-master-of-the-rolls-to-the-law-society-of-scotland/ .

Initially, Sir Geoffrey Vos MR posited that these would be minor decisions with safeguards in place, such as the right to appeal to a human judge. However, he also suggested that commercial and compensation decisions made by "*robo-judges*" might come to be accepted by parties sooner than previously expected, much like AI has been adopted in the detection of melanomas through being more reliable than human doctors at that task. Later in 2023, Sir Geoffrey Vos MR noted that AI would—by simplifying disclosure, narrowing issues in dispute and streamlining junior lawyers' tasks—"[make] [d]i*spute resolution … undoubtedly … quicker and easier*".[4] Also in 2023, Lord Justice Birss became the first known British judge to have used an LLM to summarise an area of law in a judgment, memorably calling the AI tool he used "*jolly useful*".[5]

In March 2024, Sir Geoffrey Vos MR delivered a speech at the AI Conference 2024 in Manchester.[6] He suggested that the adoption of AI technology was inevitable for both lawyers and judges due to a combination of client demands for efficiency as well as the duty of legal practitioners always to deliver better services to clients and the public through the constructive use of available technology. He posited that pressure on judicial decisions to be delivered more cheaply and more quickly would grow over time in tandem with other decisions in society becoming automated as well. Finally, he noted that clients might well want an AI LLM to predict the outcome of a case, and given it can access a larger volume of data than human lawyers, its opinion would at least be worth considering. Sir Geoffrey Vos MR gave a further speech in October 2024 on the topic,[7] using it to caution against the premature overregulation of AI technology and warn against stifling innovation—citing the EU's AI Act as a direct example.

Lord Justice Birss also gave a speech in 2024 outlining a vision for the role of AI technology in the courts more widely and in intellectual property disputes particularly.[8] Birss LJ argued that AI text summaries of documents filed by parties to disputes could make the reading-in process faster for judges. Similarly, he noted that as the technological capabilities of AI surpass that of human judges and lawyers, the main considerations regarding the role of AI in the administration of justice become those of ethics and human rights.

ESG and Climate Change Litigation

2024 saw a number of significant developments in the field of ESG and climate change litigation at both the domestic and international levels. The European Court of Human Rights delivered landmark judgments on the obligations of states under the European Convention on Human Rights in relation to climate change, while the UK High Court and Supreme Court addressed important issues concerning the legality of public authorities' decisions and actions in the context of the United Kingdom's net zero target and the rights of climate protesters.

---

4 https://www.judiciary.uk/speech-by-the-master-of-the-rolls-justice-in-the-digital-age/.
5 https://www.telegraph.co.uk/business/2023/09/14/british-judge-uses-jolly-useful-chatgpt-to-write-ruling/.
6 https://www.judiciary.uk/speech-by-the-master-of-the-rolls-ai-transforming-the-work-of-lawyers-and-judges/.
7 https://www.judiciary.uk/speech-by-the-master-of-the-rolls-ai-and-the-gdpr/.
8 https://www.judiciary.uk/the-impact-and-value-of-ai-for-ip-and-the-courts-a-speech-by-lord-justice-birss/.

Climate Change Obligations Under the European Convention of Human Rights

On 9 April 2024, the European Court of Human Rights (the "**ECtHR**") handed down highly anticipated judgments in three cases concerning States' obligations in relation to climate change under the European Convention on Human Rights (the "**ECHR**"): *Verein KlimaSeniorinnen Schweiz and Ors v Switzerland* ("***KlimaSeniorinnin***"); *Carême v France* ("***Carême***"); and *Duarte Agostinho and Others v Portugal and 32 Others* ("***Duarte Agostinho***"). The claims were brought against a background of increasing efforts to utilise international human rights instruments as a basis for bringing climate-related claims.

In *KlimaSeniorinnen*, the ECtHR ruled for the first time that an ECHR member state's failure to take actions to mitigate climate change breached Article 8 (right to private and family life) and Article 6(1) (right to fair trial) of the ECHR. The crux of the ECtHR's decision was its finding that Switzerland had failed to adopt a domestic regulatory framework to quantify national greenhouse gas emissions and meet its own emission reduction targets. Those targets were legally binding on Switzerland, including because it is a signatory to the Paris Agreement, which requires state parties to take measures to reduce emissions to ensure increases in global warming do not exceed 1.5 °C above pre-industrial levels. The ECtHR also found that the Swiss courts had failed to hear legal challenges against the authorities' inaction. The ECtHR's acknowledgement that states have a responsibility to take action to combat climate change under the ECHR will undoubtedly influence future climate change litigation efforts globally and in the United Kingdom.

The applicants in *Carême and Duarte Agostinho* were less successful, as the ECtHR dismissed the claims as inadmissible, finding that the applicants had failed to meet the requirements of victim status, territorial jurisdiction and exhaustion of domestic remedies. The ECtHR also held that the applicants had not established a sufficient causal link between the alleged violations of their rights and the actions or omissions of the respondent states. The ECtHR emphasised that the ECHR does not impose a general obligation on states to adopt specific measures to reduce greenhouse gas emissions but rather requires states to strike a fair balance between the various interests at stake, taking into account the evolving scientific and international consensus on climate change.

This triptych of judgments from the ECtHR represents a significant development in the trend of using human rights law as a tool to address the challenges posed by climate change. While the ECtHR confirmed that the ECHR will respond to rights violations induced by adverse climate change impacts, it also indicated that it will not disapply or broaden its ordinary admissibility criteria, nor interfere with the states' margin of appreciation in determining their climate policies, unless there is a clear and serious breach of ECHR rights. The ECtHR's judgments are likely to have wide-reaching implications for domestic and international litigation and regulation in this field.

Judicial Review of Government's Climate Change Policy

On 15 July 2024, the High Court delivered its judgment in *Friends of the Earth & Ors v Secretary of State for Energy Security and Net Zero* [2024] EWHC 995 (Admin), a judicial review challenge brought by a coalition of environmental groups and individuals against the UK government's climate change policy. Following separate judicial review proceedings in 2023, the Secretary of State for Energy and Net Zero was required to update the Carbon Budget Delivery Plan to ensure it complied with the Climate Change Act 2008 and the Paris Agreement.

The claimants argued that the government had acted unlawfully in respect of the updated Carbon Budget Delivery Plan since it did not meet the recommendations of the Climate Change Committee (an independent statutory body established by the Climate Change Act 2008) and fell short of meeting the United Kingdom's 2050 target of net zero carbon emissions.

The High Court found in the claimants' favour, holding that the Secretary of State had not provided sufficient evidence to demonstrate that the government's Carbon Budget Delivery Plan would in fact achieve net zero by 2050. The Secretary of State was required to take into account the risks that individual proposals and policies would not be successfully delivered (or delivered on time) and how that would impact the achievement of 2050 net zero target. However, the Secretary of State did not have sufficient information to understand and assess the adequacy of the government's policy proposals and their effects in achieving the net zero target. This included a lack of detailed explanation on how individual proposals would contribute to achieving the overall net zero target, as well as insufficient consideration of the uncertainties and risks associated with the delivery of these policies. It was accordingly irrational for the Secretary of State to have approved the Carbon Budget Delivery Plan.

The High Court's decision underscores the importance of transparency and thoroughness in the government's approach to climate change policy. The government must provide clear and comprehensive information to Parliament and the public, ensuring that the proposed measures are realistic and achievable.

The *Friends of the Earth* ruling followed approximately a month after the three ECtHR decisions discussed above. While human rights considerations did not feature in the judgment, the judgment chimes with the ECtHR's observation in *KlimaSeniorinnen* that the mere existence of climate policies is no longer sufficient—those policies must *in fact* contribute to the achievement of climate-related targets. The current government has yet to publish an updated Carbon Budget Delivery Plan, but no doubt this decision will have significant implications for the future formulation and implementation of the United Kingdom's climate policies, reinforcing the need for robust and evidence-based decision-making processes.

Environmental Impact Assessments Must Include Scope 3 Greenhouse Gas Emissions

On 20 June 2024, the UK Supreme Court delivered its judgment in *R (on the application of Finch on behalf of the Weald Action Group) v Surrey County Council and others* [2024] UKSC 20. The appellant sought judicial review of a local authority's grant of planning permission to retain and expand an existing onshore oil development. The case raised the question of whether local authorities must include an assessment of environmental impacts of the downstream greenhouse gas emissions generated when the oil extracted from the site was refined and the used (known as Scope 3 emissions). By a slim 3-2 majority, the Supreme Court answered the question in the affirmative. Accordingly, the planning permission for the project was revoked.

Surrey County Council had granted planning permission to Horse Hill Developments Ltd for the expansion of an existing oil well site and to drill four new wells (which would allow hydrocarbon production from those six wells for the next two decades). The environmental impact assessment ("**EIA**") did not include an assessment of Scope 3 emissions. The Council had initially advised Horse Hill Developments Ltd to include these emissions but ultimately accepted an environmental

statement that only assessed direct emissions at the project site. The majority of the Supreme Court found this approach to be unlawful, emphasising that the EIA had to include all significant environmental effects, both direct and indirect, of the project. The Supreme Court's decision was influenced by the broad scope and purpose of the EU's EIA Directive, which had been retained in UK legislation and which aims to ensure that decisions on development projects are made with full knowledge of their environmental consequences.

The judgment underscores the importance of comprehensive environmental assessments in the context of climate change and sets a precedent for future projects involving fossil fuel extraction. Indeed, just three months later, the High Court in *Friends of the Earth v SoS Levelling Up, Housing and Communities & others* [2024] EWHC 2349 (Admin) applied *Finch* and quashed the grant of planning permission for a new underground coal mine in Whitehaven, Cumbria. In addition to being the first application of *Finch*, the *Friends of the Earth* decision is itself notable in its acceptance of the claimants' argument that the grant of planning permission for the Whitehaven coal mine would harm the ability of the United Kingdom to persuade other countries to reduce GHG emissions from the use of coal.

Finch and *Friends of the Earth* indicate that future grants of planning permission for high-emissions projects are likely to be challenged before and closely scrutinised by the UK courts. This will have significant implications for the ongoing viability of such projects within the United Kingdom.

Sanctions

Supreme Court Grants Permission to Appeal in *PJSC National Bank Trust and another v Mints & Ors*

As we noted in our previous Year in Review, 2023 saw the first series of cases in the English courts relating to the sanctions imposed by the United Kingdom (and other Western governments) following the 2022 Russian invasion of Ukraine.

Among the most notable of these 2023 decisions was the judgment of the Court of Appeal in *PJSC National Bank Trust and Anor v Mints & Ors* [2023] EWCA Civ 1132 ("**Mints II**"). In that case, the Court held that the UK sanctions regime does not prohibit the entry of judgments in favour of persons who have been designated to be the subject of sanctions ("**Designated Persons**"). Importantly, the Court also provided *obiter* comments on the "*ownership and control*" test in the UK sanctions regime. The Court suggested that "*control*" is to be interpreted very broadly, such that an entity is *controlled* by a designated person if that designated person "*calls the shots*" at the entity. Our full discussion of Mints II can be found here.

However, the story of Mints II will not end there. In January 2024, the Supreme Court granted permission to the Defendants to appeal the Court of Appeal's 2023 decision. This appeal is due to be heard in March 2025, and it is expected that the scope of the "*ownership and control*" test will be one of the issues argued. It is hoped that the Supreme Court will provide (much needed) certainty on the proper application of this test in the context of the UK sanctions regime.

Consideration of Ownership and Control

While we wait for the Supreme Court to provide further guidance in the context of the *Mints* litigation, the lower English courts have continued to grapple with the scope of the "*ownership and control*" test under the UK sanctions regime. The "*ownership and control*" test is important under the UK sanctions regime as if an entity is "owned" and/or "controlled" by a Designated Person, then it will be subjected to the same financial restrictions as those imposed on Designated Persons.

In *Hellard & Others v. OJSC Rossiysky Kredit Bank (in Liquidation) & Others* [2024] EWHC 1783 (Ch), Mr Nicholas Thompsell (sitting as a deputy judge) sought to reconcile the Court of Appeal's obiter comments in *Mints II* with the subsequent, more restrictive approach to "*control*" outlined by the High Court in *Litasco SA v Der Mond Oil and Gas Africa SA & Locafrique Holdings SA [2023] EWHC 2866 (Comm)*. The Judge suggested that there were four types of "*control*" which could satisfy the "*ownership and control*" test:

1. *de jure* control (where the Designated Person has an absolute legal right to exercise control over the entity);

2. actual present *de facto* control (where the Designated Person is in fact manifestly "*calling the shots*" at the entity, despite having no legal right to do so);

3. potential future *de jure* control (where the Designated Person has no *current* legal right of ownership/control but has the legal means to obtain ownership or control—for example, an option to acquire the majority shareholding); and

4. potential future *de facto* control (where there is no evidence that the Designated Person is *currently* exercising actual present de facto control, but there is some good reason to believe that they *could* exercise control if they so wished). *Prima facie*, this fourth type of control would appear to cover a very broad range of scenarios. However, the judge was keen to stress that, in practice, a finding of this type of control would be "*very rare*".

The judgment arose in the context of the UK bankruptcy proceedings of Anatoly Motylev (a non-sanctioned Russian individual, living in London). Several Russian banks were creditors of Mr Motylev (the "**Russian Bank Creditors**") and were seeking to participate in the bankruptcy proceedings. None of these Russian Bank Creditors were "*designated persons*", nor were they owned by any designated persons. However, the Russian Bank Creditors were all in liquidation, and the liquidator was the Russian Deposit Insurance Agency (the "**DIA**"), a state corporation chaired by Elvira Nabiullina (the Governor of the State Bank of Russia). This raised the question of whether the Russian Bank Creditors were under the "*control*" of either Governor Nabiullina or President Putin by virtue of the DIA's role as their liquidator. The trustees in Mr Motylev's bankruptcy applied to the High Court for directions on whether the Russian Bank Creditors were controlled by designated persons and, if so, whether they could participate fully in the bankruptcy proceedings.

The Judge held that there was insufficient evidence to conclude that the Russian Bank Creditors were controlled by a designated person. While President Putin and Governor Nabiullina exercised significant influence over the management of the DIA, there was no evidence that they had the ability

to control the actions of liquidators in specific liquidations. In particular, the Court said there was no "*easy way*" for them to exercise potential future *de facto* control and to do so would breach existing constitutional arrangements. On this basis, the Judge directed that the trustees should not treat the Russian Bank Creditors as being subject to the UK sanctions regime but that they should undertake enhanced monitoring to ensure that this position does not develop.

The Judge further held that (*a*) even if the Russian Bank Creditors *were* controlled by a designated person, allowing them to participate in meetings of the creditors' committee and exercise creditors' votes would not violate the relevant sanctions rules, and (*b*) the trustees in bankruptcy were not, in undertaking their statutory function, providing "*financial services*" to the Russian Bank Creditors for the purposes of the Russia (Sanctions) (EU Exit) Regulations 2019.

Is the Imposition of Sanctions a *Force Majeure* Event?

In *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, the Supreme Court held that a party which was seeking to rely on a *force majeure* clause following the imposition of sanctions was not obliged to accept an offer of non-contractual performance.

We discuss this case, and the reasoning of the Supreme Court, in detail in our Contract Law Update (here). Nevertheless, the case is worth highlighting in the sanctions context given the growing attempted reliance on *force majeure* clauses by parties whose performance of contractual obligations is interrupted by the imposition or extension of sanctions.

In this case, a shipowner ("**MUR**") had entered into a contract with a charterer ("**RTI**") which provided for payments from RTI to MUR in US dollars. The contract contained a *force majeure* clause which stated that (*i*) neither party would be liable for failures to perform caused by a "*Force Majeure Event*" (as defined in the contract), and (*ii*) an event would only constitute a Force Majeure Event if it could not be "*overcome by reasonable endeavours from the Party affected*". In 2018, RTI's parent company was sanctioned by the US. MUR subsequently gave notice under the *force majeure* clause that payment could not be made in US dollars because of the sanctions. RTI rejected the notice and offered to pay in euros instead. MUR refused this offer and suspended performance under the contract.

The Supreme Court held that MUR had been entitled, pursuant to the *force majeure* clause, to suspend performance. Specifically, the Court highlighted the limitations of "*reasonable endeavours*" caveats in *force majeure* clauses by holding that MUR was not required to accept non-contractual performance (*i.e.* payment in euros) as part of its "*reasonable endeavours*".

Cryptocurrency Disputes

The English courts have once again continued to grapple with complex, novel issues relating to cryptoassets in 2024, including: (*i*) the availability of summary judgment against unknown (and potentially unidentifiable) crypto fraudsters; (*ii*) whether a cryptocurrency could be the subject of an order for specific performance; and (*iii*) whether Tether (a stablecoin) is a thing which attracts property rights under English law—an issue that was considered for the first time following a full contested trial.

Outside of the courtroom, in September 2024, the UK government introduced the Property (Digital Assets etc) Bill. If the Bill becomes law, it will confirm that certain digital assets can be recognised as property, even if they do not fit into the two traditional categories of personal property in English law.

Claims Against Persons Unknown

In *Mooij v Persons Unknown & Ors* [2024] EWHC 814 (Comm), the High Court considered claims in deceit, unjust enrichment and breach of constructive trust against the First, Second and Third Defendants, the identities of whom were unknown, and eight other known Defendants. Mr Mooij's claim against the First and Second Defendants[9] arose from a large-scale cyber fraud committed by unknown individuals using the fake trading platform "MegaMarkets", which was established and operated by the Sixth Defendant, MegaMarkets Trading Ltd ("**MegaMarkets**").

Mr Mooij alleged that MegaMarkets was a bogus crypto investment company that fraudulently persuaded individuals to transfer cryptocurrency to its fake online trading platform, which MegaMarkets would subsequently misappropriate. Specifically, Mr Mooij alleged that the First Defendant had persuaded him to invest monies in cryptocurrencies and coaxed him into purchasing and transferring c. 20.34 Bitcoin ("**BTC**") and €330,000 to the MegaMarkets platform. Mr Mooij also alleged that MegaMarkets was personally obliged to account to him in equity, as a result of being a dishonest accessory to, or procurer of, the breach of trust committed by the First and/or Second Defendants. The Claimant sought an order for delivery up of the 20.34 BTC and €330,000 (or the equivalent in BTC), or, alternatively, damages or equitable compensation.

On 14 December 2023, HHJ Pelling KC (sitting as a High Court judge) granted an order permitting (among other things) alternative service of the claim by non-fungible token ("**NFT**") airdrop into the Second Defendant's BTC wallet to the First and Second Defendants, and by e-mail to the other Defendants.

On 24 January 2025, Mr Mooij applied for (among other things) summary judgment. The question arose whether the First and Second Defendants were able to be subject to final judgment given that their identities remained unknown.

HHJ Russen KC (sitting as a High Court judge) delivered an *ex tempore* judgment granting Mr Mooij's summary judgment application against the defendants. HHJ Russen KC considered that the Defendants had been effectively served, had offered no resistance to the case against them and had failed to engage with the proceedings[10] and, therefore, had no real prospect of successfully defending the claim.

Notably, HHJ Russen KC found that if jurisdiction against an unknown defendant had been deemed to have been established by alternative service having been effected on that defendant (as in the present case), there was no reason why the Court's jurisdiction to grant a final judgment against that defendant should differ according to whether or not the defendant had in fact been identified by the stage. Accordingly, HHJ Russen KC granted final judgment against the first and second defendants in

[9] The High Court described the first and second defendants, respectively, as the fraudsters and the beneficiaries of the wallets into which Mr Mooij's BTC had been misappropriated.

[10] The defendants did not appear at the hearing before HHJ Russen KC and were not represented.

the form of orders for delivery of the BTC and payment of the sum of cash. Further, the Court recognised that it was plain that unless and until the first and second defendants could be identified, there may be difficulties with enforcement. Notwithstanding, HHJ Russen KC did not consider that this was a reason not to grant summary judgment against them.

Following the decision of Mr Richard Salter KC (sitting as a deputy judge) in *Boonyaem v Persons Unknown* [2023] EWHC 3180 (Comm), it was considered that summary judgment against unidentifiable crypto fraudsters was not possible. However, *Mooij* has reconfirmed[11] that summary judgment can be granted against unknown and potentially unidentifiable crypto fraudsters where service has been effected on those fraudsters (*e.g.* by alternative means via NFT airdrop).

Claims Against Persons Unknown Coupled with Claims in Breach of Trust Against Known Defendants

In *D'Aloia v Persons Unknown & Ors* [2024] EWHC 2342 (Ch), the Claimant alleged that he was the victim of a cryptocurrency scam. Mr D'Aloia alleged that a fraud was perpetrated on him by persons unknown (the "**First Defendants**") in which he was induced to hand over cryptocurrency in the form of Circle (irrelevant in these proceedings) and Tether ("**USDT**") totalling around £2.5m. The First Defendants then passed that cryptocurrency through a number of blockchain wallets before it was withdrawn as fiat currency by further persons unknown (the "**Seventh Defendants**"). Polo Digital Assets Inc (the "**Third Defendant**"), Gate Technology Corp (the "**Fourth Defendant**") and Bitkub Online Co Ltd[12] (the "**Sixth Defendant**", or "**Bitkub**", and together with the Third Defendant and Fourth Defendant, the "**Exchange Defendants**") were the cryptocurrency exchanges with whom the Seventh Defendants were said to hold their various accounts. The trial concerned the issues between Mr D'Aloia and Bitkub (the "**Sixth Defendant**").[13]

More specifically, Mr D'Aloia alleged that he transferred the funds to a crypto wallet controlled by the First Defendants (the "**1dDa Wallet**"). Mr D'Aloia's blockchain analytics expert, Mr Moore, asserted that through a series of 14 transactions ("**Hops**") a part of those funds arrived in a Bitkub wallet linked to the account of one Ms Hlangpan (the "**82e6 Wallet**"). The total transferred to Ms Hlangpan was USDT 400,000, of which USDT 46,291 was said to have either been USDT belonging to Mr D'Aloia or their traceable proceeds.[14] Shortly thereafter, the 82e6 Wallet was "swept"[15] into the Bitkub "hot wallet"[16] and USDT 400,000 was credited to Ms Hlangpan's account. Ms Hlangpan then converted the USDT 400,000 into c. 13.7m Thai Baht (THB) and proceeded to withdraw almost the entirety of these

---

11 See: *Jones v Persons Unknown* [2022] EWHC 2543 (Comm).

12 Bitkub offers its customers *custodial* digital wallet services for cryptocurrency, including USDT. A *custodial* digital wallet involves the cryptocurrency exchange, here Bitkub (as opposed to the customer), controlling the private key necessary to execute transactions on the blockchain.

13 Mr D'Aloia's claim against the Second Defendant (Binance) had settled, and his claim against the Fifth Defendant (Aux Cayes Fintech) was struck out. Mr D'Aloia had issued a separate applicationseeking summary judgment against the First Defendants, Third Defendant (Polo), Fourth Defendant (Gate) and Seventh Defendants.

14 The validity of Mr Moore's tracing exercise, including whether it was tracing at all, was a key issue in dispute between the parties.

15 The operation and legal effect of "sweeping" was summarised by Trower J in *Prioozzadeh v Persons Unknown* [2023] EWHC 1024 (Ch) at [8]. In short, customers do not retain any property in the cryptoasset (*i.e.* USDT) deposited with the crypto exchange. Instead, the customer'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 USDT are then swept into a central unsegregated pool address known as a "hot wallet" where they are treated as part of the crypto exchange's general assets.

16 A "hot wallet" is a crypto storage solution connected to the internet for ease of access.

funds, in breach of the daily limit on withdrawals imposed by Bitkub. Bitkub's systems should have prevented the transfers and blocked Ms Hlangpan's account but failed to do so for reasons Bitkub could not explain.

Mr D'Aloia brought claims against the unknown fraudsters in deceit and against the Exchange Defendants, who he alleged were liable either in unjust enrichment or as constructive trustees.

USDT as Property

A key (undisputed) issue before the High Court was the status of the stablecoin, USDT, as property. The High Court held that USDT is a thing which attracts property rights under English law. Specifically, the Court considered that USDT is neither a chose in action nor a chose in possession but rather a distinct form of property not premised on any underlying legal right. Accordingly, USDT can be the subject of tracing and can constitute trust property in the same way as other property. The Judge also observed that the starting point for considering whether a cryptoasset is a form of property is the test in *National and Provincial Bank v Ainsworth*,[17] and a key aspect of crypotassets is that they are rivalrous (*i.e.* ownership by one person prevents ownership by another). The Judge also doubted the terminology of a "third category" of property rights, indicating that he would not bracket all assets that are neither choses in action nor choses in possession under a single category of property for all purposes.[18]

Following and Tracing USDT

Critical to Mr D'Aloia's claim was to bridge the gap between the 1Dda Wallet into which he paid his USDT and the 82e6 Wallet from which the USDT left the blockchain universe and re-entered the traditional banking system. The key issues considered by the Judge with respect to Mr D'Aloia's ability to follow or trace his property (the USDT) to the Sixth Defendant were as follows:

- Is it possible to follow the USDT into the 82e6 Wallet? The Judge considered that this turned on two linked issues: (1) whether in principle the property interest in USDT is, for these purposes, more akin to a chose in action or chose in possession; and (2) can USDT in fact be followed through a mixture? The Judge considered that if the USDT was equated to a chose in action, it could not be followed because once it passed through a mixed fund it ceased to be identifiable. Alternatively, if the USDT was equated to a chose in possession, it could, in principle, be followed provided it remained identifiable. The High Court found that USDT is a "persistent thing" (*i.e.* it maintains a distinct identity, even in a mixture of similar assets), as Tether Ltd (the organisation that administers USDT) was said to be able to identify individual USDT in any wallet. On that basis, the Judge held that the USDT was more akin to a chose in possession and that in principle the Claimant's USDT could have been followed, including through the different crypto wallets used in the various Hops, even where

[17] *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1247-1248: "*Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability*".

