Debevoise & Plimpton

Civil Litigation Annual Review: 2022

Civil Litigation Annual Review: 2022

1 February 2023

Introduction

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

We have had another year of significant global events. As expected, COVID-19 has continued to re-shape the norms of court proceedings and although we have had a return to live hearings in 2022, some of the new ways of working seem here to stay. Russia's invasion of Ukraine has also resulted in extensive sanctions on Russia which has current and future implications for litigation concerning Russian parties. It remains to be seen whether Russian entities and individuals will continue to use the English courts as they have in the past although the evidence of a drop off in Russian-related cases is apparent, at least for the short to medium term.

2022 remained a busy year for the English courts. Readers may be particularly interested to read about the trends we have seen in litigation in 2022, namely in cryptocurrency disputes (page 10), sanctions related disputes (page 13), antisuit injunctions (page 15) and COVID-19 disruption cases (page 17). Readers may also be interested in our review of the recent witness statement reforms (page 59) and the consultation on the Arbitration Act reforms (page 84).

As we look ahead, 2023 promises to be another interesting year for litigators. The challenging inflation and interest rate environment coupled with the prospect of recession means that we expect to see an increase in contentious M&A activity as parties will look to warranty and indemnity claims or seek to find ways to exit deals. We also expect to see a rise in securities litigation and it will be interesting to see how the courts grapple with claims under sections 90 and 90A of FSMA which is likely to be the main focus of that activity. ESG claims are here to stay; and will shape the litigation landscape for years to come as claimant law firms continue to find innovative and novel ways to attempt to make UK companies liable for the acts of overseas subsidiaries and third parties. This coupled with the easy access to litigation funding means that the growth and prevalence of group actions should continue into 2023 and beyond.

On a personal note, we are pleased to say Debevoise has had another successful year. In early 2022 we were thrilled to see that the Commercial Court released their

highlights of the year and identified 4 cases in which we had been involved. No other firm had more than one case listed which is testament to the quality and complexity of the work that we do. The year also has seen us take exciting and challenging cases, a number of which you can read about in this guide (including successfully obtaining an order for indemnity costs, which doesn't happen very often in big ticket commercial litigation (see page 70)). We were also very pleased to see the well-deserved promotion of Natasha McCarthy to International Counsel as she now joins the senior ranks of the commercial litigation team in London.

We look forward to what we hope will be a busy and fulfilling year ahead!

Finally, we would like to thank the London disputes team for their contribution to this annual review. It is an important resource and is the culmination of a lot of hard work from many people. Special thanks in particular to our stellar senior associates and Editors-in-Chief: Emma Laurie-Rhodes, Julia Caldwell and Luke Duggan.

Patrick Swain & Chris Boyne
Partners

Table of Contents

Cryptocurrency Disputes

The English courts have issued numerous decisions concerning cryptocurrencies this year, on a range of topics. The key theme that emerges is the adaptability of English law to commercial cases concerning blockchain and cryptocurrencies. In addition, the English courts have shown a welcome readiness to provide recourse to victims of cryptocurrency fraud; this is likely to further legitimise the commercial and consumer uses of blockchain and investment in crypto technology.

Tulip Trading Limited v Bitcoin Association for BSV and others [2022] EWHC 2 (Ch) and [2022] EWHC 667 (Ch)

In perhaps the most significant crypto case of the year, the High Court held in *Tulip Trading Limited v Bitcoin Association* that blockchain developers do not owe fiduciary or tortious duties to those who use their networks to store or trade crypto assets. However, the Court of Appeal heard an appeal against this decision in December, meaning the law in this area has not been conclusively settled as of yet. If the Court of Appeal reverses the High Court decision on this issue, it will be interesting to note how the Court characterises the nature and scope of developers' duties to the owners of digital assets.

In addition to this noteworthy decision on fiduciary and tortious duties, the High Court in a separate judgment in this case held that bitcoin is not currently suitable for security for costs due to the high level of volatility in its value. However, the Court has left the door open for less volatile cryptocurrencies or central bank digital currencies to be used as permissible forms of security.

Finally, this case is significant as having gone against the weight of authority which treats cryptocurrencies as located at the place where the owner of them is domiciled; the High Court instead suggested that residence was the correct test to be applied. It is worth noting that this reasoning has not been applied in cases decided subsequently.

Cryptocurrencies as Property

In recent years, the English courts have issued a number of decisions in which they have made clear that cryptocurrencies are a form of property under English law. In a significant development earlier this year, the High Court in *Osbourne v Persons Unknown & Anor* found that there was no reason to distinguish between different classes of cryptocurrencies and held that there was a realistically arguable case that non-fungible tokens ("**NFTs**") are to be treated as property.

With cryptocurrencies treated as property, the courts can – and crucially have shown that they are willing to – grant various proprietary remedies in relation to cryptocurrencies:

- In *Ion Science Ltd v Persons Unknown* (unreported, 28 January 2022), the High Court for the first time granted an interim third-party debt order in relation to cryptocurrency.

- In *Sally Jayne Danisz v (1) Persons Unknown (2) Huobi Global Limited (trading as Huobi)* [2022] EWHC 280 (QB), the High Court granted a prohibitory interim injunction and a worldwide freezing order.

- In *Osbourne v Persons Unknown & Anor* [2022] EWHC 1021 (Comm), the High Court granted a freezing injunction against persons unknown in relation to two stolen NFTs.

- In *D'Aloia v Persons Unknown & Others* [2022] EWHC 1723 (Ch), the High Court granted the Claimant's application for an interim freezing injunction.

- In *Jones v Persons Unknown* [2022] EWHC 2543 (Comm), the High Court made an order for a proprietary injunction and also continued an interim freezing injunction on a final basis.

The breadth of these remedies demonstrates the willingness of the English courts to do everything in their power to protect victims of cryptocurrency fraud.

Cryptocurrencies Held under Constructive Trusts

The conclusion that cryptocurrencies are a form of property has also led courts to impose constructive trusts over cryptocurrencies. In 2021, in *Wang v Darby* [2021] EWHC 3054 (Comm), the Court held that while contracts under which parties agreed to a reciprocal cryptocurrency swapping structure did not give rise to a trust, a trust over cryptocurrency could still arise in principle on different facts. Such different facts arose in *D'Aloia v Persons Unknown & Others* [2022] EWHC 1723 (Ch), when the High Court found that there was a good arguable case that misappropriated cryptocurrencies were being held on constructive trust, not only by the persons unknown who had perpetrated the fraud against the Claimant, but also by the exchanges who held the assets. The High Court in *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) made a similar finding. In *Jones v Persons Unknown* [2022] EWHC 2543 (Comm), the High Court went a step further and held that a cryptocurrency exchange was a constructive trustee against the Claimant (not just that there was a good arguable case that this was so as in *D'Aloia v Persons Unknown & Other*), as it controlled the wallet into which stolen cryptocurrency was paid. In light of this finding, the Court also required the persons unknown and the exchange to deliver up the Claimant's stolen cryptocurrency.

Service by Alternative Means

In *D'Aloia v Persons Unknown & Others*, the High Court granted a novel application for alternative service: namely, service by airdropping NFTs into the Claimant's digital wallets. The judge was content only to allow this method in conjunction with service by email. The Court in *Jones v Persons Unknown* followed suit and again gave permission for service in this manner. Meanwhile in *LMN v Bitflyer Holdings Inc*, the Court made orders for service by alternative means by email at a number of specified email addresses and by posting a link to the documents on the online contact form on the relevant Defendant's website. These findings are perhaps the best example of the English Courts' adaptability to these novel technologies.

Information Orders regarding Cryptocurrency Assets

In four cryptocurrency cases, *Sally Jayne Danisz v (1) Persons Unknown (2) Huobi Global Limited (trading as Huobi)* [2022] EWHC 280 (QB), *Osbourne v Persons Unknown & Anor* [2022] EWHC 1021 (Comm), *D'Aloia v Persons Unknown & Others* [2022] EWHC 1723 (Ch), and *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm), the High Court granted a Bankers Trust disclosure order, providing a timely reminder of the substantive principles that apply to Bankers Trust applications, namely that:

1. There must be good grounds for concluding that the money or assets about which information is sought belonged to the applicant.

2. There must be a real prospect that the information sought will lead to the location or preservation of such assets.

3. The order should not be wider than is necessary in the circumstances.

4. The interests of the applicant in obtaining the order must be balanced against the possible detriment to the respondent in complying with the order (*e.g.* the potential infringement of rights to privacy and confidentiality).

The applicant must provide undertakings to protect the respondent's interests, including to: (i) pay the expenses of the respondent in complying with the order; (ii) compensate the respondent in damages, should loss be suffered as a result of the order; and (iii) only use the documents or information obtained for the purpose of tracing the assets or their proceeds.

LMN v Bitflyer Holdings Inc is also noteworthy as one of the first cases where the Court granted permission for service out under the new jurisdictional gateway at paragraph 3.1(25) of Practice Direction 6B. The gateway was introduced on 1 October 2022 to facilitate the making of information orders (both Norwich Pharmacal and Bankers Trust) against foreign non-parties.

Parties can make a claim or application for disclosure for the purpose of proceedings intended to be commenced in England and Wales to obtain information regarding: (i) the true identity of a defendant or a potential defendant; and/or (ii) what has become of the property of a claimant or applicant. Given the anonymity inherent in the technology, this gateway is likely to be particularly useful in cryptocurrency disputes.

We give further consideration to the treatment of cryptocurrencies under English law here.

The Impact of Sanctions

Following Russia's invasion of Ukraine in February 2022, the UK significantly ratcheted up its Russia-related sanctions regime. The list of designated persons expanded to include a large number of Russian businessmen deemed to be affiliated with Putin's administration, including individuals such as Roman Abramovich, the former owner of Chelsea Football Club, and Oleg Deripaska. Many of these individuals – Mr Abramovich and Mr Deripaska among them – had strong connections to the UK and were no strangers to litigation in the English courts. Indeed, a large number of designated persons have continued to participate in proceedings before the UK courts, and a much larger number have continued to seek legal advice from UK lawyers.

Legal Representation

Although UK-based lawyers are technically permitted to represent designated persons without any form of licence, receiving payment from designated persons (or from persons owned or controlled by designated persons) is prohibited. This has resulted in some law firms seeking to come off the record in relation to disputes work for designated persons. Mr Justice Foxton in the recent case of *VTB Commodities Trading DAC (formerly VTB Capital Trading Limited) v. JSC Antipinsky Refinery* [2022] EWHC 2795 (Comm), remarked that solicitors could not be criticised for doing so. There is no doubt, however, that financial sanctions can put lawyers in a difficult position, particularly where sanctions are imposed whilst the dispute is ongoing (as occurred in the *VTB* and *Navigator Equities Ltd v Deripaska* cases).

Before October 2022, UK practitioners had to apply to OFSI for a specific licence to allow them to be paid in relation to work for designated persons. The application process for specific licences can take a substantial amount of time to complete – applications for specific licences can take four to six months and sometimes long to complete. This can have serious knock-on implications for ongoing litigation and arbitration. The delay in respect of specific licence applications for legal representation was particularly acute in the context of the Russian and Belarus regimes. However, on 28 October 2022, OFSI issued a

general licence to permit the payment of legal fees owed by individuals and entities designated under either of those regimes until 27 April 2023. As such, lawyers in the UK can be paid by designated persons for legal services under the general licence, subject to a few important conditions, including *(i)* a cap on "pre-designation" and "post-designation" services (£500,000 in each case), *(ii)* an hourly fee cap, and *(iii)* a condition that funds or economic resources should not be made available to a designated person.

This was a welcome development for the UK legal industry, as UK lawyers providing legal services to persons designated under either the Russia or Belarus regime will, provided the terms of the general licence can be met, no longer have to wait to obtain a specific licence from OFSI. That said, it is important to note that the requirements of the general licence, including the cap on fees and the hourly rate limits, may mean that practitioners have to apply for a specific licence in any event. It has also been pointed out in *VTB Commodities* that the general licence does not refer to payments made to meet costs orders in favour of the other side, or to comply with an order for security for costs, brief fees or any contingency fee arrangements.

Delays and adjournment

Issues in respect of legal representation, among other things, have led to significant delays in proceedings involving designated persons and sanctions issues more generally. In the case of *Maroil Trading LLC v. Cally Shipholdings Inc* [2022] EWHC 1201 (Comm), for example, the Defendants' ultimate parent company (PAO Sovcomflot) was added to the list of designated persons on 24 March 2022. As a result, the Defendants themselves had to be treated as designated persons (pursuant to the rules on 'ownership or control'), which meant that they were no longer able to pay their lawyers in the ongoing litigation. That was particularly problematic in view of the 9-week trial that had been listed to commence in October 2022. The Defendants therefore applied to vacate the trial and stay the proceedings. Mr Justice Foxton ultimately granted the application to adjourn, holding that it was "*simply not possible to imagine this trial being fairly conducted in October 2022*."

More recently, the Defendant in *PJSC National Bank Trust v. Mints* applied to stay those proceedings, arguing that the Claimants – one of whom is a designated person – would use any favourable damages award to "*indirectly fund the war in Ukraine*". On 27 January 2023, Mrs Justice Cockerill refused the application but granted permission to appeal to the Court of Appeal. That appeal should address the important issue, which remains unclear, of whether a UK court can make an award of damages in favour of a designated person without breaching UK sanctions law.

Looking ahead: what major sanctions issues in 2023?

It is fair to say that sanctions imposed since February 2022 have had a largely procedural impact on litigation in the UK. That is likely to remain the case in 2023, as we have already seen with the recent decision in *PJSC National Bank Trust v. Mints*. However, as businesses acclimatise themselves to the wider commercial impact of sanctions, it seems likely that more cases will be brought in the UK courts addressing sanctions issues more substantively. For example, companies may increasingly seek to litigate issues arising out of contractual performance impacted by sanctions. Although sanctions will continue to have an impact on legal representation and timing, among other procedural issues, we may therefore see a rise in substantive sanctions claims.

Aircraft Leasing Disputes

The Commercial Court is anticipating a raft of claims in 2023 on insurance policies will be brought by foreign-owned aircraft or aircraft parts leased to Russian airlines which have yet to be released or are trapped as a result of the sanctions on the Russian Federation following the invasion of Ukraine.

In 2022, AerCap commenced proceedings against its insurers in relation to a US$3.5 billion claim to recover the value of aircrafts and engines remaining in Russia. *AerCap Ireland Ltd v AIG Europe SA and another* has been followed by several other insurance aviation claims filed in 2022 including *Dubai Aerospace Enterprise (DAE) Ltd and others v. Lloyd's Insurance Company S.A. and others*.

These cases will be ones to watch in 2023.

Post-Brexit Reforms – Antisuit Injunctions

For many years, English litigators lamented the inability of English courts to grant anti-suit injunctions ("**ASI**s") to restrain proceedings in the courts of EU Member States that had been brought in contravention of an exclusive jurisdiction or London arbitration clause. In short, EU law prohibited such relief largely on the basis of seeking to ensure mutual respect between each of the Member State jurisdictions. The prohibition on ASIs was particularly acute under the terms of the Lugano Convention and the Brussels Regulation as under those rules an English court could not accept jurisdiction (even if there was a jurisdiction clause in its favour) if another Member State court had already been seised. The court of the Member State first seised had first to reject jurisdiction. This issue was partially ameliorated (largely as a result of interventions by the United Kingdom) in the Recast Brussels I Regulation, which permitted the courts nominated in an exclusive jurisdiction clause to accept jurisdiction without having to await the other Member State court's determination of the question of jurisdiction. Nevertheless, ASIs could not be issued as the courts of Member States had to be treated with mutual respect under EU law.

Since the United Kingdom's departure from the European Union, English courts have once again been capable of issuing ASIs regarding proceedings in the courts of EU Member States. This is a significant development for those subject to exclusive jurisdiction clauses favouring English courts or those bound by English arbitration clauses. Such parties should think very carefully before initiating proceedings in the courts of a Member State as they may find that the English court is prepared to issue ASI relief to hold the parties to their bargain.

Ebury Partners Belgium SA/NV v Technical Touch BV [2022] EWHC 2927 (Comm)

Ebury Partners concerned a contractual jurisdiction clause under which the parties had agreed to the exclusive jurisdiction of the courts of England and Wales. Despite this, proceedings had been commenced in the courts of Belgium and an application for an ASI was made to the High Court in London.

Mr Justice Jacobs directly acknowledged that: "[p]*rior to Brexit, it would not have been possible for anti-suit relief to be granted in a case such as the present*." The grounds for issuing ASIs in respect of proceedings in the courts of EU Member States now fall to be determined according to ordinary principles of English law.

In broad terms, those principles are:

- Power to grant ASIs is based on s. 37(1) of the Senior Courts Act 1981. The court will grant such relief when it is just and convenient, the touchstone being what the ends of justice require.

- The Claimant has to demonstrate to a "high degree of probability" that there is an agreement regarding jurisdiction that covers the dispute.

- If the Claimant satisfies the court that there is an agreement on jurisdiction, then the Defendant has the burden of satisfying the court that there are strong reasons to refuse the relief, otherwise the court will "*ordinarily exercise its discretion to restrain the pursuit of proceedings*" brought in contravention of the jurisdiction agreement.

In *Ebury Partners* there was a dispute as to whether, amongst other things, the terms of the exclusive jurisdiction clause had been incorporated into the contractual agreement between the parties. Ultimately the Court was satisfied that it was, and that there were no strong reasons why the relief should not be granted.

QBE Europe SA/NV v Generali España de Seguros Y Reaseguros [2022] EWHC 2062 (Comm)

This case concerned an application for an ASI directed at the Claimant in proceedings brought in the courts of Spain in contravention of an arbitration agreement designating LCIA arbitration in London.

Generali had commenced proceedings against QBE UK in Spain. QBE UK sought to restrain those proceedings and QBE Europe sought to prevent Generali joining it to the Spanish action. The QBE parties relied on an arbitration agreement in the underlying insurance policy between QBE and the owners of a yacht which was alleged to have caused damage to an undersea cable. The losses arising from that incident were indemnified by Generali, which in turn sought recoveries from QBE. Generali's claims were made pursuant to provisions of Spanish law which enabled claims to be brought against QBE UK directly and it therefore sought to avoid the operation of the arbitration agreement contained in the insurance policy.

Mr Justice Foxton considered the principles in detail and noted the distinction between a traditional case – a contractual case (of which *Ebury Partners* is a good example discussed below), and a non-contractual (or quasi-contractual) case such as the present. The underlying jurisdiction agreement in a quasi-contractual context will be highly significant where the right sought to be enforced in the non-contractual forum arises from an obligation under the contract containing the jurisdiction clause, and the right sought to be enforced is ancillary to that contract.

In the circumstances, the QBE parties satisfied the Court that it was an appropriate case to issue the ASI because it was appropriate for Generali to be bound by the arbitration clause in the insurance policy given that Generali sought to enforce rights arising from obligations under the insurance policy.

Our more detailed note on these two cases can be found here.

Covid-19 Disruption Cases

The Commercial Court has been busy in 2022, actively case managing many COVID-19 business interruption insurance cases that continue to progress to trial.

Despite the Supreme Court's judgment in the FCA business interruption test case in 2021 (*The Financial Conduct Authority v Arch Insurance (UK) Limited and Others*), there remain a number of unresolved issues and cases which test these issues were before the courts in 2022.

The Financial Conduct Authority v Arch Insurance (UK) Limited and Others

In November 2020, the Supreme Court heard an appeal on an expedited basis concerning the construction of certain provisions in insurance policies written by eight insurers, and obtained by a range of businesses and organisations which intended to provide coverage in the event of business interruption.

The Supreme Court's judgment was handed down in January 2021 and since then, data reported by the FCA shows that £1.5 billion has now been paid out by insurers to over 36,000 small businesses as a direct result of the test case.

However, the judgment has left some unanswered questions, notably in respect of policies which had disease extensions that required the presence of COVID-19 'at premises'. There was also uncertainty regarding policy holders who had purchased Non-Damage Denial of Access cover. This led to other significant COVID-19 business interruption cases in 2022, some of which we set out below.

Corbin & King Ltd and Others v Axa Insurance UK PLC [2022] EWHC 409 (Comm)

The case concerned a combined business insurance policy issued by Axa. The Court was asked to determine: (1) whether the Non-Damage Denial of Access ("**NDDA**") clause in the policy provided cover to the Claimants; and (2) whether the policy limit applied in respect of all premises, or only for each set of premises held by the different companies.

The NDDA clause provided cover for loss resulting from business interruption or interference "*where access to your premises is restricted or hindered for more than [2 hours] arising from…the actions taken by the police or any other statutory body in response to a danger or disturbance at your premises or within a 1 mile radius of your premises*".

