HOT TOPICS IN COMMERCIAL LITIGATION

Hybrid seminar from Lincoln's Inn, London

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Seminar outline

- PART (A) – Introduction
- PART (B) – Service out of the jurisdiction
- PART (C) – Freezing order issues
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- PART (I) – Concluding observations

Part (A) – Introduction

- Despite the Covid-19 pandemic, the English courts have been able to operate very effectively since March 2020.
- Some of the key recent decisions concerning Commercial Litigation are set out in this presentation.
- The areas that are being most closely monitored by litigators include the potential increased scope for competition claims in light of the Supreme Court's decision in *Mastercard Inc v Merricks* [2020] UKSC 51, and the practical effect of the new regime relating to Disclosure and trial Witness Statements

Part (B) – Service out of the jurisdiction

(1) **Manek v IIFL Wealth (UK) Ltd** [2021] EWCA Civ 264 (1 March 2021)

(2) **PJSC National Bank Trust v Mints & ors** [2021] EWHC 692 (Comm) (23 March 2021)

(3) **Manek v IIFL Wealth (UK) Ltd** [2021] EWCA Civ 625 (4 May 2021)

(4) **Integral Petroleum SA v Petrogat FZA** [2021] EWHC 1365 (Comm) (14 May 2021)

(5) **YA II PN Ltd v Frontera Resources Corp** [2021] EWHC 1380 (Comm) (26 May 2021)

(6) **Re Devas Multimedia America Inc** [2021] EWHC 1944 (Comm) (8 July 2021)

(7) **Fetch.ai Ltd v Persons Unknown Category A** [2021] EWHC 2254 (Comm) (15 July 2021)

(8) **Qatar Investment & Projects Holding Co v Phoenix Ancient Art SA** [2021] EWHC 2243 (QB) (9 August 2021)

(B) Service out of the jurisdiction

- Following Brexit, the legal landscape governing ‘service out’ looks different.
- What do we fall back on?
  - Multilateral treaties/conventions – the Hague Service Convention (HSC) will apply to most requests for service between UK and the Member States of the EU
  - Bilateral treaties/agreements
  - Common law principles
  - Civil Procedure Rules (CPR)
- Some recent examples of how ‘service out’ challenges are being dealt with post-Brexit are presented in the following slides.

(B) Service out of the jurisdiction

(1) *Manek v IIFL Wealth (UK) Ltd* [2021] EWCA Civ 264 (1 March 2021) [see also case (3)]

- The claimants alleged D2 and D3 (domiciled in India) had (by deceit and fraudulent misrepresentation) fraudulently persuaded them to sell their minority shareholdings in an Indian company to the majority shareholders on the basis that there had been a good offer to buy the company, and that D2 and D3 had arranged for the Indian company to then be immediately resold to a German company for considerably more money.
- At first instance, the judge set aside permission to serve D2/D3 out of the jurisdiction, finding that the claimants were not entitled to rely on the "tort" gateway as they had not demonstrated that sufficiently "*substantial or efficacious*" acts were committed within the English jurisdiction for the purposes of the test in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391. D2/D3's representation that sales figures were not great was not a substantial and efficacious act.
- The Court of Appeal (Underhill LJ; Coulson LJ; Phillips LJ) allowed the appeal:
  - The judge had made multiple errors of fact including that the only actionable misrepresentation at the first face-to-face meeting between the claimants and D2/D3 was their underplaying of the sales figures, ignoring uncontested evidence that the claimants were given assurances as to who the ultimate purchaser was.
  - The judge had erred in principle in considering that it was only the last misrepresentation that could be the material event for the purposes of the deceit claim. The alleged fraud was an ongoing process.
  - The judge had also erred in indicating that what was said at a physical meeting on 8-9 August was of minor importance compared to representations made in emails or calls from overseas.
  - Overall, "*substantial and efficacious"* acts were committed within the English jurisdiction.

(B) Service out of the jurisdiction

(2) *PJSC National Bank Trust v Mints & ors* [2021] EWHC 692 (Comm) (23 March 2021)

- The claimants were Russian banks that (shortly before their nationalisation) had entered into transactions whereby secured short-term loans to companies controlled by the Mints family were replaced by unsecured long-term bonds. The claimants alleged that the Mints family had dishonestly procured those replacements in conspiracy with the claimants' then controllers contrary to Article 53 of the Russian Civil Code. The Mints family had left Russia, were resident in England and were being sued there for their role in the alleged conspiracy. Other defendants included former officers and *de facto* controllers of Otkritie (D5-D7) who were resident in USA, Israel and Russia. There were related proceedings (including criminal proceedings) in Russia and pending arbitrations.
- The Commercial Court (Sir Nigel Teare) refused D5-D7's applications to set aside permission to serve them out of the jurisdiction:
  - The burden lay on the claimant to show that England was clearly the proper place in which to bring the claim. Permission would be refused if another forum appeared to be clearly more appropriate, unless "*substantial justice*" could not be achieved in that alternate forum.
  - The claimants and the defendants were Russian, the alleged wrongdoing by all defendants occurred in Russia and the alleged losses were sustained in Russia. The causes of action relied on were creatures of Russian law and most of the documents were in Russian. The only reason why the claimants sought to bring the claims against D5-D7 in England was because the claim against the Mints family was being heard there.
  - In the instant case the court was satisfied that no rational claimant would have chosen to sue in Russia. It was reasonable for the claimants to sue in England because of the relative ease of enforceability of an English, compared with a Russian, judgment. The risk of inconsistent judgments would be materially increased if the claims against the Mints family were determined in England whilst the claims against the other defendants arising out of the same conspiracy were determined in Russia.

(B) Service out of the jurisdiction

(3) *Manek v IIFL Wealth (UK) Ltd* [2021] EWCA Civ 625 (4 May 2021) [see also case (1)]

- Following its judgment in *Manek v IIFL Wealth (UK) Ltd* [2021] EWCA Civ 264, the court considered the respondent's other arguments raised in support of its application to set aside service out.
- The Court of Appeal (Underhill LJ; Coulson LJ; Phillips LJ) refused the application:
  - The issue as to natural forum fell to be resolved by way of the 2-stage test in *The Spiliada* [1987] AC 460. The appellants had to establish that England was clearly or distinctly the proper place for their claims to be heard and that there were circumstances by reason of which justice required the claim to continue. In the instant case, the second stage came down to a debate about the potential delays if the claim was to be heard in India.
  - Three main factors pointed to England being the most suitable forum: (1) the CoA's earlier judgment had concluded that the tort had occurred in England, (2) D1 was a UK company, (3) consideration of the domiciles of the relevant personnel also firmly favoured litigation in England.

(B) Service out of the jurisdiction

(4) *Integral Petroleum SA v Petrogat FZA* [2021] EWHC 1365 (Comm) (14 May 2021)

- Integral and Petrogat contracted for the sale of oil. Petrogat's obligations were guaranteed by a third party. Petrogat failed to deliver part of the cargo and diverted it to Iran in breach of an English court injunction. The controllers of Petrogat and the third party were committed for contempt for breaching the injunction. Separately, Integral obtained LCIA arbitration awards against Petrogat and the third party, which were not satisfied. After a receiver was appointed by way of equitable execution, Integral filed Section 423 IA 1986 claims alleging that certain transfers of assets had been made with the intention of placing the assets out of Integral's reach.
- The Commercial Court (Calver J) granted the applications:
  - The court was satisfied that Integral had a real prospect to succeed in respect of its claim under Section 423 IA 1986 against each of the respondents.
  - The only concern was whether the court ought to permit Integral to pursue a Section 423 claim in England despite the fact that the respondents were based outside the jurisdiction and the fraudulent transfers had taken place abroad.
  - However, the court was satisfied that England was the most appropriate forum: the parties had opted for English law to govern their disputes and London as their arbitral seat, and the respondent's directors had previously breached English court orders (in respect of which they had been held in contempt of court).

