THE DISPUTE RESOLUTION REVIEW

Thirteenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

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THIRTEENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 28 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully, as well as overcoming challenges that life and politics throw up along the way. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different from those closer to home.

Looking back over 2020 from my study at home (this will provide a clue to the theme of this Preface), I cast my eye over words I wrote in last year's Preface:

> *All this leaves me writing this preface five days before 'Brexit Day', after an exhausting 2019 in which clients have not known whether to plan for the 'May deal', 'No deal', 'Boris's deal', a referendum (on Brexit and/or Scottish independence), no Brexit, or the extensive nationalisation of private industries and tax rises outlined in Labour's manifesto.*

Not a word about a pandemic about to sweep across the globe.

If 2019 was the year of Brexit, this year was undoubtedly the year of covid-19; the year of lockdowns, tiers, furlough and, finally and thankfully, unprecedented mainstream media scrutiny of the safety and efficacy of various vaccines. Lives have tragically been lost and many more have suffered from covid-19-related illness. Restrictions on personal freedoms that would have been unthinkable this time last year have been imposed, relaxed and imposed again. In the UK, we have seen everything from virtual total lockdown to being encouraged to 'eat out to help out' as the government picked up half the bill to support the hospitality industry. Throughout this period of enormous change, the law, courts and tribunals have had to adapt to rapidly changing circumstances and, for the most part, have kept pace.

Perhaps the most noticeable change in the legal sector has been the move to online and home working, which has emphasised the need to have strong and reliable IT systems. We have seen disputes increase around force majeure and cancellation and termination clauses, and businesses have had more cause than usual to check their insurance arrangements. The latter development is best illustrated in the UK though the Financial Conduct Authority test case to determine the scope of cover afforded by business interruption insurance policies to businesses that were affected by covid-19 and a variety of government advice and restrictions, a case that saw your editor spend an uncomfortably hot British summer 'attending' court from home and promising he would never complain about being cramped in court again, so long as it had air conditioning. See Chapter 6 for further details of the case.

The question on many lawyers' lips is 'will we ever go back to life as it was before?' Some firms confidently predict the end of the working week and office environment (giving up their leases in the process); others talk of offices becoming the 'hub' with flexible working 'spokes'; and yet others urge a return to the status quo. Certainly courts and tribunals will have learned a lot during the pandemic, not least that electronic filing and short remote hearings can be efficient; but perhaps also that even the best video link cannot replace the special atmosphere that lends something intangible, but of great importance, to live, physically present advocacy and testimony. Perhaps one of the best lessons learned is that if you don't try something, you won't know which parts work and which parts don't.

A last word has to go to Brexit, as the UK and EU agreed a deal at the end of the year with only days to spare. This will have a lasting impact on the legal and political relationship, much of which is explored in more depth in the updated Brexit chapter.

This 13th edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate a continually evolving legal landscape responsive to both global and local developments.

As always, I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies can be found in Appendix 1 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
Harpenden
January 2021

Chapter 6

ENGLAND AND WALES

Damian Taylor and Smriti Sriram[1]

I INTRODUCTION TO THE DISPUTE RESOLUTION FRAMEWORK

i England and Wales, the United Kingdom and the European Union

The United Kingdom comprises four countries – England, Northern Ireland, Scotland and Wales – which share a common (albeit uncodified) Constitution but have three separate legal systems. England and Wales share a common legal system (often referred to colloquially as English law) while Scotland and Northern Ireland each have their own independent system. The Supreme Court of the United Kingdom hears appeals from all three legal systems in civil cases, in addition to cases concerning powers devolved to the Scottish, Welsh and Northern Irish executive and legislative authorities.

Following a referendum held on 23 June 2016, in which a majority of the UK electorate voted to leave, the UK withdrew from the European Union on 31 January 2020. However, a transition period was agreed for the purposes of allowing the UK and EU to negotiate a trade deal, which lasted until 31 December 2020. During this transition period, the UK's relationship with the EU remained largely unchanged, and most EU law remained effective in the UK. The UK's relationship with the EU is now governed by the Withdrawal Agreement, which came into force on 1 February 2020, and in respect of the areas to which it applies, the UK–EU trade deal announced on 24 December 2020, which was enacted by the UK Parliament as the European Union (Future Relationship) Act 2020. For further detail on the legal implications of the UK's exit from the EU, see Chapter 1.

ii Private and public resolution

Disputes in England and Wales may be adjudicated privately (e.g., by an agreed arbitrator) or litigated publicly in the courts. Although the use of private dispute resolution mechanisms is increasing, the courts still determine the vast majority of adjudicated disputes. The courts remain the only forum in which a claim can be determined without the agreement of the other party. Private forms of dispute resolution are considered separately in Section VII.

iii The structure of the courts

Depending on the financial value and nature of a dispute, a party may bring a civil claim in either the County Court or the High Court. Most non-complex civil litigation is dealt with in the County Court through hearing centres in towns and cities throughout England and

1 Damian Taylor is a partner and Smriti Sriram is an associate at Slaughter and May. The authors wish to thank Rob Brittain (professional support lawyer) and Emily Boseley (trainee) for their contribution and assistance.

Wales. Complex, high-value litigation (including most commercial claims) and appeals from other courts are heard in the High Court. The High Court is divided into three divisions, two of which are relevant for commercial disputes, namely the Queen's Bench Division and the Chancery Division.[2] Within these divisions there are a number of specialist courts or lists, including the Commercial Court, Financial List, Circuit Commercial Court, Admiralty Court, Technology and Construction Court (TCC), Administrative Court, Planning Court, Insolvency and Companies List, and Intellectual Property List.

Following changes made in October 2017, the Commercial Court, Circuit Commercial Court, TCC, Admiralty Court, Financial List and the courts of the Chancery Division (including the Intellectual Property List, the Business List, and the Insolvency and Companies List) are known collectively as the Business and Property Courts of England and Wales. The Business and Property Courts are based in the Rolls Building in London, as well as in Birmingham, Manchester, Leeds, Bristol, Cardiff, Newcastle and Liverpool. Recent changes to the Civil Procedure Rules (CPRs) emphasise that cases can be tried outside London regardless of their size.

The High Court, the Crown Court (which deals with criminal cases) and the Court of Appeal are collectively known as the Senior Courts of England and Wales. The Court of Appeal hears appeals in civil cases from the High Court and, in certain circumstances, from the County Court and various tribunals. The final court of appeal in civil cases (and, in England, Wales and Northern Ireland, criminal cases) is the Supreme Court of the United Kingdom, which was created by the Constitutional Reform Act 2005. The Supreme Court will generally only hear cases that involve a point of law of general public importance; its decisions bind all courts below.

In addition to the courts, a number of statutory tribunals have been established to hear disputes arising under the jurisdiction granted to them by the relevant legislation. The members of the tribunal will often comprise a legally qualified chairperson as well as lay members with appropriate experience. It is often possible to appeal a decision made by a tribunal to the High Court.

iv Relationship with European courts

Prior to 1 January 2021, although there was no general right of appeal to the Court of Justice of the European Union (CJEU),[3] a court or tribunal in England and Wales could refer questions regarding the interpretation of the Treaty on European Union and the Treaty on the Functioning of the European Union or the validity or interpretation of acts of the EU institutions to the CJEU for a preliminary ruling. Having obtained such a ruling, a case would (often after many years' delay) return to the referring court or tribunal, which was required to apply the CJEU's ruling, together with any non-conflicting national law, to the facts before it. The court or tribunal was not required to make a reference where previous CJEU decisions had already dealt with the point or where the correct application of EU law was so obvious as to leave no scope for reasonable doubt (referred to as *acte clair*). Following

2 The third division is the Family Division, which deals with matrimonial and other family-related matters.

3 Formerly the Court of Justice of the European Communities (the collective name for the Court of Justice (commonly known as the ECJ), the Court of First Instance (CFI) and the Civil Service Tribunal). Following the Treaty of Lisbon, the collective court is known as the Court of Justice of the European Union. The ECJ remains the Court of Justice and the CFI is now known as the General Court.

the UK's withdrawal from the EU and the end of the transition period, there is no longer provision for the courts of England and Wales to make reference to the CJEU. For further detail, see Chapter 1.

The European Court of Human Rights (ECtHR) hears cases relating to alleged violations of the European Convention on Human Rights (Convention). The ECtHR and the Convention are separate from the EU and its institutions and therefore the relationship between the ECtHR and the courts of England and Wales remains unchanged. There is no general right of appeal to the ECtHR. A claimant who alleges breaches of the Convention may apply to the ECtHR only after having exhausted his or her rights of appeal in the domestic courts; in England and Wales, this will usually mean that the claimant must have pursued a claim and all available appeals in the domestic courts pursuant to the provisions of the Human Rights Act 1998. The decisions of the ECtHR are not binding on courts in England and Wales, although Section 2 of the Human Rights Act 1998 requires domestic courts to take into account such decisions.

II THE YEAR IN REVIEW

The past year has produced a number of important decisions by the courts. It is not possible to review all the developments that have taken place, but the following are of particular interest.

i Financial Conduct Authority v. Arch Insurance (UK) Ltd and others[4]

Known as the *FCA business interruption* (*FCA BI*) *insurance* test case, this case was bought on an expedited basis by the Financial Conduct Authority (FCA) against a number of insurers in order to clarify key issues of contractual uncertainty on the level of coverage provided by various business interruption insurance policies in light of covid-19 pandemic-related disruptions.

The FCA and various insurers agreed to conduct the proceedings under the financial markets test case scheme in order to bring certainty to the large number of policyholders who might potentially have a claim as a result of their businesses being interrupted by the covid-19-related government restrictions and advice (colloquially known as 'lockdown'). The trial was initially heard in the High Court in July 2020, with judgment handed down on 15 September 2020. The parties were subsequently given permission to bring 'leapfrog appeals' directly to the Supreme Court, given the importance of the case. The Supreme Court's judgment was published on 15 January 2021.

The Supreme Court were asked to consider two categories of policy wording; 'disease' clauses, under which the insurer would pay out if there was an incidence of notifiable disease within the vicinity (normally a 25 mile radius) of the business premises, and 'prevention of access' clauses, under which the insurer would pay out if the insured could not access or use their premises due to restrictions imposed by a public authority (there were also 'hybrid' clauses that straddled the two types). The Supreme Court dismissed the appeals from the insurers and allowed the FCA appeals in part, meaning the majority of the clauses (particularly the disease type) included within the test case were held to provide cover.

4 [2021] UKSC 1.

The judgment is also notable for its development of the law of causation in a situation where an insured party's loss is caused by multiple events. Previously, as a matter of law, an insured party could only claim for a loss if it passed the but for causation test – that is, the insured party could prove that the loss would not have occurred but for the relevant event, which in this case was the occurrence of a notifiable disease. However, the Supreme Court held that each individual case of covid-19 represented an effective cause of action, notwithstanding the fact that the number of cases in the area covered by a policy may have been low and so would not, alone, have triggered the imposition of the national lockdown. The insured risk (incidences of covid-19 within the specified vicinity) and uninsured, but non-excluded, risks (incidences of covid-19 outside of the specified vicinity) were equally effective causes of the national lockdown and the parties could not have intended instances of covid-19 spreading outside the vicinity to prevent cases within the vicinity from being a proximate cause of the loss. The but for test therefore did not apply in these circumstances and the Court overruled the leading insurance decision in this area of *Orient Express Hotels v. Generali*[5] (which had been decided by two of the Supreme Court Justices, as arbitrator and first instance judge on appeal, and who were faced with the unenviable task of reviewing their own decisions, graciously concluding that 'on mature and considered reflection we also consider that it was wrongly decided and conclude that it should be overruled'.)

