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Disputes MAGAZINE

ISSUE 7

A LOOK BACK AT THIS YEARS LITIGATION HIGHLIGHTS TO HELP YOU SET THOSE NEW YEARS (DISPUTES) RESOLUTIONS

INTRODUCTION

"That last page turned is a perfect excuse to write a whole new book."

- Edith Widder

The final issue of Disputes Magazine 2022 is here, and we are delighted to present a 'Year in Review'. This edition covers a variety of topics that have affected disputes practitioners this year, including ESG, futuristic technology, the Voss Report and more. This issue also features a supplement from BRG who discuss their 2022 M&A Disputes Report.

Thank you to all of our authors, members, and community partners for their continued support. 2023 is set to be a busy year for the disputes community, including new events launching in Mumbai and Dubai. We look forward to seeing many of you next year!

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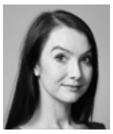
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DEVELOPMENTS IN THE ENGLISH COURTS' APPROACH TO FOREIGN LAW

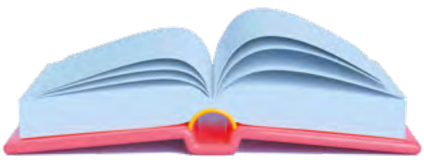
HOW DO THE COURTS APPROACH FOREIGN LAW?

Authored by: Sue Millar, Harriet Campbell and Rebecca Garrick - Stephenson Harwood

As the latest version of the Commercial Court Guide notes, "Expert evidence of foreign law features in a significant proportion of Commercial Court trials"[1]. Foreign law (i.e. the law of any jurisdiction other than England and Wales) is a matter of a "special finding of fact"[2] to be proved at trial[3], but the Court has flexibility in determining exactly how that should happen[4]. In this article, we consider guidance from the Courts over the last year or so on the different methods of evidencing the content of foreign law.

There are four key ways to prove the content of foreign law: i) judicial notice; ii) admission; iii) evidence and iv) presumption.

Generally, the English Courts (subject to certain specific exceptions) do not take judicial notice of foreign law, and admissions are rare in litigation. The doctrine of presumption is complex and beyond the scope of this article. We therefore focus on developments in proving foreign law through evidence.



Decisions of foreign courts

Where the disputed point of foreign law has already been resolved by a senior foreign court, the English Court will treat that decision as persuasive but not conclusive. In Dexia Crediop SPA v Comune Di Prato [2017] EWCA Civ 428 the Court determined that, for "disputed questions of foreign law, the task for the trial judge is to determine what the highest relevant court in the foreign legal system would decide if the point had come before it." However, in Deutsche Bank v Comune di Busto Arsizio [2021] EWHC 2706 (Comm), the Court said that it is able to "diverge from even the highest authority, particularly in the context of a civilian law system" if, for example, it "can be satisfied that an authority, however eminent, does not represent the law ". More recently, however, the Commercial Court has somewhat retreated from that position. In Banca Intesa Sanpaulo SpA and another v Comune di Venezia [2022] EWHC 2586 (Comm), the Court held that the more senior the foreign court, or the greater number of foreign court decisions, the more difficult it will be for the English Court to conclude that the decisions do not reflect the law. Further, it held this remains the case even if the decisions are "unworkable in commercial practice or their reasoning illogical or inconsistent". Ultimately, the English Court's job is not to apply the previous foreign court's finding, but to decide whether the highest foreign court would follow its own decision or not. Conducting that analysis is, of course, not easy and the role of the foreign law expert is a crucial one, as to which, see below.

Decisions of the English Courts

Because findings of foreign law are findings of fact, they have no precedential value. In theory, the foreign law must be proved each time it is raised.

1 At H3.1
2 King v Brandywine Reinsurance Co (UK) Ltd [2005] EWCA Civ 235
3 Bumper Development Corp v Metropolitan Police Commission [1991] 1 WLR 1362
4 CPR 32.1(b)/(c), 35.1, 35.4(1) and 35.5(1) and FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45 at [148]

However, s4(2) of the Civil Evidence Act 1972 provides a mechanism through which findings on foreign law can be admitted in evidence, following compliance with the relevant provisions and service of a notice.

Once admitted as evidence, the foreign law finding is presumed to be correct, unless proved otherwise or there are conflicting decisions on the point.

The importance of Civil Evidence Act notices has been thrown into sharp relief recently in the ongoing Italian swaps litigation. Giving judgment in the most recent decision of Banca Intesa v Venezia, the Commercial Court observed that the judgment given a year earlier in Deutsche Bank v Busto Arsizio was not "strictly binding". However, the findings of fact made in Busto on Italian law could have been admissible as evidence had the claimant banks served a notice under the Civil Evidence Act. Significant reliance was placed on the analysis of Italian law in Busto but without the benefit of a Civil Evidence Act Notice, it had no evidential status and the Commercial Court was free to depart from it, which it did.

By contrast, in Dexia Crediop SPA v Provincia Di Pesaro E Urbino [2022] EWHC 2410 (Comm), (a judgment given just a month earlier than Venezia on an identical issue) the Commercial Court followed the judgment in Busto, partly because the claimant bank, Dexia, served a notice under s4 of the Civil Evidence Act 1972 in relation to it, which made the findings in that case admissible as evidence of Italian law.

Now that there are two conflicting decisions of the Commercial Court on what Italian law means, there will no longer be a presumption that either judgment is correct, even if a Civil Evidence Act notice is served.

Evidencing foreign law

In FS Cairo (Nile Plaza) LLC v Lady Brownlie [2021] UKSC 45 at [148] Lord Leggatt clarified that "it should not be assumed that the only alternative to relying on the presumption of similarity is necessarily to tender evidence from an expert in the foreign system of law".

A range of options are available to the Court, depending on the relative importance of the points in dispute and the complexity/familiarity of the law in question. In the most recent Commercial Court Guide, parties have been encouraged to consider carefully what type of expert evidence may be appropriate, including:

- exchange of expert reports, an experts' meeting and joint memorandum, supplemental reports and oral evidence at trial;
- limiting expert evidence to the identification of the relevant sources of foreign law and of any legal principles on the interpretation and status of those sources; and
- accepting the agreement of the parties on the nature and importance of sources of foreign law and advocates making submissions a trial.

To what extent can questions of foreign law be reviewed on appeal?

Finally, the English Courts' approach to questions of foreign law on appeal has also been the subject of recent judicial deliberation. In Cassini SAS v Emerald Pasture Designated Activity Company & Ors [2022] EWCA Civ 102, both parties apparently accepted that although foreign law findings are treated as findings of fact, they are "not subject to the same restrictions on scrutiny by an appellate court". While the Court of Appeal did not disagree with the first instance judge, it held it was entitled to "consider the expert evidence afresh and form its own view of the cogency of the rival contentions in determining whether the trial judge came to the correct conclusion".

By contrast, in Byers v The Saudi National Bank (SNB) [2022] EWCA Civ 43, the Court of Appeal found that the circumstances in which it could interfere with a finding on foreign law from a lower court were effectively confined to the type of foreign law question where the legal concepts are so similar that the judge provides their own legal input. The Court of Appeal in Byers v SNB held: "this Court should be slow to interfere with the Judge's findings of fact on Saudi Arabian law and should only do so in accordance with the principles applicable generally to findings of fact made by a trial judge who has based his findings on evidence from witnesses." Further, that "[a]ppellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so".

In Deutsche Bank v Comune di Busto Arsizio [2022] EWHC 219 (Comm) (in which judgment was given on the same day as Cassini), in refusing permission to appeal, the Court expressed the view that its conclusions on foreign law were conclusions on factual issues informed by expert evidence which "the appeal court will inevitably be very cautious about disturbing, since they are rooted in the trial judge's greater opportunities to grapple with the expert evidence and hear the evidence of the experts".

While there remains some inconsistency in the appellate Courts' approach to findings of foreign law, it is clear that this is a complex area. If the Court of Appeal decision in Byers v SNB is followed, it may be very difficult to appeal a first instance finding on foreign law, which makes it all the more important to evidence it correctly in the first place.

Corporate and commercial disputes

Stephenson Harwood's highly regarded corporate and commercial disputes team advises on the full range of disputes. We represent clients in High Court litigation, international and domestic arbitration, and advise and assist clients on ADR, including mediation. Most of what we do is truly international and often multi-jurisdictional; we manage complex proceedings in other jurisdictions and co-ordinate proceedings in more than one jurisdiction. The team is renowned for its depth and ability to handle a broad range of disputes but has particular expertise in banking and financial services litigation and regulation, competition litigation, fund litigation, shareholder disputes and corporate litigation, professional and management liability and sanctions litigation.

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60-SECONDS WITH:

FRASER CAMPBELL
BARRISTER
BLACKSTONE CHAMBERS

Q What do you like most about your job?

A The excitement that comes from being in front of a judge who won't allow questions to be dodged – whether by a witness or a lawyer. Having nowhere to hide keeps you on your toes.

Q What would you be doing if you weren't in this profession?

A Perhaps an academic (i.e. still reading, writing, arguing).

Q What's the strangest, most exciting thing you have done in your career?

A Cross-examining an entrepreneur, and his accountant, on whether they had misled the dragons on 'Dragon's Den' about what had happened to my client's money. (They had.)

Q What is one of your greatest work-related achievements?

A In what can be quite an isolated job, I've enjoyed and been proud of supervising pupil barristers, as they navigate a daunting training/audition process to emerge as proper lawyers.

Q What has been the most interesting case you have seen in 2022?

A A long-running dispute in the Chancery Division about the ownership and management of the English holding company of a Russian insurer. The dispute has a combination of interesting legal points and colourful factual disputes about who agreed what, with whom, in Russia decades ago.

Q What do you see as the most significant trend in your practice in a year's time?

A I think that economic conditions will (further) widen cracks in shareholder relationships, leading to (even) more claims for unfair prejudice, breach of joint venture agreements, and so on. Bad news for everybody except lawyers.

Q What personality trait do you most attribute to your success?

A The ability to keep (or at least appear) calm. Nobody wants a barrister in a flap.

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

A When I was a solicitor, Michael Smyth for his skill in carving his own reputational niche in a big organisation. As a barrister, Andrew Green KC for his ability to inspire a team; and Dinah Rose KC for her ability to captivate a courtroom.

Q What is something you think everyone should do at least once in their lives?

A Back themselves, even when others are sceptical.

Q You've been granted a one-way ticket to another country of your choice. Where are you going and why?

A The USA. For all its flaws, still the most diverse and exciting country in the world.

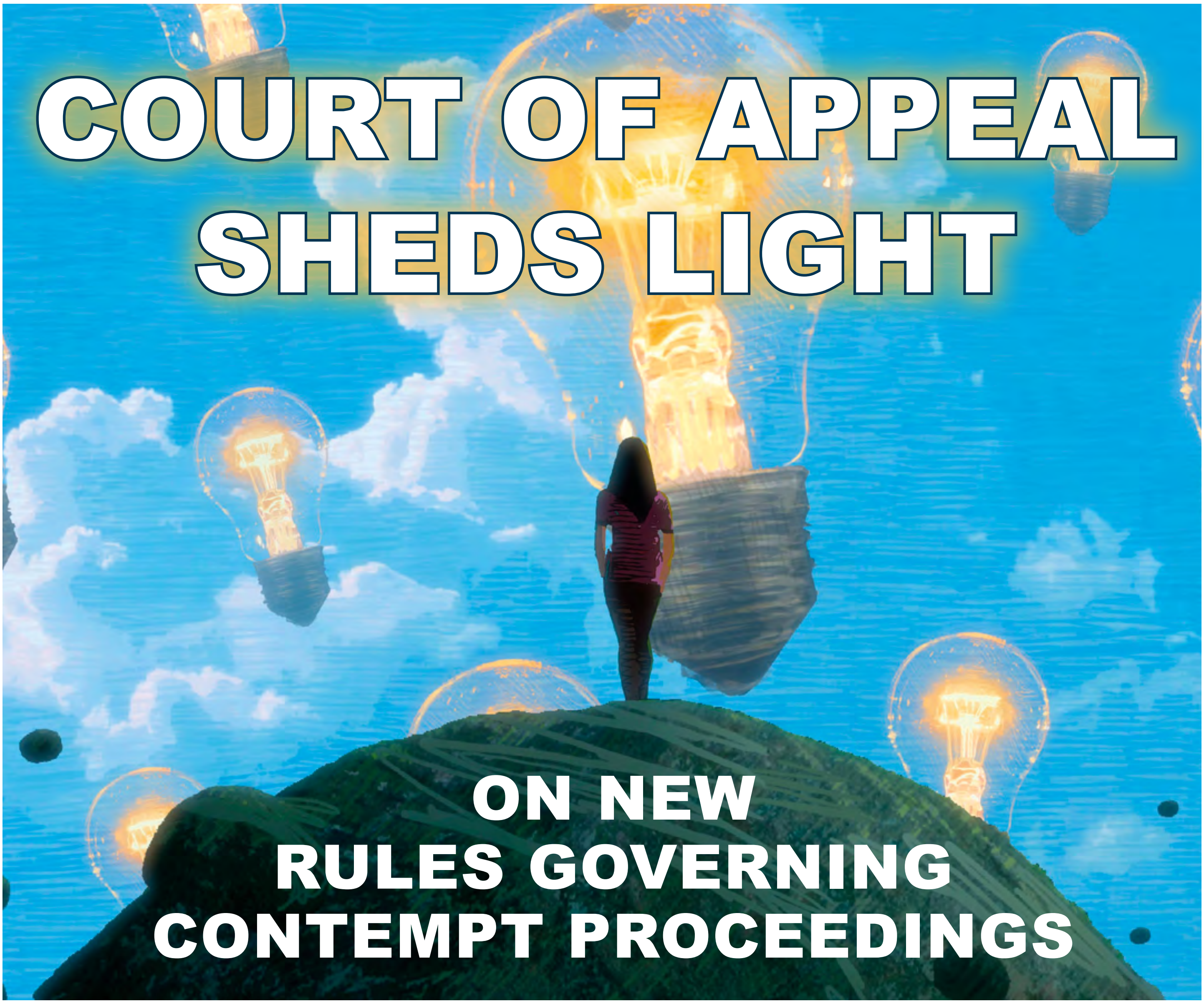
Q What is a book you think everyone should read and why?

A Scoop, by Evelyn Waugh. A hilarious, biting satire of journalism that still rings true today - and just so lightly, elegantly written.

Q Reflecting on 2022, what three words would you use to sum up the year?

A Surprising. Rocky. Transitional.

COURT OF APPEAL SHEDS LIGHT



ON NEW RULES GOVERNING CONTEMPT PROCEEDINGS

Authored by: David Fitzpatrick and Cécile Nicod - Peters & Peters

Applications for contempt of court have been brought into sharp focus in the English courts in recent years. As Mr Justice Foxton observed in Integral Petroleum SA v Petrogat FZE [2020] EWHC 558 (Comm), these applications "have become an increasingly common feature of High Court litigation, particularly in the Business and Property Courts".

Prior to this observation, a number of senior judges had expressed their dissatisfaction with the wording of Part 81, which governs contempt proceedings. Among other problems, the rules were considered to be long, complex, repetitive and ultimately difficult to apply.

Against this backdrop, in the spring of 2020 the Civil Procedure Rule Committee (which is responsible for making rules of court that govern the Court of Appeal (Civil Division), the High Court and the County Court) (the CPRC) initiated a cross-jurisdictional consultation on how to improve Part 81. The result was a new Part 81, which has been in force since October 2020.

A key focus of the CPRC's work was CPR r. 81.4, which governs the requirements of contempt applications.

> ***The CPRC described this provision as the "cornerstone of the new draft Part 81", which was "intended to stand as the guarantor of procedural fairness".***

Court of Appeal rules on personal service

In Business Mortgage Finance 4 Plc and others v Hussain [2022] EWCA Civ 1264, the Court of Appeal considered the defendant's appeal against a committal order and 24-month custodial sentence resulting from various breaches of an injunction. In upholding the High Court's decision, the Court of Appeal clarified a number of key aspects of the new contempt regime.

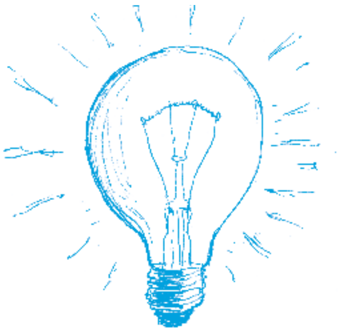
The most significant of these was the court's consideration of whether it has the power retrospectively to dispense with personal service on a defendant of the order that has allegedly been breached. While the old rules addressed this point, the new rules do not contain any express provision on it.

Under the new CPR r 81.4(2), a contempt application must include confirmation that the order allegedly breached was personally served, unless the court has dispensed with personal service (in which case the application must include a statement of the date and terms of the order). The defendant in this case argued that this rule envisages only two possibilities: either the order was personally served or the court has already dispensed with personal service. As the injunction had not been personally served in this case and the court had not dispensed with personal service, the defendant's case was that the application for contempt could not proceed.

Although the court accepted that a strict reading of the rule would support this position, it did not believe that this was the CPRC's intended effect. The court reasoned that if, as the defendant submitted, any order dispensing with service had to be made before breach, it "would mean that a respondent who was perfectly well aware of the terms of an injunction made against him could disobey the order with impunity on the grounds that no service had yet been effected on him". This would cause both serious inconvenience and represent "radical changes in the long-standing practice of the court when granting injunctions".

The court also noted that the terms of CPR r. 81.1(2) and (3) make clear that the new rules were not intended to alter the scope of the court's jurisdiction; rather, they took effect subject to the substantive law of contempt.

Although the court acknowledged that it is "perhaps not quite so easy to identify where the Court's powers to dispense with service retrospectively derive from", it confirmed that such a power does exist.



What does this mean in practice?

This is a timely judgment on one of the key provisions of the new Part 81. The general position remains that committal applications for breach of injunctions can only be brought where there has been personal service of the injunction that is sought to be enforced. This is recognised in CPR r. 81.4(2), which as the court noted, presupposes it to be the case. It also reflects the longstanding practice of the court and is intended to act as a procedural safeguard whereby the defendant has proper notice of an injunction before he is at risk of being committed for breach of it. The usual way to give this notice is personal service of the injunction itself.

However, the requirement for personal service has never been an absolute one: if it can be shown that the defendant had actual knowledge of the terms of the order (for example, if he was present when it was made), the court will not insist on personal service.

Other issues

The court also clarified certain other points concerning committal applications under the new Part 81:

- The court confirmed that applicants for committal are not under a duty to act wholly impartially; on the contrary, they have a legitimate private interest in the outcome of the application. There is therefore nothing improper in suggesting to the Judge that the maximum sentence be imposed. In dismissing the defendant's appeal against a 24-month sentence, the court reaffirmed that this sentence (the maximum available) is not reserved for the very worst contempts.