[18] The Judge noted that this is consistent with the approach proposed in the Law Commission's draft Property (Digital Assets etc.) Bill discussed below.

those wallets contained or subsequently received USDT from other sources. However, there was no evidence before the Judge that allowed that exercise to be undertaken.

- Can Mr D'Aloia trace at common law through a mixed fund? The Judge considered that tracing through mixed funds (*i.e.* crypto wallets holding cryptoassets from multiple sources) at common law was impossible. As such, tracing was only available to Mr D'Aloia in respect of his equitable claims, where tracing through a mixed fund is possible.

- Can Mr D'Aloia trace using equitable rules? The High Court recognised that there were three options to trace through a mixed fund: (1) first-in-first-out (FIFO); (2) *pari passu* distribution; and (3) rolling charge methods. However, the Judge noted that these were not the only options available, and other methods are available to a party seeking to trace assets, provided they treat all innocent claimants and potential claimants comparably and are properly evidenced. The Judge found that Mr Moore did not use any of these options and, while that was not strictly necessary, he could not accept Mr Moore's evidence because it was not clear what methodology had been adopted. Accordingly, the High Court refused to accept that Mr Moore's evidence reliably demonstrated the flow of Mr D'Aloia's funds to the 82e6 Wallet. This was fatal to Mr D'Aloia's claims against Bitkub so far as they relied on tracing.

Bitkub as a Constructive Trustee

Mr D'Aloia advanced his constructive claim in four ways. Three of the four routes alleged that the First Defendants were constructive trustees. The Judge accepted that the First Defendants held the USDT on constructive trust as a result of the initial fraud. By the fourth route, Mr D'Aloia alleged that Bitkub's failure to act in a commercially reasonable manner (*i.e.* by failing to implement adequate KYC and AML, and by failing to monitor Ms Hlangpan's account and freeze it in light of the suspicious transaction volumes) gave rise to a constructive trust. The Judge considered that this fourth limb faced insurmountable hurdles, including because: (*1*) it was not pleaded; and (*2*) Mr D'Aloia had failed to prove Bitkub received any of his funds, and so any trust that was established would not be in favour of Mr D'Aloia.

Unjust Enrichment

The Judge held that Bitkub was unjustly enriched by the receipt of the USDT 400,000. However, Mr D'Aloia's claim on this ground failed because the Court was not satisfied that Bitkub had been enriched *at the Claimant's expense* because Mr D'Aloia failed to trace his USDT to Bitkub. The Court also found that whilst the defence of *bona fide* purchase for value without notice was, in principle, available in the context of the transfer of cryptoassets, Bitkub had failed to make out the defence, as it had actual notice of the suspicious activity (and repeated breaches of withdrawal limits) on Ms Hlangpan's account.

This case is the first time following a contested trial that the English courts have held that a cryptoasset (here USDT) constituted property under English law. The decision also illustrates the importance of robust, defensible evidence as to following/tracing in cases involving transactions on the blockchain.

Valuation of Cryptoassets for Damages Awards

In *Southgate v Graham* [2024] EWHC 1692 (Ch), the High Court considered parts of an order made by HHJ Saggerson on 28 September 2023. The order was made at the conclusion of the trial of a dispute as to the terms of an oral agreement under which Mr Oliver Southgate ("**Mr Southgate**") advanced 144 Ethereum tokens ("**ETH**") to Mr Adam Graham ("**Mr Graham**") in June 2018 (the "**Agreement**").

HHJ Saggerson found that the Agreement was a contract for the provision of a funding option for Mr Graham in the form of 144 ETH on the basis that the ETH would be returned or re-transferred to Mr Southgate by way of repayment. HHJ Saggerson held that Mr Graham had been in continuing breach of the Agreement for failing to return the ETH by the contractually agreed time (*i.e.* 1 October 2019) but refused to grant specific performance of Mr Graham's obligation to return the ETH, instead ordering damages in lieu (to be assessed at a future remedies hearing).

One of the recitals to the Order provided that the assessment of damages "*must be based upon the value of the* [ETH] *as of midday, 1st October 2019*". Mr Southgate appealed against HHJ Saggerson's order on the basis that the Judge was wrong to refuse specific performance. Alternatively, Mr Southgate argued that the Judge was wrong to direct that the valuation date for an assessment in lieu should be 1 October 2019. Rather, the appropriate date should be based upon the value as at the date of judgment.

Mr Justice Trower noted that the volatility in the value of ETH was such that, as at the time of the trial judgment (*i.e.* 28 September 2023), ETH was worth approximately 10 times its value as at the valuation date picked by the trial judge (*i.e.* 1 October 2019), which itself was significantly less than the value at the time the ETH in issue were originally transferred to Mr Graham in June 2018. [19]

Specific Performance

Trower J considered that there was "*nothing special about a contract to transfer cryptocurrency*" and so "[t]*he usual rules will apply to the issue of whether* [cryptocurrency] *should be subject of an order for specific performance*". Trower J held that the nature of ETH was such that any loss as a result of a failure to return them was capable of being adequately compensated in damages.

Appropriate Valuation Date for the Assessment of Damages

Trower J found that the trial judge had been wrong to reach a settled view on the correct date for the assessment of damages. This was partly because the trial judge had assumed that the date of breach must be the correct starting point for any assessment without hearing proper submissions on whether this was in fact the case. Trower J decided not to rule on the issue and considered the fairer course was for a remedies hearing to be listed to deal with all of the issues which go to the assessment of damages. Notwithstanding, Trower J observed *obiter* that Mr Southgate's arguments for a date other than the date of breach (*i.e.* the date of judgment) appeared to have "real merit".

Whilst the appropriate valuation date for the assessment of damages remains to be decided in this case, it is clear that in similar cases, the issue will be heavily fact dependent. If an innocent party wishes to argue for a departure from the general rule that damages are assessed at the date of breach, it will need

[19] 1 ETH was worth approximately: (*i*) £448 on 6 June 2018; (*ii*) £147 on 1 October 2019; and (*iii*) £1,311 on 28 September 2023.

to bear in mind that courts will closely scrutinise the mitigating steps it took (or did not take) post-breach to crystallise its loss.

Property (Digital Assets Etc) Bill 2024 (12 September 2024)

On 27 June 2023, the Law Commission published a report on digital assets in which it recommended (among other things) that the law explicitly recognise that a thing (*i.e.* crypto-tokens like bitcoin and ether) will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession. On 12 September 2024, the Property (Digital Assets etc) Bill (the "**Digital Assets Bill**") and accompanying Explanatory Notes were published. Clause 1 of the Digital Assets Bills provides that:

"*A thing (including a thing that is digital or electronic in nature) is not prevented from being the object of personal property rights merely because it is neither –*

a) *a thing in possession, nor*

b) *a thing in action.*"

The first reading of the Digital Assets Bill took place on 11 September 2024. The second reading—the general debate on all aspects of the bill— took place in the Grand Committee on 6 November 2024 and then formally in the House of Lords chamber on 13 November 2024. Following the second reading, the Digital Assets Bill was committed to a Special Public Bill Committee, which is yet to be scheduled. On 19 November 2024, the Special Public Bill Committee issued a call for evidence asking respondents to summarise their views on the Digital Assets Bill by 20 December 2024.

The Digital Assets Bill confirms that certain digital assets (*i.e.* crypto tokens) can attract property rights even if they do not fit into the two traditional categories of personal property. The bill confirms the approach taken in recent High Court judgments.[20] However, the Digital Assets Bill deliberately does not state what digital assets fall within a "third category" of personal property or how the law will treat them. Instead, these details will be developed by the courts through the application of established common law tests for property. This means that only things with the necessary characteristics of property will be recognised as attracting property rights. The Law Commission identified crypto tokens as the main type of digital asset likely to fall into the "third category".

The government hopes that the Digital Assets Bill will ensure this jurisdiction remains an attractive place to deal with and litigate in respect of cryptoassets and other "third category" things. Recognising a further category of personal property should also decrease litigation costs and court time by giving certainty as to its existence.

[20] *D'Aloia v Persons Unknown* [2024] EWHC 2342 (Ch) (see above) and *AA v Persons Unknown* [2019] EWHC 3556 (Comm).

Company Law Update

Introduction

Company law litigation in 2024 was all about directors, with multiple key decisions being released where the courts provided guidance on the circumstances in which a director can be held personally liable for their actions in relation to the company. This has been a continuation of a recent trend whereby claimants have shown greater motivation to respond to wrongdoing by a company by targeting a wider range of defendants than just the company itself, such as the company's directors or its parent company. We expect this trend to continue in future years, particularly if the predicted increases in company insolvencies (and therefore judgment proof defendants) prove accurate.

Directors' Accessorial Liability for Torts Committed by Company

In *Lifestyle Equities CV & Anor v Ahmed & Ors* [2024] UKSC 17, the Supreme Court confirmed the level of knowledge that must be proven in order to establish that a director is liable as an accessory to a tort committed by his or her company.

Mr and Ms Ahmed were the directors of a company called Hornby Street Ltd, which manufactured and sold clothing and footwear items that displayed the logo "Santa Monica Polo Club" alongside depictions of polo players. Lifestyle Equities CV complained that these products breached its trademarks over the words "Beverly Hills Polo Club" alongside depictions of polo players. Following two trials, the High Court ruled that: (*i*) Hornby Street was liable for trademark infringement and passing off; and (*ii*) the Ahmeds were liable as accessories to Hornby Street's torts, as they had issued the instructions for the manufacture and sale of the products that breached Lifestyle Equities' trademarks.

Crucially, however, the High Court did not make a positive finding that the Ahmeds had known that the Santa Monica Polo Club products breached Lifestyle Equities' trademarks. The torts of trademark infringement and passing off are strict liability torts, meaning that it was not necessary to prove that the defendant had a particular state of mind in order to establish liability.

The Ahmeds appealed to the Court of Appeal—which confirmed the High Court's ruling on liability—before appealing again to the Supreme Court. The Supreme Court considered three key issues relating to the liability of a company's directors and employees for a tort performed by the company.

The first issue was whether the fact that the Ahmeds were directors of Hornby Street, rather than merely employees, meant that they could be held liable as primary tortfeasors (rather than merely as accessories). Under the Trade Marks Act 1994, someone will be liable as a primary tortfeasor if they "*use*" a sign that resembles someone else's trademark "*in the course of trade*". Lifestyle Equities argued that any actions performed by an employee are actions performed "*in the course of trade*". The Supreme Court disagreed and held that someone will only be acting "*in the course of trade*" if they are "*trading*

on their own account and for their own economic advantage rather than … simply performing duties for their employer". The Supreme Court further said that, in this context, it makes no difference if the person is solely an employee or is also a director.

The second issue was whether there exists a special rule providing that a company director acting in good faith and with reasonable care cannot ever be held jointly liable for a tort committed by the company. The Supreme Court rejected this contention: if someone performs the various acts that constitute a particular tort, then they will be liable, and the fact they were acting as a company director at the time will not excuse them from liability.

The third issue was whether the Ahmeds could be held liable as accessories notwithstanding that it had not been established that they had known that Hornby Street was infringing Lifestyle Equities' trademarks. Lifestyle Equities had argued (and both the High Court and Court of Appeal had agreed) that it was not necessary to prove knowledge in order to establish accessory liability, as the torts that had occurred were themselves strict liability torts. In other words, because it was not necessary to prove that Hornby Street knew it was violating Lifestyle Equities' trademarks in order to establish liability against it as the primary tortfeasor, it was also not necessary to prove that the Ahmeds had knowledge in order to establish accessory liability against them. The Supreme Court disagreed and held that in any case (including cases involving a strict liability tort), someone can only be found liable as an accessory if they:

- Procured the performance of the tort by the primary tortfeasor while having knowledge of the essential facts that mean that the primary tortfeasor's actions were tortious. For the purposes of this test, "knowledge" will be established where the defendant accessory either subjectively knew the essential facts, which meant that the primary tortfeasor's actions were tortious, or had deliberately turned a blind eye to those facts. It is not necessary, however, to establish that the defendant accessory was aware that the primary tortfeasor was doing something unlawful—so long as they knew the key facts, then they will be liable as an accessory regardless of whether they appreciated that something illegal was occurring.

- Assisted the primary tortfeasor to commit the tort pursuant to a "*common design*". Under this approach, the accessory needs to have provided assistance that was "*more than trivial*", but which could fall short of constituting outright procurement of the tort. A "*common design*" will exist where the accessory and the primary tortfeasor had actively agreed to embark on the course of conduct that led to the primary tortfeasor performing the tort. Again, this will mean that for liability as an accessory to be established, the defendant must have had knowledge of what the primary tortfeasor was doing, but they need not have known that this was unlawful.

Applying this approach to the facts, the Supreme Court found that the Ahmeds were not liable. The reason for this was that the trial judge had not made a positive finding that the Defendants had the requisite degree of knowledge (as this had not been part of the Claimants' pleaded case at trial), and the Supreme Court was unable to reassess this factual finding.

This decision provides helpful clarification of the state of mind that needs to be proven in order to establish that someone is liable as an accessory to a tort, and highlights in relation to strict liability torts that establishing accessory liability is more difficult (due to the additional requirement to prove knowledge). The decision further clarifies that it is possible to establish liability against a company director or employee if they cause the company to commit a tort, although in order to do so it is necessary to establish liability under the standard test for tortious liability—liability cannot be established on the basis that the person was a director or employee *per se*.

Accessorial Liability for *De Jure* Directors

In *Njord Partners SMA-Seal LP & Ors v Artis Maritime Ltd & Ors* [2024] EWHC 1682 (Comm), the High Court applied the approach to accessory liability in relation to a claim against a *de jure* director of a company for accessory liability relating to a deceit carried out by a shadow director of the company.

This case concerned a US$45 million revolving facility agreement (the "**Facility**"). The borrower under the Facility was Astir Maritime Ltd ("**Astir**"), which was a wholly owned subsidiary of North Star Maritime Holdings Limited ("**North Star**") and had been incorporated for the sole purpose of being the borrower under the Facility.

In due course, and after Astir had drawn down a significant amount of money under the Facility, North Star went into liquidation. This constituted a default under the Facility requiring immediate repayment by Astir. Astir in turn failed to pay and was dissolved. The lenders under the Facility (the "**Lenders**") then commenced various actions to recoup their losses from third parties. One of these actions consisted of claims for deceit and unlawful means conspiracy against two individuals: the Second Defendant ("**Tahir**") and his son, the Third Defendant ("**Ali**"). Tahir was the founder of North Star but was not a *de jure* director or shareholder. Ali was a *de jure* director and 50% shareholder of North Star (meaning he in turn was the ultimate owner of 50% of Astir).

The Lenders brought various claims against Tahir and Ali, but for present purposes, the key claim was a claim in deceit against Tahir and Ali relating to the so-called "**Asset Representations**". The Asset Representations were representations that Tahir had made to the Lenders about his total net worth. This was relevant to the Lenders because Tahir had agreed to guarantee Astir's obligations under the Facility, so Tahir's net worth affected the Lenders' assessment of the likelihood that they would eventually be repaid. The evidence plainly showed that the Asset Representations had induced the Lenders to provide the Facility, and that Tahir's actual net worth was much lower than the amounts specified in the Asset Representations. Therefore, the Court readily held Tahir was liable in deceit as the primary tortfeasor.

The more nuanced aspect of the case, however, was the Lenders' claims against Ali regarding the Asset Representation. The Lenders presented two bases on which Ali was liable as an accessory:

- The "*narrower*" basis was that because Ali was both a director and part owner of Astir, he was liable for any "*fraudulent mis-statements made to his knowledge on behalf of or for the benefit of Astir*". The Court held that this is insufficient to establish secondary liability. Instead, what is required for accessory liability to be established on this basis is that the accessory has "*manifestly approved and adopted*" the misrepresentation. It is insufficient for the alleged accessory to have merely

known about it. On the facts, there was no evidence that Ali had manifestly approved and adopted the Asset Representations and therefore he was not liable on the "*narrower*" basis.

- The "*wider*" basis of Ali's alleged liability was that he was liable as an accessory to Tahir's tortious conduct. The Court applied the legal test set down in *Lifestyle Equities CV v Ahmed* [2024] UKSC 17 (see our summary above) and held that Ali was liable as an accessory because:

  1. the evidence showed that Ali had "*assisted in a more than trivial way*" with the Asset Representations, including by sending the Lenders spreadsheets setting out summaries of Tahir's represented assets;

  2. Ali had known both that the Asset Representations were false and that Tahir had made these representations to induce the Lenders to provide the Facility; and

  3. Tahir and Ali had been acting pursuant to a common design. Tahir and Ali had both given evidence claiming that although Tahir was not a *de jure* director of North Star and Astir, in reality Tahir controlled the companies on a day-to-day basis, whereas Ali did not play a meaningful role (even though he was a *de jure* director). The Court rejected this evidence and found that although Tahir was "*very much the decision-maker for the business*", Tahir typically involved Ali in the operation of the business (including by ordering Ali to perform tasks to carry out Tahir's decisions). The Court therefore inferred that Tahir and Ali would have been acting pursuant to a common design in relation to the Asset Representations.

The Court therefore held Ali liable as an accessory to the Asset Representations.

This decision provides a helpful illustration of the application of the Supreme Court's ruling in *Lifestyle Equities* to a claim against company directors. In particular, this case is a useful reminder that tortious liability as an accessory cannot be established solely on the basis that the defendant is a director *per se*—liability must be established through the standard test for accessory liability.

Liquidators Fail to Obtain Disclosure Under Insolvency Act 1986

In *Webb & Anor v Eversholt Rail Limited & Anor* [2024] EWHC 2217 (Ch), the liquidators of Eversholt Rail (365) Limited (the "**Liquidators**") unsuccessfully applied for orders under ss,235(2)(a) and 236(3) of the Insolvency Act 1986 for the disclosure of documents held by: (*i*) Eversholt Rail Limited ("**Eversholt Rail**"), which was a sister company to Eversholt (365) Limited; and (*ii*) Norton Rose Fullbright LLP ("**NRF**"), who were the solicitors of Eversholt Rail.

Put briefly, ss.235(2)(a) and 236(3) of the Insolvency Act enable a company liquidator or other office-holder (*e.g.* an administrator) to obtain a court order requiring third parties to provide the liquidator with information and/or documents relating to the company. In this case, the Liquidators sought very wide orders requiring Eversholt Rail to provide "*copies of all documents … relating to the business,*

dealings, affairs or property of [*Eversholt Rail*] *365*". As part of this request, the Liquidators expressly stated that they wanted Eversholt Rail to provide them with copies of legal advice it had received from NRF. Likewise, the Liquidators sought disclosure from NRF of a wide range of documents relating to NRF's solicitor-client relationship with Eversholt Rail. Eversholt Rail and NRF had expressed a willingness to provide documents in response to tailored requests made by the Liquidators (and indeed had already provided some information and documentation to the Liquidators). However, Eversholt Rail and NRF took the position that the Liquidators' application for documents under the Insolvency Act was overly broad, as it sought for them to effectively provide the Liquidators with all documents they held relating to Eversholt Rail (365) Limited, including legally privileged documents.

The High Court noted that where office-holders make an application for documents under ss.235(2)(a) and/or 236(3) of the Insolvency Act, they must first establish that they have a "*reasonable requirement*" for the documents sought. If the officer-holders establish that they have a "*reasonable requirement*" for the documents, the court will then weigh this up against the degree of oppression that will be suffered by the respondent if it is ordered to hand over the documents. The High Court further confirmed that where the documents sought are privileged, an officer-holder will only be able to obtain those documents through a s.235(2)(a) or 236(3) Insolvency Act application if it can show that this privilege does not apply to the company (*e.g.* because the company has a joint interest in the privilege).

In the present case, the only explanation that the Liquidators had given for why they needed the documents was so that they could "*reconstitute the company's records*" and "*for the purpose of their investigations*". The High Court held that it would need to be provided with "*compelling evidence to understand why a liquidator needs to reconstitute and thus see absolutely all of a company's records*" and a vague reference to needing to perform investigations was insufficient to constitute a compelling reason. The High Court therefore rejected the Liquidators' application on the basis that they had failed to establish that they had a "*reasonable requirement*" for the documents. The High Court therefore did not consider it necessary to consider what, if any, oppression would be suffered by Eversholt Rail and NRF if they were ordered to hand over the documents.

This decision serves as a useful reminder of the limitations of ss.235(2)(a) and 236(3) of the Insolvency Act. While these provisions serve as a useful information-gathering tool for office-holders, they do not enable office-holders to engage in fishing expeditions or submit overly broad document requests. Instead, office-holders must ensure that the document request is carefully tailored to a specific objective. This decision also highlights the importance of being seen to attempt to cooperate with requests by office-holders for documents. The evidence before the Court showed that Eversholt Rail and NRF had repeatedly attempted to engage with the Liquidators to try to assist them with their investigations—including confirming that they would be willing to provide documents if the Liquidators could present a more precise request—but the Liquidators failed to respond cooperatively. It is apparent from the Court's judgment that the Liquidators' failure to engage with Eversholt Rail and NRF was a further reason why they had failed to show that they had a "*reasonable requirement*" for the documents sought, as they had failed to take up the opportunity to obtain documents and information from Eversholt and NRF without the need for court intervention.

Personal Liability for Directors for Wrongful Trading and Misfeasance

In a series of judgments issued in 2024, *Wright & Ors v Chappell & Ors* [2024] EWHC 1417 (Ch) and *Wright v Chappell* [2024] EWHC 2166 (Ch), the former directors of an insolvent company in liquidation were held liable for wrongful trading under s.214 of the Insolvency Act 1986 and misfeasance under s.212 of the Insolvency Act 1986 and ordered to pay damages for an aggregate amount in excess of £100 million.

The Defendants were the former directors of British Home Stores Group ("**BHS**"). At the time the Defendants were appointed to their roles, BHS was already in significant financial strife (as exemplified by the fact that it had just been sold for only £1). Over the following year or so, the directors allowed BHS to continue to trade, and during this period, the directors also caused BHS to enter into a variety of financing arrangements. Ultimately, though, BHS did not survive for long: by September 2015, it was cashflow insolvent, and by April 2016, it had gone into administration (before then being put into liquidation shortly thereafter). The liquidators subsequently brought claims against the directors for misfeasance and wrongful trading on the basis that they should not have allowed BHS to continue to trade for as long as they did.

A director will be liable for wrongful trading if on a certain date they knew, or ought to have concluded, that there was no "*reasonable prospect*" of the company avoiding insolvent liquidation, and then after that date they failed to take every step with a view to minimising potential losses to the company's creditors. The Court concluded that the directors became aware (or ought to have concluded) on 8 September 2015 (seven months before BHS went into administration) that the company did not have a reasonable prospect of avoiding insolvent liquidation. The Court was not satisfied that the directors had taken "*every step*" from that date with a view to minimising potential losses to the company's creditors. The evidence showed, for example, that the directors had not considered the interests of certain types of creditors. The Defendants had argued that they should be absolved from liability because they had obtained advice from professional advisors on what to do. However, the Court held that obtaining professional advice does not automatically protect a director from liability for wrongful trading. Furthermore, in this case, the directors had failed to give their advisors all of the relevant facts and financial information, meaning that all that their advisors had been able to do was provide generic advice on the legal issues that had arisen, and were unable to provide the directors with comprehensive advice on how to navigate these issues.

As for misfeasance under s.212 of the Insolvency Act, two different types of misfeasance were alleged against the directors:

- Trading misfeasance, for having allowed the company to continue to trade after the directors became aware that it was in financial difficulty. The Court concluded that on 17 June 2015, the company's financial position had become sufficiently dire that the directors' duties to the company required them to treat the company's creditors' interests as "*paramount*". The directors failed to do this and instead allowed the company's net debt position to worsen. Therefore, the directors were liable for trading misfeasance.

- Individual misfeasance in relation to several individual transactions where the directors had breached their duties to BHS, for example, by causing BHS to enter a

transaction so that one of the directors could receive an arrangement fee. The Court concluded that one or more of the directors had engaged in individual misfeasance in relation to nine transactions, although only three of these transactions had caused a loss to BHS.

In regard to damages, the Court quantified this by reference to the extent to which the net deficiency in BHS' assets had increased from the date on which the directors ought to have concluded that it was more probable than not that it would go into administration or liquidation, and the date on which BHS went into administration. The parties had agreed that this figure was £133.46 million, but the Court made some deductions from this amount, including to reflect the fact that during this period BHS had received one windfall in that its pension scheme had increased in value by £19 million.

This decision is a further instance (following the Supreme Court's groundbreaking decision in *BTI 2014 LLC v Sequana SC* [2022] UKSC 25) of company directors being held liable for having failed to act appropriately once the company's impending insolvency became sufficiently apparent. It is also a salient reminder that although directors should engage professional advisors, the fact they did so will not protect them from liability if they fail to adequately involve those advisors in their consideration of how to respond to the company's financial issues.

Our full discussion of the decision can be found here.

Contract Law Update

Force Majeure and Reasonable Endeavours

Various important contract law cases were decided in 2024, but the most notable is the Supreme Court's consideration of *force majeure* clauses in *RTI Ltd v MUR Shipping BV* [2024] UKSC 18. We have written about this case previously (here). Importantly, the Supreme Court found that a party seeking to rely on a *force majeure* clause is not required to accept non-contractual performance unless the clause expressly provides for such acts to amount to reasonable endeavours in order to overcome *force majeure* events. In other words, where a *force majeure* clause requires a party to use reasonable endeavours (whether expressly or by implication) to avoid the *force majeure* event, a party is not required to engage in non-contractual performance.

The key issue in the case arose because certain entities subject to contractual payment obligations in US dollars were affected by sanctions. Payment was proposed to be given in Euros instead to avoid the impacts of sanctions. This was said to be in the exercise of reasonable endeavours to overcome the *force majeure* event. The intended recipient refused to accept payment in Euros and in the absence of payment in US dollars, declared there to be a *force majeure* event. It was therefore asserted that payment in the non-contractual currency did not amount to reasonable endeavours to overcome the *force majeure* event.