(B) Service out of the jurisdiction

(5) *YA II PN Ltd v Frontera Resources Corp* [2021] EWHC 1380 (Comm) (26 May 2021)

- The claimant obtained an order for permission to serve the defendant at a specific address in Texas. The claimant was then not able to serve at that address. The claimant then personally served the person described (erroneously, as it transpired) in public filings as the defendant's vice president, and informed the defendant's CEO of the claim. Default judgment was entered.
- The defendant applied to set aside the default judgment on the basis of invalid service; the claimant cross-applied under CPR 6.15 for retrospective permission to serve the claim by way of personal service.
- The Commercial Court (Butcher J) granted the application and the cross-application:
  - There had been no valid service and thus no obligation on the defendant to serve an acknowledgment of service, and no default in failing to do so. The default judgment had to be set aside, subject only to the possible effect of an order retrospectively validating such service.
  - The service order had not been in the standard wording of Form PF6B: it had been limited to a specific address rather than broadening out to include "*or elsewhere in the jurisdiction*". The claimant was wrong to argue that, if there was service by a method permitted by the relevant US law, albeit at an address different from that specified in the order, that would nonetheless be good service in accordance with CPR 6.40(3)(c).
  - There was good reason to validate the service under CPR 6.15. The claim form and accompanying documents had been brought promptly to the defendant's attention. Personal service could not be effected on one of the defendant's current officers because it had not updated its public filings.
  - Further, the method of service used by the claimant was permitted under the HSC. Although there were defects in the manner in which it was effected, it was an attempt at "*service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination*", which was allowed under Article 10 HSC, and no prejudice would be caused to the defendant by retrospectively validating service.

(B) Service out of the jurisdiction

(6) *Re Devas Multimedia America Inc* [2021] EWHC 1944 (Comm) (8 July 2021)

- An award creditor sought permission to serve out of the jurisdiction an application to join several of the award debtor's associated companies to the enforcement judgment. The justification was steps alleged to have been taken by India to render the underlying award ineffective, including by procuring an order placing the claimant into liquidation
- The Commercial Court (Waksman J) granted permission:
  - The court was satisfied there was a serious issue to be tried and there were strong arguments that the court had the power to join other parties to an enforcement judgment under CPR Part 19.
  - Two gateways were available for service out – CPR62.18 and CPR PD6B.
  - The court also granted an order for alternative service by email, finding that there were exceptional circumstances that justified efforts to avoid delay involved in foreign process service. Those circumstances included the impending insolvency, the Covid-19 pandemic and the possibility that Indian authorities might not act speedily in effecting service.

(B) Service out of the jurisdiction

(7) *Fetch.ai Ltd v Persons Unknown Category A* [2021] EWHC 2254 (Comm) (15 July 2021)

- The applicant English and Singaporean companies alleged they had been defrauded by persons unknown gaining access to their trading accounts with the respondents and fraudulently trading cryptocurrencies at undervalues.
- Various injunctive and other relief was sought, along with permission to serve the persons unknown out of the jurisdiction, since it was not known whether they were within or outside England & Wales. One of the (known) respondents also did not have a presence in England.
- The Commercial Court (HHJ Pelling QC) granted the application:
  - The applicants had established reasonably arguable claims based on breach of confidence and unjust enrichment and were entitled to maintain constructive trust claims in respect of assets removed dishonestly or without consent.
  - As to jurisdiction, it was reasonably arguable that the causes of action available were justiciable in England and there was a serious issue to be tried on the evidence.
  - The applicants had demonstrated a good arguable case that the claim fell within one of the Gateways in CPR PD6B that England was the proper place to bring the claim. The applicants carried on business exclusively in England, the cryptocurrencies were to be treated as a matter of English law as located in England, and the losses caused by the allegedly fraudulent scheme were suffered in England.

(B) Service out of the jurisdiction

(8) *Qatar Investment & Projects Holding Co v Phoenix Ancient Art SA* [2021] EWHC 2243 (QB) (9 August 2021)

- The claimants alleged that two artefacts (A1/A2) purchased from the Swiss defendant in 2013 and 2014 were, in fact, worthless. Issues of authenticity were first raised in early 2018. The defendant agreed to provide replacements, but they were seized by US Customs.
- The limitation period in respect of A1 would have expired on 13 May 2019, but the parties entered into a standstill agreement. The limitation period in respect of A2 expired on 22 May 2020; negotiations to apply the standstill agreement to A2 were unsuccessful.
- The claimants obtained *ex parte* permission to extend the time for service out of the jurisdiction. The master set aside that permission on the basis that the claimants had only issued their claim two days prior to the expiry of limitation, that the Covid-19 pandemic situation meant nothing should have been left to chance and that the claimants had taken no steps between the issue of the claim and early May 2020.
- The Queen's Bench Division (William Davis J) dismissed the claimants' appeal:
  - Good reason for an extension had to be shown in all cases and, in cases where an extension would impinge on limitation, reasonable steps to effect service had to be shown to have been taken.
  - Covid-19 difficulties with the FPS had not begun until mid-March 2020 and the service was not suspended until mid-April 2020. The claimants had issued the claim form days before the expiry of the limitation period and it had been incumbent on them to act promptly. By doing nothing for another two months, the claimants had taken a risk. The master had made no error of law or principle and his decision was within the scope of his discretion.

Part (C) – Freezing order issues

(1) ***AA v BB*** [2020] EWHC 2490 (Ch) (14 September 2020)

(2) ***Kea Investments Ltd v Watson*** [2020] EWHC 2796 (Ch) (19 October 2020)

(3) ***PJSC National Bank Trust v Mints*** [2020] EWHC 3253 (Comm) (25 November 2020)

(4) ***Abu Dhabi Commercial Bank PJSC v Shetty*** [2020] EWHC 3423 (Comm) (2 December 2020)

(5) ***Revenue & Customs Commissioners v Malde*** [2020] EWHC 100 (Ch) (22 January 2021)

(6) ***Cesfin Ventures LLC v Al Qubaisi*** [2021] EWHC 919 (Ch) (23 February 2021)

(7) ***PJSC National Bank Trust v Mints*** [2021] EWHC 1089 (Comm) (30 April 2021)

(8) ***PJSC Darnitsa v Metabay Import/Export Ltd*** [2021] EWHC 1441 (Comm) (28 May 2021)

(9) ***Skatteforvaltningen v Solo Capital Partners LLP (in special administration)*** [2021] EWHC 1683 (Comm) (22 June 2021)

(10) ***AA v BB*** [2021] EWHC 1833 (Ch) (2 July 2021)

(11) ***AA v BB*** [2021] EWCA Civ 1017 (7 July 2021)

(12) ***JSC Commercial Bank Privatbank v Kolomoisky*** [2021] EWHC 1910 (Ch) (8 July 2021)

(13) ***Barefoot Farm Ltd v Revuckas*** [2021] EWHC 2423 (QB) (9 August 2021)

(14) ***Les Ambassadeurs Club Ltd v Yu*** [2021] EWCA Civ 1310 (24 August 2021)

(C) Freezing order issues

- Freezing Order (FO) relief is an extremely important part of dispute resolution and the English courts (with their ability to grant worldwide relief) are a popular forum in which to seek such relief.
- In addition to freezing assets, FOs typically impose strict asset disclosure obligations upon a respondent – which are policed strictly by the English courts
- Applicants need to show, *inter alia*, a "*good arguable case*" (on the substantive merits) and a "*real risk of dissipation*" of assets.
- FOs are often initially applied for without notice to the other party. Accordingly, applicants are under a "*duty of full and frank disclosure*". Allegations of breaches of this duty will often form part of any application to set aside or discharge a FO.
- FOs can have a serious impact on a party's ability to conduct business. In order to mitigate the potential damage likely to be caused by a wrongly granted FO, an applicant will usually be required to give a "*cross-undertaking as to damages*" and may be required to further "*fortify*" that cross-undertaking if the court deems it appropriate.