- Defendants to contempt applications do not require permission to appeal either the findings of contempt or the sentence imposed. Although the court did not hear any argument on the point, Lord Justice Nugee considered that this must be right both in cases where a judge makings findings of contempt and sentences the contemnor on the same occasion and in cases where the sentence is dealt with in a separate and subsequent hearing.

A PERESTROIKA MOMENT FOR NON-PARTY DISCLOSURE?

THE COURT OF APPEAL'S DECISION IN GORBACHEV V GURIEV[1]

Authored by: Natalie Todd and Jon Felce - Cooke, Young & Keidan

Whilst recent attention has been on the new gateways for service out of the jurisdiction to obtain information orders against non-parties, these gateways are confined to establishing the identity of a (potential) defendant and what has become of the applicant's property. However, what is the position on non-party and pre-action disclosure orders? This was the subject of two 2022 decisions which have gone under the radar by comparison to the new service out gateways, but which are equally of significance for disputes practitioners.[1]

The relevant provisions

Non-party disclosure applications are permitted under section 34 Senior Courts Act 1981 ("SCA81") and CPR 31.17. Section 34 enables orders to be made on the application of a party to proceedings against a third party, and rules of court giving effect to the provision are contained in CPR 31.17. A similar framework under section 33 SCA81 and CPR 31.16 addresses pre-action disclosure.

In seeking permission to serve such applications out of the jurisdiction, recent applicants have relied upon gateway (20) in CPR Practice Direction 6B. This provides for service out with permission where a "claim" made "under an enactment which allows proceedings to be brought" where such proceedings are not covered by any of the other gateways in the Practice Direction. The "enactment" relied upon was the relevant section of the SCA81, which enables the court to make orders for third party disclosure.

Nix v Emerdata Ltd[2]

These proceedings concerned the collapse of the 'Cambridge Analytica' business. The claimant had been the CEO, and the defendant had bought the business. The defendant applied for non-party disclosure against a New York law firm that had advised the claimant.

The application was initially refused on paper, the judge ruling that (i) there was no jurisdiction to make such an order against a non-party resident outside the jurisdiction, and (ii) the appropriate route was via a letter of request or a disclosure order in support of foreign proceedings granted in the relevant overseas jurisdiction.

The applicant renewed the application at an oral hearing. Two arguments were relied upon. The first (which was rejected) was that CPR rule 6.39 contemplated such an application. The second was to rely upon gateway (20). The judge considered that the court had no jurisdiction to make disclosure orders against third parties out of the jurisdiction, because legislation is generally not intended to have extra-territorial effect. She also doubted the decision in Obex[3], questioning whether pre-action or non-party disclosure qualified as "proceedings" within the meaning of gateway (20). Further, even if the court had had jurisdiction to order service out, as a matter of discretion it

1 [2022] EWCA Civ 1270
2 [2022] EWHC 718 (Comm)
3 ED&F Man Capital Markets LLP v Obex Securities LLC [2017] EWHC 2965, where permission was granted to serve a pre-action disclosure application out of the jurisdiction under gateway (20)'s predecessor.

would not have done so because that would have trespassed on the letter of request regime.

The Court of Appeal's decision in Gorbachev v Guriev

Mr Gorbachev and Mr Guriev were involved in a dispute concerning their interests in a valuable fertiliser business based in Russia called PJSC PhosAgro. One of the issues involved how and why Mr Gorbachev was financially supported between 2004 and 2012 through two Cypriot trusts. The trustees of those trusts had been advised by a partner who had joined the English law firm Forsters, which firm therefore had in their possession in England potentially relevant documents. Mr Gorbachev applied against Forsters for non-party disclosure.

Initially, Forsters resisted the application, arguing that it should have been made against the trustees. Mr Gorbachev therefore joined the trustees to the application and sought permission to serve them out of the jurisdiction, relying upon gateway (20).

Permission was granted. After service, the trustees unsuccessfully applied to set aside the order: (i) an application for non-party (and pre-action) disclosure was a 'claim' for the purpose of gateway (20) and section 34 SCA81, which should be interpreted expansively, (ii) similarly, such an application constituted 'proceedings' under gateway (20), and (iii) whilst legislation is generally not intended to have extra-territorial effect, section 34 did not limit an application to persons within England and Wales.

The trustees appealed. The Court of Appeal dealt briefly with the definitions of 'claim' and 'proceedings', upholding the first instance decisions. It focussed on the territoriality principle, discussing how the courts had consistently held that apparently wide and general words enabling documents to be obtained should be interpreted subject to the territoriality principle. If wide-ranging orders for disclosure of documents held by third parties abroad were too readily available that would infringe international comity objectionably by circumventing procedures such as the letter of request regime. They would also be difficult to enforce.

Nevertheless, the importance of the territoriality principle differed depending on the circumstances. In Guriev, the key was that - unlike Nix - the documents were in England. Territoriality had little or no relevance, and it was questionable whether the letter of request regime would have been effective. By sending documents to their English lawyers, the trustees had subjected them to the English court's jurisdiction and therefore accepted the risk of their being subject to production. Nor did it matter that those documents were held electronically. If a third party's documents were within the jurisdiction, they must be available to the court to ensure a just outcome, irrespective of the third party's location. Further, it could not be said that the first instance judge's discretion had been exercised incorrectly.

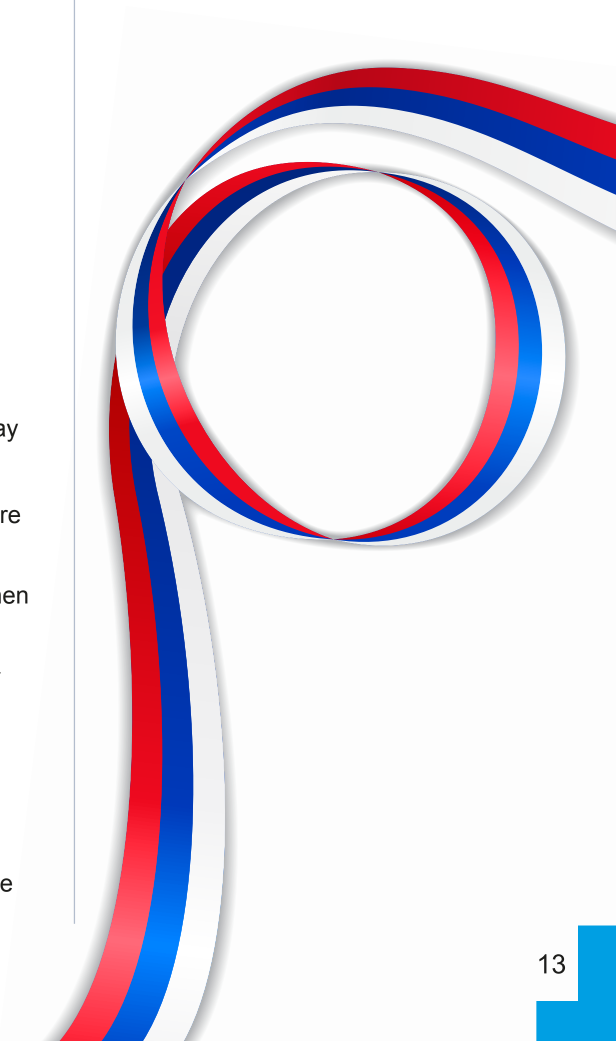
Where does that leave matters?

It is clear from Guriev that both pre-action and non-party disclosure applications are 'claims' and 'proceedings' for the purpose of sections 33 and 34 SC81 and gateway (20) as appropriate, and that such applications are available against overseas parties where documents are held within the jurisdiction.

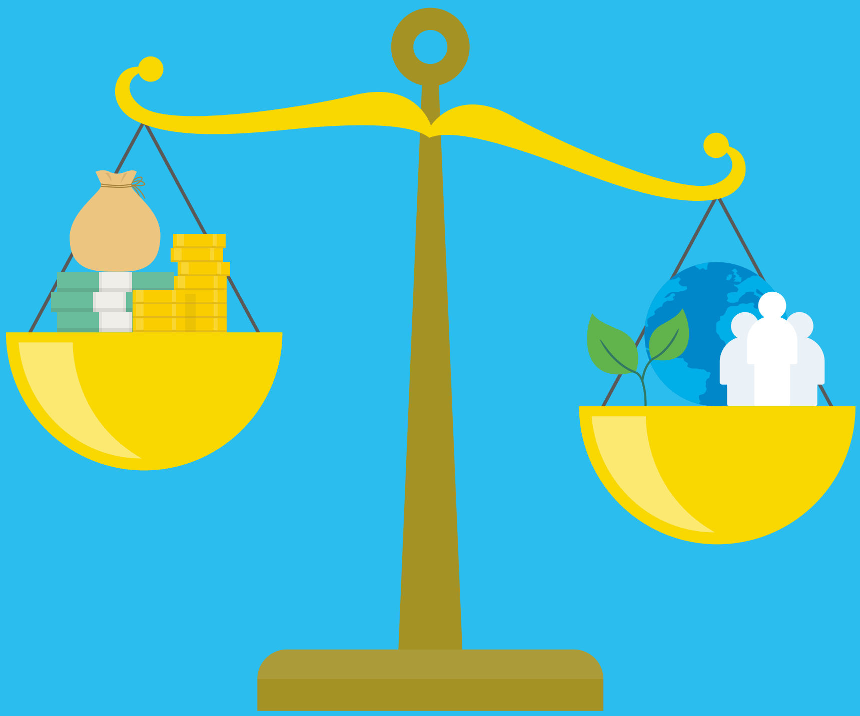
However, where do matters stand when an overseas party's documents are located out of the jurisdiction? There are two views as to the application of the territoriality principle. One view is that section 34 should be confined to disclosure of documents within the jurisdiction. The other, as held at first instance in Guriev, is that there is jurisdiction to order disclosure against a party based anywhere in the world, with the exercise of discretion providing a safeguard against infringing international comity and circumventing the letter of request procedure.

The Court of Appeal in Guriev did not need to decide this issue, saying that there is something to be said for both views. The question was best left to a case where it would make a difference, albeit that would likely be a rare instance where, for example, the letter of request regime was unavailable.

Nevertheless, the expansive view of the English courts' jurisdiction to order disclosure in Guriev - coupled with the new gateways available for service out - represents a positive development for litigants, many of whom have disputes of an international nature, and emphasises the desirability of the English courts for hearing such matters.



THE ONGOING RISE OF ESG DISCLOSURES



FERTILE GROUND FOR DISPUTES

Authored by: Emilie Jones, Beth Pendock, Sharon Smith, and Michael Fenn - Pinsent Masons

Environmental, Social and Governance ("ESG") issues have continued to shape boardroom decision-making and stakeholder demands in the past year. Despite current geopolitical and economic turmoil, these issues remain high on consumer, public and investor agendas, and are the subject of a rapidly developing legal and regulatory framework. In particular, there have been - and continue to be - significant developments around businesses' ESG disclosures, with a decisive shift towards mandatory measures. Against that backdrop, claimed ESG credentials – and associated allegations of 'greenwashing' or its wider responsible social practices equivalent, 'bluewashing' - are now a well-established source of regulatory risk and fertile ground for litigation.

While we have not yet seen any judgments handed down in the English civil courts in relation to ESG disclosures, there remains a very real need for businesses to manage their exposures in this area and a strong likelihood of a rise in claims over the coming months and years. This article discusses three key trends in respect of disputes concerning claimed ESG credentials that have come to the fore in the past year, and what we can expect going forward.

Increasing ESG disclosure obligations

Under sections 172 and 414CZA of the Companies Act 2006, large UK companies already have duties to include in their annual strategic reports an explanation of how their directors have complied with their duties to promote the success of the company, including how they have had regard to the impact of the company's operations on the community and environment.

Climate-related financial disclosures have significantly developed in recent years, most notably through the work of the Task Force on Climate-related Financial Disclosures ("TFCD"). The TFCD's recommendations are intended to support companies in making accurate, transparent, and comprehensive disclosures of climate-related financial information. The intention is that, as more companies adopt these disclosure practices, consideration of climate-related risks will become an integral part of corporate decision-making and strategic planning. In a significant step towards this goal, in April 2022 the UK government made it mandatory for certain large companies to make disclosures in line with the TFCD's recommendations.

In addition, there are a plethora of other ESG disclosure principles, standards or regulations with which businesses must comply. These include requirements of broad application, such as annual modern slavery statements and gender pay gap reporting. They may also include sector-specific regulation. For example, in October 2022 the Financial Conduct Authority ("FCA") published a consultation paper setting out plans to introduce in 2023 an express "anti-greenwashing" rule, as well as a new labelling, disclosure, naming and marketing regime in respect of sustainability-related financial products.

The need to formalise governance around ESG disclosures has also been recognised internationally: by the European Parliament adopting the Corporate Sustainability Reporting Directive ("CSRD") in November 2022 ; by the US Securities Exchange Commission which proposed rules to enhance and standardise climate-related disclosures for investors in March 2022; and through the International Sustainability Standards Board ("ISSB") which is working to develop a global baseline standard for sustainability reporting for jurisdictions and national regulators to implement in their laws and regulations. A new Taskforce on Nature-related Financial Disclosures ("TNFD") framework, which builds on the TCFD framework (albeit for nature not climate) and is intended to align with the developing ISSB standards, is also expected to be finalised in September 2023.

Businesses face a significant challenge to keep up to date and comply with this rapidly developing ESG-related regulatory landscape.

Moreover, in this relatively new world of mandatory ESG reporting, there is limited available guidance about the preparation of some types of disclosures, such as analytical or forward-looking information; as well as limitations and uncertainties around collecting the data necessary for reporting, including from, and across, supply chains.

Growing litigation risks

The increased dissemination of information on companies' ESG credentials exposes companies – and in some instances directors – to legal risks and challenges.

It is widely predicted that we will see greenwashing or bluewashing claims brought in the English courts in a number of ways. These include potential claims brought under sections 90 or 90A of the Financial Services and Markets Act 2000 ("FSMA"), which provide statutory routes for shareholders of listed companies to seek compensation for loss suffered as a result of untrue, incomplete or misleading statements in prospectuses, listing particulars or, in the case of s.90A, other published information such as annual reports. More traditional mis-selling claims against companies who over-state the ESG credentials of financial or physical products which they sell, may also arise.

However, while the scope of ESG claims globally has expanded in several respects over the last year or so - in terms of the types of claimants, the sectors involved, the routes of challenge and the subject matters of the disputes – in England at least, we have not yet seen the wave of litigation relating to companies' statements on ESG matters which many have predicted.

We have, however, seen this year the first attempts to hold directors personally liable for a company's alleged climate-related failures under sections 172 and 174 of the Companies Act 2006. In McGaughey & anor. V Universities Superannuation Scheme Ltd [2022] EWHC 1233 (Ch), two pension scheme members sought to sue the scheme's directors in respect of various claims of maladministration, including continued investment in fossil fuels. Despite the failure of that claim to achieve court permission to proceed, ClientEarth have threatened a claim under the Companies Act duties against the directors of Shell. ClientEarth alleges that Shell's directors failed to exercise reasonable care, skill and diligence and to act in a way that promotes the company's success, by failing to implement a client strategy consistent with Paris Agreement goals.

While these are not claims directly about ESG statements, businesses' public statements will often be scrutinised in the context of such claims. For example,

ClientEarth's press release in respect of its action against Shell expressly refers to the company's statement that it will transition to net zero "in step with society", which ClientEarth have said places a "caveat on the commitment to net zero".

The Australian case of McVeigh v Retail Employees Superannuation Trust also illustrates the close relationship which can exist between claims of inadequate decision-making and the disclosure of information to enable scrutiny: in that case, the plaintiff pension fund member complained of a failure by trustees to

act with care, skill and diligence and to perform their duties in the best interests of beneficiaries, principally by failing to disclose adequate information regarding climate risks and plans so as to enable beneficiaries to make informed decisions.

In a further example of the relevance of public statements and disclosure of information in ESG disputes, Volkswagen is facing novel litigation in Germany after it rejected a request from investors to include an item on the AGM agenda that sought information about the company's lobbying activities. Investors are reported to have filed the claim recently in light of claimed concerns that the company's suspected lobbying against climate regulations, whilst also promoting green credentials, may result in reputational and operational harm to the company.

An active regulatory environment

The regulatory landscape is rapidly responding to the growing dialogue around ESG, particularly in relation to consumer protection. Given the hurdles that often come with formal litigation, regulatory routes provide activists with an alternative way to hold corporates to account and we are likely to see continued focus on this approach.

The Competition Markets Authority ("CMA") and the Advertising Standards Authority ("ASA") have both made concerted efforts this year to clamp down on greenwashing claims. Putting their new Green Claims Code into practice, in July 2022 the CMA launched an investigation into claims made by retailers Asda, ASOS and Boohoo about the sustainability of their products.

The ASA has also been particularly active in this space, upholding a number of greenwashing claims throughout the year against well-known names, in sectors from aviation through to banking. The ASA acknowledges the contribution of activists in bringing offending adverts to their attention, noting for example that Plastics Rebellion were amongst those who complained about an advert by Innocent Drinks in February 2022.

Going forward, the FCA's consultation paper, mentioned above, sets out immediate plans for the financial regulator to "[step] up its supervisory engagement on sustainable finance and [enhance] its enforcement strategy".

There are also significant developments in the pipeline for regulation around improving the transparency of supply chains, with a shift towards making such measures mandatory. For example, the EU's proposed Corporate Sustainability Due Diligence Directive would impose obligations on in-scope companies to monitor supply chains for violations of human rights as well as environmental risks.

A look ahead

A consistent theme running through the trends identified is a growing demand for transparency in ESG credentials, driven by broad stakeholder engagement. Activist groups in particular are thinking creatively about how they can best drive change by applying pressure on corporates and directors; and litigation funders are increasingly looking at whether there are viable claims to fund in this area. This year's developments of mandatory disclosure obligations, a growing – albeit still nascent – body of case law, and active regulatory governance look set to continue into 2023 and beyond, and will form a vital framework for corporate ESG practices to build on going forward.

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COVID-19

LOOKING BACK AT THE IMPACTS

Authored by: Obaid Kazmi and Marzena Meeson - Kroll

The past two to three years have been challenging, and only time will tell if the worst of the COVID-19 pandemic is truly over. While it feels as if we are on our journey to “life after COVID,” there may be many reasons why an organization may need to look back and develop a detailed understanding of the manner in which it was—and, crucially, might continue to be—impacted by the early waves of the pandemic.