It now remains to be seen how the courts will apply this principle outside of the context of insurance claims.

ii Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb[6]

This Supreme Court case helpfully clarified the principles for determining which law governs an arbitration agreement where the parties have not made an express choice, and when the law applicable to the contract containing the arbitration agreement differs from the law of the seat of the arbitration.

A Russian power plant was severely damaged in a fire. After paying out on an insurance claim for the damage, Chubb, the Russian insurer of the plant's owner, brought proceedings in the Russian courts against 11 companies, including Enka, a Turkish subcontractor involved in construction work at the plant, arguing they were liable for the damage caused. Enka brought a claim in the English courts for an anti-suit injunction restraining Chubb from continuing the Russian proceedings. Enka argued that the Russian proceedings had been brought in breach of an arbitration agreement, which provided for arbitration in London under the ICC Rules. Neither the main contract nor the arbitration agreement within the contract included an explicit governing law clause.

The Supreme Court confirmed that under English law, the law governing the arbitration agreement is either the law chosen by the parties to govern it expressly (such as by specifying the law of the arbitration agreement) or impliedly (such as by expressly choosing the governing law of the contract); or, in the absence of such choices, the law with the closest connection to the arbitration agreement (which will most commonly be the law of the seat).

5 [2010] EWHC 1186.

6 [2020] UKSC 38.

iii Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd)[7]

In another leading case relating to English-seated arbitrations, the Supreme Court has provided further guidance on arbitrator conflicts and the duties of disclosure that apply to arbitrators under the Arbitration Act 1996. Halliburton and its insurer, Chubb, were engaged in arbitration proceedings bought under the Bermuda Form excess liability insurance policy in place between the parties, relating to an explosion and fire on the Deepwater Horizon drilling rig in the Gulf of Mexico. Halliburton made an application to dismiss the arbitral tribunal's chairperson on the basis that circumstances existed that gave rise to justifiable doubts as to their impartiality, as the chairperson had also accepted appointments in two other arbitrations relating to the Deepwater Horizon incident, one of which involved Chubb as a common party.

The Supreme Court ultimately dismissed Halliburton's application in this case. However, the court emphasised the importance of the impartiality of arbitrators and confirmed that the test for the appearance of bias is an objective one, that is, whether a 'fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'. The Supreme Court also confirmed that there is a legal duty on arbitrators in English-seated arbitrations to disclose matters that could give rise to doubts as to their impartiality. However, this duty does not override the arbitrator's duty of confidentiality, and disclosure must only be made if the parties owed the duty of confidentiality give their consent, either expressly or impliedly (under the arbitration agreement or by way of the practice and custom in the relevant field of arbitration).

iv Sevilleja v. Marex Financial Ltd[8]

Mr Sevilleja owned and controlled two companies, against which Marex had bought proceedings for the payment of sums due under contract. Marex's claims had been successful and it was awarded a judgment debt and costs to be paid by the companies. However, Marex accused Mr Sevilleja of asset-stripping the two companies by procuring the transfer of monies from the companies' accounts into his personal control, such that Marex could not receive payment owed under the judgment, and subsequently resulting in the winding up of the companies. Marex therefore sought damages from Mr Sevilleja for inducing the violation of its rights under the judgment, and intentionally causing it to suffer loss by unlawful means. The Supreme Court had been asked to consider whether the rule against reflexive loss prevents creditors of a company from claiming directly against a third party for asset-stripping the company.

The Supreme Court unanimously allowed Marex's appeal, although it was divided as to the basis of its decision. The law in this area had been set out in *Prudential Insurance Co Limited v. Newman Industries Limited (No 2),*[9] which established a rule of company law under which a shareholder is not permitted to bring a claim in respect of a diminution in the value of his or her shares or distributions that was merely the result of a loss suffered by the company (in consequence of a wrong done to it by the defendant). This is known as the principle of reflective loss, and it was based on the law's refusal to treat such loss as separate

7 [2020] UKSC 48.

8 [2020] UKSC 31.

9 [1982] Ch. 204.

and distinct from the damage suffered by the company – the cause of action in such cases vests in the company only. The majority in *Sevilleja v. Marex* held that, while this rule is good law, it should be distinguished from the 'no double recovery' rule; the correct understanding is not that the shareholder cannot claim as the company could also bring a claim for recovery, but because the law does not recognise a cause of action accruing with the shareholder in such a situation. However, in this case, such a restriction on bringing a claim did not apply, because Marex was bringing the action as a judgment creditor, not a shareholder. The minority would have allowed the appeal on a wider basis, abolishing the principle entirely and holding that *Prudential* did not lay down any rule of law.

v Wm Morrison Supermarkets plc v. Various Claimants[10]

The Supreme Court has overturned judgments of the High Court and Court of Appeal and decided that a supermarket was not vicariously liable for unauthorised breaches of the Data Protection Act 1998 committed by an employee who, without authorisation and in a deliberate attempt to harm his employer, uploaded payroll data to the internet using personal equipment at home. The Supreme Court found that the circumstances in which the employee had committed the wrongful disclosure of payroll data were not so closely connected with acts that he was authorised to do that they could fairly and properly be regarded as having been done by him while acting in the course of his employment. The decision provides clarity on the potential scope of vicarious liability as it may apply to rogue employees and represents mostly good news for employers, as it means they are unlikely to be held vicariously liable for the deliberate acts of disgruntled employees. That said, the decision does not offer a blanket exclusion of the vicarious liability doctrine in rogue employee cases and, depending on the facts of the case, an employer could still be held vicariously liable for the acts of a rogue employee. From a data privacy perspective, however, the results are more mixed for controllers and employers, as the Supreme Court's view was that a data controller's compliance with its obligations under data protection law does not automatically exclude a claim for vicarious liability.

III COURT PROCEDURE

i Overview of court procedure

Civil procedure in England and Wales is governed by the CPRs and accompanying practice directions (PDs). These are supplemented by guides produced by different courts summarising particular procedures that apply in those courts. Court guides do not have the force of law but courts will generally expect compliance (and may punish non-compliance with adverse costs orders). These and other sources are available online on the Ministry of Justice's website[11] and, with commentary, in *The White Book* published annually (with interim updates) by Sweet & Maxwell.

10 [2020] UKSC 12.

11 See www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/index.htm.

ii Procedure and time frames

Time frames and procedure for claims vary depending upon the court and division in which the relevant claim is issued and the nature of the claim itself. The commentary below is based on the procedure in the Chancery Division and is only a general summary.

Before even commencing a claim, a claimant should check whether a specific pre-action protocol applies to the type of claim being made (e.g., claims for professional negligence, media and communications matters and judicial review have specific pre-action protocols that should be followed). Where there is no specific pre-action protocol,[12] the claimant will be expected first to write a letter before claim to the prospective defendant setting out in detail his or her claim and allowing the defendant a reasonable period in which to respond (what is reasonable may depend on the complexity of the allegations).

Following any pre-action steps, proceedings are started (and the court is treated as seised) on the date that the claimant issues a claim form in the relevant court. The claim form must then be served on the defendant or defendants within four months of issue (assuming the relevant defendant is within the jurisdiction) or within six months if the defendant is outside the jurisdiction (see Section III.vii). It can be served by a range of different methods, including handing it to the defendant in person or by post. The courts have wide discretion in this area. They have, for example, permitted service of an injunction to be made via the social networking site Twitter against an anonymous defendant who had impersonated the claimant's blog on that site.[13] In 2019, the Intellectual Property Enterprise Court granted permission for a court order to be served through Instagram. The claimant must serve particulars of claim with the claim form or within 14 days of service of the claim form; the particulars set out the claimant's case, the relevant facts and basis for the claim in law as well as the remedy sought. Both the claim form and the particulars of claim must be verified by a statement of truth signed either by the claimant (or authorised signatory on behalf of the claimant where the claimant is an organisation) or the claimant's legal representative.

Assuming the defendant intends to defend the claim and acknowledges service by the appropriate court form, his or her response is by way of the defence, to be served within 28 days of receipt of the particulars of claim (assuming an acknowledgment of service has been filed – also note that this timescale can vary between different courts and in any event is subject to extension by agreement between the parties or by court order). The defendant should respond in the defence to each of the allegations made in the particulars of claim by either admitting it, denying it (with explanation) or putting the claimant to proof. Following service of the defence, the claimant has a right of reply in relation to any new issues or allegations raised in the defence, as well as a right to defend any counterclaim raised in the defence. From this point on, it is not expected that any further statements of case will be exchanged between the parties (unless permission to do so has been granted by the court).

Following the filing of the defence, the court will send a notice of proposed allocation to the parties (CPR 26.3(1)), which will provisionally allocate the claim to a 'track' and require the parties to provide further information about the claim in the form of a directions questionnaire. The court will then give appropriate directions as to the conduct of the proceedings and ensure that it is allocated to the correct track. The different tracks are used to ensure that the procedure adopted to trial is proportionate to the importance of the issues

12 See the Pre-Action Conduct and Protocols Practice Direction at www.justice.gov.uk/courts/procedure-rules/civil/rules/pd_pre-action_conduct.

13 *Blaney v. Persons Unknown* (unreported; October 2009).

and amount at stake. Claims below £10,000 are generally allocated to the small-claims track and are dealt with quickly without many of the CPRs applying; for example, parties typically bear their own costs, most interim remedies are not available, there are limited disclosure obligations and witness statements are not normally exchanged before trial. Claims between £10,000 and £25,000 are generally allocated to the fast track, where the claim will still be processed quickly (trial will usually be set for a date within 30 weeks of the allocation decision) but more extensive preparation is permitted than on the small-claims track and interim remedies are available. The multi-track is reserved for the most important and high-value disputes, and the court will adopt a much more hands-on role in ensuring that the procedure adopted to trial is tailored to the requirements of the case.

For multi-track cases subject to costs management under CPR 3.12, parties will be required to complete a costs budget in the form of a template known as Precedent H. Costs management applies (subject to the discretion of the court to apply or disapply the regime) to most multi-track cases commenced on or after 22 April 2014, except for proceedings where the amount of money claimed or value of the claim as stated on the claim form is £10 million or more.[14] Parties subject to the regime are required to file and exchange budgets setting out estimated costs for each stage in the proceedings. These cost budgets must be approved by the court and effectively cap the amount that the winning party can recover from the losing party at the end of the proceedings unless it can demonstrate a good reason for departing from the budget.[15] Changes were made to the relevant CPRs and PDs in 2020 to consolidate and streamline the rules around costs budgets, and a new template Precedent T has been introduced for making applications relating to proposed variations in a costs budget.

Cases on the multi-track may require one or more case management conferences (CMCs) at which the court will, usually after hearing submissions from the parties, give directions regarding the timetable for disclosure, exchange of factual witness statements and exchange of expert reports (if any), as well as indicating broadly when it expects the trial itself to be listed. For complex matters, it is not unusual for the period between the first CMC and the trial to be at least a year. Once listed, trial dates (across all tracks) are treated as set and only in exceptional circumstances will the court agree to postpone a trial.

