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Relief against sanctions

The ultimate penalty that the court may impose on a party to High Court proceedings for non-compliance with procedural rules or practice directions is to strike out its case. Such a penalty has existed in English procedural rules for well over 100 years and was retained by the Civil Procedural Rules ("**CPR**") on their introduction in 1998. However, the attitude towards the use of the penalty has varied over time depending on the approach adopted by the court towards case management, its perceived role in the litigation process and its attitude towards non-compliance with procedural rules and orders.

Under the Rules of the Supreme Court which were introduced in 1965, any failure to comply with the rules was generally treated as an irregularity and would rarely result in claims being struck out. The focus was on trying cases on their merits, as and when the parties got the case to trial. Defendants would not seek to have cases struck out for want of prosecution, out of concern that this might provoke the Claimant into making further progress with the claim, with any prior delay or default being readily forgiven. The policy of the court was non-interventionist; it was left to the parties to decide how to resolve their disputes.

The introduction of the CPR, which included a duty on the courts to manage cases actively, together with a new duty imposed on the parties to assist the court in furthering the Overriding Objective, created an expectation of increased judicial intervention to prevent non-compliance with rules and timetables. However, notwithstanding that the Overriding Objective – of trying cases justly and at proportionate cost – expressly referred to enforcing compliance with rules, practice directions and orders, in practice, the courts continued to tolerate repeated non-compliance during the early years after the implantation of the CPR. This resulted in a proliferation of interim applications and appeals over the consequences of non-compliance, as parties sought guidance on the extent of the change in culture implemented by the CPR. Unless a fair trial was no longer possible, or there were repeated breaches amounting to a total disregard of court orders, cases were rarely struck out for procedural default.

In 2009, Lord Justice Jackson was charged with conducting a review of litigation costs. In the course of his investigations, he recognised that the slack approach to compliance with procedural orders was one of the key causes of excessive litigation costs. The reforms introduced as a result of his review came into force on 1 April 2013. A key objective of the reforms was "to promote access to justice as a whole by making costs of litigation more proportionate". It was recognised that a necessary ingredient to securing that objective was to require judges to take a more robust and interventionist approach to case management and to make sure that timetables were observed.

A key component to facilitate this approach was the replacement of CPR, r 3.9, which governed the circumstances in which the court should grant relief from sanctions. The new rule provides that on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate cost, and (b) to enforce compliance with rules, practice directions and orders.

The Court of Appeal in *Mitchell v News Group Newspapers Ltd* [2013] sent out a clear message that the reforms of 2013 had brought in a newly robust approach to rule compliance. Rather than focusing on the interests of justice in the individual case, judges were required to have regard to the broader implications of allowing the consequences of non-compliance to infect the broader civil justice system. Judges had to recognise the time and resources aspects of administering civil justice, and consider the needs and interests of all court users when managing individual cases.

Regrettably, the message contained in the Mitchell guidelines was received more by those seeking to take advantage of the new approach and who saw it as an opportunity to have their opponents' cases struck out (or as in the case of Mitchell, made too expensive to fight due to cost-recovery penalties), and a tidal wave of satellite litigation flooded the courts, creating numerous decisions, many of which appeared contradictory and inconsistent.

At that time the Judiciary and the architects of the Civil Procedural Rules should have recognised that the punishment metered out for non-compliance was inappropriate for the crimes concerned (in terms of breaches of procedural rules). Instead of simply penalising the offenders, the sanctions often gave one party either total victory or a significant advantage in the litigation, irrespective of the merits of the parties' respective cases. Some commentators consider that the judge's role is to decide the substantive issues in dispute and that they should not be concerned with procedural issues. To many, there is something rather incongruous about judges seeking to create new lines of jurisprudence about what should be simple procedural rules. To others, there is something fundamentally wrong about judges denying parties access to justice due to technical breaches of bureaucratic procedural rules. Some would go so far as to say that to deny a party relief against sanctions for breach of procedural rules places the integrity of a system, fine-tuned to determine complex issues of law and fact, into jeopardy.