An understanding of how the pandemic affected an organization both structurally and in financial terms might be required to serve a myriad of ongoing business needs. For example, analyzing the pandemic’s impact on a company’s supply chain, production processes, input costs, pricing, headcount, overheads, sales and its wider operations could provide insight that would explain changes in net income, the need to revise forecasts, quantify losses for insurance claims or support decisions to terminate or renegotiate agreements.

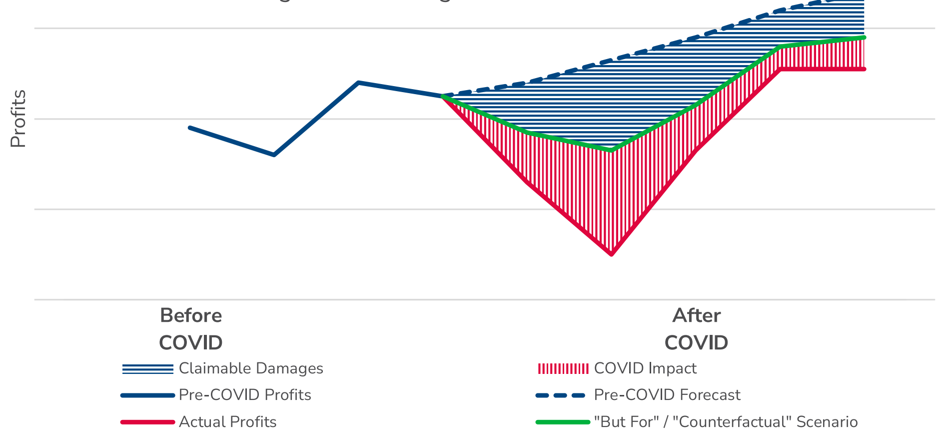
Isolating the effects of the pandemic might also be required when quantifying damages in the context of a post-COVID dispute. For example, the effects of the 2008 global financial crisis would commonly be isolated when quantifying damages in post-2008 disputes. If the financial crisis would have occurred in the counterfactual scenario and did occur in the actual scenario, losses stemming from it were typically excluded from claims.

Figure 1 demonstrates how the impact of a tort (say a contractual breach) may overlap with the economic disruption caused by COVID. In this case, isolating the COVID-related impact may be critical when quantifying claimable damages. Note that a commonly used methodology to consider damages compares a “but for” or “counterfactual” scenario against actual outturn (i.e., comparing what should have happened “but for” the breach versus actual results).

Assessing the Pandemic’s Impact

While an organization’s financial statements are useful in evaluating a company’s financial performance at a high-level and provide a helpful starting point to assess the pandemic’s financial impact, a deeper dive may be necessary to understand the drivers that lead to the observed outturn following the pandemic. A closer look at the company’s cost and revenue models can often provide such an in-depth view.

Figure 1: Isolating the Effects of COVID



Costs

A company's costs broadly consist of fixed costs (this might include, for example, lease and rental payments or insurance) and variable costs, which change based on the amount of output produced (for example labor costs, commissions or raw material costs). While identifying actual costs may be relatively straightforward, inferring costs in a hypothetical, counterfactual scenario needs estimation. An understanding of how a company's costs would typically vary depending on scale can be leveraged to estimate costs within a counterfactual scenario.

The following approaches, amongst others, may be useful:

- Conferring with business or industry specialists to assess the likely level of costs in the absence of the event.
- Statistical or econometric analysis to understand the relationship between input prices and their drivers.
- Benchmarking input prices against competitors or other comparators, assuming that they have not been impacted by the event.
- Analyzing the relationship between costs, production and sales volumes—to assess cost variability, i.e., to differentiate between costs that move (broadly) in line with sales versus those that are (broadly) fixed.

Since costs may have different, (or multiple) drivers, several approaches might be considered together.

Additionally, understanding how a company's costs vary over the short, medium and long-term can provide a better understanding of how costs are expected to change over time.

This granular insight may not always be easily ascertained from the financial statements and analyzing disaggregated cost data may provide a better estimation of costs within a counterfactual scenario.

Revenues

A company's revenues are essentially a function of its prices and quantities sold (be they products or, say, hours in the service sector). However, this relationship may become complex when discounts and atypical fees are considered. When estimating revenues in a hypothetical counterfactual scenario, it is important to understand how the underlying revenue model might have changed in light of the pandemic.

As was the case when estimating costs, relying on the aggregated data contained within the financial statements may not provide sufficient detail to scrutinize the revenue model. Analyzing disaggregated data, that may be set out in a company's detailed accounting records, however, may provide information that can be used to estimate revenues more accurately within the counterfactual scenario.

These approaches include:

- Assessing the competitive landscape and the firm's market power (the ability to charge above competitive price)—may be especially relevant if the underlying breach impacted competition in the market.
- Analyzing the firm's price setting behavior, including the relationship between costs and pricing for different products or baskets of products, and any impact the pandemic might have had on that relationship.
- Evaluating the pandemic's impact on competitors' sales, to use potentially as a benchmark to estimate sales in a counterfactual scenario.
- Considering how pricing would influence demand (i.e., price elasticity estimates).

Comparative Analysis

Identifying the movement of a company's revenue and costs may not necessarily serve to establish a causal relationship to the pandemic. Analyzing how the company's revenue and cost inputs changed in comparison with its historical trends, peer group and the overall market may identify areas where actual results differed from the expected results.

Another approach would be to analyze how COVID impacted a firm's peer group in other geographical markets. For example, if COVID did not disrupt similar companies in other geographies—perhaps due to differing quarantining restrictions—a comparison of revenues and costs between peer groups in a company's home market and those abroad can be used to estimate the COVID-related impact.

Conclusion

The COVID pandemic had a significant impact on many businesses across the world, and some of its effects are ongoing. There might be multiple reasons why a business might want to understand the continued impact of the pandemic on its revenues and costs, including in the context of a dispute.

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SERVICE OUT OF THE JURISDICTION

NEW GATEWAY IN PRACTICE DIRECTION 6B OF THE CIVIL PROCEDURE RULES CLARIFIES AND SIMPLIFIES THE PROCESS FOR OBTAINING INFORMATION FROM AND ABOUT PARTIES OUTSIDE THE JURISDICTION

Authored by: Theodore Elton - Brown Rudnick

On 1 October 2022 new changes came into force in relation to Practice Direction 6B, which deals with service out of the jurisdiction. Most significantly for the purposes of commercial disputes is a brand-new jurisdictional gateway relating to third party information orders such as Norwich Pharmacal or Bankers Trust Orders.

The new gateway (PD6B, 3.1(25)) provides as follows:

(25) A claim or application is made for disclosure in order to obtain information—

(a) regarding:

(i) the true identity of a defendant or a potential defendant; and/or

(ii) what has become of the property of a claimant or applicant; and

(b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36[1]

Whilst permission of the Court is still required, the new gateway potentially simplifies the process of obtaining information at an early stage of proceedings, particularly in fraud litigation where fraud victims need to establish where their money has gone and trace potential defendants. It should help significantly reduce the cost of the information gathering stage of the process.

The new gateway appears significantly to extend the ability of Claimants to rely on Norwich Pharmacal orders in particular to obtain information as to the identity of appropriate defendants or the location of property where those defendants and/or property are outside the jurisdiction and to address what was previously a difference in the approach of the caselaw depending on which of the Norwich Pharmacal and Bankers Trust jurisdictions a Claimant was able to utilise.

With certain limited exceptions, the weight of pre-existing authority is to the effect that there was no gateway within PD6B that permitted service out of the jurisdiction for a claim for a Norwich Pharmacal order, either as a free standing claim or as a claim made in the same claim form as a claim against those responsible for an alleged fraud.[2] Indeed, the limits of a Norwich Pharmacal order as a remedy have become more evident in recent years with a greater proliferation of cross-border fraud cases and, in particular, cryptocurrency fraud.

1 The reference to CPR rule 6.32, 6.33 and 6.36 ensures the broad applicability of the new gateway to claims where permission is not required for service out both in Scotland and Northern Ireland and outside the United Kingdom, and where permission is required.

2 AB Bank Ltd v Abu Dhabi Commercial Bank PJSC [2016] EWHC 2082 (Comm) (Teare J) but see Lockton v Google Inc [2009] EWHC 3243 (QB) (Eady J)

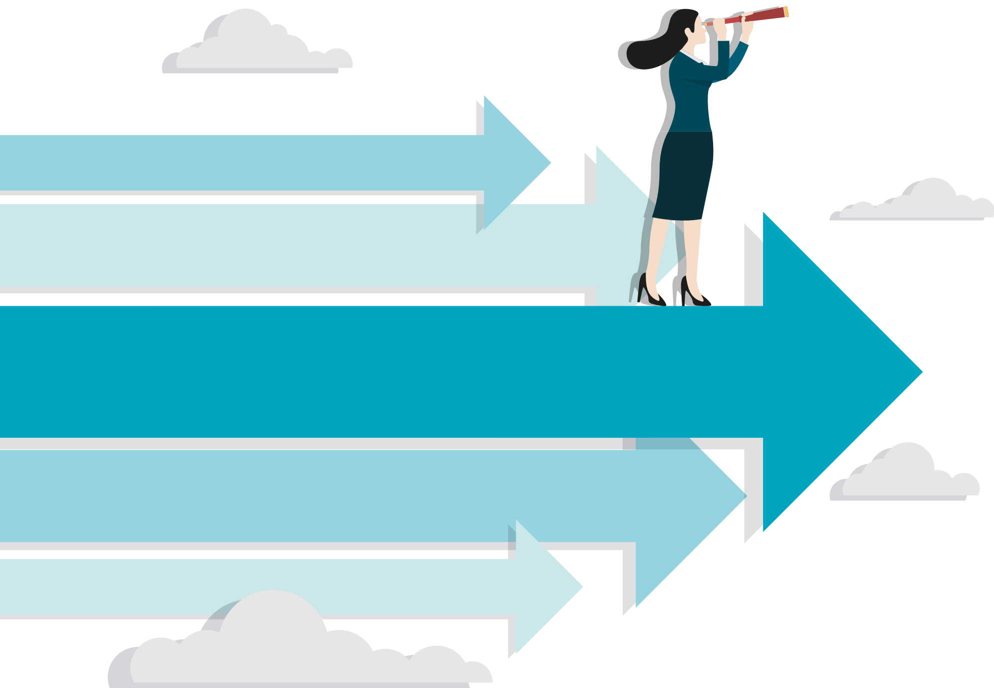
By contrast, with Bankers Trust orders, there was first instance authority that a court can permit service out.[3] However, i) that was dependent on the "necessary and proper party" gateway (PD6, 3.1(3)) and so the claim had to be included in a claim against putative fraudsters who at that stage had not been identified; ii) there needed to be evidence of urgency; and iii) the Bankers Trust jurisdiction is only available in support of a proprietary claim so the claim must have been formulated in that way.

It appears that the new gateway is intended to address this discrepancy and make service out available in all types of claims (i.e. not limited to proprietary claims to which the Bankers Trust jurisdiction applies).

Judicial comment has specifically referred to the application of the new gateway in litigation related to cryptoassets[4] and the minutes of the Civil Procedure Rule Committee which approved the new gateway state that:

"the concern regarding the ability of the Courts to assist parties seeking to obtain information from non-parties where assets have been removed from the jurisdiction has been carefully considered. The issue has been particularly acute in cases where a party has needed to identify the destination of money or cryptoassets and the increasingly important context of ever advancing digital working."

As cryptocurrency is largely unregulated and cryptocurrency exchanges are often based outside the jurisdiction, a victim of cyber currency fraud was previously faced with a situation where they would need to bring a proprietary claim against "persons unknown" and then seek information disclosure orders against those who administer the relevant wallets when the only known contact details were the email addresses used to carry out the fraud. Practically, this could be a time-consuming, costly and ultimately futile process, given the speed at which crypto-assets can be moved.



With the new gateway, the Court will now be able to grant both Norwich Pharmacal orders and Bankers Trust orders against foreign respondents and so it should resolve the divergence in how the Court has treated both types of order when dealing with service out situations and assist victims faced with a multi-jurisdictional fraud.

It remains to be seen how such orders of the Court will be treated in practice. A foreign respondent served with a Norwich Pharmacal or Bankers Trust application (or indeed the disclosure order itself) can choose to ignore the jurisdiction of the English Courts and refuse to comply with the order. However, the reputational consequences of being in breach of an order of the English Courts and/or the risk of contempt proceedings may be enough to incentivise compliance, particularly where the respondent has assets or does business within the UK. Whilst much will depend on the identity of the foreign respondent in question and the likelihood of their compliance, the new gateway will significantly reduce the costs of getting to the stage at which a Claimant can make a judgment call about whether it is worth pursuing proceedings before the English Courts or whether it would be more effective to seek relief in the jurisdiction in which the respondent is based.

3 Ion Science Ltd and another v. Persons Unknown [2020] Unreported 21 December at paragraphs 19-21 (Butcher J); Fetch.ai Limited and another v Persons Unknown Category A and others [2021] EWHC 2254 (Comm)

4 See, for example, speech by HHJ Pelling KC: issues in crypto-currency fraud claims (https://www.judiciary.uk/speech-by-judge-mark-pelling-qc-issues-in-crypto-currency-fraud-claims/#_ftnref5)

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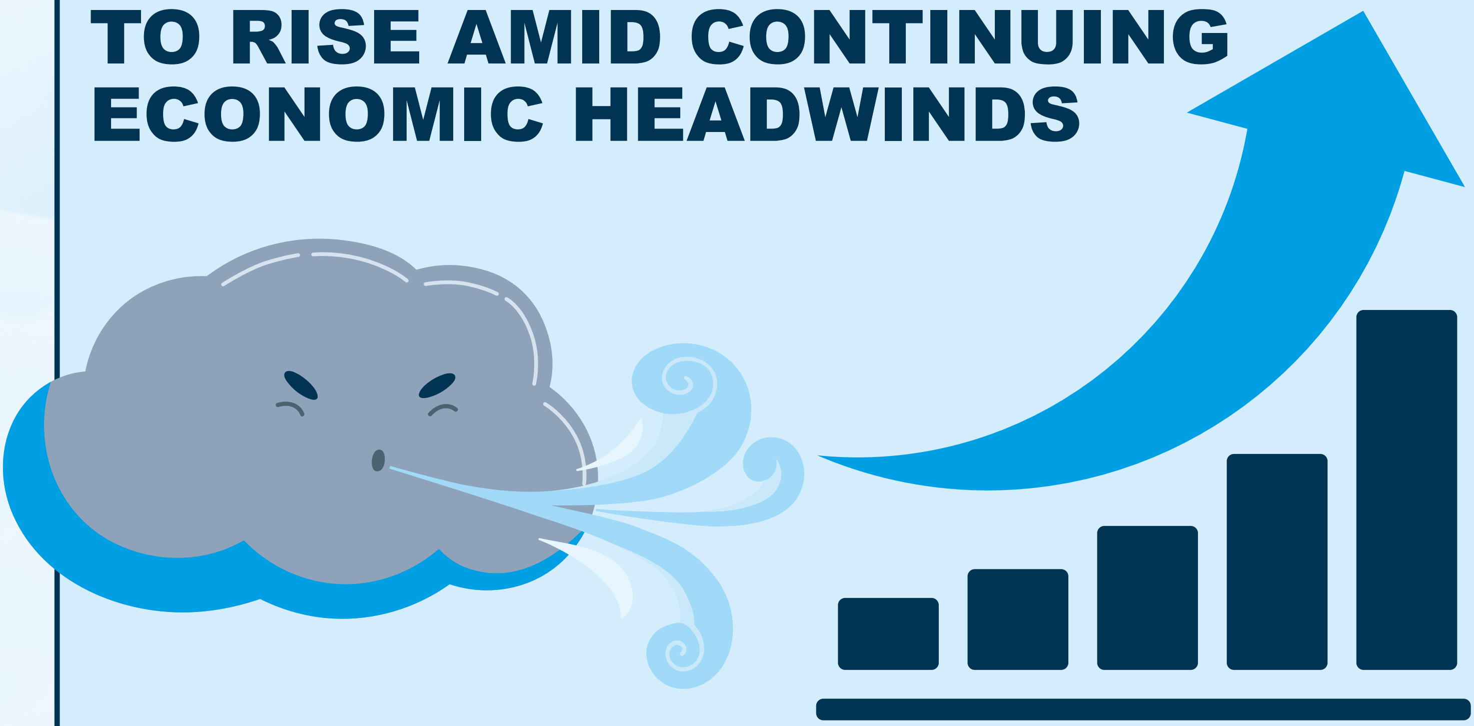
M&A DISPUTES LOOK SET TO RISE AMID CONTINUING ECONOMIC HEADWINDS



Authored by: Daniel Ryan, Managing Director - BRG

In the future, the buoyant M&A market of 2021, which saw the number of announced deals exceed 62,000 globally, with an unprecedented 24% increase from 2020, may be seen as a golden time for the sector.

This year, macroeconomic and geopolitical upheavals, including inflation, soaring energy prices, and rising interest rates have cast a cloud over M&A activity, which has declined steadily throughout 2022.

These uncertainties have fuelled a rise in M&A disputes, which rose year on year in 2022, a trend that is expected to increase into 2023, according to new research from the Berkeley Research Group (BRG), M&A Disputes Report 2022. Few industry sectors are safe from disputes, with fintech, energy and climate, and financial services looking most vulnerable.

The report found that recession fears and inflation concerns were the top two dispute catalysts this year, according to disputes lawyers, corporate finance attorneys and advisors. Along with economic chaos, stricter merger controls in Europe are adding to pressures in the M&A market. Respondents in EMEA said the regulatory environment was a prime driver of disputes in the region, where UK and European Union agencies have been enacting stricter rules on issues including antitrust, data privacy and Environmental, Social and Governance (ESG) requirements.

Disputes rising worldwide

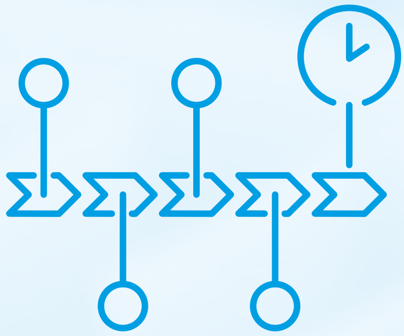
While disputes have been rising across the EMEA region—in Germany, for example, currently, around ten per cent of M&A deals have led to disputes, with the expectation that there will soon be a wave of insolvencies and distressed assets sales—the number of disputes is also growing in APAC. In Asia, the collapse of China's real estate market, which prompted the World Bank to revise down its outlook for China's gross domestic product, has created "buyer's remorse" on a number of deals. Meanwhile in Hong Kong, disputes have arisen due to Russian companies—shut out of western markets due to sanctions—exploring Hong Kong as an attractive destination. This is an issue not just in Hong Kong but across Asia.