(C) Freezing order issues

(1) *AA v BB* [2020] EWHC 2490 (Ch) (14 September 2020)

- The claimants had agreed that D1, D2 and D5 could raise arguments at an upcoming hearing concerning the continuance or the setting aside of WFOs without having to show a change of circumstances. There was no such agreement in respect of D3 and D4 (who had already applied unsuccessfully to discontinue the WFOs on the ground that the existence of criminal restraint orders (CROs) against them negated any risk of dissipation).
- The Chancery Division (Meade J) held:
  - Where a party had declined or failed to take a point when it was open to it to do so, it might be precluded from taking it later but that was not an absolute rule.
  - The CRO point argued by D3/D4 was self-contained and capable of being run on the return date. Had it been successful, the WFOs would not have been continued. It would have been a significant injustice had the CRO point been a good one but D3/D4 had been deterred from pursuing it in case it prevented them from contesting arguable case or factual risk of dissipation at a later date.
  - D3/D4 were permitted to raise arguments as to ‘good arguable case’ and ‘factual risk of dissipation’ at the further hearing without having to show a change of circumstances.

(C) Freezing order issues

(2) *Kea Investments Ltd v Watson* [2020] EWHC 2796 (Ch) (19 October 2020)

- The respondent had failed to voluntarily pay a judgment sum, and agreed to a consent order undertaking not to deal with any of his assets without notice to the applicant and to disclose all assets he held legally or beneficially. The respondent was found in contempt for failing to disclose a bank account in his mother's name which held money at his disposal.
- The Chancery Division (Nugee LJ) determined the appropriate sentence for the respondent's contempt:
  - There was no difference in principle between a disclosure order contained in a FO, and the disclosure orders in the instant case. Disobedience of orders made post-judgment to enable enforcement was more serious than disobedience to an order made pre-judgment designed to preserve assets pending judgment.
  - Had the respondent disclosed the account when he should have done, there would have been money still in the account, and his failure to do that meant that the applicant lost the opportunity to take steps to secure it towards its judgment.
  - The respondent had committed a serious and deliberate contempt designed to conceal from the applicant an asset which it was entitled to know about. The impact of mitigation was to reduce the sentence from six months' imprisonment or more to four months.

(C) Freezing order issues

(3) *PJSC National Bank Trust v Mints* [2020] EWHC 3253 (Comm) (25 November 2020)

- The claimants made an urgent application in anticipation of a Russian criminal investigator attending its premises in Russia, for the English court to release an undertaking in a WFO to allow Bank Otkritie to provide the investigator with asset disclosure documents including affidavits in the English proceedings so as to avoid criminal liability.
- The Commercial Court (Bryan J) granted the application:
  - The vast majority of the asset disclosure documentation was in the public domain by virtue of CPR 31.22(1)(a) having been read by a judge and referred to in open court, and as a result could be handed over to the investigator, subject only to the fact that there was an express undertaking in the WFO.
  - Bank Otkritie had received expert advice that if it failed to comply with the Russian investigator it risked criminal sanctions and possible loss of its banking licence. Where a person was required to disclose material to a foreign legal authority under an applicable foreign law that was the kind of special circumstances in which the undertaking would be released.
  - Balancing the competing public interests, the balance came down in favour of allowing the release of the documents for collateral use.

(C) Freezing order issues

(4) *Abu Dhabi Commercial Bank PJSC v Shetty* [2020] EWHC 3423 (Comm) (2 December 2020)

- The claimant bank sought compensation for losses allegedly caused by fraudulent misrepresentations and conspiracy by which false accounts were created to give misleading impressions as to their accuracy/reliability and the strength and robustness of the financial performance of the defendants' healthcare group to which it had loaned US$1.2 billion. The claimant applied without notice for a WFO and related disclosure order against the defendants.
- The Commercial Court (Bryan J) granted the WFO/disclosure order application:
  - The claimant had a good arguable case in deceit and conspiracy under either English law or UAE law.
  - The claimant had established a good arguable case against each defendant of their having been engaged in a major fraud and had demonstrated a real risk judged objectively that a future judgment would not be met because of an unjustified dissipation of assets. There was solid evidence going beyond inference or general assertion.
  - In light of the underlying financial manipulation and concealment in the nature of the fraud, it was appropriate to make a WFO to restrain both UK and foreign assets.

(C) Freezing order issues

(5) *Revenue & Customs Commissioners v Malde* [2020] EWHC 100 (Ch) (22 January 2021)

- HMRC applied for a further disclosure order pursuant to a FO in 2015 on the basis that it was necessary in order to properly police ongoing compliance with the FO, and that it should be made because of (1) the defendant's admitted prior breaches of the FO, (2) discrepancies in certain account balances between 2015 and 2018, and (3) inconsistencies in the defendant's explanations for not providing certain bank statements.
- The Chancery Division (Zacaroli J) granted the application:
  - Disclosure in respect of all bank accounts over a 5.5 year period would be disproportionate. The need for disclosure had to be more compelling the longer the period of delay. The instant delay exceeded 2 years. The nature of the breaches admitted by the defendant meant that there was no real risk of continuing breaches. Had HMRC been seriously concerned they could have sought further disclosure earlier; a claimant who suspected a breach of a freezing order had to initiate proceedings without delay.
  - Although a defendant to a FO was entitled to rely upon the privilege against self-incrimination in relation to the information to be provided, the privilege did not extend to production of documents which had an existence independent of the relevant order. The defendant was not subject to prosecution, and documents were not sought in connection with any pre-trial investigation. Disclosure could only be ordered ancillary to a FO to ensure its effectiveness, and not for investigating the possibility of prior breaches of the FO. However, HMRC might become aware of material to found further contempt proceedings as a by-product of the disclosure. In those circumstances, a party could only rely on the privilege against self-incrimination to avoid disclosure where the compulsion under which the documents were obtained involved a breach of Article 3 ECHR. The instant case did not fall within that category.

(C) Freezing order issues

(6) *Cesfin Ventures LLC v Al Qubaisi* [2021] EWHC 919 (Ch) (23 February 2021)

- The claimants seeking to enforce an arbitration award against D1 in the USA applied successfully to the English court for a WFO under Section 25(1) CJJA 1982. The court gave directions for a further hearing to consider various challenges D1 intended to make. When D1 failed to comply with those directions, the claimants sought to bring a summary judgment application at the further hearing.
- The Chancery Division (Deputy Master Francis) held:
  - It was wrong in principle to bring the summary judgment application. The Section 25 CJJA 1982 application was parasitic on the foreign proceedings and the only kind of relief the court could grant was interim relief to continue for so long as the foreign proceedings remained undetermined.
  - To make a final order, or one for summary judgment, went beyond what the court could properly do under Section 25 CJJA 1982. The WFO would be either continued or discharged at the further hearing.

(C) Freezing order issues

(7) *PJSC National Bank Trust v Mints* [2021] EWHC 1089 (Comm) (30 April 2021)

- The claimants had given a cross-undertaking in a WFO against D1-D4 providing total fortification of US$2m. D4 applied for additional fortification of US$20m on the basis that, after the WFO, two banks had recalled loans to third party entities in which he had an interest, causing losses.
- The Commercial Court (Calver J) refused the application:
  - An applicant for fortification had to show a good arguable case for it. In exercising its discretion the court had to consider whether: (a) there was a sufficient risk of loss to require further fortification; (b) the loss had or was likely to have been caused by the WFO; (c) there was sufficient evidence to allow for an intelligent estimate of the losses.
  - In the circumstances, the applicant was unable to establish that any of the losses or alleged losses incurred by the third party entities had been caused as a result of the grant of the WFO. The applicant's case relied on a chain of causation that was too remote.

(C) Freezing order issues

(8) *PJSC Darnitsa v Metabay Import/Export Ltd* [2021] EWHC 1441 (Comm) (28 May 2021)

- The claimant minority shareholders of a Ukrainian company commenced a derivative action in Ukraine against the majority shareholders – alleging the defendant had entered into an agency agreement with the Ukrainian company to pay it 30% commission on sales. The claimant obtained a WFO under Section 25 CJJA 1982 seeking to extract the commissions paid from the majority shareholders to repay the debt to the Ukrainian company.
- The Commercial Court (Sir Michael Burton) refused the defendant's application to discharge the WFO:
  - There was a good arguable case in the Ukrainian proceedings against the majority shareholders and their daughter on the basis that they were controlling officers of the Ukrainian company from which the commissions had been extracted.
  - There was a real risk of dissipation by the defendant in circumstances where no commission payments had been received for a number of years despite ongoing sales.