The Supreme Court engaged in a strict contractual construction exercise finding that the contract required payment in US dollars and made no provision for payment in an alternative currency. Further, the Supreme Court found that although the parties were under an obligation to exercise reasonable

endeavours to overcome *force majeure* events, this did not include non-contractual performance in the absence of clear words to the contrary.

Given the clause in question was in a form commonly used, the decision will have considerable impact. Even where *force majeure* clauses omit reasonable endeavours wording, the courts frequently imply such terms, so the Supreme Court's decision is all the more important. Parties are encouraged to review their contractual arrangements to consider the true scope of any *force majeure* clauses, especially in the context of the various prevailing sanctions regimes.

Material Adverse Change Clauses

Keeping with the theme of provisions which alter the parties' obligations upon the happening of certain events, the High Court considered the ambit of a material adverse change clause ("**MAC clause**") (sometimes referred to as a "material adverse effect" clause) in *BM Brazil & Ors v Sibanye BM Brazil & Anor* [2024] EWHC 2566 (Comm), which we considered here. MAC clauses are fairly common in US-law governed agreements, but they are finding their way into English-law agreements more frequently. Such clauses entitle one or other of the parties to terminate the contract if a "material adverse event" occurs. In a share purchase agreement, for example, the purchaser would be entitled to terminate after signing but before completion if a material adverse event occurred. It is one of the means by which parties contractually allocate risk. If exercised incorrectly, however, such conduct may amount to wrongful repudiation, so extreme care is required when considering whether or not to make use of MAC clauses.

In *BM Brazil*, a share purchase agreement contained a MAC clause under which the purchaser alleged it was able to terminate the SPA due to a geotechnical event at a mine which occurred after closing but before completion. Having engaged in a careful analysis of the law surrounding MAC clauses, the High Court concluded that the geotechnical event did not fall within the terms of the MAC clause.

The defendants sought to rely on the "revelatory effect" of the geotechnical event to support their contention that the MAC clause applied. In other words, the event revealed another pre-existing issue of which they had not been aware at the time of signing but which had not come into existence after signing. As a matter of contractual construction, the MAC clause did not cover such matters. Further, the geotechnical event which did occur after signing was not found by the Court to be of sufficient gravity to amount to a material adverse change.

In considering the materiality question, the Court drew on various cases from the Delaware courts in which MAC clauses are frequently considered. The High Court found that the distinction between qualitative and quantitative effects in Delaware cases is not a helpful approach. Instead, the Court considered that an objective assessment of what is reasonably expected to be material and adverse at the time of termination is required.

Although providing helpful guidance, the case reinforces that English courts are likely to consider all the facts and circumstances, so there is no hard and fast rule. In the circumstances, parties may wish to consider including a fixed monetary threshold or percentage of revenue or profit in their MAC clauses to provide greater certainty as to when MAC clauses may operate.

Penalty Clauses

When drafting, it is important to carefully consider whether default clauses requiring additional payments including of interest at higher rates could be characterised as penalties. The Court of Appeal considered whether a default interest clause was an unenforceable penalty in *Houssein v London Credit Ltd* [2024] EWCA Civ 721. There, the Court of Appeal determined that the High Court had not applied the correct test for determining whether a default interest provision was in fact a penalty because the first instance judge did not consider the commercial justification for higher interest rates on default. The first instance judge also neglected to consider whether the clause was extortionate, exorbitant or unconscionable. Consequently, the matter was remitted to the High Court for further determination.

Significantly though, the Court of Appeal discussed the legitimate commercial bases for higher interest rates being imposed upon a default, which will be of comfort to financial institutions. In short, the lender asserted that an event of default had occurred which entitled it to default interest under the facility until the default was remedied. Repayment of the facility together with the default interest was not forthcoming and after a further demand, the lender appointed receivers and managers in the exercise of powers under a legal charge securing the borrowing. The facility provided for discounted interest at a rate of 1% per month in the event of full compliance with the terms of the facility, and in the event of default, the standard rate of 3% per month would apply.

The appellant submitted that this arrangement reflected a legitimate interest held by the lender in repayment of the loan and that the higher default rate of interest was commercially justified. The Court of Appeal agreed, subject to the question of whether the higher rate of interest was extortionate, exorbitant or unconscionable being remitted for determination by the High Court.

Lenders frequently include default interest provisions which are drafted to seek to avoid the penalty doctrine by providing for a discounted rate of interest if there is full compliance with the terms of the facility, and the application of "standard" interest rates upon default. In principle, at least, this seems sound save where the "standard" rate is found to be extortionate, exorbitant or unconscionable in the circumstances. Care must therefore be exercised when determining the "standard" and "discount" rates of interest.

Notice Provisions

In *Drax Smart Generation Holdco Ltd v Scottish Power Retail Holdings Ltd* [2024] EWCA Civ 477, the Court of Appeal was required to consider contractual notice provisions under an SPA. The terms of the SPA required the buyer to notify the seller of claims by a nominated deadline failing which the seller would not be liable. The seller contended that the notice given by the buyer failed to state "*in reasonable detail the nature of the claim and the amount claimed* …" as required by the terms of the SPA. The High Court summarily dismissed a breach of warranty claim "notified" by the buyer, as it failed to give sufficient detail but dismissed the summary judgment application as regards an indemnity claim notified to the seller.

The underlying claims concerned whether the selling company had the benefit of a contractual option. After execution of the SPA, the seller sought to exercise a contractual option under which the seller was obliged to procure the assignment under the terms of the SPA. As it happens, the option had

lapsed, so the buyer sought to claim in respect of breach of warranty and breach by the seller of its obligation to procure the assignment of the option following the completion of the SPA.

The seller denied liability but sought to have the matter summarily dismissed on the basis that the buyer had failed to comply with the notice of claim requirements under the SPA.

The High Court found that the notice of claim with respect to the breach of warranty claim did not set out in reasonable detail the nature of the claim or the amount claimed because it did not articulate that the loss was based on the difference in value of the shares as opposed to the buyer's actual loss (*i.e.* it was based on a diminution of the value of the shares). However, the indemnity claim was properly notified.

On appeal, the buyer contended that all that was necessary to comply with the notice provisions was for the buyer's notice to state that the claim was for contractual damages for breaches of specified provisions and for an indemnity, following the seller's failure to transfer the benefit of the option. It was unnecessary to refer to the basis of loss being the diminution in value of the shares. Naturally, the seller opposed this line of argument, contending that the basis of the assessment of loss was a necessary part of the nature of the claim.

The Court of Appeal noted that contractual notice provisions for claims are a form of exclusion clause which operates to provide a contractual limitation period, which in turn seeks to promote finality and commercial certainty. To the extent there is ambiguity in the drafting, such clauses should be narrowly construed. Considering the contractual wording in the SPA, together with the terms of the "notice", the Court of Appeal concluded that whilst the buyer's notice did not notify the claim on the basis of a diminution in value of the shares, the nature of the claim as notified was straightforward: the company acquired by the buyer should have had the benefit of the option but did not as a result of the seller's breach. In other words, the seller was provided with all the information it needed to assess its liability.

Failure to Fulfil Conditions Precedent Due to Own Breach

It may seem obvious that a party should not be able to rely on its own breach of contract to avoid liability because there has been a failure to fulfil a condition precedent, but that is exactly what the Court of Appeal had to consider in *King Crude Carriers SA v Ridgebury November LLC* [2024] EWCA Civ 719.

Relying on the 1881 House of Lords decision in *Mackay v Dick* (albeit on appeal from the Scottish courts), the Court of Appeal considered that the *Mackay* principle reflected the English common law principle that parties are not entitled to rely on their own wrongs.

The buyers and sellers entered into three contracts for the sale of three ships. Under the contracts, the buyers were required to pay 10% of the purchase price as a deposit into an escrow account. The parties were required to provide all necessary documentation to open and maintain the escrow account "without delay". The sellers were entitled to cancel the sales contracts if the deposits were not lodged. The buyers breached the contractual obligation to provide the necessary documentation to establish the escrow accounts, and so, the condition precedent to performance was not fulfilled.

The sellers brought successful arbitral claims in debt seeking to recover the deposits on the basis that the condition precedent was not fulfilled because of the buyers' breach of their contractual obligations to provide the necessary documents to establish the escrow account. The buyers appealed to the High Court, which found that the sellers did not have a claim in debt. Rather, the High Court found that the sellers had to pursue a damages claim for breach of contract. On the question of the *Mackay* principle, the High Court found that it was no bar to the claim in question because it should only be applied to bar recovery of an already accrued debt under the condition precedent.

On the sellers' further appeal to the Court of Appeal, the Court found that the *Mackay* principle arises where there is a contract capable of creating a debt, the debt accrues or is payable when a condition precedent is fulfilled, and there is an agreement (whether express or implied) that the obligor would not act so as to prevent fulfilment of the condition precedent. The principle is a reflection of the parties' contractual intention rather than an interference with the freedom to contract. We note, however, that the Supreme Court has granted permission to appeal, so more may be yet to come on this topic.

Tort Law Update

2024 was a busy year in the land of tort law. A number of exceptionally complex and long-running disputes were dealt with, and claims of unlawful means conspiracy featured heavily. Perhaps most notably, in our view, the High Court significantly extended the scope of what could constitute "unlawful means" for the purposes of the tort of unlawful means conspiracy in *Takhar*, recognising a right for claimants, against whom a judgment has previously and wrongly been procured by fraud, to sue for damages.

Inducement of Breach of Contract

In May, the Court of Appeal handed down judgment in *Northamber Plc v Genee World Ltd* [2024] EWCA Civ 428, dealing with important aspects of claims for tortious inducement of breach of contract and the conduct of parties in the context of offers to mediate (which is covered in more detail here).

The underlying dispute related to the supply IT equipment. Northamber Plc ("**Northamber**"), a distributor, entered into an exclusive supply agreement with Genee World Limited ("**Genee**"), an importer of AV displays manufactured in China (the "**Exclusivity Agreement**"). Under the Exclusivity Agreement, Northamber was to be the exclusive source of Genee's products in the United Kingdom, save for four named, excluded resellers, to whom Genee was permitted to continue to sell directly. Northamber learned from third-party sources that Genee had been supplying its products directly to a number of resellers, in breach of the Exclusivity Agreement.

Northamber pursued claims against Genee and two individuals, Mr Ranjit Singh (the sole director of Genee), and International Educational Solutions Limited ("**IES**"), a supplier of IT equipment to schools. A large proportion of the products IES sold were Genee products, and the sole director of IES was the wife of Mr Singh. Mr Singh's wife had also been a director of Genee in the past.

Northamber claimed against Genee for breach of the Exclusivity Agreement. Northamber made claims against IES and Mr Singh, alleging that they had engaged in an unlawful means conspiracy and that they had induced Genee to breach the Exclusivity Agreement.

The original judgment held, relevantly, that Mr Singh had induced Genee's breaches of the Exclusivity Agreement, but dismissed the claims made against IES for inducing breach of contract. The Judge further dismissed the claims against both Mr Singh and IES for unlawful means conspiracy.

A number of matters were appealed, but of most interest is the appeal by Northamber asserting that the first instance judge had erred in dismissing the claim against IES for inducement of breach of the Exclusivity Agreement because he wrongly held that there had been no act of inducement on the part of IES.

Northamber's case was that IES, knowing through its director, the wife of Mr Singh, of the existence of the Exclusivity Agreement, and intending it to be breached, induced Genee to breach the Exclusivity Agreement by placing orders with Genee. Genee accepted IES's orders, IES paid for them and Genee fulfilled the orders.

The Judge at first instance held that although all other elements of the tort of inducing a breach of contract had been made out, the only acts of inducement relied upon by Northamber were IES's placing of orders with Genee, and that these were not sufficient to rise to the level of inducing breaches of the Exclusivity Agreement.

The reasoning given in the original judgment was, in short, that by the time IES placed orders with Genee, Genee had already supplied a substantial amount of its product to other entities in the United Kingdom in breach of the Exclusivity Agreement. The original judge held that there was no evidence that, Genee needed any inducement or persuasion to supply IES in further breach of the Exclusivity Agreement.

Accordingly, the Court of Appeal was required to consider what conduct would rise to the requisite level of *inducing* the breach of contract. It considered in some detail case law dating back to *Lumley v Gye* (1853) 118 ER 749, which established the tort of inducing a breach of contract. Its judgment traces the history of the tort of inducement of breach of contract and the related issue of accessorial liability, noting that, as Lord Hoffman explained in *OBG Ltd v Allan* [2007] UKHL 21, *Lumley v Gye* was based on the general principle that a person who procures another to commit a wrong incurs liability as an accessory. Accordingly, inducement of a breach of contract amounts to accessory liability for a breach of contract. The Court should consider whether the defendant's acts of inducement have a sufficient causal connection with the third party's breach of contract, and then whether the defendant intended through its acts that the third party would act in breach of the contract.

Ultimately, the Court of Appeal sided with Northamber, finding that the judge at first instance was wrong to hold that IES had not induced Genee's breaches of the Exclusivity Agreement by placing orders for Genee's products where those orders resulted in the supply of the ordered goods. The Court of Appeal cited a number of authorities on the issue of what constitutes "inducement"—too many to include here - and, as Lord Justice Arnold (with whom Lord Justice Lewison and Lord Justice Phillips agreed) noted, not necessary for present purposes because it was "*plain*" that IES "*went beyond merely*

facilitating the relevant breaches of contract", and its involvement "*was necessary for the breaches to occur, because breach of an exclusivity clause requires a counterparty*". IES had placed orders, paid for those orders and received goods, all while having knowledge of the Exclusivity Agreement. Lord Justice Arnold wrote:

> *"Thus IES induced Genee to commit the relevant breaches of Exclusivity Agreement. In the language of Lord Hoffmann in OBG v Allan, IES had a sufficient causal connection with Genee's breaches; and in the language of Lord Nicholls, there was causative participation by IES in Genee's breaches. In the language of Toulson LJ in Meretz v ACP adopted by Popplewell LJ in Kawasaki v Kemball, IES operated on the will of Genee. It follows, given that IES had the requisite knowledge and intention, that IES is liable as an accessory for Genee's breaches. It would have been different if IES had had no knowledge of the Exclusivity Agreement."*

Further, it was *"immaterial that Genee had already shown itself willing to act in breach of the Exclusivity Agreement by supplying other customers"* because "*each sale by Genee to a person other than Northamber…was a separate breach of the Exclusivity Agreement*".

Accordingly, the judgment in Northamber shows that in the context of claims for inducing breach of contract, where the involvement of a defendant was necessary for the breach for the contracting party to take place and the defendant had knowledge of the relevant contract, the court will likely find there is sufficient causal connection to find the defendant liable for inducing a breach.

Unlawful Means Conspiracy by Fraudulently Procuring a Judgment

In early July, the Chancery Court gave judgment in the long-running dispute of *Takhar v Gracefield Developments Ltd and Ors* [2024] EWHC 1714 (Ch)—referred to as the "sequel" to an earlier dispute which went all the way to the Supreme Court (see [2019] UKSC 13). The subject matter and conduct of the proceedings were so unusual and extreme that they are unlikely to be repeated any time soon.

The Court was required to consider a number of interesting matters, including the extent to which it must take into account findings of fact made in a previous judgment which had been set aside due to fraud, and the approach to making factual findings in a retrial. Notably, for our purposes, the Court also considered whether fraud in procuring a judgment would amount to the tort of unlawful means conspiracy, giving rise to an action for damages.

The factual and procedural background to *Takhar* is long and convoluted. In short, however, the Claimant brought a claim in 2008 for fraud, conspiracy and deceit against the defendants. The Claimant argued that certain properties she owned had been transferred to the First Defendant company under a profit share agreement ("**PSA**") as a result of undue influence or unconscionable conduct by the other two Defendants—the Claimant's cousin, and the cousin's husband (collectively, the "**Krishans**"). The Claimant argued that she had not signed the PSA and had not seen it before the dispute, but made no allegation that it was a forgery. The claim was ultimately rejected (the "**Purle Judgment**").

The Claimant then issued fresh proceedings in 2013, based on an expert report which concluded that her signature had been transposed onto the PSA from another document. The Defendants argued

abuse of process and said that the expert report was based on material which had been available to the Claimant for at least a year before the original trial of the 2008 proceedings which led to the Purle Judgment. At first instance, the Court sided with the Claimant. The Court of Appeal later allowed an appeal by the Defendants, and the Claimant appealed to the Supreme Court.

The Supreme Court in 2019 held that the Claimant's claim was not an abuse of process and that where it was proved that a judgment had been obtained by fraud, the party seeking to set it aside did not have to show that they could not with reasonable diligence have uncovered and alleged that fraud before that judgment. The matter was remitted to the High Court, which in 2020 found that (*i*) the Claimant's signature on the PSA had been forged by the Krishans, and (*ii*) the Claimant had proved the Purle Judgment had been obtained by fraud and set the judgment aside (the "**Gasztowicz Judgment**") (see *Takhar v Gracefield* [2020] EWHC 2791 (Ch)).

The most recent proceedings were, therefore, a retrial of the original allegations made in the 2008 proceedings. The Claimant also alleged deceit (though dropped the claim due to limitation issues) and unlawful means conspiracy relating to the procurement of the Purle Judgment by the Defendants' fraud. The Claimant argued that the procurement of the Purle Judgment by fraud gave not only an entitlement to have that judgment set aside, but also a distinct cause of action in unlawful means conspiracy which entitled her to damages. It is this additional cause of action which was referred to by HHJ Tindal in determining the matter as being "*perhaps the most legally-complex aspect of the entire claim*", noting that this was not an area which was covered by prior binding authority.

HHJ Tindal noted that the question of whether the Claimant had a standalone action in unlawful means conspiracy arose not only on the facts, but also in light of recent *dicta* by Foxton J in *Lakatamia v Tseng & Morimoto* [2023] EWHC 3023 (Comm), where his Honour said at [79]:

> *"I have real doubts as to whether English law recognises a tort of unlawful means conspiracy dishonestly to defend a claim through the production of forged documents in those proceedings. The extension of the tort of malicious prosecution to the initiation of civil proceedings is not without controversy (see the differing views in Willers v Joyce [2016] UKSC 43), and there is no tort of maliciously defending proceedings. Even if it is possible to overcome those difficulties through the tort of unlawful means conspiracy, further issues would arise as to whether the deployment of forged evidence at trial can provide the basis for a private law cause of action, or is a matter to be dealt with under the court's jurisdiction (through strike-out or committal) or under criminal law…"*

In determining the claim, HHJ considered that the Claimant had proved the essential elements of unlawful means conspiracy, from *Kuwait Oil Tanker Co SAK v Al-Bader (No.3)* [2000] 2 All E.R. (Comm) 271 at [108]:

> "*A conspiracy to injure by unlawful means is actionable where [i] the claimant proves that he has suffered loss or damage [ii] as a result of [iii] unlawful action [iv] taken pursuant to a combination or agreement between the defendant and another person or persons [v] to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do.*"

HHJ Tindal found that elements (i), (ii) and (iii) were satisfied by the findings in the Gasztowicz Judgment, which had held not only that the Krishans had forged the Claimant's signature on the PSA, but also that this was the operative cause of the result in the Purle Judgment (which was later set aside). The Claimant's defeat and the Defendants' success in the Purle Judgment was the means by which the Defendants inflicted on the Claimant their intended harm to her—it meant that they kept control of the relevant properties which had been subject to the forged PSA, and the ability to sell those properties. Accordingly, HHJ Tindal held the Claimant had proved she suffered damage.

On element (iv), whether the damage caused to the Claimant as a result of the unlawful action was taken pursuant to a combination or agreement between the Defendants, Tindal J said:

> *"It is absolutely clear Dr and Mrs Krishan 'combined' to commit and deploy their forgery of the PSA in the Original Proceedings, which is consistent with my findings of their 'combination' throughout this litigation."*

He noted that the Krishans "*decided to use forgery in the coming litigation to win it and so maintain and secure their control*" of the relevant properties, and that he was *"sure the decision to force the Claimant's signature* [on the PSA] *was a joint decision"*.

On the final element, intention to harm the Claimant, HHJ Tindal was satisfied that the Krishans *"shared the joint intention of procuring for their own benefit at the Claimant's expense at least most of her interests"* in the relevant properties and the proceeds of their eventual sales. Further, by the time the Claimant commenced proceedings in 2008, the Krishans intended to achieve that objective by means of deploying false documents in the litigation.

In determining whether those "means" were "unlawful" for the purposes of the tort of unlawful means conspiracy, HHJ Tindal looked at a significant body of case law and detailed findings of fact regarding the Krishans' conduct. Ultimately, he noted there were a number of bases on which it could be said that the Krishans' forgery of the PSA met the threshold of "unlawful" means:

- First, the judgment in *Neil v Henderson* [2018] EWHC 90 (Ch), in which it was held that the forgery of documents in litigation with the intention of wilfully interfering in the administration of justice by misleading the court is a criminal contempt of court.

- Second, the judgment in *Suzur v Koros* [1999] 2 Lloyd's Rep 611, where it was held *that* the deliberate production and deployment of sham documentation to secure a variation in a freezing injunction was both a contempt of court and an abuse of process.

- Third, that forgery is a crime contrary to s.2 of the Fraud Act 2006, amounting to fraud by *false* representation. The commission of a criminal act can amount in principle to "unlawful means", as was found in *Customs and Excise Commissions v Total Network SL* [2008] UKHL 19 in respect of the crime of "cheating the revenue".

- Fourth, *the* common law offence of conspiracy to defraud, as described in *R v Barton* [2020] 3 WLR 1333.

- Fifth, *the* criminal offence of forgery of an instrument under s.1 of the Forgery and Counterfeiting Act 1981.

HHJ Tindal wrote at [530]:

> *"I am sure that the [Defendants'] forgery of the Claimant's signature on the PSA deployed in the Original Proceedings was a (criminal) contempt of court as in Khrapunov and/or an abuse of process as in Surzur and/or a criminal offence as in Total Network. It follows that it can certainly in principle be 'unlawful means' for the tort of conspiracy, irrespective whether it would otherwise be actionable at the suit of the Claimant. However, in any event, it was so actionable—as a claim to set aside a judgment for fraud, as held in Takhar itself. I will call forgery of documents in litigation amounting to a crime, contempt of court or abuse of process: 'litigation forgery'."*

The only outstanding question, then, was whether recognising "litigation forgery" to be a category of unlawful means conspiracy would be inconsistent with the common law position noted by Foxton J in *Lakatamia* that there is no tort of malicious defence of civil proceedings. On this point, HHJ Tindal found that not to recognise forgery in litigation as "unlawful means" in a conspiracy claim would actually create incoherence in the law by comparison to the tort of malicious prosecution:

- A private law claim for malicious prosecution means that a meritorious defendant exposed to loss by being dragged into litigation beyond recovered costs has a remedy in tort for bringing a claim without reasonable grounds, which may in turn be considered to be malicious.

- However, by contrast, a meritorious claimant, such as the Claimant in Takhar, who was deprived of a remedy to which they were entitled by a fraudulent defendant (such as the Krishans) would have no remedy in tort at all. Absent the right to claim for unlawful means conspiracy, such a claimant would only be able to have the fraudulently obtained judgment set aside and pursue the proceedings again.

In light of all of the matters above, Tindal J held that precedent pointed firmly towards the incremental step of recognising forgery in litigation amounting to contempt of court and/or abuse of process and/or a crime as "unlawful means" for the tort of unlawful means conspiracy. He found that the elements of unlawful means conspiracy were proven in respect of the Krishans' forgery of the Claimant's signature on the PSA and that the Claimant should be awarded damages.

Unlawful Means Conspiracy and Freezing Orders

Only a week after the judgment in *Takhar*, the Commercial Court considered unlawful means conspiracy again—this time in the context of a worldwide freezing order ("**WFO**") in *Lakatamia Shipping Co Ltd v Su* [2024] EWHC 1749 (Comm). The Court dismissed allegations of unlawful means conspiracy and the "*Marex*" tort (named after *Marex Financial Ltd v Sevilleja Garcia* [2017] EWHC 918 (Comm)) of inducing or procuring the breach of rights existing under a judgment and determined that the presence of a "*Babanaft*" proviso in a WFO is capable of limiting the liability of foreign third parties who facilitate the breach of that order.

The judgment is the latest instalment in a long-running dispute arising out of a breach of contract claim between the Claimant, Lakatamia Shipping, and the Defendant, Mr Nobu Su. Since 2011, the Claimant has maintained a WFO against the Defendant in order to prevent the dissipation of the Defendant's assets. Following two judgments entered against the Defendant in 2014 and 2015, there was an unpaid judgment debt amounting to approximately $60 million. WFOs are commonly required to contain a proviso confirming that the order does not affect third parties outside of the jurisdiction, which is known as a *Babanaft* proviso (after *Babanaft International Co v Bassatne* [1990] Ch 13).

The Claimant issued proceedings against the First Defendant and two other Defendants regarding the transfer of proceeds from the sale of two Monaco villas in 2017. The Claimant alleged that the Second and Third Defendants were aware of the WFO and the 2014 and 2015 judgments at the time of the transfer and that they assisted with the transfer in breach of the terms of the WFO. The Claimant brought claims against the Defendants for unlawful means conspiracy in respect of the alleged breach of the WFO and a claim for procuring the breach of rights existing under the 2014 and 2015 judgments against the Second and Third Defendants (a *Marex* tort claim).

Conspiracy to Breach the WFO and the *Babanaft* Proviso

The Court was not satisfied that the Second Defendant knew at the time of the transfer of proceeds that the First Defendant was bound by the WFO. The evidence suggested that the Second Defendant merely did what he was told by the First Defendant and was not informed of what he was doing or why he was doing it. Accordingly, the elements of unlawful means of conspiracy were not made out in respect of the Second Defendant.