CPR 25.1(1) contains a non-exclusive list of interim remedies available from the court, including interim injunctions and declarations, orders for delivery up of goods, orders freezing property, orders for the provision of information and search orders. Interim applications may be made without notice to the person against whom the relief is sought, although the

14 A recent case has held that costs budgeting and proportionality considerations can be taken into account and directed by the court in certain circumstances, even in cases exceeding £10 million in value (see *Sharp and others v. Blank and others* [2017] EWHC 141 (Ch)).

15 Recent case law on costs budgeting includes *Harrison v. University Hospitals Coventry and Warwickshire NHS Trust* [2017] EWCA Civ 792, where it was held that in order to depart from budgeted costs already agreed in the claimant's costs budget at the costs and case management conference, the established principle of good reason was required. However, costs incurred before a budget would be the subject of detailed assessment in the usual way; there was no requirement for good reason to be shown if there was to be a departure from the approved budget. It was held in *Utting v. City College Norwich* [2020] EWHC B20 (costs) that an underspend of sums under phases of a costs budget was not a good reason to depart from the budget and subject costs to detailed assessment. In *Seekings and others v. Moores and others* [2019] EWHC 1476 (Comm), where the defendant sought to revise his cost budget upwards, the court held that there had been no significant developments in the litigation to justify the increase because the additional work should have been anticipated.

applicant is under a duty to disclose fully and fairly all material facts to the court, even if they are adverse to its case. Overseas lawyers have been encouraged to note that practitioners within this jurisdiction bear this heavy responsibility and that ill-prepared applications are to be avoided.[16]

iii Court reform

In 2014, the Ministry of Justice announced that between 2015 and 2020, HM Courts & Tribunals Service (HMCTS) would oversee a series of reforms aimed at modernising and improving the efficiency of courts and tribunals. On 5 March 2019, HMCTS stated that it was extending the completion date of the reform programme to 2023. The programme involves substantial investment in digital technology to allow cases to be managed better, with less paper and fewer delays. This will allow a reduction in the number of court buildings, so generating further savings. The digitisation process is considered below (see Section III.iv). Other separate but complementary steps to reform and rationalise court processes are also considered directly below.

Reform of the appeals process

Secondary legislation came into force on 3 October 2016, and is intended to reduce the time it takes for cases to be heard by the Court of Appeal. The Access to Justice Act 1999 (Destination of Appeals) Order 2016 simplifies the appeals process by ensuring that, in most cases, an appeal will lie to the next highest level of judge. In particular, appeals from a decision of a district judge in the County Court will generally lie to a circuit judge in the County Court (the next most senior judicial rung), while appeals from a circuit judge will lie to the High Court. In the High Court, appeals from a master will lie to a full judge of the High Court, and appeals from a High Court judge will lie to the Court of Appeal. The Civil Procedure (Amendment No. 3) Rules 2016 revised CPR Part 52 accordingly. The new Part 52 made two other important changes:

a the removal of the default right to renew, at an oral hearing, a failed paper application for permission to appeal to the Court of Appeal; and

b a clarification of the test for grant of permission to appeal in second appeals (i.e., appeals of appeals) such that a real prospect of success must be shown, or there must be some other compelling reason for the second appeal to be heard.

Shorter and flexible trial schemes

Two pilot schemes, one for shorter trials, the other for flexible trials, began in the Business and Property Courts in London in October 2015. After three years of piloting, both schemes became permanent on 1 October 2018. The objective of the schemes is to achieve more efficient trials in the context of commercial litigation. This was prompted, in part, by a recognition that comprehensive (and costly) disclosure is not always required for justice to be achieved. The shorter trials scheme is open to cases that can be tried in no more than four days – this means cases in which only limited disclosure and oral evidence is required, and in practice means factually complex or multiparty claims (including fraud and dishonesty claims) are excluded. The intention is that a trial will take place within 12 months of the issue of proceedings, with judgment to follow within six weeks thereafter. The first case directly

16 *Lewis v. Eliades (No. 1)* [2002] EWHC 335 (QB).

commenced under the shorter trials scheme in March 2016 was *National Bank of Abu Dhabi PJSC v. BP Oil International Ltd*.[17] A one-day trial took place eight months after issue and judgment was handed down two weeks after the hearing, on 18 November 2016. It is also worth noting that an appeal against the judgment was heard in July 2017, quicker than many comparable appeals.

Financial List

In October 2015, the High Court introduced a specialist Financial List for the determination of claims by judges with expertise in the financial markets. There are three criteria for inclusion (only one of which needs be fulfilled). A claim must:

a relate to banking and financial transactions where £50 million or over is in issue;
b require particular judicial expertise in the financial markets; or
c raise issues of general importance to the financial markets (see CPR Part 63A).

In *Property Alliance Group Ltd v. Royal Bank of Scotland plc*,[18] following a contested application to transfer existing proceedings to the Financial List, the Master of the Rolls (the second most senior judge in England and Wales) clarified that when deciding whether to transfer a case to the Financial List, CPR 30.3 and the overriding objective must be taken into account. The instant case was transferred to the Financial List even though the total value of the claim was £29 million (below the £50 million indicative threshold). This was because, in circumstances where the issues in the case were of broad significance for the market and a judgment would affect other proceedings already issued or in contemplation, it was desirable that it be dealt with by a judge of the Financial List in order for the resulting judgment to carry appropriate weight and respect in the financial markets.

The Financial List initiative included a two-year pilot financial markets test case scheme, which was extended in May 2017 for a further three years until 30 September 2020. It has now been incorporated into PD 63AA on a permanent basis. This permits the court to decide cases that raise issues of general importance to the financial markets in relation to which immediately relevant authoritative English law guidance is needed, even where there is no current cause of action between the parties to the proceedings. The expedited *FCA BI insurance* test case discussed above was the first case to be heard under this scheme.

Witness statements

The wording of the statement of truth that must be signed by a witness when approving the witness statements was amended with effect from 6 April 2020 to include a clear warning that proceedings for contempt of court may be brought against those who give a statement of truth without an honest belief in its truth. In addition, witness statements (including the statement of truth) provided by non-English speakers must now be prepared in the witness's own language and be accompanied by an English translation. The process of preparation of the statement, and the date of the translation, must be stated.

17 [2016] EWHC 2892 (Comm).
18 [2016] EWHC 207 (Ch).

iv Digitisation and the response to covid-19

A key focus of the reform process has been the digitisation of the courts. Prior to the outbreak of the covid-19 pandemic and the consequent lockdown restrictions, a number of key developments were already being trialled in England and Wales, including:

a a new electronic filing and case management system (CE File) in the Business and Property Courts in London and seven other cities. Since 1 July 2019, the system has also become mandatory for professional users in claims issued in the Queen's Bench Division since 1 January 2019;

b the online civil money claims pilot scheme running from August 2017 to November 2021, which tests an online process for unrepresented claimants to start money claims with a value of £10,000 or less;

c the County Court online pilot, operating from September 2017 to November 2021, by which legally represented claimants can issue certain money claims online at the County Court Money Claims Centre;

d a video hearings pilot scheme (PD 51V) was commenced on 30 November 2018, which covers applications to set aside County Court default judgments heard at either the Birmingham or Manchester Civil and Family Justice Centres. The pilot scheme tests a procedure for these applications to be heard by the court via video link. Members of the public may access a hearing by attending the court in person, where the proceedings are projected on a screen; and

e the Courts and Tribunals (Judiciary and Functions of Staff) Act 2018, which permits judges to delegate a range of work to court staff (such as granting an extension of time or issuing a summons) received Royal Assent on 20 December 2018, with some provisions coming into force on 20 February 2019.

In response to the need to work remotely during the covid-19 pandemic, HMCTS has made several changes to these pilots. For example, judges have been given greater powers to give directions for cases included in the online civil money claims pilot, and a new mediation feature has also been added. HMTCS has been clear that although these changes were expedited as part of the courts' response to the covid-19 pandemic, they build on changes made as part of the ongoing reform programme, and will remain in place for the duration of the pilot scheme. The County Court online pilot has also been expanded to all professional applicants.

Throughout 2020, and with the exception of the temporary suspension of jury trials, the courts of England and Wales have continued to function, with the majority of hearings being conducted via videoconferencing software. It was confirmed in *Huber and another v. X-Yachts (GB) Ltd and another*[19] that parties and their representatives are permitted to attend hearings held by video link due to covid-19 from outside the jurisdiction, subject to certain safeguards. The use of remote or hybrid hearings is governed by the Coronavirus Act 2020 and PD 51Y, with accompanying guidance issued by HMCTS and the individual courts directly. This guidance also covers issues around, for example, electronic communications with the court and the preparation of electronic instead of paper bundles. The video hearing pilot scheme (which initially expired on 30 November 2019) was also reinstated on 2 March 2020 and will run until 31 March 2021.

19 [2020] EWHC 3082 (TCC).

Until 30 October 2020, parties were able to agree extensions to deadlines of up to 56 days without formally notifying court, as opposed to the usual 28 days, so long as this would not impact the trial dates. In addition, a stay was placed on all possession proceedings until 20 September 2020. Rules setting out how to conduct these proceedings following the expiry of the stay are to remain in place until 28 March 2021. Restrictions on presenting corporate winding-up petitions have also been extended until 31 March 2021.

v Class actions

Pre-October 2015

The concept of class actions has been a part of English civil procedure for some time, but does not bring with it many of the characteristics that would, for example, be familiar to a US lawyer. CPR Part 19 sets out the framework for representative actions, where one person brings (or defends) a claim as a representative of others who share the same interest in the claim;[20] and group litigation orders (GLOs),[21] where claims brought by parties that give rise to common or related issues of fact or law are managed together.

Represented persons are not formally parties to the proceedings and are therefore not subject to disclosure obligations or liable for costs (therefore leaving the representative liable for any costs). They do not have to opt in to be represented, although they can apply to the court to opt out. By contrast, parties to claims covered by a GLO are fully fledged parties and are likely to have to pay their share of the common costs of the litigation if they lose. The Court of Appeal confirmed the High Court's rejection of a US-style class action brought against British Airways by two flower importers who sought to bring proceedings as representatives of all direct and indirect purchasers of airfreight services affected by an alleged cartel.[22] The Court upheld the first instance decision to strike out the representative element of the claim as it was not in the interest of justice to bring an action on behalf of a class of claimants so wide that it was impossible to identify members of the class before and perhaps even after judgment. This opposition to US-style class actions has been strengthened by the government's decision to remove provisions in the Financial Services Bill (enacted as the Financial Services Act 2010), which would have extended the options for collective actions in the financial services sector to include opt-out actions.

Orders made in a representative action are binding on all represented persons and may be enforced, with the court's permission, against any other person. Judgments issued in claims subject to a GLO are binding on every party entered on the group register (which will have been established pursuant to the GLO).