Mrs Justice Cockerill held that the clause did provide cover on the basis that cases of COVID-19 could constitute a "danger" within the NDDA clause, and this danger, coupled with other dangers outside the premises or 1-mile radius, led to the Government action which caused the closure of the Claimants' business and business interruption loss. She also held that the policy limit applied to each set of premises held by the different companies.

Stonegate Pub Company Ltd v MS Amlin Corporate Member Ltd and ors; Various Eateries Trading Ltd v Allianz Insurance plc; and Greggs plc v Zurich Insurance plc.

In October 2022, the Commercial Court handed down judgments in three COVID-19 business interruption cases which involved common or closely related issues such that the claims were determined at a single hearing.

Each case concerned claims made for business interruption loss resulting from the Covid-19 epidemic and Government action taken in response, under the "Marsh Resilience" form of wording.

The decisions address questions around aggregation and causation under the insurance policy, and the impact of furlough and other government support schemes on the availability indemnity. Mr Justice Butcher held in relation the Stonegate claim that:

- **Furlough/ business rates relief:** Both on the policy wording and as a matter of law, Stonegate would be receiving more than an indemnity if it received both the governmental support and a recovery under the Policy.

- **Aggregation:** The loss suffered by Stonegate across its UK locations in respect of the March 2020 lockdown was a "single occurrence", in the collective decision taken jointly by the four UK governments on 16 March 2020 to advise the public to avoid pubs, restaurants and clubs. This meant that Stonegate's recoverable loss was confined to £2.5 million rather than its claim in excess of £1 billion.

- **Causation:** The Court rejected Stonegate's argument that it was entitled to recover all its losses up to the end of the Maximum Indemnity Period of 30 April 2023. This was on the basis that Stonegate had only established proximate causation up to the reopening of venues after the first lockdown in July 2020. In any event, any recoverable loss after 16 March was limited to £2.5 million.

- **Additional Increased Cost of Working:** The Court accepted the Insurer's argument that the cover taken out by Stonegate only covered 'uneconomic' expenditure.

Limited permission to appeal has been granted in relation to the aggregation and furlough issues.

The Football Association Premier League Ltd v PPLive Sports International Ltd [2022] EWHC 38 (Comm)

In *The Football Association Premier League Ltd v PPLive Sports International Ltd* the High Court considered an application for summary judgment by the Football Association Premier League Ltd (the "**Premier League**") in respect of debt claims against PPLive Sports International Ltd ("**PPL**"). The primary issue that fell to be determined was whether Covid-19-related measures implemented in the 2019/2020 Premier League season amounted to a "fundamental change" to "the format of the competition", as PPL contended by way of defence.

The Court rejected the claim, finding that none of the changes relied on by PPL amounted to a change in the format of the competition. First, the Court found

that there was no doubt that there were significant changes made by the Premier League to how the remaining matches of the 2019/2020 season were played. However, the Court noted that English contract law does not require, or expect, contracts to be rewritten simply because events transpire differently to what is expected, as "*this would lead to confusion and indeed chaos*".

Second, the Court highlighted that construing a contract is a "*unitary exercise [which] involves an iterative* process *by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated*". On this basis, the Court held that "the format of the competition" did not include kick off times, the days when matches were played, or whether there were any fans. Instead, it referred to the way the competition was undertaken between the teams, e.g. how many times they played one another; how many points were awarded for various results; whether they played at "home" or "away"; and how the league table was organised.

Finally, the Court held that this conclusion also made commercial sense, as it would be strange if PPL were to be given a veto over when and how matches were played.

Our full discussion of this decision can be found here.

ESG and Climate Change Litigation

2022 has seen a significant increase in the pace of climate and ESG-related litigation. The nature of climate-related litigation varies, but in 2022 we have seen a number of new claims filed against private companies, company directors, and the UK government which follows an international trend of climate change activism. This is a trend we expect to see continuing in 2023.

ESG Litigation against the Government

R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy [2022] EWHC 1841

In January 2022, several claims for judicial review were filed by environmental legal charities and NGOs against the Secretary of State for Business Energy and Industrial Strategy ("**SoS**") in relation to the UK Government's Net Zero decarbonisation strategy. In July 2022, the High Court in *R. (on the application of Friends of the Earth Ltd) v Secretary of State for Business, Energy and Industrial Strategy* [2022] EWHC 1841 ruled in favour of the Claimants, and agreed that the SoS was obligated to understand both the qualitative and quantitative effects of individual proposals and policies under the Net Zero Strategy and the SoS had failed to do this. The court made a mandatory order requiring the SoS to lay a fresh report before Parliament before the end of March 2023.

Greenpeace v North Sea Transition Authority

In July 2022, Greenpeace filed a challenge in relation to the government's approval to develop the Jackdaw North Sea gas field. Greenpeace are seeking to challenge the government's decision to only take operational emissions into account when granting permission to extract fossil fuels. It is seeking to argue that emissions produced by burning the fuels should also be reflected in any decision.

ESG Litigation against Private Companies

ClientEarth Commencing Legal Action against Board of Directors of Shell Plc

In March 2022, ClientEarth announced that it was commencing legal action against the Board of Directors of Shell plc, arguing that their failure to properly prepare the company for net zero puts them in breach of their legal duties. This is the first case which seeks to hold company directors personally liable for failing to adopt and implement a climate strategy. Whether a formal application will be made or if it will survive the permission stage remains to be seen.

McGaughey and Davies v Universities Superannuation Scheme Ltd [2022] EWHC 1233

The High Court has determined an application *in McGaughey and Davies v Universities Superannuation Scheme Ltd* in relation to proceedings brought by contributors to a private pension scheme ("**USLL**"). The Claimants alleged, among other things, that the directors of the pension scheme's trustee were in breach of their duty to promote the success of the trustee company due to the failure to adopt an adequate plan for long-term divestment of investments in fossil fuels. The High Court refused permission to bring a derivative action against USLL, finding that the Claimants could not demonstrate a sufficient interest and evidence of loss because of the directors' failure to divest from fossil fuels.

Injunctions against "Persons Unknown"

In 2022, the courts were also asked to make a number of precautionary injunctions against "persons unknown" which prohibited climate and environmental activists from disrupting business activities of various energy and transportation companies.

Shell UK Oil Products Ltd v Persons Unknown [2022] EWHC 1215 (QB)

In spring 2022, a series of protests took place focusing on the fossil fuel industry. These protests included blocking the entrances of petrol station forecourts and damaging fuel pumps. These protests affected Shell UK Oil Products Limited, which applied for injunctive relief to restrain these and other such activities.

In *Shell UK Oil Products Ltd v Persons Unknown*, the High Court set out a new test for granting an injunction against "persons unknown" on a precautionary basis. The Court acknowledged that such an injunction interferes with freedom of assembly and expression, and for those reasons justifies raising the bar from the usual test found within *American Cyanamid*. *First*, there must be a serious question to be tried (*American Cyanamid v Ethicon* [1975] AC 396 per Lord Diplock at 407G). *Second*, damages would not be an adequate remedy for the Claimant, but a cross-undertaking in damages would adequately protect the Defendants. Alternatively, the balance of convenience otherwise lies in favour of granting the order. *Third*, there is a sufficiently real and imminent risk of damage so as to justify the grant of what is a precautionary injunction. *Fourth*, the prohibited acts correspond to the threatened tort and only include lawful conduct if there is no other proportionate means of protecting the Claimant's rights. *Fifth*, the terms of the injunction are sufficiently clear and precise. *Sixth*, the injunction has clear geographical and temporal limits. *Seventh*, the Defendants have not been identified but are, in principle, capable of being identified and served with the order. *Eighth*, the Defendants are identified in the Claim Form (and the injunction) by reference to their conduct. *Ninth*, the interferences with the Defendants' rights of free assembly and expression are necessary for and proportionate to the need to protect the Claimant's rights. *Tenth*, all practical steps have been taken to notify the Defendants. *Eleventh*, the order does not restrain "publication", or, if it does, the Claimant is likely to establish at trial that publication should not be allowed.

Esso Petroleum Co Ltd v Breen [2022] EWHC 2664

The test in *Shell UK Oil Products Ltd v Persons Unknown* has since been adopted in *Esso Petroleum Co Ltd v Breen* which concerned protests relating to the installation of a new oil pipeline across southern England by Esso Petroleum Company Limited and is likely to set the bar for future precautionary injunctions.

Company Law Update

2022 saw several important decisions in the field of company law, from the Supreme Court's "momentous" decision in *BTI v Sequana* on directors' duties where a company is approaching insolvency to important clarifications to the rule against reflective loss. We consider these and other cases below.

When Do Directors Have a Duty to Consider the Interests of Creditors?

***BTI 2014 LLC v Sequana AS & Ors* [2022] UKSC 25**

For the first time, the Supreme Court recognized in *BTI 2014 LLC v Sequana AS* that directors of a company who know or ought to know that the company is insolvent or is bordering on insolvency are obliged to consider the interests of the company's creditors and prospective creditors. Unhelpfully, although the Supreme Court recognized that the duty exists, there remains debate about when precisely the duty is triggered and the extent of its scope. This absence of clarity is unfortunate for company directors.

Following the Supreme Court's decision, the position seems to be as follows:

- Directors of UK companies are required to consider the interests of creditors in the exercise of their fiduciary (and statutory) duties to the company when the directors know or ought to know that the company is insolvent or bordering on insolvency, or that an insolvent liquidation or administration is probable.

- In such circumstances where the duty requires directors to consider creditors' interests and those interests conflict with shareholders' interests, directors must engage in a balancing exercise.

- The more precarious the company's financial state, the greater the emphasis to be placed on consideration of creditors' interests to the exclusion of shareholders' interests. When insolvent liquidation becomes inevitable, the interests of creditors are likely to be paramount.

- This duty also applies when directors are looking to approve what would otherwise be lawful distributions by way of dividends under Part 23 of the Companies Act 2006 and otherwise in compliance with common law capital restrictions.

- The duty is not a standalone duty owed by directors directly to creditors; the duty is owed to the company as with other directors' duties, including by de facto directors.

The members of the Supreme Court were not of one mind when it came to the trigger of the duty or its scope and content. The clearest indication of the scope and content is set out in Lord Briggs' analysis, namely that "*prior to the time when liquidation becomes inevitable and section 214 becomes engaged* [being the wrongful trading provisions in the Insolvency Act 1986], *the creditor duty is a duty to consider creditors' interests, to give them appropriate weight, and to balance them against shareholders' interests where they may conflict*".

As for when the duty is triggered, again this is not entirely certain. A real but not remote risk of insolvency is not sufficient but it is engaged by the time of actual insolvency. Despite the competing reasoning, it appears that it will be triggered upon imminent insolvency, or when a company is bordering on insolvency (albeit that this should not be taken to be temporary cash flow insolvency).

The decision draws on a long line of authority in England, Australia and New Zealand, but is contrary to the position taken in other common law jurisdictions such as Delaware and Canada which have rejected the "creditor duty". Given that UK Supreme Court decisions are highly persuasive in other jurisdictions that tend to adopt UK precedent in the absence of their own developed case law (such as the Crown Dependencies and the British Overseas Territories (e.g. the Cayman Islands, British Virgin Islands, Jersey etc.), the decision has the potential for wide application in many jurisdictions.

For a full analysis of the facts and the decision of the Supreme Court together with some further practical guidance for directors, please see our previous update here.

Developments regarding the Rule against Reflective Loss

Burnford & Ors v Automobile Association Developments Ltd [2022] EWCA Civ 1943; *Allianz Global Investors GmbH v Barclays Bank plc* [2022] EWCA Civ 353; and *Breeze and Wilson v Chief Constable of Norfolk Constabulary* [2022] EWHC 942 (QB)

Following a series of decisions in 2020 and 2021 which radically altered the established position regarding reflective loss (most notably Sevilleja v Marex [2020] UKSC 31 and *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands)* [2021] UKPC 22), there have been three further decisions in 2022 which add to the already numerous judicial decisions in this area. Each of *Burnford & Ors v Automobile Association Developments Ltd*, *Allianz Global Investors GmbH v Barclays Bank plc* and *Breeze and Wilson v Chief Constable of Norfolk Constabulary* have sought to reinforce the ratio in the Supreme Court's

leading decision in *Sevilleja v Marex* [2020] UKSC 31 whilst seeking to provide further parameters to the rule.

In particular, these decisions have confirmed that:

- The rule against reflective loss is *not* subject to an exception in cases where the company fails to pursue its cause of action as had been the case before *Giles v Rhind* was effectively overruled. The Supreme Court in *Marex* made this clear and the High Court in *Breeze and Wilson* reinforced this in its decision on a strike out application. In particular, the Court stated that "Giles v Rhind *is dead for all intents and purposes on any straightforward interpretation of Marex*". The Court considered itself bound to accept the Defendant's submissions that the amendments seeking to incorporate the *Giles v Rhind* position must be struck out.

- The rule against reflective loss is sufficiently certain for it to be determined on a summary basis following *Marex*. This was the case in *Burnford* where the Court of Appeal confirmed that the claim at issue should be struck out on the basis that it was barred by the rule in reflective loss.

- The Court of Appeal in *Burnford* also considered the issue of whether the applicability of the rule should be tested by reference to the position: (i) when the claimant's loss is said to have been suffered, or (ii) when the claim was brought. The Court of Appeal found that the former is the case under English law which is consistent with the Privy Council's view in *Primeo Fund v Bank of Bermuda (Cayman) Ltd & Anor (Cayman Islands)* [2021] UKPC 22 and the Court of Appeal's decision in *Allianz Global v Barclays Bank*.

- The Court of Appeal in *Allianz Global v Barclays Bank* also confirmed that there is no legal basis upon which to distinguish shareholders who redeem their shares from those who sell them.

The rule against reflective loss remains knotty and will continue to be the subject of creative arguments albeit that the edges of the rule are starting to solidify in a focused way.

Developments in Unfair Prejudice Jurisprudence

Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd [2022] EWCA Civ 1371

Although we address *Re Compound Photonics* below in our contract law update regarding the interpretation of express duties of good faith, it is worth noting that this was a central issue in an unfair prejudice petition too.

In summary terms, the minority shareholders (the "**Petitioners**"), including a Mr Faulkner and a Dr Sachs, alleged that they had been unfairly prejudiced by

the majority shareholders (the "**Investors**" or the "**Appellants**") on the basis that they were excluded from any continuing role in the management of Compound Photonics Group Ltd (the "**Company**").

The Shareholders' Agreement contained a clause pursuant to which the shareholders undertook to each other and to the Company that they would at all times act in good faith in relation to each other and regarding matters contained in the Shareholders' Agreement.

The Investors became disappointed with the progress of a project led by Dr Sachs as Chief Executive Officer of the Company and as an employee of a subsidiary. They threatened to withdraw funding unless Dr Sachs resigned, which he did. Subsequently, Mr Faulkner was removed as non-executive Chairman of the Company.

The Petitioners asserted that they had been the subject of unfair prejudice and sought relief. The High Court agreed and found that the Petitioners had been unfairly prejudiced because by excluding Dr Sachs and Mr Faulkner, the Investors had breached the good faith provisions of the Shareholders' Agreement.

The Court of Appeal unanimously overturned the High Court's decision finding that there was no unfair prejudice in respect of the removal of either of Dr Sachs and Mr Faulkner. The Court of Appeal found that the management of the company had not been conducted unfairly, and that the directors' removal did not amount to unfair prejudice.

Significantly, the Court of Appeal was at pains to reject the High Court's finding that the unrestricted right to remove the Petitioners as directors as a matter of company law was excluded by contract. The Court of Appeal noted that "*it is clear from the wording of section 168* [of the Companies Act 2006] *that the statutory right to remove a director is not given to the majority shareholders, and neither does it prevent them from alienating any such right. The right under section 168 is given to the company in general meeting, and it is the company that cannot by contract alienate such right by contract between it and the director*".

The Court of Appeal also rejected the High Court's view that the Shareholders' Agreement formed part of the constitution of the Company. Similarly, the Court of Appeal rejected the Petitioners' submission that directors are under a general obligation to exercise their powers in accordance with a Shareholders' Agreement.

For more detailed analysis, see here.

Dodson & Ors v Shield & Ors [2022] EWHC 1751 (Ch)

Re Compound Photonics can be contrasted with *Dodson v Shield* in which the diversion of a project in breach of the Shareholders' Agreement and the transfer of the technical history away from a company for no consideration amounted to prejudicial conduct. These events also constituted a breach of the directors' fiduciary duties because of a conflict of interest which had not been waived by the non-conflicted directors. Unlike *Re Compound Photonics*, the High Court in *Dodson v Shield* was satisfied that the company was a quasi-partnership, which also assisted in leading to a finding of unfair prejudice.

Our more detailed summary of the case is available here.

Re Cherry Hill Skip Hire Limited [2022] EWCA Civ 531

In this case, the Court of Appeal reversed a decision to dismiss an unfair prejudice petition on the grounds of acquiescence or a delay of some 17 years. This case demonstrates the breadth of the court's unfair prejudice jurisdiction.

The company was incorporated in 1982. It was a family-owned company in which the mother owned 51% of the shares and her son (the "**Petitioner**") owned the remainder. It was alleged that differences in the family resulted in the Petitioner's effective exclusion from management of the company in 1985. The company ceased trading in 2019 and in January 2020 an application was made to strike off and dissolve the company. This prompted the Petitioner to issue proceedings in July 2020, but the company was struck off and dissolved in October 2020 in any event.

At first instance, the petition was dismissed on the grounds of delay and acquiescence following a hearing of a preliminary issue.

On appeal by the Petitioner the Court of Appeal drew a distinction between:

- A shareholder who knows that it is being excluded and that its rights are being denied but which fails to act; and

- A passive shareholder which after failing to act, then discovers (years later) that money was diverted from the company for the benefit of its directors, and indeed its own shareholding has been expropriated.

According to the Court of Appeal, the distinction lies "*in the fact that in the absence of evidence to the contrary, a shareholder is entitled to assume that the company is being managed properly*". Therefore, on the facts of this case, it was wrong for the petition to be dismissed at a preliminary stage.

Although there are no statutory limitation periods which apply to unfair prejudice petitions and the equitable doctrine of laches also does apply, delay will

still be relevant to the exercise of the court's wide and flexible discretion regarding remedies.

For more details, see here.

Contract Law Update

Exclusion Clauses: Wasted Expenditure

***Soteria Insurance Ltd v IBM United Kingdom* [2022] EWCA Civ 440**

The Court of Appeal in *Soteria Insurance* held that a clause excluding liability for "*indirect or consequential Losses, or for loss of profit, revenue, savings (including anticipated savings)*" did not exclude a claim for wasted expenditure in circumstances where the Defendant was found to have wrongfully terminated a contract for the provision of a new IT system to the Claimant. The main items of wasted expenditure were sums paid by the Claimant to the Defendant and third parties in expectation of the implementation of the new IT system.

Overturning the decision of the High Court, the Court of Appeal held:

- **Natural and Ordinary Meaning of the Words**: Based on the natural and ordinary meaning of the words, a reasonable person in the position of the parties would conclude that the clause did not exclude a claim for wasted expenditure.

- **The Proper Approach to Exclusion Clauses**: The more valuable the right, the clearer the language of any exclusion clause will need to be. There was nothing in the relevant clause, let alone clear and obvious exclusionary words, to indicate that costs incurred by the Claimant in the expectation that the Defendant performed the contract would be irrecoverable if the Defendant repudiated the contract.

- **Different Types of Loss**: The types of loss identified in the exclusion clause (loss of profit, revenue, savings) are notoriously open-ended and difficult to ascertain. They are routinely excluded by contractual parties on this basis. Wasted expenditure is a different species of loss which is both precisely ascertainable and a valuable right. It therefore makes commercial and practical sense to distinguish between these types of loss. If the Defendant had intended to exclude wasted expenditure, it could have easily done so by including express wording to this effect.

- **Loss of Bargain**: The High Court had incorrectly characterised the nature of the contractual benefit lost by the Claimant as the savings, profits and revenues that it would have obtained if the IT system had been delivered. The correct analysis is that the loss of bargain was principally represented by

the loss of the IT system itself and was not limited to loss of profit, revenue and savings.

Express Duties of Good Faith

Re Compound Photonics Group Ltd; Faulkner v Vollin Holdings Ltd [2022] EWCA Civ 1371

At first instance, Mr Justice Adam Johnson held that an express good faith clause in a shareholders' agreement meant that certain directors were entrenched in office and could not be removed, despite the absence of any more express prohibition. In overturning the decision of the High Court, the Court of Appeal conducted a detailed analysis of the existing case law in order to ascertain the meaning of the duty of good faith. The key points arising from the Court's analysis are as follows:

- **Interpretation of Express Good Faith Clauses**. The Court of Appeal held that express good faith obligations will take their meaning from the context in which they are used. Cases from other areas of law and commerce may be of limited value and should be treated with caution. The core duty inherent in a good faith obligation is honesty. Whether a duty of good faith encompasses more than this core duty will be a question of interpretation in each case; it will not be appropriate to apply general principles from existing case law in a "formulaic way".