The second-ranked dispute driver in EMEA was earn-outs. This is unsurprising given the drastic shift in the macroeconomic environment over the past year—and earnout disputes arising from deals done during last year's boom could continue to increase in the year ahead.

In addition to economic concerns, we are also seeing ESG concerns featuring more prominently in M&A deals and experts expect ESG is likely to factor strongly into disputes on the energy front as regulations take shape and businesses strive to meet evolving investor expectations.

A large majority of respondents agreed that deal activity in the sector will be driven by ESG factors (86%) and that a lack of firm metrics will lead to disputes (78%).

ESG decarbonisation targets could also give rise to energy-sector disputes over the financial burden of stranded assets such as coal-fired power plants, as well as government-related disputes triggered by ESG issues that involve sagging commodity prices.



Disputes occurring at different stages of a deal

Disputes are occurring both in the pre- and post-closing of deals, with a growing number of exit disputes, and threats of injunctive relief becoming more commonplace.

One of the most contentious issues around M&A deals is pricing.

Buyers are renegotiating purchase prices, with 82% of respondents seeing this happen somewhat often or very frequently.

Post-acquisition, many buyers will be disappointed as actual results will fall significantly below expectations, spurring buyers to look at reps and warranties. Statistically, most post-deal disputes relate to breaches of reps and warranties. The most common is a breach of financial statement warranties.

Looking ahead, respondents expect construction and Real Estate to generate the most disputes in the coming year. That likely reflects the upheaval in in the Chinese property market and pressures on the US housing and construction sectors amid rising inflation and ongoing hikes in the cost of supplies and labour. In the US, a wave of new infrastructure and energy projects tied to the 2021 Infrastructure Investment and Jobs Act and this year's Inflation Reduction Act could result in additional disputes in the coming years.

Minimising the risks of disputes

Robust due diligence—looking at all aspects around the deal—is essential for minimising the risk of disputes. All parties must have realistic expectations on valuations in order for the deal to be completed successfully.

It's also important to recognise that different legal frameworks may exist depending on which countries are involved in the deal, so parties must have a thorough understanding of all legal requirements.

Finally, deals need to be a good cultural as well as a financial fit. There is often not enough consideration given to cultural nuances. Even in today's environment of cross-border deals, it's surprising how often cultural factors are not considered, which can lead to misunderstandings across parties.

Speakers:

Mustafa Hadi, Managing Director, **BRG**, moderator

David Rogers, Director, **BRG**

Byron Phillips, Partner, **Hogan Lovells**

Amy Kläsener, Partner, **Jones Day**

Matthew Townsend, Partner, **Reed Smith**

Factors giving rise to M&A disputes

- Geopolitical uncertainties, soaring energy prices, currency fluctuations and rising interest rates have cast a cloud over M&A activity, which has declined steadily throughout 2022 following an extremely buoyant 2021.
- These uncertainties have fueled a rise in M&A disputes, led by EMEA – currently, around ten per cent of M&A deals in Germany are being disputed, with the expectation that there will soon be a wave of insolvencies and distressed assets sales. Fintech, life sciences and financial services are all seeing an increase in disputes
- The number of disputes is also growing in AIPAC. In Asia, the collapse of China's real estate market has created "buyer's remorse" on a number of deals. And, with Hong Kong being an attractive destination for Russian corporates, disputes have arisen over Russian-owned entities in the wake of global sanctions. This is an issue not just in Hong Kong but across Asia.
- Disputes are occurring both in the pre- and post-closing of deals, with a growing number of exit disputes, and threats of injunctive relief becoming more commonplace.
- With market volatility worldwide, one of the most contentious issues around M&A deals is pricing. Post-acquisition, many buyers will be disappointed as actual results will fall significantly below expectations. Then buyers start looking at reps and warranties; going through financial statements line by line; and looking at supplier and customer contracts. Statistically, most post-deal disputes relate to breaches of reps and warranties. The most common is breach of financial statement warranties.

Minimising the risks of disputes

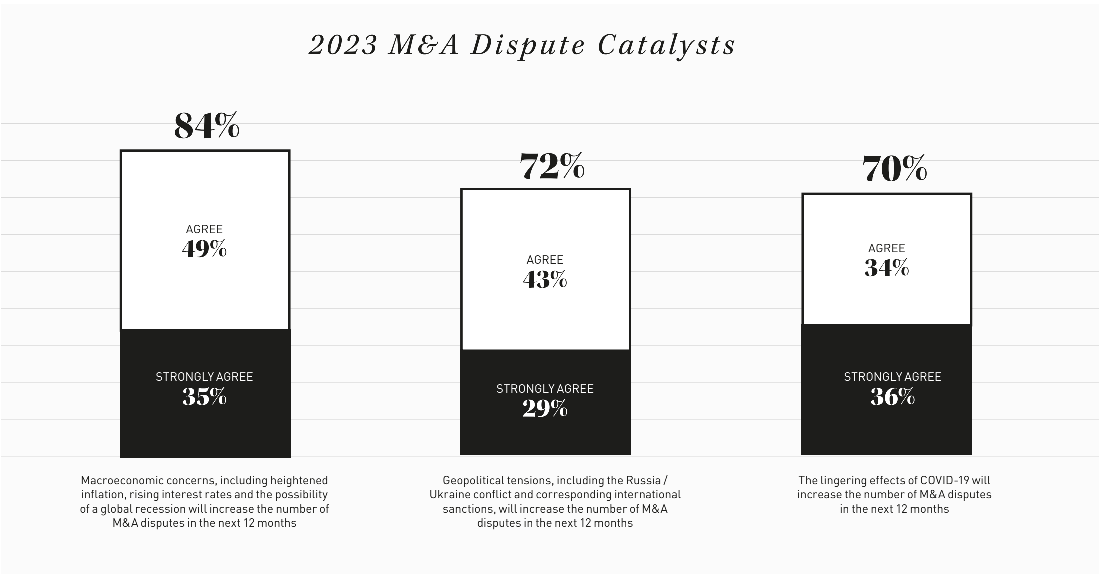
Panellists also examined what steps can be taken to reduce the risk of disputes:

- Robust due diligence – looking at all aspects around the deal – is essential. All parties must have realistic expectations on valuations. Insurers and consultants can also play an important role in the early stages of a deal to ensure that key points are covered.
- It's important to recognise that different legal frameworks may exist depending on which countries are involved in the deal, so parties must have a thorough understanding of all legal requirements.
- Deals need to be a good cultural as well as a financial fit. There is not enough consideration given to cultural nuances. Failure to consider these can lead to misunderstandings across the parties involved.

Economic Uncertainty Fuels Rise in Disputes

Last year, Berkeley Research Group (BRG) professionals predicted an escalation in M&A disputes as global dealmaking volumes reached a record high. That frenzied M&A activity hit a speed bump in 2022, as liquidity dried up and the economic outlook darkened. Yet these headwinds are fueling new post-transaction disputes—and changing their characteristics in important ways.

That's according to BRG's third-annual M&A Disputes Report, which will launch in mid-November. The report finds that the volume of disputes has risen even further in the last year, with respondents expecting increased activity over the next 12 months. Our latest survey also shows that macroeconomic concerns are surpassing COVID-19 disruptions as the primary dispute catalyst.



The new report examines M&A dispute activity and insights from Europe, the Middle East and Africa (EMEA), North America and the Asia-Pacific (APAC) regions. The research again brings together the perspectives of some of the world's top deal lawyers, disputes lawyers and private equity professionals, along with leading BRG experts.

Additional Takeaways >

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Additional Takeaways

- Disputes increased the most in the FinTech industry (including Crypto) in 2022, with Energy and Traditional Finance rounding out the top three. Respondents expect the Construction & Real Estate sector to see the biggest increase in disputes in 2023.

- Environmental, Social and Governance (ESG) disputes are brewing as regulations take shape and businesses strive to meet evolving ESG criteria.

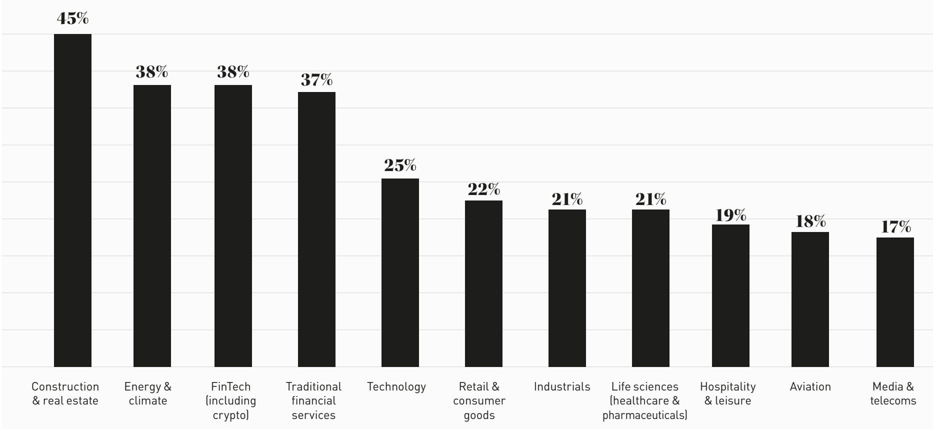
- EMEA is the region expected to drive the most dispute activity in the coming year, with strict regulatory regimes and political strife seen as significant factors.

- Enhanced due diligence is recommended as a critical dispute-mitigation measure for both buyers and sellers.

Regions Driving M&A Dispute Activity

	2021	2022
APAC	35%	32%
EMEA	30%	41%
LATIN AMERICA	5%	4%
NORTH AMERICA	30%	20%

Industries Likely to See an Increase in Dispute Activity in 2023



Our research suggests that in a volatile economy, dealmakers may deepen their focus on opportunistic transactions, potentially increasing the likelihood of disputes. Private equity involvement further complicates the picture, as such firms—whose tolerance for risk in a downturn may be higher than that of corporate dealmakers—remain flush with dry powder and continue to raise funds and hunt for bargains in a distressed environment.

We hope this report will help our clients and readers keep their ears to the ground in this quickly evolving landscape. In this spirit, BRG will continue to provide updates on this rapidly changing space over the coming year.

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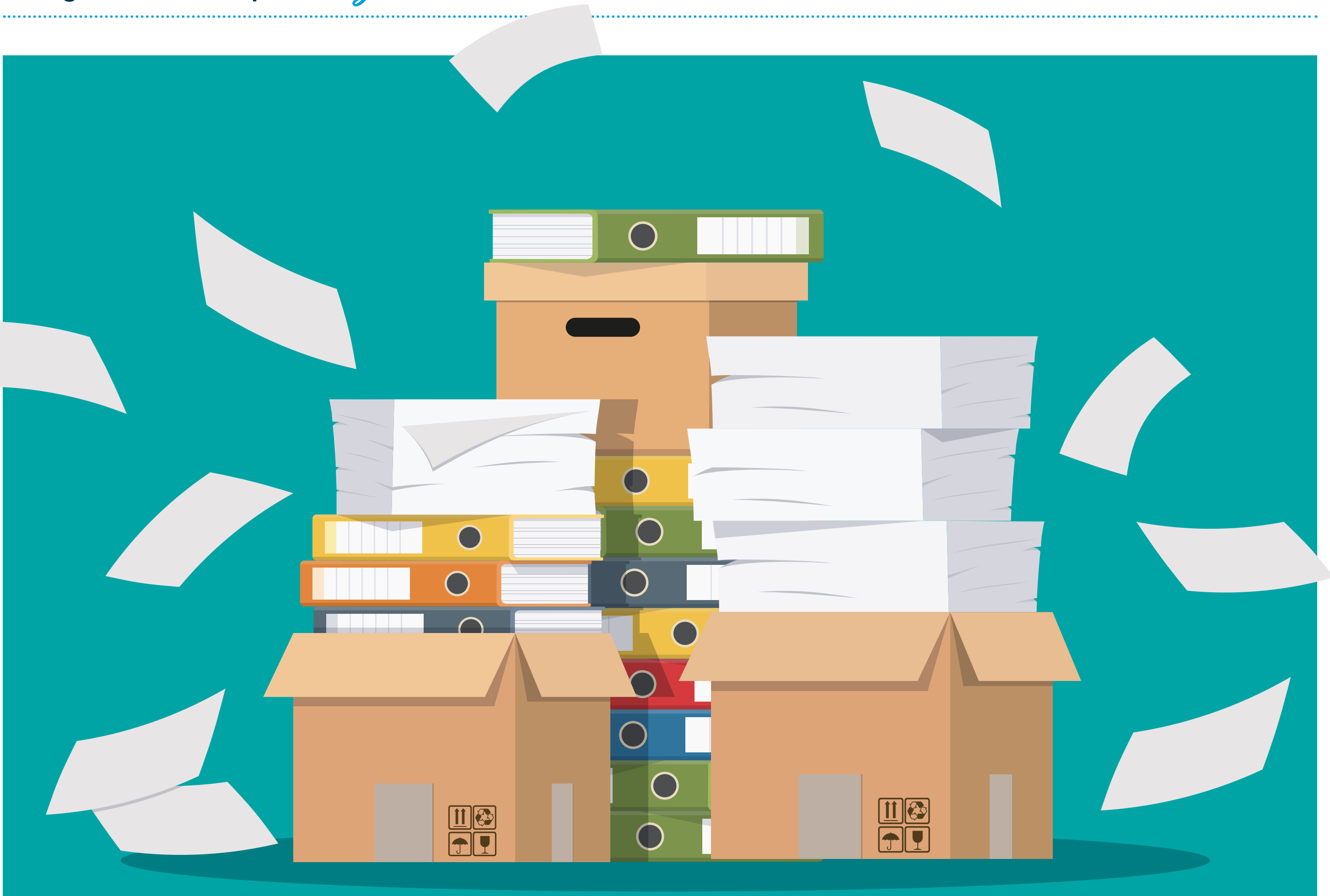


WITNESS STATEMENTS AND PD 57AC

Authored by: Alison Regan - Russell Cooke

The new regime for witness statements has been in place since 6 April 2021. There have been a number of judgments regarding non-compliant statements, reinforcing the need to give attention to the principles of the practice direction when drafting, and also giving a warning to consider proportionality when launching tactical attacks on purportedly non-compliant statements.

PD57AC- Why and When

A trial witness statement should only contain evidence as to facts that need to be proven at trial in relation to one or more issues at that trial. CPR 32.5(2) states that the witness statement stands as the evidence in chief of the witness unless the court orders otherwise. This openness promotes an environment in which the parties are upfront with each other as to the case to be met, allows advice to be given at an earlier stage and promotes settlement- all consistent with the overriding objective in CPR 1.1.

Clearly then the trial witness statement is of paramount importance.

PD 57AC was introduced following the recommendations of the Witness Evidence Working Group which commented that the "project stemmed from an impression shared by a substantial majority of the judges of the Commercial Court that factual witness statements were often ineffective in performing their core function of achieving best evidence at proportionate cost".

Witness statements often stray into commentary, argument and issues of marginal relevance. The time and costs savings intended by CPR32.5(2) are being lost by having to go over and clarify witness statements. PD 57AC is intended to remedy that.

PD 57AC applies to trial (final hearing) witness statements in the Business and Property Courts of the High Court (although note that the directions template for Central London County Court stipulates that witness statements must comply with PD57AC). It came into force and applies to witness statements signed on or after 6 April 2021 including in existing proceedings.

PD57AC the changes

Para 3.2 of the PD sets out that the witness must only give evidence as to facts they have personal knowledge of, and that they must provide a list of documents to which they have been referred in the process of drafting that statement.

(The stipulations as to drafting a statement in the first person, in the witness' own words and language are obviously unchanged).

Para 4.1 of the PD sets out a standard statement of truth for the witness and paragraph 4.3 requires a certificate of compliance to be completed by legal representatives – confirming that the statement has been drafted in compliance with PD57.

The Appendix to PD57 sets out a statement of best practice setting out certain principles (paragraph 2) and a practice note (paragraph 3) and reinforces that the statements should be concise, not cover narrative, argument or commentary on other matters. As few drafts as possible should be produced: "Any process of repeatedly revisiting a draft statement may corrupt rather than improve recollection" (paragraph 3.8).

Paragraph 3.13 allows the legal representative to assist the witness in terms of "structure layout and scope" but does not permit the legal representative to go further than the content of any contemporaneous notes taken in interview. "If the legal representatives wish to indicate in a draft for a trial witness statement that further evidence is sought from the witness to clarify or complete the statement, that should be done by non-leading questions for the witness to answer in their own words and not by proposing content for approval, amendment or rejection by the witness".

Non compliance

The Court has the full range of case management powers at its disposal including ordering re-drafts, adverse costs or refusing permission for the witness to rely on the statement altogether. Clearly the Courts would prefer to avoid a whole raft of satellite litigation in relation to compliance with PD 57AC

In Greencastle MM LLP v Payne and others [2022] EWHC 438 (IPEC). Fancourt J withdrew permission to rely on non-compliant statements but allowed replacement statements to be filed. The statements had commented on documents produced on disclosure in relation to issues of which the witness had no personal knowledge and which involved speculation on the thought processes of third parties. It is worth reproducing paragraph 24 of the judgment: "The witness statement as a whole is the clearest case of failure to comply with Practice Direction 57AC that I have seen…. The impression it gives is that the chief executive officer of the Claimant was very upset about the conduct of the Defendants and is determined to have his say about what they did and why he considers that it was wrong. It is replete with comment and argument that goes well beyond the disputed facts that are known to Mr Quinlan personally!"

In McKinney Plant & Safety Ltd v The Construction Industry Training Board [2022] EWHC2361 (Ch) the defective statement gave extensive commentary and submissions on other evidence and disclosure and no list of documents (to which the witness had referred) had been provided. In addition the statements of truth and compliance were given two weeks after the statement was signed. Most of the offending statement had to be amended and so it was held that there had been a serious breach of PD57AC. The breach (and the refusal by the offending party to engage with the issue until very late in the day) was held to justify indemnity costs.

Curtiss and others v Zurich Insurance plc [2022] EWHC 1514 stands as a warning to overeager practitioners on the perils of applying to strike out statements for breach of PD57AC. In this case the decision was to strike out parts of the statements rather than wholesale elimination and so while the application wasn't without merit itself, it was considered "oppressive and disproportionate" bearing in mind the 109 page schedule of particulars of non-compliance and costs of £275,000. The applicant was ordered to pay the respondents' costs on the indemnity basis.