A single claim can be selected from any set of similar claims (including those governed by a GLO) to be advanced as a test case. There is power for the court to order this in accordance

20 CPR 19.6.

21 CPR 19.10–19.15.

22 *Emerald Supplies Ltd v. British Airways plc* [2010] EWCA Civ 1284. This case was cited and reaffirmed recently by the Court of Appeal in *Lloyd v. Google LLC* [2019] EWCA Civ 1599, in which it was held that that for a claim brought under CPR 19.6, it must be possible to say of any particular person whether they qualify for membership of the represented class of persons by virtue of having the same interest as the representative. The class action did not have to rely on the facts of how each individual had been affected to pass the same interest test. However, if it did not, any damages awarded would be restricted to the lowest common denominator. Permission has been granted for *Lloyd v. Google* to be appealed, and this is likely to be heard by the Supreme Court in early 2021.

with their case management powers under CPR 19 or the parties can agree a test case. An example of a test case was the bank charges litigation, where thousands of customers' claims in the County Court were stayed pending the outcome of the Office of Fair Trading's claim.[23]

Although there have been some high-profile cases involving representative actions and GLOs,[24] class-action proceedings of any kind are still relatively uncommon in England and Wales, in part because of the risks of adverse costs orders against unsuccessful claimants and, more generally, the costs of commencing and maintaining proceedings. Parties are increasingly able to mitigate these risks through the increased availability of after-the-event insurance, third-party litigation funding, conditional fee agreements and damages-based contingent fee arrangements with lawyers who are willing to share the risks with their clients in return for a share of any damages (see Section III.xi).

Collective proceedings for breaches of competition law

Section 47B of the Competition Act 1998 as amended came into force on 1 October 2015. It creates a genuine class action regime for the first time in the UK, allowing private individuals to seek collective redress for breaches of competition law. The regime operates in the Competition Appeal Tribunal (CAT) only. It accommodates follow-on damages claims, where a breach has already been established by a regulator, and stand-alone claims, where a claimant must prove breach itself. Claims that would raise the same, similar or related issues of fact or law may be pursued as collective proceedings; they are initiated by a representative of the class of affected persons and it is for the CAT to authorise that representative and make a collective proceedings order (CPO) permitting the proceedings to be continued. That order

23 *Office of Fair Trading v. Abbey National plc and others* [2009] UKSC 6.

24 See, for example, the class actions brought by shareholders of RBS in respect of the 2008 RBS rights issue, and the shareholders of Lloyds/HBOS in respect of alleged losses suffered as a consequence of Lloyds' acquisition of HBOS in January 2009 and the subsequent recapitalisation of the merged entity. On the *Rights Issue* litigation, RBS announced on 5 December 2016 that it had settled with three of the five claimant groups, and in April 2017 further settlements occurred with additional shareholders, resulting in an effective settlement of 87 per cent of the claim (by value). The trial on liability began in May 2017; however, further settlements were announced in June 2017, and the High Court vacated the trial. On the *Lloyds/HBOS* litigation, the High Court has recently handed down judgment in *Sharp and others v. Blank and others* [2019] EWHC 3078 (Ch), dismissing the claim against the bank and five of its former directors on the basis that the bank's failure to provide sufficient information to its shareholders had not been causative of any loss. See also the *Equitable Life* litigation (in the House of Lords: *Equitable Life Assurance Society v. Hyman* [2002] 1 AC 408), where Equitable Life sponsored one defendant, Hyman, to represent around 90,000 of its policyholders to establish the correct interpretation of a life insurance policy it had issued. In January 2017, the High Court granted a GLO that saw a class action against the Post Office regarding claims that sub-postmasters were wrongly punished because of flaws in the Post Office's Horizon computer system. Judgment was found against the Post Office and the matter was settled for a sum of £57.75 million in December 2019. In March 2018, the court granted a GLO to manage the legal claims brought against Volkswagen Group UK for financial compensation in respect of the NOx emissions scandal. Over 90,000 car owners joined the action. A trial of two preliminary issues of law was be heard in December 2019, and a further trial to determine the Volkswagen Group's liability is likely to be heard in 2021. On 4 October 2019, the court granted a GLO allowing claimants to bring legal action against British Airways following its data breach in September 2018, resulting in the theft of customers' personal data. This is the first UK group action brought under the General Data Protection Regulation seeking to claim compensation for non-material damage.

will also specify whether the proceedings are to be opt-in or opt-out. This places the UK in a minority in the EU (which typically does not support opt-out claims) and may potentially make the UK a more attractive place for large groups of claimants to commence claims.

In mid-2016, an application was made to commence a £14 billion follow-on claim against Mastercard for damages arising from the EU Commission's 2007 decision that Mastercard's European Economic Area (EEA) multilateral interchange fees breached Article 101(1) of the Treaty on the Functioning of the European Union. The CPO application was made by Walter Merricks, former Chief Ombudsman of the UK Financial Ombudsman Service, on behalf of approximately 46 million customers on an opt-out basis. At first instance, the CAT refused to grant the CPO, in a judgment dated 21 July 2017.[25] The CAT considered the commonality requirement and confirmed that it was not necessary for an applicant to show that all of the issues that would arise on an individual claim would be common to every other individual's claim. However, the CAT found that the expert methodology put forward by Mr Merricks on the assessment of damages of all the claims was not suitable as it did not satisfy the test set out by the Supreme Court of Canada in *Pro-Sys Consultants Ltd v. Microsoft Corp*[26] (at paragraph 118):

> *the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.*

The Court of Appeal overturned this decision in a judgment dated 16 April 2019,[27] stating that the CAT ruling had been too narrow. The Court of Appeal agreed that *Pro-Sys Consultants Ltd v. Microsoft Corp* provided the correct guidance on the proper approach to claims for aggregated damages. However, the CAT had placed too heavy a burden on the proposed representative at the certification stage, who should not be required to demonstrate more than that the claim had a real prospect of success. The CAT had effectively conducted a mini-trial in requiring detailed specifications as to what data would be available for each relevant retail sector during the infringement period. The CAT had also wrongly directed itself that an aggregate damages award had to be distributed on a compensatory basis; the rights of individual claimants could be vindicated by obtaining the aggregate award itself.

On 25 July 2019, permission was granted for Mastercard to appeal to the Supreme Court. Judgment was handed down on 11 December 2020, and the majority largely upheld the Court of Appeal's decision.[28] This was on the basis that the Supreme Court interpreted suitability as a relative concept and noted that the CAT should have asked itself whether a claim is 'suitable to be brought in collective proceedings rather than individual proceedings, and suitable for an award of aggregate rather than individual damages'. Second, the Supreme

25 *Walter Hugh Merricks CBE v. Mastercard Incorporated and others* [2017] CAT 16.

26 [2013] SCC 57.

27 *Walter Hugh Merricks v. Mastercard Inc* [2019] EWCA Civ 674.

28 *Mastercard Incorporated and others v. Walter Hugh Merricks CBE* [2020] UKSC 51.

Court emphasised that the courts should not deprive claimants of a trial merely because of challenges relating to the quantification of harm, this being a 'fundamental requirement of justice [. . .] often labelled the "broad axe" [. . .] principle'.

This means the threshold that a proposed class representative needs to overcome when applying for a CPO has been significantly lowered, and Mr Merrick's application has been remitted to the CAT to be reconsidered. Given the number of other CPO applications currently pending in the CAT, the Supreme Court's decision is expected to have a material impact on their viability as well as to reinvigorate potential claimants' interest in the possible pursuit of collective proceedings. Nonetheless, there remain areas of uncertainty, especially as the collective action regime remains in its infancy in the UK, for example around how the CAT may apply this precedent to different claimant groups, or in a scenario where there are two or more competing opt-out CPO applications.

vi Representation in proceedings

Any person who is not a child nor lacks capacity as a result of an impairment or disturbance of the mind has the right to begin and carry on civil proceedings without professional representation. The courts generally seek to accommodate litigants who represent themselves in proceedings.[29]

vii Service out of the jurisdiction

As a general rule, where a defendant is outside England and Wales, he or she can only be served with the claim if the English court has given the claimant permission. The claimant's application for permission must meet three tests. First, it must demonstrate (to the standard of a good arguable case) that the claim falls within one of the 'gateways' in PD 6B paragraph 3; for example, it is in respect of a claim made in contract where the contract was made in England. Second, it must persuade the court that England is the proper place to bring the claim. Third, the claimant must show that each cause of action in the claim raises a serious issue that ought to be resolved by a trial. If the court grants permission to serve out, the defendant, once served, can challenge jurisdiction by making an application under CPR Part 11; the burden will be on the claimant to show that permission was properly granted.

The court's permission is not required for service of the claim form or other documents out of the jurisdiction where the court has jurisdiction under the 2005 Hague Convention on Choice of Court Agreements (2005 Hague Convention) and the defendant is a party to an exclusive choice of court agreement conferring jurisdiction on that court within the meaning of Article 3 of the 2005 Hague Convention. Separately, CPR 6.32 makes specific provision for service without permission in Scotland or Northern Ireland.

viii Enforcement of foreign judgments

Before the end of the transition period, judgments of the courts of EU Member States, Iceland, Norway and Switzerland were enforceable in the UK (and vice versa) in accordance with a streamlined process set out in EU law. The Withdrawal Agreement provides that judgments in proceedings started before 1 January 2021 in the EU and the UK will continue to be enforceable in accordance with EU law.

29 See, for example, *Nelson v. Halifax plc* [2008] EWCA Civ 1016.

Judgments for a sum of money in proceedings started in the EU on or after 1 January 2021 will be enforceable in England and Wales in accordance with the common law rules that apply to all countries with which the UK has no reciprocal enforcement arrangement (including, e.g., the United States). The judgment creditor issues a claim in debt in the English court in respect of the sum due under the foreign judgment. Summary judgment will usually then be sought on the claim and the resulting English court judgment enforced against the defendant or judgment debtor.

An exception applies where the judgment in question was in proceedings founded upon an exclusive jurisdiction agreement within the scope of the 2005 Hague Convention. The UK, EU, Singapore, Mexico and Montenegro are party to the 2005 Hague Convention. Where it applies, a relevant foreign judgment may be enforced in England and Wales upon its registration with the English court. This requires an application to the Queen's Bench Division of the High Court pursuant to the process set out in CPR 74. Article 9 of the 2005 Hague Convention sets out limited grounds upon which a judgment debtor can resist enforcement.

Judgments from Commonwealth countries and other countries that have reciprocal enforcement agreements with the UK may be enforced pursuant to the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933 by making an application for registration to the High Court. Once registered under either Act, the judgment is enforceable as though it were a judgment of the English court. A separate procedure applies for enforcing judgments from Scotland and Northern Ireland, under the Civil Jurisdiction and Judgments Act 1982 and CPR 74.

ix Assistance to foreign courts

Again, the position in relation to assisting foreign courts in collecting evidence in civil or commercial matters has changed as of 1 January 2021, at the end of the transition period following the UK's withdrawal from the EU. Previously, courts of EU Member States (other than Denmark) could request that the English courts take evidence on their behalf or grant permission for the requesting court to take evidence in England directly under the EU Taking of Evidence Regulation.[30] The grounds for refusing the application were limited (for instance, where a witness has a right not to give evidence under English law or the law of the requesting Member State), and the court was required either to comply with the request or refuse to do so within 90 days. However, this procedure no longer applies between the UK and EU Member States, and so requests will proceed under the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (1970 Hague Convention). Generally, the English court will exercise its discretion to assist the foreign court; however, the court will not make orders for pretrial discovery or general disclosure, or require a witness to do anything he or she would not be required to do in English civil proceedings. Austria, Belgium and Ireland are not signatories to the 1970 Hague Convention, and requests for judicial assistance from and to these countries will need to be in the form of letters rogatory sent to the relevant national court via diplomatic channels.