If it is the current policy of the court actively to manage cases, to set the pace of the litigation and to specify required levels of compliance with rules and timetables then, instead of making issues of non-compliance matters between the parties to the litigation, these should be dealt with as issues between the defaulting party and the court's case managers. In most cases, other parties to the proceedings should have no interest in the penalties meted out for non-compliance. Active case management should involve specialist case managers (not High Court Judges), ensuring compliance with the rules and timetables, and whose task would be to determine the reasons for non-compliance, and to penalise the culprit in a manner that does not jeopardise their prospects in the proceedings (or at least does not enhance their opponent's prospects). For example, a system of fines imposed either on the defaulting party or its legal advisor for non-compliance, administered by a dedicated team of case managers, would soon gain the attention of the parties and their legal advisors. A by-product would be some much-needed increased revenue for the courts.

Sadly, in 2014 the Court of Appeal failed to recognise the problem with the current system. It took a narrow view of the issue, namely that: (i) the court has these ultimate sanctions that it must use from time to time to ensure its orders are respected; (ii) however, how can it formulate a universally acceptable test to define the circumstances in which the ultimate sanction should be imposed; and (iii) how can it apply this test consistently to ensure parties are treated fairly and predictably? *In Denton v TH White Ltd and another, Decadent Vapours Ltd v Bevan and others and Utilise TDS Ltd v Davies and another* [2014], the Court of Appeal agreed to hear three appeals together on the topic of relief from sanctions and invited intervention from the Law Society and the Bar Council, in order to clarify and amplify the Mitchell guidelines, which it said had been misunderstood and misapplied by some courts.

In *Denton*, new guidance in the form of a three-stage test replaced the *Mitchell* guidelines. In future, on any application for relief against sanctions, the court must:

(i) Identify and assess the seriousness of the non-compliance. Is the breach "serious or significant"?

(ii) If it is, consider why did the default occur?

(iii) Consider all the circumstances of the case in order to deal with the application "justly", including (a) the need for litigation to be conducted efficiently and at proportionate cost, and (b) the need to enforce compliance with rules, directions and court orders.

The Court of Appeal also issued a number of warnings to litigants and lawyers to co-operate and comply in order to:

(i) agree requests for relief from sanctions where a failure is neither serious or significant, there is good reason for it, or it is otherwise obvious that relief is appropriate. Contested applications for relief should be exceptional;

(ii) agree limited but reasonable requests for time extensions of up to 28 days; and

(iii) not take advantage of opponents' mistakes to try and obtain an advantage. The court will more readily penalise opportunism with heavy costs sanctions.

However, for many, the possibility of obtaining a swift and successful end to otherwise lengthy, uncertain and expensive litigation (especially where their case may be weak on the merits) still remains too good an opportunity to miss. Two cases in particular in 2017 may have given some encouragement to any parties in litigation proceedings with a difficult case and a disorganised opponent to take advantage of an opponent's breach and to oppose the application for relief, or at least assist the court by presenting all the relevant cases, when it comes to consider the application.

<u>Lakhani v Mahmud [2017]</u>

In *Lakhani,* the High Court dismissed the Defendants' appeal from the Central London County Court, rejecting their application for relief from sanctions for failing to comply with a case management order relating to the filing of costs budgets. This was a relatively minor property dispute. The parties were ordered to exchange costs budgets 21 days before the Case Management Conference ("**CMC**"). The Claimant served a budget on the last day of the 21-day period, claiming about £100,000. The Defendant prepared its own budget for £50,000 which was served the next day, although out of time such that CPR 3.14 applied. This provides that unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees. Effectively the party in breach is unable to recover any of its lawyer's fees if successful at trial, unless the court grants relief against the sanction.