Conclusion

Witness statements should provide admissible and relevant evidence that is within the witness' own knowledge and which puts their cards on the table in terms of the case that is to be met. They are not to be used for commentary outside that scope or to advance argument.

Serious breaches may result in hefty costs orders (and unhappy clients) but the courts are likely to save the most serious consequence of striking out a witness statement altogether (with no provision for a replacement) for the most serious breaches.

Practitioners are also cautioned against launching tactical but disproportionate and/or oppressive applications.

Finally the timing of any application should be considered. Both Greencastle and McKinney commented on the need to resolve these issues pre-trial with Fancourt J expressing in Greencastle "the very purpose of PD57AC is to avoid the situation where the trial judge has to sift the procedural wheat from the chaff of witness evidence following extensive cross-examination."

THE CLASS SYSTEM

RECENT DEVELOPMENTS IN MECHANISMS AND MANAGEABILITY FOR GROUP LITIGATION

Authored by: Cian Mansfield and Alice Bernstein[1] - Scott + Scott

Introduction

Recent years have seen the expansion of group claims in England across a variety of areas of law, including competition, securities, data misuse, and mass torts. The increased volume of group claims has lead to developments in how such claims can be brought by claimants (the procedural 'mechanism' for the claims) and how they should be subsequently managed by the courts (the 'management' of the claims).[1]

This article addresses recent developments on these issues across the aforementioned areas of law and how they may develop in 2023.

Competition: opt-out or opt-in?

Since the introduction of the 'collective action' mechanism and 'opt-out' regime in section 47B of the Consumer Rights Act 2015 ("CRA") for group competition damages,

26 collective actions have been filed (to October 2022) in the Competition Appeal Tribunal ("CAT") and only three of these have been opt-in[2].

2022 has seen a record 10 filings (again to October). The focus of the CAT to date has primarily been on certification of the collective actions, but 2022 has seen issues of mechanism and manageability addressed substantively for the first time.

1 Counsel and associate respectively at Scott+Scott UK LLP. All views are the authors' own.

2 'Opt-out' actions being those that cover all members of the class unless they opt-out; 'opt-in' actions being those that only cover class members who opt in.

In the O'Higgins/Evans Forex judgment[3], the CAT in a majority judgment rejected the competing proposed class representatives' ("PCRs") applications for an opt-out collective action but suggested that an opt-in action could be certified. However, the dissenting CAT panel member argued that access to justice would not be achieved by an opt-in claim only as it would not be economic in the circumstances. Both PCRs appealed the judgment and permission to appeal to the Court of Appeal ("CoA") was granted by the CAT.[4] The appeal will be heard in 2023 and provide important guidance on the application of the opt-out and opt-in mechanisms in CRA collective actions.

Competition: under the CAT's umbrella

The issue of manageability of collective actions and their inter-relationship with individual actions has also received the CAT's attention in 2022. Due to the volume of collective actions, there are now several instances of parallel collective and individual actions relating to the same conduct, albeit sometimes at different levels of the supply chain (e.g. Trucks and Maritime Car Carriers). There are also in relation to Multilateral Interchange Fees ("Interchange") several hundred individual actions as well as one certified and four pre-certification collective actions, covering varying time periods.

Understandably, manageability of these complex proceedings has been at the forefront of the CAT's consideration. This focus on manageability led to the CAT issuing the Umbrella Proceedings Practice Direction (2/2022) ("UPD") which enables it to group "ubiquitous" issues in otherwise unrelated proceedings under a case management 'umbrella'. The first 'Umbrella Proceedings Order' was issued in Interchange.[5] At a recent case management conference, the CAT President summarised its position regarding management of umbrella claims by stating:

> ***"we will be engaging in our case management powers pretty aggressively to ensure that we have not only a fair trial but also a manageable trial at the end of the process".***[6]

It will be interesting to see how the UPD will develop in 2023. In particular, how the rights of individual claimants in umbrella proceedings will be respected shall be of great interest, especially if the individual claimants are 'opt-outs' from collective proceedings under the same umbrella.

Mass torts: unmanageability as abuse of process?

Manageability has also been a focus in mass tort group litigation in 2022, with an important judgment on this issue by the CoA in Municipio de Mariana.[7] The claim is an effective opt-in claim brought by over 200,000 claimants regarding the 2015 collapse of a dam owned by a Brazilian subsidiary of BHP. The defendants argued that the proceedings should be struck out or stayed as an abuse of the process of the court given inter alia the existence of parallel Brazilian proceedings.

At first instance, the judge found that all claims should be struck out, or alternatively stayed, as problems of irreconcilable judgments and cross-contamination from the parallel Brazilian proceedings would make the English claims "irredeemably unmanageable" and an abuse of process.[8]

The CoA overturned the judgment while questioning in paragraph 184 "whether proceedings can ever truly be said to be unmanageable", given case management options available to the courts. Further, even if the proceedings were "unmanageable" due to parallel proceedings or other procedural complexities, it did not follow that the court process was being misused but rather that it was not capable of meeting the challenge posed by the proceedings. However, such a finding could not be made at an early stage of proceedings but only in front of the assigned judge and after the "precise scope and nature of the issues between the parties" had been identified and the parties had cooperated to put forward case management proposals.[9]

The CoA judgment is important for confirming the English courts' willingness to use active case management to control procedurally complex group litigation.[10] It will be interesting to monitor how this develops in 2023, and in particular whether the CoA judgment withstands any appeal to the Supreme Court ("SCt").

Data misuse: Lloyd v Google and individual loss

In its Municipio judgment, the CoA rejected attempts by the defendants to use the SCt judgment in Lloyd v Google[11] – a CPR 19.6 representative damages action relating to data misuse – to support their arguments. Lloyd was an attempt to use a CPR 19.6

3 1329/7/7/19 Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC and Others; 1336/7/7/19 Mr Phillip Evans v Barclays Bank PLC and Others; [2022] CAT 16 (together "O'Higgins/Evans").

4 [2022] CAT 42.

5 Case 1517/11/7/22 (UM) Merchant Interchange Fee Umbrella Proceedings ("UM Interchange").

6 CMC Day One, 7 November 2022, UM interchange.

7 Municipio De Mariana & Ors v BHP Group (UK) Ltd & Anor [2022] EWCA Civ 951 ("Municipio").

8 [2020] EWHC 2930 (TCC), paragraph 104.

9 Paragraph 188, Municipio CoA Judgment

10 It is also of significant importance regarding jurisdiction for mass environmental tort claims but that is outside the scope of this article

11 Lloyd v Google LLC [2021] UKSC 50 ("Lloyd").

representative action as an effective 'opt-out' mechanism for group litigation in contrast to the use of a group litigation order ("GLO"), which is an opt-in mechanism. The SCt rejected Lloyd's claim finding that representative actions are only available as a mechanism for damages claims where "the entitlement can be calculated on a basis that is common to all members of the class" (paragraph 82).

In Lloyd, the SCt noted that opt-in group litigation can be impractical, in contrast to opt-out litigation, as it requires all opt-in claimants to prove their loss in circumstances where the potential gain to them is small. In paragraph 189 of Municipio, the CoA noted that a claim being impractical does not mean that it is abusive, and that Lloyd therefore did not help the defendants.

While the CoA found Lloyd was irrelevant to the Municipio claims, its finding that loss cannot be established on an individualised basis in representative actions has significantly curbed the momentum around data misuse group litigation as there is now seemingly no available mechanism for opt-out data misuse claims. However, in this respect, we note that the SCt confined itself in Lloyd to commenting on the position under the Data Protection Act 1998 – the appropriate legislation for the claim – and declined to be drawn into discussing the General Data Protection Regulation and the Data Protection Act 2018 which provide an express right to compensation (unlike the earlier legislation).

It remains to be seen whether representative actions could be used as an opt out mechanism for claims under the latter legislation and if such claims will be filed in 2023.

Securities: a new mechanism under CPR 19.6?

While representative actions may not work for data misuse claims, the SCt finding that losses must be calculated on a "basis that is common to all members of the class" suggests representative actions could work as an opt-out mechanism for securities claims under sections 90 and 90A Financial Services and Markets Act 2000. Securities claims relate to the loss in value in securities following untrue or misleading statements in, or omissions from, listing particulars (section 90) or a company's financial reports and accounts (section 90A).

In Lloyd, the SCt noted that representative actions could work in a situation where "all the class members acquired the same product with the same defect which reduced its value by the same amount" as in such cases the "defendant's monetary liability could be determined as a common issue and no individualised assessment would be needed" (paragraph 82). This example can arguably apply to securities – e.g., each class member bought a security which reduced in value by the same amount per security for all class members (although you may need separate classes or sub-classes for different classes of security).

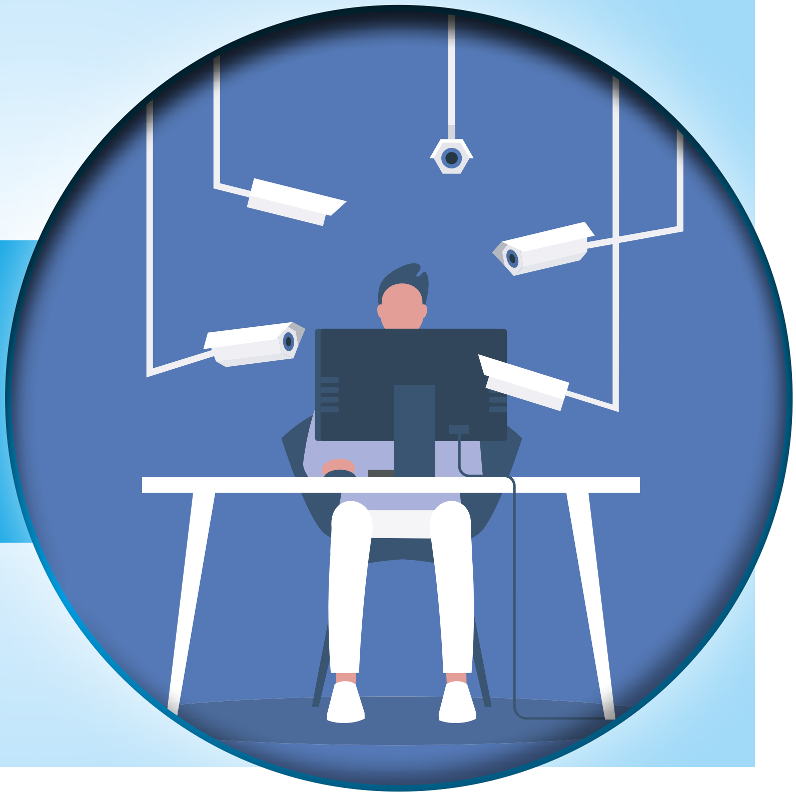
However, this approach is untested and will meet challenges from defendants. Nonetheless, it seems highly likely that we will see securities representative actions in 2023.

Conclusion

These judgments from 2022, and late 2021 (Lloyd), highlight claimants' use of procedural mechanisms and the courts' use of case management to make group claims manageable. We expect to see continued innovation in both fronts by claimants and the courts in 2023, ensuring that English group litigation remains a fascinating area to watch, and one which will continue to develop.

TOTAL SURVEILLANCE?

FUTURISTIC TECHNOLOGY IN DISCLOSURE



Authored by: Dan Heinrichs and Emma Young - Sky Discovery

Introduction

Science Fiction is rife with images of George-Orwell-esque futures of total surveillance, often enforced with elaborate, intelligent technology. This future feels closer when we read Western coverage of law enforcement in China or see shows such as "The Capture" about near-absolute CCTV cover and evidence manipulation in London (excellent and well worth a watch, by the way).

Looking at changing trends of the document types and data sources disclosable in a commercial legal dispute over the last 10 years, we start to see a convergence between cinematic fiction and today's Disclosure reality. Many advanced artificial intelligence technologies are not only built into e-Disclosure platforms, they are readily available for purchase by any organisation online, often via existing means such as Amazon Web Services, or the Microsoft Azure Cloud.

10 years ago, mobile phone data, text or chat was disregarded as irrelevant, today it is often included as a rich source of disclosable material.

Further to bringing fiction towards reality, "Technology Assisted Review" is actively encouraged in the new Practice Direction PD57AD[1], in fact for disputes with over 50,000 documents the rules require an explanation as to why you wouldn't use it (PD57A DRD Section 2 Question 9)[2]. Despite this support from the courts, the authors argue that even established technologies are often not used to their full potential, while emerging technologies such as image and facial recognition or sentiment analysis are not commonly adopted - despite their potential to offer drastically lower costs, higher accuracy and faster results. Will this change in another 5 to 10 years, or sooner?

Looking Back 5-10 years

Disputes traditionally centred around limited data sources and applied comparatively basic review workflows, using de-duplication and keyword searching. The last decade has seen a number of changes in this area.

For example, audio, video and chat data were often dismissed as data sources unlikely to contain relevant data in a commercial dispute. Technology such as Machine Learning (often called "Predictive Coding", in which the algorithms try to "understand" what types of documents are relevant to a matter) – has been available for many years and indeed is built into all of the leading review applications. Even though they offer significant cost savings and have been tested, approved and encouraged by the courts since 2016[3], their adoption was still not standard practice for many lawyers, instead, basic workflows continued to be popular.

1 https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-57a-business-and-property-courts/practice-direction-57ad-disclosure-in-the-business-and-property-courts
2 https://www.justice.gov.uk/__data/assets/pdf_file/0009/177471/disclosure-review-document.pdf
3 https://www.lawgazette.co.uk/law/landmark-ruling-on-predictive-coding-in-disclosure/5053681.article

The Last 2 Years

The last two years have seen a dramatic shift of user behaviour, away from more traditional E-Mail communication to chat and video-call platforms, such as Teams, Zoom, WhatsApp, Slack or Bloomberg. All of these interactions are tracked, often recorded and thus discoverable in disputes.

While E-Mail is generally stored in a handful of different formats and systems and technology such as E-Mail Threading (reviewing only the latest E-Mail in a chain) and Concept searching offer powerful methods to reduce E-Mail datasets for review, chat data is another story entirely.

Chat programs offer a variety of options for correspondence – 1 to 1 chats, Groups, Teams, Slack Channels just to name a few. Additional complications arise from non-written-word communication such as voice notes, images, GIFs, emojis and recorded video calls, all of which themselves aren't keyword searchable. Chat messages tend to lack the formality of E-Mails and differ widely culturally, both in terms of organisations and jurisdictions, meaning abbreviations, acronyms and slang are prevalent, all of which don't lend themselves to common keyword searching.

There have been technological advancements in these areas, with software providers such as Relativity offering applications specialising in Short-Message review, however chat platforms are developing much faster than most review-software can develop solutions, so disputes including these data sources will require detailed consultation to ensure defensibility and proportionality.

Today

Commercial disputes today are being required to consider an ever-increasing matrix of technologies (DRD Section 2 Question 9) and data sources (DRD Section 2, Question 2) in order to achieve a fair resolution of civil proceedings. Examples include:

- **Keyword Search of Images**
  - Using artificial intelligence to search for "cracks in a dam" or "bridge" or "concrete" to isolate relevant images for review and Disclosure.
- **Teams Data**
  - Used as a central repository to store draft documents, business plans, meeting agendas, meeting action items including comments and internal communications which contain far richer content than traditional organisational E-Mail stores or Microsoft Word documents. Sources such as Teams or other collaboration tools require strategic search and collection techniques to both isolate relevant material and adequately exclude from review that data that is entirely irrelevant to the dispute.
- **Handwritten Notes / Diaries**
  - Advanced Optical Character Recognition technology can now identify photographs or scans that contain handwriting, which it will transcribe, allowing for keyword searches to be deployed, reducing the time and cost to isolate relevant material.

Looking Forward

It is difficult to predict where Technology and Disclosure will take us in the coming years. Sanctions, Bring Your Own Device and "Work from Anywhere" policies, increased Data Privacy awareness, Blockchain, and the "Metaverse" all already bring challenges in data retention and audit.

Technology such as Sentiment Analysis is now in early availability in Disclosure platforms[4]. This allows for automated classification of documents via the language used into "positive" and "negative", but in the near future also "happy", "sad", urgency and of-interest). This additional layer of artificial intelligence and understanding of data allows savvy litigators to gain early insight into their client's data, but can also be deployed in quality control of review decisions prior to Disclosure or quickly identify "hot" documents in incoming Disclosure.

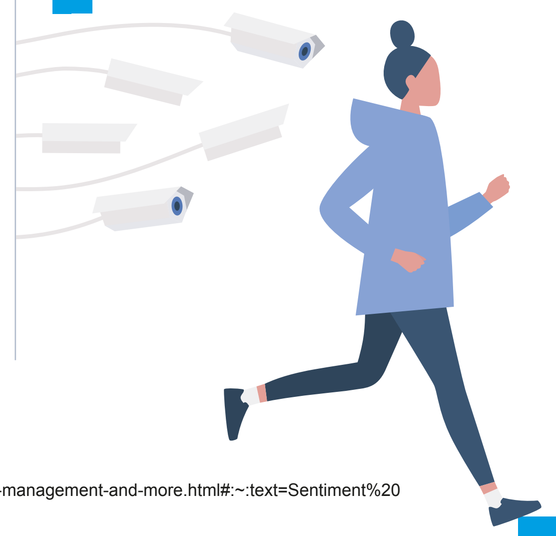
In a similar vein the authors would like to see greater investment by technology providers in analysing non text evidence that exists. Examples may include:

- Replies to an E-Mail sent or deleted almost immediately (within seconds) may mean a mistake has been made or there is controversy or emotion attached to the response.
- E-Mails sent then immediately followed up by text message may indicate an important commentary about the content or insight about the more formal correspondence from two different data sources

Whilst the above is technically already possible with a considered and determined approach to the analysis of metadata, we normally see this limited to fraud related cases. What level of insight might this information give us when deployed into the everyday commercial dispute?

Looking forward, a simple indicator of the likely data sources of interest and technical challenges for lawyers in coming years is to stop and reflect on your own technical behaviour, that of your firm, and that of your colleagues. How are you communicating with your clients (is it only E-Mail or do you use chat)? Where are you storing and sharing draft documents?

When disputes about current and future events arise in the coming years, all of these topics will need to be considered. As these technological and cultural advancements are coupled with ever advancing, powerful technology available to support lawyers; the learning curve to understanding the technology, capabilities and what is reasonable and proportionate for any dispute is steep. Nonetheless, the future is bright for the tech savvy lawyer.



4 https://www.lawnext.com/2022/10/at-its-user-conference-relativity-unveils-new-tools-for-e-discovery-compliance-data-management-and-more.html#:~:text=Sentiment%20analysis%20uses%20AI%20to,within%20the%20context%20of%20communications.