- **Procedural Fairness:** The High Court's decision that the good faith clause imposed a duty of procedural fairness on the Defendant had been imported from earlier authorities, rather than the relevant shareholders agreement or company articles of association, which were not applicable to the present case.

- **Fidelity to the Bargain**. The Court of Appeal held that the good faith obligation did not require the Defendants to act with fidelity to the bargain as a matter of contractual interpretation. Although courts have, from time to time, used the expression "the spirit of the contract" in the context of a good faith clause, this was not an "open invitation" to interpret the clause as imposing additional substantive obligations or restrictions outside the contract terms. Particularly in the context of changes to the constitution of a company or to the company's board of directors, the Court stated that "*considerable caution must be exercised*" before interpreting a good faith clause as requiring fidelity to the bargain.

- **Bad Faith and Dishonesty**. The Court rejected the proposition that a breach of the duty to act in good faith was synonymous with a requirement of dishonesty. The clause prohibited conduct that reasonable and honest people would regard as commercially unacceptable without necessarily being dishonest.

In light of the above, it is clear that a party may be in breach of a contractual term of good faith when the behavior at issue is commercially unacceptable (by reasonable standards) and yet not dishonest per se. However, questions remain as to the type of behaviour that would be commercially unacceptable. Overall, it appears that the duty of good faith is a duty of moral behaviour, as opposed to one that imposes granular standards of performance.

Damages: Breach of Warranty

MDW Holdings Ltd v Norvill [2022] EWCA Civ 883

In *MDW Holdings Ltd v Norvill*, the Court of Appeal considered the proper approach to the quantification of damages for breach of warranty under a share purchase agreement ("**SPA**") pursuant to which the Claimant purchased the Defendant's waste disposal, collection, and processing business.

The High Court held that the Defendants were liable in breach of warranty and deceit. The Court calculated damages: (a) as the difference between the value of the company on the basis that the warranties were true ("**Warranty True**"); and (b) the value of the company given that the warranties were false ("**Warranty False**"). Both were assessed as at the date of the breach, i.e. when the SPA was executed. The Warranty False valuation was reduced to account for the risk of reputational damage to the Claimant arising from the Defendas breaches of warranty, despite this risk ultimately not materialising.

The Defendants appealed on the basis that Warranty False valuation should not been reduced on the basis of a contingency that was known not to have materialised. The Claimant cross-appealed arguing it should have been awarded a larger damages award for deceit. In dismissing the Defendants' appeal and allowing the cross-appeal to determine whether the Claimant is entitled to additional damages for deceit, the Court of Appeal articulated the key principles applying to quantification of damages in this context:

- Where damages fall to be assessed in respect of an anticipatory breach of contract that was accepted, it is appropriate to consider what would have happened if the breach had not occurred and, in that context, events subsequent to the breach may be relevant. However, that principle has no application where a party to a contract has, by failing to supply goods or services, committed an actual – rather than anticipatory – breach of contract.

- Where a claimant has been induced by deceit to buy something, the defendant cannot reduce its liability by showing that a contingency that served to reduce the value of the item at the date of assessment did not eventuate.

- There is a strong case for saying that, in general at least, the position should be similar in relation to warranties given on a share sale. Events subsequent

to the purchase cannot affect the value at the time of the transaction. If a particular risk does or does not eventuate, the price may rise or fall, but that will not retrospectively change the value of the share at an earlier date.

- Cases in which account can be taken of what happened subsequently as regards a contingency that existed on the date of assessment when determining what, if any, damages are payable for breach of a warranty on a share sale, will be rare.

- The mere fact that the value of the relevant shares has increased since the date of assessment cannot demonstrate such a "windfall": it is inherent in the selection of a date of assessment that subsequent changes in value can fall to be disregarded. Still less is it appropriate to categorise a post-assessment rise in value as a "windfall" if it were attributable to steps that the purchaser had itself taken since the transaction.

For a more in-depth analysis, see the Debevoise Case Update here.

Tort Law Update

Quincecare Duty

In the 30 years since the *Quincecare* duty was first articulated in *Barclays Bank v Quincecare* [1992] 4 All ER 363, the duty has not been widely tested or discussed. The *Quincecare* duty was considered a fairly narrow duty owed by a bank (or other payment entity) to its customers, requiring it to refrain from executing a payment instruction where it has reasonable grounds to suspect the transaction may be an attempt to defraud the customer. However, in 2017 a breach of the duty was first proved in *Singularis Holdings v Dalwa Capital Markets Europe* [2017] 2 Al ER (Comm) 445 and upheld on appeal to the Court of Appeal and Supreme Court. This decision showed for the first time that the duty could be an effective vehicle to recover against a well-resourced defendant (i.e. a bank) in the case of fraud. Since then, several *Quincecare* cases have been filed which have made their way to the appeal courts in 2022.

In 2022, there have been four prominent cases that seek to test the boundaries of the *Quincecare* duty.

Philipp v Barclays Bank UK plc [2022] EWCA Civ 318

In *Philipp v Barclays Bank* the courts have considered the scope of the *Quincecare* duty in protecting a bank's customers from authorised push payment ("APP") fraud.

In March 2018, a Barclays' customer authorised two international payments from her bank account that she had been deceived into making as a consequence

of fraud. This particular fraud, known as APP fraud, is a widespread issue in personal banking and follows a similar pattern. A customer is deceived by a fraudster, often on the pretense that their money is at risk, to instruct their bank to transfer their money into an account controlled by the fraudster. It is "authorised" from the bank's perspective because the payment is made at the request of the customer.

The question the Court of Appeal was asked to consider, was whether a bank owes a duty of care in these circumstances. The Court of Appeal held that:

- As a matter of law the duty of care identified in *Quincecare*, which is a duty on a bank to make inquiries and refrain from acting on a payment instruction in the meantime, does not depend on the fact that the bank is instructed by an agent of the customer of the bank.

- It follows from this conclusion that it is, therefore, at least possible in principle that a relevant duty of care could arise in the case of a customer instructing their bank to make a payment when that customer is the victim of APP fraud.

- The right occasion on which to decide whether such a duty in fact arises in this case is at trial.

The Supreme Court has granted permission to appeal and this case will be one to watch in 2023.

Federal Republic of Nigeria v JPMorgan Chase Bank NA [2022] EWHC 1447 (Comm)

The case of *Federal Republic of Nigeria v JPMorgan Chase Bank NA* has a complex factual history and arises as part of the settlement of a long-running dispute concerning the Oil Prospecting Licence 245 ("**OPL 245**") which was granted by the Federal Republic of Nigeria ("**FRN**") for the operation of an oil field in Nigeria.

The FRN first awarded OPL 245 to a Nigerian company, Malabu Oil and Gas Ltd ("**Malabu**"), for $20 million in 1998. It was subsequently revealed that Malabu is owned by Dan Etete, who was an oil minister at the time, and close to the former military ruler Sani Abacha.

In 2001, Shell signed an agreement to acquire a 40% stake in OPL 245 from Malabu. Later that year, the FRN (under new President Olusegun Obasanjo) revoked Malabu's OPL 245 licence, which lead to numerous claims about its ownership between the FRN, Malabu and Shell which dragged on for many years. Those disputes were eventually settled by agreements reached in 2011. The settlement agreements provided that Malabu would hand OPL 245 back to

the government for $1.1 billion. Shell and Eni then agreed to pay the government $1.1 billion plus a signature bonus for OPL 245.

In May 2011 the $1.1 billion was placed in an escrow account opened by FRN with US bank, JPMC. In 2011 and 2013, JPMC paid out $1.1 billion to Malabu on instructions from authorised officers of the FRN.

The FRN alleged that in making those payments, JPMC was in breach of its *Quincecare* duty. It was said to arise here because JPMC was on notice that Malabu's past was murky and certain members of the Nigerian government giving the payment instructions were allegedly involved in a fraudulent and corrupt scheme. The FRN argued that in making the payment JPMC was grossly negligent.

Mrs Justice Cockerill dismissed the case, finding that the FRN was not the victim of a fraudulent and corrupt scheme in respect of the payments, and the recipient of the funds had a legitimate entitlement to them. Significant aspects of the decision included:

- **Gross Negligence**: in this case the terms of the depository agreement modified the *Quincecare* duty, so that FRN had to prove gross negligence in order to succeed in its claim. Gross negligence was described as a "notoriously slippery concept": "*it requires something more than negligence but it does not require dishonesty or bad faith and indeed does not have any subjective mental element of appreciation of risk*."

- **Notice of Fraud**: The Court said that, in relation to the content of the obligation, the bank must be on notice that the payment instruction itself must be vitiated by fraud and not any different or wider potential concern.

- **Shortcomings in AML Systems Not Relevant for the Purposes of the *Quincecare* duty**: The Court provided helpful commentary on general AML red flags. Mrs Justice Cockerill stated that: "*It may be the case that JPMC fell below best practice standards or even in some respects below the standards of the reasonable and honest banker as regards money-laundering risk, having regard to the number and magnitude of the red flags; but that does not trigger a Quincecare duty… The red flags for money laundering and past financial crime might well be said to be many, glaring and obvious. What there was not, however, was a serious or real possibility that in relation to this transaction FRN might be being defrauded*."

- **Fact Specific Nature of Analysis**: Mrs Justice Cockerill emphasised that the *Quincecare* duty is narrow and must be considered on the facts of the specific fraud which needs to be proved as reliance on a fraud in broad terms is insufficient.

Stanford International Bank Ltd (In Liquidation) v HSBC Bank PLC [2022] UKSC 34

In December 2022, the UK Supreme Court struck out a £116 million claim for breach of the *Quincecare* duty on the basis that the Claimant had suffered no loss. The case arose in the context of the insolvency of a company which had been used as a vehicle for a high-profile Ponzi scheme.

Stanford International Bank ("**SIB**") was the vehicle used by Robert Allen Stanford for a large-scale Ponzi scheme discovered in 2009. Claims were brought by the joint liquidators of SIB against HSBC, which alleged that HSBC failed, in breach of its *Quincecare* duty, to freeze payments out of SIB accounts from August 2009. SIB's case is that there were many warning signs that put HSBC on notice that SIB's business was a fraud.

The appeal proceeded on the basis that even if HSBC did owe a relevant duty of care, and was in breach of that duty, that breach has not given rise to any recoverable loss on SIB's pleaded case. In a decision handed down on 21 December 2022, the majority of the Supreme Court upheld the Court of Appeal decision and held that the *Quincecare* claim should be struck out on the basis that SIB had not suffered any recoverable loss.

The Supreme Court distinguished between two sets of customers: the "early customers" who withdrew their funds before the Ponzi scheme collapsed and escaped without a loss; and the "late customers" who risk losing almost all of their money because they did not withdraw their funds before the scheme collapsed. The £116 million is a sum of money paid out to the early customers that arguably should have been prevented by HSBC and retained to be distributed to all creditors *pari passu*. SIB argued in the Supreme Court that its loss was a "loss of chance" to discharge the debts of certain customers in the liquidation rather than the payment of 100 pence in the pound received by the early customers. This argument was dismissed by the Supreme Court. If the £116 million had not been paid out to the early customers, then precisely the same amount of SIB's debt would be extinguished when the company is dissolved. There is therefore no recoverable loss.

The Supreme Court noted that the fairness or unfairness of these payments is not a matter that the court can investigate and assess in the context of a claim for negligence where the negligence results in no monetary loss. This is a matter of policy within the applicable insolvency regime.

Royal Bank of Scotland International Ltd v JP SPC 4 and another (Isle of Man) [2022] UKPC 18

The Judicial Committee of the Privy Council has also handed down a topical judgment in *Royal Bank of Scotland International Ltd v JP SPC 4 and another (Isle of Man)*. The appeal concerned the question of whether a bank owes a duty of

care in negligence to a person who is known to be the beneficial owner of moneys held in the account of a customer of the bank and who has been defrauded by the customer.

The Board emphasised that the *Quincecare* duty is co-extensive with a bank's contractual duties to their customers. That duty is owed to a bank's customer and not to third parties. The Board concluded that: "*There is nothing in principle or in the cases to support the idea that the tortious duty of care owed by a bank to its customer to exercise reasonable care and skill, which is co-extensive with the contractual duty of care owed by a bank to its customer, can be extended across to a third party with whom the bank has no contractual relationship even if the bank knew or ought to have known that the third party was the beneficial owner of the moneys in the customer's account*."

The Board saw "*no good reason in this case for incrementally developing the tort of negligence, beyond the well-established Quincecare duty of care, so as to impose on a bank an equivalent duty of care to a third party who is not a customer of the bank*."

Although the decision is not binding on the English courts, it is highly persuasive and is likely to be indicative of how the Supreme Court would decide a similar issue that may come before it.

Liability of a Director or Senior Manager as an Accessory to a Tort Committed by a Company

Barclay-Watt & Ors v Alpha Panareti Public Ltd & Anor [2022] EWCA Civ 1169

The Court of Appeal in *Barclay-Watt & Ors v Alpha Panareti Public Ltd & Anor* has upheld a decision that a director was not personally liable as an accessory to a tort committed by a company. The decision is welcome news for directors that it will be difficult (and confined to narrow categories of cases) to hold a director liable as an accessory where a company has acted negligently.

The High Court held Alpha Panareti Public Ltd ("**APP**") liable for negligent misrepresentation and misstatement for failing to warn the Claimants about the foreign exchange ("**Forex**") risk associated with their property investment scheme where investors would repay a Swiss Franc mortgage in British or Cypriot pounds. The Claimants appealed the judgement that APP's director was not jointly liable, as accessory (i.e. joint tortfeasor) to APP's tort, despite him creating the investment scheme's marketing materials. The Court dismissed the appeal and made the following findings:

- For cases involving the personal liability of directors, there needed to be a non-prescriptive and fact-specific balance between the separate legal personality of the company (*Salomon v Salomon & Co Ltd* [1897] AC 22) and the inability to plead directorship as a defence to a tort.

- The three-stage test for accessory liability (*Fish & Fish Ltd v Sea Shepherd UK* [2015] UKSC 10, [2015] A.C. 1229*)* was not satisfied because the director and APP did not share a "*common design*" (i.e. common purpose to, or mutual participation in) not to warn of the Scheme's Forex risk.

- The director being in charge of producing the Scheme's marketing materials did not constitute him "*assuming responsibility*" for the Claimants who: (1) did not have a contractual, yet alone "*special relationship*" with the director (See *Williams v Natural Life Health Foods [1998] UKHL 17)*; and (2) knew they were contracting with APP. To prevent undue litigation against directors, the director could not be liable for simply carrying out his duty as a director.

- The intellectual property and strict liability tort cases relied upon by the Claimant were rejected in order to keep findings of a director's personal liability "*narrow*" and within "*reasonable bounds*". On a contextual, tort, *and* fact specific basis, the instant case required an assumption of responsibility where the other cases did not.

The decision reaffirms the high standard required to pierce the "*corporate veil*" that separates company and director acts to ensure directors aren't unnecessarily inhibited by undue litigation from customers they are not in actual or implied contractual relationships with.

Consultations and Changes to Rules/Guidance

Updates to Commercial Court Guidance

The 11th edition of the Commercial Court Guide was published on 3 February 2022, bringing with it a variety of changes to practice in the Commercial Court. The new Guide reflects a number of changes to normal court practice, particularly as a result of the COVID-19 pandemic. The new Guide includes the encouragement of video-link evidence, and the use of electronic bundles.

The Commercial Court remains extremely busy (about "as busy as can be"[1]). The new Guide along with other guidance issued in Practice Notes and by the Commercial Court User Group also emphasize the need to give adequate time estimates and comply with procedural rules in order that cases can be dealt with efficiently. A summary of the important updates can be found here.

Some other notable guidance from the Commercial Court includes:

- The default position is now that shorter hearings up to half a day will be held remotely.[2]

- In March 2022, Mrs Justice Cockerill published a Practice Note which raises concerns about inadequate time estimates and their effect on the conduct of hearings in the Commercial Court. Parties are asked to carefully consider what is to be covered in the hearing time, the pace at which documents/authorities can be taken, and the need for oral argument on the issues raised.

- The Commercial Court User Group has clarified that (notwithstanding the removal of old paragraph F4.2 of the Commercial Court Guide, which permitted applications made by correspondence), the court will continue to allow applications made on paper, whether by correspondence or application notice.[3]

---

1 Commercial Court User Group Minutes May 2022.

2 *See* Guidance from the Chancellor and the Judges in Charge of the Commercial Court and TCC: 25 September 2021: https://www.judiciary.uk/announcements/remote-hearings-guidance-to-help-the-business-and-property-courts/

3 Commercial Court User Group Minutes May 2022.

- The Commercial Court User Group has noted an "epidemic" of highly delayed consequentials.[4] The Commercial Court will be placing an emphasis on determining consequential issues at short one-hour hearings between 1-2 weeks after hand down.

New Edition of the Chancery Court Guide

The new Chancery Guide, published in July 2022, aims to align the Guide with the other courts in the Business and Property Courts including the Commercial Court Guide. A summary of the important updates can be found here.

Some notable changes include:

- Remote hearings are now the standard process for dealing with ordinary applications.

- The court can allow a party, their legal representative, a witness or an expert outside England and Wales to attend the hearing remotely.

- Parties and their legal representatives are encouraged to use electronic bundles.

A new Chancery Practice Note has also been issued in October 2022 to retain the practice of "*remote hand-down*", which was adopted during the COVID-19 pandemic. Reserved judgments will now routinely be handed down remotely.

New Edition of the Technology and Construction Court Guide

In October 2022, the 3rd edition of the Technology and Construction Court ("**TCC**") Guide was published. The new Guide is also aimed at making litigation more efficient and less costly.

As with the Chancery Court Guide, the TCC Guide has also been amended to be more aligned with the practices in the other Business and Property Law Courts. The New TCC Guide includes an increase to the minimum threshold to commence proceedings in the TCC from £50,000 to £250,000.

A summary of the key changes can be found here.

---

[4] Commercial Court User Group Minutes November 2022.

Group Actions

"Group", "Mass", "multiparty", or "class" actions are terms used to describe litigation brought collectively by a group of claimants (sharing certain characteristics) against one or more defendants. Group actions are particularly common in certain types of claims such as environmental, product liability, data privacy, competition law, financial services, and personal industry claims. This area of law has seen rapid expansion in recent years and we continued to monitor the most significant developments in group actions in 2022.

There are three main procedural mechanisms by which group actions may be brought before the English courts, which are considered in more detail below:

(1) Competition claims brought by way of Collective Proceedings Orders;

(2) Claims brought by way of "Representative Action" under CPR 19.6; and

(3) Claims managed under Group Litigation Orders under CPR 19.11.

Collective Proceedings Orders

Following the landmark *Merricks* Supreme Court judgment in December 2020, there has been a sharp rise in the number of collective actions cases in the CAT. A record twelve opt-out mass claims were filed in the CAT in 2022, which has stimulated debate regarding the extent to which the opt-out collective action regime can and should be used by businesses rather than consumers.

Walter Hugh Merricks CBE v Mastercard Incorporated and others [2022] CAT 43

In our 2021 Review, we considered the Supreme Court's decision authorizing Mr Merricks as the class representative for a Competition Appeal Tribunal ("**CAT**") collective proceeding on behalf of over 46 million individuals. The claim is the first ever CAT class action and the largest mass claim ever brought in the United Kingdom.

The claim has progressed throughout 2022. On 9 March 2022, the CAT issued a judgment determining the "domicile date" (the date specified in a collective proceedings order for the purpose of determining whether a person was domiciled in the UK) for the purpose of the collective proceedings (which Mastercard, the Defendant, has appealed).

Mr Merricks argued that the domicile date should be the date on which the claim form was submitted (i.e. 6 September 2016) whereas Mastercard argued that the domicile date should be the date the CAT decided to grant the collective proceedings order ("CPO") application (i.e. 18 August 2021). This issue was particularly relevant in this case because the domicile date would define the way

the proposed class was defined (and the number of people who would fall within the class). The CAT dismissed Mastercard's argument and decided that the domicile date should be the date on which Mr Merricks commenced proceedings, i.e. 6 September 2016.

Mr Merricks subsequently filed an Amended Claim Form reflecting the CAT's earlier decision to grant a CPO, and the determination of the domicile date. Following a CMC, the CAT accepted the parties' proposals for the determination of certain preliminary issues, which will be heard in early-2023.

Mr Merricks is paving the way for other huge value mass competition claims; this case is one to continue to watch in 2023.

