ThoughtLeaders4 Disputes • September 2023

Disputes MAGAZINE

ISSUE 10

WHAT LIES AHEAD:
THE NEXT GENERATION OF DISPUTE RESOLUTION

INTRODUCTION

"Metaverse isn't a thing a company builds. It's the next chapter of the internet overall."

- Mark Zuckerberg

We are delighted to present Issue 10 of Disputes Magazine which is our Next Gen edition. This edition hears from our next generation of practitioners, along with best practices for them. The issue highlights a number of chapters, including articles on highlighting advances in ediscovery techniques, the path for greener litigation, recent updates on collective actions, and examining the bank's legal role following the Supreme Court's decision in the Philipp v Barclays case.

Thank you to our community partners and contributors for their support.

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CONTENTS

Disputes

Upcoming Events

Corporate Disputes 2023 - 3rd Annual Forum	**22** Nov 2023
India Dispute Resolution Forum - Mumbai	**1 - 2** Dec 2023
Sovereign & States Disputes and Enforcement Summit 2024	
Financial Institutions Litigation	**6 - 7** Feb 2024
	28 Feb 2024

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PAYWARD V CHECHETKIN

A RARE PUBLIC POLICY EXCEPTION TO ARBITRAL AWARD ENFORCEMENT

Authored by: Philip Gardner (Senior Associate) and Louisa Keech (Trainee Solicitor) - Peters & Peters

Last month, the High Court concluded that to enforce an arbitral award obtained by a major crypto exchange would be contrary to public policy under section 103(3) of the Arbitration Act 1996. This unusual invocation of the public policy exception arises as part of a recent line of cases in which crypto traders have generally been considered consumers who are entitled to consumer protection rights.

Effect on international trading platforms, users and consumers

International trading platforms like the Payward group (whose business is the operation of the Kraken crypto exchange) and other types of international trading platform will no doubt wish to reflect on the High Court's decision. Many such platforms will need to contend with the issue of their users being consumers under different legal standards in different jurisdictions, and should take this into account when including dispute resolution clauses in their standard terms and conditions, especially given the prevalence of arbitration clauses like the one in this case.

Bright J's decision is a further basis for the contention that crypto traders and potentially users of other types of international trading platforms can be considered consumers and so will benefit from consumer rights protections such as those under the Consumer Rights Act 2015 (CRA 2015).

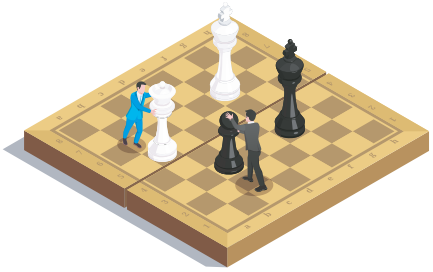
This case provides potential guidance for such platforms to avoid future jurisdiction challenges should they be able to find a way to incorporate resolution of consumer protection issues and other legal provisions under legislation like the Financial Services and Markets Act 2000 (FSMA) within their preferred dispute resolution mechanism.

Any mitigation strategy will, however, need to be realistic, given the challenges of providing for different consumer protection laws and other jurisdiction-specific claims with a global clientele.

The decision is of note to users such as Mr Chechetkin and their lawyers given that the arbitral award and the arbitration clause in the contract have not prevented Mr Chechtekin from pursuing his claim in the English courts. Arbitral proceedings in a foreign jurisdiction may, therefore, not always be the only recourse for consumers, notwithstanding the pro-arbitration attitude of the English Court.

Ultimately, notwithstanding the highly respected arbitral jurisdiction and given the UK-specific nature of some of Mr Chechetkin's claims, Bright J stated (at paragraph §59(iv)) that he did not see how "claims under English statute could sensibly have been advanced in the JAMS arbitration" even though the arbitrator had clearly acknowledged that Mr Chechetkin was a consumer

albeit under a different definition. Others resisting enforcement of arbitral awards will wish to bear this in mind.



What happened

Mr Chechetkin is a Russian-qualified lawyer based in the UK who during the relevant period was employed as full-time in-house legal counsel. In March 2017, he opened an online crypto trading account via the Kraken website operated by Payward. In doing so, he filled out a standard online form in which he gave his occupation and indicated that the source of his wealth was his employer. He left the box in relation to "Crypto Trading Experience" blank. While he opted for a "Pro" account, this was because this type of account offered higher withdrawal limits and not because he was a professional trader.

Mr Chechetkin's contract with Payward Limited, the UK entity within the Payward group, was subject to Payward's standard terms which contain an arbitration clause requiring any disputes to be arbitrated in California under JAMS rules. Mr Chechetkin ticked the box purporting to confirm that he had read and agreed to Payward's terms.

Mr Chechetkin was relatively active on his Kraken account between 2017 and March 2020, however, during the pandemic, he started trading more than usual. The underlying dispute in this case concerns deposits made by Mr Chechetkin in 2020 to the tune of over £600,000; he claims that he ended up losing £608,534. Mr Chechetkin ultimately issued proceedings in the English courts in February 2022 asserting that Payward was in breach of the General Prohibition under section 19 of the FSMA and that his agreements with Payward are unenforceable.

In June 2022, Payward issued a jurisdiction challenge in England in favour of the arbitration in California. This challenge failed in October 2022.

In October 2022, Payward obtained a final arbitral award in California, which it sought to enforce against Mr Chechetkin in England, the effect of which would have been to end Mr Chechetkin's claim. This attempt to enforce the award is the subject of Bright J's decision.

Key points from the decision

The High Court agreed with Mr Chechetkin that he was a 'consumer' under the CRA 2015, with Bright J making it clear that he did not find this point difficult. Notwithstanding an exceptional and successful application to cross-examine a witness in arbitral enforcement proceedings, having heard from Mr Chechetkin the judge found that he was indeed a consumer. He was, of course, employed as a lawyer. His crypto trading, even when undertaken at high volumes, with money from third parties and whether or not declared as income to HM Revenue & Customs, was not his trade, craft or profession. Much of the indicators relied on to challenge this in any event post dated the concluding of the contract.

Bright J explained that in asking the High Court to enforce the final award, Payward was effectively asking him not to consider whether the arbitration clause in its terms and conditions was fair within the meaning of the CRA 2015. This is notwithstanding that the English Court is required to do so whether or not the parties have raised the fairness of a clause as an issue. Bright J noted that this obligation reinforces the importance of consumer protection as a matter of public policy. Given that importance, the High Court refused to enforce Payward's arbitral award and thereby deny Mr Chechetkin a chance to enforce his consumer rights.

Enforcement of the award was also considered to be contrary to the public policy enshrined elsewhere in the CRA 2015: where a consumer contract has a close connection with the UK, the consumer rights issues encompassed by the CRA 2015 should be dealt with under UK statute.

The court also agreed that the effect of compelling Mr Chechetkin to arbitrate in California was, in circumstances where the arbitrator had held that Californian and not English law applied, to deprive him of making the claims he wished to make under the FSMA.

Allowing individuals to bring such claims here is an important matter of public policy. Bright J makes the key point that Financial Conduct Authority enforcement would likely be hindered if customer complaints were all handled overseas in confidential arbitral proceedings; the criminal prosecution of offences is an important public matter.

The great emphasis on speed in the arbitral rules applied was clearly something that the English judge doubted would, in any event, be consistent with careful consideration of CRA 2015 and FSMA claims.

Potential consequences of the decision

As a consequence of the failure of Payward's arbitration claim, Mr Chechetkin is able to pursue his claim in the English courts under the FSMA regarding the enforceability of his agreement with Payward. The merits of Mr Chechetkin's FSMA claim with potentially further significant consequences for crypto and other trading platforms are yet to be determined.

International exchanges operating in the UK will want to consider their dispute resolution mechanisms carefully in light of this judgment. Litigating or arbitrating disputes in each jurisdiction where the consumer is found may well be unattractive and impractical.

Creative alternatives, including the bespoke incorporation of consumer-specific protections into governing law clauses, whereby, for example, an arbitrator might apply Californian law with due regard to the consumer-jurisdiction's consumer rights law, could be one way of avoiding ceding jurisdiction to national courts.

PETERS & PETERS

ISO 31030: TRAVEL LEGAL RISK AND MITIGATION

ISO 31030 came out in 2021, setting out guidance for travel risk management (TRM). This infographic directs legal and compliance professionals to some key issues

APPROACHING THE ISO 31030 TRM GUIDANCE

Companies sending employees on UK or foreign travel should consider whether **travel security risk management policies are reviewed and enforced** in accordance with ISO 31030

Courts in England and Wales have found **BSI/ISO standards to be influential**

Compliance with ISO 31030 **could demonstrate a business has assessed and managed risks** to the highest available benchmark

CIVIL POSITION IN THE UK

Employers owe a duty of care to their employees to protect their health, safety and security and not to expose them to unnecessary risk

ISO 31030 may make it easier to bring breach of duty claims because it provides standardisation

Standard still new, so not used in UK cases yet

Employees travelling for work who have suffer harm may bring a claim against the employer. A UK court is likely to consider whether:

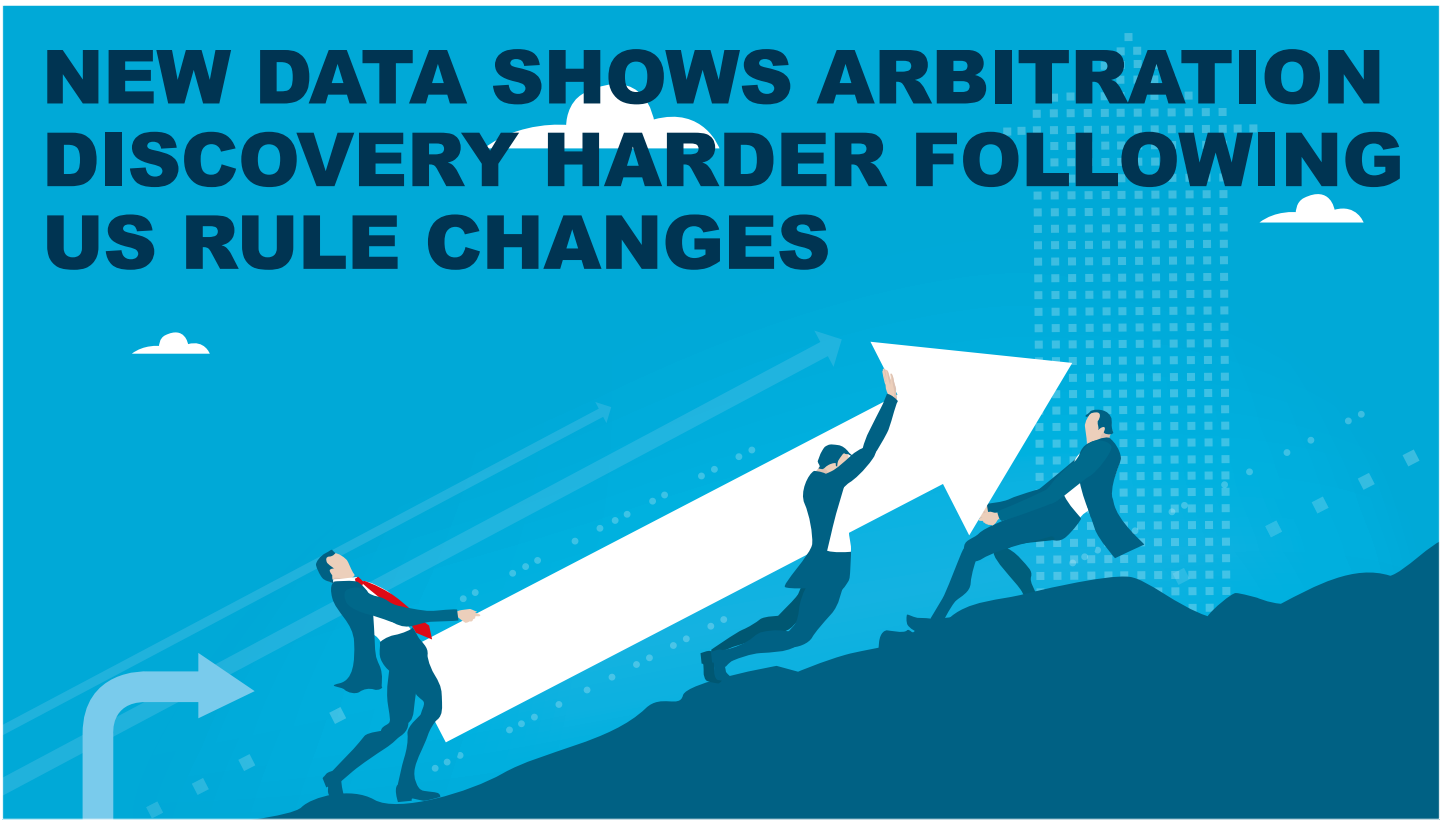
- a duty of care was owed
- that duty was breached
- the employer's breach of its duty causes loss to the employee

Duty of care

- Top management is responsible for implementing policies to reduce travel risks
- An employer's duty of care is personal and non-delegable and an employer will not be excused for a travel company's failures if it should have known of them for employees

> **"THE ISO STANDARD IS THE FIRST TRULY GLOBAL BENCHMARK FOR TRAVEL RISK MANAGEMENT AND PROVIDES A FRAMEWORK OF GOOD PRACTICE."**

NEW DATA SHOWS ARBITRATION DISCOVERY HARDER FOLLOWING US RULE CHANGES



Authored by: Michael Redman (Co-Head of EMEA) and Rupert Black (Senior Associate) - Burford Capital

Legal discovery is an important tool for the enforcement of judgments and awards but its availability is not uniform and the rules governing its availability are constantly evolving. The latest example is new data confirming that changes to US discovery rules have had a knock-on effect on the ease of accessing information for foreign arbitrations.

Section 1782

US federal statute 28 U.S.C. § 1782 allows discovery in the US for use in a foreign proceeding, and it has become an increasingly popular and powerful tool for asset recovery. Any conference on commercial disputes, cross-border litigation and insolvency will inevitably feature at least one session on Section 1782, with English or other foreign legal professionals talking chapter and verse about its benefits, so attractive and now familiar is it to foreign litigants seeking information outside the US.

Section 1782 has exploded in use in the last ten years, growing from a little-known federal statute to a key weapon in the litigator's or arbitration lawyer's information gathering arsenal. The numbers speak to this. According to litigation data,[1] in 2012, only around 25 applications for Section 1782 relief were made. In 2022, that number was 379—a growth of 1500%.

Use of Section 1782 was fueled in no small part by a 2019 Second Circuit decision that held that Section 1782 discovery could be used to obtain documents from US subjects even if those documents were found outside the US.

However, a recent and much reported US decision has dramatically curtailed Section 1782's scope.

The impact of ZF Automotive v Luxshare

In June 2022, the Supreme Court held in ZF Automotive v Luxshare that Section 1782 discovery is no longer available to foreign arbitration proceedings. This includes private commercial as well as investment treaty arbitrations (civil and commercial litigation remain unaffected).