(C) Freezing order issues

(9) *Skatteforvaltningen v Solo Capital Partners LLP (in special administration)* [2021] EWHC 1683 (Comm) (22 June 2021)

- In substantial litigation, the claimant had obtained a WFO against various respondents. On a preliminary issue, the judge ruled that (1) Dicey Rule 3 (the Revenue Rule) applied so that the English courts did not have jurisdiction to entertain an action for the direct or indirect enforcement of a revenue law of a foreign state, with the result that at common law all of the claims were dismissed; (2) the Brussels-Lugano regime did not preclude the application of the Revenue Rule to dismiss claims against defendants domiciled in Brussels-Lugano Member States.
- At a consequential hearing, the WFO was continued and the claimant was granted permission to appeal on the Brussels-Lugano issue but refused permission to appeal on the Revenue Rule issue. The claimant applied for the continuation of the WFO against two of the respondents.
- The Commercial Court (Andrew Baker J) held:
  - Having refused permission to appeal, the court did not have jurisdiction to continue a WFO, pending an application to the CoA for permission to appeal. However, it could grant such an order for a short period to enable the claimant to apply to the CoA, which had jurisdiction to grant interim injunctions pending appeal. The ultimate aim was to arrange matters so that the CoA was best able to do justice between the parties. The only balance of hardship or injustice to consider was that involved in contemplating whether the WFO should remain in place during that short period.
  - In the circumstances, it was right simply to specify a deferred date on which the WFO expired, rather than state that it was to continue until some uncertain future date.

(C) Freezing order issues

(10) *AA v BB* [2021] EWHC 1833 (Ch) (2 July 2021)

- D1 was subject to a FO which contained the usual legal fees exception. D1 sought an order that the claimants could not pursue legal action against his lawyers in respect of legal fees over which the claimants claimed a proprietary interest.
- The Chancery Division (Miles J) refused the applications:
  - Where a defendant used claimed assets to pay their defence lawyer, the lawyer would be a purchaser for value.
  - The order sought was akin to a permanent injunction pre-emptively preventing the claimants from asserting actual or potential rights against D1's lawyers in respect of any fees paid.
  - The court would not be deciding how to "*hold the ring*" pending the determination of the parties' rights, but would be making a "*proleptic determination*" of the claimants' substantive rights. The court was in no position to do that.

(C) Freezing order issues

(11) *AA v BB* [2021] EWCA Civ 1017 (7 July 2021)

- The respondent companies (and their administrators) alleged substantial sums were misappropriated by the appellant directors. The appellants were made subject to criminal restraint orders (CROs) on the SFO's application. The respondents obtained (without notice to the appellants or the SFO) WFOs against the appellants. The WFOs were continued on the basis that, notwithstanding the existence of the CROs, there was a real risk of dissipation.
- The Court of Appeal (David Richards LJ; Simler LJ; Nugee LJ) dismissed the appeal:
  - The appellants had submitted that the existence of the prior CROs was not just relevant to whether a WFO should be granted, but was fatal to any suggestion of a real risk of dissipation. However, there was no principle that the court must *prima facie* refuse to make a civil or criminal restraint order where another restraint order was already in force. There was a fundamental difference between criminal restraint proceedings in the public interest and civil freezing orders which sought to protect private interests.
  - On the facts, the CROs were not an adequate substitute for a WFO as there was no provision for the respondents to be given notice if the CROs were about to be discharged or varied.
  - Serious consideration should be given to arranging joint management in cases involving related/overlapping restraint orders.

(C) Freezing order issues

(12) *JSC Commercial Bank Privatbank v Kolomoisky* [2021] EWHC 1910 (Ch) (8 July 2021)

- The defendants were founders of the claimant bank, and they were resisting having to disclose their Ukrainian/Russian assets under a WFO on the basis, *inter alia*, that they were political enemies of the leadership in Ukraine and Russia and disclosure would enable seizure of their assets there. Nugee J made a confidentiality club order (CCO) restricting disclosure of Ukrainian/Russian assets to the claimant's English legal team until the sealing of any order determining the defendants' application to set aside the WFO. The defendants' set-aside application was refused by the CoA (permission to appeal to the Supreme Court was refused).
- The court was required to determine whether the CCO remained in effect or should be set aside.
- The Chancery Division (Trower J) set aside the CCO:
  - The language of the CCO suggested that the intention was for it to be reviewed (rather than automatically terminated) when the order determining the set aside application was sealed.
  - A number of factors supported the setting aside of the CCO: it had significantly disrupted the claimant's case, its significant adverse consequences would become increasingly difficult to mitigate as trial drew closer, the claimant's solicitors were unable to take instructions from their own client's officers on matters that went to the heart of the claimant's substantive case and hampered important lines of enquiry. Further, the defendants had not established (beyond unsubstantiated speculation) a real risk of harm such as to justify the CCO's continuation.

(C) Freezing order issues

(13) *Barefoot Farm Ltd v Revuckas* [2021] EWHC 2423 (QB) (9 August 2021)

- The applicant brought deceit and constructive trust claims against R1/R2 for falsifying records for fake seasonal workers in order to obtain payments for their 'work'. The applicant obtained FO relief, and R1 asserted he had no assets valued at more than £1500. The applicant sought, *inter alia*, an order allowing the Land Registry to carry out a search in respect of the respondents.
- The Queen's Bench Division (Ellenbogen J) granted the application:
  - As regards the Land Registry search, the applicable test was whether the application had been made to assist a party to enforce its legal rights in proceedings, or whether it was an application to obtain access to the register for other reasons.
  - There was a 3-stage test: (1) whether the applicant had a reasonable prospect of success, (2) whether the respondents were unlikely to be able to satisfy a judgment from disclosed/known assets, (3) whether there were any competing reasons to refuse access to the proprietors' index.
  - The applicant had a strong arguable prospect of success. R1 claimed to have no assets over £1500, and R2 had no money so it was unlikely that they could satisfy a judgment from their known assets. As soon as was reasonably practical, a search should be made of the index of proprietors' names against the names of each respondent.

(C) Freezing order issues

(14) *Les Ambassadeurs Club Ltd v Yu* [2021] EWCA Civ 1310 (24 August 2021)

- The appellant obtained summary judgment against the respondent. The deputy judge refused a post-judgment FO on the basis that the respondent (who had UK and foreign assets) did not present a real risk of dissipation.
- The Court of Appeal (Nicola Davies LJ; Andrews LJ; Birss LJ) dismissed the appeal:
  - The focus should be on whether, on the particular facts and circumstances, the evidence objectively demonstrated a risk of unjustified dissipation which was sufficient to make it just and convenient to grant a freezing injunction. A theoretical, fanciful or insignificant risk would not meet that threshold. The appellant's contention that it was clear from the way in which the judge applied the test that he had set the threshold too high was unjustified.
  - The judge was prepared to draw the inference that the respondent had known or was reckless as to whether his cheques would be dishonoured, and rightly regarded that as a factor in favour of a risk of dissipation. However, the judge was not obliged to treat that as the key factor which made the case different from any other in which a debtor simply did not wish to pay until they had to.

Part (D) – Group claims

(1) **Re Fundao Dam Disaster** [2020] EWHC 2930 (TCC) (9 November 2020)

(2) **Test Claimants in the Franked Investment Income Group Litigation v HMRC** [2020] UKSC 47 (20 November 2020)

(3) **Weaver v British Airways Plc (No.2)** [2021] EWHC 520 (QB) (1 March 2021)

(4) **Municipio de Mariana v BHP Group Plc** [2021] EWCA Civ 1156 (27 July 2021)

(D) Group claims

- Large-scale, multi-party litigation can potentially become procedurally unwieldy and costly.
- One device used to effectively manage this is a Group Litigation Order (GLO) under CPR 19.11 for the case management of claims which (the court is satisfied) give rise to common or related factual or legal issues.
- GLOs can be applied for either by prospective claimants or defendants.
- GLOs are often seen in claims where a particular course of conduct affects a very large number of people – such as product liability claims, data breach claims, financial services claims and environmental claims. Affected persons can “opt in” to a GLO.
- Multiple claimant litigation firms may be involved in the management of a GLO but there is usually a “lead solicitor” appointed to enable cost/procedural efficiencies.
- GLOs require very active case management in order to avoid significant costs/delays in a number of areas, including pleadings, disclosure and trial management.