UK Trucks Claim Limited v Stellantis N.V. (Formerly Fiat Chrysler Automobiles N.V.) and Others, Daf Trucks N.V. and Others [2022] CAT 25

On 8 June 2022, the CAT determined two applications for a CPO pursuant to s. 47B of the Competition Act 1998, in respect of follow-on damage claims resulting from the European Commission's 2016 decision that European truck manufacturers had been colluding in a 14-year price fixing cartel. The first application was brought by UK Trucks Claims Ltd ("UKTC") and the second by Road Haulage Association Limited ("RHA").

UKTC sought to bring collective proceedings on an opt-out basis, with opt-in proceedings as a second-best alternative. The RHA sought to bring collective proceedings on an opt-in basis.

The CAT found that both the UKTC's and RHA's claims were eligible and suitable in principle as collective proceedings but that it would be "*wholly inappropriate*" to approve both the claims in parallel because there was a significant overlap between the two claims. The CAT said "*one of the significant benefits of collective proceedings is efficiency both for the parties and for the tribunal*" and "*if there were two, overlapping collective actions, they would clearly have to be heard together, which would very substantially increase the cost and complexity of the proceedings generally and the trial in particular*." The CAT also considered that this would be "*very confusing*" for potential class members.

The CAT ultimately declined UKTC's application, but approved RHA's CPO application for an opt-in action. This is the first opt-in CPO order in the UK and exposes the Defendants to potential liabilities of approximately £2 billion.

Regarding the suitability for collective proceedings, the CAT determined that it would be "*fanciful to suppose that, save for a few exceptions, PCMs [proposed class members] could bring independent, individual actions*" given the number of small Claimants within the proposed class in each claim, stating that "*potential damages recovery on an individual basis for such claimants is dwarfed by the vast cost of such damages proceedings, and it is unrealistic to expect small businesses to*

take the risk of litigation of this nature against major and very well-resourced defendants". The "*judicial economy*" that would be achieved by trying the numerous individual truck cartel claims collectively was a key reason for the CAT's determination.

The CAT highlighted that "*the relative test of suitability does not require…that it is impossible to try the claims individually, but that it is more suitable to try the claims collectively, having regard to a multi-factorial evaluation*". However, the CAT noted that only UK truck claims should be permitted within the class, as non-UK truck claims would complicate the proceedings.

The CAT also noted that, because there were over 17,500 potential Claimants signed up to RHA's claim on March 2021, there was "*no practical problem in converting potential claimants into litigants*", thus there was no compelling reason to certify the claims on any other basis.

The RHA CPO is funded by litigation funder Therium. RHA will pay Therium 6% of any damages award of over £2 billion, 8% of any damages award of over £3 billion, and 30% of any damages award of over £150 million. RHA's funding arrangement with Therium is being challenged by the Defendants on appeal to the Supreme Court. On 26 May 2022, the Supreme Court granted the Defendants permission to appeal against a March 2021 Court of Appeal decision that dismissed the allegation that the litigation funding arrangements by RHA and UKTC fall under the Damages-Based Agreements Regulations 2013. The 2013 Regulation prescribes what damages-based agreements (a type of no win, no fee arrangement) must and must not contain in order to be valid under UK law. Both UKTC and the RHA have conceded that their funding arrangements would not comply with this regulation if they are found to qualify.

However, the CAT noted that "*collective proceedings would be impossible without third-party funding*", which may suggest that third-party funding arrangements should not prevent a CPO being granted.

Other Collective Proceeding Orders

2022 was an active year for the CAT, with other major certification decisions, appeals to the Court of Appeal, and new claims in novel sectors such as guitars and cryptocurrency exchanges.

- ***Apple App Store:*** In May 2022 the CAT certified Dr Rachael Ken's opt-out consumer claim against Apple. In June 2022, the CAT declined to strike out aspects of the claim. A trial is to commence in October 2024, with the Defendants' application for a split trial having been refused.

- ***Google Play Store:*** In August 2022, the CAT certified Elizabeth Coll's collective action against Alphabet and other Google companies for alleged competition law infringement relating to Google's practices in its Play Store,

including charging a commission rate of 30% on certain app and in-app purchases.

- ***Boundary Fares:*** The Court of Appeal in *London & South Eastern Railway Limited & Ors v Gutmann* [2022] EWCA Civ 1077 has upheld the October 2021 decision of the CAT to grant a CPO in relation to so-called "boundary fares" claims against South Western Trains and South Eastern Trains.

- ***Shipping companies*:** In *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd and Others* [2022] CAT 10, the CAT has granted a CPO to Mark McLaren in a claim worth up to £150 million, against shipping companies that were found by the European Commission in 2018 to have breached competition law by engaging in horizonal anti-competitive and collusive arrangements regarding deep sea car carrier services, including price-fixing, capacity reduction and marketing sharing.

- **Foreign exchange spot trading**: In *Michael O'Higgins FX Class Representative Ltd v Barclays Bank Plc* [2022] CAT 16 , the CAT (by a 2:1 majority) refused to grant an opt-out CPO to either of the two proposed class representatives for follow-on damages arising from infringement decisions of the European Commission in relation to foreign exchange spot trading cartels.

- ***Fender Guitars***: A claim has been filed against Fender Musical Instruments Europe Ltd and Fender Musical Instruments Corporation, for loss and damage caused by online resale price management in the guitar sector.

- ***Cryptocurrency Exchanges:*** Lord David Currie has filed a €12 billion opt-out claim on behalf of investors against cryptocurrency exchanges following the allegedly collusive delisting of Bitcoin Satoshi Vision in 2019.

Representative Actions

La Brea Environs Protectors v The Petroleum Company of Trinidad and Tobago (Petrotrin) [2022] UKPC 22

On 21 February 2022, the Privy Council held that La Brea Environs Protectors ("**LBEP**"), a non-profit organization, could not appear as a representative Claimant for the 101 residents of the La Brea area in a claim seeking damages against the now defunct state-owned oil company in Trinidad and Tobago, Petrotrin, for the consequences of an oil spill in December 2013.

Although the decision is concerned with representative actions under the Trinidad and Tobago Civil Procedure Rules, The Privy Council relied on English authorities to interpret the meaning of the "*same or similar interest*" test for representative procedure.

The Privy Council, following the UK Supreme Court decision in *Lloyd v Google LLC*, was of the view that "*a similar purposive approach must be adopted in considering the elements of rule 21 of the CPR of Trinidad and Tobago in issue in this appeal and … in the meaning and scope of the "same or a similar interest" … and the meaning of the qualifying words "a body having sufficient interest"*.

The Privy Council observed that LBEP did not exist when the oil spill occurred and therefore had not suffered any economic loss, nor did it own any land that may be said to have been interfered with. The Privy Council therefore decided that LBEP did not have the same or similar interest with five or more of the La Brea residents "*to enable it to properly represent those residents*".

We covered the 2021 UK Supreme Court decision in *Lloyd v Google LLC* in our 2021, Review which can be found here.

Group Actions

Group litigation is continuing to increase in the UK, and 2022 saw further decisions that will embolden claimants (or more accurately, claimant law firms) to adopt aggressive litigation strategies against companies incorporated and/or registered in the UK.

Municipio de Mariana v BHP Group (UK) Ltd (formerly BHP Group Plc) [2022] EWCA Civ 951

In our 2020 and 2021 Reviews, we considered the High Court's decision to strike out as an abuse of process a claim brought by 202,600 Claimants in relation to the collapse of a dam in Brazil, which had resulted in severe flooding, multiple deaths and environmental damage.

In 2022, the Court of Appeal has overturned the decision of the High Court which now paves the way for proceedings to continue against members of the BHP Group arising out of the collapse of the Fundão Dam in Brazil.

In doing so, the Court of Appeal overturned the High Court's decision to strike out the claims as an abuse of process on the basis that the proceedings would be "irredeemably unmanageable" due to their size and complexity. Size and complexity cannot form the basis of an abuse of process, even if the proceedings are unmanageable. The courts retain wide case management powers that can be deployed in such cases.

The Court of Appeal did not, however, rule out as a matter of principle that findings of abuse could be made where the litigation became unmanageable with vexatious consequences because of the deliberate conduct of the Claimant, for example.

Our full discussion of the decision can be found here.

Alame and others v Royal Dutch Shell Plc and another [2022] EWHC 989 (TCC)

In 2022, the High Court in *Alame and others v Royal Dutch Shell Plc*, addressed case management directions in relation to claims brought by two Nigerian communities for clean-up and compensation against Royal Dutch Shell (now Shell plc) and its Nigerian subsidiary in the English courts.

This judgment is the first step towards case managing these complex and significant claims to trial, following the Supreme Court's ruling in February 2021 that the Claimants have an arguable case that a UK domiciled parent company owed them a common law duty of care so as to properly found jurisdiction.

The High Court in this judgment was asked to determine: (1) whether it was appropriate to order a Group Litigation Order ("**GLO**") at this stage in the proceedings before the parties had agreed a list of issues that would bind the parties to the GLO; and (2) other directions consequential on any GLO, including provisions for Schedules of Information, Group Registers and Cut-off dates.

The Court accepted that it would be premature to order a GLO before the GLO issues had been agreed (or identified with sufficient particularity), and therefore the procedural requirements that a GLO must specify the GLO issues could not be met at this stage. However, on the basis that the parties agreed that a GLO would be suitable in principle (and therefore that an order to make a GLO be deferred to a later date), the Court went on to consider other case management directions relating to the proposed GLO.

The Court directed that each individual Claimant must specify in schedules of information, additional details that included all the facts necessary for the purposes of formulating a complete cause of action. In doing so, the Court addressed the nature of the Claimants' case in which they have identified a number of oil spillages over a thirty-year period, and described the damage suffered as a result of consequential contamination of the land and waterways, but have not pleaded any causal nexus between each oil spill and the damage suffered by individual Claimants.

The Defendants submitted that the proposed details for the schedules of information were insufficient, and that the claims included in the GLO should include: (i) details of the particular oil spills said to have caused damage; (ii) the location of damage; (iii) the date of the first impact from the oil spill on the Claimant; (iv) details of the Claimant's interest in land; and (v) evidence of the solicitor's authority to act. The Court ultimately agreed that these details should be provided.

The Court characterised the current pleaded case is a "global claim" (in that it does not seek to establish a causal nexus between each oil spill and the damage

suffered by individual Claimants) and noted the "*inherent degree of risk in a global claim because it depends on establishing the matters of which complaint is made in their entirety*" citing *John Doyle Construction Ltd v Laing Management (Scotland) Ltd* [2002] BVLR 393.

The Court accepted that the work to obtain the additional information would be "*expensive and time-consuming*" but held that it was necessary to ensure that "*the material issues in dispute can be identified and determined in the trial of the lead claimants*". The decision emphasises that there is no exemption in group claims from ensuring that a claim is properly pleaded and individual Claimants will still need to provide the details necessary to establish a complete cause of action.

Upham and others v HSBC UK Bank Plc [2022] EWHC 1843

In *Upham v HSBC*, the High Court was asked to consider disclosure orders in the context of a trial of sample Claimants. The case involves 396 Claimants and relates to the £1.3 billion claim against HSBC for its alleged involvement in the development, marketing, and implementation of a film finance scheme.

On 7 February 2022 an order was made at the first CMC that the claim should proceed as a joint single trial of "*Sample Claimants*". At the second CMC on 8 July 2022, the Defendants argued that non-sample Claimants and/or their agents should provide disclosure on "*issues in the generic pleadings*".

On 15 July, Mrs Justice Moulder handed down the judgment in which she held that the disclosure requested by the Defendants would be "*inconsistent with the rationale of having Sample Claimants (namely to make proceedings manageable and control costs whilst still striving to ensure that there is good coverage of the issues)*".

Mrs Justice Moulder commented that "*the crux of the matter*" is that by seeking "*generic disclosure*" at this stage "*HSBC seeks to obtain disclosure against the Claimants who will not be party to the proceedings at trial*" and this would not have been the position if disclosure had followed the normal course (after the case of the Sample Claimants had been pleaded) and in Moulder J's view "*it is not justified merely because some earlier disclosure is now contemplated in order to progress matters*."

Furthermore, Mrs Justice Moulder went further to say that "*it is inherent in the fact that the proceedings are proceedings by way of Sample Claimants that not all documents in the possession of the Claimants will be before the Court even if such documents could or might be relevant to the cases brought by the Sample Claimants*". Accordingly, "*[t]o adopt a view to the contrary*" would go *"far beyond the usual approach to disclosure by a party and in effect to order third party disclosure without HSBC having satisfied the Court that the documents sought would meet the test under CPR31.17 for third party disclosure*".

Accordingly, Mrs Justice Moulder held that disclosure at this stage should be limited to the "*respective pool of documents which is held by the respective solicitors*" and should not extend to individual Claimants or their agents.

Baker and others v Volkswagen Aktiengesellschaft and others [2022] EWHC 810 (QB)

On 7 April 2022, Senior Master Fontaine in the High Court refused to grant a declaration that certain Claimants, represented by ERM (the "**ERM Claimants**"), were deemed to be included in the group register following service of schedules of information. The High Court also dismissed an application for relief from sanctions for late service or omission of the ERM Claimants from the group register. Senior Master Fontaine stressed the importance of co-operation between parties in group litigation to enable the litigation to progress efficiently, reasonably, and proportionately.

By way of background, this claim is part of The VW NOx Emissions Group Litigation established by a GLO that Senior Master Fontaine made on 11 May 2019. The ERM Claimants consisted of 49 Claimants of a total group of about 91,000 Claimants. The lead solicitors, Leigh Day ("**LD**") under the GLO agreed that the preferred method for collecting data to add to the group register was an Excel spreadsheet and a template was agreed.

Two days before the 15 February 2019 deadline, ERM provided data in a different format to the agreed template. LD communicated to ERM that the data has not been provided in the agreed format and that LD would be unable to include the ERM Claimants on the group register unless the data was provided in the agreed format. ERM declined to provide the data in the agreed format. According to ERM, "*because the GLO did not require this information to be in an Excel format they would be sending the information by scanned pdf Schedules of Information*."

At the first CMC on 5 and 6 March 2019, permission was granted for a prospective application by the ERM Claimants for relief from sanctions and the court extended the deadline for additional entries to the group register. The Defendants agreed to ERM's application for relief from sanctions but not ERM's application for the declaration. The ERM Claimants took no steps to join the group register by the extended deadline of 18 April 2019 and as a result, the ERM Claimants' claims were automatically struck out. In July 2019, the ERM Claimants made a further application for relief from sanctions but did not take the required steps in relation to listing the application until 2 February 2022.

On 7 April 2022, Senior Master Fontaine had "*no hesitation in dismissing*" the application. ERM may not have agreed with LD's method of collecting data for the group register, but LD were not required to obtain agreement from all the claimant firms, provided they fulfilled their obligation to establish and maintain the group register in a "*sensible and proportionate manner*." The ERM Claimants

had not explained their objection to the Excel format. Senior Master Fontaine commented that by refusing to co-operate, ERM had breached its obligations under CPR 1.3 to assist the court in furthering the overriding objective.

Furthermore, Senior Master Fontaine also refused to grant relief from sanctions. The High Court held that failure to join a group register prior to the deadline was a "*serious and significant breach*" and that the ERM Claimants had not provided a good reason for why they were unable to comply with the Excel format by the deadline. Furthermore, Senior Master Fontaine commented that the ERM Claimants "*failure to take any steps to list the application over 2 ½ years would be sufficient on its own not to grant relief from sanctions*."

David Abbott & 3,449 Ors v Ministry of Defence [2022] EWHC 1807 (QB)

On 14 July 2022, Master Davison in the High Court settled the issue of "*whether it was permissible to join multiple claimants with widely differing claims to one claim form*." In Master Davison's view "*it was clearly not*" and therefore the multiple claims issued on the same claim form should be reissued on individual claim forms in order to progress.

There were two cohorts of military noise deafness cases; the first cohort consists of roughly 250 claims ("the Turner cohort") and in the second cohort there were an additional 3,500 claims ("the Abbott cohort") against the Ministry of Defence, in one single claim form.

CPR rule 29.1 says that "*any number of claimants or defendants may be joined as parties to a claim*" but rule 29.1 is subject to the provisions of rule 7.2, which states that "*a claimant may use a single claim form to start all claims which can be conveniently disposed of in the same proceedings*" (emphasis added). Master Davison decided that the claims were "*far, far too disparate in terms of periods and circumstances*" in which each Claimant sustained their noise-induced hearing loss. In relation to the Abbott cohort, according to Master Davison, there "*obviously could not be a trial of 3,500 claims at one sitting*" nor "*is it realistic to suppose that the other 3,484 cases would be resolved or fully resolved by the outcome of the [16] lead cases.*"

Moreover, in rejecting the single claim form, Master Davison said "*the proposal to place 3,500 separate claims on one claim form would put an impossible strain on the court's computerised case management system*".

Rawet v Daimler AG [2022] EWHC 235 (QB)

On 10 February 2022, the High Court ruled that Claimants can be added to a claim form prior to service without permission of the court under CPR 17.1. This claim is one of a number of claims concerning emissions from Mercedes diesel vehicles and alleged breached of statutory obligations and concern common law claims.

This case reaches the opposite view as that in *Various Claimants v G4S Plc* [2021] EWHC 524 (Ch), which we covered in our 2021 Review. In *Various Claimants v G4S Plc* Mr Justice Mann held that CPR 17.1 allows an existing party to amend their statement of case (i.e. the statement of case embodying the claim that the existing Claimants were making), and it would "*distort[…] the words to take it any wider that that*". On that basis, Mr Justice Mann ruled that "*[a]n amendment to plead another claimant's entirely separate case is not so much an amendment of the existing claimant's claim form by the claimant…it is bringing in a new person who is bringing in a separate and distinct claim*" (emphasis added). Thus, in *Various Claimants v G4S Plc* the additional Claimants were all struck out.

In *Rawet v Daimler AG*, Mr Justice Picken noted that *Various Claimants v G4S Plc* had taken a "*too restrictive approach to CPR 17.1(1)*" and the fact that CPR 17.1(3) explicitly referred to amending a statement of case by "*removing, adding or substituting a party*" in accordance with CPR 19.4 (at the post-service stage) reinforced the understanding that CPR 17.1(1) should not be read in such a restrictive manner.

Mr Justice Picken also noted that CPR 19.4(2) made it clear that an application for permission under CPR 19.4(1) could be made by either an "*existing party*" or "*a person who wishes to become a party*". This was a useful signal that the reference in CPR 17.1(1) to a party making an amendment was to be regarded as a reference to either an existing party or a person who wishes to become a party. Mr Justice Picken was satisfied that CPR 17.1(1) allowed an existing party to amend "*his statement of case*" to introduce an additional Claimant.

He further noted that to require Claimants in group litigation to issue separate proceedings every time they wanted to add additional Claimants entails a "*disproportionate approach to costs and, worse still, potentially represents a denial of access to justice*."

The formal position, regarding the matter of precedent, is that there are now two conflicting High Court authorities on the issue of whether additional Claimants can be added without permission under CPR 17.1.

Structured ADR Process in Group Litigation

Abdel-Kader v Kensington and Chelsea RLBC [2022] EWHC 2006 (QB)

On 28 July 2022, a second Case Management Conference ("**CMC**") in the Grenfell Tower Litigation highlighted the importance of Alternative Dispute Resolution ("**ADR**") in complex litigation cases where there are multiple claimants groups in numerous claims against some or all of the Defendants. The Grenfell Tower Litigation involves 1,134 issued claims and approximately 1,125 Claimants in total.

Following the second CMC, Senior Master Fontaine handed down a judgment for a stay of the proceedings for 12 months in order for the ADR process to take place. Senior Master Fontaine referred to the mediation as a "*constructive and sensible manner of progressing claims*" in complex litigation. The judgment reaffirms the courts' approach since the introduction of the CPR to "*encourage parties to try and achieve settlement without resorting to litigation*".

Although much of the ADR process is confidential, the Bindmans Claimants stated during the second CMC that, since the last CMC, the parties had agreed a "*detailed ADR framework for the Bindmans group of claims*." This framework has many strands and includes "*restorative justice overseen by a leading authority in the field*", Paul Van Zyl, and former president of the Supreme Court, Lord Neuberger, has agreed to be the mediator.

Costs and Security for Costs

The Enforceability of Conditional Fee Agreements

***Diag Human v Volterra Fietta* [2022] EWHC 2054 (QB)**

In what was described as a "*tough but not irrational*" consequence of failing to abide by the statutory provisions governing conditional fee agreements ("**CFAs**"), the High Court rejected attempts by a law firm to recover fees from a client under what it found to be an invalid retainer.

The Respondent ("**Diag**") instructed the Appellant ("**Volterra**") to represent it in a bilateral investment treaty arbitration in which Diag was claiming $2.4 billion.