A year after ZF Automotive v Luxshare, it is worth analyzing the impact of this decision on the volume of Section 1782 applications filed.

1 Original research and analysis of data produced by Bloomberg Law by Rupert Black and Faaiza Akhtar, Burford Capital

According to Bloomberg Law, there has been a marked decline in the number of Section 1782 applications filed in 2023. In the first half of 2021, a total of 180 Section 1782 applications were filed in US federal courts. That figure remained largely unchanged at 183 in the first half of 2022, just prior to the ZF Automotive decision. In the six months to July 2023, that figure fell by 15% to 157.

Analysis reveals that a small but meaningful number of recently filed Section 1782 applications were dismissed on the basis that the respondents were able to show that the discovery would be used in aid of a foreign proceeding deemed to be arbitration and so precluded.

Furthermore, this drop bucks the ten-year growth trend in filed applications (excluding 2020 when courts closed), making this decline even more marked.

The June 2022 ZF Automotive v Luxshare decision has demonstrably limited the information available in arbitration disputes outside the US. The number of applicants seeking Section 1782 relief has dropped significantly. While applicants can be reassured that no such circuit split exists for those seeking discovery in aid of foreign civil proceedings, with Section 1782's ever-increasing use it cannot be ruled out that subsequent decisions may seek to clarify the statute's scope even further.

Implications for arbitration claimants

The impact of the ZF Automotive v Luxshare decision on claimants is evident in its restriction of the availability of a gateway for discovery for foreign litigants outside the US—the impact of the restriction on collectability and enforcement is unknown and yet to be seen.

Given the challenges, complexity and fluidity of this constantly evolving regulatory landscape, claimants need partners to help them navigate these issues and to help distinguish strategically important assets regardless of jurisdictional discovery hurdles.

Burford routinely works with businesses and the law firms that represent them to provide this expertise along with a variety of financing options—and we are the only major legal finance provider with global corporate intelligence and asset recovery services in-house, giving clients the combined benefit of capital and investment expertise and top-level global judgment enforcement. We continue to monitor and to help clients master the factors impacting enforcement in jurisdictions around the world, including navigating the impacts of the ZF Automotive v Luxshare decision on Section 1782 applications and asset recovery broadly.

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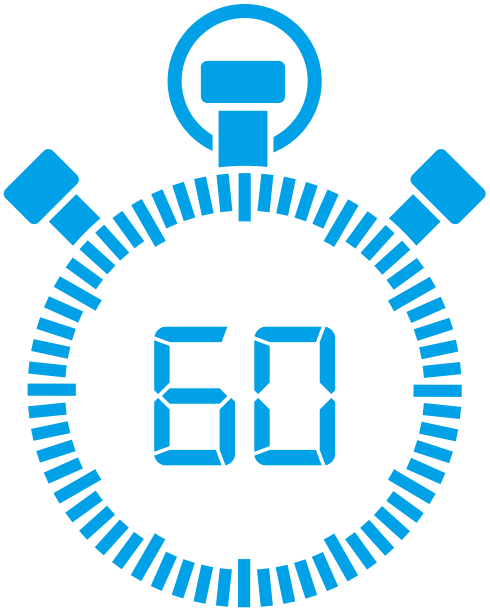

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A At least in the short term, exactly as I do now – there are things that I would like to achieve in my career regardless. That said, I would be very tempted to take some time out for an adventure – perhaps trekking through the Amazon.

Q **What do you see as the most important thing about your job?**

A Adding value on cases. Clients have their pick of a near unlimited supply of disputes lawyers who can do a competent job on their cases, so it is important to repay their faith in instructing you rather than someone else and help them extract the full value out of their claim (or indeed provide the strongest possible defence). That involves being invested in the outcome and going above and beyond what others might do, and instilling those values in your team.

Q **What motivates you most about your work?**

A Winning (by which I mean achieving the optimal result for the client). One of the best things about being a litigator is the adversarial process, and there is no better feeling than pitting your skills against worthy opposition and coming out on top (especially if the odds are against you).

Q **What is one work related goal you would like to achieve in the next five years?**

A One of the most rewarding initiatives I have been involved with during my career was co-founding the Crypto Fraud and Asset Recovery ('CFAAR') network, which is a global group of legal industry professionals whose purpose is developing and sharing best practice in the crypto sphere and placing the UK and common law jurisdictions at centre stage for global crypto dispute resolution. It has been fantastic to collaborate with some of the leading crypto disputes practitioners and see the organisation grow, which now comprises approximately 2,000 members and has international chapters in the US, Singapore, Hong Kong and the Middle East. I hope that momentum continues over the next five years (and beyond).

Q **What has been the best piece of advice you have been given in your career?**

A That how you frame experiences is often subjective. Over my career I have had to deal with many challenging situations which I could choose to view negatively. However, as I reflect on them, they have improved me in various ways and given me greater confidence and resilience than I might otherwise have had, and I find seeing past experiences through that lens changes how I view and deal with incoming challenges.

Q **What is the most significant trend in your practice today?**

A AI. This technology will have a far-reaching impact on legal services and will bring new efficiencies and challenges. The main area disputes practitioners may have seen it in practice is in the use of predictive coding in a disclosure context but AI chatbots will undoubtedly have a much greater impact on legal services. As a civil fraud practitioner, I also expect to see fraudsters increasingly leveraging AI to further their schemes, so it will be important for lawyers to understand how that is done and the underlying technology.

Q **Who has been your biggest role model in the industry?**

A Andy McGregor at A&O, formerly Head of Civil Fraud at RPC. Andy is an inspirational leader and unflappable in a crisis. I learned a lot from working with Andy and in particular whenever I need to persuade or advocate an unpopular position, I try to channel my inner McGregor. I could also say some very nice things about my current colleagues at RPC but some of them may read this!

Q **What is one important skill that you think everyone should have?**

A Mastering MS Excel. Quite simply it wins cases – where a dispute involves structured / numerical data it is to a massive strategic advantage to be able understand and extract all the value out of it. As a collective I think lawyers tend to be quite wary of Excel and ignore the fact that there is a huge amount of low hanging fruit that will make them more effective at their day job and really enhance their litigation 'power level'.

Q **What cause are you passionate about?**

A I am a believer in the ability of technology to improve the world and enhance the quality of life globally. Tech is the long-term solution to many of humanity's greatest challenges; the potential of clean energy from commercial fusion and the possibilities offered by AI are particularly exciting.

Q **Where has been your favorite holiday destination and why?**

A I spent some time in Sydney after a year of teaching in a small island nation in the South Pacific, which was pretty memorable for suddenly reintroducing all western luxuries I had gone without during that year. Having subsisted mostly on rice, onions and island cabbage, the MacDonalds cheeseburger I more or less swallowed whole on arrival remains the tastiest thing I have ever eaten and sleeping in a bed without the sound of rats gnawing in the walls was also pretty nice.

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A Stephen Hawking; I owe that to my younger self. I can remember reading his book 'A Brief History of Time' and being totally absorbed by the subject matter (and it was one of the reasons I chose to study Physics at university), although I am less perturbed about the eventual heat death of the universe now than I was when I first read it! Few have overcome the challenges Hawking did, and he had a lot of interesting stuff to say about AI, so I think we'd have a stimulating conversation.

RPC

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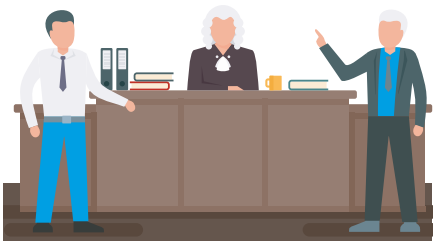
REGULATED UTILITY COMPANIES FACE A BARRAGE OF CLASS ACTION CLAIMS IN THE UK

Authored by: Colm Gibson (Managing Director) and Mark Bosley (Director) - BRG

This year has seen a variety of new claims focused on utility companies. While a perception had been emerging that the bar for bringing such claims can be very low, recent decisions have confirmed that a robust early defence can be effective in preventing or reducing the size of a claim.

What's changed?

Mass opt-out class actions have long been a major feature of the US litigation landscape. Following changes to legislation, they can now be brought in various ways in the UK, particularly in relation to competition law infringements. Walter Merricks, the former financial ombudsman, brought the groundbreaking UK case representing a class of over 45 million people in a claim against Mastercard for an amount comfortably over £10 billion. This case was challenged all the way up to the Supreme Court, which gave the green light in 2021, and has set the ball rolling for many more claims. New cases frequently attract media attention, but these are only the tip of the proverbial iceberg, as litigation funders have little interest in tipping off potential defendants before the claim is filed.



What is the risk for utility companies?

No industry is immune from class actions, but some sectors are particularly vulnerable, not least the regulated utility sector. Salient features include that:

(1) Plentiful information is in the public domain thanks to investigations undertaken by regulatory bodies such as Ofgem, Ofcom, Ofwat, ORR, the NAO, Parliamentary Select Committees, the Environment Agency, the CMA and various government departments. Claimants can use reports, or even simply the announcement of an investigation by these bodies, to support a prima facie case.

(2) Utilities are required to publish financial and operating information, reducing or dispensing with the need for legal disclosure (hence avoiding the need to alert the companies before the case is filed).

(3) Claimants have the benefit of hindsight; for example, to see if the cost of capital assumed for their price cap was too high or if companies have failed to deliver the services for which customers have paid.

(4) Having customers physically connected to wires or pipes makes it easier for claimants to pass the legal tests necessary to define a class.

(5) The high degree of standardisation (standard pricing structures, standard methodologies for setting prices and so forth) reinforces the commonality of any alleged wrongdoing, again making it easier to pass the legal tests necessary to define a class.

(6) From an economic perspective, it is relatively easy to argue that the incumbent utility network companies are dominant as a matter of competition law.

(7) The large number of utility customers means that, if a class can be defined sufficiently broadly, the headline value of claim can be very large, even if the individual claims are small.

Rightly or wrongly, utility companies are assumed to have access to significant resources to pay any damages award.

Obvious avenues for claims against utilities arise where companies have failed to meet their regulatory targets; or where outturn costs have been lower than assumed by the regulator, but prices have remained at the price cap. (After all, if costs are lower in a competitive market, you would expect prices would be competed downwards to reflect this.) However, given the propensity of litigation funders and law firms to become increasingly innovative, there is a significant risk that claims

will come from unexpected angles, and companies are often surprised by the claims that emerge.

Whilst a claim might ultimately be defeated, that process can take several years. Having a large class action claim—and hence an uncertain contingent liability—hanging over a company can create significant financial uncertainty over an extended period. Impacts may include:

(1) adverse publicity: where a class is certified based on a claim of "unfair pricing", this can create a perception that defendant companies have overcharged their customers by many millions of pounds, even if the claim is not well founded.

(2) regulatory concerns: any claim where the sector regulator has not already investigated is bound to draw that regulator's attention.

(3) financial concerns: a certified claim can impact credit ratings and deter equity and debt investors

(4) political attention: as the UK water industry is experiencing.

What should utility companies do?

Potential claimants will be working on preparing a thorough case, and litigation funding means they are well resourced. While claimants have unlimited time to prepare, defendants face tight timeframes to respond to certification applications, making it hard to prepare compelling expert and other evidence to challenge certification if work begins only when the application is filed.

To counterbalance the claimants' inherent advantage, defendants need to be equally well prepared. As a minimum, therefore, they will need to have engaged advisors familiar with class actions to prepare a "response pack" to have on the shelf in anticipation of a filing. In addition to normal legal defences, companies must also be prepared to challenge all aspects of the application at the certification stage, such as the suitability of proposed claim to be brought as collective proceedings, commonality of the alleged effect on class members, class definition and proposed expert damages methodology. The CAT has declined to certify some recent applications, suggesting that the bar is not as low as some have assumed and that a robust response from proposed defendants, supported by the right expert evidence, can pay dividends.

Disputes

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Thought leaders in this field, BRG launched its 2022 report on the sector at the TL4 Corporate Disputes conference last November. We look forward to sharing our 2023 mid-year report with the community this Summer.

For more information, please contact Dan Tilbury.

COLLECTIVE COMPETITION LAW ACTIONS

CHALLENGES FOR CASE AND COSTS MANAGEMENT

Authored by: Suzanne Rab (Barrister) - Serle Court

The Consumer Rights Act 2015 (CRA 2015) allowed the Competition Appeal Tribunal (CAT) to hear a species of collective actions never seen before. With effect from 1 October 2015, CRA 2015 confers on the CAT the power to hear standalone as well as follow-on actions and introduced new procedures for collective proceedings, both opt-in and, for the first time in the CAT, opt-out.

The magnitude of damages in competition litigation can be in the billions and where the number of parties, and the scale and complexity of actions multiplies, this inevitably raises difficult case and cost management issues.

In the CAT, the relevant options for collective competition law claims are in broad summary:

1) collective actions which can be brought by multiple claimants or by a specified body on behalf of consumers; or

2) collective actions which can be the subject of a collective proceedings order (CPO) and can proceed on either an opt-in or opt-out basis. The claims may be brought by or on behalf of persons who have suffered loss or damage in respect of an infringement decision or alleged infringement of Chapter I or II of the Competition Act 1998 (CA 1998) or (up to and including 31 December 2020) Article 101 or 102 of the Treaty on the Functioning of the European Union (TFEU).

The CAT also hears applications for approval of collective settlements of such private actions brought, or which could have been brought, by way of collective proceedings. In 'follow-on' claims, the CAT is bound by the earlier infringement decision, whereas in standalone actions, liability must be established without the benefit of any such prior finding.

Complexity, Scale and Scope

No opt-out collective claim was certified in the first five years since CRA 2015 came into force, but 2022 and 2023 have seen an escalation in collective claims moving closer to certification, settlement or judgment. Merricks v Mastercard[1] is a collective claim seeking an estimated £14 billion of compensation; while Royal Mail and BT have been awarded approximately £17.5 million in damages against DAF Trucks.[2]

Litigating cases to trial, in some cases lasting as long as 6 months, raises case management quandaries. These cases involve extensive factual and expert evidence, weeks of cross-examination and a large number of parties each requiring separate representation.

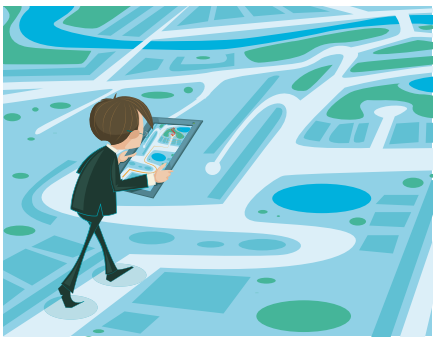
A case in point is the litigation concerning multilateral interchange fees stemming from the European Commission (Commission) 2007 decision against Mastercard[3] upheld by the Court of Justice[4] (the MIF Litigation).

Here conflicting first instance judgments in England and Wales[5] resulted in a seminal appeal to the Supreme Court[6] further highlighting the need for robust case management.