(D) Group claims

(1) *Re Fundao Dam Disaster* [2020] EWHC 2930 (TCC) (9 November 2020) [see also case (4)]

- D1 and D2 were respectively English and Australian companies that were part of the ownership structure of a company that operated (through a JV vehicle) a dam in Brazil. The dam collapsed in 2015 causing catastrophic damage.
- In Brazil, individual and group claims (CPAs) were underway against the dam's owners and operators. One of the CPAs had been settled under an agreement (subsequently annulled) which aimed to compensate all those eligible. A further CPA had been initiated on the basis that the settlement agreement had not covered all damage. Compensation was being paid under the settlement agreement (which was being renegotiated).
- The English proceedings involved more than 200,000 claimants. D1/D2 sought to have them struck out as an abuse of process (or stayed for various reasons).
- The Technology & Construction Court (Turner J) granted the application:
  - The claims were an abuse of process and would be struck out. Allowing them to continue would be to permit closely related group claims to proceed in parallel in two jurisdictions, with many of the same claimants seeking identical remedies in each. There was an acute risk of irreconcilable judgments that could not be ignored.
  - Further, the time, cost and duplication of effort would be considerable; cross-contamination of the proceedings would lead to chaos in the conduct of the litigation in both jurisdictions; and the English claims would be "*irredeemably unmanageable*".

(D) Group claims

(2) *Test Claimants in the Franked Investment Income Group Litigation v HMRC* [2020] UKSC 47 (20 November 2020)

- In proceedings seeking the restitution of tax paid under a mistake of law, the taxpayers sought to avoid a limitation bar by relying on Section 32(1)(c) LA 1980 to postpone commencement of the limitation period until the claimant "*could with reasonable diligence have discovered [the mistake]*". On a preliminary reference, the CJEU decided that the tax regimes in question were contrary to EU law and so the judge allowed some (but not all) of the claims.
- On appeal, an issue arose as to whether Section 32(1)(c) LA 1980 applied to mistakes of law as well as mistakes of fact. The taxpayers argued that HMRC were barred from raising the argument that Section 32(1)(c) LA 1980 did not apply to mistakes of law, on the grounds of *res judicata*, estoppel or abuse of process.
- The Supreme Court (Lord Reed; Lord Hodge; Lord Lloyd-Jones; Lord Briggs; Lord Sales; Lord Hamblen; Lord Carnwath) (by majority) partially allowed HMRC's appeal:
  - Section 32(1)(c) LA 1980 applied to claims for the restitution of money paid under a mistake of law, with time beginning to run when the claimant discovered, or could with reasonable diligence have discovered, their mistake in the sense of recognising that they had a worthwhile claim.
  - HMRC were not barred from now raising the argument that Section 32(1)(c) LA 1980 did not apply to mistakes of law, whether on the grounds of *res judicata*, estoppel or abuse of process.

(D) Group claims

(3) *Weaver v British Airways Plc (No.2)* [2021] EWHC 520 (QB) (1 March 2021)

- In a previous decision ([2021] Costs LR 121) the court refused to allow potential claimants any sum for advertising in the "British Airways Data Breach Group Litigation". The court had to consider whether, in fixing costs budgets for individual claimants, whether £624 per litigant was reasonable to cover "round robin" updating letters claimed at 1 minute of lawyers' time.
- The Queen's Bench Division (Saini J) held:
  - An approach which multiplied the claimed average unit cost of a round robin letter by the number of individual claimants, as if a unit cost would in fact be incurred in the sending of a standard letter, was neither reasonable nor proportionate.
  - When all that was required was "keystroke work" to enable the mailing of drafted letters to claimants whose details were already electronically stored, the claimable allowance worked out at nil. There would be no allowance for such letters in individual costs budgets.

(D) Group claims

(4) *Municipio de Mariana v BHP Group Plc* [2021] EWCA Civ 1156 (27 July 2021) [see also case (1)]

- Following the striking out of the English proceedings as "*irredeemably unmanageable*" and an abuse of process, an appellate judge refused permission to appeal. The claimants argued that the appellate judge had failed to grapple with their arguments, including that there was no legal basis to strike out proceedings as an abuse of process on the grounds of "*irredeemable unmanageability*".
- The Court of Appeal (Sir Geoffrey Vos MR; Underhill LJ; Carr LJ) granted permission to appeal:
  - The appellate judge had not addressed the point of principle that unmanageability was not a proper ground on which to strike out a claim for abuse of process and he had not addressed specific points raised in the claimants' particulars. The centrality of the finding of unmanageability to the first instance judge's reasoning meant that the claimants were entitled to expect that their reasons for challenging that finding would be specifically addressed.
  - The stringent test imposed by CPR 52.30 had been satisfied. The points that the appellate judge had failed to address went to the heart of the claimants' challenge to the decision on abuse of process. Had the appellate judge grappled with the relevant grounds, there was a powerful probability that he would have granted permission.

Part (E) – Competition claims

(1) **Secretary of State for Health & ors v Servier Laboratories Ltd** [2020] UKSC 44 (6 November 2020)

(2) **AB Volvo (PUBL) v Ryder Ltd** [2020] EWCA Civ 1475 (11 November 2020)

(3) **Mastercard Inc v Merricks** [2020] UKSC 51 (11 December 2020)

(4) **Phones 4U Ltd (in administration) v EE Ltd** [2021] EWCA Civ 116 (2 February 2021)

(5) **Allianz Global Investors GmbH v Barclays Bank Plc** [2021] EWHC 399 (Comm) (25 February 2021)

(6) **Merricks v Mastercard Inc** [2021] CAT 28 (18 August 2021)

(E) Competition claims

- In the UK, the Competition Appeal Tribunal (CAT) was established in 2002, *inter alia*, to hear damages claims that "follow on" from infringement decisions issued by competition regulatory authorities both in the UK and in Europe.
- Private actions for breaches of competition law are usually framed as actions for breaches of either:
  - Article 101 of the Treaty on the Functioning of the European Union (TFEU) or Section 2 of the Competition Act 1998 concerning a prohibition of anti-competitive conduct – examples of which might include price-fixing or market-sharing cartels, production/sales limitation agreements, bid rigging, exclusivity agreements, territorial restrictions, exchange of commercially sensitive information, or
  - Article 102 TFEU or Section 18 of the Competition Act 1998 concerning prohibition of an abuse of a dominant position – examples of which might include unfair purchase/selling prices, discriminatory treatment without objective justification, predatory pricing and refusals to supply essential items/information.
- The CAT often hears "collective proceedings" in large-scale matters, wherein a representative claimant brings a claim on behalf of an entire class of affected parties.

(E) Competition claims

(1) *Secretary of State for Health & ors v Servier Laboratories Ltd* [2020] UKSC 44 (6 November 2020)

- The General Court had upheld all but one of the findings of the Commission that Article 101 TFEU had been breached by the defendant, but annulled a finding of breach of Article 102 TFEU. Both the Commission and the defendants appealed. In the meantime, the defendants sought to rely in English proceedings on a number of the General Court's findings of fact, in order to make good their defence that the claimants had failed to mitigate their losses.
- The judge held that, as a matter of EU law, the General Court's conclusion that the Commission had not established that the relevant product market was limited to perindopril was *res judicata* and binding on him, but that the findings of fact on which the defendants sought to rely were not. The CoA dismissed the defendants' appeals. The defendants appealed, contending that the Supreme Court should refer to the CJEU for preliminary ruling the question whether the findings of fact on which the defendants sought to rely were binding in the English proceedings.
- The Supreme Court (Lord Reed; Lord Lloyd-Jones; Lord Briggs; Lord Sales; Lord Hamblen) dismissed the appeal and declined to make the reference sought:
  - The EU principle of absolute *res judicata* only applied to judicial decisions which had become definitive, either after all rights of appeal had been dismissed or after expiry of the time limits provided to exercise those rights.
  - There could be no definitive ruling on the definition of the relevant product market until the decision of the CJEU on the appeal was handed down.
  - As matters presently stood, the factual findings of the General Court on which the defendants sought to rely were not binding in the English proceedings pursuant to the EU principle of absolute *res judicata* because they were not yet definitive and, indeed, might never become definitive.