30 EU Taking of Evidence Regulation (Council Regulation 1206/2001/EC).

x Access to court files

As a general rule, members of the public may obtain copies of statements of case and judgments or orders made in public without the permission of the court.[31] Parties or any person mentioned in a statement of case may apply to the court in advance for a pre-emptive order restricting the release of statements of case to non-parties.

The right of access does not extend to documents attached to statements of case, witness statements, expert reports, skeleton arguments and correspondence between the court and the parties, although members of the public may obtain access with the court's permission. In *Cape Intermediate Holdings Ltd v. Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)*,[32] the Supreme Court confirmed that the default position was that the public should be allowed access not only to the parties' written submissions and arguments, but also to documents that had been placed before court and referred to during the hearing. The court will carry out a fact-specific balancing exercise, considering on the one hand the purpose of the open justice principle and the potential value of the information in question in advancing that purpose, and on the other any risk of harm that its disclosure may cause to the maintenance of an effective judicial process or to the legitimate interests of others.

xi Litigation funding

Historically, the common law rules against maintenance (support of litigation by a disinterested third party) and champerty (where the supporting party does so for a share of the proceeds) prevented the funding of litigation by anybody who was not party to the relevant litigation. Today, these restrictions are much narrower, and third-party funding has become accepted as a feature of modern litigation; the UK has more specialist litigation funding companies than any other jurisdiction.

Case law and practice are still developing in this area, but the approach of the courts has so far been to uphold such arrangements provided they contain no element of impropriety that impairs the integrity of the litigation process. Relevant factors in this assessment include:

a the nature of the funder's involvement in the litigation (control of the litigation must not be ceded to the funder);

b the nature of the relationship between the funded party and the solicitor and the extent to which the funded party can make informed decisions about the litigation (this should be a genuine and independent relationship);

c the amount of profit the funder stands to make (it has been held that 25 per cent may not be excessive);[33]

d whether there is a risk of inflating damages or distorting evidence;

e whether the funder is regulated; and

f whether there is a community of interest between the funder and the funded party.

Lord Justice Jackson recommended in his final report on civil litigation costs, published on 14 January 2010, that a voluntary code should be drawn up to which all litigation

31 CPR 5.4C(1). In *R (on the application of British American Tobacco (UK) Ltd and others) v. Secretary of State for Health* [2018] EWHC 3586, the court affirmed that it had inherent jurisdiction to grant access to documents on the court file, even though the documents might not technically fall within the scope of the CPR.

32 [2019] UKSC 38.

33 *Yeheshkel Arkin v. Borchard Lines Ltd and others* [2005] EWCA Civ 655.

funders should subscribe. The Code of Conduct for Litigation Funders was launched on 23 November 2011.[34] The Code contains provisions concerning effective capital adequacy requirements, restrictions upon a funder's ability to withdraw support for ongoing litigation and restrictions on a funder's ability to influence litigation and settlement negotiations. It is enforced by the Association of Litigation Funders.[35] Third-party funders may also be potentially liable for the full amount of adverse costs, subject to the agreement between the funder and the litigator. The Court of Appeal considered the basis and extent of funders' liability to a successful opponent in *Excalibur Ventures LLC v. Texas Keystone Inc and others*.[36] Indemnity costs were awarded against the funded claimants on the basis that their 'spurious' claims had been pursued to trial despite having 'no sound foundation in fact or law'. The Court of Appeal dealt with the issue of whether third-party funders could be made liable on the same basis as an unsuccessful party. Agreeing with the trial judge that the litigation was 'egregious' and a 'war of attrition', the Court of Appeal held that a funder should 'follow the fortunes' of the funded party. A funder seeks to derive financial benefit from the pursuit of a claim just as much as the funded litigant. It cannot avoid any downside that may instead arise. In any event, in the matter of liability for indemnity costs it was not appropriate to seek to differentiate between a party to litigation and those who stand behind that party purely on that basis; that would be to misconstrue one of the tests for indemnity costs, which requires a court to consider the character of the action and its effect on the successful party (and not any other party). In the past, funders have enjoyed protection from unlimited costs liability, which has been subject to the *Arkin* cap, which limits a funder's adverse liability to the amount of its investment.[37] However, the recent case of *Chapelgate Credit Opportunity Master Fund Ltd v. Money and others* shows that professional funders cannot necessarily rely on the *Arkin* cap, as the Court of Appeal dismissed a funder's appeal against an order holding it liable for all the respondent's costs from the date of entry into its funding agreement with the claimant, emphasising instead the court's inherent jurisdiction to make costs orders.[38]

Solicitors (and sometimes barristers) acting for clients with the benefit of third-party funding will typically be required, as a condition of that funding, to enter into some form of contingency arrangement in respect of their fees. Two structures, both permitted only insofar as they comply with regulations, predominate:

Conditional fee agreements

Conditional fee agreements (CFAs) are defined in Section 58 of the Courts and Legal Services Act 1990 as agreements between a lawyer and a client by which the lawyer's fees and expenses, in part or in whole, are payable only in specified circumstances (meaning, usually, victory for

34 See http://associationoflitigationfunders.com/code-of-conduct/. An updated version was published in January 2018.

35 However, in *Re Ingenious Litigation* [2020] EWHC 235 (Ch), the High Court found that a litigation funder's membership of the Association of Litigation Funders was not sufficient to give confidence that it would meet the liability for security for costs, which has led to questions being raised around the relevance of the organisation.

36 [2016] EWCA Civ 1144.

37 *Arkin v. Borchard Lines Ltd and Others* [2005] EWCA Civ 655.

38 [2020] EWCA Civ 246. This case followed the earlier judgment in *Davey v. Money* [2019] EWHC 997 (Ch), in which the High Court clarified that the *Arkin* cap is best understood as an approach that the Court of Appeal intended should be considered as a means of achieving a just result in all the circumstances, but it was not a rule to be applied automatically in all cases involving commercial funders.

the client either at trial or by way of settlement). At its most basic, a CFA will provide that a losing client has no liability for its lawyer's fees (no win, no fee) while a winning client will be required to pay its lawyer for work done on the case and, in addition, a success fee intended to compensate the lawyer for the risk it took of earning nothing at all.

As the market has developed, more sophisticated variants of this model have emerged. For instance, a client may agree to pay its lawyer throughout the life of the case, but on the basis of a discount to the lawyer's usual hourly rate. If the client loses the case, it will have no further costs liability to its lawyer. If the client is successful, it will be liable to top up the lawyer's fees to the full hourly rate and, in addition, pay a success fee calculated by reference to the full hourly rate. Regulations set out the form and permissible limits of a CFA. For instance, any success fee may not exceed 100 per cent of the fees that would have been payable to the lawyer had there been no CFA in place.

Under CFAs entered into before 1 April 2013, a winning party could recover any success fee payable to its lawyer from its losing opponent (in addition to the ordinary fees for which the client was liable to its lawyer). Reforms introduced following Lord Justice Jackson's report on civil litigation costs abolished the recoverability of success fees.

Damages-based agreements

Damages-based agreements (DBAs) are a species of contingency fee arrangement in which the amount payable by the client to the lawyer in the event of a successful outcome is calculated as a percentage of the damages received. Arrangements of this kind, in which the contingent payment is expressly linked to the level of the client's recovery, were outlawed in all but employment disputes until Section 45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was brought into effect. DBAs will only be valid if they comply with the requirements set out in the Damages-Based Agreements Regulations 2013.[39]

Contingency fee arrangements do not protect a party to litigation from the risk of adverse costs liability. In other words, a losing claimant with the benefit of a CFA may not have to pay anything to its lawyer, but it will, in the ordinary course, remain liable to pay a large part of the winning party's legal costs. Funded claimants (and sometimes those funding a claim from their own resources) will typically seek to insure against that risk. A large market has grown up for such after the event (ATE) insurance (so named because it is usually taken out once a cause of action has arisen and been formulated). Before the Jackson reforms of 2013, ATE insurance premiums were recoverable from a losing party. The end of recoverability does not appear to have significantly reduced the availability of ATE insurance, and it is frequently offered in conjunction with third-party funding of a party's own legal costs. The liberalisation of the regime for third-party funding and the corresponding development of a market for professional funders is making it easier for claimants to commence and maintain proceedings, particularly in relation to class actions where there can be very many claimants and such funding options represent an opportunity to spread the funding risk.

xii Bill of costs

In October 2015, as part of the Jackson reforms, a voluntary pilot scheme was introduced at the Senior Courts Costs Office with a view to establishing a new mandatory model form electronic bill of costs based on uniform task-based time-recording codes. This was

39 SI 2013/609.

aimed at reducing the time and expense of drawing up a bill of costs by aligning it with the time-recording technology used in practice. On 6 April 2018, the electronic bill of costs scheme became mandatory in the Senior Courts Costs Office and the County Court. CPR 47 and the associated PD were amended accordingly.

IV LEGAL PRACTICE

i Conflicts of interest and information barriers

Conflicts of interest are governed by the rules contained in the Solicitors Regulation Authority's Code of Conduct for Solicitors, RELs and RFLs 2019 and Code for Firms 2019 (for solicitors) and the Bar Standards Board Handbook (for barristers). Generally, lawyers must refrain from acting in circumstances where there is a real or significant risk that a conflict exists between the interests of two or more different clients in either the same matter or a related matter, or where there is a conflict or a significant risk of a conflict between the lawyer's interests and those of his or her client.

There are two exceptions to this rule for solicitors whereby lawyers may be permitted to act for two or more clients despite there being an actual or significant risk of a conflict between his or her clients' interests. The first relates to situations in which the clients have a substantially common interest in relation to the matter or a particular aspect of it, as might be the case with a non-contentious commercial transaction. The second is where the clients are competing for the same objective, which if attained by one client will be unattainable to the other (e.g., in the case of bidders competing for the same asset in a private auction). There are, however, some preconditions that must be met before either exception can be relied on. Most significantly, all relevant issues must be drawn to the attention of clients and they must give their consent in writing. In addition, lawyers must be satisfied that it is reasonable to act in all the circumstances. If an actual or a significant risk of conflicts of interest exists, it may be possible for an existing client to seek an injunction to prevent the lawyer from continuing to act. Further, if a lawyer is found to have continued to act where there was a real or significant risk of a conflict arising, the retainer may be considered an illegal contract, which would impact the lawyer's ability to recover fees or to rely on any professional indemnity insurance to respond. In addition, he or she may face disciplinary proceedings before his or her relevant professional body.

Barristers may act where there is a conflict of interest between an existing client or clients and a prospective client or clients or two or more prospective clients if the potential conflict has been fully disclosed to the parties and they have each provided their informed consent to the barrister acting; and barrister is still able to act independently and in the best interests of each client.