In the initial retainer entered into in February 2017, Volterra was retained on a discounted hourly rate basis ("**Retainer One**"). Approximately $107,000 was billed under this arrangement before being amended by a side letter, signed by the parties in September 2017.

The side letter created a new retainer containing a CFA. Under the new retainer, Volterra agreed to apply a 30% discount to the fees under Retainer One, in exchange for a success fee entitling Volterra to 280% of its base fees (the "**New Retainer**").

By May 2019 Diag was in substantial fee arrears of almost $3m and the New Retainer was terminated. Volterra then brought a claim against Diag for payment of the arrears.

In order to be lawful and therefore enforceable, CFAs must comply with sections 58-58A of the Courts and Legal Services Act 1990. The statutory maximum for a success fee is 100% of the base fees.

Volterra did not dispute the unlawfulness of the CFA (due to the success fee being more than double the statutory maximum) however, Volterra argued that Retainer One was severable from the New Retainer. Diag, on the other hand, argued that the New Retainer changed the nature of the agreement to an unlawful CFA arrangement.

A Master of the Senior Courts Costs Office ("SCCO") agreed with Diag finding that, (i) a success fee of potentially 280% is unlawful and therefore unenforceable, (ii) unlawful CFAs may be severable from an overall contract but that was not the case here, and (iii) paying a law firm fees pursuant to an unlawful CFA amounted to unjust enrichment and therefore Volterra must return any fees paid.

On appeal to the High Court Volterra raised two questions: (i) can the offending provisions of a contract be severed; and (ii) where a retainer is unenforceable, does the *Aratra* decision mean that a client is not automatically entitled to return of the retainer unless he or she can prove he or she is owed restitution?

The High Court upheld the SCCO's findings and noted that permitting severance would "*allow virtually all defective CFAs or DBAs to be put right late in the day. This is not the effect of the statute read in the light of the earlier and subsequent caselaw. Further, it would undermine consumer protection and the administration of justice*".

As to the second question, the High Court disagreed with Volterra's contention that it was not possible to order a repayment of the monies without Diag making a restitutionary claim (Diag had not made any such claim). Volterra was therefore ordered to repay Diag any monies it received under the unenforceable CFA.

The judgment is a reminder of the importance of entering into compliant CFAs and the extreme consequences of failing to do so. This is all the more so as it is not unknown for non-compliant CFAs to be entered in respect of BIT arbitrations and other arbitrations with an international component but where the fee agreements are subject to English law.

Our more detailed discussion of this case can be found here.

Security for Costs

Ras Al Khaimah Investment Authority v Azima [2022] EWHC 1295 (Ch)

In *Ras Al Khaimah Investment Authority v Azima*, the High Court provided a timely reminder of the key principles pertaining to security for costs, including that:

- Where there is a risk of non-enforcement, security should usually be ordered by reference to the costs of the proceedings.

- The evidential hurdle in security for costs applications is real (meaning non-fanciful) risk of substantial obstacles to enforcement, rather than likelihood.

The case concerned the exercise of the Court's discretion under the CPR to order security for costs against a non-resident Claimant (the "**Respondent**" to the security for costs application). The High Court noted that it was not allowed to act in a discriminatory manner towards a non-resident unless there were objectively justified grounds relating to obstacles to, or the burden of, enforcement in the context of the particular foreign Claimant or country concerned. It highlighted the following factors as relevant to the exercise of its discretion:

- The Court can infer that there is a real risk of there being substantial obstacles to enforcing a future costs order if the non-resident Respondent does not disclose any details about the location, nature and/or value of its assets, and there is no other evidence available.

- In considering the evidence of the Respondent's assets, the Court will look at the actual location of all assets, not just those in their place of residence.

- The Court can take into account the Respondent's character, including whether the Respondent is "untruthful, dishonest and self-serving" or lacks "probity". Judicial findings of dishonesty and fraud are also relevant.

- It may also be relevant to consider whether the Respondent would be able to delay or avoid the enforcement of the costs order and whether there would be additional irrecoverable costs of enforcing a costs order in the place of residence. However, a Respondent cannot defeat an application for security simply by establishing the ease with which an English costs order can be enforced in the foreign jurisdiction without evidence that assets are located there.

Our in-depth discussion of this case can be found here.

Tulip Trading Limited v Bitcoin Association for BSV and others [2022] EWHC 2 (Ch)

The High Court in *Tulip Trading Limited v Bitcoin Association* did not allow the Claimant to use bitcoin to provide security for costs due to its volatility. However, it did not conclusively rule out the use of cryptocurrencies to provide security for costs. It remains an open question, therefore, whether less volatile cryptocurrencies or central bank digital currencies can be used to provide security for costs, or whether bitcoin will be a permissible form of security if its value stabilises in the future.

Service and Jurisdiction

In October 2022 amendments to the jurisdictional service gateways contained in Practice Direction 6B ("PD 6B") came into force thereby expanding the jurisdictional gateways available to claimants. In a general sense, the English court has jurisdiction over a party if that party can be validly served. Service and jurisdiction are therefore inherently linked. Despite the expansion of the service gateways, however, the amendments are unlikely to open the floodgates to litigation in England and Wales, although they are a welcome development.

Conditions Necessary to Establish Jurisdiction

When seeking permission to serve out of the jurisdiction, a claimant must satisfy three conditions:

- There is a good arguable case that the claim falls within one or more of the gateways in PD 6B, enabling the court to exercise jurisdiction over the foreign party.

- There must be a serious issue to be tried in respect of the underlying claim. In effect, the claimant must satisfy the court that the claim has reasonable prospects of success.

- Finally, England and Wales must be the appropriate jurisdiction in which the claim is to be tried.

Accordingly, the expansion of the jurisdictional gateways assists with only one of these conditions.

Jurisdictional Gateways

Below we consider some specific amendments to PD 6B.

Information Orders against Non-Parties

The amendments to PD 6B now provide a gateway for service out of the jurisdiction of claims seeking disclosure of information as opposed to substantive relief. The new gateway will be especially relevant for claims for Norwich Pharmacal orders and Bankers Trust orders, which we mentioned when discussing trends in crypto-currency disputes above.

With the amendments, a claim may now be made where:

- the claimant seeks disclosure of (i) the identity of the defendant or potential defendant, or (ii) what has become of the claimant's property; and

- the claim and application are made for the purposes of existing proceedings or proceedings that are intended to be commenced subject to receipt of the information sought.

As we noted above when considering cryptocurrency disputes, *LMN v Bitflyer Holdings Inc* [2022] EWHC 2954 (Comm) is one of the first cases to use the new jurisdictional gateway at paragraph 3.1(25) of PD 6B and shows the importance of the gateway to such disputes.

Extension of Contract and Tort Gateways

The amendments expand the contractual and tort gateways respectively. For example, now a claim may be brought where a contract is "*concluded by acceptance of an offer, which offer was received within the jurisdiction*" in addition to a case where a contract is made within the jurisdiction. Claims may also be brought for unlawfully causing or assisting in the breach of applicable contracts. The tort gateway now applies to claims governed by English law.

New Breach of Trust and Fiduciary Duty Gateways

Where there has been a breach of trust and the trust is subject to English law, or where such breaches have or are likely to occur within the jurisdiction, a claim may be made. Similar extensions are made with respect to constructive and resulting trusts, and accessorial liability claims. Parallel amendments have been made regarding breaches of fiduciary duty.

Domicile and Establishments

The new amendments to PD 6B expand the domicile test to include those persons or corporate entities domiciled in the jurisdiction but not physically present in England and Wales. They also include a gateway similar to the former Brussels regulation where there is a dispute arising out of the operations of a branch, agency, or other establishment of a person within the jurisdiction.

Other Changes to the Gateways

Amendments have also been made with respect to claims for breach of confidence and privacy claims, those permitting declarations of non-liability to be brought, and contempt applications.

For further information, see our more detailed commentary here.

Consultation on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Hague 2019)

Following its as-yet unsuccessful attempt to re-join the Lugano Convention, the UK government published a consultation seeking views on its plan for the UK to become a contracting state to the Hague Convention of 2019 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Hague Convention provides a framework of common rules to facilitate the recognition and enforcement of judgments from one jurisdiction to another. The UK becoming a contracting party to the Hague Convention would enable the enforceability of English judgments in the EU.

The consultation is expected to close on 9 February 2023, with responses published in Spring 2023.

The consultation can be accessed here.

Judgments

Re-opening Judgments

AIC Ltd v Federal Airports v Authority of Nigeria [2022] UKSC 16

It is well established that a court has the discretionary power to re-open its own judgment and order, provided that the order has not been sealed. What has been less clear, until now, are the principles that the court should consider when exercising this discretion in relation to unsealed orders concerning matters other than appeals. The Supreme Court has now provided some much-needed clarity in its judgment in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] UKSC 16, which concerned an arbitral award enforcement order.

The Supreme Court held that the question of whether to set aside the enforcement order centred on the finality principle, which requires that once a court issues a judgment it should – save for any appeal – be treated as final. This is a longstanding legal principle that is designed to ensure that litigation is conducted at proportionate cost and with expedition, and is also enshrined in the requirement in the Overriding Objective, specifically Civil Procedure Rule 1.1(2)(f).

Accordingly, the Supreme Court held that when a court considers whether to re-open a judgment and unsealed order, it must assess whether the factors in favour of doing so carry sufficient weight to override: (i) the finality principle; and (ii) any other factors pointing toward retaining the order. In relation to this exercise, the following points are pertinent:

- The court's discretionary power to re-open its own judgment and unsealed order is a "*structured*" form of discretion (at [37]), meaning that the court must give greater weight to some factors over others. Due to the fundamental importance of the finality principle, when the court performs its analysis it must start from the position that the scales are "*heavily loaded*" against the party seeking to re-open the order (at [45]).

- Notwithstanding the above point, the Supreme Court stressed that the courts have flexibility when considering whether to re-open a judgment and/or unsealed order (at [33]).

- While the finality principle will always carry significant weight, its precise weight can vary from case to case depending on the nature of the order already made, the type of hearing, or proceedings in which it was made. By way of example, where the order at issue would have the effect of ending the proceedings, the finality principle will carry the most weight, but would be less acute in relation to orders such as interim orders (at [35]).

- It would be wrong to attempt to identify a comprehensive list of factors that are capable of outweighing the finality principle. However, the Supreme Court indicated that it may be possible to identify factors that will never carry significant weight, for example "*a desire by counsel to re-argue a point lost at trial in a different way*" (at [40]).

We expect that the effect of this Supreme Court decision is that, going forward, significant factors will need to be present in order for a court to re-open its own judgment and unsealed order. Although the Appellant ultimately succeeded in this case, it paid a substantial price. The Supreme Court's decision sounds a strong warning to all litigants: if you fail to raise any arguments or evidence at a hearing, then you do so at your own risk.

Our full analysis can be found here.

Disclosure

There is never a shortage of cases on disclosure and 2022 was no different. We summarise some of the key developments and decisions on disclosure from 2022.

Documents "Mentioned" in Witness Statements

***Morten Hoegh and Thomas Hoegh v Taylor Wessing LLP and MSR Partners LLP* [2022] 4 WLUK 137**

In *Hoegh v Taylor Wessing* the Court considered an application for the production of documents referred to in a witness statement pursuant to CPR Practice Direction 51U ("**PD51U**") pursuant to which a party can request copies

of documents mentioned in a statement of case, witness statement, witness summary, affidavit, or expert report at any time.

The Second Defendant made an application for an order pursuant to CPR PD51U paragraphs 21.1 and 21.4 requiring the Claimants to produce documents that were said to be "mentioned" in a witness statement provided by their lawyer ("**Ray-Smith 3**"), which had been filed in support of a pleading amendment application. Paragraph 21.1 provides that a party may request a copy of a document "mentioned" in a witness statement. A document is "mentioned" where it is referred to, cited in whole or in part, or there is a direct allusion to it (paragraph 21.3 of PD51U).

The Claimants resisted the application on, *inter alia*, the basis that "review" was a reference to a process and no documents had been mentioned for the purposes of the rule.

Following a thorough and helpful review of the law, Deputy Master McQuail dismissed the application holding that the "review" of the Claimants' tax affairs *"[…] was a process, which probably generated documents, but it was not itself a document or collection of documents or even a compendious reference to a class of documents and nor did it 'comprise of' documents."* She went on to state at [40] that *"the Court of Appeal cases of Dubai and Rubin are clear. A document is not 'mentioned' to engage what is now paragraph 21 of PD51U unless the reference is a direct allusion to it or to its contents. Reference by inference is not sufficient and reference to the effect of a document rather than its contents is also not sufficient. Further a mere opinion that on the balance of probabilities a transaction will have been effected by a document is not itself enough."*

This case confirms the existing position, i.e. that the purpose behind the rule is a "cards on the table" approach to litigation and that "mentioned" is not a difficult test; it is "*as general as could be*" (*NCA v Abacha* [2016] EWCA Civ 760, [23]). Nonetheless, there is a real difference between a reference to the effect of a document and the contents of a document and the court will not accept overly technical arguments on whether a document has been "mentioned."

Our full discussion of *Hoegh v Taylor Wessing* can be found here.

Guidance on Redaction of Disclosed Documents under CPR PD 51U

JSC Commercial Bank Privatbank v Kolomoisky and others [2022] EWHC 868 (Ch)

In *JSC Commercial Bank Privatbank v Kolomoisky and others*, the High Court considered the approach taken by the First Defendant's solicitors when redacting WhatsApp messages. The Claimant submitted that the redactions were unjustified and sought an order that certain messages be disclosed in unredacted form.

The application was brought in the context of allegations made by Privatbank that the First and Second Defendants orchestrated a scheme to misappropriate around US $2 billion from the bank.

Of the 6,000 WhatsApp messages disclosed by the First Defendant, 272 were disclosed in redacted form. In a number of instances, it was not possible to identify the counterparty to the message. The Claimant asked the Court to order that 17 of the messages be disclosed in full. Alternatively, the Claimant sought an order for the Court to inspect the documents itself or for the documents to be disclosed to a closed group of solicitors to review and agree a way forward.

Trower J considered that a distinction needed to be drawn between (i) identifying a document as relevant in accordance with the Issues for Disclosure; and (ii) determining that a document was "*irrelevant to any issue in the proceedings*" for the purposes of paragraph 16.1(1) of CPR 51U. Once a document has been identified as disclosable, the question of whether parts of it can be excluded from inspection is to be assessed by applying a broader test than simply what may be relevant to any issue in the proceedings.

This case is an important reminder that, while parties giving disclosure have the ability to redact irrelevant confidential information, the test for relevance should not be limited to whether the information is relevant in accordance with the issues for disclosure. The question of whether the information is "*irrelevant to any issue in the proceedings*" is a broader test. While the court identifies the need for proportionality in conducting a search for relevant documents, once a document has been identified for disclosure, different considerations apply to whether there are justifiable grounds to apply redactions. Parties should therefore think carefully about applying broad redactions to "*unrelated commercial transactions and other commercial information*" in circumstances where evidence of the wider commercial relationship between the parties may have relevance beyond the specific transaction in dispute.

Our full discussion of *Privatbank v Kolomoisky* can be found here.

High Court Makes the Disclosure Pilot Scheme Permanent for the Business and Property Courts

In what might not be the most welcome news to practitioners, the Chancellors of the High Court have announced the approval of a new Practice Direction for disclosure in the Business and Property Courts, making the Disclosure Pilot Scheme permanent.

The new Practice Direction 57AD ("**PD 57 AD**") applies to all existing and new proceedings (subject to limited exceptions) in the Business and Property Courts from 1 October 2022. The new practice direction largely implements the rules from the Disclosure Pilot Scheme (Practice Direction 51U) ("**DPS**"), which was

implemented in 2019 in an attempt to manage the costs and complexity of the disclosure process.

The DPS was introduced to bring the principles of reasonableness and proportionately to the forefront of the disclosure process. Some key features of the DPS included: (i) emphasis on early engagement; (ii) standard disclosure is not the default; (iii) cooperation between the parties is essential; (iv) the use of technology is encouraged.

The DPS has been criticised by many in the profession for making the disclosure process more complex than it had been under the old regime. The DPS introduced new stages to the disclosure process and was criticised for not ultimately making disclosure more manageable for large commercial disputes. However, the approval of PD 57 AD for disclosure is an endorsement from the High Court of the DPS and provides the Business and Property Courts with case management powers to actively manage disclosure issues and bring about a "cultural change" in how disclosure is approached. PD 57 AD has not, at this stage, been implemented more widely and does not replace the standard rules for disclosure and inspection of documents (found in Part 31 of the Civil Procedure Rules), which still apply in other courts.

Our full discussion of the DPS becoming permanent can be found here.

High Court Provides Guidance on English Disclosure Rules

Provimi France S.A.S. & Ors v Stour Bay Company Limited [2022] EWHC 218 (Comm)

The proceedings concerned a claim for breach of contract in which the Claimant alleged that the Defendant had sold it a defective product.

The Defendant complained of a "*substantial lacuna*" in the Claimant's disclosure due to the fact that the Claimant group's document retention policy provided for documents held in individual Outlook files to be deleted after three years. Accordingly, Outlook documents pre-dating 2016—the entire period relevant to the claim—may not have been available.

Correspondence between the parties' solicitors had suggested that the failure to put in place a litigation hold, to prevent documents from being automatically deleted, was not the result of the Claimant's solicitors failing to give advice, but the result of the Claimant's in-house lawyer—unfamiliar with English disclosure rules—failing to appreciate the advice given as to the types of documents that should be retained.

The Court noted that the deletion of emails, which likely included a number of relevant documents, was "*highly regrettable*", and that "*it serve[d] to emphasise the importance of solicitors dealing with clients unfamiliar with English disclosure rules*

explaining the position fully." Further, the Court also considered that *"[i]t may well be that an instruction simply to retain relevant documents, without explaining or ensuring that the client understands exactly what "relevant" means, is not enough*."

Our full discussion of the *Sheeran v Chokri* and *Provimi France S.A.S. v Stour Bay Company Limited* can be found here.

Evidence

Trial Witness Statements – PD 57AC

In early 2021, Practice Direction ("**PD**") 57AC and its Appendix (Statement of Best Practice in relation to Trial Witness Statements) were introduced, setting out the rules applicable to trial witness statements signed on or after 6 April 2021 in the Business and Property Courts. The PD was introduced following rising criticism concerning the preparation of trial witness statements and the fact that such statements were often 'over-lawyered'.[5]

The PD sets out various requirements that trial witness statements need to comply with, including: (i) stating, if practicable, the strength of the witness's recollection of the matters addressed and whether their recollection had been refreshed by reference to documents; (ii) being prepared using as few drafts as practicable and based upon a record or notes made by the relevant party's legal representatives of evidence they obtained from the witness; (iii) include a confirmation of compliance with PD 57AC; and (iv) identify by list any documents the witness has referred to, or been referred to, for the purpose of providing their witness statement evidence.

Just under two years since PD 57AC was introduced, the English courts have issued a number of judgments addressing the rule. Several cases were discussed in our 2021 Annual Review here and our 2022 mid-year publication here. Further 2022 judgments are discussed below.

Cost Consequences Relating to Non-Compliant Witness Statements

Two recent cases have indicated that parties may incur serious costs consequences for failing to comply with PD 57AC, serving as a useful reminder to parties to take care in ensuring compliance with PD 57AC when preparing trial witness statements, and that any issues regarding non-compliance are addressed in a proportionate, co-operative manner and at an early stage; failure to do so could lead to an order of indemnity costs being made.

---

[5] Factual Witness Evidence in Trials before the Business & Property Courts: Report of the Witness Evidence Working Group at [57].

McKinney Plant & Safety Ltd v The Construction Industry Training Board [2022] EWHC 2361 (Ch)

McKinney concerned issues regarding a supplemental witness statement served by the Claimant in the proceedings ("**McKinney 2**"), and in particular, McKinney 2's non-compliance with PD 57AC. The Defendant initially flagged its concerns about McKinney 2's non-compliance with PD 57AC to the Claimant in writing. The Claimant responded, dismissing criticisms raised by the Defendant as "*nit-picking*". The deputy judge ordered the parties to file written submission on the issue at the Pre-Trial Review.

Having analysed McKinney 2, the Claimant concluded that only 7 out of 102 paragraphs of the statement did not require modification. The Claimant proceeded to file a revised witness statement that the Defendant also considered to be in breach of PD 57AC. The Defendant sought its costs on the indemnity basis. The deputy judge observed that McKinney 2 was in substantial breach of PD 57AC and noted the following issues amongst others: (i) the witness statement gave extensive commentary on evidence that was not available to Mr McKinney at the time of the events in question; (ii) the witness statement contained extensive submissions; (iii) lists of documents were not filed; and (iv) the confirmations of compliance with PD 57AC were only provided two weeks after McKinney 2 was signed.