The Trucks Litigation is an example of a proactive approach in litigation of significant scale. The litigation arose out of the Commission's 2016 settlement decision[7] finding that certain European manufacturers of trucks were engaged in a cartel in breach of Article 101 TFEU over a 14-year period (broadly, 1997-2011). The case involves more than 600,000 cartelised trucks in the UK. This began with the "first wave" claims of seven cases, followed by nine additional claims. There are also two collective actions: one "opt-in" (Road Haulage Association Ltd.) against IVECO, MAN and DAF (1289/7/7/18), and another "opt-out" (UK Trucks Claim Ltd.) against IVECO and Daimler (1282/7/7/18). Over a dozen additional claims follow on the heels of these actions, adding further complexity.

The CAT is sensitive to the need to avoid excessive delay by allowing some cases to proceed to trial at different paces.

The Trucks Litigation exemplifies a multiple trial approach with three claimant groupings and three separate merits trials. However, this could potentially result in inconsistent decisions, perhaps inescapable in the circumstances.



Umbrella Proceedings

A recent innovation is the so-called Umbrella Proceedings (1517/11/7/22 (UM) Merchant Interchange Fee Umbrella Proceedings). Common issues across the MIF Litigation that are to be determined in one set of proceedings are intended to be binding on the parties in the others. This litigation heralded the potential use of 'sample' claimants and a hearing dedicated solely to evidential issues in relation to pass-on (23-25 May 2023).

Again in the MIF Litigation, the CAT has allowed parties to voluntarily apply for a stay of their claims while others proceed on condition they agree to be bound by the outcome in the lead proceedings. A 'wait and see' approach might be attractive to a claimant seeking to ride on the coat tails of the lead proceedings. An 'exceptions-based' approach of then asserting claimant-specific evidence to cherry-pick the desired outcomes may not be palatable for either claimants or defendants depending on where the costs fall.

Certification Challenges

The Supreme Court in the Merricks Litigation[8] has confirmed that the bar for certification was relatively low, which led to a number of cases being certified. On 8 June 2023 the CAT declined to grant the CPO applications brought by Commercial and Interregional Card Claims I Limited (CICC I) and Commercial and Interregional Card Claims II Limited (CICC II) under section 47B of the CA 1998, against each of Mastercard and Visa.[9] The CAT allowed a period of eight weeks to allow the Proposed Class Representatives (PCRs) to notify the CAT whether they intend to attempt to address the CAT's concerns. This does not mean that any revised pleadings need to be perfected by that date. However, it may be conjectured whether this has imposed more onerous requirements on the PCRs than, for example, Merricks had to satisfy. The reality is that the PCRs have to some extent found themselves

1 Case No: 1266/7/7/16.
2 1284/5/7/18 (T) Royal Mail Group Limited v DAF Trucks Limited and Others and 1290/5/7/18 (T) BT Group PLC and Others v DAF Trucks Limited and Others [2023] CAT 6.
3 COMP/34.579 Mastercard, 19 December 2007
4 Case C-382/12P - MasterCard and Others v European Commission, ECLI:EU:C:2014:2201.
5 CAT: Sainsbury's Supermarkets Ltd v MasterCard Incorporated and Others [2016] CAT 11; High Court: Asda Stores Limited and Others v MasterCard Inc and Others [2017] EWHC 93 (Comm) (Popplewell J): High Court: Sainsbury's Supermarkets Limited v Visa Europe Services LLC, Visa Europe Limited and Visa UK Limited [2017] EWHC 3047 (Comm) (Phillips J).
6 Sainsbury's Supermarkets Ltd v Visa Europe Services LLC and others, Sainsbury's Supermarkets Ltd and others v Mastercard Incorporated and others [2020] UKSC 24.
7 Commission decision AT.39824, 19 July 2016.
8 Mastercard Incorporated and others v Walter Hugh Merricks CBE [2020] UKSC 51.
9 Commercial and Interregional Cards Claims I Limited v Mastercard Inc and others, Commercial and Interregional Cards Claims II Limited v Mastercard Inc and others, Commercial and Interregional Cards Claims I Limited v Visa Inc and Commercial and Interregional Cards Claims II Limited v Visa Inc [2023] CAT 38.

in the current position due to the unfolding chronology of events where they have had to address later case developments after issue.[10]

Future Funding of Collective Competition Law Claims

A question remains whether a Supreme Court ruling that litigation funding agreements (LFAs) are 'damages-based agreements' will dampen the incentives to bring more collective competition law claims.[11] By a 4 to 1 majority, the Supreme Court has upheld an appeal by DAF challenging the LFAs in two separate follow-on collective claims against members of the EU trucks cartel. The judgment renders those arrangements unenforceable until certain conditions are met.

The case concerns the definition of a damages-based agreement (DBA), derived from one legislative context - the Compensation Act 2006 (the CA 2006) - and its use in a different legislative context (section 58AA of the Courts and Legal Services Act 1990 (CLSA 1990)). Section 58AA(1) and (2) CLSA 1990 provide that a DBA will be unenforceable unless certain conditions are met. The Damages Based Agreements Regulations 2013 (the DBA Regulations 2013) set out further requirements which must be satisfied if a DBA is to be enforceable. It is accepted that the LFAs in this appeal would not satisfy these conditions. The relevant part of the definition of DBA in this appeal, pursuant to section 58AA(3), is whether the LFAs involve the provision of "claims management services". The Court held that claims management services are capable of covering LFAs when "read according to their natural meaning".

As a result, the claimants' funding arrangements fall under the scope of the DBA Regulations 2013 since damages-based funders provide "client management services" and would be paid based on how much the tribunal awarded as damages.

Early reactions suggest, however, that the judgment – though unwelcome – will not sound a death knell to the growing body of funded collective competition law claims.

While the highest court in the land has ruled on the issue, this may not be the end of the matter. But reversing this position would require legislative change.

2022/23 has been important for the development of collective private enforcement actions for breach of competition law against the challenging competition law environment after Brexit. The MIF and Trucks Litigation and others will continue to pose challenges for case management in the CAT. Some funding agreements will need to be revised to reflect the Supreme Court's recent ruling but certain of the more prominent funders in the industry have reacted to say the judgment will not stem their appetite to fund a claim with merit. Navigating the future landscape will require a delicate balancing exercise between proportionality, fairness and reasonable cost.

Professor Suzanne Rab is a barrister at Serle Court Chambers in London where she specialises in commercial litigation and regulatory law. Professor Suzanne Rab operates at the cutting edge of competition damages litigation. In the financial services sector, she represents the proposed class representatives in a collective lawsuit against Mastercard and Visa on behalf of merchants accepting payments using UK corporate cards, and credit and debit cards from overseas visitors. The case, which has been filed in the Competition Appeal Tribunal, seeks compensation for businesses which were charged Multilateral Interchange Fees by their banks on Mastercard and Visa transactions. She is a law lecturer at the University of Oxford, Visiting Professor at Imperial College London, and Professor of Commercial Law at Brunel University. Suzanne is a mediator accredited by the Centre for Effective Dispute Resolution, the Civil Mediation Institute and the Civil Mediation Council.

10 For example, Dr Liza Lovdahl Gormsen v Meta Platforms, Inc. and others [2023] CAT 10.

11 R (on the application of PACCAR Inc and others) (Appellants) v Competition Appeal Tribunal and others (Respondents) [2023] UKSC 28.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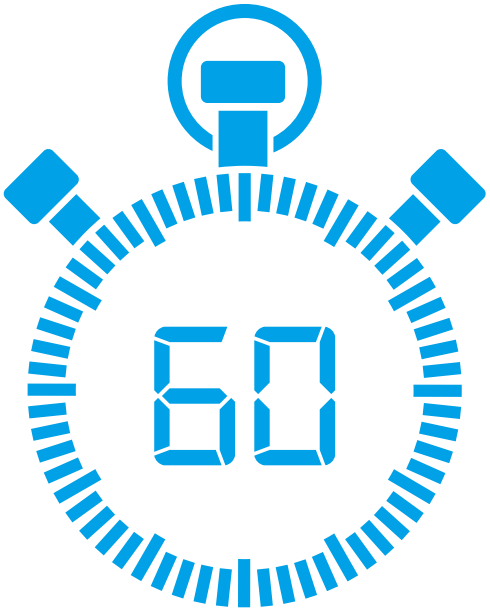

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A Lots of time with my wife (if she also no longer had to work!) and my daughter. Lots of cycling, lots of watching sport!

Q **What do you see as the most important thing about your job?**

A The people that you work with, both the colleagues and clients. It's a very collaborative industry, everything stems from relationships. If you respect and get on well with those people you feel inspired, supported and confident.

Q **What motivates you most about your work?**

A It's always rewarding to solve a problem for a client and receive good feedback. The nature of fraud work is often urgent crisis management. To know that a client trusts you and comes to you for help in these difficult situations is satisfying.

Q **What is one work related goal you would like to achieve in the next five years?**

A Many of our team have been involved in a large matter for several years, which is listed for a year long trial in 2024 (!). It would be great to achieve a successful outcome after all the time and effort invested by so many at Pinsent Masons and the wider legal team.

Q **What has been the best piece of advice you have been given in your career?**

A Try to be the type of person that you would want to work with.

Q **What is the most significant trend in your practice today?**

A Much of my practice relates to civil fraud and contentious insolvency. The current (unfortunate) economic climate is causing an increase in companies being wound up and the type of fraud and Insolvency Act claims that come out of these processes.

Q **Who has been your biggest role model in the industry?**

A I won't embarrass them by mentioning names, but I have learnt a lot from the team I work with. We have a genuinely collaborative approach. Senior and junior colleagues' views are shared which has allowed me to learn from different perspectives and experiences.

Q **What is one important skill that you think everyone should have?**

A Compassion and being able to put yourself in another's shoes.

Q **What cause are you passionate about?**

A Pinsent Masons is a founding member of the Mindful Business Charter and I am on the firm's delivery committee for the MBC. The legal industry can be a busy, stressful environment. It is so important to be aware of the impact of our interactions and to create cultures that commit to healthier, more sustainable ways of working.

Q **Where has been your favorite holiday destination and why?**

A Japan. I went during my qualification leave. The food, culture, people and history were amazing and it really felt like a once in a lifetime trip!

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A Ben Stokes. Being a cricket fan, I would love to hear about the historic contests he's been a part of. I also admire his honesty and openness about the stresses and obstacles he's faced.

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WITHDRAWN FROM THE FRONTLINE

BANKS EXCUSED FROM FIGHT AGAINST APP FRAUD BY SUPREME COURT - PHILIPP V BARCLAYS BANK UK PLC [2023] UKSC 25

Authored by: Kit Smith (Managing Associate) - Keidan Harrison

On 12 July 2023, the Supreme Court handed down the eagerly awaited decision in Philipp v Barclays which confined the duty owed by the banks and held that it does not extend to individuals dealing with their own funds.

In reaching its decision the Supreme Court noted that Mrs Philipp was not trying to misappropriate funds. That the funds were misappropriated by a third party is not relevant to the Quincecare duty of care, since "fraud does not negative intention"[1]. The Court held that where the instruction provided to a bank is clear and given by the customer personally, or an agent of the customer who acts with apparent authority, then no further inquiries are required on the part of the bank to verify that instruction. The bank's immediate duty is therefore to execute the instruction.

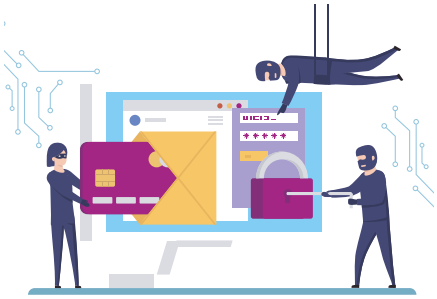
The banks will no doubt welcome the decision, which represents a return to fundamental banking principles and a restatement of the banks' role as agent of its customer and where the limits of that agency lie.

Philipp: The Background Facts

In 2018 Mrs Fiona Philipp and her husband were deceived by an individual who represented himself as a working for the Financial Conduct Authority in conjunction with the National Crime Agency. The fraudster told Mrs Philipp that he was investigating a fraud within HSBC and the investment firm, Tilney – where Mr Philipp held a large part of his life savings. The fraudster persuaded Mrs Philipp that these funds ought to be moved to "safe accounts" whilst the investigation was ongoing and that she should not co-operate with the Police when they attended on her to warn her of the fraud.

Between 5 and 10 March 2018, Mrs Philipp transferred £700,000 to "safe" accounts in the UAE. On 19 March 2018, Mrs Philipp sought to pay a final £250,000 to a "safe" account. By this time her account had been frozen and despite the Philipps' attempts to persuade Barclays to make the payment, it was not executed. On 26 March 2018, following a third visit from the Police, the Philipps realised that they had been the victims of an elaborate fraud. Barclays sought to recall the funds on/after 31 May 2018, but to no avail. The Philipps therefore claimed £700,000 in damages from Barclays for breaching the duty of care owed by it to them, by executing Mrs Philipp's payment instructions.

1 Shogun Finance Ltd v Hudson [2004] 1 AC 919, para 6



Philipp: First Instance and Appeal Decisions

Following the issue of the claim, Barclays applied for reverse summary judgment/the claim to be struck out, on the basis that that there were no reasonable grounds for bringing the claim or no real prospect of success on the claim. HHJ Russen acceded to that application and granted summary judgment in favour of Barclays[2].

On appeal[3], Birss LJ delivering the leading judgment, held that the High Court had engaged in conducting a "mini trial" at first instance and reiterated the need for cases of this type to be decided on the basis of tried facts, rather than by a summary procedure.

As regards, the extent of the application of the Quincecare duty, it was noted that the purpose of the duty identified by the logic that underpins the duty is to protect the customer. It was noted that the duty did "not depend on the fact that the bank is instructed by an agent of the customer of the bank"[4] and that, ultimately, whether the duty was breached or not, ought to be decided at a trial. Nevertheless, permission for Barclays to appeal to the Supreme Court was granted.

Philipp: The Bank's Duties – A Return to Banking Principles

The Court began by returning to fundamental banking principles, noting that a bank is debtor to its customer, since money deposited with a bank by its customer is thereafter the bank's to deal with as it sees fit. The bank's debt to the customer, falls to be discharged by the bank, when the customer instructs it to do so – e.g. to withdraw funds or to transfer funds to another account. When making such payments, the bank acts as the customer's agent.

The bank is bound to act in accordance with the authority conferred upon it by the principal and the terms of such agency are typically to be found contained within the bank's mandate. Unless that mandate states otherwise, the duty co comply with the principal's instructions is strict – i.e. where an instruction is given in accordance with the mandate, the ordinary duty of the bank is simply to execute the instruction. This reasoning implies that any red flags that a bank may see in the background which might put them on inquiry are to be ignored and do not impact on the ordinary duty.