Pending the CMC, the parties reached a measure of agreement on budgets – further, it was acknowledged that the Claimant had not been prejudiced by the Defendant's conduct and had "ample time to consider and comment". *Significant reductions* were made to the Claimant's budget at the CMC but, given the Defendant's failure to comply with CPR 3.14, the court had to consider whether relief should be given to the Defendant. The 45-minute CMC turned into half a day of argument about relief from sanctions. The Defendant's application for relief was made only the day prior to the hearing, presumably because the Claimant had apparently dropped its challenge to the breach of CPR 3.14. The three-stage test, established in *Denton* was discussed in order to assess the seriousness of the costs-budgeting breach, as well as the reasons for it and all other contextually relevant facts.

In his judgment, the judge concluded that:

"*[T]his is not a trivial breach. It is a serious breach. It is a breach which has imperilled the proper conduct of this litigation. It has reduced the time available for these parties to conduct themselves in the way that is expected by the Rules to narrow the issues on the costs budget. It has further created an environment in which the attention of both parties, by the default of the Defendants, has been distracted onto a matter which is irrelevant to those costs budgeting issues*."

The judge refused an application to grant the Defendant relief from sanctions, which was made just a day before the hearing:

The Defendant appealed to the High Court, arguing that the failure was a "minor default" which did not significantly affect the procedure, and that the County Court (i) erred in approach in its failure to take into account such matters in assessing the seriousness of the breach, and (ii) gave too little weight to the fact that there were innocent reasons for the breach.

In considering whether the County Court decision was disproportionate, that judge noted that the "*decision would operate to deprive the Defendant of its budgeted costs in the event that it succeeded at trial although, if the Claimant succeeded, the decision would have no direct financial adverse impact on the Defendant. It just gave the Claimant the comfort that it could litigate without significant risk of having to pay the Defendants' costs. As such, the judgment was hard to criticise as disproportionate*".

The judge recognised that a delay of one day for filing "*might not be regarded as terribly serious*". However, the judge was conscious that time which "*should have been devoted to agreeing costs*" had been wasted in debating whether and to what extent the Defendant had been in breach of CPR 3.14. The High Court judge concluded that:

"*This seems to me a case on the borderline of sufficient seriousness to warrant refusal of relief from sanctions*."

When tackling the reasoning behind the Defendant's tardiness, the judge described their budget preparation as "*work undertaken at the last minute*", and concluded that:

"*In my judgment, the approach taken [by the County Court Judge] did not involve errors of principle and was not wrong on the facts. The conclusion was open to him in the exercise of his discretion and is of a kind which the Court of Appeal has recommended should normally be upheld. The decision was, perhaps, on the tougher end of the spectrum as to substance and on the leaner end of the spectrum as to analysis. But the Defendants have not been deprived of a trial altogether. Had that been the consequence, the situation would have merited more detailed scrutiny than the judge gave it.*

"*Nor is this a case in which the Claimants were using the rules as a tripwire. The Claimants' solicitors pointed out correctly and promptly following late service of the Defendants' costs schedule that without an application for relief from sanctions the consequences of CPR 3.14 would follow. They were not obliged to consent in advance to an application for relief from sanctions which had not been made and which was not provided to them until the day of the hearing, giving them almost no opportunity to address it fully*."

Redbourn Group Ltd v Fairgate Development Ltd [2017]

In *Redbourn* the High Court dismissed the Defendant's application to set aside a default judgment. Redbourn ("**RGL**") had brought proceedings against Fairgate ("**FDL**") for sums due under a contract and damages for wrongful repudiation. FDL did not file its defence within the deadline and RGL obtained judgment in default. In this case, the High Court followed the decision of the Court of Appeal in *Gentry v Miller* [2016] which had held that the three-stage test for relief against sanctions also applied to applications under CPR 13.3 to set aside judgments in default of: (i) acknowledging service of a Claim Form; or (ii) serving a defence within the prescribed time, notwithstanding that CPR 13.3 provided its own test for setting aside default judgments.

CPR 13.3 provides that the court may set aside or vary a default judgment if:
(a) the Defendant has a real prospect of successfully defending the claim; or
(b) it appears to the court that there is some other good reason why:
(i) the judgment should be set aside or varied; or
(ii) the Defendant should be allowed to defend the claim.
(c) Finally, in considering whether to set aside or vary a default judgment the court must consider whether the person seeking to set aside the judgment made the application promptly.