The deputy judge ordered indemnity costs against the Claimant and took the following points into consideration when making his decision:

- the breach of PD 57AC was serious as the "overwhelming majority" of McKinney 2 had to be altered;
- the Claimant had failed to engage with the complaints raised by the Defendant in a timely manner; and
- when the Claimant did respond, its response was dismissive and uncooperative.

In making his decision, he held that "*the seriousness of the breach and the Claimant's refusal to engage with it until I raised the point does take this case well outside the norm and does merit an award of indemnity costs.*"

Our full discussion of the decision can be found here.

Prime London Holdings 11 Ltd. v. Thurloe Lodge Ltd [2022] EWHC 79 (Ch)

Prime London concerned a dispute over property rights and access, as the Claimant wished to have access over the Defendant's land in order to make repairs to a wall. This was resisted by the defendant. Shortly before the commencement of the trial, the Claimant made an application for the

Defendant's witness statement to be struck out on the basis it was non-compliant with PD 57AC. The Defendant also made an application around the same time, requesting relief from sanctions and for a revised version of the witness statement to be admitted into evidence.

The deputy judge hearing the case held that the witness statement as originally drafted failed to comply with PD 57AC, and reiterated that the purpose of the rule is to ensure that witness statements do not become a vehicle for arguments and submission, and that they should be confined to the knowledge of the witness. In considering the Court's approach to the non-compliant witness statement, the deputy judge explained that the Court, pursuant to its general case management powers, was able to order (i) the non-compliant witness statement be struck out, (ii) the witness statement to be redrafted, or (iii) the witness to give some or all of their evidence in chief orally. That said, the deputy judge held that the striking out of a witness statement should only be actioned in the most serious cases and that in these circumstances, the Claimant's failures "*were not particularly egregious in their non-compliance*" and therefore the witness statement should not be struck out.

The deputy judge was critical of both parties in the proceedings; firstly of the Defendant for not complying with PD 57AC, and secondly of the Claimant for failing to raise its objections at an earlier stage with the Defendant with a view to agreeing a revised version of the witness statement that could be submitted. In relation to this latter point, the deputy judge referenced *Mansion Place Limited v Box Industrial Services Ltd* [2021] EWHC 2747 (TCC)[6] in which O'Farrell J held at [49] that:

"[w]*here a party is concerned that another party has not complied with the Practice Direction in any particular respect, the sensible course of action is to raise that concern with the other side and attempt to reach agreement on the issue. Where that is not possible, parties should seek the assistance of the court, by application for a determination on the documents or at a hearing. However, this should be done at a time and in a manner that does not cause disruption to trial preparation or unnecessary costs…*"

The deputy judge decided that in this case, the appropriate action would be to replace the original non-compliant statement with a compliant one. Although the deputy judge reserved the issue of costs for a separate occasion, he noted that indemnity costs could be appropriate and emphasised that his tolerant approach in his decision should "*not be seen as providing any carte blanche to parties to play fast and loose with the Practice Direction.*"

Our full discussion of *Prime London* can be found here.

---

[6] Our full discussion of *Mansion Place* can be found here.

Applications Relating to PD 57AC Should Not Be Used as a Weapon

Two recent cases have emphasised the importance of common sense, cost-effective approaches being adopted by parties in respect of applications concerning non-compliance with PD 57AC.

Lifestyle Equities CV & Anor v Royal County of Berkshire Polo Club Ltd & Ors [2022] EWHC 1244 (Ch)

In *Lifestyle Equities,* an application was made by the Claimants at the Pre-Trial Review to strike out considerable sections from two witness statements prepared on behalf of the First to Fifth Defendants as a result of their alleged non-compliance with PD 57AC.

The Claimants' lengthy objections focussed on passages in the witness statements containing (i) commentary on evidence and documents, (ii) commentary on matters outside of the witness's own knowledge, and (iii) argument and/or submission.

The judge considered that although the Claimants' statements contained "*minor infractions*" of PD 57AC, it was "*not reasonably necessary to excise any of the paragraphs or passages to which* [the Claimants] *objected*." At [98] the Court provided a useful reminder to practitioners advancing applications relating to PD 57AC:

"*PD 57AC should not be taken as a weapon with which to fillet from a witness statement either two or three words at various points or essentially insignificant failures to comply with PD 57AC in a witness statement. Furthermore, in my view, before an application is brought seeking to strike out passages in a witness statement based on PD 57AC,* careful *consideration should be given as to proportionality and whether such an application is really necessary. Indeed, in my view, an application is warranted only where there is a substantial breach of PD 57AC (as, for example, Greencastle).*[7] *If there really is a substantial breach of PD 57AC, it should be readily apparent and capable of being dealt with on the papers. That might provide a mechanism for dealing with objections in an efficient and cost-effective manner.*"

Curtiss & Ors v Zurich Insurance plc & Ors [2022] EWHC 1514 (TCC)

Curtiss provides a strong warning to practitioners to ensure that a proportionate, reasonable and considered approach is taken when making application for strike out regarding non-compliance of witness statements pursuant to PD 57AC. In *Curtiss*, the Claimants were awarded 75% of their costs on the indemnity basis

---

[7] *Greencastle MM LLP v Payne & Ors* [2022] EWHC 438 (IPEC) is discussed in further detail below.

following the First Defendant's partially successful application to strike out certain parts of the Claimants' witness evidence.

The First Defendant had applied to strike out all or part of some of the Claimants' 39 witness statements on the basis of non-compliance with PD 57AC. In doing so, the First Defendant's solicitors set out a 109-page schedule providing particulars of the alleged non-compliance. The judge held that four of the Claimants' witness statements were to be struck out on the basis that they contained no relevant evidence from the witnesses' knowledge but instead introduced opinion evidence. Sections of another statement were also struck out on the basis that they contained commentary on matters that fell outside the proper scope of the witness's evidence. The remaining parts of the First Defendant's application were unsuccessful.

Costs incurred from both parties in respect of the application exceeded £275,000 excluding VAT. In relation to these costs, the judge commented at [10] that "*there is no rational world in which this sort of expenditure can have been justified on an application such as this.*" At [12], the judge criticised the First Defendant's conduct further:

"the application was prepared and, until a very late stage, presented on a scale that was disproportionate and unmanageable. It was not an attempt to conduct the litigation in a reasonable and proportionate manner but a piece of strategy…by a party with deep pockets and presented a major distraction in the run-up to trial. The application ought not to have been made."

As with *Lifestyle Equities,* the judge reminded the parties at [19] that applications for the impositions of sanctions for non-compliance with PD 57AC "*should not be used as a weapon for the purposes of battering the opposition*" and that parties must undertake a 'common sense' approach and act with proportionality when deciding how to respond to non-compliance with PD 57 AC.

Sanctions for Non-Compliant Witness Statements

Greencastle MM LLP v Payne & Ors [2022] EWHC 438 (IPEC)

In March this year, a judge held that two of the Claimant's witness statements were in breach of PD 57AC in what he described at [24] as "*the clearest case of failure to comply with Practice Direction 57AC that I have seen since it* […] *came into force in April 2021.*"

Shortly before the Pre-Trial Review, the Defendants issued an application regarding one of the Claimant's witness statements in the proceedings, requesting an order that various identified passages of the statement be struck out due to non-compliance with PD 57AC. The Defendants made a further application a few days later, requesting a further witness statement filed by the Claimant to be struck out in its entirety due to non-compliance with PD 57AC.

Both witness statements were provided by the Claimant's CEO and the only witness to be called on behalf of the Claimant at trial.

Fancourt J was highly critical of the witness statements, expressing "*real doubts*" as to whether the Claimant's CEO and his lawyer had even read PD 57AC or "*understood the effect and purpose of it*". At [22] he noted that:

"the whole purpose of Practice Direction 57AC is to avoid a situation where the witness statements are full of comment, opinion, argument and matters asserted that are not within the knowledge of the witness, which have to be disentangled at trial by protracted cross-examination. The purpose is to limit factual evidence to admissible and relevant evidence on facts within the witness's own knowledge (including correctly identified hearsay evidence) that a witness can properly give in relation to disputed issues of fact."

The judge went on to discuss the various powers the Court had to address non-compliant witness statements pursuant to PD 57AC:

- Withdraw permission for the witness statements, leaving the Claimant to apply for permission to adduce a further witness statement;
- Withdraw permission for the witness statements, but order that the statements be redrafted to comply with PD 57AC;
- Excise the non-compliant passages from the witness statements;
- Order that the witness give some or all of their evidence in chief orally at the trial; and
- Do nothing and let the matter go on to trial and make an adverse costs order against the non-compliant party.

Fancourt J noted at [35] that if there was a "*sensible alternative to striking out the witness statements and directing that oral evidence be given in chief at trial*" he would prefer that alternative. He held that in the circumstances, the right approach was to withdraw permission for the Claimant's two witness statements and provide permission for the Claimant to prepare a fully compliant witness statement to be filed a week later.

Primavera Associates Ltd v Hertsmere Borough Council [2022] EWHC 1240 (Ch)

In Primavera, HHJ Paul Matthews (sitting as a High Court Judge) held that certain sections of the Claimant's witness statement be struck out for non-compliance with PD 57AC.

In the underlying proceedings, the Claimant served a single witness statement and the Defendant notified the Claimant that it would not be serving any witness statements for trial. Upon receipt of the Claimant's statement, the Defendant considered it to be "*wholly non-compliant*" with PD 57AC. The Defendant noted, amongst other things, that the statement did not contain the confirmation certificates for the witness and solicitor as required by PD 57AC. The Defendant wrote to the Claimant on several occasions highlighting issues with the witness statement, however, no response was received. The Defendant then made an application to the Court requesting that the witness statement be redrafted to comply with PD 57AC, or alternatively be struck out.

The application was successful and the Court ordered the Claimant's statement to be redrafted so that it complied with PD 57AC. The Claimant filed and served a revised statement, however, the Defendant considered the revised statement to still be non-compliant on the basis that it (i) took the Court through documents, (ii) continued to argue the Claimant's case, and (iii) failed to set out how well the witness recalled certain matters and whether his memory had been refreshed by considering documents, and if so how and when. The Defendant applied to Court to have the whole statement struck out and provided 'examples' of the non-compliance as part of its supporting evidence.

HHJ Paul Matthews ordered that certain sections of the Claimant's witness statement were to be struck out for non-compliance. He refused to strike out the whole statement, holding that the points raised by the Defendant related to certain paragraphs of the statement (in the form of examples) and not to the whole content of the statement. In relation to this, at [23] he noted:

> "[…] *merely calling the specified paragraphs "examples" does not somehow mean that the burden is thereby cast on the claimant in relation to the non-specified paragraphs. The burden is still on the defendant. Showing, for example, that one paragraph in a statement consists of argument does not prove that other paragraphs do as well.*"

In making his decision, HHJ Matthews stated at [35] that in circumstances where (i) the Claimant is professionally represented, (ii) the lawyers have already redrafted the statement once due to non-compliance with PD 57AC, and (iii) they have opposed the application on the basis that the statement is compliant, it would not be appropriate to impose a lesser sanction than withdrawing permission to the Claimant to rely on the non-compliant paragraphs. In these circumstances, he considered that the appropriate sanction was to strike out the relevant non-compliant sections.

The case serves as a useful reminder to practitioners to ensure that when making an application to court for strike out of a witness statement due to non-compliance with PD 57AC, particulars detailing non-compliance relating to the *whole* witness statement should be given rather than a set of examples.

Drafting Witness Statements for Witnesses Whose Native Language Is Not English

Three recent cases have considered the appropriate language to use when drafting a non-native English speaker's witness statement to ensure compliance with CPR PD 57AC and CPR PD 32. Above all, parties should consider using translators where a witness's first language is not English, to comply with the applicable Practice Directions.

Bahia v Sidhu [2022] EWHC 875 (Ch)

Bahia concerned a partnership dispute between Jaswinder Singh Bahia ("**Mr Bahia**") and Tara Singh Sidhu ("**Mr Sidhu**"). Mr Bahia provided two witness statements at trial which were written in English.

During the course of Mr Bahia's oral evidence, it transpired that:

- a Punjabi translation of Mr Bahia's statement had been prepared after the date he had signed his English statement, but had not been lodged with the Court;

- Mr Bahia appeared to understand and speak simple English, but often switched to Punjabi to answer more demanding questions;

- Mr Bahia required an interpreter for the entirety of his evidence, even requesting that certain paragraphs of his witness statement be translated; and

- there were, as revealed by Mr Bahia himself, "many" words in his English witness statement that he did not understand.

Counsel for the Defendant argued that Mr Bahia's statements were in breach of PD 32 and PD 57AC. Specifically, he submitted that, *inter alia*, the statements:

- were not in his own words (PD 32, §18.1); and

- had not been drafted in his own language (*i.e.* in a language in which Mr Bahia was sufficiently fluent to give oral evidence, including under cross examination) (PD 32, §18.1; and PD 57AC, §3.3).

Accordingly, the Defendant submitted that the Court should approach Mr Bahia's statements with a "*considerable degree of caution*", and afford his statements no weight.

The High Court acknowledged that it was doubtful as to whether Mr Bahia's statements should have been prepared in English, and that the statements had been "overly lawyered". Nonetheless, the Court found that there had been "no

serious breach" of the relevant Practice Directions. Further, the High Court considered that "*Mr Bahia's solicitors were faced with a difficult decision over the language to use in the preparation of his statements and, on balance their decision to prepare them in English* [was] *not open to criticism*".

Our full discussion of the decision can be found here.

Correia v Williams [2022] EWHC 2824 (KB)

Mr Jose Carlos Maques Correia ("**Mr Correia**"), a Portuguese national, brought a tortious claim for damages against Ms Suleima Williams ("**Ms Williams**") for serious personal injury following a road traffic accident in 2017.

In 2021, at a trial in the Central London County Court, concern was raised at the fact that Mr Correia's witness statement was written in English. HHJ Gerald noted that Mr Correia was plainly a Portuguese speaker who was not particularly proficient in English, and that Mr Correia had given instructions to his solicitor in Portuguese, who took notes in English, and subsequently drafted a witness statement in English.

HHJ Gerald held that Mr Correia's witness statement was "*simply not a witness statement*", and so it was not admissible as such. In particular, HHJ Gerald cited several reasons as to why allowing Mr Correia's witness statement to be admitted would have been grossly unfair:

- it is only fair to the witness that they give their statement in their own language, because if they get it wrong, they may lose the case, and they run the risk of being in contempt of court;

- Ms Williams had provided a witness statement that complied with the rules, and, as a result, Mr Correia knew the evidence to which he had to respond. By contrast, Ms Williams had only the account of events drafted by Mr Correia's solicitor, in a language in which Mr Correia was not fluent; and

- it is critical that a witness be tied down—in advance of trial—to one version of events and then cross-examined on the basis of it.

Mr Correia appealed against HHJ Gerald's finding that his witness statement was inadmissible. Garnham J in the High Court dismissed Mr Correia's appeal, and found that HHJ Gerald was entitled to exercise his discretion to refuse to admit the statement.[8] Of particular note are Garnham J's findings that:

---

[8] However, Garnham J did not think it was appropriate to find that Mr Correia's statement was "*simply not a witness statement*". In his view, it was a witness

1. If the witness's statement is not in the witness's own language, there can be no confidence that it is their own evidence rather than the evidence of the drafter;

2. Whilst the words "*if practical*" in CPR PD 32 paragraph 18.1 qualify the need for the witness statement to be in the witness's own words, there is no such qualification for the following clause in paragraph 18.1. On the contrary, the expression that applies to the requirement that the statement is in the witness's own language is "*in any event*";

3. There is nothing in CPR PD 32 paragraph 25.2[9] to suggest that the deficiencies to which it refers are *only* deficiencies of form rather than deficiencies of substance. Thus, in the case of errors of 'form' on a witness statement, the default position is that the statement is admitted (unless the court rules otherwise)[10] and in the case of defects of 'substance', the default position is that the statement is not admitted, unless the court agrees (CPR PD 32, §25.2).

Requirement to Seek Permission for Foreign Witnesses to Give Evidence

Where civil proceedings have been commenced in England and Wales, evidence required for trial may be located overseas. In these circumstances—especially in a situation where a foreign witness is unwilling to give evidence—it may be possible to seek assistance from the relevant foreign judicial authorities to obtain evidence in the form of witness deposition or documents. A party may apply to the English courts to issue a 'letter of request' to the relevant foreign court requesting that they order the taking of evidence abroad and send that evidence to the English court for use in the English proceedings.

Of particular note are two recent decisions that confirm that the courts will not allow the 'letters of request' regime to be circumvented by the use of an application under CPR 31.17 for third-party disclosure.

Nix v Emerdata Limited & Anor [2022] EWHC 718 (Comm)

In *Nix*, the Commercial Court was concerned with two applications by the Defendant:

---

statement, however, it was manifestly defective in all the respects identified by HHJ Gerald.

9 CPR PD 32, §25.2 provides that: "*[p]ermission to file a defective…witness statement…may be obtained from a judge in the court where the case is proceeding.*"

10 CPR PD 32, § 25.1 provides that: "*where…a witness statement…does not comply with Part 32 or this practice direction in relation to its form, the court may refuse to admit it as evidence and may refuse to allow the costs arising from its preparation*".

1. A third-party disclosure application against the Claimant's New York solicitors, Schulte Roth & Zabel LLP (the "**Respondent**"), seeking access to the communications that had passed between the Defendant's representatives and the Claimant (the "**TPD Application**"); and

2. An application for permission to serve the TPD Application on the Respondent outside the jurisdiction (the "**Service Application**").

In considering the Defendant's application for a third-party disclosure order (under section 34 of the Senior Courts Act 1981 and Civil Procedure Rule 31.17), Cockerill J held that the Court did not have jurisdiction to grant permission to serve the TPD application on a foreign non-party outside the jurisdiction.[11]

Notably, the Court considered that the Service Application was merely a way around the 'letter of request' regime, and that "*[t]he letter of request regime was the proper, courteous, respectful method of obtaining evidence within a foreign jurisdiction from a foreign party*".

Further, Cockerill J commented *obiter* that even if the Court had jurisdiction to grant the order sought, she would not be minded to do so where a party was plainly trespassing on the 'letter of request' regime.

Our full discussion of the decision can be found here.

Gorbachev v Guriev & Ors [2022] EWCA Civ 1270

In *Gorbachev,* the Claimant sought to obtain, pursuant to Civil Procedure Rule 31.17 and section 34 of the Senior Courts Act 1981, an order for third-party disclosure of certain documents held by Forsters LLP (an English law firm) on behalf of the Respondents.

In *Gorbachev v Guriev & Ors* [2022] EWHC 1907 (Comm), Jacobs J had held that: (*i*) the Court has jurisdiction to permit service out of a third-party disclosure application abroad under 'gateway' 20(a) of Practice Direction 6B[12] (a finding at odds with Cockerill J's decision in *Nix*); and (*ii*) in appropriate cases (such as the present where the documents sought were located in England, but the relevant Respondents were not), the court will be inclined to exercise its discretion to grant such permission.

---

[11] N.B.: The decision in *Nix* has been partially overruled by the Court of Appeal's decision in *Gorbachev v Guriev & Ors* [2022] EWCA Civ 1270 (see below).

[12] Gateway 20(a) provides that a claimant may serve a claim form outside the jurisdiction with the court's permission where: "*(20) a claim is made—(a) under an enactment which allows proceedings to be brought and these proceedings are not covered by any of the other grounds referred to in [PD 6B para 3.1]*".

The Court of Appeal narrowly confirmed Jacobs J's decision, finding that the courts *only* have the power to permit service of a third-party disclosure application outside the jurisdiction for an order to produce documents that are located within England.

Males J (delivering the leading judgment of the Court of Appeal) left undecided the issue of whether the court would have jurisdiction to make such an order, and thus permit service out of the jurisdiction, where the documents sought are located abroad. Nonetheless, Males J noted that:

"*Even if jurisdiction exists to make an order against a third party for production of documents held abroad, in view of the availability of the letter of request procedure it would only be in an exceptional case that it would be appropriate to exercise that jurisdiction, for the reasons given by Mrs Justice Cockerill in Nix v Emerdata Ltd. Still less would it be appropriate to do so in order to obtain documents (for example, classes of documents) which could not be obtained pursuant to a letter of request*".

In particular, Males J considered that if wide-ranging disclosure of documents held by third parties abroad could be too readily obtained by means of an application under section 34 of the Senior Courts Act 1981 and Civil Procedure Rule 31.17 then: (*i*) international comity might be infringed; and (*ii*) the 'letter of request' procedure would be circumvented.

Our full discussion of the decision can be found here.