Quincecare: The Wrong Turn

In the Quincecare case, Mr Justice Steyn (as he then was), observed that:

"Given the bank owes a legal duty to exercise reasonable care in and about executing a customer's order to transfer money, it is nevertheless a duty which must generally speaking be subordinate to the bank's other conflicting contractual duties." [5]

Steyn J then went on to posit the question at the crux of the Quincecare duty that has caused much confusion to date:

"How are these conflicting duties to be reconciled in a case where the customer suffers loss because it is subsequently established that the order to transfer money was an act of misappropriation of money by the director or officer?"[6]

The Court noted that it was flawed to "regard the bank's duty of care as potentially conflicting with its duty to execute its customer's instruction"[7]. This is so because the duty to exercise reasonable skill and care is incidental only to an instruction from a customer to a bank that is either (i) unclear, or (ii) leaves the bank with a choice about how to carry out that instruction. In Mrs Philipp's case, her instruction to transfer funds from her account was unequivocal and was, albeit unwittingly in furtherance of fraud, a valid payment order which was clear and left no room for interpretation on the bank's part. As such, the bank was strictly bound by its mandate to follow Mrs Philipp's instruction and its duty of care extended only to the effective execution of the order.

Philipp: Agency and Limit on Authority

Lord Leggatt considered the role of authority and agency in the Quincecare context. It was noted that authority to act as an agent includes "only authority to act honestly in pursuit of the interest of the principal"[8]. A bank relying on the apparent authority of an authorised agent of its customer should be able to point this as a protection, but only so far as the reliance is reasonable. Where the circumstances are such that the bank has reason to believe the agent acts without authority, and fails to make enquiries, then the bank may be liable.

If a bank makes a payment when it ought to have been on notice and it has failed to make inquiries, then such a transfer is outside of the scope of its mandate and in excess of its authority.

2 Fiona Lorraine Philipp v Barclays Bank UK Plc [2021] EWHC 10 (Comm)
3 Fiona Lorraine Philipp v Barclays Bank UK Plc [2022] EWCA Civ 318
4 Ibid, [50]
5 Philipp v Barclays Bank UK Plc [2023] UKSC 25, [28]
6 Barclays Bank Plc v Quincecare Ltd [1992] 4 All ER 363, [376]
7 Philipp, [63]
8 Bowstead & Reynolds on Agency, 22nd ed (2021), Article 23

In such a circumstance, the account should fall to be reconstituted – a point confirmed in the Hong Kong Court of Final Appeal decision in Tugu[9].

Philipp: Customer's Intention

Counsel for Mrs Philipp sought to argue that instructions induced as part of a fraudulent scheme did not represent the client's true intentions. It was submitted that a bank's duty was to act in accordance with the instructions of its customer – i.e. this "must mean his really intended instructions". Mrs Philipp's instruction to transfer funds to accounts controlled by fraudsters cannot have been her "really intended" instructions.

The argument was dismissed by the Court, noting that the fact that an intention results from a mistaken belief does not affect a fact that is genuinely held. The Court noted the comments of Lord Nicholls of Birkenhead in Shogun Finance[10]:

"Fraud does not negative intention. A person's intention is a state of mind. Fraud does not negative a state of mind."

The Court held that the Court of Appeal was wrong to accept that a payment instruction was vitiated by being part of a wider APP fraud. The effect of fraud is to give the victim of that fraud the right to set aside that transaction induced by fraud – but the right to set aside is applicable as against the fraudster, not a third party such as a bank.

Hope(s) on the Horizon?

It is not all doom and gloom for individual victims of APP fraud however, with recent and forthcoming legislative reforms. The Financial Services and Markets Act 2023 received Royal Assent on 29 June 2023 and provides a mandatory reimbursement scheme applicable to all payment service providers. On 31 July 2023, the FCA Consumer Duty came into force, requiring firms to act to deliver good outcomes for retail customers. Whilst these reforms may provide compensation for future claims, they will offer little or no respite for victims of historic APP fraud.

Comment

The Court's decision represents a reasoned rejection for the argument to extend the Quincecare duty of care to individual victims of APP fraud. The nature of APP fraud and other social engineering frauds is that the individual victim does intend to make the transactions in furtherance of that fraud. A bank is bound to act in accordance with the instructions of its principal, where there is no ambiguity.

The judgment does not provide the panacea sought by victims of APP fraud. The Court declined to encroach upon the role of regulators and legislators – who must ultimately address the issue of APP fraud. There is some hope on the horizon for victims of APP fraud, with regulatory and legislative changes afoot – see the Financial Services and Markets Act 2023 and the FCA Consumer Duty. Some may wonder if the law is again loaded in favour of the banks. The pros and cons of taking such a pro banking line will be of concern to consumer organisations which enables paying banks to make payments without any concern as to potential red flags.

The banks will welcome their withdrawal from the front line in the fight against fraud and the restatement of reasonable reliance upon apparent authority of agents will be very welcome. That said, they are not completely excused from the fight and the Quincecare duty does remain, albeit in very much diluted form, for now. In light of the judgment in FRN[11] and the banks' ability to contract out of a duty of care (save for gross negligence), it is likely that in practice, the duty will cease to have any practical effect in the coming years.

9 PT Asuransi Tugu Pratama Indonesia TBK (formerly known as PT Tugu Pratama Indonesia) v Citibank N.A. [2023] HKCFA 3

10 Shogun, [6]

11 The Federal Republic of Nigeria v JP Morgan Chase NA [2022] EWHC 1788 (Comm)

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LITIGATION FUNDING AGREEMENTS "RETAIN THE CHARACTER OF A DBA AS DEFINED"

THE LEGAL LANDSCAPE FOLLOWING THE SUPREME COURT'S DECISION IN PACCAR

Authored by: PJ Kirby KC (Barrister) and Charlotte Wilk (Barrister) - Gatehouse Chambers

P J Kirby KC and Charlotte Wilk consider the impact of the Supreme Court's decision in R (on the application of PACCAR Inc and others) v Competition Appeal Tribunal and others [2023] UKSC 28

The Supreme Court's decision

Last month, the Supreme Court handed down its decision in the PACCAR Trucks appeal ("the Appeal"). The court allowed the Appeal, and decided by a majority (Lords Sales, Reed, Leggatt and Stephens) that a litigation funding agreement ("LFA") under which the funder is to receive a percentage of any damages recovered by the funded party is a damages-based agreement ("DBA") within the meaning of s58AA Courts and Legal Services Act 1990 ("CLSA"). Lady Rose delivered a strong lengthy dissenting judgment.

Whilst some funders have prepared for an adverse outcome, the impact of the decision should not be underestimated. The majority's favouring of a wide definition of claims management services will have a significant impact on the litigation funding industry at large, and much commercial litigation, in particular claims in the Competition Appeal Tribunal ("CAT") and other large group actions.

Historically, the law of champerty and maintenance rendered the funding by third parties in return for a share of the proceeds unlawful.

However, over the last 25 years public policy considerations including increasing access to justice led to the acceptance of third party funding. The Appeal turned not on the development of the common law in relation to third party funding but rather the proper interpretation of the relevant legislation and its complex history. The deceptively simple issue of statutory construction was how to interpret the meaning of the words "claims management services".

Whilst the definition of a DBA was found in section 58AA CLSA the definition of claims management services was borrowed from the Compensation Act 2006.

The Justices grappled with a range of issues, including but not limited to the relevance, if any, of uncommenced legislation, the significance of secondary legislation as an aid to construction, and the presumption against absurdity. Sir Rupert Jackson's endorsement of third party funding, in his preliminary Review

of Civil Litigation Costs (May 2009) and his final report (January 2010), as a means of improving access to justice carried little weight. In the CAT and the Divisional Court, accepting the Respondents' purposive approach to statutory construction, it was held that for a service to be caught by the definition of claims management services, that service had to be provided within the context of the management of the claim, and that funders did not ordinarily manage claims. Lady Rose agreed with this approach in her dissenting judgment.

However, the majority considered that Parliament's drafting of a wide definition was deliberate. As per [para 67] "the textual and contextual indicators from the 2006 Act itself clearly lead to the conclusion that the definition of 'claims management services' is meant to be wide and is not intended to be coloured by the notion of 'claims management'". This drafting decision meant that the Secretary of State could decide which claims management services should be regulated as and when the need to do so arose and provided for regulation of the same through a Scope Order. Litigation funding is not a form of regulated claims management under the current scope orders; however, the definition of a DBA covers all those providing claims management services and is not confined solely to regulated claims management services.

Troubled Waters?

Litigation funders now face a central problem: any funding agreement providing for a return based on a proportion of damages will be caught by the definition of a DBA. Therefore, such agreements are unenforceable unless they comply with s58AA CLSA and the Damages Based Agreements Regulations 2013 ("the Regulations"). In all likelihood, the majority (if not all) of funding arrangements since the birth of litigation funding would not have complied with the Regulations. This has wide-reaching consequences.

Third party funders are therefore urgently seeking advice as to whether it is possible to draft a compliant LFA. It is worth noting that in Lady Rose's dissent [para 227], she opined that LFAs cannot "realistically" comply because the Regulations were not, in her view, drafted with any intention to be applied to the litigation funding industry. This probably overstates the difficulty.

Challenges in the CAT

The Appeal involved both opt in and opt out proceedings in the CAT. A DBA is unenforceable if it relates to opt-out collective proceedings (s47C(8) Competition Act 1998). LFAs providing for a percentage-based return will therefore not be permissible for funding opt-out proceedings. The Collective Proceedings Orders in those cases will need to be re-evaluated, and funders continuing to fund such cases will have to limit their return to a multiple of their investment. At present, it is believed that all opt-out proceedings in the CAT are backed by LFAs, and those claims are worth billions of pounds, hence the colossal impact of this Appeal.

What issues should funders be considering?

Since the hearing of the Appeal in February, some funders are one step ahead of the game and have already been advised as to the appropriate steps to take. Funders will need to act swiftly to consider what action to take in relation to existing but unresolved cases within their portfolios as well as future LFAs, with a view to ensuring compliance. Funders may also have to carry out a risk assessment in relation to resolved cases and the possibility that a funded party may try to recoup amounts previously paid to the funder.

LFAs where the return is a multiple of the amount invested will not be caught by the definition of a DBA. Some LFAs are drafted with a return based on a multiple or a percentage of the recovery, whichever is higher.

In LFAs with a severance clause, caution must be exercised as to whether the same can be relied upon in removing the provision pertaining to a percentage return.

What should funded parties consider?

It is likely that funded parties will find themselves unable to secure further funds unless an amended or new LFA is drafted and agreed; it is therefore prudent for funded parties to agree the same to avoid hampering the progress of the litigation.

What next?

New primary legislation may be required temper the uncertainty ahead. It is therefore essential that the Association of Litigation Funders and funders themselves spearhead lobbying to secure these vital legislative reforms. If solutions are not forthcoming, the UK's reputation on the commercial litigation stage will be in jeopardy.

PJ Kirby KC, David Went, and Charlotte Wilk appeared for the Road Haulage Association in the Supreme Court instructed by Backhouse Jones and Addleshaw Goddard

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FINANCIAL WARRANTY CLAIMS AND CURRENT TRENDS

Authored by: Will Anderson (Partner), Louise Boswell (Partner & Solicitor Advocate), Jack Laidlaw, (Associate) - CMS Cameron Mckenna Nabarro Olswang LLP

This article explores the current trends in financial warranty claims arising from M&A transactions in a UK context and offers dealmakers tips from a disputes perspective.

Warranties in M&A deals

The giving of warranties, generally from seller to buyer, is a core feature of M&A deals in the UK and across the Atlantic.

Warranties are contractual statements, usually contained within the acquisition agreement, as to the condition or state of affairs of the company or business being acquired (i.e., the target).

A buyer will be able to successfully sue for a breach of warranty if it can show that the warranty was untrue at the time it was given and that the breach caused an actionable loss.

Typical financial warranties in M&A deals

"Financial warranties" include any warranties pertaining to the financial condition, performance or obligations of the target company or business.

Financial warranty protection commonly covers areas such as accounting, financial performance, liabilities and obligations, borrowings and encumbrances, changes in business and working capital.

Typical financial warranties include assurances from the seller to the buyer that the target's financial statements fairly represent the true and accurate financial position of the target and comply with certain recognised accounting standards.

Other common examples of financial warranties include assurances that the target is not in breach of any of its banking covenants and that, since its most recent accounts or the 'locked box' date, it has carried on its business in the ordinary course of business.

'Locked Box' Mechanism

A 'locked box' mechanism is often used in M&A deals to determine the final acquisition price that the buyer must pay to acquire the shares in the target company.

With such a mechanism, parties agree the final price of the target in advance of completion using the company's most recent financial statements, and there is no post-completion adjustment to account for any change.

Using a 'locked box' mechanism has the advantage of being simpler and cheaper than relying on a target's completion accounts and carrying out a post-completion price adjustment.

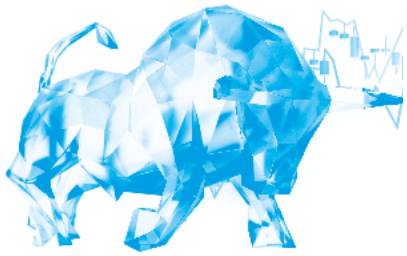
However, it has the disadvantage of added uncertainty for the buyer, in that it involves the buyer effectively taking on the financial risks and rewards of ownership of the business from the 'locked box' date, rather than the completion date of acquisition.

With a 'locked box' mechanism, "what you saw might not be what you get", and this is particularly true with respect to today's volatile and challenging economic climate.

Impact of the current economic climate

With the pandemic, geopolitical constellations, wars, record levels of inflation, supply chain disruptions and the high energy costs of recent years, the world economy is undoubtedly experiencing a period of inherent volatility.

A volatile economic climate normally leads to more claims, and this is consistent with what we, as disputes specialists, are experiencing in practice.



Common financial warranty disputes

In recent times, we have witnessed an increase in aggrieved M&A purchasers bringing claims against sellers for various forms of (alleged) financial warranty breaches. Examples of common breach of warranty allegations being made against sellers include:

i. That the sellers failed to accurately disclose the target's financial performance (with respect to revenue, profits, and cash flows);

ii. That the management accounts provided by the seller are misleading, materially overstate the value of the assets and materially understate the liabilities of the target;

iii. That since the agreed 'locked box' date, the sellers have caused or permitted unauthorised withdrawals or leaks from the target business;

iv. That the 'locked box' accounts provided by the seller have not been prepared in accordance with IFRS so as to give a true and fair view of the target's financial situation; and/or

v. That the target company has fundamentally and materially changed its way of business between the 'locked box' date and the signing date.

Buyers making these allegations commonly claim that the company they have purchased is not in the same financial shape as the warranted accounts, or that the directors must have taken steps between the warranted account dates or locked box date that were inconsistent with business practice prior to those dates, and which have damaged the value of the target. Buyers allege they have suffered loss as a result and want damages to compensate that loss.

Tips for dealmakers from a disputes perspective

The overarching message to be taken from the current trends in financial warranty claims is one of "dealmakers beware!".