10 LEGAL AND REGULATORY ISSUES FOR LAW FIRMS TO CONSIDER IN MANAGING AN INVESTIGATION INTO PARTNER MISCONDUCT

Authored by: Andrew Pavlovic - CM Murray

In recent years there has been a renewed focus on how misconduct allegations are managed by law firms. That focus has arisen for a variety of reasons, including cultural shifts resulting from the #MeToo movement, generational changes, heightened media scrutiny and regulatory pressures.

Once a complaint of misconduct is received, the situation can escalate extremely quickly. Internal and external pressure on management to send a strong message in relation to misconduct can result in decisions being made in haste, leading to accusations from the accused partner of procedural or substantive unfairness.

It is vital that firms have a plan in place to ensure a robust and independent investigative process, which treats all sides fairly and is capable of standing up to external scrutiny.

The following are 10 key legal and regulatory issues to consider in managing an investigation into partner misconduct allegations:

1 **Independence and consistency of process** – Control of the investigation and the firm's response must be placed in the hands of people who are not involved in the allegations and all partners should be treated consistently as far as possible - irrespective of profitability or seniority – to minimise the risk of discrimination complaints.

2 **Consideration of suspension or other amendments to working arrangements** – Firms should consider whether it is appropriate and necessary in all the circumstances to suspend anyone involved in the allegations or make any other temporary amendments to working arrangements, including reporting lines. These should not be knee jerk decisions and firms will need to consider carefully what powers they have to take any such action.

3 **Prompt regulatory reporting** – Firms are required to self-report promptly to the SRA where facts or matters give rise to a reasonable belief that there has been a serious breach of the regulatory arrangements. In practice this means that once an allegation of misconduct has been made, firms are required to submit an interim report to the SRA promptly, stating what the allegation is and the steps they are taking to investigate the matter. If the SRA are reassured that the firm is dealing with the matter properly, then they will usually allow the firm to complete its own internal investigation and present the findings of that investigation to them in due course.

4 **Identity of the investigator** –Where allegations are very serious and/or made against senior individuals, the firm will need to consider whether it is possible to conduct a properly

independent investigation internally or whether it should be outsourced to an external investigator.

In 2019 the SRA brought proceedings in the Solicitors Disciplinary Tribunal against a firm, a partner and the firm's HR Director in respect of their conduct of an investigation into alleged misconduct by the firm's managing partner. It was alleged that the firm/individuals had allowed the managing partner to exert influence over the investigation and that they had failed to put in place an independent process. Whilst the Tribunal ultimately found that the investigation had been fair, the level of on-going communication between the investigators and the managing partner throughout the investigation gave rise to the accusation of unfairness.

5 **Wellbeing of all parties involved** – An investigation can be incredibly stressful, distressing and isolating for all concerned; not only for the complainant, but also the alleged perpetrator and potential witnesses. Firms should take ongoing, proactive steps to provide appropriate support and assistance throughout, and, if necessary, be willing to make reasonable adjustments to facilitate participation in an investigation.

6 **Prevention of victimisation and retaliation** – Clear, robust instructions should be given to all parties involved in an investigation to ensure that neither complainants nor witnesses are subjected to any mistreatment as a result of their involvement in the process.

7 **Avoiding pre-determination** – In September 2021, an independent review by Alison Levitt QC heavily criticised the approach taken by RICS' General Counsel to an internal investigation into a boardroom dispute. The review found that the General Counsel had pre-determined the outcome of the investigation, failed to identify who the "client" was, and appointed as external lawyers a firm with whom she enjoyed a close relationship and were accordingly not sufficiently independent.

8 **Ensuring adequacy of the investigation from the outset** – Once an investigation is complete, the firm will usually then be required to submit a follow up regulatory report to the SRA setting out the results of their investigation and whether any misconduct had been established. It should not be assumed that the SRA will simply accept the findings of the firm's investigation, particularly if it has been carried out poorly, subject to delay, and/or has not been adequately documented. If the SRA decide that, due to the inadequacy of a firms' investigation, they need to re-interview witnesses or reconstruct events, this can be a significant drain on the time and resources of firms, given the typical length of SRA investigations.

9 **Internal/external messaging** – The investigation team should be as limited in size as possible to avoid the potential of internal/external leaks whilst the process is on-going. PR consultants often play a role, preparing either proactive statements within organisations or reactive statements to the press in the event of leaks. Any statements must balance the need to give individuals/employees reassurance that matters are being taken seriously whilst also ensuring that the confidentiality of the process is protected.

10 **Firm culture** – Finally, the SRA published its guidance on workplace environments in February 2022. In that guidance the SRA makes clear that it will take action against firms where it is considered that cultural/systemic issues have contributed to individual misconduct. The guidance emphasises the need for firms to create a "speak up" culture, in which individuals who suffer harassment/unwanted conduct feel that they will be supported if they report it. Firms need to have clear reporting lines in place so that individuals know who to complain to in the event of issues. Firms also need to ensure that they take a "zero tolerance" approach to misconduct and do not allow complaints of bad behaviour to go unresolved or allow them to escalate.

In light of the above, when a firm does receive an allegation of misconduct, it is vital that they balance the need for speed with the importance of taking a measured and calm approach, avoiding any knee jerk decisions that could compromise the investigation, leading to reputational damage (both internal and external) and the risk of regulatory action.

MINORITY SHAREHOLDER FAILS IN UNFAIR PREJUDICE CLAIM RELATING TO CARDIFF CITY FOOTBALL CLUB

Authored by: Laura Jenkins, Alexander Lerner and Mary Read - Stewarts

Debt-to-equity transactions can raise thorny shareholder issues in private limited companies, which is exactly what happened at Cardiff City Football Club between 2016 and 2018. Laura Jenkins, Alexander Lerner and Mary Read consider the recent decision in Re Cardiff City Football Club (Holdings) Limited [2022] EWHC 2023 (Ch). The claim failed on almost every point, but the judgment provides a helpful guide to the (sometimes counter-intuitive) nuances of unfair prejudice petitions and illustrates the court's pragmatic approach to disposing of such proceedings.

What is unfair prejudice?

Section 994(1) Companies Act 2006 provides that a member of a company may apply to the court for an order on the grounds that:

(a) a company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

What does that involve? At the risk of over-simplification, one of the easiest ways to think about unfair prejudice is that it is essentially a corporate form of divorce. Claims (referred to as petitions) arise where the relationships between shareholders (generally, but not always, in a private limited company) break down. More often than not, a minority shareholder will then seek an order from the court for their shares to be bought out by the majority shareholder(s).

Factual background

Mr Isaac (the Petitioner) is a minority shareholder in Cardiff City Football Club (Holdings) Limited (the Company), which is the holding company of Cardiff City Football Club Limited (the Club). Mr Tan (the First Respondent) is a Malaysian businessman and the majority shareholder in the Company (the Second Respondent).

The Company and Club were funded by substantial loans advanced by Mr Tan. The level of indebtedness was a matter of concern to supporters because of its effect on the Club's operations (in the context of UEFA's Financial Fair Play Regulations). By early 2016, the Club had been embargoed from acquiring new players. Accordingly, in February 2016, Mr Tan made a public commitment to reduce the Company's and Club's indebtedness (the Pledge).

Mr Isaac's allegations

Mr Isaac's complaint centred on an open offer of shares made by the Company following a resolution of the board of directors dated 18 May 2018 (the 5:2 Offer), which was taken up by Mr Tan only. The result of Mr Tan taking up the 5:2 Offer and no one else doing so was that his shareholding in the Company increased from 94.22% to 98.3%, while Mr Isaac's reduced from 3.97% to 1.18%.

Mr Isaac alleged that:

1. The dilution of his percentage shareholding was prejudicial to him and unfairly so: prejudicial because it left him worse off in terms of his shareholding interest, and unfair because the whole exercise was orchestrated by Mr Tan, who was motivated not by any proper business purpose but by personal animosity towards him following a falling out between them.
2. Although the proposal for the 5:2 Offer was approved by the Company's board of directors, the board essentially rubber-stamped a decision Mr Tan had already made. Accordingly, the directors did not exercise their own independent judgment as they were required to (s173 Companies Act 2006) and/or failed to exercise their power to allot new shares only for a proper purpose (s171 Companies Act 2006). Instead, the directors exercised their allotment power to further Mr Tan's personal vendetta against Mr Isaac and not to improve the Company's financial position.

The respondents denied the allegations. Mr Tan's position was that his motivations were proper and there were good commercial reasons for the 5:2 Offer, which represented the culmination of the Pledge. That was because he paid for the new shares issued to him under the 5:2 Offer by agreeing to write off a large sum (approximately £67m), which at the time was owed to him by the Company.

For essentially the same reason, the Company argued that its board of directors had acted properly. There was a sound commercial purpose for the 5:2 Offer, which improved the Company's balance sheet, and the Company's directors were independently satisfied with that. Accordingly, they exercised their allotment power for an entirely proper purpose.

Mr Isaac sought an order for Mr Tan to buy his shareholding at fair value.

The decision

Did Mr Tan's actions constitute conduct of the affairs of the Company?

No. It was alleged that Mr Tan had used his position as majority shareholder and major lender to the Company and the Club to put pressure on the board to accede to his demands and get his own way. However, those were matters personal and private to Mr Tan himself. He was entitled as a shareholder and creditor to seek to exercise commercial pressure at his disposal in his own interests. He was, therefore, acting on his own account. This could not be characterised as the conduct of the Company's affairs, unlike the acts of the board of directors, which Mr Isaac also complained of (as to which, see below).

Did Mr Tan act unlawfully or unconscionably?

No. Mr Justice Adam Johnson found that Mr Tan's behaviour "was unfair in the moral sense… it was vindictive and unpleasant behaviour… But to say something is unfair in that sense is not the same as saying it is unfair or unconscionable in the legal sense, because one can behave unpleasantly and unfairly (and people often do) without behaving unlawfully."

This is an important distinction. A shareholder will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which they have agreed the affairs of the company should be conducted or where equitable considerations make it unfair for those conducting the affairs of the company to rely on their strict legal rights.

Mr Isaac could not point to any breach of, for instance, the articles of association or a shareholders' agreement. Nor could he show (or had he pleaded) there was some overriding arrangement or understanding between the Company's shareholders that restrained Mr Tan's conduct. The best Mr Isaac could show was that Mr Tan had behaved unfairly in the general sense of the word, but that was insufficient.

In short, there was nothing unlawful or unconscionable in how Mr Tan acted, even if he had been motivated by a personal feeling of vindictiveness against Mr Isaac.

Absent any legal or equitable restraints, Mr Tan was free to use his shareholding, or the leverage arising from his position as lender, however he wished.

Did the directors act independently? (s173 Companies Act 2006)

Yes. Even though there may have been ulterior motives behind the 5:2 Offer, and even though it favoured Mr Tan, there was a justifiable commercial rationale for what the directors were being asked to do. Reducing its indebtedness was very much in the Company's interest. To the extent any of the rationale of the directors in reaching their decision had been flawed, that did not prove (without more) they had failed to act independently.

Further, Mr Justice Adam Johnson held that it was perfectly possible for a company director, acting independently, to form the view that the company's best interests are achieved by implementing the same proposal as is favoured by the company's majority shareholder (even where the majority shareholder had been responsible for appointing that director).

Did the directors act for a proper purpose? (s171 Companies Act 2006)

Sort of. In breach of duty, one of the directors did have Mr Tan's improper purpose in mind, which gave rise to unfairness. However, in the judge's view, this did not alter the ultimate conclusion: the board as a whole would still have made the decision it did. Accordingly, there was no prejudice to Mr Isaac even though there had been unfairness.

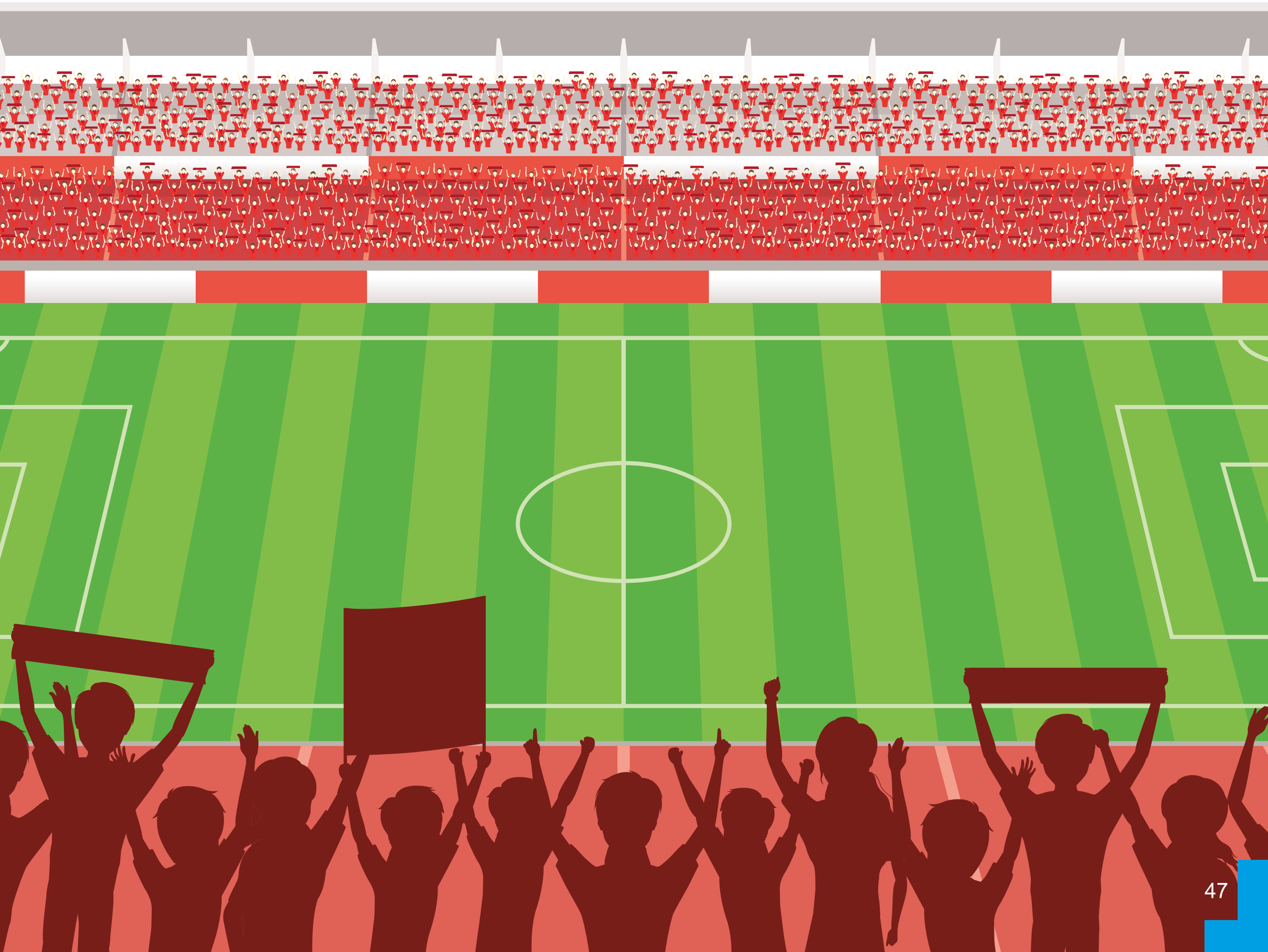
Commentary

Unfair prejudice claims tend to be long-running and extremely hard-fought disputes, particularly so where a long-standing shareholder relationship has broken down irreparably. The decision in Re Cardiff City Football Club (Holdings) Limited offers not only a succinct, worked example of a number of common pitfalls for the unwary petitioner but also an important dose of commercial reality and pragmatism.

Although it is easy to see why Mr Isaac felt aggrieved and why he might have viewed Mr Tan and the board as acting to further a personal vendetta against him, it is clear why his claim failed:

- Mr Isaac's allegations regarding Mr Tan failed because they were centred on acts that did not constitute the affairs of the company. Although unfair in the moral sense, they were not unfair in the sense of being unlawful or unconscionable such as to found a successful claim for unfair prejudice.
- Further, the judge's decision in relation to Mr Isaac's allegations regarding the board's independence shows that directors can have ulterior motives so long as there is also a justifiable commercial rationale for their decisions. It also showed that a director's independence cannot be impugned simply because that director concludes that a company's best interests are aligned with that of the majority shareholder who appointed them. The judge's conclusion regarding the board's purpose emphasises that what mattered was the outcome: even if there had been unfairness, there had not been any prejudice suffered by Mr Isaac.

Majority shareholders are not required to be paragons of virtue in their dealings with minority shareholders. In appropriate circumstances, they are entitled to bring their influence and will to bear. Similarly, directors are not required to operate in a vacuum such that consideration of a majority shareholder's will is excluded. What matters most for a director is making sure they act in a company's best interests and do not allow improper considerations to lead them away from that.



HOW GREAT CHANGE IS INFLUENCING INTERNATIONAL DISPUTES

Authored by: David Dearman, Gary Davies and Robert Jones - Ankura

In 2022 global crises, inflationary pressure, regulatory scrutiny, and judicial clarity have driven activity in international arbitration, competition litigation and class actions and will continue to do so in 2023. David Dearman, Gary Davies and Rob Jones of Ankura highlight these key developments.

At the outset of 2022, Covid-19 continued to dominate everyday life, and many expected a number of new disputes to arise from the economic disruption caused by the pandemic. However, in February 2022 Russia's sudden and devastating invasion of Ukraine triggered a global crisis and conditions that will lead to disputes for many years to come.

The international reaction to the invasion of Ukraine was swift. Companies worldwide announced a cessation of Russian operations and withdrawal from the country, facing the complex issue of unwinding years of Russian investments and contracts. It has also had a profound impact on companies with Russian investments, and the impact of sanctions has been widespread. Russia's response to Western sanctions has been to threaten and impose counter sanctions restricting the flow of funds, withholding stocks and securities listed on the Russian stock exchange and nationalising foreign owned assets and business.

With the consequential impact of rising energy prices, high inflation, and a weakening of all major currencies against the US dollar leading to rising interest rates, the international arbitration community is likely to be busy in 2023 with these continuing themes:

- Contractual non performance
- Sanctions issues
- Force Majeure
- Dissolution of Joint Ventures
- Supply chain disruption
- Government / investor protection measures
- Regulatory changes
- Complex financing and refinancing structures
- ESG related disputes in commercial and investment arbitrations
- More third party funded claims

The forum for international dispute resolution may also continue to evolve if the Ukraine's petition for a war claims commission[1] is successful. It is thought that US$300 billion in frozen Russian central bank assets could be targeted for enforcement to resolve claims against Russia for financial damages arising out of the war.