Conduct of Parties

2022 has seen a number of very high-profile cases of litigation (mis-)conduct – a reliable guide to practitioners on how *not* to conduct litigation.

Impact on Costs

The biggest consequence for parties who misbehave in litigation is an award of costs on the indemnity basis. Over the past year, parties have had indemnity costs awarded against them for conduct ranging from inappropriate redactions, to non-compliance with court deadlines. Conversely, the courts have been reluctant to award indemnity costs for failure to engage with mediation alone.

Mr Pisante & ors v Mr Logothetis & ors [2022] EWHC 2575 (Comm)

In *Pisante*, the judgment handed down following a consequentials hearing provided some helpful guidance on when a party will become liable for indemnity costs.

The trial took place across two weeks in July 2021, and judgment was handed down in January 2022. The first Defendant, Mr Logothetis, was found to have

fraudulently misrepresented the basis on which his company, Lomas, would be contributing to a joint venture. The First Claimant, Mr Pisante, was induced by that misrepresentation to invest (via his company, Swindon Holdings & Finance Limited)in the joint venture.

The Claimants sought their costs on an indemnity basis, seeking to establish a presumptive rule that where fraud is proved, the successful claimant's costs should be assessed on the indemnity basis – a corollary to the way in which a successful Defendant who defeats a fraud claim is ordinarily entitled to their costs on the indemnity basis. The Claimants also relied on the unreasonable conduct of the Defendants in seeking indemnity costs.

Although the Court rejected the first argument, it accepted the unreasonableness of the Defendants' conduct. That conduct involved:

- The redaction of highly relevant and adverse material during disclosure, for which there was "*no arguable justification*".

- Pursuing the case to trial where there was clear documentary evidence that Mr Logothetis had made the misrepresentations complained of. This was compounded by Mr Logothetis, in his evidence, seeking to "*explain away the contemporaneous material*" by concocting an alternative interpretation in "*an attempt to create plausible deniability*".

- The confrontational and less than forthcoming approach of certain of the Defendants' witnesses while giving evidence.

- The Defendants' overly aggressive response to the Claimant's "serious and measured" letter before action.

- The terms of a press release issued after the decision became public.

The response to the letter before action drew particular criticism from the Court. In their letter, the Defendants had described claims as *"vexatious"*, *"defamatory"* and *"nothing more than a thinly veiled attempt to coerce Mr Logothetis to settle […] with the threat of negative publicity"*. The Defendants' letter had gone on to suggest that those representing the Claimants would be reported to the SRA and Bar Council and that a wasted costs order could be sought against the Claimants' solicitors.

Mr Justice Baker concluded his thoughts on the response letter by saying *"It is the mildest of responses by the court, and a just consequence, that defendants who so sought to bully the claimants as to the merits of their claim should be required as fully as the costs rules will permit to indemnify the claimants in respect of their costs after they have made the claim good"*.

This judgment shows that courts are rarely receptive to aggressive tactics, and is indeed willing to punish litigants if they go too far.

Our full discussion of this decision can be found here.

Paul Richards and Keith Purves v Speechly Bircham and Charles Russell Speechlys LLP [2022] EWHC 1512 (Comm)

In *Richards & Anor v Speechly Bircham & Anor* the Court considered the consequential matters arising from the Claimants' successful claim in negligence. The consequential matters included the issue of costs, and the basis on which they were to be awarded.

In support of their application for indemnity costs, the Claimants pointed to four separate offers to mediate that they had made to the Defendants. Those offers were sent in *"without prejudice save as to costs"* correspondence, and three of the offers had been made before the Claimants issued the Claim Form. The fourth offer was made following service of the Defence, and in advance of the first case management conference.

The Defendants had responded to the first offer by stating that it would not be productive or cost effective at that stage, and rejected the other three offers by stating that there was no point in engaging in mediation as the claim was doomed to fail.

The Defendants argued that their refusal to mediate had not been unreasonable, and that even if it was unreasonable, the refusal to mediate was only one facet of the Defendants' conduct to be taken into account when determining costs.

The Court considered the Defendants' conduct in detail, and concluded that:

- The uncertainty of the outcome at any mediation means that a party who suggests unreasonableness on the part of their opponent "*cannot point to the result at trial and demonstrate that costs have been wasted through the mediation not having taken place.*" Accordingly, the Defendants' conduct in refusing to mediate was not sufficient on its own to warrant an order for indemnity costs.

- The Defendants' conduct in successfully resisting a significant part of the claim, and doing significantly better than either of the two Part 36 offers made by the Claimants, also weighed in the Defendants' favour.

The Court concluded that although the Defendants' failure to engage in mediation was unreasonable, it did not justify an award for costs on the indemnity basis. Such an award would have elevated that factor over others weighing in the Defendants' favour.

Our full discussion of the decision can be found here.

Adverse Inferences

Vardy v Rooney [2022] EWHC 2017 (QB)

Beyond costs consequences, the courts have shown again this year the importance of ensuring relevant evidential material is available. *Vardy v Rooney* made the news for many reasons this year, and illustrates this important point.

One of the issues the Court had to determine in *Vardy* was whether the Defendant had established a defence of truth to the claim made against her. The Court ultimately held that the defence was made out, and dismissed the claim.

In reaching this conclusion, the Court carefully considered allegations concerning a volume of missing evidence: WhatsApp media files (i.e. photos, videos and GIFs, but not the text of messages themselves, which had been disclosed) between the Claimant and her agent. The Defendant had alleged that the agent was the conduit through which the Claimant had leaked the Defendant's social media posts to the press. The Defendant alleged that the loss of media files had been deliberate.

The Claimant denied this. She stated that the files were lost when she tried to transfer her WhatsApp data to her lawyers via a document-sharing platform; an explanation the respective experts in the case found "*surprising*" and "*impossible*". In addition to this, Ms Vardy also had disposed of the laptop she used to transfer the files, claiming that "*it had been damaged beyond repair*". The agent's (now infamous) explanation for the loss of media files on her own device was that she had accidentally dropped her phone into the North Sea during a family holiday in August 2021, shortly after an order had been made requiring inspection of that phone.

The Court did not think much of these explanations. Mrs Justice Steyn found that (i) it was "likely" that the loss of the files was "not accidental"; (ii) the Claimant had deliberately deleted the WhatsApp media files exchanged with her agent; and (iii) the agent had deliberately dropped her phone in the sea.

In the absence of the evidence, Steyn J drew the significant adverse inference that "*both Ms Vardy and Ms Watt have engaged in destroying relevant information which would undermine Ms Vardy's case*". This—along with other factors such as the Defendant's belief that there was no reason to suspect any of her other followers of publishing the posts and stories—contributed to Steyn J's finding that it was probable that the Claimant's agent had provided certain stories to the press "*with the knowledge and approval of*" the Claimant, with the result that the statutory truth defence was satisfied.

Our full discussion of the decision can be found here.

Abuse of Process

Alfozan v Quastel Midgen LLP [2022] EWHC 66 (Comm)

It has always been the case that parties may issue protective proceedings shortly before the expiration of a limitation period in order to preserve their cause of action. In the recent case of *Alfozan*, it was held that doing so, then failing to do anything more than the bare minimum to keep the proceedings alive, may amount to an abuse of process, giving the defendant grounds to strike out the claim.

In *Alfozan*, both the first and second Defendants applied to strike out the claim. The claim against the first Defendant was struck out on 21 May 2021 on grounds that the proceedings were an abuse of process due to the inaction of the Claimant following the commencement of the proceedings.

The second Defendant, a law firm which had acted for the Claimant in the purchase of a series of properties, issued an application to strike out the proceedings on 21 May 2021, also asserting that the inaction of the Claimant in prosecuting the claim was an abuse of process. By this time, the proceedings were nearly two years old. The delay had been caused by a number of factors:

- The Claimant waited until the end of the period during which the Claim Form was valid to serve it;

- The Claimant's pleadings were deficient, and although the Claimant agreed that amendments were needed, he took approximately 17 months to send amended particulars to the Defendants;

- Following service of the Defendants' defences, the Claimant made no attempts to list a CMC.

As to whether there had been an abuse of process by the Claimant justifying the strike out of his claim against the second Defendant, Pearce J considered that:

- Although the judgment on the strike out of the First Defendant's claim was relevant, each case must turn on its own facts. Accordingly, it was relevant to show a pattern of abusing the process of the court by the Claimant.

- Where there was a pattern of this kind, the ultimate power of strike out is more likely to be exercised because of the party's tendency to waste time and resources of others on litigation which is not being properly conducted.

- Although delay alone is not an abuse of process, where the Claimant's behaviour goes beyond mere delay it may amount to "warehousing" of claims, which would be an abuse.

- Warehousing can occur in situations where the Claimant commences the claim and has no intention to pursue the claim in the short to medium term, as in the present case.

- In order to be struck out for abuse of process by warehousing, the court will consider whether the behaviour is in fact an abuse of process, and secondly whether it would be proportionate to strike out on this basis.

Accordingly, in light of the "bare minimum" approach taken by the Claimant in pursuing his claim, the Court determined that the claim against the second Defendant was an abuse of process and should be struck out.

Our full discussion of the decision can be found here.

Privilege

Admissibility of Privileged Documents Disclosed in Foreign Proceedings

In early 2022, the Commercial Court confirmed that the English courts will apply English law in deciding whether documents lawfully disclosed in foreign proceedings remain privileged for the purposes of English litigation, including whether those documents remain confidential.

Suppipat & Ors v Siam Commercial Bank Public Company Limited & Anor [2022] EWHC 381 (Comm)

In *Suppipat*, HHJ Pelling QC (sitting as a High Court judge)[13] considered, among other things, an application by Siam Commercial Bank Public Company Limited ("**SCB**") to prevent Mr Nopporn Suppipat and others (the "**Claimants**"), from using certain documents in the proceedings that were confidential and/or covered by SCB's legal professional privilege. The documents had been obtained by the Claimants from a third party pursuant to subpoenas in Thailand.

In particular, during separate Thai proceedings, the Claimants had lawfully obtained a copy of a legal opinion from (undisclosed) Thai lawyers together with 90 pages of emails and an invoice related to the legal opinion (the "**Documents**"). SCB was not a party to the Thai proceedings and was not notified of the disclosure of the Documents.

HHJ Pelling QC rejected the Claimant's arguments that the Documents were not or had ceased to be privileged because as a matter of Thai law, the recipient

[13] Now KC, but QC when the judgment was delivered.

of the Documents, which were obtained lawfully in the Thai proceedings, can use them for whatever purpose they choose. HHJ Pelling QC considered that the "*effect of a loss of privilege in a foreign jurisdiction on the admissibility or disclosability of documents in litigation in this jurisdiction is a question to be resolved applying English law.*" Further, there was also no reason to adopt a different approach because the Thai courts had (apparently) decided that the Documents were not privileged.

HHJ Pelling QC also rejected the Claimant's submissions that the confidentiality of a document is a matter to be determined under Thai law because that is where the confidential nature of the communication arose. HHJ Pelling QC held that English conflicts law establishes that the *lex fori* (i.e. English law) is the system of law by which issues concerning the existence and loss of privilege are to be determined, and "*it would be entirely artificial for that principle to apply but for the issue of the continued existence of confidence on which the existence of privilege depends to be tested by reference to another system of law.*"

Moreover, HHJ Pelling QC found that as a matter of English law "*whether privilege has been lost is to be tested by asking whether the document and its information remain confidential in the sense that it is not properly available for use*" (emphasis added).[14] He concluded that the necessary confidence had not been lost simply by reason of the subpoenas having been applied for and copies of the Documents having been obtained in Thailand. Whether confidence has been lost is a contextual and fact-specific question.

Our full discussion of the decision can be found here.

Iniquity Exception to Privilege

Candey Ltd v Bosheh [2022] EWCA Civ 1103

In *Candey Ltd v Bosheh*, the Court of Appeal considered whether a solicitor could rely on otherwise privileged material in a claim against former clients, where it was alleged that the clients had made false statements to their solicitors and to the Court.

The solicitors, Candey Ltd, brought a claim against their former client, Mr Bosheh, for breach of retainer. They also brought proceedings against a Mr Salfiti for procuring Mr Bosheh's breach of retainer, and/or unlawful conspiracy. Candey's claims concerned a retainer entered into with its former clients, who had settled proceedings without providing for any recovery of Candey's costs. Candey had been acting for the clients under a conditional fee agreement (the "CFA"), and as the clients settled the underlying proceedings on a "drop-hands"

[14] Citing *Bourns Inc v Raychem Corp* [1999] 3 All ER 154 per Aldous LJ at [167h–168b].

basis, each side was to be responsible for its own costs. As a consequence, there was no recovery for Candey.

Candey sought to recover its costs from the former clients on the basis that the clients acted in breach of an implied duty of good faith, and in repudiatory breach of the retainer. Candey's case relied heavily on privileged information.

At first instance, the High Court had to consider:

- Whether a client was in breach of an implied duty of good faith by settling underlying litigation on terms that meant Candey had no entitlement to their costs under the CFA;

- Whether Candey could rely on privileged documents in support of their claims; and,

- Whether Candey could rely on confidential documents that had been provided to them by a third party after the underlying proceedings had settled.

At first instance, the High Court had held that no implied duty of good faith arose in respect of the CFA. The Court of Appeal agreed.

In respect of whether the documents were privileged and/or confidential, Candey argued:

- Because it was in possession of relevant documents on which it wanted to rely, there was no confidentiality as between the client and solicitor in relation to those documents and they were not, therefore, privileged.

- The information it had been provided by the former clients to pursue their defence of the underlying claims had been false. Candey claimed it had been deceived, and used to perpetrate a fraud on the other party and on the court.

- In the alternative, it was appropriate for Candey to rely on privileged material to unravel the fraud, and so the iniquity exception to privilege applied.

The Court of Appeal rejected Candey's arguments on the confidentiality of the information. The fact that the information is known to the solicitor does not mean that it lacks the necessary quality of confidence that would be the case if it were in the public domain. If the information is not in the public domain, the solicitor owes the client a duty to keep the information confidential.

In respect of the fraud allegations, the Court of Appeal considered the High Court's approach to the iniquity exception. The iniquity exception applies in

relation to documents brought into existence for the purpose of furthering a criminal or fraudulent purpose. If the client had abused the solicitor/client relationship such that privilege over those communications was negated, Candey would be able to rely on them. The High Court had considered the test and concluded that the communications arose in the ordinary course of Candey's professional engagement, so remained privileged.

The Court of Appeal agreed with the analysis of the High Court. The Court of Appeal added that a court will look particularly carefully to see whether the necessary thresholds for the iniquity exception are met in circumstances where the allegations of fraud are no more than repetitions of the allegations of past fraud that gave rise to the original proceedings. Candey's appeal was dismissed.

Our full discussion of the decision can be found here.

Inadvertent Waiver of Privilege

Pickett v Balkind [2022] EWHC 2226 (TCC)

In *Pickett v Balkind*, HHJ Matthews considered three applications as part of ongoing proceedings that raised issues about inadvertent waivers of privilege and the independence of experts.

The first application was made by the Claimant, seeking an adjournment of the trial date. The witness statement filed in support of the application exhibited a letter (the "**Letter**") from an expert instructed by the claimant. The Letter indicated that the Claimant's legal team had been providing the expert with substantive comments and suggestions on the experts' joint statement – a serious breach of the Technology and Construction Court ("**TCC**") Guide.

When the Defendant raised the issue of the Letter with the Claimant, the Claimant maintained that the Letter was privileged, and its disclosure was unintentional, requesting the deletion of any copies of the Letter in the Defendant's possession. The Defendant refused, prompting the Claimant to make the second application for an injunction to restrain the use of the Letter.

The third application was made by the Defendant, seeking disclosure of further documents and for permission to cross examine the expert at trial. The documents sought included an aide memoire referenced by the Claimant's solicitor and a report relied upon by another expert engaged by the Claimant.

In respect of the privilege issue, HHJ Matthews rejected the application for an injunction. The issue of the granting of an injunction was closely connected with whether privilege in the Letter had been waived. HHJ Matthews considered the principles set out in *Al Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780, namely:

- If privileged material is disclosed in error, the disclosing party will usually be unable to assert privilege and obtain an injunction to undo its error; and

- The court retains discretion to grant an injunction to restrict the use of the material "where justice requires" such as cases of fraud or where the disclosure has come about "as a result of an obvious mistake".

HHJ Matthews began by considering the Claimant's solicitor's evidence that he "*did not intend to waive privilege*" and "[his] *inclusion of a complete copy of the* [Letter] *without redaction was an inadvertent and obvious error*". In contrast, the Defendant's solicitor had the impression that the Claimant intentionally, rather than inadvertently, exhibited the Letter to rely on its contents for the purposes of the adjournment application. HHJ Matthews determined that the error could not be characterised as obvious.

HHJ Matthews went on to consider whether the inadvertent disclosure of the Letter amounted to a waiver of privilege. The central distinction emerging from the authorities was between referring to the effects of a document and deploying the document by relying on its contents. On the facts of the case, HHJ Matthews held that by exhibiting the Letter to seek an adjournment, the claimant had not "*merely referred to the letter, but* [had] *deployed its contents*". It was irrelevant that the Letter was deployed in relation to an interim application rather than the case as a whole. HHJ Matthews found that "*if there is a deliberate disclosure of information by a party to its opponent, even for an interlocutory purpose, it ceases to be confidential as against that party, and hence loses its privilege*".

Accordingly, HHJ Matthews concluded that the Claimant had waived privilege through deploying the Letter, and that an injunction would not be appropriate.

Since the Claimant had inadvertently waived privilege through deploying the Letter and the Defendant was not aware that this was a mistake, HHJ Matthews concluded that an injunction would not be appropriate. He also had concerns based on public policy grounds because the Letter's contents called into question whether the Claimant's legal advisors had complied with their duty to maintain the independence of experts

Our full discussion of the decision can be found here.

Part 36 Offers

Moradi v Home Office [2022] EWHC 3125 (KB)

The High Court in *Moradi v Home Office* considered the cost consequences of accepting a settlement offer the working day before the trial is due to start.

The case concerned a claim for unlawful detention, issued in October 2019. In May 2021, at the Claimant's instigation, the parties engaged in a mediation but this was unsuccessful. In November 2021, the Defendant made a Part 36 offer. The Claimant did not accept this offer, and then waited nine months before making a counter-offer less than a month before trial. Although the Defendant did not accept this counter-offer, further negotiations took place and eventually the Defendant accepted a further Part 36 offer from the Claimant just before 5 p.m. on the working day before the trial was due to take place.

CPT 36.13(4) provides that "*where … a Part 36 offer which was made less than 21 days before the start of a trial is accepted … the liability for costs must be determined by the court unless the parties have agreed the costs.*" The parties were unable to agree costs, so pursuant to CPR 36.13(4) the matter was to be determined by the court. The preliminary issue was, however, what methodology the Court should apply when determining costs. Judge Tindal ruled that the Court should follow the standard costs rules and principles (as set out in CPR 44) in such circumstances. While CPR 36 is a "*self-contained code*", where it is silent as to cost consequences it should be applied "*consistently and in harmony*" with CPR 44.

In accordance with CPR 44, the judge applied the general rule that the unsuccessful party pays the costs of the successful party, and the court will consider the conduct of the parties in deciding the quantum of costs. In this case, the claimant had been successful and was therefore entitled to a costs award. As for the parties' conduct, Judge Tindal determined that the Claimant had acted reasonably until the expiry of the Defendant's November 2021 Part 36 offer. However, after November 2021 the Claimant unreasonably failed to continue settlement negotiations with the Defendant. If the Claimant had attempted to continue to negotiate then the parties may have reached a settlement earlier and therefore avoided much of the costs that were incurred between November 2021 and the eve of trial (when a settlement was eventually achieved). The Court found that this behaviour by the Claimant was "*moderately unreasonable*", and therefore ruled that although the Defendant must pay all of the Claimant's reasonable costs up to December 2021, the Defendant only had to pay 66% of the Claimant's reasonable costs from December 2021 onwards.

Moradi v Home Office serves as a reminder of the importance the courts place on the Overriding Objective; delaying settlement until the day before trial and leaving issues unresolved will not be viewed particularly favourably by the courts. As Judge Tindal explained in the opening paragraphs of the judgment: "*Of course, all Courts welcome all settlements. But some settlements are more welcome than others.*" Parties should keep this is mind in order to avoid unwanted costs consequences.

Privileges and Immunities

No diplomatic immunity for breaches of modern slavery laws

***Basfar v Wong* [2022] UKSC 20**

In a landmark decision – the first of its kind from any domestic court of final appeal – the UK Supreme Court has found, by a 3:2 majority, that a serving diplomat does not benefit from immunity in proceedings alleging exploitation of a domestic worker amounting to modern slavery.