Lawyers have a duty to protect all confidential information regarding their clients' affairs, unless disclosure is required or permitted by law or the client consents to the disclosure. In addition, a lawyer who is advising a client must make that client aware of all information material to the retainer of which the lawyer has personal knowledge. Historically, where a lawyer's duty of confidentiality to one client comes into conflict with the duty of disclosure to another client, the duty of confidentiality takes precedence (although this does not mean that the duty of disclosure has not been breached). Although this position is not expressly restated in the 2019 Codes of Conduct for solicitors, it is clear that lawyers may not represent

a potential client (A) in circumstances where the potential client has an interest adverse to another client (or former client) (B) and the lawyer holds confidential information regarding B that may reasonably be expected to be material to A unless:

a effective measures have been taken that result in there being no real risk of disclosure of the confidential information to B; or

b B, whose information the lawyer or his or her business or employer holds, has given informed consent, either in writing or evidenced in writing, to the lawyer acting, including to any measures taken to protect B's information.

In most cases, a firm will be unable to proceed unless both clients consent, in writing, to the arrangement. In *Marks and Spencer Group plc v. Freshfields Bruckhaus Deringer*,[40] the court confirmed that where a firm is unable to implement effective measures to ensure that its former client's confidential information is protected, the former client may be granted an injunction to prevent the firm from continuing to act for the new client.

ii Money laundering, proceeds of crime and funds related to terrorism

The key money laundering offences are contained in the Proceeds of Crime Act 2002 (POCA) and the Terrorism Act 2000. These ensure that the balance of responsibility for detecting and preventing financial crime rests more than ever before on the firms participating in the UK financial markets, including law firms.

There are three principal money laundering offences. A person (including a firm, corporation or individual) commits a money laundering offence if he or she:

a conceals, disguises, converts or transfers the proceeds of criminal conduct or of terrorist property;

b becomes concerned in an arrangement to facilitate the acquisition, retention or control of, or to otherwise make available, the proceeds of criminal conduct or of terrorist property; or

c acquires, possesses or uses property while knowing or suspecting it to be the proceeds of criminal conduct or of terrorist property.

There are also essentially three secondary or third-party offences:

a failure to disclose any of the offences from (a) to (c) above;

b disclosing or tipping off that a report of suspicion of money laundering has been made to the authorities in circumstances where that disclosure might prejudice an investigation; and

c prejudicing an investigation in relation to money laundering or terrorist financing offences.

The POCA offences in particular cast a wide net. Criminal conduct is defined as conduct that constitutes an offence in any part of the UK, or would do so if the conduct occurred in the UK. Further, its scope is not limited to offences that might be considered more serious offences with the effect that it is necessary to report relatively minor offences to the National Crime Agency. The failure to disclose offence is subject to an objective test and will therefore be committed if a person does not actually believe that another person is engaged in money

40 [2004] EWCA Civ 741.

laundering but a jury later finds that he or she had reasonable grounds for knowing or suspecting such activity. Lawyers are not required to make a disclosure if the information or other matter on which their knowledge or suspicion of money laundering was based, or which gave reasonable grounds for knowledge or suspicion, came to them in privileged circumstances.

The Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (which implemented the EU's Fourth Money Laundering Directive[41]) came into force on 26 June 2017. They were updated in 2019 and 2020 to reflect the EU's Fifth Money Laundering Directive,[42] in particular about registration of trusts.[43] These Regulations prescribe standards that regulated persons (including law firms) must meet in relation to, among other things, client identification, employee training and record keeping. These are designed to prevent firms from being used for money laundering. The Regulations also seek to give effect to the updated Financial Action Task Force global standards that promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system.

iii Data protection

Prior to the end of the transition period following the UK's withdrawal from the EU, the processing of personal data was primarily regulated by the EU General Data Protection Regulation (EU GDPR),[44] the Data Protection Act 2018 (DPA) and certain secondary legislation made under the DPA. The EU GDPR was adopted on 27 April 2016 and entered into force on 25 May 2018 after a two-year transition period.

The principal elements of the EU GDPR can be summarised as follows:

a both data controllers and data processors have statutory obligations under the EU GDPR;

b data controllers and data processors must comply with the six data protection principles under Article 5(1) of the EU GDPR and the additional accountability principle under Article 5(2) of the EU GDPR (Principles); and

c data subjects have certain rights, including to access personal data held about them, to rectify erroneous personal data, and to object to the processing of their personal data and to the erasure of their personal data.

The EU GDPR has now been replaced in the UK with a UK general data protection regime (UK GDPR) under the DPA, which closely mirrors the existing EU GDPR. This means that for the purpose of the EU GDPR, the UK is a now a third country. Data transfers to third countries outside of the EEA are prohibited under the EU GDPR unless the European Commission has made a decision that the data protection laws in such third country are of equivalent adequacy to those under the EU GDPR, or if individual organisations have implemented certain safeguards such as entering into contracts containing the EU-specified standard conditions. The EU is yet to give a decision on whether the UK's data protection

41 EU Fourth Money Laundering Directive (2015/849).

42 EU Fifth Money Laundering Directive (2018/843).

43 Money Laundering and Terrorist Financing (Amendment) Regulations 2019 and Money Laundering and Terrorist Financing (Amendment) (EU Exit) Regulations 2020.

44 EU General Data Protection Regulation (Regulation (EU) 2016/679).

regime is adequate for these purposes (although the UK has already confirmed that the EU does have an equivalent adequate regime for the purposes of transfers from the UK to the EU). Under the trade and cooperation agreement entered into between the UK and the EU on 24 December 2020, there is a further transition period for the purposes of data transfers of up to six months, during which time the UK will not be treated as a third country for the purposes of the EU GDPR, and so data transfers can continue to take place. During this period, the UK cannot make any changes to the UK GDPR, and cannot exercise certain powers granted to the government under the UK GDPR (e.g., approving a code of conduct to be adhered to or certification methods that mean that the UK approves the transfer of data out to non-EU countries). This period will terminate sooner if the EU confirms that the UK regime is adequate for the purposes of transferring data from the EU. If no such decision is forthcoming, safeguards will need to be put in place at the organisational level to ensure that data transfers from the EU to the UK can continue.

The Information Commissioner's Office (ICO) is charged with policing and enforcing the regime, and has been given enhanced powers under the DPA to do so. The ICO's enforcement powers include the ability to serve four types of notices:[45]

a an information notice requiring any person to provide information reasonably required for the purpose of investigating a range of compliance failures (and notably, there is no general exemption for legally privileged or confidential information);

b an assessment notice requiring a controller or processor to allow the ICO to enter the premises, be directed to documents, examine documents, be given explanations, observe the processing of information and interview staff;

c an enforcement notice requiring a controller or processor to take specified steps or refrain from taking specified steps, or both; and

d a penalty notice requiring a controller or processor to make a penalty payment of up to £17.5 million or 4 per cent of the undertaking's total annual turnover in the preceding financial year, whichever is higher.

Data and personal data are widely defined under the UK GDPR such that any electronic information (and some information held in structured hard-copy filing systems) that relates to an identified or identifiable natural person (the data subject) is likely to be personal data. Processing is also widely defined under the UK GDPR to include anything that can be done with or in relation to data, including obtaining, recording, holding, organising, altering, retrieving, using, disclosing, transferring and destroying data. A data controller is a natural or legal person, public authority, agency or other body that determines the purposes and means of the processing of personal data. A data processor is a natural or legal person that processes personal data on behalf of the controller.

Access to, analysis of and disclosure of electronic information held by a client (or a third party) by legal professionals for the purposes of advising or acting on a dispute will almost always be subject to the UK GDPR. This is because such data will usually contain the names, email addresses or other identifying information of the client's employees or customers, or other living individuals, and will therefore be personal data. It may also contain sensitive personal data, which is personal data containing information about (among other things) the data subject's racial or ethnic origin, political opinions, religious beliefs, trade union

45 Sections 142 to 159 DPA.

membership, physical or mental health, sexual life or the commission or alleged commission of an offence by the data subject. Additional, more stringent conditions for processing apply in respect of sensitive personal data.

Law firms acting as data controllers or data processors (or both) and the clients who are providing them with personal data (for example, for the purpose of locating relevant documents or evidence in relation to a dispute) need to comply with the new data protection principles. In the context of dispute resolution practice, the relevant conditions for processing personal data for the purposes of the first principle include that the data subject consents to the processing, that the processing is necessary in order to comply with a legal obligation, or that the processing is in the legitimate interests of the controller or a third party. Even when one of those conditions is met, the client and law firm will also need to ensure that the processing is otherwise fair and transparent and that the other principles are complied with.

The accountability principle in the UK GDPR contains two elements: first, the data controller is responsible for complying with the UK GDPR and second, the controller must be able to demonstrate this compliance. Data processors are also liable to the extent that they do not comply with their obligations under the UK GDPR. The subject access rights under the UK GDPR can be used as a means to seek relevant information for the purpose of a dispute involving a living individual. Law firms acting in a dispute with an individual and their clients may receive subject access requests by that individual for documents containing personal data relating to that individual. However, information that is subject to legal privilege is exempt from the subject access rights under the GDPR.

The DPA also covers processing relating to areas outside the scope of EU law (such as national security and immigration). The DPA implemented the EU Data Protection (Law Enforcement) Directive[46] into UK law, setting out requirements for the processing of personal data for criminal law enforcement purposes, and this has been retained.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

Legal privilege in England and Wales is governed by the common law and entitles its holder to refuse to produce a privileged document for inspection. The recognised categories of privilege that may be claimed by a party in respect of its documents or communications are:

i Legal advice privilege

The House of Lords confirmed in its decision in *Three Rivers District Council and others v. Governor and Company of the Bank of England (No. 6)*[47] that legal advice privilege protects confidential communications between a lawyer and client made for the purpose of receiving or giving advice in the relevant legal context. However, the House of Lords did not interfere with the Court of Appeal's previous ruling in *Three Rivers (No. 5)*,[48] which warned that care must be taken when identifying the client for the purposes of legal advice privilege. Particularly in large organisations, but potentially in any organisation, the client may be limited to a defined group within the instructing entity with the responsibility for regular correspondence with the solicitors and not simply any employee or member of the instructing entity. In *Serious*

46 EU Data Protection (Law Enforcement) Directive (2016/680).

47 [2004] UKHL 48.

48 *Three Rivers District Council and others v. Governor and Company of the Bank of England* [2003] EWCA Civ 474.

Fraud Office (SFO) v. Eurasian Natural Resources Corporation Ltd (ENRC),[49] although the Court of Appeal affirmed that *Three Rivers (No. 5)* remained good law, it did acknowledge that the case put large corporations in a less advantageous position than individuals and small businesses, and that English law was undesirably out of step with other common law jurisdictions in this regard. In *Re the RBS Rights Issue Litigation*,[50] the High Court dismissed an application by RBS to withhold from disclosure notes of interviews (which were created in the context of internal investigations). The High Court decided that legal professional privilege did not apply as:

a applying *Three Rivers (No. 5)*, the notes of interviews were preparatory information gathered from current or former employees who did not form part of the lawyers' client (notwithstanding that the information was collected in order to be shown to a lawyer to enable legal advice to be given to RBS); and

b the interview notes could not be said to be privileged as lawyers' working papers as it was not sufficiently clear that the notes would give an indication as to the legal analysis or advice undertaken or given to RBS.

The High Court held in *PJSC Tatneft v. Bogolyubov and others*[51] that that legal advice privilege extends to communications with foreign lawyers, whether or not they are in-house or independent, and the court should not enquire into the extent of their qualification or regulation, or whether legal advice privilege applies in their home jurisdiction.