M&A sellers should be wary of the increased appetite for, and prevalence of, buyers bringing claims for breach of financial warranties in the current climate. Sellers should take particular care in deciding which warranties to give and seek to limit their liability for breach of warranty under the acquisition agreement to the greatest extent possible.

M&A buyers should properly acknowledge the heightened risk that, in this economic climate, the target businesses they acquire may turn out to be materially different from what they believed they were acquiring if there is a significant period between the warranted accounts date and completion or between the locked box date and completion. Buyers may seek to try and mitigate this risk through enhanced due diligence.

However, a buyer is often at the mercy of the market and no amount of due diligence can prepare them for sudden unforeseeable shifts.

Claims for breach of warranty can be costly and difficult to prove. Changes to a target's business financial performance, however monumental they may be, may be explained by the volatile market conditions and do not necessarily mean any warranty was untrue at the time it was given such that there is an actionable claim.

An already uncertain landscape is further clouded when an M&A acquisition is structured such that there are gaps in time between, for example: (i) the date a warranty is given, (ii) the 'locked box' date, (iii) the signing date, and (iv) the completion date.

As such, parties may be able to alleviate some uncertainty and strengthen their warranty protection by ensuring that their M&A acquisitions do not drag on unnecessarily with multiple, lengthy gaps between key dates.

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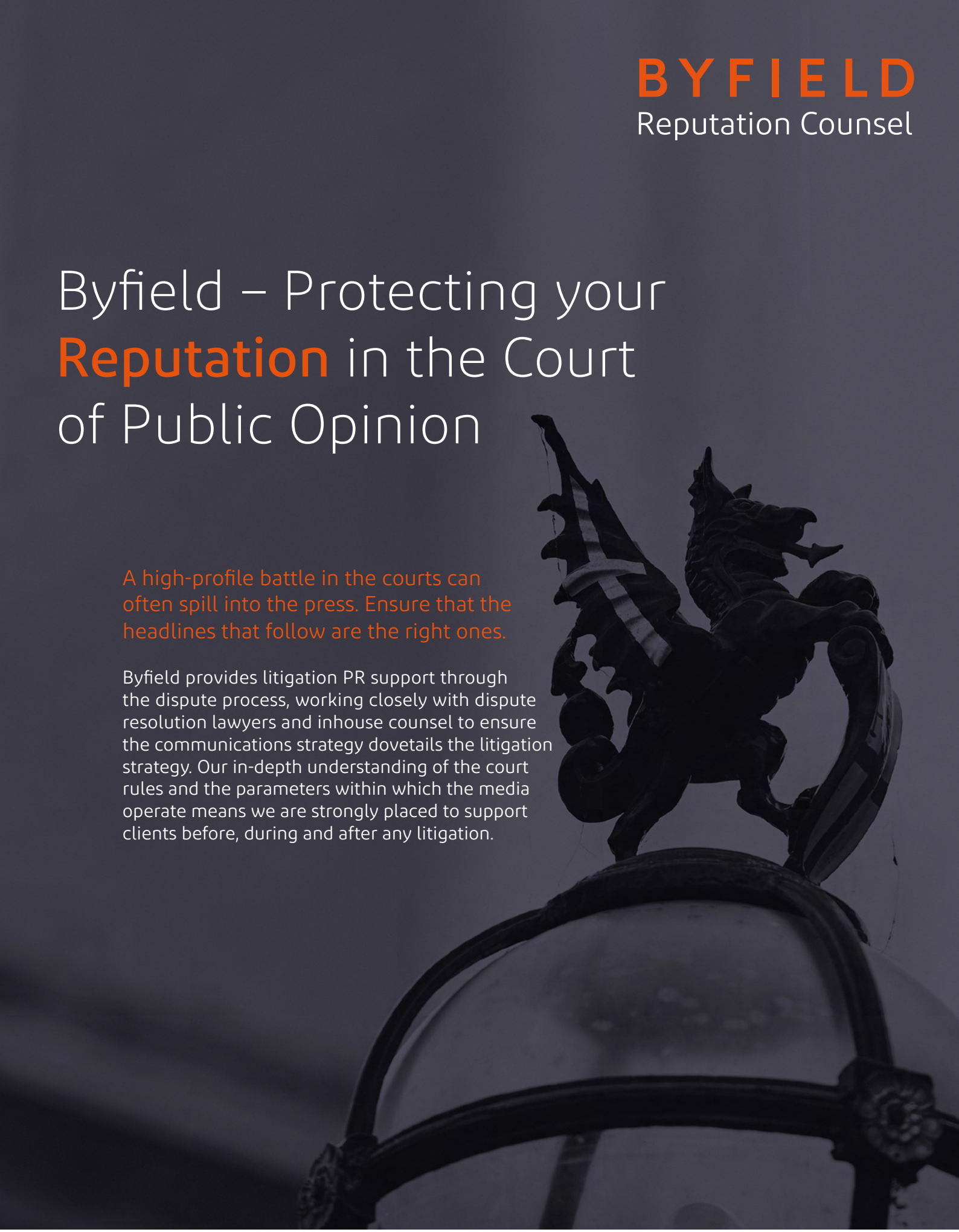

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ARE "CLEAN BILLS OF HEALTH" AILING?

AUDIT DEFICIENCIES AND IMPLICATIONS FOR CORPORATE DISPUTES

Authored by: Peter Maras (Managing Director) - Reference Consulting

Given the significance of audited financial statements (AFSs) as the primary document providing a transparent measure of an entity's financials, recent statistics on audit deficiencies threaten to disturb the privileged position of AFSs as a source of "financial truth". This article explores the role and reliability of audits and AFSs, encouraging a critical look at their value and affected stakeholders in corporate disputes.

Directors are ultimately responsible for the preparation of financial statements[1] (FSs) of a given entity, whether by regulation or general law, even though they can delegate the technical preparation.

Such FSs are typically required to be prepared in accordance with one of the following:

1. Generally Accepted Accounting Principles[2] (GAAP or US GAAP) – Primarily a rules-based system adopted by the US Securities and Exchange Commission (SEC) for US-based, regulated or publicly listed companies; or
2. International Financial Reporting Standards (IFRS) – Principally a principles-based system used by many non-US entities, with some countries using either a converged or modified version of IFRS[3] as their local reporting standard[4], often termed "local GAAP"[5]. Others have effectively adopted or permit IFRS without modification.

But how are FSs transmuted into AFSs? Those reassuring "gold-standard" documents that help bankers, CFOs, and markets sleep at night.

The Alchemy of Auditing: What AFSs Do and Do Not Do

AFSs are the combination of FSs prepared by the directors (typically in respect of a period to and including financial year end) and a short (often around 2-4 pages in length) auditor's report (AR) prepared by the auditor[6] and issued in respect of those FSs.

1 These are typically the statement of financial position (balance sheet), statement of profit or loss and other comprehensive income (income statement), statement of cash flows, statement of changes in equity and notes to the financial statements.

2 Commonly known as simply GAAP in the US.

3 See, for example A-IFRS in Australia which substantially adopts IFRS.

4 For at least some entities (e.g., listed or public companies).

5 For example, "UK GAAP" refers largely to FRS 102, which shares similarities with IFRS but with differences and simplifications to meet the needs of predominantly UK and Republic of Ireland private entities. Countries which have a "local GAAP" that is distinct from US GAAP and IFRS include: China (Chinese Accounting Standards), Japan (J-GAAP) and Brazil (BR GAAP).

6 Whether a natural person or firm. Although the PCAOB principally oversees audit firms.

The AR summarises the audit but omits details like specific audit procedures or testing methods. Those details are documented in the auditor's workpapers, which are not publicly disclosed, but may be reviewed by regulators, during a peer review, or in other contexts.

For users of ARs, the key point of interest is often the "audit opinion" itself. This is commonly one of the following and is often seen as a gauge for the reliability of the FSs.:

In descending order of "lustre":

1. **unmodified opinion** - colloquially known as a "clean bill of health" or an "unqualified" opinion. This could be considered a "sign off" or a "thumbs up" from the auditor.

   What does it mean? It means that the auditor believes the FSs give a true and fair view of the financials of the entity, or (more common wording in the US) are presented fairly, in all material respects - a "positive" endorsement of the FSs.

   The auditor will generally conduct their audit at such a standard to obtain reasonable assurance about whether the FSs are free from material misstatement, whether due to fraud or error.

   Reasonable assurance is a high level of assurance, but it is no guarantee. A statement that a reasonable assurance standard has been achieved is generally disclosed in the AR for unmodified opinions[7].

2. **modified opinion** (this could be considered to cover the range of auditor responses from "yes but…" to "no comment" to "thumbs down")

   a. qualified opinion - this opinion is issued when the auditor disagrees with the treatment or has been unable to obtain sufficient appropriate audit evidence, of certain items in the FSs. However, these issues are not pervasive enough to require an adverse opinion.

   b. **disclaimer of opinion** - this opinion is issued when the auditor is unable to obtain sufficient appropriate audit evidence on which to base an opinion, and the possible effects of undetected misstatements could be both material and pervasive.

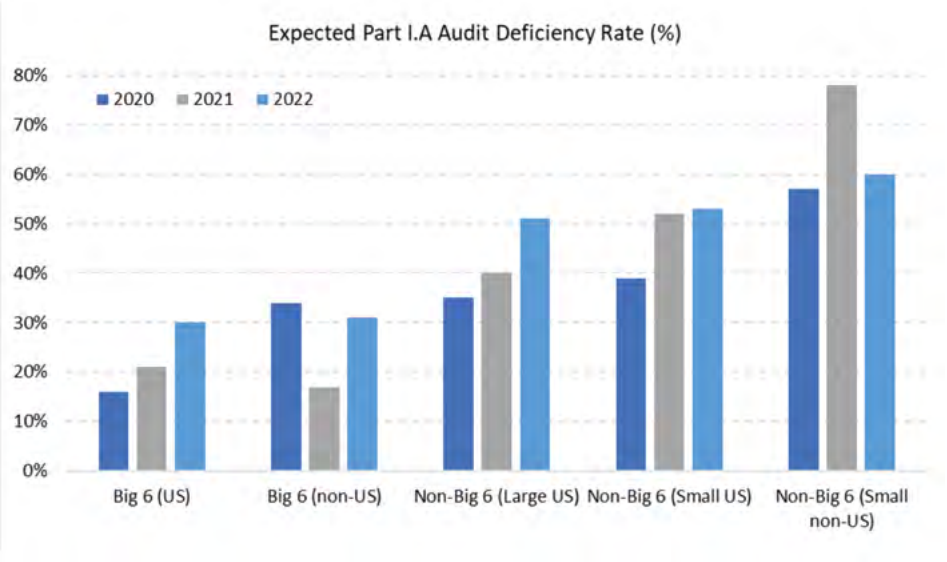
   c. **adverse opinion** - this opinion is issued when the auditor believes the FSs are materially and pervasively misstated.

Contrary to popular belief, auditors don't "correct" the FSs such that an "unqualified opinion" means the auditor has "corrected the boards' homework" and issued an "accurate" version for disclosure. Instead, auditors advise directors on material misstatements in the FSs for the directors to consider.

Even a "gold standard" "true and fair" audit belief formed by the auditor does not mean that the FSs as presented are "true" or "accurate".

A Tarnished "Gold Standard"?: Disconcerting Trends in Audits

A recent report[8] on inspection observations from staff of the Public Company Accounting Oversight Board (PCAOB)[9], expects[10] deficiencies in 30% of sampled[11] audits (up from 21% last year) conducted by US members of the "Big Six" accounting firms[12]. The results are similarly unflattering for the non-US members[13] of the "Big Six" and even worse for Small[14] non-US audit firms, with a ≥ 57% deficiency rate over the past three years.



7 But it could also be said that reasonable assurance is provided in respect of a qualified opinion save for the qualification.

8 SPOTLIGHT: Staff Update and Preview of 2022 Inspection Observations. (July 2023). Available at: https://assets.pcaobus.org/pcaob-dev/docs/default-source/documents/staff-preview-2022-inspection-observations-spotlight.pdf?sfvrsn=63b51390_7 [Accessed 14 Aug. 2023].

9 A US non-profit audit regulator established by the Sarbanes-Oxley Act of 2002 and overseen by the SEC.

10 The "expected" deficiency rate is an interim estimate of the final deficiency rate, made before the inspection reports are finalised.

11 In selecting audits for review, PCAOB disclose they generally use both random and risk-based methods of selection. Accordingly, the statistics may not be representative of a random audit. Notwithstanding, the PCAOB report discloses that in 2022 they expect approximately 26% of all randomly selected audits and 42% of all audits selected on risk-based criteria (both from Large audit firms) will be categorised as Part I.A deficient.

12 Being, the "Big Four" of Deloitte, EY, KPMG and PwC, plus BDO and Grant Thornton.

13 The PCAOB regulates non-US audit firms to ensure the reliability of audit reports for companies traded on US stock exchanges, protecting the interests of US investors regardless of where the companies and auditors are located.

14 Small is defined as a firm that performs 100 or fewer audits per year with Large (Big 6 is considered Large) firms performing greater than 100 audits per year.

The report's implications are global affecting the general credibility of AFSs. The "deficiencies" above, referred to as "Part 1.A" deficiencies[15], were of such significance that PCAOB believes that the auditor failed to obtain sufficient appropriate evidence to support their opinion[16] e.g., they issued a "unqualified opinion" when they should have issued a "qualified opinion", potentially leading to a greater risk of material misstatement (a PCAOB-identified deficiency does not automatically signify a material misstatement in the AFSs nor does PCAOB provide assurance that the AFSs are free of any deficiencies not specifically described in an inspection report).

These high deficiency rates raise questions about the validity of "reasonable assurance" in audits. Do these numbers undermine our belief that an unmodified audit opinion is a "clean bill of health"? What deficiency rate are we implicitly expecting?

Despite the high deficiency rates, AFSs still offer more reliability, through some additional independent scrutiny, compared to unaudited ones. However, the trend may erode public trust in the "reasonable assurance" standard.

Potential Stakeholder Impacts and Losses from Materially Misstated FSs

There are an array of stakeholders that may be affected by high or rising audit deficiency rates and the resulting likelihood of AFSs being materially misstated. These stakeholders may suffer from claimable or non-claimable losses.

Stakeholder	Potential Impact on Stakeholder from Materially Misstated FSs	Potential Losses
Shareholders & Investors	Reduced share value and dividends due to misstated financials.	Diminution in share value, lost dividends.
Directors	Legal liability.	Defence costs, damages.
Employees	Job and benefits (e.g. pensions) insecurity.	Lost wages, reduced value benefits.
Lenders & Creditors	Non-recovery. Tighter lending.	Lost capital and interest, enforcement costs.
Suppliers & Vendors	Unpaid invoices, business interruptions.	Write-downs, consequential losses.
Customers	Non-delivery, business interruptions.	Replacement costs, consequential losses.
Regulatory Bodies	Increased enforcement. Resource strain.	Reduced effectiveness, but increased fines.
Auditors	Legal liability	Defence costs, damages.
Competitors	Realignment costs, poor decisions	Lost opportunities, wasted costs.
General public	Economic downturn, insecurity.	Lost income, diminution in asset values, consequential losses
Company	Legal liability, reduced trust, de-listings, regulatory scrutiny, insolvency.	Fines, increased audit fees, damages, litigation costs, liquidation costs, increase in cost of capital, loss of market value.