(E) Competition claims

(2) *AB Volvo (PUBL) v Ryder Ltd* [2020] EWCA Civ 1475 (11 November 2020)

- The Commission found the appellants had infringed Article 101 TFEU through collusive pricing arrangements concerning medium and heavy trucks. The respondents commenced 'follow-on' damage claims in England claiming they had bought trucks from the appellants at prices artificially inflated by unlawful conduct (as admitted in European proceedings).
- The CAT ordered a preliminary hearing as to whether it was an abuse for the appellants to deny or not admit facts they had previously admitted in order to settle an investigation into their infringing conduct. The CAT held, *inter alia*, that the appellants were precluded from denying facts which formed an essential basis of the Commission decision (to do so would breach Article 16 Regulation 1/2003).
- The Court of Appeal (Sir Geoffrey Vos C; Flaux LJ; Rose LJ) dismissed the appeal:
  - In the present case, it could not possibly have run counter to the EC's decision if the CAT had held that the non-essential facts to the EC decision had also been binding on the appellants, even if it would not have been a breach of Article 16 for the CAT to have held that such facts had been wrong.
  - It had not been a breach of the duty of sincere cooperation to have held that the admissions recorded in the EC decision had been binding on the appellants in national proceedings, even where those admissions had related to non-essential facts.
  - The whole of the EC decision had been a binding and final decision for the purposes of deserving protection from collateral attack pursuant to the abuse of process doctrine. Accordingly, the abuse of process doctrine had been properly engaged.

(E) Competition claims

(3) *Mastercard Inc v Merricks* [2020] UKSC 51 (11 December 2020) [see also case (6)]

- The CAT rejected an application for certification of a collective proceedings order under Section 47B CA 1998. The claimant were seeking to represent claims by all UK resident adult consumers of goods and services purchased from merchants accepting the defendants' payment cards during a 16-year infringement period. The CAT was obliged to consider factors set out in Rule 79(2) of the Competition Appeal Rules 2015, including whether the claims were "*suitable for an aggregate award of damages*".
- The CAT held that it had not been demonstrated that there would be available at trial sufficient data for all sectors across the whole infringement period for quantifying the merchant pass-on, and that the claimant did not propose to distribute any damages awarded in a way which would reflect the individual losses suffered by the members of the class. The CoA allowed the claimant's appeal.
- The Supreme Court (Lord Briggs; Lord Sales; Lord Leggatt; Lord Thomas) dismissed the further appeal:
  - Where aggregate damages were to be awarded, Section 47C CA 1998 removed the ordinary requirement for the separate assessment of each claimant's loss. Accordingly, the CAT's decision that it was only permissible to make an award of aggregate damages to the members of the class in a way which sought to compensate them for their individual losses had been an error of law.
  - The CAT misconstrued Rule 79(2) of the Competition Appeal Tribunal Rules 2015 by treating the suitability of the claims for aggregate damages as if it were a hurdle.

(E) Competition claims

(4) *Phones 4U Ltd (in administration) v EE Ltd* [2021] EWCA Civ 116 (2 February 2021)

- The claimant brought a competition claim against the defendant alleging unlawful collusion to cease trading with the claimant. At a CMC the judge ordered each defendant to request its employees to give IT consultants access to personal mobile phones and e-mails to search for work-related communications relating to the relevant defendant's business, which would then be passed to that defendant for a disclosure review to be undertaken pursuant to CPR Part 31.
- The Court of Appeal (Sir Geoffrey Vos MR; Asplin LJ; Green LJ) dismissed the defendants' appeals:
  - CPR Part 31 provided a simple and effective procedure for a party to make standard disclosure by undertaking a reasonable search for adverse documents. It was expressly written in broad terms to allow the court maximum latitude to ensure that, as far as possible, relevant documents were before the court at trial to enable it to reach just and fair decisions on the issues.
  - Although the court could only compel third parties to do anything by an order under CPR 31.17 or another procedure to which they were made a party, that did not mean that the court could not, as a matter of principle, require the parties to the proceedings to make requests of third parties by making a search for relevant documents. In the present case, the order was within the terms of CPR 31.5(8)(a).
  - It had not been inappropriate or disproportionate to involve a third party, or for that third party to be an IT consultant, rather than an independent solicitor, or for the order to have envisaged voluntary access being given to devices and e-mails, or for the order to have lacked an express provision giving liberty to apply.

(E) Competition claims

(5) *Allianz Global Investors GmbH v Barclays Bank Plc* [2021] EWHC 399 (Comm) (25 February 2021)

- More than 170 claimants sought damages from banks for alleged anti-competitive FX manipulation between 2003 and 2013 in breach of Article 101 TFEU and Section 2 CA 1998. The banks denied the allegations, but also asserted that to the extent that they were proved and loss was established, the claimants had 'pass-on mitigated' their loss by passing on loss to customers. The claimants applied for strike out.
- The Commercial Court (Sir Nigel Teare) refused the application:
  - The banks' argument that the claimants should give credit for losses they had passed on to their customers would not be struck out.
  - The plea of pass-on mitigation could only succeed if the person to whom the loss had been passed on had their own right to sue in respect of that loss, and it was arguable that the customers still had rights to sue under (i) contract law, (ii) trust law, (iii) company law, and/or (iv) partnership law.

(E) Competition claims

(6) *Merricks v Mastercard Inc* [2021] CAT 28 (18 August 2021) [see also case (3)]

- Following the Supreme Court's remission of the matter to the CAT, Mastercard no longer opposed certification of the collective proceedings order, but disputed the applicant's claim for compound interest and an application to amend the claim form to extend the class to include persons who had died before it was issued.
- The Competition Appeal Tribunal (Roth J; Jane Burgess; Professor Waterson) held:
  - The applicant had not put forward a credible and plausible method for estimating the extent of the overcharge that would have been saved or used to reduce borrowings, which was the essential basis of the claim to compound interest as a distinct head of loss. That head of claim was not suitable for an aggregate award and could not fairly be resolved in collective proceedings.
  - The claim form had estimated the class numbers on the express basis that deceased persons were excluded. Although there was no difficulty in principle in having a class definition that included the estates of deceased persons, the applicant's proposed draft amendment did not include such a definition but simply treated deceased persons as individuals within the class.

Part (F) – Litigation funding

(1) Hall v Saunders Law Ltd [2020] EWHC 404 (Comm) (27 February 2020)

(2) Paccar Inc v Road Haulage Association Ltd [2021] EWCA Civ 299 (5 March 2021)

(3) Tonstate Group Ltd v Wojakovski [2021] EWHC 1122 (Ch) (30 April 2021)

(4) Harbour Fund III LP v Kazakhstan Kagazy Plc [2021] EWHC 1128 (Comm) (5 May 2021)

(5) Re Gertner [2021] EWHC 1404 (Ch) (21 May 2021)

(6) Acupay System LLC v Stephenson Harwood LLP [2021] EWHC B11 (Costs) (25 June 2021)

(F) Litigation funding

- Litigation funding involves a third party financing some or all of a party's legal expenses in a dispute in exchange for a share of the recovered proceeds
- Legal claims are expensive both to bring and to defend. Litigation Funding may be a useful way for a party to mitigate some of the risks involved in conducting litigation.
- The extent to which a Litigation Funder exerts (or has a right to exert) influence or control over a party's conduct of litigation has been an important issue for the courts to consider in cases where:
  - a funder takes steps to recover monies it has paid out, or
  - a successful party takes steps to enforce costs orders against the unsuccessful counterparty's funder.

(F) Litigation funding

(1) *Hall v Saunders Law Ltd* [2020] EWHC 404 (Comm) (27 February 2020)

- The claimant commenced proceedings in both his own right and as assignee of an insolvent litigation funder. The claimant contended that the defendants had not communicated to the funder various pessimistic views expressed by counsel as to the prospects of success of the funded action in breach of a tripartite funding agreement.
- The Commercial Court (Richard Salter QC) held:
  - There was no proper basis for the breach of contract claims made against the solicitors.
  - It was inherently unlikely that sensible commercial parties would have set up an arrangement in which conflicting fiduciary duties of the kind argued for had been likely to arise. No fiduciary duties were owed to the claimant.
  - There was no prospect of success and no other compelling reason why the case should be disposed of at trial rather than on a summary basis.