By contrast, the Court found that, on the balance of probabilities, the Third Defendant knew at the time of the transfer that the First Defendant was bound by the WFO and the 2014 and 2015 judgments. While it was noted that the Third Defendant honestly believed that he was entitled to transfer the proceeds since the WFO and the judgments were not registered in Monaco, the High Court considered that it was bound by the Court of Appeal's decision in *Racing Partnership Ltd v Done Bros (Cash Betting) Ltd* [2020] EWCA Civ 1300, which held that a defendant can be held liable for unlawful means conspiracy even where they honestly believe their actions were not unlawful.

However, the High Court ultimately found that the *Babanaft* proviso contained in the WFO precluded the Third Defendant from having any liability in tort for his actions. The proviso stated that the terms of the order did not affect or concern anyone outside the jurisdiction of the English courts. In making its findings, the High Court made the following observations:

- While the damage of the breach was suffered in England (*i.e.* the reduction in value of the judgment debt), this did not impact the fact that the Third Defendant was outside the jurisdiction of the Court at the time of making the transfer.

- The language of the *Babanaft* proviso was expansive and therefore capable of excluding tortious liability, not just liability for contempt of court.

- It would be contrary to the purpose of the *Babanaft* proviso for persons outside the jurisdiction of the Court to be liable in tort for simply assisting in a breach of a freezing

> order. To hold otherwise would mean that such persons would be coerced or have obligations imposed on them just as if they were within the jurisdiction.

Since the conspiracy claims against the Second and Third Defendants were dismissed, there was no claim to be made against the First Defendant.

Marex Tort

As with the claim for unlawful means conspiracy, it could not be shown that the Second Defendant knew, at the time of transfer, that the First Defendant was bound by the 2014 and 2015 judgments. As such, the claim for the *Marex* tort failed.

The High Court clarified that the *Marex* claim was not dependent on the breach of the WFO or affected by the *Babanaft* proviso when considering the claim against the Third Defendant. The key issue was whether a third party knowingly or intentionally assisted a judgment debtor to dissipate their assets so as to hinder enforcement of the judgment debt. On the facts, the High Court held that the element of intention was missing. The Third Defendant had honestly believed that he was entitled to transfer the proceeds of the sale and was bound by contractual and professional obligations to make the transfer. The Court also noted that in those circumstances, the Third Defendant might also be able to avail himself of a defence of justification. The *Marex* tort claim against the Third Defendant failed.

Lakatamia Shipping is currently being appealed.

Procedural Developments in 2024

Consultations and Changes to Rules/Guidance

Updates to the King's Bench Guide

The tenth version of the King's Bench Guide was published on 19 April 2024, introducing further limited amendments to the Guide since it was fully revised in the 2022 edition. Some of the targeted revisions include updated guidance on: (*i*) open justice, anonymity and non-disclosure orders; (*ii*) contempt applications; and (*iii*) the resources available to litigants in person.

Updates to the Chancery Guide

A revised version of the Chancery Guide was published on 10 July 2024. The updated Guide includes a limited number of changes to the 2022 edition. Some of the revisions include:

- Skeleton arguments. Further tightening of the restrictions on skeleton arguments, with the Guide noting that "*a desire to be of greater assistance to the Court is rarely a good reason*" for skeletons exceeding the set page limits and that "*overly long skeletons do not assist*". If the court is not satisfied by the explanation provided by a party for a skeleton argument exceeding the set page limits, a party may be required to redraft the skeleton argument, and/or cost sanctions may be imposed.

- Trial time estimates. Parties should bear in mind that additional time may need to be included in a trial time estimate for the trial judge to consider any written closing submissions.

- ADR. In appropriate cases, "*proceedings may be stayed and the parties may be ordered to participate in ADR*". This has been added following the decision in *Churchill v Merthyr Tydfil Borough Council* [2023] EWCA Civ 1416.

- Electronic exhibits. Parties should seek to agree in advance of trial how "*recordings, video or other electronic media*" will be made available to the judge and any witnesses at trial and ensure that appropriate facilities are available at court for such evidence to be heard or watched.

- Part 8 claims. The Guide confirms that a Part 8 Claimant is required to file a Certificate of Service.

- Extensions of time. Applications for extensions of time for compliance with a time limit set by the CPR or in an order may be determined by a master on paper. The master may also give directions for the determination of the application without a hearing.

- Service out of the jurisdiction. Wording has been added to the Guide noting that applications for service out of the jurisdiction must be supported by evidence and (where appropriate) a skeleton argument, even if the application is to be considered on paper and without a hearing. The application must also set out "*with clarity*" the basis on which the order for service out is sought.

Updates to the Civil Procedure Rules

The CPR has been updated to reflect the Court of Appeal's decision in *Churchill v Merthyr Tydfil Borough Council* [2023] EWCA Civ 1416, which confirmed that the court can order parties to engage in forms of alternative dispute resolution. From 1 October 2024, the following amendments were introduced:

- The overriding objective of enabling the court to deal with cases justly and at proportionate cost now includes "*promoting or using alternative dispute resolution*" (CPR 1.1(2)(f)).

- The court's duty to actively manage cases includes "*ordering…the parties to use…*alternative *dispute resolution*". (See CPR 1.4(2)(e) and CPR 3.1(2)(o)).

- When providing case management directions, the court must consider "*whether to order or encourage the parties to engage in alternative dispute resolution*" (see, for example, CPR 29.2(1A)).

- In exercising its direction as to making an order for costs (and when considering the conduct of the parties), the court must have regard to "*whether a party failed to comply with an order for alternative dispute resolution, or unreasonably failed to engage in alternative dispute resolution*". (CPR 44.2(5)(e)).

Civil Justice Council Reports

Litigation Funding

Following the Supreme Court's seminal decision in *R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others* [2023] UKSC 28 ("**PACCAR**") in spring 2024, the Lord Chancellor that requested the Civil Justice Council (the "**CJC**") provide advice on litigation funding. The Labour government has stated that it intends to wait for the findings in the CJC's final report (expected in summer 2025) before considering introducing new legislation on litigation funding.

The CJC recently published its interim report in respect of the matter on 31 October 2024, setting out a detailed set of questions for the expansive consultation process, for which responses are due on 31 January 2025. It will be interesting to see the CJC's final report in 2025, as the CJC's findings and any subsequent legislation could dramatically impact the funding sector and the types of claims being funded in England & Wales.

Pre-Action Protocols

The CJC has also published its second report concerning significant recommended amendments to the Pre-Action Protocols in the CPR. Notably, in the report, the CJC has recommended a separate pre-

action protocol for multitrack litigation in the Business and Property Courts, a draft of which is appended to the report. It will now be for the Civil Procedure Rule Committee (the "**CPRC**") to consider how best to take forward the recommendations made by the CJC in its review.

Civil Procedure Rule Committee Consultations

In February 2024, the CPRC initiated a consultation on the reform of CPR 5.4C and the documents that non-parties to litigation can obtain from court records in England & Wales. The consultation arose following the Supreme Court's decision in *Cape Intermediate Holdings Ltd v Dring* [2019] UKSC 38 in which it was held that non-parties to litigation should be permitted to access to documents provided to the court on the basis of the principle of open justice.

At present, CPR 5.4C permits non-parties to obtain statements of case (*i.e.* pleadings, but excluding any accompanying documents) and judgments or orders from the court without seeking permission (subject to certain exceptions). The CPRC's proposed reforms, however, would have the effect that non-parties may also be permitted to obtain skeleton arguments, witness statements and expert reports without seeking permission from the court. The proposed reforms proved controversial, with concerns raised about the unclear timing at which non-parties would be able to access such documents, and the CPRC received numerous detailed responses to the proposal.

Following the responses received, the CPRC noted in a meeting held on 10 May 2024 that the detail of the proposal "*requires further consideration*", and work on the proposal was considered "*temporarily paused*" in a subsequent CPRC meeting on 7 June 2024. Given the impact of this reform and concerns raised during the consultation process, practitioners will be keen to see whether the proposed reforms will be revised and revisited in 2025.

Group Actions

This year, the courts have grappled with a number of interesting decisions which consider the use of group procedure for resolving claims brought by multiple claimants who share varying degrees of commonality and interests. Of particular interest is *Kumar Limbu & Others v Dyson Technology Limited & Others* concerning the liability of a parent company for activities of subsidiaries or supply chains abroad.

Supply Chain Litigation to Proceed in the English Courts

The Court of Appeal *in Kumar Limbu & Others v Dyson Technology Limited & Others* [2024] EWCA Civ 1564 ("**Limbu**") has recently overturned the High Court's decision which determined that Malaysia was the more appropriate forum for claims brought against three companies in the Dyson group of companies by migrant workers in Malaysia (which we wrote about here). The decision follows a trend of recent appeal authorities in which concerns about perceived inequality of arms have led to favourable decisions for claimants.

The decision suggests that it may not be straightforward for a UK-headquartered company to challenge jurisdiction in claims of this nature (although inevitably each case will turn on its facts, which we explore further below). *Limbu* is also another example of a claim brought against UK-

headquartered companies in relation to human rights, labour standards and environmental impacts abroad. For a more detailed discussion of the case, see our in depth article here.

The claim concerned the degree of oversight and control exercised by Dyson over the living and working conditions of workers employed by third-party suppliers in the Dyson group's supply chain. The Claimants alleged that they were they were trafficked to Malaysia and while there subjected to conditions of forced labour and exploitative and abusive working and living conditions. Dyson was said to have known of the high risk of forced labour in Malaysia and exerted a high degree of control over the manufacturing operations and working conditions at suppliers' factories by promulgating and implementing mandatory policies and standards concerning worker conditions.

The High Court concluded that Malaysia was the more appropriate forum for the claims to be heard and that there was no real risk of the claimants being unable to access justice there. On the issue of appropriate forum, the High Court held that the centre of gravity in the case was Malaysia: that was where the underlying alleged mistreatment had taken place.

The Court of Appeal overturned the High Court decision, identifying five errors of principle. First, the High Court failed to take account of the important connection between two of the Defendants and their domicile in England and that they had been served in England as of right. Second, the High Court failed to have sufficient regard to the fact that the real dispute was concerned with acts in England. Third, the High Court made a serious error of principle in considering that there was a real risk of irreconcilable findings in relation to related defamation proceedings even if the *Limbu* proceedings went ahead in England. Fourth, the High Court failed to have regard to the fact that the Defendants' defence would be coordinated from England. Fifth, the High Court was wrong to conclude that there was no real risk that the Claimants and NGOs would be unable to fund the disbursements necessary to pursue their case in Malaysia.

Having identified those errors of principle, the Court of Appeal ultimately concluded that England was clearly and distinctly the appropriate forum.

The claim will now be remitted to the High Court to proceed to trial. There are very few decisions that consider the circumstances in which a company may assume a duty to claimants allegedly harmed by the acts or omissions of a foreign subsidiary. The extension of those principles to a third-party supplier is completely novel and would involve a significant extension of the law. Assuming the case progresses, this is likely to be the first time *Vedanta*-type liability for the activities of a supply chain is examined on the evidence.

Strike Out of Representative Claim Made on Behalf of Thousands of Claimants

In *Smyth v British Airways PLC* [2024] EWHC 2173 (KB), the High Court struck out a representative action brought under CPR 19.8 in relation to claims for compensation for delayed and cancelled flights.

The Claimant, Ms Smyth, was booked on a British Airways ("**BA**") flight from London to Nice in 2022. Her flight was cancelled, and under EU Regulations, she was entitled to claim a fixed sum of £220. Instead of submitting a claim for compensation with the airline, she issued a representative action, purporting to claim damages on behalf of all passengers entitled to compensation following delays or

cancellations to 116,000 different BA and Easyjet flights. She estimated the quantum of the claim would be worth £319 million.

Master Davison concluded that the claim could not proceed as a representative action because the claimant and the representative parties did not share the same interest. He concluded that the practical reality was that the opening class in the claim as pleaded presented numerous and widely diverging interests, requiring individualised determination. The Court further rejected that these issues could be addressed by successive amendments to the class: the Claimant had proposed that the class would be progressively trimmed as the delayed and cancelled flights were analysed and as Claimants were identified who were eligible for compensation. This, it was held, was to admit that at the outset the claim was not properly constituted as a representative action.

Another notable feature of the claim was the discussion of the funding arrangements. A separate order was obtained on a without notice basis in March 2024, whereby it was declared that Ms Smyth as lead Claimant would be entitled to deduct "*an aggregate sum equivalent to 24% of any compensation recovered by her on behalf of the Represented Persons*" in the action. The order was based upon trust law principles permitting remuneration out of trust assets for work done in relation to those assets. Master Davison also concluded as matter of discretion that he would not allow the claim to go forward as a representative action because "*the dominant motive for it lies in the financial interests of its backers… and not the interests of consumers*". While the Court did not reach any conclusions on the lawfulness of the funding arrangements, the Court's provisional view was that the funder's entitlement to compensation was excessive and disproportionate.

Multiple Claimants Bringing Claim Using Same Claim Form

The decision of *Ryan Morris & Ors v Williams & Co Solicitors (A Firm)* [2024] EWCA Civ 376 involved claims brought by 134 claimants against a law firm for alleged negligence related to their investments in separate development projects promoted by the same group of companies. The firm sought to argue that it was not permissible under the Civil Procedure Rules for multiple claimants to bring claims on one claim form and in a single proceeding.

The Court of Appeal's decision is notable for two reasons. First, it provides a clear rejection of the argument raised by the law firm that multiple claimants could not commence proceedings using the same claim form. The Court of Appeal held that this interpretation was unduly narrow and unsustainable in light of the meaning of CPR 7.3. On a plain reading of the provisions, any number of claimants could use a single claim form to start all claims which could conveniently be disposed of in the same proceedings.

Second, the Court of Appeal considered the correctness of the tests applied by the Divisional Court (Dingemans LJ and Andrew Baker J) in *Abbott v. Ministry of Defence* [2023] EWHC 1475 (KB) in interpreting CPR 19.1 and CPR 7.3. In *Abbott*, Andrew Baker J set out three tests for determining whether it is convenient for claims to be disposed of in the same proceedings pursuant to CPR 19.1 and CPR 7.3:

1. The "real progress" test. Whether a cohort of claimants had a sufficient commonality of significant issues of fact that it would be useful or helpful, in the interests of justice, that their determination would bind the other parties.

2. The "real significance" test. Whether the determination of the common issues be of "real significance" for all cases.

3. The common interest test. Would the court's determination of the common issues bind all parties?

The Court of Appeal held that none of these tests were appropriate to exclude cases from the ambit of CPR 19.1. The only question for the Court was whether the various claims could conveniently be disposed of in a single set of proceedings. The Court of Appeal ruled that "convenience" is an ordinary word that requires no gloss or further test.

The Master of the Rolls invited the Civil Procedure Rules Committee to consider whether CPR 7.3 should be amended to refer to the need for "some common question of law or fact" (as previously provided under the Rules of the Supreme Court). The Civil Procedure Rules Committee reported back in July 2024, concluding that the current rules are flexible and appear to be uncontroversial; there is no other authoritative judgment and no evidence that the rule is not working well.

Alternative Dispute Resolution

Court of Appeal Rules on Offers to Mediate

In *Northamber Plc v Genee World Ltd [2024]* EWCA Civ 428, the Court of Appeal highlighted the importance of responding to offers to engage in alternative dispute resolution ("**ADR**") by imposing cost sanctions on a party who remained silent in the face of a "*clear offer to mediate*".

The factual background to *Northamber* is set out in the Tort Law update, here, dealing with the Court of Appeal's findings in respect of tortious inducement.

On 5 October 2021, a case management order was made which required that: (*i*) the parties consider solving the dispute through ADR "*at all stages*"; and (*ii*) if one party proposes ADR, and another party refuses to engage in it, the refusing party must serve a witness statement explaining their reasons for doing so within 21 days.

On 16 February 2022, the Claimant's solicitors wrote to the solicitors of Mr Singh and IES to inform them that the Claimant was "*open to mediation as a means of resolving the dispute*" and requested that they take instructions and provide a response. IES' solicitors responded that they were taking instructions, while Mr Singh's solicitors provided no response at all. Neither party provided a substantive response, nor did either party serve a witness statement of reasons as required by the case management order.

At first instance, the Court held that Genee had breached the Exclusivity Agreement and that Mr Singh had induced this breach but dismissed the unlawful means conspiracy claim against Mr Singh and both claims against IES. The Judge ordered, amongst other things, that Mr Singh pay 70% of the Claimant's costs.

Notably, the trial judge refused to impose cost sanctions on Mr Singh for his failure to mediate. While he acknowledged the Claimant's letter of 16 February 2022, the Judge described it as a "*half-hearted*" suggestion of mediation, which was only offered up at a late stage. He also noted that the Claimant had failed to follow up with Mr Singh when he did not respond. The Claimant appealed against this decision on costs.

On appeal, the Court of Appeal held that the trial judge had erred in respect of the award of costs by ignoring both Mr Singh's failure to reply to the letter of 16 February and his breach of the case management order. Contrary to the findings of the trial judge, the Court of Appeal found that the letter represented a "*clear offer to mediate*", and the Court reminded the parties that, as a general rule, silence in the face of an invitation to participate in ADR is (of itself) unreasonable, even if the refusal might be justifiable. Moreover, the Court criticised the trial judge's attempt to shift the onus onto the Claimant by expecting it to follow up in the fact of the Defendants' silence.

The Court recalled that costs consequences are not *automatically* imposed for losing parties who unreasonably refused to mediate but that this was a relevant factor to take into account. In the circumstances, the Court of Appeal opted to impose a "*modest, but not insignificant*" penalty on Mr Singh—increasing the costs order against him by 5%, to 75% of the Claimant's costs.

High Court Considers Mandatory Adjudication Clause

In *Lancashire Schools SPC Phase 2 Ltd v Lendlease Construction (Europe) Ltd* [2024] EWHC 37 (TCC), the High Court was asked to consider whether to give effect to a mandatory adjudication clause which (*prima facie*) required the parties to adjudicate any dispute as a pre-condition to litigation. In an important reminder of the limitations of ADR clauses in English law, the High Court held that, while the clause was a condition precedent to the commencement of litigation between the parties, the Court would not in the circumstances of this case exercise its discretion to set aside the relevant Claim Form or to strike out the Claimant's claim.

The Fourth Defendant (Lancashire County Council, the "**Council**") had entered into a contract (the "**Project Agreement**") with the Claimant under which the Claimant agreed to facilitate certain building works at one of the Council's schools. The Claimant subsequently commenced litigation against the First, Second and Third Defendants (the "**Primary Defendants**"), alleging that their work on the school building project was defective, in breach of contract. The Claimant then brought proceedings against the Council arguing that, if the Primary Defendants could prove that they were not in breach of their respective contracts, the Council had no entitlement to apply financial deductions against the Claimant under the Project Agreement.

The Council asked the Court to (*i*) set aside the service of the Claimant's claim form and/or (*ii*) strike out the Claimant's claim against the Council on the basis that the Claimant had failed to follow the mandatory ADR process contained in the Project Agreement. Under the terms of the Project Agreement, "*any dispute arising in relation to* [the Project Agreement]" needed to be adjudicated between the parties before being referred to the English courts.

Mr Alexander Nissen KC (sitting as a High Court judge) accepted that this adjudication clause was sufficiently clear and certain to be enforceable. He also noted that, as a matter of English law, contractual dispute resolution clauses should only be departed from with good reason. However, the

Judge rejected the Council's application, declining to either to set aside service of the claim form or to strike out the claim. The Judge said that the overriding objective would be better served by *not* setting aside or striking out, because:

- this was a multiparty dispute, so there would be little practical utility in bilateral adjudication between the Claimant and the Council; and
- the dispute was so complex that any adjudication was unlikely to be concluded within the timescale provided for in the Project Agreement, rendering it an expensive process.

Litigation proceedings were already underway with the other Defendants; therefore, disposing of the proceedings in order to adjudicate could lead to a delay on the ultimate disposal of the dispute as a whole.

Costs, Funding and Security for Costs

Introduction

The key cases on costs and funding in 2024 reflected the wider trends in litigation practice over the past few years, including most notably the growth of litigation funding in a group litigation context and, relatedly, the use of ATE insurance policies in the context of litigation. As one might expect, developments in the funding and litigation insurance industries have had flow-on effects for the courts in considering whether to order security for costs, which is intended to give the defendant some costs protection when they are pulled into litigation.

Although the Russian invasion of Ukraine took place in 2022, the impact of sanctions flowing from the invasion is still being felt, with the courts being required to consider the effect of sanctions on an application for security.

ATE Insurance and Security for Costs

In *Asertis Ltd v Lewis Barry Bloch* [2024] EWHC 2393 (Ch), the Court considered whether an ATE insurance policy could defeat an application for security for costs.

Mr Bloch was defending a claim brought by Asertis, a litigation funder, for alleged breach of director's duties. Mr Bloch applied for security for costs on the basis that Asertis' accounts showed it to be trading at a loss, and there was reason to believe that Asertis would be unable to pay his costs if so ordered. Asertis rejected Mr Bloch's interpretation of the accounts and submitted that it would be able to meet any costs order made against it. It further relied on a revolving credit facility and an after-the-event ("**ATE**") insurance policy as evidence that it could meet an adverse costs order. Mr Bloch argued that insufficient evidence regarding the credit facility had been provided and that the ATE policy did not afford him sufficient costs protection. The Court agreed that there was reason to believe that, due to its financial position, Asertis would not be able to meet an adverse costs order and therefore considered whether the ATE policy would give adequate costs protection to Mr Bloch, effectively acting as security.

Judge Mullen cited Akenhead J in *Michael Phillips Architects v Riklin* [2010] EWHC 834 (TCC) where he found "*it will be a rare case where the ATE insurance policy can provide as good security as a payment into court or a bank bond or guarantee. That will be, amongst other reasons, because insurance policies are voidable by the insurers and subject to cancellation for many reasons, none of which are within the control or responsibility of the defendant, and because the promise to pay under the policy will be to the claimant*".

Judge Mullen also provided helpful guidance on the threshold an applicant for security should reach, holding that "*all a defendant is required to show on an application such as this […] is that there is a real, as opposed to fanciful, risk that the ATE policy will not respond in full*".

The Court found that the policy did not offer Mr Bloch sufficient protection for the following reasons:

- It offered no protection for costs incurred for the period before it had been taken out.
- It was limited to £250,000, which may be inadequate.
- Mr Bloch had no means of directly enforcing the policy, which created an exposure should Asertis become insolvent.
- There were numerous conditions on which payment was contingent and over which Mr Bloch had no control.
- The termination provisions did not make clear whether Mr Bloch would be informed should the policy be terminated.
- It was not clear whether the insurer would be liable up until the point of termination.

Further, given the numerous conditions and termination provisions in the policy, Mr Justice Mullen found that it should not reduce the amount payable into court by way of security for costs and ordered that Asertis pay security.

The case provides helpful and clear guidance on when ATE insurance will be deemed adequate and demonstrates that the courts are willing to closely scrutinise ATE policies in the context of security for costs.

High Court Declines to Order Disclosure of Funding Arrangements Where No Order for Security for Costs Could Properly Be Made

In *Various Claimants v Mercedes-Benz Group AG* [2024] Costs L.R. 685, also known as the Nox Emissions Group Litigation, the Defendants made an application for information regarding the underlying funding arrangements put in place by Pogust Goodhead, the firm representing the majority of the Claimants, in advance of a potential application for security for costs against the funders.

The defendants argued that the Court had jurisdiction to make orders ancillary to the relief available under CPR 25.14(2)(b), which provides that the courts may make an order for security against a person who has contributed or agreed to contribute to the claimant's costs in return for a share of any

recovery, including by exercising its discretion to order the claimants to provide the information sought here. The Claimants' position was that no order for security could properly be made under CPR 25, and therefore no ancillary power to order disclosure of information could exist.

The Claimants denied that the funders had contributed or agreed to contribute to the Claimants' costs in return for a share of any recovery. They argued that, as a firm of solicitors which offered legal services on full conditional fee agreements ("**CFAs**"), they required capitalisation and that capital was provided by the "funders" by way of a debt facility. It was, they submitted, Pogust Goodhead which was funding the claim, and this was not a case where claimants "*were incurring costs and someone else was financing them. They are simply not incurring costs and will not have a liability for costs unless they win*". The Defendants were, they argued, seeking to bypass the prohibition on obtaining security from solicitors acting under CFAs by instead seeking security from those who finance their practices. In any event, the Claimants intended to ensure that sufficient ATE insurance was in place which would render any application for security redundant.

The contention that the claimants were not incurring costs was roundly rejected by the Court, which noted that at an upcoming CMC costs budgets would be submitted which would "*plainly*" not reflect that no costs were being incurred. The Court went on to find that the "*fact that the claimants' liabilities to pay Pogust Goodhead are contingent upon sums being awarded to it by way of either damages or costs does not, therefore, mean that there are no 'Claimant's costs' for the purposes of CPR 25.14(2). Many of the provisions of the CPR would be undermined in cases run on CFAs if [the Claimants'] argument was correct*".

The Court was more persuaded by the submission that sufficient ATE insurance would be in place and went on to note that it had "*given an indication*" as to the "*potential*" disclosability of the terms of the funding agreement but had concerns that "*(i) the application as presently structured may elide the knowledge position of the claimants (the formal target of the application) and that of Pogust Goodhead and (ii) in any event it may be premature to do so without considering submissions from the party against whom the security for costs application would be made and from whom the disclosure is, in reality, sought in circumstances where it appears to be accepted that no application would be made against Pogust Goodhead itself*".

The Court therefore declined to make the order and instead considered that it would be appropriate to reconsider the issues at the upcoming CMC, adding that the funders against whom disclosure was sought would have to be "*joined/in attendance*" if the application was pursued.

The case is helpful in that it makes clear that whether a non-party has contributed or agreed to contribute to a claimant's costs in return for a share in the recovery "*is a question of substance, and not form*", and the courts' power under CPR 25.14 is not limited to those in a direct contractual relationship with the claimants. Defendants should also remember that the correct party must be pursued for the information, which in this case was not the Claimants.