The UK Supreme Court confirmed in *R (on the application of Prudential Plc) v. Special Commissioner of Income Tax*[52] that legal advice privilege applies only to legal advice provided by members of the legal profession and not to members of other professions who give legal advice in the course of their business (such as accountants who provide tax advice).

ii Litigation privilege

Litigation privilege arises only when litigation is in existence or contemplation.[53] In those circumstances, any communication between a lawyer and client, or a lawyer or his or her client and a third party, is privileged if made for the dominant purpose of obtaining or giving legal advice or collecting evidence or information in relation to the litigation. Litigation privilege is wider in scope than legal advice privilege in that it may cover communications with third parties and therefore avoids the difficulties in identifying the client inherent in legal advice privilege. In *SFO v. ENRC*, the Court of Appeal held that, in the context of internal investigations, litigation privilege arises where criminal proceedings are in reasonable contemplation. The Court of Appeal further held that, in both civil and criminal contexts, legal advice given for the purpose of avoiding or settling contemplated proceedings was protected by litigation privilege to the same extent as advice given for the purpose of resisting

49 [2018] EWCA Civ 2006. This sentiment was echoed in the Court of Appeal's more recent decision in *Civil Aviation Authority v. R Jet2.com Ltd* [2020] EWCA Civ 35.

50 [2016] EWHC 3161 (Ch).

51 [2020] EWHC 2437 (Comm).

52 [2013] UKSC 1.

53 It is unlikely that the privilege applies to non-adversarial situations; *Re L (A Minor)* [1997] AC 16.

or defending such proceedings. In *WH Holding Ltd and another v. E20 Stadium LLP*,[54] the Court of Appeal clarified that litigation privilege did not extend to purely commercial discussions about settlement.

iii Privilege against self-incrimination

Documents that tend to incriminate or expose a person to criminal proceedings in the UK or to proceedings for the recovery of a penalty in the UK (including civil contempt) are generally protected by privilege (although the privilege is subject to statutory exceptions, especially in the context of regulatory investigations). It is sufficient if the document might tend to incriminate or so expose the person, provided the risk is apparent to the court.[55]

iv Common interest privilege

Common interest privilege preserves privilege in documents that are disclosed to certain third parties; if a person voluntarily discloses a privileged document to a third party who has a common interest in the subject matter, or in litigation in connection with which the document was bought into existence, then the document remains privileged in the hands of the recipient. This applies to both legal advice privilege and litigation privilege.

v Public interest immunity

This immunity applies where production of a document would be so injurious to the public interest that it ought to be withheld, even at the cost of justice in the particular litigation.[56] The procedures for claiming this immunity (which in most practical respects operates as another head of privilege) are set out in CPR 31.19.

vi Without prejudice communications

Any communications made in a good faith effort to settle proceedings are covered by without prejudice privilege. However, the without prejudice rule is not absolute and evidence of without prejudice communications may be admitted in certain circumstances; for example, to determine whether the communications resulted in a concluded settlement agreement (and to interpret the terms of such an agreement)[57] or whether the agreement was procured by fraud, misrepresentation or undue influence.

The case of *Brown v. Rice*[58] reinforced the principle that without prejudice privilege applies to communications made during a mediation; however, on the facts, the communications were admitted as evidence to establish whether a settlement had been concluded. In *Farm Assist Limited (in Liquidation) v. the Secretary of State for the Environment, Food and Rural Affairs (No. 2)*,[59] Ramsey J clarified that without prejudice privilege is the privilege of the parties and not the mediator. On the facts of the case, the parties had waived the privilege, and so the mediator could not rely upon the privilege to resist a witness summons.

54 [2018] EWCA Civ 2652.

55 See *R (on the application of River East Supplies Ltd) v. Crown Court at Nottingham* [2017] EWHC 1942 (Admin).

56 *Burmah Oil Co Ltd v. Governor and Company of the Bank of England* [1980] AC 1090.

57 *Oceanbulk Shipping & Trading SA v. TMT Asia Limited* [2010] UKSC 44..

58 [2007] EWHC 625 (Ch).

59 [2009] EWHC 1102 (TCC).

Communications between a company and its qualified in-house legal advisers are capable of being privileged to the extent that the communication concerns the lawyer in his or her legal capacity rather than some other managerial role (for example, as company secretary).[60] Communications with qualified lawyers in other jurisdictions in relation to foreign or English law may also be privileged before the English courts.[61]

VI DOCUMENT PRODUCTION

i Disclosure and inspection

Parties to English litigation are required to produce to their opponent and the court documents within their control upon which they rely. They are frequently also required to produce documents that tend to harm their case. A party is entitled to withhold from inspection documents that are legally privileged (but must still disclose their existence). The relatively expansive nature of document production is reflective of the 'cards on the table' approach that characterises English court procedure.

A mandatory disclosure pilot scheme (PD 51U) is in operation for the majority of new and existing proceedings in the Business and Property Courts. This was initially due to run for two years from 1 January 2019, and has now been extended to run for a further 12 months until 31 December 2021. The main objectives of the disclosure reforms, which almost entirely replace the old menu-based system, are to reduce costs and streamline the process of disclosure. The new rules provide for a two-stage disclosure: initial disclosure and extended disclosure. As a general rule, each party is required to give initial disclosure by providing with their statements of case the key documents on which they have relied (expressly or otherwise), and key documents that are necessary to enable other parties to understand the claim or defence they have to meet. Extended disclosure is not an automatic right; a party seeking disclosure in addition, or as an alternative, to initial disclosure will need to request this from the court. Extended disclosure is ordered by reference to five disclosure models in relation to issues for disclosure drawn up by the parties. The five models range from a basic 'no search needed' disclosure through to a more onerous train of enquiry approach from *Peruvian Guano*.[62] The new rules also impose express duties on parties and their lawyers, such as confirming document preservation and disclosure of known adverse documents, with sanctions for non-compliance. In the recent case of *Square Global Ltd v. Leonard*,[63] it was noted that it is fundamental that the client must not select the relevant documents for disclosure. Further guidance on this disclosure pilot has also been provided by Sir Geoffrey Vos, then Chancellor of the High Court, in a reserved judgment given following a disclosure guidance hearing in the matter of *McParland & Partners Ltd and another v. Whitehead*.[64] Vos emphasised that parties need to think constructively and cooperatively about what documents are required for fair resolution of the dispute, avoiding 'unduly granular and complex' solutions. He also stressed the difference between issues for disclosure from issues

60 *Three Rivers (No. 6)* [2004] UKHL 48.

61 *Lawrence v. Campbell* (1859) 4 Drew 485 and *IBM Corp v. Phoenix International (Computers) Ltd* [1995] 1 All ER 413.

62 *Compagnie Financiere du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55.

63 [2020] EWHC 1008 (QB).

64 [2020] EWHC 298 (Ch).

for determination at trial, and noted that it is entirely unacceptable for parties to use the pilot as 'a stick with which to beat their opponents', and such conduct can be expected to be met with immediately-payable adverse costs orders.

Cases in which the disclosure pilot scheme do not apply are subject to the disclosure rules under CPR 31.[65] CPR 31.4 makes it clear that a document is anything in which information is recorded. Examples of documents include, for these purposes, photographs, emails, text messages and voicemail recordings. PD 31A.2A.1 even extends this definition of document to cover metadata (i.e., information about an electronic document that is not visible on its face, such as electronic records of who created the document).

CPR 31.8 provides that parties are only required to produce documents that are or have been under their control. The definition of control includes documents that a party has or had in its possession, or has or had a right to possess, or has or had a right to inspect or copy. In *Lonrho Ltd v. Shell Petroleum Co Ltd (No. 1)*,[66] the court confirmed that a document will be considered to be in a party's control if the party has a presently enforceable right to obtain inspection or copies of the document without the need to consult anyone else. The fact that a document may be situated outside the jurisdiction is irrelevant.

The CPR and courts recognise that the disclosure of electronic documents may present unique challenges to parties because of the potential volume of material that might have to be recovered and reviewed and the technical challenges of so doing. PD 31B sets out the procedure parties should follow in attempting to define and sensibly restrict the scope of electronic disclosure. Similar provisions are included in the Commercial Court Guide.

Searches for relevant electronic documents may include using specialist software to conduct keyword searches across computers, or even entire servers. It may also involve the restoration of backup tapes (or other electronic archives that are not readily accessible) for the purpose of conducting electronic searches for relevant material.

PD 31B was introduced with effect from 1 October 2010 and encourages the parties to complete an electronic documents questionnaire (EDQ) at an early stage of proceedings, setting out details of material held electronically that they intend to disclose. The EDQ must be supported by a statement of truth. The parties are then expected to discuss the disclosure of electronic documents, including the scope of a reasonable search for such documents and any tools and techniques that might reduce the burden and cost of the disclosure of electronic documents.

ii Predictive coding

Parties are making increasing use of information technology to assist in the review of large bodies of data. Such technology can take many forms. Predictive coding, for example, refers to the use of software to assess the likely relevance of documents to a dispute so as to limit the time and expense incurred in conducting a reasonable search for disclosable documents under CPR 31.7. In *Pyrrho Investments Limited and another v. MWB Property Limited and others*,[67] Master Matthews approved the use of predictive coding to expedite the search of more than 17 million documents. Ten reasons were given, chief of which was that predictive

65 In *Kazakhstan Kagazy plc v. Zhunus* [2019] EWHC 878 (Comm), the High Court partially granted an order for specific disclosure apparently under CPR 31.12, noting that the proceedings were subject to CPR 31 when standard disclosure was ordered even though 'strictly' CPR 31 no longer applied.

66 [1980] 1 WLR 627.

67 [2016] EWHC 256 (Ch).

coding allows parties to search vast amounts of electronic documents at proportionate cost. Courts have since shown an increased inclination to order the use of predictive coding over and above other search methods, such as keyword searches. Pyrrho was approved in *Brown v. BCA Trading Ltd*,[68] which endorsed the use of predictive coding in electronic disclosure. The court also stated that predictive coding would be significantly cheaper than a keyword search and there was no evidence to suggest that it would be less effective.

iii Privilege lists

Document production is a two-stage process: the parties disclose the existence of relevant documents by serving on each other a list of those documents. They then provide their opponent with copies of all those documents save for those which they have some legal basis for withholding (most commonly, documents over which privilege is claimed). Each document over which privilege is claimed should be described. In *Astex Therapeutics Ltd v. AstraZeneca AB*,[69] the High Court ruled that a generic statement to the effect that the categories of documents referred to in the relevant section of the disclosure list are privileged is insufficient to discharge the requirement under CPR 31.10(4)(a). In *Hutchison 3G UK Ltd v. EE Ltd*,[70] the court refused an application for specific disclosure on the basis that a party could not rely on the court's general management powers to avoid the specific disclosure provisions in CPR 31.12.

VII ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

There are a number of forms of alternative dispute resolution (ADR) mechanisms available in England and Wales. The glossary to the CPR defines ADR as a 'collective description of methods of resolving disputes otherwise than through the normal trial process'. ADR encompasses a variety of dispute resolution methods ranging from non-binding negotiations, in which there is no third-party involvement, to formal binding arbitral proceedings.[71] ADR has achieved acceptance as it is confidential, its outcome is normally subject to agreement of the parties, and it may offer a faster and more cost-effective resolution to a dispute than traditional litigation. The Civil Justice Council ADR Working Group considered, and dismissed, the idea of imposing mandatory ADR in its interim report, which was published in October 2017. The report notes that in England and Wales there are already a number of ADR processes that are effectively mandatory, and introducing compulsory pre-action ADR would be 'too heavy-handed'. The following reasons were cited in the report: the difficulties with avoiding unnecessary cost and hassle, the risk of delay due to difficulties with engaging defendants pre-action and the largely negative feedback about mandatory pre-action systems from jurisdictions such as Italy (which is the only European system with a mandatory pre-action mediation requirement).