What is an audit?

An audit is a process undertaken by an auditor that involves a series of tests on internal controls, along with various audit procedures, all aiming to minimise (as realistically cannot be eliminated) "audit risk", the risk that an inappropriate audit opinion is issued in respect of the FSs. Audit risk affects many stakeholders. The recent PCAOB statistics are consistent with audit risk levels being high or increasing.

Think of audit risk as a three-piece puzzle. Each representing a risk that can impact the overall picture:

Risk	Definition	Auditor Control	Example of high risk
Inherent	Risk of material misstatements due to business nature.	None	Complex financial derivatives.
Control	Risk business internal controls won't prevent/detect material misstatements.	Limited (can recommend improvements)	Weak cash disbursements controls.
Detection	Risk audit won't detect material misstatements.	High (can adjust audit procedures)	Small review sample in high-risk areas.

15 PCAOB also identifies "Part 1.B deficiencies" which are deficiencies related to the audit firm's quality control system. While these "Part I.B deficiencies" do not necessarily relate directly to the specific audits selected for inspection, they highlight issues with the firm's overarching quality control systems, which can impact multiple audits. These might include, for example, inadequacy in the firm's training programs, partner evaluation processes, or client acceptance procedures.

16 And/or on the effectiveness of internal controls over financial reporting.

Handle with Care: Implications for corporate disputes

Given the trends, disputes practitioners might wish to critically assess AFS reliability in disputes. The "number" may not be the "number"...

For example:

(1) the use of AFSs as prima facie evidence of financial status and hygiene - practitioners may need to be prepared for arguments about the potential deficiency rate (often in double digits) and consequential implications for reliability of AFSs or may wish to use these to challenge the probative value of AFSs.

(2) have insolvency triggers or financial ratios been achieved where these have been determined on the face of the AFSs?

(3) have the AFSs been relied upon as a key input in a valuation or damages quantification calculation with the common disclaimer that "I have assumed that the information contained in these AFSs is accurate and complete…"?

(4) the degree to which there has been reliance on the AFSs? How do users think about AFSs? What do they expect they will show? Does "reasonable assurance" matter to users?

(5) do we need to consider alternative methods of proving financial states of affairs? Can we scaffold AFSs evidence in a way that addresses any potential deficiencies? Can forensic accountants play a greater role where financial evidence is crucial? If so, what is it? Might this lead to an increase in forensic audits, re-audits, special audits, audit reviews?

(6) what are we expecting AFSs to show in a disputes context? The simple fact that the directors "have done their homework", that their "homework" is correct, that they didn't copy their "homework"…? Are we expecting too much from AFSs?

Considering these challenges, the author welcomes insights and perspectives from professionals in the accounting, regulatory, and disputes sectors.

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A QUESTION OF VALUE

ASSETS IN THE METAVERSE

Authored by: Pascale Leymin (Director) and Daniel Ryan (Managing Director) - BRG

The metaverse, a 3D-enabled virtual realm in which users can interact, blurring physical and digital, is expected to be a crucial aspect of Web 3.0, the decentralised iteration of the internet. Coined "the successor to the mobile internet" by Mark Zuckerberg, it presents astonishing commercial potential; a study funded by Meta suggested that it could contribute over $3 trillion to global GDP by 2031, while McKinsey estimated that it may generate up to $5 trillion in value by 2030.

However, with these opportunities come risks, including legal challenges regarding the ownership of digital assets and protection of intellectual property (IP) in a borderless online world.

BRG is exploring asset valuation in the metaverse and its legal, economic, and social implications. The first report in a series on the subject, A Question of Value: Assets in the Metaverse, was released this summer, and further reports will focus on areas such as virtual real estate, the consumer sector, and commercial and legal considerations across the metaverse. The goal is to advance industry understanding and foster a broader debate on this evolving topic.

The metaverse is rapidly gaining media attention and popularity and is becoming a focal point for various industries. However, with its increasing prominence, new threats are arising, especially in the legal and economic realms.

Litigation related to metaverse activities and assets is already on the rise and can be expected to increase as the marketplace matures. Regulation in this field is still catching up, with discussions among legal firms, market regulators and courts about protecting asset owners in the metaverse already underway. Challenges include overseeing IP rights, handling the anonymity of participants, and determining the applicable jurisdiction.

Indeed, defining jurisdiction and applicable laws for contracts in the metaverse is one of the primary challenges faced by legal professionals, as, unlike in the physical world, where disputes are often resolved based on international rules related to the location of the transaction, the online nature of most metaverse transactions makes locating parties difficult. Additionally, the decentralised nature of blockchain-based transactions further complicates the issue, as no central party may have a complete overview of the information. Factors like the registered seat of the company or the location of its servers

can be considered, but these may not always be applicable in decentralised environments without a central server controlling all blockchain nodes. Experts have suggested that an international convention to harmonise rules could be beneficial, but achieving such an agreement may be challenging.

Legal experts agree that existing copyright and trademark laws to some extent apply to assets in the metaverse. The ownership of digital assets is often stipulated in license agreements between users and service providers. This can create challenges as participants might not truly own the assets that they think they do. Platform providers may also change license terms overnight, leaving users to look to protection of their rights in court. Disputes related to alleged infringements of IP originating from the physical world have also begun, as illustrated by the recent landmark case win of French luxury brand Hermès against the creator of the MetaBirkin.

Another issue posed is that the economic models for valuing assets in the metaverse have not yet been fully theorised, as traditional economic thinking will not entirely translate to this virtual environment. For example, the application of the law of supply and demand, a fundamental principle in the physical world affecting the prices of assets (such as real estate assets in prime location), could be challenged in the metaverse, where platform operators can alter (unbound by the laws of physics) and increase the supply of assets, theoretically to an infinite level.

Additionally, the metaverse is increasingly being used as a marketing tool by brands, affecting the value of both physical and digital assets by encouraging consumer engagement and therefore creating exposure for the brand.

Sociological considerations also play a role in metaverse economics, with a significant number of people expected to engage with the metaverse regularly in the coming years. User behaviour, such as psychological ownership and the endowment effect – by which individuals attribute greater value to things they own over things they do not, either tangible or virtual - will influence how people perceive the value of their digital assets.

In the long term, ensuring interoperability and achieving critical user mass will be significant drivers of the metaverse's sustained growth.

The value of the metaverse and its assets can be expected to increase with growing user participation.

Consolidation of platform providers may be expected in the short to mid-term, but issues surrounding the transfer of assets and the protection of ownership rights will arise if platforms fail, making interoperability crucial for asset movement between platforms.

As the metaverse evolves, legal considerations will remain at the core of its development. Regulatory frameworks are rapidly evolving, and the ability to understand the dynamics of dematerialised assets will be crucial for asset valuation. With consolidation expected in the metaverse industry, platform operators that prioritise protecting user investments and IP assets are more likely to succeed.

The future of the metaverse remains uncertain, but its increasing adoption and potential for value creation are undeniable. The establishment of appropriate regulatory frameworks, high adoption rates, and increasingly mature digital markets will be important factors in the metaverse's success, and the road ahead will involve navigating legal complexities, economic challenges, and social dynamics to unlock its full potential. As the metaverse continues to evolve, its impact on various industries and the global economy will undoubtedly be a fascinating journey to observe.

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A GUIDE FOR LAW FIRMS

OPTIMIZING LEGAL OUTCOMES WITH ADVANCED EDISCOVERY TECHNIQUES

Authored by: Adam Page (Director EMEA) - Lineal

Understanding Advanced eDiscovery's Function in Contemporary Legal Practice

In the age of digitization, there has been a radical change in the way that evidence is gathered, handled, and examined in the court system. Nowadays, law firms must deal with enormous volumes of electronic data, much of which may be pertinent to their cases. In today's legal environment, the practice of eDiscovery, which involves using technology to locate, gather, and produce electronically stored information (ESI) in response to a request for production in a lawsuit or inquiry, is crucial.

Given the volume and complexity of electronic data, conventional techniques of evidence evaluation, such as manual searching through physical files or even simple digital searches, are no longer adequate. Enter advanced eDiscovery, a technology-driven method that uses tools and procedures to enhance legal results, expedite the eDiscovery process, and save expenses.

Advanced eDiscovery is a must for contemporary legal practice, not merely an extra choice. In light of a legal landscape that is becoming more and more digital, it is essential to preserve effectiveness and competitiveness.

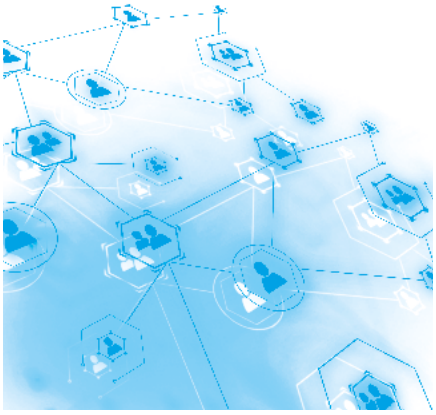
Important Advanced eDiscovery Methods and Their Legal Consequences

With the use of advanced eDiscovery, law firms can better traverse the complicated world of digital data. These include text analytics, predictive coding, data mining, and computer-assisted review.

These cutting-edge methods have several advantages over conventional discovery procedures, including cost savings, improved case preparation, and more effective and accurate review.

1. **Predictive Coding:** Based on a collection of training data, this approach uses machine learning algorithms to forecast the relevance of texts. It helps legal teams concentrate their review efforts on the most important papers in circumstances when there are a lot of documents to evaluate.
2. **Data mining:** By using data mining, patterns, trends, and linkages in vast data sets may be found. This method in eDiscovery can highlight linkages that could have gone unnoticed otherwise, giving crucial information for case strategy.
3. **Text analytics:** This method includes sifting through text data to draw out pertinent information. Legal teams may find pertinent information more easily by using text analytics to discover significant themes, individuals, places, and other things within a data collection.
4. **Computer/Technology-Assisted Review (CAR or TAR):** CAR/TAR classifies papers according to relevancy using algorithms. It may significantly speed up the review process and increase accuracy, just as predictive coding.

Each of these methods has distinct legal ramifications. For instance, the application of CAR and predictive coding may call into question the viability of the eDiscovery procedure. Working with eDiscovery vendors who use open and defended techniques is crucial for law firms to allay these worries.



AI and Machine Learning's Effects on eDiscovery for Law Firms

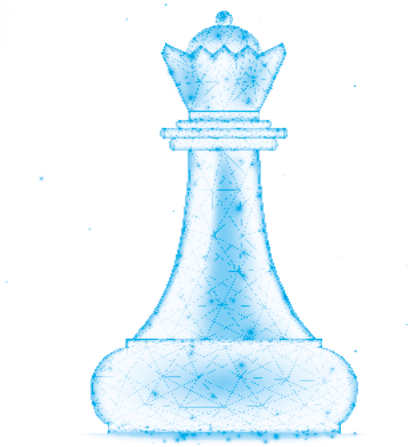
In the area of eDiscovery, artificial intelligence (AI) and machine learning have emerged as game-changers, bringing an unheard-of degree of complexity to data analysis. These tools can help save money, improve case outcomes, and greatly increase the accuracy and efficiency of document review.

AI and machine learning systems can quickly examine large volumes of data to find patterns and connections that human reviewers would overlook. AI, for instance, may be used to find papers that are conceptually similar even when they don't utilize the same phrases. This is very helpful for finding pertinent data in huge data sets.

Predictive coding is highly successful when using machine learning, a branch of AI.

The algorithm 'learns' and develops over time as it is exposed to additional data, increasing the efficiency and accuracy of document classification.

However, there are difficulties in integrating AI and machine learning into eDiscovery. There are several issues with algorithmic bias, transparency, and defensibility. Law companies should collaborate with trustworthy eDiscovery providers, such as Relativity, the leading eDiscovery platform for the legal sector, that follow best practices in the application of AI and machine learning in order to reduce these risks.



Advanced eDiscovery Tools for Complex Litigation

Complex litigation is being handled very differently by legal firms because of advanced eDiscovery techniques. These solutions offer a quick, simple, and lawful way to handle and examine ESI in the face of growing data quantities and changing legal requirements.

For quickly ingesting and putting ESI together for evaluation, automated data processing techniques are crucial. Advanced search and filtering technologies assist legal teams in finding pertinent information quickly, while data visualization tools can highlight relationships and patterns that may not be seen in raw data.

Concept clustering and keyword expansion are two text analytics algorithms that can help uncover hidden patterns and subjects in data sets, giving case strategists important information. Similar to this, predictive coding algorithms can find papers that could be pertinent, aiding in the organization of review activities.

The ability of sophisticated eDiscovery technologies to offer a defendable, repeatable process—a crucial aspect of any legal proceeding—may be of utmost importance. These technologies assist in ensuring that the discovery process can withstand examination by creating thorough audit trails and quality control processes.

Gains in Efficiency: Simplifying Legal Procedures with Advanced eDiscovery

For legal firms, advanced eDiscovery can result in considerable productivity advantages. Businesses may cut expenses, human labor, and review times by automating and improving different eDiscovery process phases.

Large amounts of ESI may be processed quickly by automated data processing technologies, which also prepare ESI for review considerably more quickly than human processes. Tools for predictive coding and text analytics help speed up the review procedure so that legal teams can concentrate their attention on the documents that matter most. Gains in efficiency can result in considerable cost reductions, which is important because document reviews sometimes have the highest costs in legal proceedings.

Aside from lowering costs, sophisticated eDiscovery can improve the caliber of legal work.

Advanced tools can assist legal teams in developing better case strategies and increasing their chances of victory by lowering the possibility of human mistakes and offering deeper insights into data.

Despite these possible advantages, some legal firms are hesitant to use sophisticated eDiscovery, frequently because of the perceived complexity or expense. The advantages of outsourcing eDiscovery and litigation assistance, as this blog post has shown, can, however, significantly exceed these worries.

For Your Law Firm, Choosing the Best Advanced eDiscovery Solution

It's crucial to pick the best advanced eDiscovery solution for your legal company. Your eDiscovery process may be significantly more productive and efficient with the correct solution, which will result in superior legal outcomes. But not every solution is made equal.

Consider the following elements while assessing alternative solutions:

(1) **Features:** Does the solution include the cutting-edge methods and technologies you require, such as text analytics, predictive coding, and data visualization?

(2) **Usability:** How user-friendly is the solution? Will it be simple for your employees to learn how to utilize it, or will it take considerable training?