In the High Court, the judge hearing the application had little doubt that the three stage test in *Denton* applied. In his view, the test was plainly relevant to any application to set aside:

"*…after all, there is no greater sanction than judgment being entered in default of defence, and no more important relief from sanction than being allowed to set aside that judgment*."

In some respects, this is an odd decision as, when considered in isolation, CPR 13.3 provides a self-standing procedure for applications to set aside default judgments. A literal reading of the provision does not appear to give the judge a discretion to refuse relief if the Defendant has a real prospect of successfully defending the claim. However, CPR 3.9 does refer to an application for relief from **any** sanction, and it would be odd if different tests were applied to applications for relief from the various penalties that may be imposed under the CPR.

A number of other applications for relief against sanctions in 2017 have been reported including:

Mott v Long [2017]

In *Mott*, the Defendants filed their costs budget 10 days late and applied for relief from sanctions. In applying the three-stage *Denton* test, the court came to the following conclusions:

(i) *Serious or significant breach?*

The Defendants submitted that the delay in service was minor because, although served 10 days late, the budget was filed and served nine days ahead of the CMC hearing. The Defendants relied on the decisions of *Wilfred Murray v BAE Systems plc* [2016] and *Azure East Midlands v Manchester Airport Group* [2014] to contend that the minor delay in providing the budget had no material effect on the proceedings and had not prejudiced the Claimants in any material way.

The court concluded that filing a costs budget 10 days late is not of the "*same relatively modest order*" as being a few hours, or even one or two days late. The degree of lateness in every case is to be construed in the context of the particular circumstances of that case. Serving a costs budget late can prejudice the "*process of co-operation in the costs-budgeting process which the rules are designed to achieve*". In this case, the court considered that the 10-day delay "*answers the description of being serious or significant, perhaps with particular emphasis on the latter word*".

(ii) *Why did the default occur?*

The court was not satisfied that the Defendants had established a good reason for the default. That was not to say there may not have been such a reason, but the evidence was lacking in particularity as to the precise nature of the experienced "IT difficulties". For example, it was unclear whether the failure was human or system error, and there was no evidence from anyone with the appropriate IT expertise.

(iii) *The circumstances of the case*

The court set out the circumstances it considered material, including that the Defendants' solicitors had served a costs budget nine days before the CMC (albeit, due to other matters, this only allowed one working day for its consideration). The Defendant had already demonstrated a disregard for such orders, having already failed to file a Case Management Information System ("**CMIS**") and disclosure report, and having been three months late in paying a £285 costs order. However, the far more influential matter was the nature of the parties' budgets and the significant disparity between them due to their different approaches to the case, in particular as to the nature of expert evidence required and the trial length. The court acknowledged that while the "*10 days could have been put to good use*", and the parties might have been able to agree some of the substantive matters in issue, it was possible that they might not have done and, in such circumstances, the issues would have become the subject of oral submissions at the CMC which the court would have to rule on. A party that filed a costs budget reflecting its own views was:

"*… likely to be ordered to file and serve a revised cost budget which reflects the orders which the court has in fact made at the CMC, with a view to the parties discussing such revised budget, and in default of agreement a cost-management hearing would be listed…*"

Taking everything into account, the court came to the conclusion that, in light of the "*substantive order for directions relating to expert opinion evidence and the estimated length of the forthcoming trial*" that it had made at the CMC, and the need for the Defendants to file and serve a revised costs budget reflecting that order, relief from sanctions should be granted:

"*The fact that the parties are now in precisely the same procedural position in which they would have been so far as the process of cost budgeting is concerned, had the Defendants served their cost budget in time, is a highly significant circumstance in the case, and one to which the court should have proper regard*."