Impact of Sanctions on Security for Costs

In *LLC EuroChem North-West 2 v Societe Generale SA & Ors* [2023] EWHC 2720 (Comm), the High Court considered the effect of sanctions on an application for security for costs. The issues in dispute concerned the effect of EU and UK sanctions, to which the Russian claimant was subject, on SocGen's ability to pay sums otherwise due to EuroChem under bonds.

SocGen sought security for costs on the basis that the Claimant was based outside of the jurisdiction in a state not bound by the 2005 Hague Convention (Russia) and/or that the claimant would be unable to meet an adverse costs order. The Claimant denied that there was reason to believe it would not be able to pay the Defendant's costs but accepted that it was resident in Russia. The Claimant had "*realistically taken the position that despite steps towards ratification of the 2019 Hague Convention it is appropriate to provide security. […] Therefore, the jurisdictional threshold need not detain us, and one comes to the discretionary element, because it is here that today's battle lies*".

The Claimant argued that a payment into court should not be ordered because it had offered security in the form of a guarantee from its Swiss parent company. The Defendant argued that it could not accept that guarantee without at least arguably breaching EU, French and Italian sanctions, an argument which Mrs Justice Cockerill found, in the absence of any contradictory evidence, that she must take to be "*correct or at least sufficiently arguable for current purposes*".

The Claimant subsequently offered for its parent to provide an undertaking to the Court to pay any adverse costs. That offer was rejected by the Defendants on the basis that (*i*) a payment into court provides a readily realisable source of funds which was not provided by an undertaking, (*ii*) it was unclear how the Defendant would enforce the undertaking, and (*iii*) there was a risk that by the end of the litigation the position of the parent would be very different.

The Court was satisfied that it should exercise its discretion to award security for the reasons put forward by the Defendants. The next question was therefore the form of the security to be given.

The Court noted that the "*baseline*" is a payment into court, and while other forms of security are often ordered, that is "*only if either (i) they are agreeable to the secured party; or (ii) the court is persuaded that they offer what one might term an equivalency*". Having considered the authorities on the point, Mrs Justice Cockerill found that the "*important thing, therefore, is that the security which is offered to be provided, provides that same level of copper-bottomed, adequate security equivalent to payment into court, cash, or first-class London bank guarantee. What one is therefore looking for in this case is an equivalence*".

Mrs Justice Cockerill did not accept that an undertaking to the Court from a Swiss parent was equivalent "*in that it does not provide a readily realizable source of funds. […] The particular point in issue is that it is very unclear how such an undertaking could be enforced in circumstances in which the parent company is not resident within the jurisdiction*". She noted that notwithstanding the parent's offer to submit to the jurisdiction, the only obvious route of enforcement was contempt proceedings, which presented a host of other issues. She found that even if the parent company "*were good for the money, […] the undertaking offered appears to provide at best a more complex and indirect alternative form of security*", which was not equivalent to a payment into court. The Defendant was therefore awarded security for costs set at approximately 70% of the costs incurred to date.

This decision is a useful reminder that while alternatives are available, the "baseline" is a cash payment into court, and the court will not rush to order alternatives at the request of a claimant.

High Court Rejects Application for Wasted Costs to Be Paid by Solicitors

In *Williams-Henry v Associated British Ports* [2024] EWHC 2415 (KB), the High Court considered an application for wasted costs against solicitors.

The Claimant, represented under a conditional fee agreement ("**CFA**"), was found during the main proceedings to have been fundamentally dishonest within the meaning of the Criminal Justice and Courts Act, and her claim had been dismissed.

Unable to recover its costs from the Claimant, the Defendant sought its costs from the Claimant's solicitors on the grounds that (*i*) the solicitors failed to collect and analyse relevant documents that showed that the Claimant was being fundamentally dishonest, and (*ii*) the solicitors maintained the litigation, even though it was hopeless, because they were funding it on a CFA. The solicitors were said to be either negligent or acting unreasonably in allowing the case to go to trial, the costs of which would have been avoided if the claim had settled (the Defendant having made offers) or if the solicitors had terminated their retainer (as they were entitled to do in the circumstances).

The courts may make an order for wasted costs if (*i*) the solicitor has acted unreasonably, improperly or negligently, (*ii*) that conduct caused costs to be wasted, and (*iii*) it is just and proportionate to make the order.

The Court did not consider that the solicitors had acted unreasonably or negligently (allegations of impropriety were not pursued at the hearing). As the Claimant had not waived privilege, the solicitors were given the full benefit of the doubt and were assumed to have been acting on instruction, with Mr Justice Ritchie noting that the solicitors were "*assumed to have acted on instructions and, without more, I am not entitled to go behind the principle that lawyers are permitted to fight difficult cases, even hopeless cases, if clients want to do so. The person carrying the liability is the client not the lawyer*". The fact that the lawyers were acting under a CFA made no difference to that principle.

The allegations against the solicitors were wide-ranging and vague, and no attempt to particularise the causal link between the alleged conduct and wasted costs had been made. The application for a wasted costs order against the solicitors was therefore dismissed.

This case is a reminder that when privilege is not waived, the benefit of doubt will be given to the solicitors in question and further that an application for wasted costs should make simple, clear allegations, precisely setting out what costs were wasted and how.

Satisfaction of Order for Security for Costs

In *Parsdome Holdings Ltd v Plastic Energy Global SL* [2024] EWCA Civ 1293, the Court of Appeal clarified when an order for security for costs has been satisfied.

Security for costs was ordered by consent in 2022, and those orders were complied with. Further orders had been made in 2023 and 2024, and it was those orders which gave rise to the appeal.

The 2023 order had been breached in four respects, including by security being paid late, in the wrong currency and in the wrong amount. While reserving its rights in relation to the 2023 order, the Defendant agreed to the 2024 order (the "**Calver J Order**") to permit security to be paid into the Court Funds Office by cheque in US dollars. The Calver J Order required the Claimant to satisfy the security ordered in the 2023 order, and the further security, "*by way of a payment of an equivalent sum of £1,282,500 into the [CFO] (whether by way of cheque or bank transfer) by 4pm (UK) on the date 7 days*

after the date on which the Court seals this Order and provides the same to the Claimant's solicitors". That date was 22 January 2024.

The Calver J Order had been breached as the CFO had not received the cheque at all. It was not clear why the cheque was not received, as there was evidence that a cheque had been posted from Guatemala on 22 January 2024, but it did not matter as there was no way the CFO would have received it by the deadline given the date of postage. At a hearing before Foxton J 12 days before the trial, no cleared funds had been received by the CFO.

In considering whether to strike out the claim, Foxton J applied the three-stage test from *Denton v T H White Limited* [2014] EWCA Civ 906: (*i*) Was the breach serious? (*ii*) Was there a reasonable excuse? (*iii*) Would it be just in all the circumstances to impose a sanction? He also considered whether striking out the claim would be proportionate. Mr Justice Foxton concluded that the breach was serious, and there was no reasonable excuse for it but declined to strike out the claim at that point. The Claimant was given six days to provide security by way of cleared funds, failing which the claim would be struck out.

Shortly after the hearing, the Claimant drew the Court's attention to *ENE Kos 1 Ltd v Petroleo Brasilieiro SA* [2009] EWCA Civ 1127, in which the Court of Appeal had found that the effective date for payment of a cheque in purported compliance with an order to pay funds into court is the date on which the cheque is received by the CFO and not the date the funds clear. Foxton J thus acknowledged that, in light of that decision, part of his reasoning was wrong. He noted, however, "*that (in contrast to the facts of this case) in ENE Kos the cheque was drawn on an account of London solicitors who confirmed they had already been put in funds by their client, and that the cheque had cleared before the issue of alleged non-compliance came before the court*". He also noted "*the observations of Arden LJ in ENE Kos (at §51-54) to the effect that the circumstances of a particular case may make it just for the court to craft a special form of order, such as requiring cleared funds to be received by a particular date. One such circumstance which she envisaged was an order to pay money into court for security for costs, where it would be unfair to the opposing party to require them to incur substantial costs at a time when the cheque by which payment into court was made was in the process of being cleared*".

Foxton J concluded that the only just order to be made was the one he had made. He refused to stay the order and delayed consideration of permission to appeal until after the deadline he had set for the funds to clear had passed. The deadline passed without compliance, and permission to appeal was granted.

The issues before the Court of Appeal were (*i*) whether Foxton J's interpretation of the Calver J Order (that it required funds to have cleared) was wrong, (*ii*) whether Foxton J was wrong to change the nature of the security requirements which had been agreed by consent and (*iii*) whether the decision to strike out was disproportionate considering the cheque had been lost.

The Court agreed with ground (i) and found that Foxton J's interpretation of the Calver J Order could not stand. While the primary reason for the decision in *ENE Kos* no longer applied, as the Court Fund Rules had been updated, the reasoning stood, and the Court found that, as long as a cheque subsequently cleared, an order for security is complied with if the cheque is received by the CFO by the deadline.

As to (ii), there was no reason in principle why the Court could not direct that funds had to be cleared by a certain deadline, particularly where time was of the essence.

As to ground (iii), whether or not the cheque had gotten lost after posting was irrelevant; posting it from Guatemala on the day of the deadline was a clear breach of the order. It was 12 days until trial, and the Defendant remained wholly unsecured. In those circumstances, not only was Foxton J entitled to make the order he had made, his order was "*the only order which met the justice of the case*".

Service and Jurisdiction

Consideration of Appropriate Forum for Claims Brought Against English Parent Company

In the recent decision of *Limbu & Others v Dyson Technology Limited & Others* [2024] EWCA Civ 1564, which we discussed here, the Court of Appeal noted factors which influenced its decision to assert jurisdiction in a case where Dyson's UK-based entities were sued by claimants in Malaysia based on alleged forced labour and exploitative working practices abroad.

Applying the *Spiliada* test, the High Court had initially concluded that Malaysia (instead of England & Wales) was the more appropriate forum for the claim to be heard. However, the Court of Appeal reversed this decision, noting issues with the High Court's reasoning and other factors which pointed towards England & Wales as the appropriate jurisdiction to hear the case. Due to space constraints, only the most noteworthy and/or novel points are explored below.

1. Actions/policies that promulgate the abusive actions. The Court of Appeal held that the High Court failed to place sufficient emphasis on the fact that the decisions and policies which led to the abusive actions occurring in Malaysia were promulgated in England.

2. Coordination of the defence. The Court of Appeal highlighted that the High Court failed to give proper weight on the fact that Dyson's defence would be coordinated from England (as that was where the Dyson legal team was based).

3. Claimants' ability to pursue the case in the other jurisdiction. The High Court failed to consider the Claimants' (*i*) inability to fund the disbursements necessary to pursue their case in Malaysia (which are unlikely to be covered by the Defendants' undertakings or NGOs) and (*ii*) difficulties with obtaining representation from suitably qualified and resourced lawyers in Malaysia (based on a partial CFA).

4. Risk of irreconcilable findings. The High Court was wrong to conclude that there was a real risk of irreconcilable findings on the basis that there were defamation proceedings brought by Dyson's UK entities against several UK news agencies about the same facts. These proceedings could have been coordinated to avoid such an outcome.

5. Governing law: The Court of Appeal thought that given the applicable law was Malaysian law, which was the law of a Commonwealth jurisdiction, the English court would be able to deal with expert evidence on Malaysian law and apply its experience with Commonwealth authorities.

The Court of Appeal's observations will likely inform how a future court may deal with issues of jurisdiction in a similar case. Broadly, the case suggests that UK-based companies will likely find it challenging to resist claims at the jurisdictional stage in relation to acts done by their direct/indirectly owned subsidiaries (although every case will necessarily turn on its facts).

Service Out of the Jurisdiction on Undisclosed Principals

In *Yangtze Navigation (Asia) Co Limited & Anor v TPT Shipping Limited & Ors* [2024] EWHC 2371 (Comm), claims were brought under letters of indemnity ("**LOIs**") against various Defendants in relation to the misdelivery of certain log cargoes. The Defendants included entities based in New Zealand (the "**NZ Defendants**") who were alleged by the Claimants to be liable as undisclosed principals to the LOIs, given that the nominal giver of the LOI (the first defendant), now in liquidation, acted as agent for them. The LOIs contained English law and jurisdiction clauses.

The NZ Defendants challenged the jurisdiction of the English courts. They argued that there was no "good arguable case" that they were undisclosed principals to the LOIs, and therefore the Claimant did not meet the standard required (under CPR 6.33(2B)(b)) to be permitted to serve proceedings on them outside the jurisdiction.

On the facts, the Court found in favour of the NZ Defendants and set aside service of the claim forms on them. The noteworthy observation for our purposes was that Court highlighted that its conclusion was consistent with the substantial amount of disclosed evidence by the NZ Defendants. In contrast, the Court rejected the Claimant's suggestion that the jurisdiction challenge should be dismissed on the basis that further evidence might arise in due course that may support their case on agency.

The decision demonstrates the persuasiveness of relevant and useful documentary evidence at the jurisdiction stage, and the courts' general attitude towards claimants relying on speculative arguments to resist a jurisdiction challenge.

Successful Challenge to Jurisdiction in Fraud Claim

A number of noteworthy observations about jurisdiction clauses were made in *Borrelli v Otaibi* [2024] EWHC 1148 (Comm), which concerned proceedings brought by the joint liquidators and various subsidiaries of four offshore investment funds against 20 Defendants who were alleged to have caused losses to the funds prior to their liquidation. The claims concerned conspiracy, dishonest assistance in breaches of trust and/or fiduciary duty and knowing receipt of property belonging to the funds.

One of the Defendants, FFISA, based in Luxembourg, was alleged to have dishonestly assisted the other Defendants by issuing a series of asset-backed securities (the "**Aviation Notes**") to which a particular fund, GFIF, had subscribed under four subscription agreements (the "**Subscription Agreements**"). The Claimants had previously obtained permission to serve FFISA out of the

jurisdiction. These proceedings dealt with FFISA's application to set aside the order granting permission and to stay or dismiss the proceedings against it.

FFISA's application was made on the basis that: (*i*) the claims against it fell within the scope of the exclusive jurisdiction clauses in the Subscription Agreements and/or the Terms and Conditions in the Aviation Notes in favour of Luxembourg courts, and therefore the English Court was required to suspend or dismiss the proceedings under Article 6 of the Hague Convention; and (*ii*) the Claimants had failed to disclose the existence of those exclusive jurisdiction clauses when applying for permission to serve FFISA out of the jurisdiction, in breach of their duty to make full and frank disclosure on a "without notice" application.

With regards to the wording of the exclusive jurisdiction clauses: (*i*) the Subscription Agreements provided that the "*Agreement and all matters arising from or connected with it*" were subject to the exclusive jurisdiction of the Luxembourg courts, and (*ii*) the Conditions provided that the Luxembourg courts had jurisdiction over "*any disputes which may arise out of or in connection with*" the Aviation Notes but this submission to the Luxembourg courts was "*for the benefit of the Issuer only and shall not affect the Issuer's right to take Proceedings in any other court of competent jurisdiction*" (*i.e.* an asymmetric jurisdiction clause).

The Court set aside service against FFISA based on non-disclosure. Otherwise, it would have stayed the proceedings as against FFISA on the basis that the claims against it fell within the exclusive jurisdiction clauses in the Subscription Agreements.

The first issue was whether GFIF's claims against FFISA were "*matters arising from or connected with*" with Subscription Agreements and therefore subject to the exclusive jurisdiction of the Luxembourg courts. The Court also had to be satisfied that the jurisdiction clause fell within Article 3 of the Hague Convention, which states that an exclusive choice of court agreement is one that designates the courts of one contracting state, to the exclusion of any other courts, for the purpose of deciding disputes that arise "*in connection with a particular legal relationship*".

The Claimants argued that the claims made were in tort or for equitable remedies, rather than breach of contract, and thus fell outside the scope of the Subscription Agreements' jurisdiction clauses and/or the legal relationship between the parties required under Article 3 of the Hague Convention. However, the Court rejected this analysis and held that this framing did not take the claims outside the parties' legal relationship; the specific activities that are subject of the complaint are precisely those that fall within scope of the Subscription Agreements. This meant that the proceedings as against FFISA had to be stayed under the Hague Convention.

While unnecessary to consider FFISA's alternative argument, the Court nonetheless observed in *obiter* that even though the claims brought would also be caught by the exclusive jurisdiction clause in the Conditions, the fact that the clauses were asymmetric jurisdiction clauses meant that the Hague Convention did not apply, consistent with English authorities on the point. Applying the English common law rules instead, the Court noted that it would have found that there were strong reasons not to enforce the clause by granting a stay.

The Claimants were aware of the existence of the Subscription Agreements for at least four months before their application for permission to serve FFISA. However, those agreements were not exhibited to the application, and the Judge who heard the application was not told about the jurisdiction provisions the agreements contained. The Court held that it should have been obvious that the jurisdiction clauses contained in those agreements were of great importance in the context of that application.

It was concluded that there had been a serious failure by the applicant to comply with the duty of full and frank disclosure sufficient to warrant the immediate discharge of the order granting permission to serve FFISA.

The decision provides helpful guidance on how to ascertain whether allegations would fall within the scope of a Hague Convention-compliant exclusive jurisdiction clause. It also affirms that asymmetric jurisdiction clauses do not engage the Hague Convention. Finally, it is a reminder of the general importance of complying with the duty of full and frank disclosure for *ex parte* applications (especially when there are jurisdiction clauses which may affect the Court's granting of permission to serve proceedings outside of jurisdiction).

Court Considers Party's Failure to Indicate Intention to Contest Jurisdiction

The judgment in *The Tintometer Ltd v Pitmans* [2024] EWHC 370 provides important insight in relation to the application of CPR 11(5) and CPR 3.10 regarding when a defendant's procedural error in failing to indicate its intention to contest the court's jurisdiction in its acknowledgement of service may be remedied.

The case concerned negligent advice by the Defendants' solicitors in relation to the amendment of a pension scheme. The Claimants were the employer and the pension scheme trustee.

In April 2021, the Claimants issued a claim form against two firms (Adcamp and BDBP). Multiple extensions of time for service of the claim form were granted and/or agreed to. In September 2023, after further investigation, the Claimants amended the claim form to substitute BDBP for Pitmans as the latter was the entity who had actually provided the negligent advice. In October 2023, the Defendants applied to strike out the claim either on the ground that the orders extending time for service should be set aside, or the substitution of Pitmans as a defendant should be disallowed. Days later, the Defendants filed acknowledgements of service without ticking the box to indicate that they intended to contest jurisdiction.

The Court dismissed the Defendants' application to strike out the claim on both grounds (for reasons not addressed here). What is relevant for our purposes was that a challenge was raised by the Claimants on the basis that the Defendants should have expressly contested jurisdiction in their acknowledgement of service. The Court therefore had to consider whether relief should be granted to correct that error. CPR 11(5) provides that if a defendant files an acknowledgement of service and does not make an application under CPR 11 within the stated period, it is to be treated as having accepted that the court has jurisdiction to try the claim.

Referring to *Hoddinott v Persimmon Homes (Wessex) Ltd* [2007] EWCA Civ 1203, the Court affirmed that CPR 11 is engaged where a defendant argues that the court should not exercise jurisdiction on

grounds that an order extending time for service of the claim form should be set aside. In other words, there was a need to expressly contest jurisdiction under CPR 11, and this could be fatal to that application in this case.

However, the Court held that it was appropriate to use CPR 3.10 to remedy the procedural error and technical error, in line with *Pitalia v NHS England* [2023] EWCA Civ 657. In particular, there was no suggestion that the Claimants understood the Defendants to have abandoned their application to set aside the orders extending time for service.

This part of the decision illustrates the applicable circumstances which would merit the exercise of CPR 3.10 to cure a defendant's technical error in failing to state that it intends to contest jurisdiction in its acknowledgment of service.

Disclosure

Introduction

There have been a number of interesting cases concerning disclosure in 2024. Over the past few years, many of the key decisions on disclosure have arisen as parties have grappled with significant changes to the disclosure regime through reforms to the CPR and the introduction of Practice Direction 57AD in the Business and Property Courts.

The notable decisions on disclosure this year concern cross-border proceedings and circumstances in which a party is said to have control over third-party documents. This shows that court users have become more familiar and comfortable with the reformed disclosure regime, and accordingly the focus of disputes is shifting back towards more substantive matters. The question of control of third-party documents is an issue that has been litigated in a number of high-profile decisions in recent years, particularly in relation to documents held by related entities, and we expect to see that trend continue.

Scope of Disclosure in Support of a Jurisdiction Challenge

The decision of *Alesayi v Bank Audi SAL* [2024] EWHC 1975 (KB) considered the important question of how far a court ought to go in making orders for disclosure where the court is asked to determine a challenge to the court's jurisdiction.

In *Alesayi*, Master McCloud made orders for disclosure under CPR 31.12 (specific disclosure) and CPR 31.14 (documents referred to in statements of case and witness evidence) against the Defendant (a Lebanese bank) in the context of a jurisdiction challenge.

The Master's decision emphasised that disclosure in the context of a jurisdictional challenge should be ordered with caution: if the English courts allowed wide disclosure of documents before determining jurisdiction, then there would be a risk of forum shopping just to obtain documents. It was also recognised that disclosure in the context of a jurisdiction dispute was not the norm and would usually be "exceptional".

In granting the order for disclosure, Master McCloud recognised the need to "do justice between the parties" and to ensure a "level playing field" given the "information asymmetry" at play between the parties. Other factors which appeared to have influenced the Master's decision included that the disclosure was relatively low cost compared to the value of the claim and the fact that the material intended for disclosure was likely to be highly conclusive to the jurisdiction issue.

Subsequently, in March 2025, the High Court partially overturned the orders of Master McCloud, refining the scope of disclosure to be given to reflect that the issue to be determined in the jurisdiction proceedings was a very narrow one.

Foreign Trustee Ordered to Disclose Information on Assets Held in Foreign Trusts

In *Tonstate Group Ltd & Ors v Wojakovski & Ors* [2024] EWHC 975 (Ch), the High Court made a *Bankers Trust*[21] disclosure order, which required a foreign trustee to disclose information and documents relating to bank accounts and assets held in a foreign trust. The application arose in the context of long-running litigation involving the Tonstate Group of companies. Tonstate Group has been the victim of an admitted fraud, involving the unauthorised extraction of more than £13 million of company funds. These proceedings were a further chapter in efforts to recover those funds.

The application was made against the brother of the wrongdoer, who is an Israeli citizen and is resident in Israel. The application was made on the basis that the brother could be expected to have access to, and control of, documents of a family trust and access to, and control of, documents relevant to the bank accounts of his late father. The basis for the application was the Court's power to make orders for disclosure in aid of proprietary claims—that is, a disclosure order to allow a Claimant to find out what has become of his own property.

Before making an order, a court must be satisfied that it has: (a) personal jurisdiction over the respondent—whether the respondent should be made subject to an order directing him personally to act in a particular way; and (b) subject matter jurisdiction—whether an English court could claim to regulate the conduct of people outside the jurisdiction.

The decision provides helpful guidance as to how these principles may be applied in the context of a complex, cross-border fraud claim. In this case, the High Court was satisfied that it had personal jurisdiction, including because the respondent was a director of an English company and had provided a registered address for service with Companies House in the United Kingdom.

The Court also noted that "*the principal interest in the case in my view, and the principal difficulty in dealing with it, arises from the fact that [the brother] is resident abroad and the Order seeks disclosure of information and documents held at least partly abroad, by regulating [the brother's] conduct outside the jurisdiction*." The Court identified a number of factors justifying an English court using its power to order disclosure in accordance with internationally recognised principles on the limits of the exercise of jurisdiction. These included the sufficient connection with England, that one of the bank accounts identified was in London and the significance in jurisdictional terms that the case involved a fraud.

---

[21] Named after *Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274.

Documents Held by Sub-Contractors Held to Be Within the Control of a Party for Disclosure Purposes

In *Mornington 2000 LLP (t/a Sterilab Services) and another v The Secretary of State for Health and Social Care* [2024] EWHC 1708 (TCC), the High Court ordered that documents in the possession of a sub-contractor and a sub-sub-contractor were within the control of the Claimants for the purposes of discharging their disclosure obligations under Practice Direction 57AD.

The decision arose out of an application for a declaration concerning the scope of the documents within the control of the Claimants. The Judge considered the well-established principle that an arrangement or understanding which gave a party practical or *de facto* control of a third party's documents was sufficient to constitute control for disclosure purposes. In this case, practical control was asserted, including because undertakings had been made where the sub-contractors had committed to providing the Claimant with assistance in terms which were applicable to the claim.

The High Court agreed that the balance of evidence showed that there was an arrangement or understanding that the sub-contractor would search for relevant documents or make documents available to be searched. The starting point in this analysis was the contractual assistance clauses which extended to documents both favourable and unfavourable, which are necessary to the fair disposal of the claims. In addition, the evidence of past access to documents was a significant factor in determining that there was more than a mere close commercial relationship between the parties. Finally, it was not necessary to establish that the Claimant had free and unfettered access to the documents. The Court was satisfied that there was an understanding that access would be provided, and the sub-contractor would cooperate in providing the relevant documents.

Disclosure of Documents Held by Third Parties

In *The Public Institution for Social Security v Al-Wazzan* [2024] EWHC 480 (Comm), the High Court was asked to consider whether The Public Institution for Social Security ("**PIFSS**") should be required to disclose documents which were not currently in its possession, but which were in the hands of various third parties, both governmental and non-governmental. In determining the application, the High Court was asked to determine whether PIFSS had practical control over documents held by various government bodies and professional services providers.

The case affirms existing principles for when a party is said to have control of documents held by a third party: that is, not only where the party has a legally enforceable right to obtain access to such a document but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access.