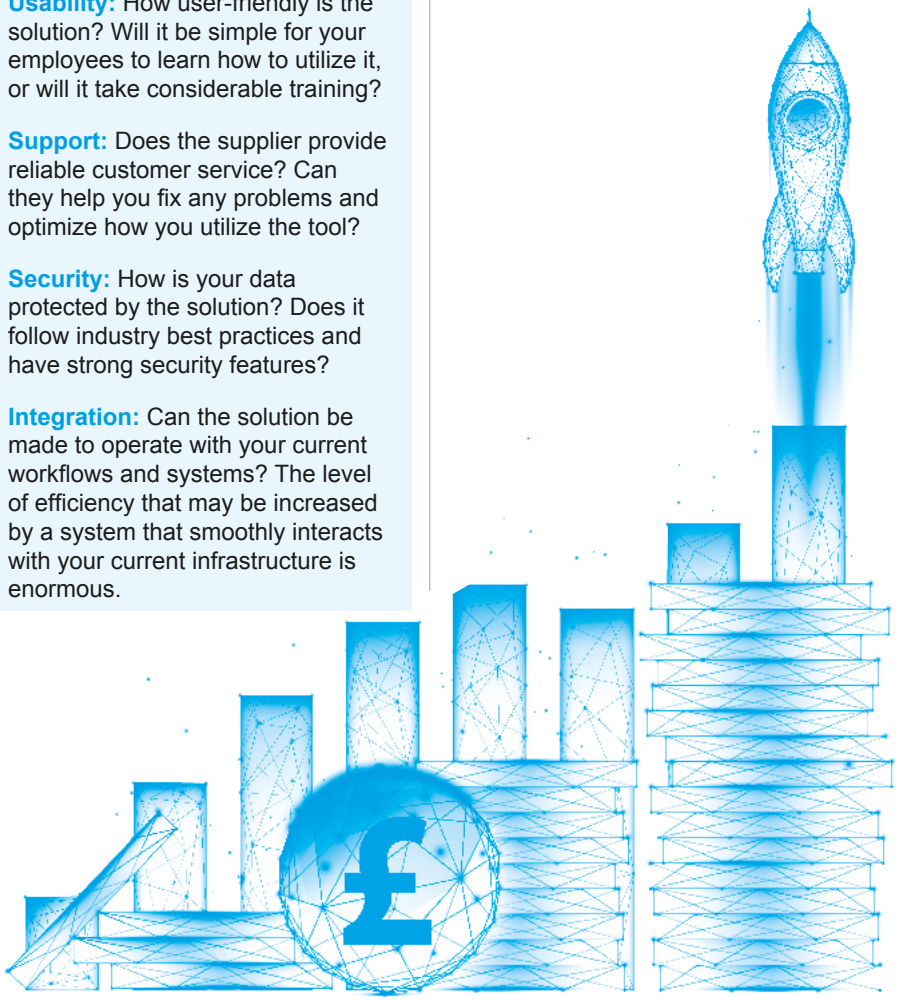
(3) **Support:** Does the supplier provide reliable customer service? Can they help you fix any problems and optimize how you utilize the tool?

(4) **Security:** How is your data protected by the solution? Does it follow industry best practices and have strong security features?

(5) **Integration:** Can the solution be made to operate with your current workflows and systems? The level of efficiency that may be increased by a system that smoothly interacts with your current infrastructure is enormous.

Finally, think about the provider's standing and track record. As you traverse the complicated realm of advanced eDiscovery, a supplier with a track record of success in the legal sector, such as Lineal, can give insightful advice and help.

With the use of advanced eDiscovery, law firms may greatly improve the results of their legal cases. Law firms may better manage complicated litigation and streamline their legal procedures by comprehending the function of advanced eDiscovery, the essential methodologies and their legal ramifications, and the influence of AI and machine learning. The advantage your business needs to thrive in the digital era may be found in the proper sophisticated eDiscovery solution.



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Authored by: Sara Roden (Associate) and Daniella Cha (Solicitor) - Greenwoods Legal

The climate crisis is a global threat that demands urgent action from all industries, including the legal sector, which is now recognizing the importance of integrating environmental and ethical concerns, such as climate crisis, just transition, and biodiversity destruction, into its core practices.

The Law Society's Guidance: Climate Change Resolution

In April 2023, the Law Society published guidance on how to take into account the likely impact of matters upon the climate crisis in a way that is compatible with solicitors' professional duties and the administration of justice.

In line with this guidance, a number of law firms have committed to reducing the environmental impact of its dispute resolution practice by signing up and adhering to the "Greener Litigation Pledge".

What is the Greener Litigation Pledge?

The UK's commitment to achieving Net-Zero greenhouse gas emissions by 2050, as outlined in the Paris Agreement, served as the inspiration behind this initiative.

The Greener Litigation Pledge aims to empower courts and court users in England and Wales to play a pivotal role in achieving the nation's climate goals and promoting positive changes in litigation practices.

The primary objective of the Greener Litigation Pledge is to revolutionize the approach of dispute resolution practitioners in handling court cases, effectively reducing the carbon footprint associated with legal proceedings. Despite its focus, the pledge maintains that the highest standards of justice and client service must be preserved. To achieve this objective, the Greener Litigation initiative adopts several strategies:

1. **Drafting and producing guidelines:** Greener Litigation provides guidelines for court users to adopt when conducting litigation, emphasising sustainable practices.
2. **Technology's role:** The initiative explores how technology can play a significant role in transitioning to a Net-Zero practice, promoting the use of electronic communication, bundles, and remote hearings wherever feasible.

3 **Engaging with the courts:** Greener Litigation collaborates with the courts to introduce impactful changes into the rules of litigation practice, emphasizing eco-friendly approaches. This is already reflected across several court guides.

4 **Expanding global reach:** The initiative aims to extend the reach of Greener Litigation within the UK and beyond, encouraging similar efforts in other jurisdictions.

Law firms, barristers' chambers, legal tech companies, and other organizations involved in the litigation process can join the Greener Litigation Pledge. By signing up, these entities commit to various practices, including:

1 **Corresponding electronically:** Conscious efforts to communicate electronically to reduce paper usage and minimize unnecessary emails.

2 **Promoting electronic bundles:** Reduced printing of hard-copy bundles and other documents to save paper and lower carbon footprint.

3 **Embracing video-calls and minimizing travel:** Considering video-calls over in-person hearings when appropriate, to cut down on travel-related emissions.

4 **Green suppliers and service providers:** Partnering with suppliers and service providers committed to reducing their own carbon footprint to create a greener supply chain.

Greener Litigation has three working groups at present: engaging with the courts to consider how carbon emissions can be reduced within the judicial system; considering the use of technology in relation to adopting sustainable litigation practices; and seeking to expand the reach of Greener Litigation in the UK, and other jurisdictions.

"Advised Emissions"

In addition to reflecting on the impact that day-to-day practices have on the climate crisis, many of which are addressed by the Greener Litigation Pledge, the Law Society Guidance also highlights the impact of "advised emissions".

The guidance explains that, for lawyers, the most significant greenhouse gas emissions associated with the firm are likely to be the emissions associated with the matters upon which they are instructed to advise. The question that arises here is therefore not "how" a law firm should conduct itself when advising to take into account the likely impact of matters upon the climate crisis, but whether it is right to advise at all, considering the impact that that advice could have, particularly given the importance of avoiding allegations of "greenwashing".

Can "reverse-mentoring" promote a greener litigation practice?

Reverse mentoring is a mentoring scheme where the traditional roles of mentor and mentee are reversed. In this arrangement, younger or less experienced individuals take on the role of mentors, providing guidance, knowledge, and insights to more senior or experienced individuals, typically from a different generation or with less familiarity in certain areas.

Reverse mentoring is often used as a way to bridge the generation gap and foster cross-generational learning in the workplace.

It allows older, more established employees to learn from the fresh perspectives and technological expertise of younger colleagues. This exchange of knowledge and ideas can lead to increased understanding, improved collaboration, and enhanced innovation within an organization.

Much has been vocalised about the impact of an increase in "Gen Z" in the workforce. This applies as acutely to law firms as it does to other industries. As a generation who have grown up immersed in technology, AI, and an ever-increasing awareness of the climate crisis, their expectations about how law firms can and should operate can be vastly different to those in more senior or management roles.

Embracing the insight of younger generation on where the use of technology can assist not only in a cost-efficiency or more pragmatic basis, but to also further the impact the firm may have in reducing its carbon footprint within their litigation practice is invaluable, and reverse-mentoring schemes are an effective route to raise this awareness, encourage commitment, and elicit consciousness for senior litigators to "do their part for the planet" during their day-to-day.

Conclusion

The legal profession is now actively embracing its role in combating the climate crisis and working towards the UK's Net-Zero targets. In addition to lawyers' duties and obligations to their clients, they should also be mindful of the planet's well-being. The Greener Litigation initiative and the adoption of reverse-mentoring schemes showcase the legal industry's commitment to being progressive and reducing its carbon footprint while ensuring justice and client service remain paramount. By aligning legal practices with climate-conscious values, the legal sector can contribute significantly to the fight against climate change and create a more sustainable future for all.

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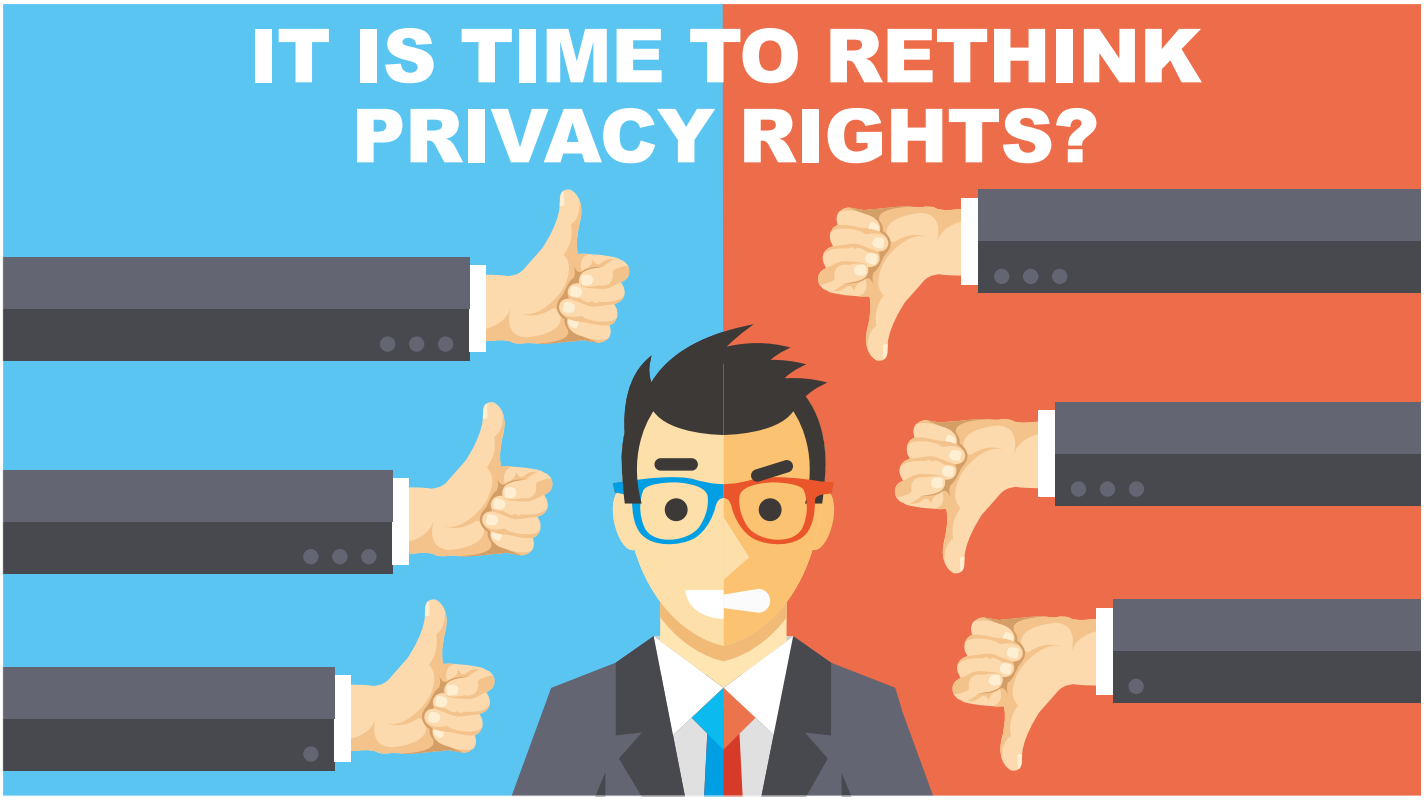

Authored by: Liam Lane (Associate) - Peters & Peters

In February 2022, the Supreme Court unanimously held in the landmark judgment in ZXC v Bloomberg [2022] UKSC 5 that an individual under criminal investigation "has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation".[1] The court acknowledged the longstanding and repeated "concerns as to the negative effect on an innocent person's reputation of the publication that he or she is being investigated by the police or an organ of the state".[2]

Criminal defence lawyers and reputation managers were hopeful that the landscape for individuals subject to investigation for criminal offences had turned a corner given the confirmation of the protection of the right to privacy for individuals.

However, the court also made clear that the "rational boundary" for publication of information would be when the individual is charged with a criminal offence, so as to respect the "open justice principle" and that a charge was "of an essentially public nature so that there can be no reasonable expectation of privacy in relation to it".[3] The central consideration here - which was identified and acknowledged by the Supreme Court in Bloomberg -is the harm, distress and reputational damage that are caused following the reporting of investigation for criminal offences. This, of course, conflicts, with the general public interest in reporting wrongdoing, but also the principle of open justice.

The stress, and distress, of investigations

The distress suffered by individuals under investigation, which is oft an alienating and sensitive process

1 Para 146 of Bloomberg
2 Para 80 of Bloomberg
3 Para 77 of Bloomberg

dependent on the allegations under investigation, was considered with great care by the High Court in Sir Cliff Richard v BBC (and another) [2018] EWHC 1837 (Ch).

In Sir Cliff Richard[4], in a judgment that found in favour of Sir Cliff Richard for the harm and breach of privacy of the publication of a criminal investigation into him (that concluded with no action being taken), Mr Justice Mann concluded that while suspects under investigation generally suffer from distress and discomfort as a result of being investigated, the level of upset "pales into insignificance beside the effects of knowing that everyone knows".[5] As such, the question that falls to be asked again, is whether the court in Bloomberg was correct to conclude that the "rational boundary" of that of charge, or whether the correct position should be the conclusion of proceedings, once wrongdoing has been established conclusively by the tribunal.

Post Bloomberg

Individuals in general, let alone those in the public eye, face a particular type of stigma in the social media era, no matter the outcome of the investigation or proceedings. In the period since Bloomberg, a number of high-profile individuals have been charged with serious sexual offences, notably, musician Rex County Orange, former Premier League footballer Benjamin Mendy and Oscar-winning actor Kevin Spacey.

What was notable about these cases, beyond the nature of the individuals involved, was that all had substantially varied media attention and interest, and concluded at different stages in the criminal proceedings that followed after charge. Importantly however, none of the proceedings resulted in a conviction.