(F) Litigation funding

(2) *Paccar Inc v Road Haulage Association Ltd* [2021] EWCA Civ 299 (5 March 2021)

- The applicants for collective proceedings orders were funded by third party funders (TPFs) under litigation funding agreements (LFAs) which provided that the TPFs' only involvement would be to provide funding and that they were to be remunerated by a share of any damages recovered.
- The respondents contended the funding agreements were unenforceable "*damages-based agreements*" (DBAs) within Section 58AA CLSA 1990 as agreements between persons providing "*claims management services*" and the recipients of those services. "*Claims management services*" was defined in the Compensation Act 2006 as advice or other services, including financial services or assistance, in relation to the making of a claim.
- The CAT held that the funding agreements were not DBAs.
- The Court of Appeal (Henderson LJ; Singh LJ; Carr LJ) held:
  - The LFAs did not come within the definition of a DBA in Section 58AA(3) CLSA 1990 and were therefore enforceable.
  - The phrase "*claims management services*" in Section 4(2) of the Compensation Act 2006 was interpreted as applying in the context of the management of a claim, as opposed to pure funding, so as to exclude the LFAs.

(F) Litigation funding

(3) *Tonstate Group Ltd v Wojakovski* [2021] EWHC 1122 (Ch) (30 April 2021)

- Post-judgment, solicitors obtained a charging order over shares held by a client for whom they had acted in litigation. The litigation claimants sought disclosure of information relating to the funding of solicitors who acted for that client in family proceedings and bankruptcy proceedings (contending that failure to do so breached an FO against the client).
- The Chancery Division (Zacaroli J) partially granted the applications:
  - Their damages-based agreement (DBA) did not entitle a solicitors' firm to a charging order under Section 73 of the Solicitors Act 1974 over shares their client retained as part of a litigation settlement. The DBA entitled the solicitors to payment from any proceeds of the litigation, defined as any benefit arising out of it, but the client's ownership of the shares pre-dated the litigation and was not a benefit derived from them.
  - The claimants' disclosure as sought was "*strikingly aggressive*", but that did not disentitle them from obtaining orders in order to police the FO.

(F) Litigation funding

(4) *Harbour Fund III LP v Kazakhstan Kagazy Plc* [2021] EWHC 1128 (Comm) (5 May 2021)

- In 2015, the parties entered into an agreement for the claimant to fund the defendants' litigation against their former officers. Under the agreement, "*legal costs*" were the reasonable costs incurred in the funded proceedings consistent with an agreed budget and any accepted variation thereto. The claimant paid £4.6 million pursuant to successive purported variations. In 2016, D2 was declared bankrupt in Kazakhstan. The defendants were successful in the funded proceedings and were due, *inter alia*, a payment of US$300,000. In 2018, the claimant exercised its contractual rights to take control over conduct of the proceedings to enforce the judgment.
- The Commercial Court (Moulder J) dismissed the claims seeking recovery of monies paid on the basis of breach of contract and unjust enrichment:
  - The various variations to the agreement had been entered into without actual authority under Kazakh law and without apparent or ostensible authority.
  - The 'variation payments' were not made by the claimant in connection with the preservation of its rights under the agreement, and so were not "*legal costs*". Payments made by the claimant after it took control of enforcing the judgment were also not incurred in connection with the enforcement or preservation of any rights under the agreement, and so also did not constitute "*legal costs*".
  - The claimant was not entitled to claim damages for any breaches of express or implied terms of the agreement.
  - The claimants' unjust enrichment claim also failed – any such enrichment had not been shown to be 'unjust'.

(F) Litigation funding

(5) *Re Gertner* [2021] EWHC 1404 (Ch) (21 May 2021)

- The applicant was due £330,000 plus interest from the respondent (which its evidence showed it could not pay) in the underlying litigation. The applicant sought a third party costs order (TPCO) under CPR 46.2 against the respondent's litigation funder on the basis that its funding agreement showed the funder had absolute control over the conduct of the litigation. The litigation funder was placed into voluntary liquidation on the same day the application was served on it.
- The Chancery Division (Marcus Smith J) granted the TPCO application:
  - Under Section 51(3) SCA 1981, the court had full power to determine by whom, and to what extent, costs should be paid.
  - In general, the discretion to order a non-party to pay costs would not be exercised against pure funders, but could be exercised against those who went beyond the mere funding of litigation.
  - In the instant case, that test had been clearly exceeded. Through the funding agreement, the funder had a massive degree of control over the litigation. Although the extent to which that power had in fact been exercised was unclear, the test for imposing a TPCO had been met.

(F) Litigation funding

(6) *Acupay System LLC v Stephenson Harwood LLP* [2021] EWHC B11 (Costs) (25 June 2021)

- The client retained the law firm in August 2018 to represent it in large-scale litigation and negotiated a discounted hourly rate for 3 months. After 3 months, the law firm continued to charge the discounted rates. In 2019, the parties entered into a CFA whereby the client would continue paying the discounted rates but would pay an uplift in the event of a "*successful outcome*" or a 20% success fee for an early escape from the litigation. The client terminated the CFA, which entitled the firm to recover payment for work done. The rates charged were 11% higher than the pre-CFA rates.
- The client pleaded that the agreement was not a CFA, but a CBA within the meaning of Section 59(1) of the Solicitors Act 1974, and that its terms were unfair and unreasonable.
- The Senior Courts Costs Office (Costs Judge Leonard) determined the preliminary issue in favour of the defendant:
  - The test for fairness and reasonableness was that in *Re Stuart ex parte Cathcart* [1893] 2 QB 201. Informed consent or breach of fiduciary duty might be relevant to whether a CBA was unfair, but they were distinct concepts: fairness was not generally relevant to breach of fiduciary duty, nor was a breach of fiduciary duty determinative of the issue of fairness.
  - The terms of the CFA were consistent with it being a CBA except that the agreement expressly stated that it was not a CBA. Solicitors could not contract out of the Solicitors Act 1974 but parties to a contract of retainer were entitled to choose which of the two mutually exclusive statutory regimes offered by Sections 59(1) and 70 would apply. It did not follow that an agreement for remuneration within the wide range of options provided for by Section 59(1) of the Solicitors Act 1974 had to be a CBA even if the agreement said it was not.
  - In the instant case, the agreement was a CFA. The disputed bills would proceed to detailed assessment under Section 70 of the Solicitors Act 1974.

Part (G) – New disclosure and witness statement regimes

(1) McParland & Partners Ltd v Whitehead [2020] EWHC 298 (Ch) (14 February 2020)

(2) Castle Water v Thames Water Utilities [2020] EWHC 1374 (TCC) (29 May 2020)

(3) MAD Atelier International BV v Manes [2021] EWHC 1899 (Comm) (7 July 2021)

(G) New disclosure and witness statement regimes

Disclosure

- The new disclosure regime for the Business & Property Courts has (since 1 January 2019) brought about key changes in disclosure in English commercial litigation.
- The intention was to reduce the scope (and cost) of disclosure by focusing on a 2-stage process: (1) Initial Disclosure (requiring disclosure of documents along with statements of case); (2) Extended Disclosure (5 disclosure models A-E from which the court may order one or more).
- Parties must preserve documents in their control, disclose “known adverse documents”, use reasonable efforts to avoid ‘document dumping’.
- Legal representatives must (amongst other duties) obtain written confirmation from clients that they have taken steps to preserve documents, including (if necessary) suspending internal policies concerning document deletion/destruction

Witness statements

- New witness statement regime (CPR PD57AC/Statement of Best Practice) aims to improve efficacy/reliability of witness statements
- Statements to be limited to matters of which witness has “personal knowledge” and which are required to be determined by factual evidence
- Statement must include description of how it was prepared (e.g. face-to-face)
- Both witness and relevant legal representative must confirm compliance with new requirements

(G) New disclosure and witness statement regimes

(1) *McParland & Partners Ltd v Whitehead* [2020] EWHC 298 (Ch) (14 February 2020)

- The Chancery Division (Sir Geoffrey Vos C) gave guidance, *inter alia*, that:
  - The disclosure pilot (DP) provisions for the Business & Property Courts in CPR PD51U are intended to apply across a wide range of cases.
  - In every case the type of extended disclosure given must be fair, proportionate and reasonable.
  - Issues for disclosure are very different from issues for trial, and should be driven by the relevance of the categories of documents in the parties' possession to the contested issues before the court.
  - A high level of co-operation between the parties and their representatives in agreeing the issues for disclosure and completing the disclosure review document is required
  - It is entirely unacceptable to use the provisions for litigation advantage and that any party attempting to do so will face serious adverse costs consequences.