<u>ADVA Optical Networking & Anor v Rotronic Instruments [2017]</u>

In this case, the court was faced with a last-minute application for relief against sanctions from a Defendant whose "overall conduct" was poor. The Defendant just did not seem to have engaged properly with its lawyers in response to the claim, such that a number of time limits had been breached and the Defendant was facing judgment in default as a result. The Court considered the breaches to be serious and that the Defendant had no good reasons for them. However, there were two factors which counter-balanced its negative assessment; namely that the delay had not had any real effect on the course of the proceedings, and any judgment in default would be contingent on certain other aspects of the proceedings (which involved the same issues) being argued before the court. As a result, the court concluded that the breaches could not have any significant impact on the court timetable such that relief from sanctions would be granted.

Freeborn v Marcal [2017]

This case concerned a 14-day-late filing by the Defendant of its costs budget. The Defendant argued that it had relied on correspondence from the court to establish the due date. There was also a good deal of correspondence between both parties' solicitors during those 14 days, although at no point did the Claimants' solicitor complain about the delay. It was only following service of the Defendant's costs budget that the claimants raised the matter. The Defendant promptly made a formal application for relief from sanctions, supported by witness evidence.

The parties had received a letter from the court in which it specified the date on which costs budgets had to be filed, which departed from the deadline under CPR 3.13. The High Court considered that the court's letter was the "best possible reason for delay", and that an application for relief as such was not required in the first place.

Even if an application was required, the court held that there was still "no doubt" that the three-stage test in *Denton* would be met in any case: the breach was not serious given that, once the error had been identified, the Defendant's solicitor took immediate steps to discuss the costs budget and ensure that the delay had no consequence. In all the circumstances, the court found it was "just and reasonable" to grant relief as there was no deliberate breach, and that no prejudice had been caused to the Claimants.

Each year, the Efficiency and Integrity section of the England and Wales chapter of this review is dominated by commentary on the courts' approach to applications for relief against sanctions. The fact that the courts are having to address this issue so often is about the only consistent aspect of the subject. It is not surprising that different judges have different views on the exercise of this power, which invariably involves very subjective considerations. There can be no doubt that the existence and the exercise of the power by the court to refuse relief resulted in the costs-budgeting aspects of the Jackson reforms being implemented and adopted much more swiftly than might otherwise have been the case. It may also be the case that over time a clearer pattern will emerge, which will provide some certainty to parties to litigation. However, there will always be a lingering concern that the effect of a refusal to grant relief against sanctions is to deny a party to litigation access to justice.

An extension of fixed recoverable costs

On 31 July 2017, Lord Justice Jackson delivered recommendations in the form of a report entitled *Review of Civil Litigation Costs: Supplemental Report – Fixed Recoverable Costs*. The report supplements his January 2010 report on fixed recoverable costs for fast-track cases and costs budgeting for multi-track cases. The recent report introduces a grid of fixed recoverable costs for all fast-track cases, as well as a new intermediate track for certain claims valued between £25,000 and £100,000 which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side. It would also have streamlined procedures and a grid of fixed recoverable costs. Claims for non-monetary relief could exceptionally fall under the track where the promotion of justice demands it. However, cases which bear more complexity or specificities, as well as cases which could potentially not be dealt with justly and proportionately under the proposed streamlined procedure, would not fall under the intermediate track.

The intermediate track grid is divided into four categories or "bands", graded by the complexity of and the estimated recoverability of costs in the case. The underlying reason for the grid and a new intermediate track is to further the efforts to reduce costs in litigation in England & Wales and to ensure that costs are proportionate for lower-value cases in the multi-track.

<u>A restructuring of the High Court</u>

Large commercial claims are currently heard in one of the two divisions of the High Court; the Queen's Bench Division ("**QBD**") and the Chancery Division.

The QBD deals with a wide range of claims including contract, negligence, breach of statutory duty and defamation, and has specialist divisions namely:

(i) the Commercial Court;

(ii) the Admiralty Court; and

(iii) the Technology and Construction Court ("**TCC**").

The Chancery Division deals with disputes relating to business, property, companies, insolvency, trusts, competition, patents and IP. It includes four specialist courts, namely:

(i) the Companies Court;

(ii) the Bankruptcy Court;

(iii) the Patents Court; and

(iv) the Intellectual Property Enterprise Court.