68 [2016] EWHC 1464 (Ch).

69 [2016] EWHC 2759 (Ch).

70 [2017] 10 WLUK 149.

71 Some practitioners would exclude arbitration as a form of ADR and would emphasise instead the procedural informality of ADR mechanisms. However, since an arbitration can only be commenced with the consent of the parties, it is treated here as an alternative to the formal court process.

Recently, however, the courts have begun to indicate that it may become a requirement for parties to engage in ADR; for example, the decision in *Lomax v. Lomax*[72] indicated that it was not a requirement for parties to consent for the court to order that they engage in early neutral evaluation. Sir Geoffrey Vos, then Chancellor of the High Court, has stated that, in his opinion, this case inevitably raises the question of whether the court might also require parties to engage in mediation.[73]

ii Arbitration

The Arbitration Act 1996 (1996 Act) restated and aimed to improve the law in England and Wales relating to arbitration pursuant to an arbitration agreement. Certain provisions (listed in Schedule 1 of the 1996 Act) are mandatory and have effect notwithstanding any agreement to the contrary, whereas other provisions apply only in the absence of any agreement between the parties. Key mandatory provisions include:

a Section 9: a party to an arbitration agreement may apply for a stay of proceedings if proceedings are brought against it in respect of a matter that, under the agreement, should be referred to arbitration. The court in which proceedings are brought shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed;

b Section 40: the parties are under a general duty to do all things necessary for the proper and expeditious conduct of the arbitral proceedings;

c Section 67: a party may apply to the court to challenge a tribunal's substantive jurisdiction; and

d Section 68: a party may apply to the court to challenge an award for serious irregularity.

Section 69 of the 1996 Act permits parties to appeal to the court on a question of law arising out of an award made in the arbitral proceedings, unless they have agreed otherwise. This right to appeal will usually be excluded if the parties have agreed to arbitrate the dispute using institutional rules (see below). A party seeking leave to appeal an award must complete an arbitration claim form within 28 days of the award date stating the reasons for the appeal sought. The court will determine an application for leave to appeal without a hearing unless it appears to it that a hearing is required. On an appeal, the court has the discretion to confirm the award, vary it or set it aside in whole or in part or to remit the award to the arbitral tribunal, in whole or in part, for reconsideration in the light of the court's determination.

Arbitration may be institutional or ad hoc. In institutional arbitration, the parties will agree to submit to an institution to administer the arbitration, applying the rules of that institution. The major institutions used in English arbitration are the Chartered Institute of Arbitrators, the International Chamber of Commerce and the London Court of International Arbitration. There are also established arbitral institutions for industry-specific arbitration, including maritime, construction and engineering, and insurance disputes.

In ad hoc arbitration, parties may agree all procedural issues themselves. The United Nations Commission on International Trade Law (UNCITRAL) procedural rules are widely used in appropriate ad hoc English arbitration.

72 [2019] EWCA Civ 1467.

73 *McParland & Partners Ltd and another v. Whitehead* [2020] EWHC 298 (Ch).

Section 66 of the 1996 Act (another mandatory provision) governs the enforcement of foreign arbitral awards in England and Wales. It permits the enforcing party to apply to the High Court to enforce the award as if it were a judgment or order of the court to the same effect.

Where an arbitral award is made in a country (other than a country in the UK) that is a signatory to the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), that foreign award is recognised as binding and, with the court's permission, may be enforced in England, Wales and Northern Ireland under Section 101 of the 1996 Act. Section 103 sets out the limited circumstances where a court must or may refuse to allow a foreign award to be enforced: for example, if the award was invalid under the governing law of the arbitration or the seat of the arbitration. If the court permits the foreign award to be enforced, the options available on enforcement will be the same as if it were a judgment of the English court.

The New York Convention applies to arbitration in England and Wales. In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp*,[74] the Supreme Court held that the terms of the 1996 Act and the New York Convention did not enable the court to order a partial enforcement of an arbitral award.

iii Mediation

In England and Wales, there are no rules obliging parties to mediate or determining how mediations are conducted or concluded. Parties are free to agree between themselves all aspects of the mediation process.

The potential benefits to parties of being able to resolve their disputes through mediation, even where normal trial processes are contemplated, continue to be recognised by the English courts. The CPRs strongly encourage parties to consider mediation at several stages during litigation, including before formal proceedings commence, when a case is allocated to track and at any CMCs. The court may also impose or grant a request for a stay of proceedings pursuant to CPR 26.4 to enable the parties to attempt mediation.

The Jackson ADR Handbook was published in April 2013 following Jackson LJ's recommendation.[75] It has been endorsed by Jackson LJ, the Judicial College, the Civil Justice Council and the Civil Mediation Council, and is the authoritative guide to ADR in England and Wales.

The approach of the court in this area has frequently been to treat mediation and ADR as effectively synonymous terms. In *Dunnett v. Railtrack plc*,[76] the court declined to order that the defeated claimant pay Railtrack's costs because Railtrack had, unreasonably in the court's view, refused to consider an earlier suggestion from the court to attempt ADR. In *Halsey v. Milton Keynes General NHS Trust*,[77] the court stated that it was for the unsuccessful party at trial to demonstrate that the successful party's costs should be reduced because of its unreasonable failure to consider ADR. Relevant factors when assessing whether ADR was unreasonably refused include the nature of the dispute, the merits of the case, the relative costs of ADR to the case and whether ADR had a reasonable prospect of success. However, in

74 [2017] UKSC 16.

75 Available from Oxford University Press.

76 [2002] EWCA Civ 303.

77 [2004] EWCA Civ 576.

PGF II SA v. OMFS Company 1 Limited,[78] the Court of Appeal made it clear that parties are expected to engage with a serious invitation to participate in ADR and they may be penalised in costs if they refuse to do so. In that case, the Court refused to award the defendant its costs as it had ignored an offer from the claimant to mediate.

In 2008, the EU adopted the Mediation Directive,[79] which applies to all Member States when engaged in cross-border disputes within the EU. The Directive seeks to ensure that Member States facilitate mediation. This includes ensuring that local law does not prevent parties who emerge from unsuccessful mediations from being time-barred from litigation, and that settlement agreements reached in mediation are enforceable under local law. Following the UK's withdrawal from the EU and the end of the transition period, this Directive has been repealed from UK law and so there is no dedicated reciprocal regime for mediations arising in respect of cross-border disputes between parties in the UK and those in EU Member States. However, they will continue to apply to cross-border mediations commenced prior to 31 December 2020. Neither the EU nor the UK have currently signed up to the Singapore Mediation Convention, which came into force in September 2020 and aims to reduce issues around the enforcement of cross-border mediated settlement agreements by creating an international framework for their enforcement, although the UK government has indicated that it is giving serious consideration to doing so.

At present, mediations and mediation services providers are not regulated by a central body, and there are no formal qualifications mediators must possess to be able to practise. However, there are a number of recognised mediation providers in England and Wales, such as the Centre for Effective Dispute Resolution and the ADR Group, which provide training and maintain lists of their accredited mediators who sign up to a voluntary code of conduct.

iv Other forms of alternative dispute resolution

In addition to arbitration and mediation, there are a range of other processes available to parties seeking to settle their disputes out of court. These include early neutral evaluation, a non-binding process intended to provide parties at an early stage in a dispute with an independent assessment of facts, evidence or respective legal merits; expert determination, typically a contractually binding determination by a neutral expert of a dispute involving technical or valuation issues; and adjudication, a statutory process that is mandatory for disputes arising under specified construction contracts entered into since 1 May 1998. Ultimately, private dispute resolution can take any form that the parties wish. In most cases, the procedures are non-binding and without prejudice, which allows the parties to commence or continue litigation or arbitral proceedings, if necessary.

VIII OUTLOOK AND CONCLUSIONS

There are a number of upcoming macro-level challenges to the existing state of the English legal system and its component parts, together with some substantive changes to practice and procedure.

78 [2013] EWCA Civ 1288.

79 Mediation Directive (Council Directive 2008/52).

i Reform of the courts

The finish date of the £1 billion HMCTS reform programme has been extended to 2023, building on feedback received from the Public Accounts Committee and the National Audit Office. The reforms comprise an upgrade of facilities as well as the modernisation of technology. A number of procedural reform initiatives have already been rolled out, such as the establishment of the Business and Property Courts, the introduction of the shorter and flexible trial schemes, and creation of the Financial List (all of which have since been made permanent), as have initiatives aimed at digitising the courts system (see Section III.iv). Heading into its third phase, the reform programme will expand online services with a view to offering a complete end-to-end service to users. Expected changes include the provision of additional IT infrastructure to courts, including providing Wi-Fi and video conferencing equipment in all courts and tribunals, and delivering additional centralised case administration centres. The recommendations put forward by the Disclosure Working Group, chaired by Lady Justice Gloster, to address the excessive costs, scale and complexity of disclosure, have taken effect in the Business and Property Courts from January 2019 in a mandatory disclosure pilot scheme in PD 51U (see Section VI.i). It is expected that if the pilot scheme is deemed successful, the existing CPR 31 will be revised to incorporate PD 51U and the scheme might be extended to proceedings outside the Business and Property Courts.

ii Continued use of remote hearings

On 26 November 2020, HMCTS announced that it will be carrying out an evaluation of the use of remote hearings during the covid-19 outbreak. The aim of the evaluation is to 'collect robust evidence on the characteristics, experiences and perceptions of court and tribunal users, during covid-19'. The evaluation's findings will inform HMCTS's use of audio and video technology to improve user experience, and consider the use of remote hearings on an ongoing basis. Early indications from senior judges suggest that, particularly for business and property cases, many of the innovations adopted in response to the covid-19 pandemic will be made permanent.

iii Witness statements

The Witness Evidence Working Group has conducted a survey and completed a report in relation to the use of witness evidence in the Business and Property Courts, which was published in December 2019. The Working Group collected court users' views regarding the current rules and practice on factual witness evidence, as well as possible alternatives. This reflects a number of recent cases in which judges expressed fatigue over unnecessarily lengthy statements or sought to curb the practice of lawyers drafting statements for witnesses to suit the cases being advanced.[80] Following the publication of this report, a working draft of a new PD 57AC and an Appendix (Statement of Best Practice) has been approved by the Commercial Court and the Business and Property Courts Board. It was recommended

80 See, for example, *PCP Capital Partners LLP and another v. Barclays Bank plc* [2020] EWHC 646 (Comm) and *Skatteforvaltningen (The Danish Customs And Tax Administration) v, Solo Capital Partners LLP and others* [2020] EWHC 1624 (Comm).

to be put before the Civil Procedure Rule Committee, and it has suggested that they come into effect on 1 April 2021 once approved. Under the new PD it will be a requirement that witness statements include a list of documents that were reviewed by the witness during the process of preparing the statement, including any that were not seen by the witness at the time of the events discussed.

Appendix 1

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