(G) New disclosure and witness statement regimes

(2) *Castle Water v Thames Water Utilities* [2020] EWHC 1374 (TCC) (29 May 2020)

- The Technology & Construction Court (Stuart-Smith J) gave guidance on CPR PD51U:
  - As regards what was "*reasonable and proportionate*" (as defined in paragraph 6.4 of CPR PD51U), a party had to undertake reasonable and proportionate checks to see if it had or had had known adverse documents. If it had, then the party had to undertake reasonable and proportionate steps to locate them.
  - Provided that the party made appropriate checks when proceedings had been commenced against it and the case was formulated by reference to the pleadings, that should cause the party to discharge its initial obligation to disclose known adverse documents.
  - However, circumstances might change which could raise the need for a party to review whether it had documents that were not previously known adverse documents but now were.
  - CPR PD51U made clear that if a party became aware of adverse documents after its initial checks and disclosure, it was under an obligation to disclose them, including where that awareness arose in the course of searches directed by the court.

(G) New disclosure and witness statement regimes

(3) *MAD Atelier International BV v Manes* [2021] EWHC 1899 (Comm) (7 July 2021)

- D applied to strike out passages of witness statements served on behalf of C concerning quantum, namely the hypothetical profits that were likely to have been made "but for" the termination of a JVA. In particular, D relied on paragraphs 3.1(1) and 3.1(2) of CPR PD57AC.
- The Commercial Court (Sir Michael Burton) refused the application:
  - CPR PD57AC did not change the law as to admissibility of evidence or overrule the directions given by the previous authorities as to what might be given in evidence.
  - CPR PD 57AC was valuable in addressing the wastage of costs incurred by the provision of absurdly lengthy witness statements merely reciting the contents of the documentary disclosure and commenting on it. However, it was not intended to affect the issue of admissibility.
  - The evidence of C's witnesses, which D sought to exclude, might turn out to be self-serving or unreliable, particularly if not supported by documents, but it was not inadmissible and was either itself factual evidence or evidence of opinion given by those with knowledge of the facts and by reference to the factual evidence which they each gave. The passages in question were all admissible.

Part (H) – Recent Supreme Court decisions

(1) Okpabi v Royal Dutch Shell [2021] UKSC 3 (12 February 2021)

(2) Matthew v Sedman [2021] UKSC 19 (21 May 2021)

(3) Pakistan International Airline Corp v Times Travel (UK) *Ltd* [2021] UKSC 40 (18 August 2021)

(H) Recent Supreme Court decisions – parent company duty of care

(1) *Okpabi v Royal Dutch Shell* [2021] UKSC 3 (12 February 2021)

- The claimants were the victims of an environmental disaster caused by a leaking pipeline operated by D2 (a Nigerian subsidiary of D1, an English Plc). They commenced negligence proceedings claiming that D2's efforts to prevent oil leaks were inadequate and in breach of a duty of care owed to them by both D2 and D1 (on the basis of its high degree of control over D2). D1 was used as the anchor defendant.
- The defendants challenged jurisdiction, contending that there was no arguable duty of care on the part of D1 to the claimants. In the absence of any action against D1, there was no connection between England and the claims against D2 on which to found the court's jurisdiction over D2.
- At first instance, the judge held there was no arguable duty of care. The CoA held that the judge had erred in his approach to the evidence but (by majority) agreed (taking into account fresh evidence) there was no arguable duty of care.
- The Supreme Court (Lord Hodge; Lord Briggs; Lord Hamblen; Lady Black) allowed the appeal:
  - Instead of focusing on the pleaded case and whether that disclosed an arguable claim, the CoA had been drawn into conducting a mini trial that led it to making determinations in relation to contested factual evidence.
  - The claimants' pleaded case had not been shown to be demonstrably unsupportable and established that there were real issues to be tried.

(H) Recent Supreme Court decisions – limitation / ‘midnight deadline’

(2) *Matthew v Sedman* [2021] UKSC 19 (21 May 2021)

- On 5 June 2017, the claimants brought negligence proceedings against the defendant trustees alleging a failure to make a claim on behalf of the trust under a court-sanctioned scheme of arrangement by the deadline of midnight on 2 June 2011.
- The defendants contended the claim had been brought outside the 6-year limitation period. The claimants contended that the cause of action accrued during part of 3 June 2011, which day was therefore not to be counted for limitation purposes, with the consequence that the claim had been brought in time, having been issued on the first working day after the expiration of the limitation period on Saturday 3 June 2017.
- At first instance, the judge found that the cause of action accrued at the first moment of 3 June 2011 but that that day would nevertheless be counted for limitation purposes. The CoA held that the cause of action accrued at the very end of 2 June 2011 so that 3 June 2011 fell to be included in the limitation period.
- The Supreme Court (Lord Hodge; Lady Arden; Lord Sales; Lord Burrows; Lord Stephens) dismissed the appeal:
  - The general rule which directed that the day of accrual of a cause of action should be excluded from the reckoning of a limitation period was that the law rejected a fraction of a day. The justification for that rule was that it would prevent part of a day being counted as a whole day for the purposes of calculating a limitation period, which would have prejudiced claimants and interfered with the time periods stipulated by the LA 1980.
  - However, ‘midnight deadline’ cases constituted an exception to the general rule, with the consequence that the whole day which followed a midnight deadline was not to be excluded from the calculation of a limitation period. In the instant case, 3 June 2011 should be included in the computation of the limitation period since it was a whole day, and, accordingly, the claim was out of time.

(H) Recent Supreme Court decisions – economic duress

(3) *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 (18 August 2021)

- The respondent airline contracted for the appellant to act as its ticketing agent. The appellant's business was largely dependent on its ability to sell the respondent's tickets. Many other agents of the respondent had sued to recover allegedly unpaid commissions but the appellant (under pressure from the respondent) did not join in. In September 2012, the respondent gave notice that the contract would be terminated at the end of October 2012, and the appellant's normal ticket allocation was suddenly cut. Under the threat of the respondent not continuing with their contractual relationship, the appellant agreed new terms and waived any claims it might have for unpaid commission.
- The appellant subsequently brought proceedings to recover unpaid commission, arguing that it could rescind the new agreement for lawful economic duress. The trial judge agreed, but also found that the respondent had genuinely believed that the disputed commission was not due. The CoA allowed the respondent's appeal on the ground it had not acted in bad faith.
- The Supreme Court (Lord Reed; Lord Hodge; Lord Lloyd-Jones; Lord Kitchin; Lord Burrows) dismissed the appeal:
  - There were two circumstances in which the English courts recognised lawful act duress: (1) where a defendant used their knowledge of the criminal activity of the claimant (or a person close to them) to obtain a personal benefit from them with express or implicit threats; (2) where the defendant, having exposed himself to a civil claim by the claimant, deliberately manoeuvred the claimant into a position of vulnerability by illegitimate means and so forced him to waive his claim.
  - The reduction of the ticket allocation was not (by itself) illegitimate pressure. There had been no findings that the respondent had used any reprehensible means to manoeuvre the appellant into a position of increased vulnerability. The respondent's genuine belief that it was not liable to pay the disputed commission further supported the view that its behaviour was not reprehensible.

Part (I) – Concluding Remarks

- As the cases demonstrate, it is vital for parties to ensure that they identify the evidential basis for invoking a Gateway for jurisdiction, as well as serve out of the jurisdiction promptly.
- It remains to be seen whether the changes to the Disclosure and Witness Statement regimes have the desired impact of achieving more efficiency in the determination of disputes.