Competition disputes are also likely to arise from the twin supply-side crises of Covid-19 and the conflict in Ukraine, both of which have impacted supply chains and prices for businesses and consumers. In 2021-22 the UK's Competition & Markets Authority (CMA) has used its powers to identify market imbalance, recommend reform, and impose fines on companies involved in illegal behaviour.

CMA investigations into anti-competitive behaviour have resulted in fines totalling £404 million in 2021/22[2].

This is a record level of fines since the Competition Act came into force in 2000, albeit primarily focused on fines on pharmaceutical companies supplying important medicines to the National Health Service. The CMA is also paying attention to market factors affecting the cost of living, which could indicate an area of future penalties. These include fuel, food, and digital markets (privacy, app purchasing, data, online reviews, music streaming and mobile ecosystems), which increasingly underpin all consumer engagement, leading to potential vulnerabilities.

Focusing also on the green economy and de-carbonisation the CMA has coupled policy advice with market intervention, notably by enforcing competition law to support the electric vehicle charging market and publishing market guidance in relation to 'green' claims on products.

Where authorities find violations of competition law, the risk of follow-on litigation is heightened.

Merricks v Mastercard[3] in the Competition Appeal Tribunal (CAT) and the various international collective and private enforcement claims against truck manufacturers[4] continue to dominate the competition litigation landscape.

The OECD has called for better co-operation and information exchange between international competition agencies[5]. This combined with the long tail from competition investigation to damages awards, presents a high cross-border risk to in-house counsel. Reviewing internal policies and adherence to them remains a high priority. Internal investigations, assessments of supplier and customer relationships and regular testing of dawn raid response procedures help business to stay on the side of the angels.

However, businesses which have suffered loss at the hands of a cartel are continuing to recognise and pursue their recovery interests as a source of income. Sometimes the most expedient way of doing so is by bringing their claims with other institutions. Globally, such class actions continue to grow.

Claimant or plaintiff lawyers are utilising the full power of the internet, big data and international horizon scanning, to shine a light on complex matters which affect ordinary people and businesses and demonstrate a significant will to litigate matters that may otherwise go unnoticed.

1 https://globalarbitrationreview.com/article/ukraine-pushes-war-claims-commission

2 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1097032/Annual_Report_CE.pdf

3 Case No: 1266/7/7/16, Competition Appeal Tribunal

4 For example Road Haulage Association Limited v MAN SE and Ors. Case No: 1289/7/7/18, Competition Appeal Tribunal

5 OECD (2022), International Co-operation on Competition Investigations and Proceedings: Progress in Implementing the 2014 OECD Recommendation https://www.oecd.org/daf/competition/international-cooperation-on-competitioninvestigations-and-proceedings-progress-in-implementing-the-2014-recommendation.htm

Outside of the US, Australia and Canada, many European jurisdictions have busy mechanisms for collective redress. The Netherlands leads the field and is closely followed by its neighbours across the EU in countries like Germany and even Portugal.

In the UK, the greatest traction has been gained in relation to complaints where the class and the harm suffered has been relatively clearer to establish. Cases involving products, services, and the recovery of quantifiable sums – such as in the worldwide Dieselgate claims and Merricks – are clearly growing in number. In England and Wales, thanks largely to a favourable Supreme Court decision in Merricks[6], the Collective Proceedings regime in the CAT is seeing more cases and making swifter decisions in areas such as financial services, infrastructure, transport, technology, retail, and cryptocurrency.

Conversely the Supreme Court created an unsettling ripple for privacy cases in Lloyd v Google[7]. Compared to the Netherlands which seems privacy-friendly, there remains some doubt as to whether CPR 19.6 is the right procedure for bringing all types of data-breach claims. However, the guidance offered by the Court showed how same-interest claims can succeed and it is a matter of when, not if such cases will get over the line. The persistence and ingenuity of the claimant bar and funding organisations makes it highly likely that well-structured meritorious cases will be filed and make better progress where Lloyd seemed to fail.

Delivering redress brings a number of practical challenges which have not been fully examined in less mature jurisdictions. Approaching case management issues in order of the procedural timetable means that settlement matters are likely to take centre-stage in future judgments.

In the meantime, organisations like the Collective Redress Lawyers Association are considering early reforms which can improve access to justice for claimants. Likewise, defendants are making direct settlements as a way of avoiding the long stretch of costly litigation. Perhaps in these two areas we may yet see the biggest leaps of learning and progress in class actions.

Now more than ever, the mix of economic and geopolitical conditions with growing jurisprudence seems to indicate that 2023 will be a very busy year for all involved in disputes and investigations.

6 [2020] UKSC 51

7 [2021] UKSC 50

VOSS REPORT

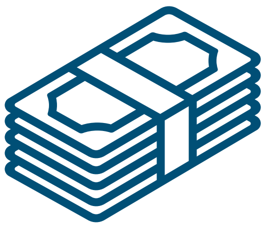
RECOMMENDATIONS TO THE COMMISSION ON RESPONSIBLE PRIVATE FUNDING OF LITIGATION

Authored by: Polly O'Brien and Boris Ziser - Schulte Roth & Zabel International

The potential for regulation is a key consideration for any emerging asset class as it reaches a level of maturity, and legal assets are no exception. Indeed, appropriate and well-informed regulation can promote stability within an asset class, potentially enabling new market opportunities. Over- or heavy-handed regulation can have the opposite effect.

On this note, the recommendations to the Commission on Responsible Private Funding of Litigation (commonly known as the "Voss Report"), passed by the European Parliament on 13th September 2022 and proposed Directive (EU) 2020/1828[1] require further analysis prior to any statutory implementation.

Below, we look at five of the key recommendations of the Voss Report[2] in the context of the current litigation funding market in Europe and provide our commentary.



1. Capital adequacy:

Member States should require litigation funders to demonstrate that they have sufficient capital to satisfy their financial obligations.

The issue of capital adequacy is a key tenet of the best practices promoted by the International Legal Finance Association and the code of conduct of the Association of Litigation Funders. In an increasingly competitive market, it is in a funder's interests to be able to provide comfort to clients with respect to its creditworthiness - but what level of comfort are we looking at and at what stage of proceedings will capital adequacy be assessed? Are other industries subject to such tests?

2. Adverse costs:

Litigation funders should be responsible for defendants costs arising from unsuccessful litigation, such as due to an adverse cost award.

Depending on the Member State, rules currently vary as to whether a funder can be held liable for adverse costs. A

1 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 Nov. 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

2 Summary- Responsible private funding of litigation, 2020/2130 (INL)- 25/07/22

degree of harmonization makes sense in principle, but needs to be assessed in conjunction with the wider judicial framework - for example, the basis on which costs are assessed and factors taken into consideration such as conduct of the parties.

The Voss Report emphasizes the importance of lowering costs of litigation and facilitating the use of third party litigation funding as a "tool to support access to justice."[3] However, an important factor to consider in relation to the recommendation that funders be responsible for adverse costs is the knock-on effect on pricing. As addressed further below, funders often receive a substantial reward in the event of a successful case, but they also take on considerable risk - something which is only increased by the threat of adverse costs.

3. Fiduciary duty:

Third-party funding agreements should be required to observe a fiduciary duty of care to act in the best interests of a claimant.

If we consider the concept of fiduciary duties, we are effectively looking at an obligation of a principal to act in the best interests of a beneficiary, in circumstances where power has been delegated by one party to another. That duty inarguably exists between a funder and its investors - being the pension funds, family offices, high net worth individuals or others who allocate capital for investment in litigation funding. It does not logically exist between a funder and a claimant. It is somewhat misguided to suggest that this is an appropriate development - that a funder should balance a duty of care between investors on whose behalf it is making a non-recourse investment, and a claimant to which it ultimately has no recourse in the event of an unsuccessful case. Should banks owe a fiduciary duty to their borrowers?

4. Cap on fees:

Save in exceptional circumstances, when the share of any reward claimed by a litigation funder would dilute the award, including all damages amounts, costs, fees and other expenses, available to claimants and intended beneficiaries to 60% or less, it should be presumed unfair and deemed invalid.

While undeniably a funder can potentially stand to make a large return on its investment should a case be successful, the Voss Report fails to address the issue of the transfer of risk from the claimant to the funder.

In the event that the case is unsuccessful, the funder loses its investment and has no recourse to the claimant - it may even, in certain jurisdictions, also have an additional liability in the form of adverse costs. How can a regulator have a blanket cap on returns when each case represents a bespoke risk? Further, how can a cap based on a percentage of the recovery be agreed at the outset when neither the claimant nor the funder have a precise idea of the costs? An arbitrary cap will simply make litigation funding unavailable to EU residents. Perhaps that is the Commission's aim.

5. Disclosure of funding agreements:

In the interests of transparency, there should be an obligation to inform the relevant court or administrative authority of the existence of commercial funding and the identity of the funder, as well as to disclose third-party funding agreements in full to courts or administrative authorities, upon their request or at the request of the defendant to the court and subject to appropriate limitations to protect any necessary confidentiality.

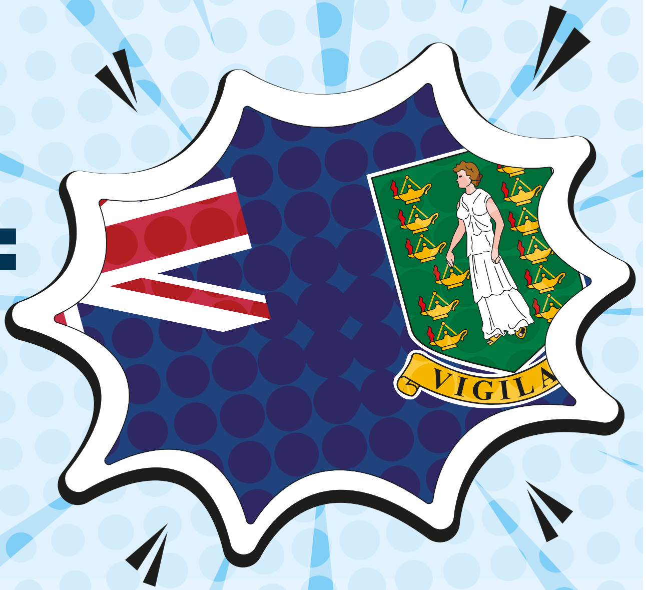
The intention of this recommendation may be to promote transparency, but it is clear to see how disclosure of un-redacted commercial terms of funding agreements may leave claimants exposed from a tactical perspective. Deep-pocketed defendants will be granted full visibility of the resources available to claimants and may employ tactics to delay proceedings and expend remaining funds. What happened to the notion of dispute adjudication simply on the merits? Furthermore, if the court starts from the position that documents should be fully disclosed, with arguments to be made for "necessary confidentiality", this increases the likelihood of further process, delays and legal costs which would seem counter to the original intention.

In terms of questions raised, there are many. As 2022 draws to a close, the situation is watched closely, with the hope and expectation that 2023 will see more in-depth consultation by the Commission with market participants prior to any further submissions being made.

3 Report with recommendations to the Commission on Responsible private funding of litigation, 2020/2130 (INL), p.4/39

THE LAW ON ILLEGALITY IN THE BRITISH VIRGIN ISLANDS:

THE BVI'S TAKE ON PATEL V MIRZA [2016] UKSC 42



Authored by: Allana-J Joseph - Conyers

"…the law on illegality is not entirely clear in this jurisdiction."

This was the position expressed by BVI Commercial Court Judge, Justice Adrian Jack in his judgments of 17 June 2021 and 15 February 2022 in Briefline Assets Ltd v Nikolay Anatolyevich Falin, Belfast Services SA [2020] ECSCJ No 223, BVIHC (COM) 2020/00223. The underlying dispute in that case concerned a transaction which is alleged to have been entered into with the purpose to defraud banks. The Judge opined on whether the claimant's involvement in such a transaction automatically barred him from asserting any rights in light of the seminal House of Lords decision in Tinsley v Milligan [1994] 1 AC and the more recent reframing of illegality as a defence as applied by the Supreme Court decision of Patel v Mirza [2016] UKSC 42.

This article considers the position of the Eastern Caribbean Supreme Court on the law of illegality since Patel v Mirza and in light of Tinsley v Milligan [1994], and whether there is indeed any uncertainty in this jurisdiction.

Illegality as a Defence - "The Reliance Test" versus the "Multi-factorial Approach"

The House of Lords in Tinsley v Milligan held that the question of whether illegality would be an automatic bar to a claim would depend on how the cause of action is pleaded. Lord Browne Wilkinson at page 377 summarizes the Tinsley v Milligan approach thus:

> "…In a case where the plaintiff is not seeking to enforce an unlawful contract but founds his case on collateral rights acquired under the contract (such as a right of property) the court is neither bound nor entitled to reject the claim unless the illegality of necessity forms part of the claimant's case."

The Tinsley v Milligan approach therefore meant that if the claimant needed to plead or rely on the illegal matters to found his cause of action, he lost. If he did not, he won, subject of course to proving his pleaded case.

In 2016, the Supreme Court in Patel v Mirza expressly decided that the reliance principle applied per Tinsley v Milligan should no longer be followed. The question of illegality as a defence to a civil claim should be considered using a multi-factorial approach. The multi-factorial approach is intended to give effect to policy considerations behind illegality as a defence, namely that (i) a person should not be allowed to profit from his own wrongdoing, and (ii) the law should be coherent and not self-defeating.

Applying Patel v Mirza, the Court should now assess the question of illegality by considering whether allowing the claim would damage the integrity of the legal system or be inconsistent with any underlying public policy.

In conducting that exercise, the court will consider a variety of factors described by Lord Toulson JSC in Patel v Mirza as the 'trio of considerations' including (i) considering the underlying purpose of the prohibition which has been transgressed, (ii) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim and (iii) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality.

The Approach taken by the Eastern Caribbean Supreme Court

Patel v Mirza has seemingly been applied within some Eastern Caribbean jurisdictions without uncertainty.

In the Anthony Jonathon Nunns v Howard Mark Rotherham High Court decision from Montserrat (decided on 16 July 2021), Morley J in his discussion on illegality at paragraph [19] of his judgment said the following:

"…illegality used to be a mostly automatic response founded on the long standing reliance test, emphasised in Tinsley v Mulligan 1994, supra, being, 'the question is whether the person making the claim is obliged to rely in support of it on an illegal act on his part' per Lord Sumption at para 234 in the seminal rewrite by the UK Supreme Court of the illegality doctrine in Patel v Mirza 2016 supra. Though Patel is not 'year zero' rendering previous case law irrelevant, nevertheless the reliance test has been clearly superseded, and qualified…"

Further, High Court Judge Rosalyn E. Wilkinson, in a decision from Antigua Kenneth Meade, Hilda Meade v Cleveland Seaforth et al (decided 22 March 2017), held that the defendant Bank was entitled to enforce the contract entered into with Emerald Spring Villas Ltd ("Emerald") to secure repayment of a loan although the contract for the loan was unlawful. Applying the principles set out in Patel v Mirza, Wilkinson J took the position that to do otherwise would leave Emerald unjustly enriched. The Judge went on to dismiss the application for an injunction seeking to restrain the Bank from enforcement. That decision was appealed.

On 8 November 2017, the Court of Appeal, in an oral judgment, determined that Wilkinson J had considered the relevant law on illegality and while noting that it was not necessary for the Judge to decide the issue on enforcement, determined that her Ladyship was entitled to form the view that there was no triable issue with respect to the claim that any part of the contract was void ab initio and of no legal effect because it formed part of an illegal transaction. The appeal was dismissed.

In SR Projects Ltd v Rampersad [2022] UKPC 24 (judgment delivered on 26 May 2022) the Privy Council, hearing an appeal from the Republic of Trinidad and Tobago (not part of the Eastern Caribbean jurisdiction), held that the law relating to illegality had now been rationalised and put on a coherent footing in England and Wales by the Supreme Court in Patel v Mirza and that the subsequent decisions of the Supreme Court namely Grondona v Stoffel & Co [2020] UKSC 42 and Henderson v Dorset Healthcare University NHS Foundation Trust [2020] UKSC 43 have left no doubt that the approach articulated in Patel v Mirza applies across all areas of private law.

What is the approach of the BVI Courts?

Returning to Briefline v Falin et al, Jack J sets out why he considers the law on illegality to be not entirely clear in this jurisdiction. His judgment cites three Privy Council decisions which support the Tinsley v Milligan reliance test, and cites the cases of Petherpermal Chetty v Muniandi Servai (1908) LR 35, Singh v Ali [1960] AC 167 and Palianiappa Chettiar v Arunasalam Chettiar [1962] AC 294 which led him to opine that "it is unclear whether this Court is bound to follow those Privy Council decisions or treat them as impliedly overruled by the UK Supreme Court decision."

While there is no written judgment from the Eastern Caribbean Court of Appeal applying Patel v Mirza, it would be a surprise if the Privy Council were to take a different view on the question of illegality to that set out in SR Projects Ltd v Rampersad on hearing appeals from territories within the Eastern Caribbean. With due respect to the issues highlighted by his Lordship in Briefline v Falin, the answer would appear to be clear.

The law has moved on, and has done so, it may be considered, in the right direction. The question of illegality now requires the BVI Court to carry out a proportionality exercise and to consider the relevant public policy considerations specific to each case on their particular facts.

The automatic bar to civil claims enshrined in Tinsley v Milligan is now, we believe, a thing of the past.

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THE GLOBALISATION OF SECURITIES LITIGATION

THE CHALLENGES AND OPPORTUNITIES

Authored by: Jennifer Pafiti and Daniel Summerfield - Pomerantz

Over the last four decades, pension funds' equity portfolios have diversified significantly with a gradual reduction, in many cases, in exposure to their respective domestic markets and a correspondingly increased proportion of their portfolio exposed to equities outside their domestic markets. With the continual search for diversified sources of returns to meet their pension liabilities coupled with global capital markets becoming more integrated, the whole global equity market has become the opportunity set. As investors have looked overseas for their investments, they have also had to ensure that the tools in their engagement armoury are fit for purpose to act as effective stewards of their members' assets in overseas markets. This has, by necessity, required pension funds to look at securities actions as a way of protecting their investments when investing overseas and particularly in the U.S., which has a tried and tested method for compensating defrauded investors.

While class actions have traditionally been the preserve of the U.S. legal system, with the primary focus on U.S. securities orchestrated largely by U.S.-based investors, there have been many interesting developments in case law and legislation across Europe, as well as developments in the U.S., which suggest that there may be more options for global investors who are seeking legal redress.

Although the U.S. will always be the most popular jurisdiction for investors to bring cases, the obstacles that were prevalent across Europe may become less onerous as investors seek innovative ways to bring claims.

Notwithstanding this development, the U.S. has not been without its challenges as the courts sought to deal with the challenges faced by the globalisation of investors' securities portfolios.