The High Court considered the relationship between PIFSS and each of the third parties separately. The decision provides some helpful guidance on the boundaries of control where there has been some co-operation and provision of information but where there is insufficient evidence of a "free flow of information" or pattern of ongoing cooperation. The decision is a good reminder that the courts will exercise caution when assessing practical control and that a "degree of stringency" is required.

Disclosure of Funding Information in the Context of Non-Party Costs Order

In *Topalsson GmbH v Rolls Royce Motor Cars Ltd* [2024] EWHC 297 (TCC), the High Court has ordered disclosure of funding information in the context of a non-party costs order. The application arose following proceedings in the Technology and Construction Court where the Defendant had received a £1 million costs order in its favour. The Defendant applied for disclosure of certain information in support of its application for a non-party costs order against Mr Topal, the managing director and majority shareholder of the Claimant, and potentially other funders, under s.51 of the *Senior Courts Act 1981*.

The decision highlights that company directors may be required to disclose funding information if there is evidence that they may have personally funded proceedings on behalf of a company. The Defendant in this case submitted that the director stood to benefit most from the proceedings as Topalsson's majority shareholder, and there are arguable grounds to consider that Topalsson is a vehicle for Mr Topal's personal ambitions and his own perception of his reputation.

Previous authorities have established that that payment of costs by a non-party under s.51 will always be exceptional, and "any application should be treated with considerable caution" (*Thomson v Berkhamsted Collegiate School* [2009] EWHC 2374 (QB) (endorsed by the Court of Appeal in *Flatman v Germany* [2013] EWCA Civ 278 at [48ff]).). The mere fact that someone has funded proceedings would generally be insufficient to support an application that they pay the costs of the successful party. Pure funders with no personal interest in the litigation (as described at the case of *Hamilton v Al-Fayed No. 2* [2002] EWCA Civ 665), will not normally have the discretion exercised against them. However, where the non-party not merely funds the proceedings but substantially also controls or, at any rate, is to benefit from them, they will ordinarily be responsible for paying the successful party's costs if the proceedings fail.

In this case, the High Court ordered the disclosure of funding information. It was not necessary for the Defendant to establish that the application for a non-party costs order was likely to succeed but that the information sought by Rolls-Royce on the disclosure application was likely to be highly relevant to the exercise of the Court's discretion when ultimately considering the s.51 non-party costs application.

Court Refuses Disclosure Order in Support of Third-Party Costs Order

In another case concerning third-party disclosure, the High Court in *SFL Ace 2 Co Inc v DCW Management Ltd (Formerly Allseas Global Management Ltd)* [2024] EWHC 3074 (Comm) refused an application for disclosure in support of a third-party costs order.

The Claimant, a shipowner, was awarded $27.4 million in damages in connection with a charterparty which was said to have been repudiated. The Claimant sought its costs of the proceedings to be paid by a former director of the charterer and two companies which had been operating subsidiaries of the first defendant ("**AGML**"). The shares of those companies had been sold after the Claimant had commenced proceedings. After judgment was given, AGML was placed into administration. The Claimant asserted that a scheme was hatched to make the AGML judgment-proof for the benefit of the Third to Fifth Defendants and to frustrate the Claimant's ability to enforce a judgment against AGML. The Claimant sought third-party disclosure to support its assertions.

The High Court refused the application on the basis that the requests were speculative, too broad and in the nature of a fishing expedition. The Claimant had not demonstrated that this was an appropriate case to order an exceptional remedy for disclosure in support of an application for a third-party costs order.

Evidence

Non-Compliant Witness Statements

Since the introduction of Practice Direction 57AC ("**PD57AC**"), there have been numerous cases calling out deficiencies with trial witness statements. Three of the best examples from 2024 are dealt with in more detail below and serve to demonstrate that even though PD57AC is no longer particularly new, parties and practitioners alike are still grappling with how to comply with it.

Fulstow v Francis [2024] EWHC 2122 (Ch)

In *Fulstow*, the High Court considered the appropriate weight to be placed on three witness statements served by the Claimant in light of their non-compliance with the requirements of PD57AC. The underlying action related to the Claimants' beneficial interests in the shares of a land development company held by the Defendants.

Mr David Stone (sitting as a Deputy High Court Judge) declined to strike out the witness statements for their non-compliance but placed no weight on the statements as he could have *"no confidence"* in their truthfulness. In reaching his conclusion, the Judge noted multiple defects in the statements, including that (*i*) none of the statements included the witnesses' confirmation of compliance, (*ii*) none of the statements included a list of documents to which the witness was referred, and (*iii*) one of the statements did not include a solicitor's certificate of compliance. In respect of witness statements containing a solicitor's certificate of compliance, the Judge could not "*see how he* [the solicitor] *can have believed that the two (or three) witness statements complied with PD 57Ac—because they clearly and obviously do not, and any solicitor properly practising in this court ought to have known that*" (at [36]). Substantive issues, including that (*i*) two of the witness statements reconstructed a narrative of events from the documents and commented on other evidence in the proceedings, and (*ii*) one of the statements included legal submissions and matters of which the witness could have no direct knowledge, were also criticised by the Court.

Notably, Stone J found that the witness statements were heavily influenced by solicitors' advice on what to include and were not an independent recollection of events but a "*carefully constructed analysis of the documents then available to the Claimants*" (at [29]). The Court also noted that the Claimants' witness statements were similar in wording, each seemingly copied from the other. Accordingly, the Court could not have confidence in the truthfulness of the statements "*where the contents of these witness statements are not corroborated by other sources (such as contemporaneous documents)*" (at [29]). Notably, the Claimants had waived privilege over certain correspondence with their legal advisers, allowing the Court to investigate the preparation of the statements. The Court noted an "*aide memoire*" sent by the solicitors to the Claimants, which contained a summary of the case and questions to be addressed and suggested possible answers for one question, which appeared contrary to the principle of not asking leading questions when preparing witness statements.

The Court also refused the Claimants' attempt to introduce corrective witness statements on the first day of the trial, as the list of documents referred to by the witnesses covered all pleadings and disclosure instead of identifying specific documents, which was "*blatantly non-compliant with PD 57AC*" (at [34]).

The case serves as a reminder of how seriously the courts continue to treat breaches of PD 57AC.

***IlliquidX Ltd v Altana Wealth Ltd and others* [2024] EWHC 2191 (Ch)**

In *IlliquidX Ltd*, Chief Master Shuman ordered that two trial witness statements be rewritten by the Claimant due to breaches of PD 57AC. The dispute concerned allegations of a misuse of confidential information by the Defendants.

The Court emphasised that trial witness statements *"should be the oral evidence of the person making them, of direct events, and be tethered to the case that the claimant is advancing at trial"* (*at* [149]). Chief Master Schuman also believed it unclear from the witness statements "*how far the evidence reflected what the witness actually remembered of events or simply recalled events from the documents*" (at [150]).

Although Chief Master Shuman was cautious about the "*risk of weaponizing PD 57AC*", the overall sense of the witness statements was that they were "*constructed by reference to documents*" (at [151]). Whilst witnesses are permitted to refresh their memory, PD 57AC was designed to avoid documents leading to the recollection of events. The Court noted that "*[u]ltimately the court needs the best evidence from the witness, what the witness actually remembers of events, so that it can ascertain the truth through accurate fact finding*" (at [151]).

However, the Court rejected the Defendants' request that the solicitor who signed the certificates of compliance should provide a witness statement concerning the preparation process. The Court was "*reluctant to embroil the solicitor*" (at [158]) and stated that the order did not amount to finding improper conduct on the part of the solicitor.

The case emphasises the importance of ensuring compliance with and understanding the purpose of PD 57AC. Whilst documents are useful for refreshing a witness' memory, witness statements should be focused on their own recollections.

KSY Juice Blends UK Ltd v Citrosuco GmbH [2024] EWHC 2098 (Comm)

In *KSY Juice Blends UK Ltd*, HHJ Pearce suggested that there is "*far too much lip service paid to PD 57AC by those preparing and certifying witness statements*" (at [22]). HHJ Pearce's observation was made in response to the Defendant's counsel stating, during trial, that "*PD 57AC is more honoured in the breach than the observance*".

Both parties accepted that the witness statements, particularly those for the Claimant, contained a considerable amount of inadmissible opinion evidence regarding the construction of the contract. Although the parties' counsel did not rely on inadmissible evidence during the trial, the Judge stated that "*the mere fact that more was not made of the issue of non compliance with PD 57AC does not mean that it should go without mention*" (at [22]).

Although non-compliance did not disrupt the progress of the trial, and the Judge was not asked to order any sanctions, practitioners should conduct themselves on the assumption that non-compliant witness evidence will have consequences, either through unfavourable costs orders or through sanctions listed in PD 57AC, including the risk of inadmissibility.

Witnesses Abroad

The High Court has taken two varying approaches this year in *Skatteforvalningen* and *Gorbachev* as to whether a trial judge should exercise their discretion to take evidence from a witness abroad.

Under CPR 34.13(4), the High Court has the power to appoint a "*special examiner*" to take evidence from a person located abroad (provided that this is permissible under the laws of the foreign country). In *Skatteforvalningen,* the Court held that CPR 34.13 should be read alongside CPR 34.8–34.12, and particularly CPR 34.8, which allows a party to apply for an order *"before the hearing takes place"*. However, in *Gorbachev*, Pelling J found the approach to be *"unduly narrow"* as it was contrary to the *"inherent power of the court to make appropriate orders in the management of its own procedures and the case management of the cases before it"* (at [11]).

Both cases acknowledge that the choice between remote evidence and the special examiner procedure are *"two sub-optimal solutions"*. While obtaining evidence via video-link remains the default position where witnesses are located abroad, in-person examinations are still viewed as the preferred method of taking evidence, and the courts may insist on this in certain circumstances. Therefore, practitioners should note the factors considered by the courts, including disruption to the trial timetable and the cost of taking evidence abroad, when considering whether to pursue an application to appoint a special examiner.

Skatteforvalningen v Solo Capital Partners LLP [2024] EWHC 19 (Comm)

In *Skatteforvalningen,* Mr Andrew Baker KC (sitting as a High Court judge) found that it was not in the interests of justice to adjourn the trial and take evidence from witnesses located in Dubai who were subject to European arrest warrants and/or a travel ban.

Baker J's decision was informed by potential burdens on the justice system, as *"when taking evidence abroad as a special examiner, not only would the trial judge not be acting as the trial judge, they would not be acting, and could not act, as a judge at all"* (at [20]). Therefore, a *"much more compelling"* argument would be required *"before it would be right to impose that burden on the system and run the inevitable risk that would still exist that some other litigant or litigants might have justice delayed or denied through judicial unavailability"* (at [41]).

The Court drew attention to a number of factors applicable when considering remote evidence, including the inconvenience and cost of travelling abroad and the limited intervention powers of a special examiner. Importantly, they would be unable to control the questions asked or compel the witnesses to attend or to answer questions. Therefore, Baker J was unpersuaded that there would be any material loss of quality in the factual witness evidence if provided remotely. On the impact of the oral evidence, Baker J held that *"there is no reason why those should not be captured well so as to be as evident to me on screen as they would be in person"* (at [34]) given the high-quality screen *"replicating as closely as possible"* how the witnesses would have appeared in the witness box. Furthermore, the Court

acknowledged that witness testimony would not provide *"substantial value"* for determining what had occurred as the facts of the case were well-known to the Court.

***Gorbachev v Guriev* [2024] EWHC 247 (Comm)**

In *Gorbachev*, Mr Mark Pelling KC (sitting as a High Court judge) permitted a joint application to appoint himself as a special examiner and take evidence from Dubai. The Defendant and his son were prohibited from travelling to England, as they were designated persons under Regulation 5 of The Russia (Sanctions) (EU Exit) Regulations 2019. The application occurred in the context of a dispute concerning the operation of two Cypriot trusts.

Noting that Baker J in *Skatteforvalningen* did not reach any conclusions on the point, Pelling J was unpersuaded that a judge would be giving themselves an unauthorised leave of absence by acting as a special examiner. Instead, in making the order, *"the judge is performing an incidental function in the course of the duties of a trial judge"* (at [12]).

Agreeing with Baker J's assessment as to why taking evidence abroad should be avoided, Pelling J made the *"wholly exceptional"* order to take evidence from Dubai. Reasons included (*i*) the limited English proficiency of the two witnesses and the associated difficulties of translation over video-link, (*ii*) that the complexity of the case would require a careful consideration of the oral evidence, which may be lost in remote evidence, and (*iii*) the unfairness of imposing a disadvantageous method of evidence on the Defendant, considering that both parties had supported the application, and the Claimant and his witnesses would be giving evidence in England.

Please see our Debevoise in Depth article for more information.

The Weight to Be Given to Evidence

***Jaffe v Greybull Capital* [2024] EWHC 2534 (Comm)**

In *Jaffe*, the High Court considered the conflicting "*evidence of two equally patently honest and truthful witnesses*" (at [4]) in a dispute concerning whether fraudulent misrepresentations about the source of funds provided to a company were made at a meeting in 2016. The alleged representations derived from a contemporaneous note written by one of the Claimants' witnesses shortly after the meeting based on a manuscript note.

Mrs Justice Cockerill held that the *Gestmin* approach, *i.e.* placing greater reliance on contemporaneous documents over oral evidence, would fail to take into account the possibility "*of a faulty impression or recollection being encoded at a very early stage and recorded in that document*" (at [230]). Therefore, "*the document can be taken as the basis for a compelling argument; but it itself must be tested against the facts in the full context*" (at [231]), which included (*i*) whether one of the witnesses strayed *"off-message"* from the agreed script, (*ii*) matters of importance to the parties at the time and (*iii*) "*the short distance between ambiguity and inaccuracy*" (at [232]).

Notably, Cockerill J's reasoning focused on Popplewell LJ's lecture "*Judging Truth from Memory*", which, importantly, stated that contemporaneous documents *"may be produced near the time, but they are produced after the memory has been encoded, and if there is an encoding fallibility, which there may be for all these different reasons, it infects the so called contemporaneous record every bit as much as other reasons for the fallibility of recollection which affect it at the storage and retrieval stage"* (at [201]).

Dismissing the claim, Cockerill J concluded that the contemporaneous note was "*entirely innocently*" inaccurate, and therefore, the alleged misrepresentations had not been made. The note was not a live transcript but a "*reinterpretation of his* [the witnesses'] *manuscript notes*" (at [285]). Cockerill J further acknowledged that "*there is scope for 'Chinese whispers' both in the taking of a note and in its interpretation, particularly when there is discussion immediately afterwards*" (at [286]).

This case provides a helpful insight on how a party may challenge the accuracy of a contemporaneous account produced by a credible witness without showing dishonest intent. Following *Jaffe*, contemporaneous documents will still provide the "*basis for a compelling argument*", but its accuracy must be tested "*against the facts in full context*" (at [231]).

Experts

Expert Changes Position After Preparation of Report and Admits to Lack of Objectivity Under Cross-Examination

In *Wilson v Ministry of Justice* [2024] EWHC 2389, the Court refused to rely on evidence regarding disputed matters from an expert witness that it deemed to be *"non-objective and partisan"*, contrary to CPR 35.

The dispute arose in the context of *"life-threatening and life-changing injuries"* the Claimant sustained during an attack by a fellow prisoner whilst working in the prison kitchen. The Ministry of Justice had admitted liability to the Claimant for negligence at the outset, but causation and quantum remained in dispute. To determine damages, the parties relied on separate expert evidence in the fields of spinal cord injury ("**SCI**"), psychiatric injury, pain, physiotherapy, care/occupational therapy and accommodation.

The Court heard oral evidence from Naveen Kumar, the Defendant's SCI expert, in which he *"agreed that part of his evidence (that he did not find Mr Wilson to have any balance or weakness issues) was wrong"*. When it was put to him by the cross-examining counsel that this demonstrated a *"lack of objectivity"* and that he was *"advocating for the Defendant"*, Kumar reinforced his earlier admissions, stating, *"I agree. I have said he had impaired balance previously"*, and accepted that he had not provided evidence in accordance with his Part 35 duties to the Court.

Kumar did attempt to withdraw from his earlier admission in re-examination and maintained that he had been an independent expert in his duty to the Court. However, HHJ Melissa Clarke did not accept this justification, noting that "*Mr Kumar said and wrote quite a lot which was not justified on the evidence, or which was directly contradicted by the evidence, or by which he trespassed outside his area of expertise and/or into my judicial functions, or which amounted to argument and advocacy*".

The *"problematic"* evidence provided by Kumar included: (*i*) recording in his report that Wilson did not use a wheelchair yet later quoting Wilson saying to him that he does; (*ii*) recording that Wilson does not have any balance or weakness issues, whilst consistently reporting the contrary;

and (*iii*) opining on Wilson's criminal record and its effect on his employability, beyond the remit of Kumar's expertise.

As a result, HHJ Clarke considered that Kumar *"had lost sight of the fact that his first duty was to the Court, and was actively seeking to influence the Court to make a lower award to Mr Wilson than that which is justified*". Consequently, to place any significant reliance on this evidence risked *"an unjust outcome in this case*".

Wilson is a reminder about the importance of expert independence and objectivity. It is acceptable for an expert to change their view, so long as this is supported with the information justifying the change. Mr Selmi, the Claimant SCI expert, presents a helpful model of a "good witness". Despite changing his evidence, he was deemed *"thoughtful, careful and considered"* by the court in taking account of all of the evidence before him.

Lawyers are advised to explain the content of the CPR 35 duties to their witnesses, with reference to the statement of Cotter J in *Muyepa v Ministry of Defence* [2022] EWHC 2648 (KB):

> *"Experts should constantly remind themselves through the litigation process that they are not part of the Claimant's or the Defendant's 'team' with their role being the securing and maximising, or avoiding and minimising, a claim for damages. Although experts always owe a duty to exercise reasonable skill and care to those instructing them, and to comply with any professional code, as CPR35.3 expressly states, they have, at all times an overriding duty to help the Court on matters within their expertise. That they have a particular expertise and the court and the parties do not … means that significant reliance may be placed on their analysis which must be objective and non-partisan if a just outcome is to be achieved in the litigation."*

Claimant Granted Permission to Change Experts After Solicitors Admitted to Interfering with the Drafting of Experts' Joint Statement

In *Glover and Anor v Fluid Structural Engineers & Technical Designers Ltd and others* [2024] EWHC 1257 (TCC), the Court granted permission for the Claimants to appoint a replacement expert following *"substantial and impermissible interference in the expert statement process"* by the Claimants' solicitors.

The parties submitted evidence from structural engineers in the form of a joint statement of the relevant issues per CPR 35.12(3), followed by individual expert reports, in a dispute regarding damage to properties caused by renovation works. During the exchange of drafts, the Defendant's expert became concerned that significant changes to the joint statement by the Claimants' expert were due to involvement from the Claimants' lawyers.

Following an exchange of letters, the Claimants' solicitors admitted that due to a failure of understanding, they had not complied with the applicable rules and guidance when making comments and proposing amendments to the expert joint statement. However, they *"did not intend to have any impact on the substance"* of the Claimants' expert's views or his independence.

Subsequently, the Claimants sought permission to replace their expert with a new expert witness. The Defendant resisted this and argued that further disclosure of the attendance notes and email communications between the Claimants' solicitors and the Claimants' original expert was necessary.

Mr Simon Lofthouse KC, sitting as a judge of the High Court, granted permission to the Claimants to rely on the new expert witness and refused the Defendants' request for additional disclosure. The Court was guided by the Overriding Objective of the CPR to deal with cases justly and at a proportionate cost and considered the following factors to be relevant: (*i*) the expert evidence was central to the Claimants' case; (*ii*) the replacement evidence would not affect the scheduled trial date; (*iii*) the evidence does not suggest that the amendments had sought to change Hardy's opinion on the central issues in dispute; (*iv*) the Claimants should not suffer an injustice due to the error of their solicitors; and (*v*) the Claimants' solicitors had apologised and made a full and frank admission to the Court. The Judge emphasised that the protected trial date was of particular importance to his reasoning and that *"if the consequence of the replacement structural engineering expert had been to lose the trial date this September then, for that reason alone, I would not grant permission*".

The Claimants were ordered to pay wasted costs and cover 30% of the Defendant's future costs in considering the joint statement and expert report by Tant.

The decision affirms the limited role that solicitors can have in relation to the preparation of expert joint statements, and the costly consequences of failing to adhere. The relevant guidance in paragraph 13.6.3 of the Technology and Construction Court Guide states,

> *"Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement* (emphasis added). *Any such concerns should be raised with all experts involved in the joint statement."*

Valuation Experts Need to Show Their Calculations

In *Sahota v Sahota & Ors* [2024] EWHC 2165 (Ch), the Court criticised a forensic accounting expert for appearing to form an approximated opinion then carrying out a detailed calculation and adjusting it until the result matched the initial opinion.

The Claimant in the proceedings alleged that the affairs of Corrugated Box Supplies Limited (the "**Company**") were being conducted in a manner that was unfairly prejudicial to his interests as a member. Both parties obtained expert reports from forensic accountants to determine the valuation of the Company. The Defendants' reports, produced by Andrew Donaldson, contained several errors. The errors in Donaldson's supplemental report of 19 April 2024 and the joint report of 8 May 2024 were of particular concern to the Court. In the judgment of HHJ Rawlings, these revealed an approach to valuation that *"undermines the credibility and reliability of his opinion*".

Donaldson assessed the value of the Company to be £22.77m as at 29 February 2024. However, he later accepted in the joint report that this calculation contained an arithmetical error which, if corrected, would produce a valuation of £29.9m. When asked about the discrepancy in cross examination, Donaldson set out his approach as follows:

1. He already had a good idea of the value based on two prior valuations, which he considered to be around £22m.

2. When he carried out a calculation using a method that was not the agreed primary basis of calculation but rather was only to be used to cross check (discounted cash flow), the outcome confirmed his view about the value of the Company. He did not enquire into the assumptions underpinning the calculation.

3. Upon realising that the corrected calculations produced a value of £29.9m, Donaldson revisited his assumptions and concluded that there were issues specific to the Company that had not been considered and would reduce its value.

4. He then produced a calculation on the agreed primary basis (capitalised earnings) to match the approach of the petitioner's expert and used an adjusted multiplier to keep the valuations coherent across both methods.

The Court was particularly concerned by the lack of detailed calculations provided by Donaldson for it to scrutinise and held that *"there is a good reason why forensic accounting experts produce detailed calculations to arrive at a value for a company, that reason is that a valuation based upon such detailed calculations is susceptible to objective analysis and challenge*".

The Court appeared to draw a distinction between *"errors of calculation"* in Donaldson's first report and *"errors of principle"*. Whilst the latter were considered to be of more concern, the errors in the first report did show *"at least a lack of care and attention to detail"* and mean *"that there is reason to approach his opinion in those reports with a degree of caution*".

Privilege

Introduction

2024 was a busy year in privilege law, with multiple judgments on waivers and exceptions to privilege and a particularly well-publicised decision requiring the law firm Quinn Emanuel to disclose the identity of a consultant which had prepared a report which was later deployed in litigation.

Perhaps the biggest development in the law of privileged was the consideration by the High Court of the 'Shareholder Rule' – an exception to the law of privilege that prevented a company from asserting privilege against its own shareholders.

High Court Overturns 'Shareholder Rule'

In *Aabar Holdings S.á.r.l. v Glencore Plc* [2024] EWHC 3046 (Comm), the High Court directly considered for the first time in more than a century whether a company was prevented from asserting privilege against its shareholders. We wrote in detail about *Aabar* here.

The 'Shareholder Rule' was previously an exception to legal advice privilege and litigation privilege, which had been in place since the 19th century and which provided that a company was not permitted to assert privilege against its own shareholders. Instead, shareholders would be entitled to seek disclosure of legal advice obtained by the company, save where there was a dispute between the shareholder and the company.

Although the 'Shareholder Rule' had been criticised at various points in time, it was not until the *Aabar* case in 2024 that it came before the courts for direct consideration.

The proceedings in *Aabar* concerned claims against *Glencore Plc* and other individuals brought by a group of shareholders pursuant to s.90 and s.90A of the Financial Services and Markets Act. The parties disputed whether Glencore was entitled to assert privilege against the claimant shareholders or whether it was prevented from doing so by the 'Shareholder Rule'.

In a detailed judgment, Picken J noted that in earlier cases "*the Shareholder Rule appears to have been justified on the basis that a shareholder has a proprietary interest in the company's assets and the advice taken by the company had been paid for from the company's funds*", akin to the position in respect of trustees and beneficiaries. Picken J held, however, that this "*proprietary interest basis*" was no longer correct in law. Ultimately, Picked J concluded that the "*Shareholder Rule is unjustifiable and should no longer be applied*." Instead, he confirmed that English law permits companies to assert privilege against their own shareholders in the same way as privilege can be asserted against any third party.

Consideration of the Iniquity Exception to Privilege

In *Al Sadeq v Dechert LLP and others* [2024] EWHC Civ 28, the High Court gave guidance on the scope of litigation privilege and legal advice privilege and provided a clearer test for when the so called 'iniquity exception' applies.

The Claimant was a group legal director of the Ras Al Khaimah Investment Authority ("**RAKIA**"). Following findings in separate proceedings that RAKIA's CEO had fraudulently misappropriated funds, the Claimant was himself convicted of fraud and imprisoned. The Defendants were Dechert LLP (as well as individual Dechert lawyers), a law firm that had been retained by the Investment and Development Office of the Ras Al Khaimah government to investigate fraudulent activities at RAKIA. The Claimant contended that the Defendants had violated his rights by using threats, mistreatment and other unlawful methods to force him to give false evidence against RAKIA's CEO.

The case raised three main issues concerning privilege: (*i*) the scope of the "iniquity exception"; (*ii*) whether non-parties could be covered by litigation privilege; and (*iii*) whether the restrictive definition of "the client" from *Three Rivers (No 5)* applied in the context of litigation privilege.