The Appellant/Claimant, Ms. Wong, is a Philippine national who had been employed to work in the household of Mr. Basfar. Ms. Wong alleged that she had been subjected to abusive conditions, which included, among others, being confined to Mr. Basfar's house (except to dispose of household waste); being prevented from communicating with her family; and being forced to work approximately 16 hours a day every day with no rest, days off, or vacation. Ms. Wong received no payment for most of the time she was in Mr. Basfar's employ.

After successfully escaping, Ms. Wong commenced legal proceedings in the Employment Tribunal against Mr. Basfar for breaches of her employment rights and seeking to recoup wages. Mr. Basfar applied to strike out the claim against him, on the basis that he was entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations 1961 ("**VCDR**"; which has largely been given effect in domestic English law as the Diplomatic Privileges Act 1964).

The VCDR grants diplomatic agents broad general immunity from civil proceedings. Exceptions are listed in Article 31 of the VCDR, including (at 31(1)(c)) for proceedings arising out of "*any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions*". Accordingly, the fundamental question on appeal was whether Mr. Basfar's alleged exploitation of Ms. Wong was commercial activity exercised by Mr. Basfar.

The majority of the Supreme Court (Lords Briggs, Leggatt and Stephens) determined that exploitation of a domestic worker to such an extent that she was forced to work in conditions amounting to modern slavery was materially different to an ordinary employment relationship that might be incidental to a diplomat's daily life. Mr. Basfar's high degree of control over Ms. Wong, and the fact that he exploited that control for his personal profit, meant that Ms. Wong's treatment amounted to an abuse of Mr. Basfar's diplomatic presence in the UK. While the majority left open the question of whether Ms. Wong's

treatment amounted to human trafficking (as defined under international legal standards), their Lordships observed that the case constituted a "*paradigm example of domestic servitude*".

The minority (Lord Hamblen and Lady Rose) disagreed that the conditions under which a person was employed could convert employment (which was not of itself a "*commercial activity*") into such an activity falling within the exception to immunity under the VCDR.

Former King of Spain is entitled to immunity in respect of harassment allegations pre-dating abdication

Zu Sayn-Wittgenstein-Sayn v Borbón y Borbón [2022] EWCA Civ 1595

In *Zu Sayn-Wittgenstein-Sayn v Borbón y Borbón*, the Court of Appeal overturned the decision at first instance of the High Court, which had found that the Defendant/Appellant, King Juan Carlos II (the former Spanish monarch) was not entitled to immunity in proceedings brought against him.

The claim was brought by Ms. Corinna zu Sayn-Wittgenstein-Sayn, who had been in an intimate relationship with King Juan Carlos II from 2004-2009, while he was still the Spanish sovereign. The Claimant/Respondent alleged that, after the breakdown of their relationship and from 2012 onwards, King Juan Carlos II (who, by then, had abdicated) had engaged in a course of conduct amounting to harassment, in breach of the Protection from Harassment Act 1997. King Juan Carlos had filed an application seeking a declaration that the English court had no jurisdiction to hear the claim against him, based on his entitlement to sovereign immunity under the State Immunity Act 1978 ("**SIA**").

Sections 1 and 14 SIA read together provide for the immunity of "*sovereign or other head of* [] *State* [acting] *in his public capacity*". Accordingly, State immunity ratione personae will attach to acts performed by a head of State while he or she is in office. After the head of State leaves office, they continue to enjoy immunity ratione materiae for acts performed in office in their capacity as head of state.

The Claimant/Respondent had alleged in her Particulars of Claim that King Juan Carlos either directly or through the use of Spanish State agents had pursued "*a course of conduct targeted at the* [Respondent] *which amounts to harassment*", while he was a serving head of State.

The Court of Appeal considered that, taken at its face, the only pleaded case as to the capacity in which the Spanish State agents acted were that they were acting in their capacity as agents of the State. States are liable for acts done "*under the colour of public authority*", whether or not those acts were actually authorised or lawful under domestic or international law.

Further, it was only King Juan Carlos' position as head of state that enabled him to procure the Spanish state agents to act in the manner that was alleged. The first instance Judge was wrong to conclude that the pre-abdication conduct alleged was private conduct to which immunity did not attach.

Kuwaiti sovereign wealth fund found to not be entitled to diplomatic immunity in employment tribunal proceedings

Kuwait Investment Office v Hard [2022] EAT 51

In proceedings before the Employment Tribunal, the Claimant had made certain applications for specific disclosure, which had been opposed by the Defendant Kuwait Investment Office ("**KIO**"). The KIO is the London branch of the Kuwait Investment Authority; Kuwait's sovereign wealth fund, managing over US$ 700 billion in assets.

The KIO argued that it was a part of Kuwait's diplomatic mission in the UK. As such, its premises constituted a diplomatic mission. The KIO's documents, in turn, were documents belonging to a diplomatic mission. The Vienna Convention on Diplomatic Relations 1961 ("**VCDR**"), given effect in the UK by the Diplomatic Privileges Act 1964 ("**DPA**"), provided for the absolute inviolability of diplomatic missions and documents belonging to those missions. Accordingly, the KIO was immune from providing documents in disclosure.

The Employment Tribunal rejected the KIO's arguments and ordered disclosure. This was later upheld by the Employment Appeal Tribunal ("**EAT**"). The crux of the matter, in the view of the EAT, was that the KIO had failed to provide a certificate from the Secretary of State of the Foreign & Commonwealth Development Office ("**FCDO**") recognising the KIO as being part of the Kuwaiti diplomatic mission to the UK.

In the absence of an express statement from the FCDO, the courts were unable to imply the recognition by the UK government of a diplomatic mission. Accordingly, the KIO was not entitled to diplomatic immunity and was required to comply with the disclosure orders.

Court of Appeal refuses to declare provisions of the Diplomatic Privileges Act 1964 as incompatible with the European Convention on Human Rights

London Borough of Barnet v AG (A Child) and another [2022] EWCA Civ 1505

In *Barnet v AG (A Child)*, the Applicant London Borough of Barnet ("**LBB**") had certain safeguarding concerns regarding the welfare of a diplomat's children who were resident within the Barnet area. The diplomat refused consent to the LBB speaking to the children at home or at school, and objected to the school being asked to provide information, citing their diplomatic immunity.

When the safeguarding concerns increased in severity, the LBB applied to the Barnet Family Court for an emergency protection order. The Judge stayed the proceedings, finding that, while there was a significant risk of future physical and psychological harm, in his provisional view the parents were immune under the Diplomatic Privileges Act 1964 ("**DPA**") and the Vienna Convention on Diplomatic Relations 1961 ("**VCDR**"). That immunity appeared to him to be incompatible with the UK's positive obligations under Article 3 of the European Convention on Human Rights ("**ECHR**"; the prohibition on torture and inhuman or degrading treatment).

The diplomat's sending State refused to waive immunity. Later, the Secretary of State for the Foreign & Commonwealth Development Office informed the sending State that the diplomat and his family were considered personae non gratae. This required their immediate exit from the UK. The LBB filed a further application, seeking a declaration of incompatibility between the DPA/VCDR and the ECHR. The first instance court refused to grant the declaration, a decision later upheld by the Court of Appeal.

It considered that the fundamental question in considering whether to grant a declaration of incompatibility was whether or not the UK was required to breach the VCDR in order to avoid breaching the ECHR. The Court of Appeal found that there was no jurisprudence, either from the European Court of Human Rights or elsewhere, suggesting that the UK was under such an obligation. To the contrary, if the UK were to refuse to adhere to the VCDR's framework, it would likely cause far-ranging adverse repercussions to the UK on the international plane.

Arbitration Act Reform

Since its entry into force, the English Arbitration Act 1996 (the "**Act**") has played a significant role in consolidating London's position as a leading arbitral seat. Twenty-five years later, the Law Commission of England and Wales (the "**Law Commission**") has launched a review to reflect on the legislative framework for arbitration in England and Wales.

The Law Commission's stated aim of the review is maintaining the attractiveness of London as an arbitral seat and the "*pre-eminence of English law as choice of law*". During the first, pre-consultation stage, the Law Commission undertook a study of the existing legal framework and held discussions with principal stakeholders and interest groups (including the judiciary, practitioners, and London-based arbitral institutions). On 22 September 2022, the Law Commission published its formal consultation paper, formally inviting stakeholders to provide responses by the end of 2022 on key issues identified during its pre-consultation stage. After considering those responses, the Law

Commission will issue a final report with recommendations to the UK government on potential changes to the Act.

The Law Commission's consultation paper (which we previously discussed here) provisionally identifies certain areas for reform, including: (i) codification of case law imposing a continuing duty on arbitrators to disclose circumstances reasonably giving rise to justifiable doubts as to arbitrators' impartiality; (ii) explicitly providing powers for tribunals to adopt summary procedures to dispose of claims and defences; and (iii) revising the standard of review for challenges to tribunals' jurisdiction brought under section 67 of the Act, from a *de novo* rehearing to a review, in certain circumstances where a party has ventilated the same jurisdictional objections before a tribunal.

The Law Commission has also identified certain areas where it has provisionally recommended that the *status quo* be maintained, such as retaining the ability for parties to appeal against awards on points of law under section 69 of the Act; and leaving the issue of confidentiality in arbitration and arbitrators' duty of independence for development through common law.

The Law Commission's consultation paper suggests that it is aiming for a pragmatic and incremental approach to reform of the Act, reflecting the consensus amongst stakeholders that the current framework generally functions well and does not need an overhaul. Nonetheless, the Law Commission's recommendations have been hotly debated in the arbitration community. The precise terms of its final recommendations are keenly anticipated and will continue to spark debate in the arbitration community well into 2023.

Arbitration Cases in the English Courts

Applicability of Issue Estoppel to Non-Parties to Arbitral Awards

PJSC National Bank Trust and another v Boris Mints and others [2022] EWHC 871 (Comm)

In *PJSC National Bank Trust v Mints*, the Commercial Court considered an application by the Claimants—two Russian state-owned banks—for permission to amend their Particulars of Claim to allege that the Defendants were bound by findings made by an LCIA arbitral tribunal in arbitration proceedings between the Claimants and three Cypriot companies alleged to be under the control of some of the Defendants.

The crux of the Claimants' case was that the Defendants had fraudulently procured certain transactions. These transactions had resulted in the release of certain pledges in favour of the Claimants over shares provided by the Cypriot companies. The pledges were released pursuant to "Pledge Agreements", which provided for disputes to be resolved by LCIA arbitration. The Cypriot

companies commenced arbitration against the Claimants, seeking declarations that the Pledge Agreements and subsequent release of the pledged shares were valid. The Claimants counterclaimed and alleged that the Cypriot entities had acted dishonestly and unlawfully. The Claimants were successful in their counterclaim in the arbitration.

In the parallel English court proceedings, the Claimants applied to amend their Particulars of Claim to include allegations that the Cypriot companies in the arbitration were privies of the First-Third Defendants in the court proceedings. Consequently, the Claimants contended that the First-Third Defendants were precluded in the court proceedings from challenging certain findings made by the LCIA tribunal, either because the award gave rise to issue estoppel or, in the alternative, to prevent an abuse of process. The Claimants requested summary judgment on their amendments.

As a matter of English law, the doctrine of issue estoppel prevents parties and their privies from relitigating issues that are the subject of a court judgment or arbitral award. The case of *Gleeson v Wippell* [1977] 1 WLR 510 held that the scope of 'privies' extends to third parties sufficiently connected to a party, such that, having regard to the subject matter of the dispute, it would be just for the third parties to also be bound by a decision binding the connected party.

In the present dispute, Foxton J confirmed that arbitral awards were capable of giving rise to an issue estoppel that applies to non-parties to the arbitration. However, Foxton J acknowledged that the contractual source of an arbitral tribunal's substantive jurisdiction and the consequent features of an arbitral process meant that it would be "*extremely challenging*" to establish the preclusive effect of an award against anyone other than parties to the arbitration or their contractual privies.

Foxton J ultimately concluded that he could not determine, on a summary basis, the factual issues relied on by the Claimants to prove that the First-Third Defendants were privies of the Cypriot companies. The Judge further denied the Claimants permission to amend their Particulars, concluding that it was unlikely that the necessary privy relationship could be established even at trial, particularly in light of the exceptional nature of the principle in *Gleeson,* and the difficulty in its application to non-parties to an arbitral award. The Judge also found that there was no abuse of process in the Defendants raising issues in their defence which are inconsistent with the LCIA award.

Applicability of the Henderson v Henderson Principle to Arbitral Proceedings

Union of India v Reliance Industries Ltd and another [2022] EWHC 1407 (Comm)

In the latest instalment of the long-running saga between *Union of India v Reliance Industries*, the Commercial Court considered a challenge to a partial Award issued pursuant to section 68 of the Act (alleging a serious irregularity by

the tribunal causing substantial injustice in the award) and section 69 of the Act (requesting permission to pursue an appeal on certain points of law).

A prior partial award had been rendered by the tribunal in October 2018, which was challenged in the Commercial Court. This yielded the decision in *Reliance Industries Ltd v Union of India* [2020] EWHC 263 (Comm), in which the court found that the tribunal had erred in declining jurisdiction to consider certain documentary evidence, and ordered the remittal of related issues for a further arbitral hearing. During that further hearing, the tribunal was tasked with considering the relevant documentary evidence and determining certain costs that Reliance and BG claimed they were entitled to recover from India. India raised certain objections based on, *inter alia*, substantive Indian constitutional law. The tribunal handed down a further partial award in January 2021 (the "**2021 Award**"), finding that the objections India had raised could and should have been raised by India at earlier stages of the proceedings. India had further failed to provide any justification for its failure to previously raise those objections. India's submissions were therefore precluded on the basis of *res judicata*, and, specifically, the *Henderson v Henderson* principle in English law, requiring parties to bring and argue their entire case at once (the "***Henderson* principle**").

India applied for permission to appeal under section 69 of the Act on two points of law. The first point was whether the tribunal was correct to determine that the *Henderson* principle was applicable as a matter of English law, on the basis of the seat of the arbitration being London. India argued that the *Henderson* principle was one of substantive English law and therefore not applicable to an arbitration where the underlying contracts were governed by Indian law. The second point assumed that the answer to the first question was in the affirmative, and asked whether the *Henderson* principle was applicable to earlier phases in the same arbitration proceedings (instead of separate arbitrations).

India also challenged the 2021 Award under sections 68(2)(a), (d), and (g), alleging that the tribunal had failed to hear its case on the application of relevant principles of Indian constitutional law and that the award was contrary to Indian public policy.

Cranston J refused both applications. As to permission to appeal under section 69, the Judge considered prevailing Supreme Court authorities[15] that had recognised the *Henderson* principle as being procedural in nature, intended to guard against "*wasteful and potentially oppressive duplicative proceedings*". As a procedural rule, the seat governs its exercise, irrespective of the proper law of the contract. The tribunal was accordingly correct to apply the *Henderson* principle, and it was not open to serious doubt for the Tribunal to do so.

---

[15] *Virgin Atlantic Airways Limited v Zodiac Seats UK Limited* [2013] UKSC 46 and *Takhar v Gracefield Developments Ltd* [2019] UKSC 13.

Cranston J further found that the principle applied in arbitral proceedings and that it applied to each stage of the same proceedings (not just to separate proceedings), noting that finality is a goal in both court and arbitral proceedings. India's application under section 69 of the Act therefore failed for, *inter alia*, this reason.

As regards the application under section 68, the Judge held that India had failed to establish its case under each of the sub-provisions relied on. First, there was no unfairness in the tribunal's application of the *Henderson* principle. Second, it was plain that the tribunal had considered and then rejected India's arguments on the (non-)applicability of Indian constitutional law. Third, there was no basis to argue that the 2021 Award was contrary to public policy. On the final point, the Judge considered that section 68(2)(g) was not to be used for the purpose of allowing parties to attack conclusions of foreign law under the auspices of public policy.

Circumstances in Which a Party Loses the Right to Pursue a Jurisdictional Challenge to Arbitration Proceedings

National Iranian Oil Company v Crescent Petroleum Company International and another [2022] EWHC 2641 (Comm)

The dispute between NIOC and Crescent Petroleum has spanned over a decade, commencing initially in a London-seated arbitration in 2009 in respect of a gas sale and purchase agreement between NIOC and Crescent. In a 2014 award, the tribunal found NIOC in breach of the purchase agreement subsequently (in 2021) awarding Crescent over a billion dollars in damages for lost profits. In 2016, during the subsequent phase of the arbitration in which the tribunal was tasked with considering the remedies Crescent was entitled to, NIOC raised objections to the tribunal's jurisdiction to hear this aspect of Crescent's claim. The tribunal rejected NIOC's arguments and awarded Crescent damages in a Partial Remedies Award dated 27 September 2021 (the "**Partial Award**").

In October 2021, NIOC issued a challenge to the Partial Award under section 67 of the Act. Crescent argued that NIOC's jurisdictional objection differed substantially to the jurisdictional challenge NIOC had raised in the proceedings in 2016. NIOC's first objection in 2016 related to party consent to arbitration, arguing that the Crescent entity claiming lost profits was not party to the relevant purchase agreement. NIOC's challenge now under section 67 concerned the limited scope of the arbitration agreement in that purchase agreement. Accordingly, Crescent argued that section 73 of the Act applied, precluding NIOC from raising a jurisdictional challenge that it should have but had failed to raise before the tribunal. Crescent's alternative argument was that the section 67 challenge should be summarily dismissed.

The key issue before Butcher J in determining Crescent's argument under section 73 was the degree of specificity with which the ground of jurisdictional challenge must be raised before a tribunal if it is then to be relied on later before a court during a section 67 challenge. The Judge made extensive reference to the

decision of Knowles J in *Province of Balochistan v Tethyan Copper Company Pty Ltd* [2021] EWHC 1884 (Comm), which summarised the principles on the application of section 73. Butcher J considered Knowles J's statement that, while the grounds of objection to jurisdiction should be examined broadly it should not imply a relaxed approach and the other party should know the specific grounds that are being advanced in challenge to an arbitration award. Butcher J determined that this statement could have been better formulated (in Butcher J's view) as "*the party challenging the tribunal's jurisdiction needing to have communicated to the other party (and the tribunal) the substance of each ground of objection relied upon*". Accordingly, the Judge recast some of Knowles J's summarised principles and put forward a comprehensive summary of principles applicable to section 73 of the Act.

Butcher J concluded that NIOC had sufficiently raised its arguments before the tribunal although he noted that the point could have been made much more clearly. Butcher J found that NIOC had raised the substance of the objection but not the stages in the argument or the facets of Iranian law it was relying upon before the Court. This was sufficient to avoid the section 67 challenge being precluded by section 73.

However, Butcher J found that NIOC's challenge had no realistic prospect of success. The arbitration agreement had been broadly drafted to refer all disputes to arbitration. The Judge did not consider there to be reasonable grounds to expect a materially different outcome favouring NIOC should the challenge proceed to trial.

* * *

Please do not hesitate to contact us with any questions.

LONDON


Christopher Boyne
cboyne@debevoise.com


Lord Goldsmith KC
phgoldsmith@debevoise.com


Patrick Swain
pswain@debevoise.com


Tony Dymond
tdymond@debevoise.com


Samantha J. Rowe
sjrowe@debevoise.com


Karolos Seeger
kseeger@debevoise.com


Jane Shvets
jshvets@debevoise.com


Patrick Taylor
ptaylor@debevoise.com


Conway Blake
cblake@debevoise.com


Gavin Chesney
gchesney@debevoise.com


Natasha McCarthy
nmccarthy@debevoise.com


Shreya Aren
saren@debevoise.com

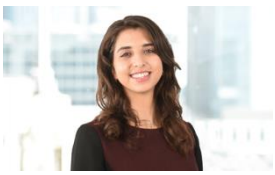

Julia Caldwell
jcaldwell@debevoise.com


Olivia Collin
ocollin@debevoise.com


Tom Cornell
tcornell@debevoise.com


Catalina Diaconeasa
cdiaconeasa@debevoise.com


Luke Duggan
lduggan@debevoise.com


Sara Ewad
sewad@debevoise.com

Hugo Farmer
hfarmer@debevoise.com

Monika Hlavkova
mhlavkova@debevoise.com

Doreena Hunt
dhunt@debevoise.com

Emma Laurie-Rhodes
elaurierhodes@debevoise.com

Emily Mackenzie
emackenzie@debevoise.com

Mark McCloskey
mmccloskey@debevoise.com

Sophie Michalski
Trainee Associate
smichalski@debevoise.com

Callum Murphy
Trainee Associate
cmurphy@debevoise.com

Lisa Sheldrick
Trainee Associate
lsheldrick@debevoise.com

Deniz Tanyolac
Trainee Associate
dtanyolac@debevoise.com

Adewunmi Williams
Trainee Associate
awilliams@debevoise.com