There is also an argument that institutional investors no longer view class action securities litigation as merely a way of seeking financial compensation. With the continued amplification of ESG concerns, active engagement in litigation is also being viewed as a means of bringing about corporate governance reforms which otherwise would not have been achieved. When used effectively, securities litigation is also about future-proofing the companies in which pension funds invest, and sometimes acting as a deterrent to other companies who might be tempted to pursue a path which is not in their shareholders' or stakeholders' interests. The changes that can be brought about through class actions can have very positive, long-lasting outcomes.

The participation of global investors in securities litigation in the U.S. to bring about corporate governance reforms is not a new phenomenon. In 2005, a number of U.S., Australian and European funds successfully sued Rupert Murdoch's News Corp in Delaware Chancery Court. The suit alleged that News Corp defrauded investors by refusing them the right to vote on an extension of a "poison pill" provision, as it had promised it would do. The company had claimed that it did not need to honour its promise to shareholders because the board had the right to change its poison pill policy. This was a significant win for shareholder rights and for corporate governance reform, and it has been frequently cited since. In the words of the Delaware Court of Chancery in 2005 "when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation, the board must give away. This is because the board's power – which is that of an agent with regard to its principal – derives from the shareholders, who are the ultimate holders of power under Delaware law"

Unfortunately, the U.S. Supreme Court's 2010 decision in Morrison v. National Australia Bank Ltd. disrupted decades of legal precedent by barring use of U.S. federal securities laws to recover losses from investments in foreign-traded securities – even where a company dual-lists its stock or sells other securities in the U.S. Investors were abruptly left unprotected, with no right of recovery under U.S. law and seemingly no viable recourse in U.S. courts, whenever the exchange on which their damaged shares traded was outside U.S. borders.

Before the ink on the Morrison decision was dry, attorneys were hard at work developing novel legal theories to overcome the roadblocks it imposed. In the first successful workaround to Morrison, ground-breaking individual lawsuits for institutional investors were pursued to recover losses in BP plc's London-traded common stock and NYSE-traded American Depository Shares (ADS) following the company's 2010 Gulf of Mexico oil spill.

During the course of the BP litigation, ground-breaking rulings were secured that paved the way for 125+ global institutional investors to pursue their claims, marking the first time, post-Morrison, that both U.S. and foreign investors, pursuing foreign claims seeking recovery for losses in a foreign company's foreign-traded securities, did so in a U.S. court. In the process, the rights of investors were secured with U.S. federal law claims concerning BP's U.S.-traded ADS to simultaneously pursue English common law claims concerning their London-traded ordinary shares in a U.S. court. In early 2021, after nine years of hard-fought, landmark litigation, lawsuits pursued on behalf of its nearly three dozen institutional investors were resolved and a confidential, favourable monetary settlement was achieved.

The globalisation of securities litigation was also evidenced in a recent historical $3 billion settlement with Brazil's energy giant, Petroleo Brasileiro SA – Petrobras in which the lead plaintiff was a U.K. pension fund. This was achieved as a culmination of over three years of hard-fought litigation which resulted in a significant victory for investors following a decades-long corruption scandal involving tens of billions of dollars. Allegations against Petrobras involved the company concealing a sprawling, decades-long money laundering and kickback scheme from investors. The scandal ensnared not only Petrobras' former executives, but also Brazilian politicians, including former presidents and at least one third of the Brazilian Congress. According to plaintiffs, defendants' fraudulent scheme involved billions of dollars in kickbacks and tens of billions of dollars in overstated assets, resulting in significant losses to Petrobras investors.

To demonstrate the global nature of this particular case, the Petrobras settlement represented significant milestones in securities class action litigation history not least in it resulting in the largest settlement ever involving a foreign issuer and the largest settlement ever achieved by a foreign lead plaintiff.

This settlement certainly serves as a timely reminder to companies – both foreign and domestic – that raise money by issuing stock on a U.S. exchange that, when it comes to corporate misconduct, their investors will be afforded the protection provided by the U.S.'s robust securities fraud laws.

These developments have prompted Pomerantz LLP, headquartered in the U.S., to open a London office in October 2022 to complement its offices in Paris and Tel Aviv. We can now ensure that U.K. investors and pension funds have a full breadth of understanding of what is going on in the U.S. and around the world, and work closely with them, guiding them through the decision-making process regarding identifying specific cases in which they have exposure and advising them on the best route to recover losses.


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LITIGATION FUNDING PAVING THE WAY FOR ACCESS TO JUSTICE IN THE CAT

Authored by: Alex Thompson and Kees Jan Kuilwijk - Gateley

Following the Supreme Court's decision in Walter Hugh Merricks CBE v Mastercard Incorporated and Others in 2019, the Competition Appeal Tribunal (CAT) has experienced a significantly increased workload in 2022 that will continue to rise next year.

One of the principal functions of the CAT is to provide a specialist forum where claims for damages (including collective actions) can be brought where a consumer or business has suffered loss as a result of an infringement of UK competition law.

Litigation funding is a critical component to many of these actions being pursued, particularly collective actions brought on behalf of consumers who would not ordinarily be able to pursue those that they have suffered losses from.

In this article, we examine three decisions by the CAT in 2022 that considered the funding arrangements put in place for collective actions. What is clear from these decisions is that the CAT recognises the important role that litigation funding plays in promoting access to justice and, therefore, we expect to see in 2023 a further increase in the number of claims that are being pursued in the CAT that are backed by a funder.

Dr. Rachael Kent v Apple Inc. and Apple Distribution International Ltd

On 5 May 2022, the CAT granted its fifth (and first "on the spot") Collective Proceedings Order (CPO). The collective action, led by Dr. Rachael Kent against Apple, alleges that Apple abused its dominant position over app distribution and payment processing services. Dr. Kent now represents around 19.6 million UK mobile Apple device users who are estimated to have suffered between £621 million and £1.7 billion in damage. Relevant to both financiers and funded parties is that in this judgment the CAT denied Apple's request to disclose redacted portions of the litigation financing agreement and the ATE policy.

According to the CAT Rules, when determining whether the Proposed Class Representative (PCR) should be authorised and a class action order ordered, the CAT must consider whether the PCR will be able to pay both its own costs and the defendant's costs if it is ordered to do so. Typically, PCRs will therefore disclose substantial aspects of the arrangements they have made with litigation funders and After The Event (ATE) insurers.

Dr. Kent therefore presented copies of a Litigation Financing Agreement (LFA), an ATE insurance policy, a litigation plan and a litigation budget to the CAT.

However, the premiums due under the ATE policy and certain amounts set out in the LFA were redacted on the basis of "confidentiality, privilege and strategic sensitivity."

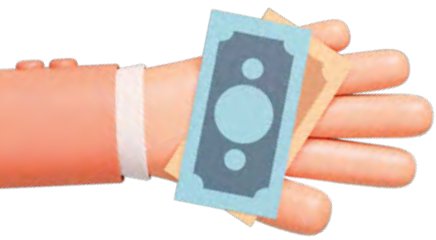
Apple objected to the redactions, arguing that it needed more information.

Apple's arguments failed to convince the CAT. Regarding the ATE policy, it noted that disclosure of the premiums could give defendants insight into the insurers' thinking about the strength of the case, giving Apple a tactical advantage. The requested disclosure in relation to the LFA related to the amount of solicitors' fees in excess of the agreed budgeted amounts, which were not covered by the funder and were therefore at the risk of the solicitors. The CAT considered that disclosure of the contingent element could in principle reveal legal advice on the merits of the claim and thus falls within the realms of legal privilege. Disclosure of the excess would also likely reveal the solicitors' risk assessment and allow Apple to use a litigation tactic of increasing costs beyond budgeted amounts to put pressure on Dr. Kent's legal team.

Elizabeth Helen Coll v Alphabet Inc. and Others

On 31 August 2022, the CAT released its judgeent in Coll v Alphabet, confirming the certification of Liz Coll's claim at a hearing before the CAT on 18 July 2022, the second on-the-spot certification of class actions in the UK after Dr Kent's. Coll's facts are very similar to Dr. Kent's facts. The PCR filed a class action on behalf of millions of UK consumers regarding alleged anti-competitive practices by Google in the area of app distribution and payment processing services.

The CAT's ruling was also similar in that it broadly agreed with the CAT's approach in Dr Kent v Apple to disclosure of funding arrangements and ATE policies. The Coll decision emphasized, however, that clear and articulated reasons must be given as to why the disclosure of such information could cause material harm. However, it is not the funded party that bears the burden of demonstrating why disclosure should not be made, but their adversary to justify why it should.



Road Haulage Association Limited v Man SE and Others

On 8 June 8 2022, the CAT approved an opt-in CPO application by the Road Haulage Association (RHA), a carrier industry association, while denying a competing opt-out CPO application filed by a special purpose vehicle, UK Trucks Claim Limited (UKTC).

The CAT chose the RHA application on the basis of a number of substantive factors. With regard to funding, it considered that provided the funder's return is not unreasonable, the CAT should not favour opt-in procedures over opt-out procedures merely because of the unavoidable need to deduct funding from the available total amount of damages recovered from the defendant (if any).

UKTC argued that its opt-out application should be preferred as its funding arrangements were significantly more favourable to claimants than those applicable to the RHA's opt-in procedure. In the case of UKTC's opt-out procedure, under the arrangements with its litigation funder and the ATE insurer, the funder's fee and ATE premium could be paid out of the amount that remains after damages have been paid to the claimants actually seeking payment.

The experience with opt-out procedures in the US and Canada teaches us that usually a significant part of the total available compensation is not claimed, probably because victims who are entitled to compensation are not aware that they can, or the amount is so low that it is not considered worth claiming. This does not apply to opt-in procedures because all persons represented have expressly decided to participate. Almost everyone will, therefore, actually claim compensation.

In the case of RHA's opt-in application, the litigation funder and insurer would have to be paid from the damages recovered for all individual claimants, reducing the ultimate amount available to them. The amount to be paid to the RHA's litigation funder varies between 5% and 30%, depending on the amount of the total compensation.

The CAT did a quick calculation. The RHA already has 315,000 trucks in its opt-in portfolio. A conservative estimate of the damage is £6,700 per truck. Total damages could, therefore, exceed £2 billion. In that situation, RHA's funder would be entitled to 8% of this amount (approximately £170 million).

According to the CAT, this is not a cause for great concern. Also, the fact that RHA is claiming £10,000 per truck (excluding interest) and UKTC £21,000 per truck (including interest) and foreseeing that the number of 315,000 will increase significantly after the CPO (meaning RHA's funder's return is likely to be at least 5% of £5 billion), did not apparently change the CAT's opinion. This is because there is no realistic fear that the funding arrangements with RHA's funder may operate unfairly towards the members of the class or that, if RHA's claims are succesful, these members of the class are likely to be deprived of a significant portion of their damages.

The CAT reiterates that without collective proceedings the vast majority of victims would not be able to file their claims at all and collective proceedings are simply impossible without third party funding.

The CAT concluded: "If the Tribunal considers that opt-in proceedings are otherwise preferable in the circumstances of the case, we think it should be slow to reject opt-in proceedings where the funder's remuneration does not appear unreasonable, only because the funder will be paid in the manner that is inevitable for proceedings of that kind."

ESG LITIGATION

KEY TRENDS ON THE HORIZON

Authored by: Faranak Ghajavand and Beata Brachkov - Stewarts

As a growing number of companies set sustainability goals and publish ESG-related data, investors, regulators and the broader public are exercising greater scrutiny of corporate sustainability efforts, whether real or alleged. Climate is eclipsing governance and social issues at the top of the ESG agenda, given the urgent and existential threat of the global temperature rise. With increased scrutiny and stricter regulatory requirements regarding ESG disclosures, the risk of litigation for those companies falling foul also rises.

Claims based on climate change grounds have been brought since the 1980s, but scientific advances are making it easier to attribute the damages caused by climate change to companies' activities. Those wishing to bring claims are relying on existing laws in sometimes innovative ways, with ESG claims based on a wide spectrum of legal grounds including tort, breach of fiduciary duty, claims for misstatement / misrepresentation, and under company and securities law.

We look at the key trends emerging in ESG litigation and what this spells for future disputes.

Claims based on parent company liability

We have seen a number of cases brought against English-based parent companies on the basis of alleged environmental damage by their subsidiaries abroad. In Lungowe and others v Vedanta Resources PLC and another [2019] UKSC 20, a group of Zambian claimants brought claims in negligence against the Zambian subsidiary and its English-based parent arising out of losses caused by the subsidiary's mining operations in Zambia. Similar claims were brought by a group of Nigerian claimants against Shell and its Nigerian subsidiary in Okpabi and others (Appellants) v Royal Dutch Shell Plc and another [2021] UKSC 3 arising out of losses suffered due to alleged oil leaks from infrastructure operated by Shell's Nigerian subsidiary. In both of these cases, the Supreme Court allowed the claims to proceed through the English courts by extension of the duty of care owed by the subsidiary onto the parent company. This was done by assessing the degree of control exercised by the English-based parent over its subsidiary.

Claims based on supply chain liability

In a similar legal vein, the duty of care owed by companies may be extended to include the actions of its suppliers. In Begum v Maran (UK) Ltd [2021] EWCA Civ 326, the widow of a deceased worker brought a claim based on knowledge of unsafe working practices down the supply chain, where the defendant was a shipbroker who negotiated the sale of a defunct oil tanker during whose demolition the worker fell to his death in a shipyard. The Court of Appeal has allowed the case to proceed on the basis that it was arguable that the defendant owed a duty of care to the deceased.

Claims for misstatement / misrepresentation

Several greenwashing claims, both in the UK and across the pond in the Netherlands and Germany, have been brought against companies such as BP, Shell and KLM for breaches of advertising standards and European consumer law. These say that the companies' alleged 'carbon neutral' practices give consumers the false and/or misleading impression that the climate impact of their high-carbon products are being reduced.

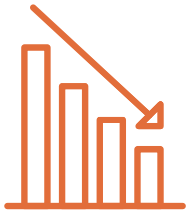
We expect to see similar claims, potentially structured by consumer claimants in group litigation, for misstatement / misrepresentation arising out of the sale of advertised 'carbon neutral' products aimed at setting off one's carbon footprint in circumstances where such off-sets may not sufficiently address the negative environmental externalities of products and services offered by industries such as oil and gas or aviation.

Claims under the Companies Act 2006 for breaches of directors' duties

ClientEarth's recent claim against Shell's board of directors is thought to be the first case in the UK where a shareholder claimant has taken action against a company's board for failing to "properly manage climate risk", thereby "breaching its legal duties".

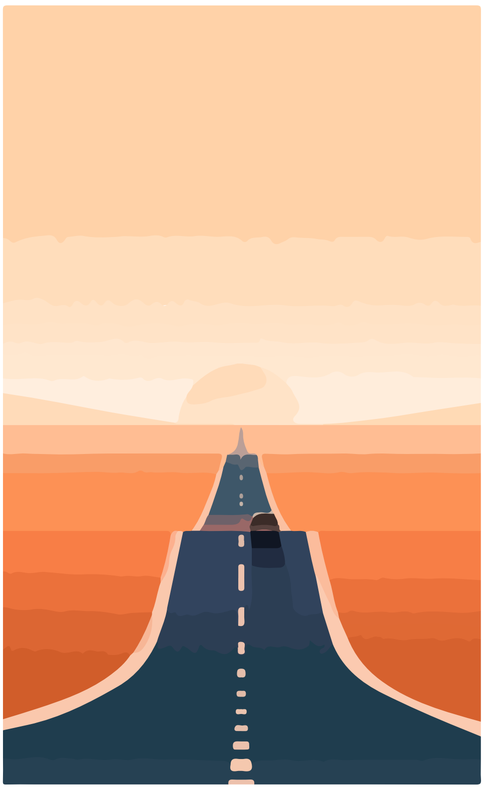
ClientEarth say that despite committing to net-zero by 2050, Shell's current strategy would result in a 4% rise in net emissions by 2030, which leaves the directors falling short of their directors' duties.

The case if successful could have a huge impact on how UK boards devise and report climate strategies.



Claims under s.90 / 90A of the Financial Services and Markets Act 2000 ("FSMA")

There is an increased impetus for boards to assess ESG risks, whether this be complying with regulations or including ESG issues when devising investment strategy and making credit decisions. With this we expect to see a rise in claims based on companies' statements and disclosures on ESG rather than specific actions already taken. In 2008, the New York State Attorney General commenced proceedings against ExxonMobil alleging that the company had misled investors about the risk of climate change regulation to its business. Similarly, earlier this year, the US Securities and Exchange Commission fined Bank of New York Mellon $1.5 million for misstatements regarding whether certain funds had undergone an ESG quality review; finding that at the time of the relevant statements numerous investments in those funds did not have an ESG quality review score.



Similar actions are possible in the UK under s.90 / 90A of FSMA by shareholders of UK-listed companies who have suffered loss arising from the fall of a company's share price. Liability may arise as a result of a company's untrue or misleading statements relied on by shareholders in deciding to acquire, hold or dispose of certain securities. Similar to the RBS Rights Issue litigation or the Tesco litigation, such actions will likely take the form of high-profile class actions.

Comment

So far, the class actions we have seen in England relate to mass tort claims, such as the case against BHP brought by more than 200,000 victims of Brazil's Mariana dam collapse in 2015 which led to the release of toxic mining waste. Despite some of the victims having recovered compensation in Brazil, the Court of Appeal has allowed the case to proceed in the English courts, saying that the recovered damages were modest ([2022] EWCA Civ 951). On the other hand, in Jalla v Shell [2021] EWCA Civ 1389, relating to the largest-ever oil spill in the history of Nigeria, the Court of Appeal gave a more conservative ruling in relation to "opt out" class actions. It ruled that the case could not proceed as a representative action under CPR 19.6 due to the lack of "same interest" among the victims as to damage.

On that basis, ESG claims of this type seem likely to continue to proceed on an "opt in" basis either under the GLO route or on a test-case basis.

Such cases will need to be supported by philanthropists or litigation funders, who appear increasingly willing to invest in damages-based ESG cases on behalf of claimants who would otherwise not have the means to seek redress.

TL4 Disputes

Upcoming Events

- **Financial Institutions Litigation** — **19** Jan 2023
- **Sovereign & States Disputes and Enforcement** — **24-25** Jan 2023
- **ESG Litigation** — **7** Feb 2023
- **India Dispute Resolution Forum - London** — **7-8** Jun 2023

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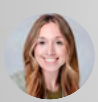

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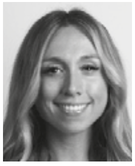
ThoughtLeaders Disputes

Meet ThoughtLeaders





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