The "iniquity exception" prevents privilege from applying to communications which have come into existence in furtherance of a fraud, crime or other iniquity. The Claimant and the Defendants disagreed as to the threshold that must be met to demonstrate iniquity which would trigger the iniquity exception. The Court held that the proper test was whether there was a *prima facie* case in iniquity. A *prima facie* case meant a balance of probabilities test—*i.e.* "*the existence of the iniquity must be more likely than not on the material available to the decision maker*". However, the Court caveated this by noting that "*there might exist exceptional circumstances which could justify a court taking the view that a balance of harm analysis has a part to play*". The Court widened the test for the relationship between the communication and the iniquity which must be established to trigger the exception. The exception applies to documents brought into existence *as part of*, as well as in furtherance of, the iniquity. Documents created after the iniquitous conduct that report on it or reveal it are captured. Having refined the test for the iniquity exception, the Court ordered the Defendants' disclosure exercise to be undertaken again.

On the issue of non-party privilege, the Claimant argued that five of the underlying 11 pieces of litigation in respect of which privilege was claimed by the Defendants could not qualify for the purposes of litigation privilege because Dechert's clients were not parties to such proceedings but merely alleged victims. The Defendants contended that, provided the other elements of litigation privilege were fulfilled, there was no requirement that contemplated proceedings be proceedings to which the clients were or would be a party. The Court found in favour of the Defendants: litigation privilege can apply where the person claiming the privilege is not a party to the contemplated litigation. The Court did, however, note that "*cases where the dominant purpose test is satisfied by the party claiming privilege is essentially a stranger to the litigation are likely to be extremely rare*" and left open the issue of whether there must be an additional requirement of a sufficient interest in the contemplated proceedings.

As to the scope of the *Three Rivers (No 5)* principle, the Claimant argued that this could be applied to litigation privilege (as well as legal advice privilege). The Court rejected this argument, finding that "*the* Three Rivers (No 5) *principle has no application to litigation privilege*". Under litigation privilege, communications with third parties can be covered by the privilege irrespective of any role the third party may or may not have in conducting the litigation.

Without Prejudice Privilege in the Context of Mediation

In *Pentagon Food Group Ltd and others v B Cadman Ltd* [2024] EWHC 2513 (Comm), the High Court considered the exceptions to without prejudice privilege in the context of mediation.

The dispute concerned a settlement agreement made between the Claimants (The Pentagon Food Group Limited, Khan Estates Limited and Mr Ashfaq Khan) and the Defendant, B Cadman Limited ("**BCL**"). Paragraph 3 of the settlement agreement provided that Khan Estates Limited would purchase a property, Portland House, from BCL. It subsequently transpired that BCL did not own the freehold to Portland House and therefore could not sell the property without first obtaining third-party consent. The Claimants sued the Defendant, alleging breaches of both express and implied terms under the settlement agreement, as well as misrepresentation. The Court held that the settlement agreement had been induced by fraudulent misrepresentation and that there were breaches of the express and implied terms requiring BCL to sell the property. Although Judge Tindall reached this decision relying only on non-privileged evidence, he did consider the extent to which he could have

admitted evidence from the mediation. This examination raised the following three issues: (*i*) whether mediation is subject to its own form of privilege; (*ii*) the scope of the exceptions under *Unilever v Procter & Gamble* [2000] 1 WLR 2436; and (*iii*) the scope of the exception in *Oceanbulk Shipping v TMT* [2010] 3 WLR 1424 (SC).

The Court noted the concept of mediation privilege being distinct from the without prejudice rule, argued, for example, in *Brown v Rice* [2007] EWHC 625 Ch. The Court also noted the significant development of ADR since 2007, with the courts now being able to compel ADR since the judgment in *Churchill v Merthyr Tydfil BC* [2024] 1 WLR 3827 (CA). In light of this, the Court considered whether "*the undoubted enhanced importance of mediation and ADR generally justifies a more enhanced form of 'mediation privilege' beyond traditional 'without prejudice privilege' e.g. with narrower exceptions*". Judge Tindall found that the authorities do not yet support the view that mediation privilege is distinct from without prejudice privilege but accepted that "*the contractual and formal context of mediation means that it is a particularly clear* [...] *example of 'without prejudice privilege'*".

Under *Unilever*, there are several exceptions that permit the admission into evidence of what parties said or wrote during without prejudice negotiations. Here, the relevant exception (had the Court not been able to rely on non-privileged material) was: "*(2)* [e]*vidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud, or undue influence…*". Judge Tindall, agreeing with Richards LJ in *Berkley Square Holdings v Lancer Property* [2021] 1 WLR 4877 (CA), proposed extending *Unilever* Exception 2 to cover negligent misrepresentation, as well as fraudulent misrepresentation.

The exception in *Oceanbulk* permits the admission into evidence of facts, conveyed by one party to another during without prejudice negotiations, which have a bearing on the meaning to be given to words in a contract. The Court accepted that the *Oceanbulk* exception applies on its face only to the interpretation of contractual terms and not their implication. However, while caveating that its opinion on this matter is *obiter*, the Court proposed extending the exception to cover implication—"*justice does clearly demand that implication of terms should be able to draw on the same material as interpretation of terms in the* Oceanbulk *exception*".

Law Firm Required to Disclose Identity of Consultant

In *Filatona Trading Ltd v Quinn Emanuel Urquhart & Sullivan UK LLP* [2024] EWHC 2573 (Comm), the High Court granted a *Norwich Pharmacal* order against Quinn Emanuel ("**QE**"), a law firm, requiring them to disclose the identity of the consultancy who produced a report which was deployed in litigation.

The case relates to a long-running dispute between (*i*) Mr Deripaska and Filatona Trading Limited (together, the "**Deripaska Parties**") and (*ii*) Mr Chernukhin and Navigator Equities Ltd (together, the "**Chernukhin Parties**"), regarding a joint venture formed in the early 2000s. In July 2017, the Chernukhin Parties obtained a circa US$95m arbitral award against the Deripaska Parties. In April 2020, the Chernukhin Parties sought to set aside this award, arguing that it had been vitiated by the Deripaska Parties' commission of a fraud. The alleged fraud was the suppression of a report (the "**Glavstroy Report**") obtained by QE from a business intelligence consultancy (the "**Consultancy**") on behalf of the Chernukhin Parties. The Glavstroy Report was a report that the Consultancy had procured from a Russian construction company and purported to be a feasibility study of a factory in

Moscow. The Chernukhin Parties alleged that, had the Glavstroy Report been produced to the 2017 tribunal, they would have instead been awarded US$395m.

In the present proceedings, the Deripaska Parties alleged that the Glavstroy Report was a forgery and sought an order from the Court that QE disclose the identity of the Consultancy. QE submitted that it could not disclose the Consultancy's identity as it was covered by litigation privilege and expressed concerns for the safety of the ultimate source(s) of the Glavstroy Report.

QE sought to rely on *China National Petroleum Corp v Fenwick Elliott Techint International Construction Company* [2002] EWHC 60 (Ch), in which the court held in relation to witness evidence that "*both the information given and the identity of the person supplying it are confidential and privileged unless and until the privilege is waived by that person giving evidence in the proceedings or some other equivalent action*". However, the Court disagreed with QE, finding that *China National Petroleum* did not apply on the facts. The Court instead applied *Loreley Financing (Jersey) No 30 Ltd v Credit Suisse Securities (Europe)* [2022] EWCA Civ 1484, in which Males LJ stated that "*to determine whether litigation privilege extends to the identity of the persons communicating with a solicitor in relation to litigation, it is necessary to consider whether disclosure of that identity would inhibit candid discussion between the lawyer and the client (or the person communicating on behalf of the client). If so, the identity of such persons should be privileged. But if not, to extend privilege to the identity of such persons is unnecessary and may deprive the court of relevant evidence needed in order to arrive at a just determination of litigation* […] *litigation privilege attaches to communications (including secondary evidence of such communications) rather than information or facts divorced from such communications*". In *China National Petroleum*, the identity of the potential witness was privileged, as identifying a potential witness could reveal a solicitor's litigation strategy. Here, the Court found that providing the Consultancy's identity would not: (*i*) reveal anything about the content of privileged communications; (*ii*) reveal anything about the Chernukhin Parties' litigation strategy (they had already deployed the Glavstroy Report in previous litigation); (*iii*) or inhibit candid discussion between Mr Chernukhin and QE. Disclosing the Consultancy's identity would therefore not require waiving privilege as the Consultancy's identity was not privileged information at all.

The Court consequently granted the order to disclose the Consultancy's identity. The Court noted that this decision was supported by the following factors: (*i*) there was a strongly arguable case that the Glavstroy Report was forged; (*ii*) the order would deter similar wrongdoing in the future; and (*iii*) the Consultancy's identity could not be obtained from another source.

Tactical Waiver of Privilege Led to Collateral Waiver of Privilege

In *Gorbachev v Guriev* [2024] EWHC 622 (Comm), the Court considered the extent to which a Claimant's tactical waiver of privilege necessitated a collateral waiver of privilege over other documents. We wrote in more detail about *Gorbachev* here.

The Defendant contested the consistency of the Claimant's account of events over time. To show that his evidence had remained consistent, the Claimant disclosed, and waived privilege over, a chronology prepared by his barrister in January 2013. Following this disclosure, the Claimant's solicitors noted in correspondence to the Defendant's solicitors the existence of a second chronology that the Claimant's barrister had prepared in February 2013. When the Claimant refused to disclose this second chronology, the Defendant applied to the Court for an order confirming that that the Claimant had

waived privilege in relation to all factual instructions provided by the Claimant to his barrister in relation to his case against the Defendant.

In his analysis, Pelling J stressed the general principle that any party is entitled to waive privilege. However, to avoid such a waiver giving an "*incomplete and unfair picture* […] *the whole of the material relevant to the issue in question has to be disclosed*". To determine what the whole of the material relevant to the issue is, the first step is to identify the issue to which the originally disclosed material was relevant. In particular, the Court will determine the "*actual transaction in respect of which disclosure is made*"—the "actual transaction" being the issue to which the originally disclosed material is said to be relevant. Once identified, the whole of the material relevant to the "actual transaction" must be disclosed. If as a result of carrying out this exercise it is apparent that what has been disclosed is part of a bigger picture, then "*fairness may require further disclosure to be given*".

Pelling J found that the "actual transaction" to which the chronology was relevant was "*whether the version of events pleaded in the claim is consistent with instructions provided by the claimant at the outset of his case, specifically in relation to the preparation of the chronology*". It was "*obvious*" that "*if instructions were given shortly after the chronology was created for the purpose of its material alteration, then the chronology cannot be considered as anything more than a developing draft*". Disclosing the January 2013 chronology but not the February 2013 chronology carried the risk of giving the Defendant a "*misleading impression*". Having found that the second chronology would need to be disclosed, Pelling J noted that the requirement to disclose the whole of the material relevant to the issue in question meant that any documents containing instructions by the Claimant to his legal team in relation to the chronologies would also need to be disclosed. The Claimant tried to limit the scope of disclosure by imposing an end date (being the date the second chronology was finalised), but Pelling J refused. Imposing an end date would create "*an arbitrary time limit*" when the law "*requires the whole of the material relevant to the issue in question to be disclosed*".

As a result, Pelling J ordered the Claimant to disclose the February 2013 chronology and the underlying instructions to his legal team. *Gorbachev* underscores that making a tactical waiver of privilege must be balanced against the risk of a finding of collateral waiver over a much larger tranche of documents than what was intended.

Conduct of Parties

Introduction

2024 has seen a number of cases of litigation (mis-)conduct. We have set out a few of these noteworthy judgments below, which cover late and haphazard service of trial bundles, whether parties are under a duty to correct counterparties operating under a misunderstanding of procedural rules, and an interesting decision involving what the Court described as "procedural trench warfare".

Extension Sought Three Minutes Before Deadline

The dispute in *Lloyds Development Ltd v Accor HotelServices UK Ltd* [2024] EWHC 941 (TCC) arose out of the conversion of a building in Glasgow into a 17-story hotel. The Claimant ("**Lloyds**") was the

owner of the building and, in December 2018, agreed with the Defendant ("**Accor**") that it would be operated by Accor as a "Tribe" brand hotel for a period of 35 years.

Each party alleged that the other's conduct amounted to a repudiatory breach of contract. A trial was fixed for March 2024; however, as a result of changes in Lloyds' case, Accor applied for a successful adjournment of the trial. By an order dated 21 December 2023 (the "**December Order**"), Waksman J summarily assessed Accor's costs of the adjournment application at £120,000 and ordered Lloyds to pay by 4pm on 12 January 2024. Lloyds failed to pay in accordance with the December Order and Accor sought an unless order. By an Order dated 26 February 2024 (the "**Unless Order**"), Eyre J ordered that unless Lloyds paid by 4pm on 8 March 2024, Lloyds' claim would be struck out and judgment entered.

Lloyds did not pay any sum by 4pm on 8 March 2024. However, at 3:57pm (*i.e.* 3 minutes before the deadline), Lloyds filed an application for an extension of time to comply with the Unless Order ("**Lloyds' Application**"). At 4:26pm, Accor filed an application for judgment to be entered against Lloyds and for consequential orders. Subsequently, on 15 March 2024, Lloyds paid the sums ordered to be paid by the Unless Order.

There were a number of issues with Lloyd's Application: (*i*) the application notice, confusingly, referred to the December Order and Unless Order dated 23 February 2024; (*ii*) paragraph 10 stated "*witness statement to follow*"; and (*iii*) it was accompanied by a draft order which in the recitals referred to the Court having read "*the witness statements of [ ] dated 8 March 2024*". In light of these issues, on 9 March 2024, Lloyds filed a further version of the application notice (which corrected the reference to the December Order) and was accompanied by a draft order and witness statement signed on 8 March 2024 ("**Lloyds' Amended Application**"). On 12 March 2024, it transpired that Accor's solicitors had not been served with or had any notice of Lloyds' Amended Application. Further, Lloyds' solicitors had purported to provide a copy of Lloyds' Application dated 8 March 2024. In fact, what was provided to Accor's solicitors was the Lloyds' Amended Application dated 9 March 2024.

A key issue that arose was whether Lloyds' Application was to be treated as having been made 3 minutes before the deadline in the Unless Order (such that it was an in-time application to extend time) or whether it was to be treated as having been made out of time.

The Court found that the failure to provide even the briefest of reasons for the initial application to extend time was a procedural error. On that basis, CPR 3.10[22] was engaged. The Court accepted that Lloyds' Application was "*not an application made just to get a foot in the door before time for compliance expired*". Lloyds had a settled intention to apply for an extension of time and had reasons for doing so (*i.e.* to form a view as to the viability of the claim and obtain third-party funding). Notwithstanding, the Court considered it was regrettable that: (*i*) Lloyds' solicitors had wrongly created the impression that what had been filed on 9 March 2024 was what they had filed on 8 March 2024; and (*ii*) in circumstances where there was no certainty that the Unless Order would be complied with and Lloyds

[22] CPR 3.10 provides that "[w]*here there has been an error of procedure such as a failure to comply with a rule or practice direction – (a) the error does not invalidate any step taken in the proceedings unless the court so orders; and (b) the court may make an order to remedy the error*".

clearly considered they had considerable work to do to secure litigation funding, no steps were taken sooner to make or make ready the application.

Ultimately, the Court found that Lloyds' Application was made in time and concluded that the interests of the just and fair disposal of this litigation militated in favour of permitting the claim to proceed and, therefore, granting the seven-day extension for compliance with the Unless Order that was sought.

"Procedural Trench Warfare" Criticised by Court

In *Carl v Hawkins & Ors* [2024] EWHC 2186 (Ch), the High Court considered claims of the alleged misappropriation of eight valuable, historic sports cars, and their proceeds, by thirteen different Defendants. The Claimant, Mr Carl, was described as a collector of historic sports cars, and the Defendants (with one exception) were car dealers and intermediaries. There were several interesting procedural aspects to this matter:

- The majority of the Defendants had their defences struck out and were debarred from defending as a result of failures to comply with unless orders. Some Defendants had default judgments entered against them.

- In the run-up to the trial, the vast majority of the parties appeared in person, including the Claimant. Mr Simon Gleeson (sitting as a Deputy High Court Judge) expressed surprise that a litigant such as Mr Carl (who was not without personal means) elected to conduct a complex case in person, even though he had some experience as a trial lawyer in the United States. His stated reason was that he would never be able to recover his legal costs because the Defendants would not have the resources to meet them.

- Mr Carl managed to administer his case (throughout a series of interlocutory decisions by various Masters during the preliminary stages of the case)—albeit "chaotically"—such that it was never actually struck out. Mr Simon Gleeson noted that the Masters' "*exasperation with Mr Carl's continuing failures to present his case in accordance with the requirements of the rules of court* [was] *almost tangible*".

- The Fourth and Fifth Defendants made regular applications for the case to be struck out for non-compliance with the various listing rules. Mr Justice Gleeson described the result as "*procedural trench warfare between litigants in person*".

- There was no agreed trial bundle. Instead, the parties produced a "*loosely catalogued assembly of what appear[ed] to be every document which ha[d] ever been disclosed or alluded to by any party*". The result, Mr Simon Gleeson said, was a "*shambolic mess*".

- The Judge was required to deal with the large number of legal issues at play largely without the benefit of counsel (*i.e.* a large number of legal arguments were not actually advanced). Mr Simon Gleeson considered he was required to apply his own legal analysis, "*steering between the Scylla of advocacy and the Charybdis of failure to acknowledge established law*".

Ultimately, Mr Simon Gleeson found that Mr Carl had won his case and was, in principle, entitled to his costs from the Defendants. However, the Judge (expressing a preliminary view on costs, pending a consequential hearing) described Mr Carl's conduct of the case as "*shambolic, and undoubtedly had the effect of inflating the costs of the other parties*". Accordingly, in exercising his discretion as to costs under CPR 44, Mr Simon Gleeson took into account the "conduct of all the parties" (CPR 44.2(4)(a)), including "the manner in which a party has pursued or defended its case" (CPR 44.2(5)(c)), and held that Mr Carl should be entitled to no more than 60% of his costs in the main action.

Late Service of Inadequate Trial Bundle Leads to Wasted Costs Order

The trial in *Serra v Harvey* [2024] EWHC 2250 (KB) had been scheduled to commence on 24 June 2024, with a four-day time estimate. However, on Day 1 of the trial, Deputy High Court Judge Obi adjourned the trial due to the late service of the trial bundle and concerns about the adequacy of that bundle, which he described as "*haphazard*". Specifically, the Claimant's solicitors ("**MFG**") had failed to prepare the trial bundle on time despite a court order having been made in June 2023. The late service of the trial bundle adversely affected the preparations of the parties and the Court and the ability to conclude the trial within the original trial window.

In determining whether a wasted costs order should be made against MFG, DHCJ Obi observed that there were four stages to consider: (*i*) Had there been conduct on the part of MFG sufficient to engage the jurisdiction? (*ii*) If so, did that conduct cause the Defendant to incur unnecessary costs? (*iii*) If so, should the Court exercise its discretion to order MFG to pay those costs? and (*iv*) If so, what sum should be specified as the costs to be paid?

DHCJ Obi found as follows:

1. Conduct. MFG breached two Court orders regarding the preparation of trial bundles, and consequently the trial dates were lost. The failure to prepare the trial bundles on time represented a failure to act within the competence reasonably expected of ordinary members of the legal profession. Thus, the conduct of MFG was improper, and it was negligent in failing to take appropriate timely steps to prepare the trial bundle.

2. Unnecessary costs. The adjournment of the trial had caused the Defendant to incur unnecessary costs.

3. Discretion. No good reason was provided for MFG's non-compliance with two Court orders. There is a public interest in costs which have been wasted because of a solicitor's conduct in proceedings, being visited on the solicitors in the form of a wasted costs order.

4. Quantum. 100% of the wasted costs of the Defendants were to be paid by MFG on an indemnity basis.

As the Judge noted, 'early preparation of trial bundles does not require hindsight'. Preparing trial bundles is not difficult, but it is important and requires careful organisation and planning. This decision serves as a clear message that the Court expects orders to be complied with, and it reaffirms

the duty to monitor compliance and inform the Court about any failure to comply with a case management direction.

Court Criticises Unwarranted Corrections Proposed to Draft Judgment

On 1 August 2024, a copy of a draft judgment was circulated to the parties in *Parsons v Covatec Ltd* [2024] EWHC 2111 (Pat), and the parties were requested to supply an agreed list of typographical corrections or other obvious errors in writing by 7 August 2024.

On 7 August 2024, the Defendant's solicitors sent an email dealing with several minor typographical errors agreed between the parties and proposing some further changes. These further changes had not been raised in advance with the Claimant's solicitors, who regarded the proposed changes as unnecessary and objected to the Defendant's solicitors' failure to discuss them in advance.

The Defendant's solicitors' explanation for having submitted the proposals without prior discussion with the Claimant's solicitors was that the proposed changes followed a discussion with junior counsel, which had been delayed owing to a vacation period.

Ms Pat Treacy (sitting as a Deputy High Court Judge) referred to the Court of Appeal's recent judgment in *Supponor v AIM Sport Development* [2024] EWCA Civ 369 ("***Supponor***"), which reiterated the function of circulating a judgment in draft and the process for doing so (per Lord Judge CJ in *R (Mohamed) v Foreign Secretary (No 2)* [2010] EWCA Civ 158). In particular, "*an invitation to go beyond the correction of typographical errors … is always exceptional, and when such a course is proposed it is a fundamental requirement that the other party or parties should immediately be informed, so as to enable them to make objections to the proposal if there are any*". The Judge considered that, irrespective of the merits of the proposed changes, the fact that they were made to the Court without prior warning to the Claimant's solicitors (or acknowledgment of that fact when emailing the Court) was "*regrettable*".

This judgment serves as a reminder of the importance of a party notifying their counterparty immediately if they are going to propose any changes (whether typographical or, exceptionally, substantive) to a draft judgment.

Parties Required to Assist the Court, but Not Necessarily Each Other

The Claimants in *Thiscompany Limited & Ors v Welsh & Ors* [2024] EWHC 2159 (Comm) issued proceedings in the London Circuit Commercial Court on 27 October 2023 against the first three Defendants (the "**Welsh Defendants**"). From 16 February 2024 to 11 March 2024, the claim was stayed. On 11 March 2024, the claim form was amended to add the fourth Defendant, and the Claimant served the amended claim form on the Welsh Defendants on 15 March 2024. Pursuant to CPR 6.14, the deemed date of service was 19 March 2024.

CPR 59.5(2) (Circuit Commercial Courts) applied, so that the period for filing an acknowledgment of service was 14 days after the service of the claim form, that is 2 April 2024.

The Welsh Defendants did not successfully file acknowledgments of service (indicating an intention to defend the claim) dated 26 March 2024 until 11 April 2024. Between 3–11 April 2024, the Claimants might have sought default judgment against the Welsh Defendants, but did not do so.

On 18 April 2024, the Claimants' solicitors emailed the Defendants' solicitors ("**SW**") seeking agreement that service of the particulars of claim by email would be accepted. SW responded on 23 April 2024, saying they were unable to respond to the question because they believed the Claimants were out of time for service of the particulars of the claim. The Claimants therefore filed and served particulars on the Welsh Defendants by delivery to SW on the same day, 23 April 2024. By virtue of CPR 6.26, the deemed date of service was the same day.

On 8 May 2024, SW responded to the Claimants' solicitors (erroneously), saying that the 14-day period for serving the particulars of claim after service of the claim under CPR 7.4 was 29 March 2024, at the latest, so the particulars purportedly served on 23 April 2024 were out of time.

The parties' solicitors thereafter exchanged emails in which SW attempted to solicit the Claimants' solicitors' understanding of the position on service of the Claimants' particulars. Ultimately, no defence was served by the Welsh Defendants and, on 22 May 2024 the Claimants made an application, without notice, for default judgment. Default judgment was entered by HHJ Pelling KC on the same day. HHJ Pelling KC's order recited that time for the defence had expired on 21 May 2024. On 31 May 2024, the Welsh Defendants applied to set aside the judgment and for permission to file and serve their defence.

The Welsh Defendants argued that the default occurred because SW thought the particulars had not been served in time. The Defendants' evidence was that if SW had been given notice that the Claimants' solicitors intended to assert that time for the defence had expired (and was about to expire), SW would have sought an extension; but SW did not, because it had no inkling the Claimants were going to play what SW described as "procedural games". HHJ Cadwallader observed that SW was wrong in thinking the particulars of claim had not been served in time, and that the "*error appear[ed] to have been a failure to appreciate that different time limits applied in the London Circuit Commercial Court*".

HHJ Cadwallader held that the Claimants' solicitors "*were under no duty to explain their reasoning*" and "[t]*he parties are required 'to help the court' further the overriding objective: CPR Part 1.3. They are not required to help each other*". Ultimately, HHJ Cadwallader determined that the default judgment ought to be set aside, as "[n]*othing else would serve the interests of justice and the overriding objective*".

Naturally, each case depends on its facts; however, this decision reiterates that CPR 1.3—parties' obligations to further the overriding objective—does not create an obligation for parties to correct counterparties operating under a misunderstanding of procedural rules.

Claimants' Solicitors Make "Avoidable Error" in Seeking to Arrange Service by Email

In *Keilaus v Houghton & Anor* [2024] EWHC 2108 (Ch), the parties were siblings and are all the children of Jane May Fergusson, who died in December 2022, leaving a will dated 24 May 2010 (the "**Will**"). The Will made no provision for the Claimants, Mark and Siobhan Keilaus. The Defendants, Nichola Houghton and Charlotte Fergusson, were the executors appointed by the Will and beneficiaries under it. The claim was for provision under the Inheritance (Provision for Family and Dependants) Act 1975 (the "**1975 Act**").

The claim form was issued on a protective basis on 29 November 2023. The deadline for dispatch of the claim form was therefore midnight on 28 March 2024.[23] On 13 March 2024, the Claimants' solicitors sought by email and obtained (by email) the Defendants' solicitors' confirmation that they were instructed to accept service. The Defendants' solicitors' email was overlooked by the Claimants' solicitors and, on 25, 26 and 27 March 2024, they wrote to the Defendants' solicitors seeking confirmation that they had been instructed to accept service.