After the Bloomberg judgement, the editor-in-chief of Bloomberg News, John Micklethwait, wrote an op-ed decrying that the judgement should "frighten every journalist in Britain".[6] Micklethwait went on to cite a series of examples of high-profile corporate frauds, including Robert Maxwell, Polly Peck and

By way of example, Rex County Orange was charged with six allegations of sexual assault, and had proceedings concluded against him after his case had been sent for trial in the Crown Court

There was limited contemporaneous media interest in the case, but it was reported that he had been charged with the allegations. His case was concluded following new evidence that wholly contradicted the complainant's account. The Crown Prosecution Service (CPS) in a press release simply stated that the case was dropped as "our legal test for a prosecution was no longer met and so we will not be continuing a prosecution".[7] The CPS statement does not, of course, actually exonerate Rex County Orange. It is legalistic and formulaic, and in no way goes far enough to counter the position and reporting, less still the impact, of charging a person with six offences of sexual assault. Yet, it remains a matter of record that Rex County Orange faced the case, and of course, the media reports remain online and are accessible, despite the fact that the prosecution ultimately offered no evidence against him.

As a result of the stage of proceedings that both Rex County Orange reached, but also were concluded at, none of the evidence was public, or reported on. The court of public opinion has been fairer to Rex Country Orange, likely because of his comparative niche fame (in contrast to others in this article) but also because of the lack of reporting. However, in cases where individuals are acquitted after trial, such as Kevin Spacey, or after a retrial, such as Benjamin Mendy, the same cannot said to be true.

In both cases, there was substantial reporting of the evidence provided by the complainants, and the cross-examination by the defendant's counsel. The court of public opinion has derided Spacey and Mendy, having heard the evidence. Multiple commentators on social media, and traditional media, have challenged and questioned the decisions of the juries in Spacey and Mendy, and for many in the court of public opinion, both men are guilty.

In Bloomberg, the news outlet placed heavy reliance on the public's deference to, and understanding of, the presumption of innocence (as protected by Schedule 1, Part 1, Article 6(2) of the Human Rights Act 1998) as a justification for why information ought to be published, but in high-profile cases where defendants were acquitted, the court of public opinion still judged Spacey and Mendy to be culpable. For example, there have been detailed op-eds asserting that Spacey should not be "uncancelled"[8] and that is without turning towards the recent and high-profile aftermath of former Premier League footballer Mason Greenwood following the conclusion of proceedings (without trial or conviction).

Reform on the horizon

How then, does the decision to publicise help individuals such as Spacey or Mendy, rebuild their lives following their acquittals? Is it right, or reasonable, that individuals should even have to "rebuild" their lives and reputations as a result of being acquitted or cases discontinued? There is no easy answer, but in the age of trial by social media, it is likely that it will not be too long before courts, or Parliament, will have to grapple with the question again, which will be welcomed both by individuals and their advisors.

L

4 Cliff Richard v BBC and CC of South Yorkshire Police [2018] EWHC (Ch)
5 Para 375 Cliff Richard
6 U.K. Judges Are Helping the Next Robert Maxwell" (Bloomberg News: 16 February 2022)
7 Rex Orange County: Singer has sexual assault charges dropped before trial (BBC News: 22 December 2022)
8 Kevin Spacey should not be uncanceled - opinion (Jerusalem Post: 1 August 2023)

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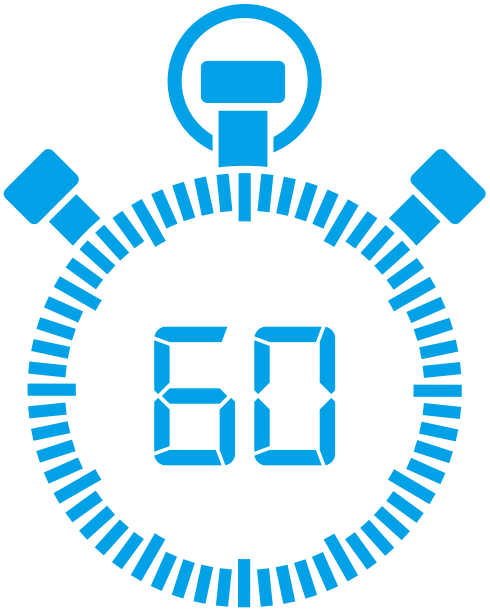

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A Cycling, cooking, reading, and above all else hanging out with my daughter. Certainly not sending or receiving emails.

Q **What do you see as the most important thing about your job?**

A Providing clarity to clients. Litigation can be very strategic and very complex, but above all else clients want to see the wood for the trees.

Q **What motivates you most about your work?**

A The endless challenge of daily problem-solving.

Q **What is one work related goal you would like to achieve in the next five years?**

A Becoming a partner feels like climbing a mountain, only to realise you are in the foothills of another – I'd like to gain some more altitude.

Q **What has been the best piece of advice you have been given in your career?**

A Giving straight answers requires the confidence to occasionally be wrong.

Q **What is the most significant trend in your practice today?**

A The increasing prevalence of cryptocurrency as a target for civil recoveries.

Q **Who has been your biggest role model in the industry?**

A Nicola Boulton: not only a brilliant strategist but also someone who sees the humour in every situation, which is a very important trait in a litigator.

Q **What is one important skill that you think everyone should have?**

A How to fix and maintain a bicycle – they are freedom machines.

Q **What cause are you passionate about?**

A Legal aid cuts are a travesty, leaving the most vulnerable people in society with no access to justice.

Q **Where has been your favorite holiday destination and why?**

A Colombia: endless variety of landscapes, climates, and experiences

Q **Dead or alive, which famous person would you most like to have dinner with, and why?**

A It has to be Bowie, the ultimate pop culture enigma.

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- according to the Legal 500 United Kingdom 2022 edition.

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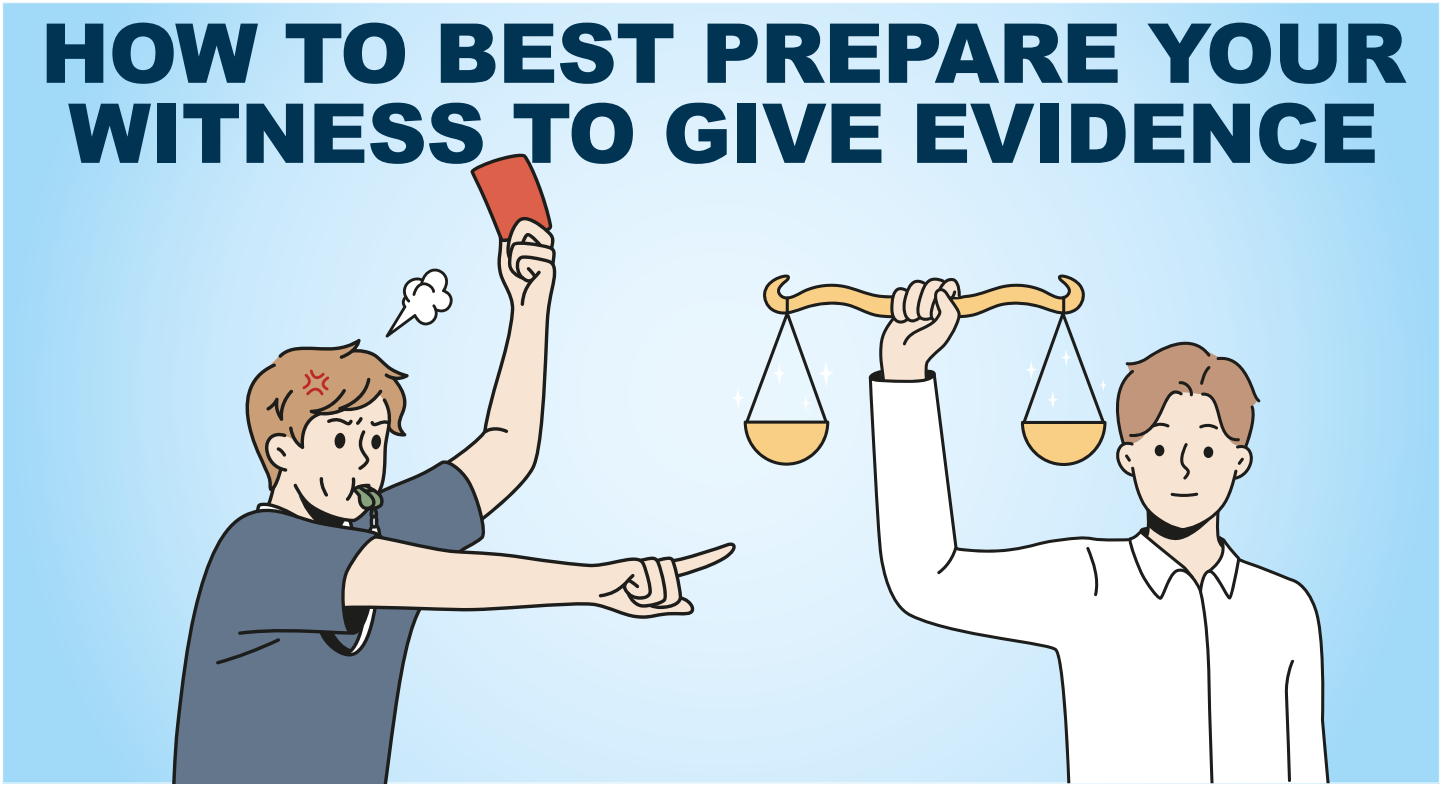

Authored by: Meera Shah (Content Manager) and Leslie Cuthbert (Lawyer and Trainer) - Bond Solon

In the recent High Court case of Old Park Capital Maestro Fund Ltd v Old Park Capital Ltd & Ors [2023] EWHC 1886 (Ch), Mr Justice Richards' judgment explored a key reason why many witnesses give inaccurate evidence: ''litigation wishful thinking''.

This concept was set out explicitly by Mr Justice Mann in Tamlura N.V -v- CMS Cameron McKenna [2009] EWHC 538 (Ch)

"I am sure he is a basically truthful man…however, as is not unfamiliar in litigation, regret over what happened has led to a search for those who might be blamed and has tinted the spectacles through which the events are now viewed. It is a form of "litigation wishful thinking".

A witness falling foul of ''litigation wishful thinking' will not be found to be dishonest. However, the inconsistences and inaccuracies of their evidence are likely to be drawn out in cross-examination, which could lead to them being discredited as a witness.

Given that the process of civil litigation itself can subject memory to biases, what can litigators do to prevent or minimise the memory distortion of their witnesses?

We sat down with lawyer, Bond Solon trainer and interviewing and advocacy subject matter expert, Leslie Cuthbert, to find out more about the issues associated with memory recollection and how cognitive interviewing techniques can be used to enhance the retrieval of information.

1 What are the main factors that can lead to an unreliable witness and how is the judge likely to treat them/their evidence?

When training judges I distinguish between the credibility (believability) and the reliability (inherent quality or trustworthiness) of a witness' evidence.

In assessing these, judges tend to focus on three elements:

- The perceived truthfulness/honesty of the witness.
- The accuracy/consistency of the witness' account - both internally (is what they say consistent and accurate over time) and externally (is what they say consistent/accurate with other evidence).
- The impartiality/objectivity of the witness.

Where a witness displays qualities that are contrary to these elements, a judge is less likely to give weight (i.e., importance) to their evidence.

2 What, in your experience, are some of the common misconceptions held by litigators when interviewing witnesses?

There are several common misconceptions people have about interviewing witnesses, the first being that they are good at it despite never having been trained in investigative

interviewing. I look back on when I took statements as a trainee and then a newly qualified solicitor and cringe with embarrassment at the memory of the quality of my interviewing and the statements that were produced.

Secondly, many litigators don't take a statement from the perspective of beginning with a blank slate. They are looking for the witness to give certain information and to fill in gaps in their understanding of the case. They will ask questions in order to achieve this, which can, in itself, lead to litigation wishful thinking. As a result, they may fail to properly undertake either a full 'fact finding' stage of the interview and/or fail to appropriately 'challenge' the witness' account by reference to other evidence. These are two distinct phases of an appropriate and effective investigative interview that require following researched models such as the PEACE model, the Conversation Management model and/or the Cognitive Interview technique.

3 What is cognitive interviewing, and can you share some techniques that litigators can use to adopt a more effective interviewing style?

The cognitive interview technique is a memory-enhancing approach, which can be used with witnesses who have been present at, or closely involved with, the incident under investigation.

The word 'cognitive' is derived from the branch of psychology that deals with memory and the functioning of the brain.

It can be frustrating trying to get a witness to tell you everything that happened on a particular occasion. Common issues include an account being too brief, too jumbled and rambling, or even a witness seemingly unable to remember something that the interviewer believes they may have seen. The cognitive interview technique seeks to overcome all these problems as far as the limitations of human memory allow, while producing a statement that is in the witness' own words.

One element I particularly enjoy from the cognitive interview approach is 'rewinding the video'. This is where the witness is asked to change the order of recall and to recall what happened in reverse order. The benefits of doing this are:

- The witness is less likely to become irritated or bored as they won't be going over the same ground in the same way.
- It requires more concentration and therefore makes the witness work harder.
- The witness is less likely to rely on pre-prepared 'scripts' of what they 'want' to say.

4 And finally, what are your top tips for dealing with a difficult interviewee/ witness?

Not to think of them as 'difficult' to start with! Provided someone is answering your questions then it is a matter of finding the right approach to deal with them. Interviewing someone is a completely different skill to undertaking examination in chief or cross-examining a witness. What works and is appropriate in one doesn't work for the other so don't confuse them.

In interviewing my three top tips are:

1. **Undertake training.** Interviewing is a skill. Not only do you need to be taught it but it's also important to have the opportunity to practise and receive feedback in order to improve your technique.
2. **Recognise that it is the interviewee's interview.** You are simply the conduit, responsible for capturing their account in their own words. It's important, therefore, to keep summarising back your understanding of what they have told you.
3. **Most people do not listen with the intent to understand, they listen with the intent to reply" (Stephen R Covey).** Don't be like most people! Listen to understand what the person is saying to you and not what you want to believe they are telling you. This will minimise the risk of you leading them to 'litigation wishful thinking'.

In cross-examination it is difficult to choose just three top tips as I authored a book outlining 365 tips, but I'll give it a go:

1. **Be polite and respectful at all times.** Focus more on the examination than on the 'cross' part, to avoid coming across as angry or aggressive. Remember the adage of getting more with the carrot than the stick.
2. **The salami approach.** Approach questioning using the analogy of eating a stick of salami. Question one small issue at a time, just as you only eat a thin slice of salami at a time (apologies if you are vegetarian!) You should stop before you get to the final point that will go into your closing speech (i.e., stop before you get to the metal bit at the end of the stick of salami).
3. **Begin with the end in mind.** Know what you are hoping to achieve from the questioning before you start. Stop as soon as you get it, or realise you aren't ever going to get it. Cross-examinations are more likely to blow up in your face the longer they go on!

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