On 27 March 2024, the Claimants' solicitors served the claim form on the Defendants personally,[24] and also sent a copy (by email) to the Defendants' solicitors. On 12 April 2024, the Defendants filed acknowledgments of service contesting jurisdiction. The Claimants applied for relief from sanctions, or alternatively, for permission to extend time or alternatively, retrospective permission to serve the claim form by an alternative method.

Master Clark dismissed the Claimants' application, finding that the Claimants' solicitors had made an "avoidable error", and so, the Claimants could not show: (*i*) that there was a good reason to authorise service by an alternative method; or (*ii*) that they took (or were unable to take) all reasonable steps to serve the claim form within the period of its validity.

At risk of stating the obvious, whether a defendants' solicitors are instructed to accept service is, self-evidently, a very significant fact in the conduct of litigation. Practitioners would be well-advised to record or highlight that fact on the client file and, of course, to ensure claim forms are always dispatched well before the deadline for doing so.

Anti-Suit Injunctions

Introduction

2024 was a significant year for anti-suit injunctions ("**ASIs**"), as English courts navigated complex disputes through geopolitical tensions and evolving jurisdictional principles. The three landmark rulings below collectively reshaped ASI practice, balancing contractual autonomy and cross-border enforcement challenges, particularly in the context of sanctions.

The UniCredit ruling against RusChemAlliance ("**RusChem**") by the Supreme Court empowered English courts to grant ASIs for foreign-seated arbitrations governed by English law. *Tyson International Company Ltd v Gic Re* showed the courts willing to engage in active case management and grant interim ASIs to prevent forum-shopping. *Renaissance Securities v Chlodwig* delineated the boundaries of ASIs, clarifying that express intent would be required in order to bind third parties to an arbitration agreement.

---

[23] CPR 7.5 provides that "*Where the claim form is served within the jurisdiction, the claimant must complete the step required by the following table in relation to the particular method of service chosen, before 12.00 midnight on the calendar day four months after the date of issue of the claim form*".

[24] It is trite law that service on a defendant personally where their solicitors have confirmed that they are instructed to accept service is not valid service: see CPR 6.7 and *Nanglegan v Royal Free* [2001] EWCA Civ 127.

Anti-Suit Injunctions Ordered and Subsequently Revoked

The background to the decision in *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] UKSC 30 involved three cases arising out of disputes regarding an LNG plant in Russia. In 2023, RusChem took advantage of new Russian legislation which gave Russian courts exclusive jurisdiction over cases involving parties subject to foreign sanctions in order to pursue three banks, including UniCredit, which had issued on-demand bonds and guarantees. The banks sought ASIs to prevent the proceedings from going ahead.

Proceedings were brought against UniCredit in the Russian courts in respect of certain bond guarantees. The contracts in question were governed by English law and provided that all disputes be resolved by arbitration seated in Paris under the rules of the International Chamber of Commerce ("**ICC**"). UniCredit asked for an ASI to restrain the Russian proceedings, which was granted at first instance and upheld in the Court of Appeal. When the case reached the Supreme Court, it had to determine whether it had jurisdiction over the claim and could therefore uphold the ASI. It considered two issues: (*i*) whether the arbitration agreements within the contracts were governed by English law (as per the governing law of the bond contracts) or French law (as per the seat of the arbitration specified); and (*ii*) whether England & Wales was the proper place to bring the claim for an ASI.

In respect of issue (i), the Court clarified the position set out in the relatively recent case of *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors* [2020] UKSC 38 ("**Enka**"). In *Enka*, the Supreme Court considered how to determine the choice of law applicable to an arbitration agreement in a construction contract in circumstances where that contract contained no express or implied choice of law. In that case, the Supreme Court had suggested that the general rule that a choice of law to govern a contract will also apply to an arbitration agreement incorporated in the contract may be displaced where the law of the seat of arbitration provides that the arbitration agreement will be treated as being governed by that country's law.

The Supreme Court found in favour of UniCredit, and in doing so, made clear that whether or not the law of the seat of the arbitration would treat the arbitration as being governed by a law other than the law of the main contract does not displace the general rule in English law that the arbitration agreement will be governed by the same law as the rest of the contract. Absent explicit language to the contrary, the arbitration clause inherits the contract's governing law (here, English law).

The Court also rejected RusChem's arguments regarding issue (ii). It tried to advance arguments that either the French courts or an arbitration commenced under the arbitration clause were the proper place for bringing the claim for the ASI. The Court disagreed, finding that a consideration of whether the English courts were the most appropriate forum did not arise in circumstances where the parties had contractually agreed upon the forum. In addition, the Court found that UniCredit would be unlikely to achieve substantial justice in the French courts due to a lack of proper ASI jurisdiction. Accordingly, the Supreme Court held that the English courts had jurisdiction to determine the dispute.

The Supreme Court's judgment was published in September 2024.

Subsequently, in February 2025, UniCredit successfully applied to revoke the ASI it had previously won, after RusChem obtained its own injunction from the Russian courts (see [2025] EWCA Civ 99).

The Russian injunction would make UniCredit liable to a fine of €250 million if it did not take all measures within its control to have the ASI revoked. In its judgment on the revocation application, the Court of Appeal determined that (*i*) it had the power to revoke the ASI, (*ii*) there was a real risk of UniCredit being forced to pay the fine, with Master of the Rolls Sir Geoffrey Vos noting that it was unknown how a Russian court would assess whether UniCredit had complied with its injunction, and (*iii*) although there were concerns about the obvious coercion of the Russian courts, UniCredit is a major bank and capable of making its own decisions. Accordingly, the revocation was granted.

Anti-Suit Injunctions Where There Are Conflicting Contractual Dispute Resolution Clauses

The judgment in *Tyson International Company Ltd v GIC Re, India, Corporate Member Ltd* [2024] EWHC 236 (Comm) clarifies issues regarding conflicting dispute resolution clauses and ASIs. Tyson International Company Ltd (**"TICL"**) was a captive insurer for Tyson Foods, which reinsured property risks with the Defendant, GIC Re, under Market Reform Contracts (**"MRCs"**) that were governed by English law and that contained exclusive English jurisdiction clauses, and Facultative Certificates (which amended the MRCs) that introduced New York-seated arbitration and non-exclusive US jurisdiction clauses.

The MRCs contained a "confusion clause" which stated that the "RI slip" should take precedence over reinsurance certificates in case of confusion. After one of Tyson Foods' premises caught fire in 2021, a claim was launched: GIC Re sought New York arbitration, whereas TICL pursued English litigation and secured an interim ASI in October 2023.

The Court ruled that the MRCs' English jurisdiction clause prevailed over the Facultative Certificates' arbitration clause due to (*i*) the clear terminology of the "confusion clause" prioritising MRC terms and (*ii*) objective evidence that the parties had intended the MRCs to be the primary contractual framework. The Court issued a final ASI to restrain the New York arbitration, noting that it was incompatible with the litigation, which demanded a single forum. GIC then attempted to stay the proceedings under s. 9 of the Arbitration Act 1996 but was unsuccessful, as the arbitration clause was subordinate to the MRCs' jurisdiction clause and there was no basis to find a supervisory jurisdiction by English courts of a New York arbitration.

This judgment reinforces the courts' prioritisation of the parties' objectively discernible intentions, even where the disputes involve multiple contracts. It was also a warning against forum-shopping—the courts are willing to restrain a party from attempting to manipulate procedural rules to derail dispute mechanisms already agreed between contractual counterparties. Finally, the decision highlights the importance of proper drafting. Ambiguous dispute resolution clauses risk costly litigation—the "confusion clause" proved crucial in this case, and explicit hierarchy provisions are critical in layered contracts to avoid the risks of potentially inconsistent boilerplate terms.

Anti-Suit Injunctions Involving Third Parties and Sanctions Issues

In *Renaissance Securities (Cyprus) Limited v ILLC Chlodwig Enterprises and Others* [2024] EWHC 2843 (Comm), the Court set out key principles for ASIs which involve third parties and sanctions-related disputes.

Renaissance Securities ("**RenSec**") held assets worth approximately €430 million pursuant to an investment service agreement ("**ISA**") between it and each of the six Defendants. The ISA was governed by English law and provided that any disputes arising under it would be referred to arbitration seated in London and conducted in accordance with LCIA rules.

The Defendants were all ultimately beneficially owned by Russian billionaire Andrey Guryev, who is subject to UK and US sanctions. In light of Mr Guryev becoming sanctioned, RenSec froze the assets it held under the ISA. RenSec was ready and willing to transfer the assets to the Defendants' order but considered that sanctions would prevent it from doing so. The Defendants disputed that RenSec was obliged to freeze their assets, and (notwithstanding the terms of the ISA) each Defendant issued contractual proceedings against RenSec in the Russian court system seeking return of their assets (the "**ISA Claims**").

RenSec subsequently sought, and was granted, an ASI against each of the Defendants.

In the meantime, the Second and Sixth Defendants in the English proceedings had issued separate claims in Russia, in the law of delict, against a number of Russia-based entities related to RenSec (the "**Delict Claims**").

RenSec then applied to the English courts for what was referred to as "clarification" of the effect of the ASI, which Judge Pelling described as being, in reality, an application to vary the terms of the ASI so as to require the Second and Sixth Defendants to withdraw the Delict Claims. RenSec argued that the Delict Claims were *"a naked collateral attack on [RenSec's] arbitration rights"* under the ISA.

The Second and Sixth Defendants applied for their own clarification of the ASI, so as to make clear that the ASI applied only to proceedings commenced in Russia by the Defendants against RenSec itself (and not any of its related parties). This would have the effect of allowing the Delict Claims against RenSec's related parties in Russia to proceed.

Ultimately, the Court held that the ASI could not bind non-parties to arbitration agreements: the LCIA arbitration clauses applied only to RenSec and the other Defendants, and not to entities related to RenSec (who were not signatories to the ISA). Requiring a third party to arbitrate against its will must be approached with great caution. Accordingly, the ASI could not restrain the Delict Claims.

The Court further refused to include a clause limiting extraterritorial enforcement, reaffirming the global nature of ASIs granted under English jurisdiction.

Ultimately, this decision had a number of implications for ASIs, chief among them that parties intending to bind affiliated entities under an arbitration agreement should state this explicitly.

Support by English Courts of Foreign Proceedings

English courts have a long tradition of assisting foreign courts and those litigants before them to obtain information and to otherwise preserve the viability of foreign claims. Such measures have included disclosure and freezing orders in respect of foreign proceedings and the granting of Norwich

Pharmacal relief to aid litigants abroad. The jurisdiction of the English courts to aid foreign proceedings is not, however, without its limitations.

Court Refuses to Assist Foreign Trustee in Bankruptcy

In *Kireeva v Bedzhamov* [2024] UKSC 39, the Supreme Court upheld the Court of Appeal's judgment to refuse assistance to a Russian trustee in bankruptcy who had sought to be appointed as a receiver over real property in England. Under the "immovables rule", the English courts will not assist a foreign trustee in bankruptcy to dispose of the bankrupt's immovable property in England even where the foreign bankruptcy has been recognised as a matter of common law. Certain exceptions to the immovables rule exist under statutory regimes such as the Cross Border Insolvency Regulation 2006, but none applied in this case.

The Chancery Division of the High Court had recognised the foreign bankruptcy but had refused to make an order that would give the trustee in bankruptcy power to dispose of the real property in London, *e.g.* an order for appointment of a receiver. The Supreme Court upheld this decision, noting that it was a matter for Parliament to decide whether the immovables rule should be the subject of further exceptions or modifications.

Summary Judgment Granted Where Foreign Defendant Failed to Acknowledge Service

When engaging in international litigation, parties must always have one eye on enforcement and the challenges that may arise with enforcement in foreign jurisdictions. *Nederlandse Financierings-Maatschappij Voor Ontwikkelingslanden NV v Societe Bengaz SA* [2024] EWHC 901 (Comm) is a helpful reminder of the English courts' discretion to grant summary judgment instead of default judgment where a foreign defendant fails to acknowledge service. In the ordinary course, a claimant would seek default judgment—*i.e.* judgment in default of acknowledgment of service and the filing of a defence. However, default judgments issued by the High Court of England & Wales may be more difficult to enforce in some overseas jurisdictions than summary judgments.

In this case, a Dutch bank brought claims against a defendant in Benin and another in The Bahamas. The bank also obtained interim injunctions and a worldwide freezing injunction. The Bahamian Defendant acknowledged service, but the Beninese company failed to acknowledge service and did not file a defence.

In the absence of the acknowledgment of service, the Claimant applied under CPR 24.4(1) for permission to apply for summary judgment. The High Court acceded to the application for permission and also granted summary judgment having found that there was no real prospect of a successful defence of the claim nor was there a compelling reason why the case should proceed to trial.

Collateral Use Undertaking Discharged to Allow Disclosure of Documents to Foreign Regulator in Support of Foreign Criminal Proceedings

The High Court also retains the power to discharge a party from the collateral use undertaking with respect to documents provided under compulsion. In *JSC Commercial Bank Privatbank v Kolomoisky* [2024] EWHC 1837 (Ch), the Claimant bank obtained permission to provide schedules in its particulars of claim which contained information about the Defendants' assets which had been disclosed under a worldwide freezing injunction. The information was protected by the collateral use

undertaking, but the Claimant bank wished to be relieved of the undertaking in order to pass on the schedules to the Ukrainian Bureau of Economic Security. The Claimant bank had been ordered to do so in respect of criminal proceedings in Ukraine in which it was alleged that the Claimant had been defrauded by the First Defendant.

The High Court found in favour of the Claimant bank noting that cogent and persuasive reasons were required as to why the undertaking should be discharged. In the present case, there were also special circumstances and the Respondent would not suffer from injustice if the materials were disclosed. The special circumstances here included that a Ukrainian order sought to compel the disclosure so that the Claimant bank was in the position of either being in contempt of the English courts or breaching the Ukrainian order if it did not obtain permission from the English courts to be released from the collateral use undertaking. Further, the ongoing investigation of fraud allegations in the Ukrainian criminal proceedings was in the public interest such as to justify the release of the undertaking, and the information was already largely in the public domain.

Arbitration

Permission to Enforce Arbitral Award Set Aside on Grounds That Award Was Fabricated

In *Contax Partners Inc BVI v Kuwait Finance House (KFH-Kuwait) & Ors* [2024] EWHC 436 (Comm), Butcher J was tasked with unravelling a "*very disquieting*" fraud on, amongst others, the High Court itself "*of the utmost seriousness*". On remarkable facts, it illustrates the common sense and procedural flexibility for which England's commercial judges are widely respected.

The legal issue in *Contax* was whether the Judge should set aside his own earlier order under s.66 of the Arbitration Act 1996 (the "**1996 Act**") entering a judgment on the same terms as a purported Kuwaiti arbitration award (the "**Original Order**").

The Original Order granted a without notice application on the papers apparently made on behalf of Contax Partners BVI ("**Contax**") against, among others, Kuwait Finance House (KFH-Kuwait) (together "**KFH**"). It was only after Contax had purportedly served the Original Order on KFH, waited for KFH's window to apply for it to be set aside to expire, sought and had been granted interim and final Third Party Debt Orders ("**TPDOs**") against KFH by a different judge (Master Stevens), and KFH's Barclays bank account had been frozen pending payment of what was by then an over £70,000,000 debt, that KFH became aware of and joined the proceedings.

After a series of applications, witness statements and a preliminary hearing (at which the TPDOs were set aside on the basis they were not properly served on KFH), the case boiled down to two issues:

- First, whether Contax had the proper authority to bring the enforcement proceedings as a matter of its own corporate governance; and
- Second, whether in any event the arbitral award those proceedings sought to enforce was genuine.

Given the late entry of conflicting evidence purportedly on behalf of Contax, Butcher J considered the correct approach was to ask, on analogy to a summary judgment application, whether there was an issue on the facts which meant he ought not to set aside his Original Order without a trial.

On the first issue, despite a witness statement from an individual claiming to have authority to act on behalf of Contax, which stated he was unaware of the entire affair and had given no approval to launch either the arbitration in Kuwait or enforcement in England, the Judge considered there were sufficient evidentiary gaps and conflicts that had this been the only ground on which KFH sought to set aside the Original Order, he would have ordered a trial.

As for the second issue, however, the Judge had ample evidence that the arbitral award was a fraud and held that his Original Order must therefore be dismissed. In summary:

- *Ad hoc* arbitration agreement. Was fraudulent because no original was ever produced and the apparent KFH signatory testified he was not aware of it, never signed it and that the signature used was not his.

- Arbitration award. Was a fabrication that adapted Picken J's judgment in Manoukian *v Societe Generale de Banque au Liban SAL* [2022] EWHC 669 (QB) while keeping (as examples) Picken J's assessment of expert evidence, phrasing and summary of the issues and arguments substantially unchanged. In addition, the General Secretariat of the Kuwait Chamber of Commerce and Industry Commercial Arbitration Centre, in which the arbitration was meant to have occurred, confirmed no dispute ever existed while witnesses listed as testifying or counsel listed as acting for KFH testified they had never done so.

- Kuwait judgment. A purported judgment of the Upper Court of the Kuwait Commercial Court of Appeal, which apparently rejected KFH's challenge to the award, was also fraudulent.

- Kuwait's Ministry of Justice confirmed no such case ever took place, further diligence confirmed the judges named did not sit on the court, both counsel and experts listed as appearing testified they had never acted in the case and, contrary to Kuwaiti law, the judgment was written in English not Arabic.

- Unsuccessful prior enforcement. The individuals who had supposedly offered witness statements supporting apparently unsuccessful prior attempts to enforce the award in Kuwait, Bahrain and Turkey also testified they had never been involved in those proceedings.

- Underlying documents. None of the many documents referred to in both the apparent award and Kuwaiti judgment were ever produced.

Having set aside his Original Order, the Judge indicated that further investigation of the background to the fraud would be likely to follow.

Court Rejects Challenge to ICC Award Made on Grounds of Serious Irregularity

In *Republic of Kosovo v ContourGlobal Kosovo LLC* [2024] EWHC 877 (Comm), the High Court rejected the Republic of Kosovo's ("**Kosovo**") application under s.68 of the Arbitration Act 1996 (the "**1996 Act**") to set aside an arbitral award made under ICC Rules exceeding €20,000,000 entered against it.

Kosovo relied on the Tribunal's alleged failure to act fairly and impartially between it and the Claimant, Contour Global Kosovo LLC ("**CGK**"), under s.33(1)(a) of the 1996 Act.

HHJ Pelling KC summarised the applicable principles from *Terna Bahrain Holding Company WLL v Al Shamsi & Ors* (2012) EWHC 3283 (Comm) (Popplewell J) and *Obrascon Huarte Lain SA v Qatar Foundation for Education, Science, & Community Development* (2019) EWHC 2539 (Comm) (Carr J), emphasising:

- To succeed, such an application must show: (*i*) a breach of s.33(1)(a); (*ii*) amounting to a serious irregularity; which (*iii*) gives rise to substantial injustice.

- Section 33(1)(a) will generally be breached if the Tribunal decided the case based on a point one party did not have a fair opportunity to deal with. This is a fact-sensitive question of degree, with the authorities distinguishing between a party not having an opportunity to deal with a point and simply missing the opportunity to do so.

- The threshold for both a serious irregularity and substantial injustice is deliberately high given a key policy of the 1996 Act was "*to reduce drastically the extent of intervention by the courts in the arbitral process*".

- Serious irregularities occur "*in extreme cases where the Tribunal has gone so wrong in its conduct of the arbitration that justice 'calls out for it to be corrected'*".

- Applicants need to separately demonstrate a substantial injustice, but it is sufficient for these purposes to show that had they been able to address the point in question, "*the Tribunal might well have reached a different view and produced a significantly different outcome*" (*i.e.* the applicant does not need to show that the outcome probably, least of all necessarily, would have changed).

On the facts, the Judge considered it was "close to unarguable that the majority [of the Tribunal] *had failed to act fairly*" in entering the award in favor of CGK.

In summary, Kosovo had argued that two procedural orders issued by the Tribunal after oral arguments closed which sought, and then addressed the procedural consequences of, extra evidence on liability had raised a reasonable expectation that further evidence and argument would be sought on quantum. This was despite the Tribunal expressly reserving its position on both issues in those orders and only indicating that it might exercise its power under Article 25(3) of the ICC Rules to appoint an evidentiary expert to assess, among other documents, 1577 invoices which CGK had admittedly "*left it to the Tribunal to attempt to analyse the effect of … for itself*". Ultimately, the Tribunal felt able to conclude that CGK's case on quantum was made out, in part because Kosovo "*had access to*

all the underlying invoices for a substantial period of time and failed to present any analysis of the alleged defects in all but a few of them".

The Judge was bolstered in his conclusion that Kosovo's challenge to the award was "an after-the-event construct" by post-hearing supplemental submissions it made after both procedural orders were issued inviting the Tribunal to dismiss CGK's arguments on quantum, *i.e.* revealing its assumption that the Tribunal had not in fact already resolved to find against CGK on quantum.

Final Freezing Order Granted Over Properties Owned by High Commission of Nigeria in Support of Arbitral Award

In *Zhongshan Fucheng Investment Co Ltd v The Federal Republic of Nigeria* [2024] EWHC 1503 (Comm), the Hight Court granted a final freezing order over two properties in Liverpool (the "**Properties**") owned by the High Commission of Nigeria in London (the "**High Commission**") in support of the enforcement of an arbitral award against the Republic of Nigeria ("**Nigeria**"), rejecting Nigeria's objections based on state immunity.

In the underlying arbitration, the Claimant, Zhongshan Fucheng Investment Co Ltd ("**ZFI**"), secured an award of $55,675,000 (plus $9,400,000 in interest and £2,864,000 in costs) against Nigeria for breaches of the China–Nigeria bilateral investment treaty. ZFI then successfully applied for the award to be registered as enforceable on the same terms as a High Court judgment under CPR 68.12, overcoming an appeal by Nigeria from the initial grant of registration and being awarded its costs at both stages. Nigeria nevertheless made no payments to ZFI, resulting in its aggregate liability reaching £59,600,000. ZFI then successfully sought, without notice, interim charging orders over the Properties under CPR 73, estimating their collective worth at between £1,300,000 and £1,700,000 (i.e. at most, 2.85% of Nigeria's total liability).

Nigeria unsuccessfully objected to the charging orders being finalised on four grounds.

First, that ZFI's applications had not been "*transmitted*" to the Nigerian Minister of Foreign Affairs via the UK's Foreign Commonwealth and Development Office, as required for effective service under s.12(1) of the State Immunity Act 1978 ("**SIA**"). The parties agreed the applications had not been transmitted in this way, but Master Sullivan held this requirement only applies to the initiation of fresh proceedings, not further steps within proceedings which have already been properly served. Here, the application to register the award had been duly transmitted so any enforcement applications could follow without special formalities.

Nigeria then claimed that the Properties enjoyed state immunity from the enforcement of arbitral awards under s.13(2) SIA. ZFI responded that the carve out from state immunity for property used, or intended for use, for commercial purposes in s.13(4) applied to the Properties. In support of Nigeria's position on state immunity, the High Commission submitted a certification of non-commercial use in respect of the Properties to the Court under s.13(5).

Three key points emerge from Master Sullivan's rejection of Nigeria's argument on non-commercial use. First, the analysis is focused on the point in time the contested application is made (relying on *AIC Ltd v Nigeria* [2003] EWHC 1357 (QB) (Stanley Burton J)). Second, profit from an activity is not

necessary for it to be a commercial use for the purposes of the SIA (albeit the absence of profit might indicate a non-commercial use).

Finally, when a state has issued a certificate of non-commercial use in respect of state property under s.13(5), this is given presumptive weight by the judge, and the applicant must then displace it on the balance of probabilities. Notably, however, Master Sullivan held that Nigeria's supplementary witness statement, made by a senior High Commission official, did not enjoy the same presumptive weight. In any event, the Judge accepted hearsay evidence given by ZFI's solicitor in a witness statement and held the Properties were being used for commercial purposes because they were being let to residential tenants for approximately market rents. As if to underscore the ease he felt disregarding Nigeria's certification and witness statement on commercial use, Master Sullivan held that even though ZFI's witness statement only discussed one of the Properties, he was willing to extend his conclusions to the other without calling for further evidence.

Having failed on state immunity, Nigeria's hopes rested on two arguments that, in any event, the Judge should decline to grant the final freezing orders. Master Sullivan disagreed with Nigeria's contention that ZFI had inadvertently misled the Court during the without notice hearing on the facts and was also unpersuaded by the argument that because ZFI was seeking multiple means of enforcement in parallel, there was a risk it might ultimately recover a greater sum than the arbitral award itself. He held that, in general, creditors are entitled to take as many enforcement actions as they like to pursue their debt and, in this case, the Properties amounted to a small enough portion of Nigeria's overall (still fully unpaid) liability to ZFI that this concern was unfounded.

* * *

Please do not hesitate to contact us with any questions.

LONDON

Conway Blake
Partner
cblake@debevoise.com

Christopher Boyne
Partner
cboyne@debevoise.com

Lord Goldsmith KC
Partner
phgoldsmith@debevoise.com

Patrick Swain
Partner
pswain@debevoise.com

Natasha McCarthy
Counsel
nmccarthy@debevoise.com

Julia Caldwell
Associate
jcaldwell@debevoise.com

Luke Duggan
Associate
lduggan@debevoise.com

Sara Ewad
Associate
sewad@debevoise.com

Hugo Farmer
Associate
hfarmer@debevoise.com

Doreena Hunt
Associate
dhunt@debevoise.com

Emma Laurie-Rhodes
Associate
elaurierhodes@debevoise.com

Emily Mackenzie
Associate
emackenzie@debevoise.com

Callum Murphy
Associate
cmurphy@debevoise.com

Darius Ng
Associate
dng@debevoise.com