The Financial List (which was created in 2015) sits across the Commercial Court and the Chancery Division. It covers claims for more than £50 million that principally relate to financial products; claims that require particular expertise in the financial markets; and claims that raise issues of general importance to the financial markets.

From July 2017, the specialist divisions of the High Court were renamed as the Business and Property Courts of England and Wales, and act as a single umbrella for the Commercial and Admiralty Courts, the TCC, the Financial List, and the Courts of the Chancery Division (which will be renamed according to the particular practice area, including the Business Courts, the Company & Insolvency List, and the Intellectual Property List). This restructuring, which was a further development of the initiative commenced in 2015, is aimed at ensuring that the best qualified judge, in terms of experience and expertise, is available to deal with the different cases while allowing for more flexible cross-deployment of judges.

Interim relief

<u>Worldwide Freezing Orders</u>

The High Court is often asked to grant what have come to be known as "Worldwide Freezing Orders". In acceding to these requests, the court is not claiming the right to exercise its powers in foreign jurisdictions. A Worldwide Freezing Order operates "in person" against the Defendant. However, as is explained below, it can also bind third parties where a relevant connection between that third party and the jurisdiction can be established.

The aim of a Worldwide Freezing Order is to restrain the Defendant concerned from taking action anywhere in the world which could have the effect of dissipating its assets and thereby frustrating the enforcement of any future order that the court may make in the proceedings.

The English court is likely to issue a Worldwide Freezing Order in cases where the Defendant does not have sufficient assets within the jurisdiction to cover the claim. The Claimant will also have to demonstrate that the preconditions to granting a domestic freezing order exist.

A Worldwide Freezing Order issued by the English court will commence with a general order restraining the Defendant from disposing of assets (which would otherwise be available to satisfy any subsequent orders in the proceedings), whether they are in or outside England and Wales (subject to certain specified exemptions, usually to enable the Defendant to fund his normal living expenses). Assets include any asset which the Defendant has the power, directly or indirectly, to dispose of or deal with as if it were his own. The Defendant is regarded as having such power if a third party holds or controls the asset in accordance with the Defendant's direct or indirect instructions.

Naturally, the preferred objective of any freezing order is to preserve sufficient assets within the jurisdiction so that they may be easily enforced against, should the claim succeed, and the parties are not required to take the dispute to the courts of other jurisdictions. The Worldwide Freezing Order will therefore specify the amount in value of assets that should be retained in the jurisdiction of the English Court. The order dealing with the restriction on dealing with assets held outside the jurisdiction will then be expressed to apply only if and to the extent to which the value of the Defendant's assets in the jurisdiction falls below the specified amount. If insufficient sums are in the jurisdiction, such that the Claimant may need to enforce against assets outside the jurisdiction, the court may increase the "specified amount" which should be preserved by the Defendant, to take account of the potential additional costs of enforcing against such foreign assets.

A Worldwide Freezing Order may even require a Defendant to transfer assets into the jurisdiction up to the specified amount.

In formulating the terms of any Worldwide Freezing Order, the English court has made clear that, whilst the basic structure of such orders will be broadly similar, the precise terms of each order will be dependent on all the circumstances of the case. In that regard, the court must undertake a balancing act between, amongst other things, the strengths of the Claimant's case, the perceived risks of dissipation of assets by the Defendant, and the impact that the order may have on the Defendant's ability to live and work comfortably and reasonably, having regard to all the circumstances.

A Worldwide Freezing Order will also apply to third parties who are notified of the order and who thereafter knowingly assist in or permit a breach of the order, provided that such actions either take place within the jurisdiction or are committed outside the jurisdiction by persons who are either acting as the agent of the Defendant, or:

(i) are subject to the jurisdiction of the English court; and

(ii) have been given written notice of the order at their residence or place of business within the jurisdiction;

and are able to prevent acts or omissions outside the jurisdiction which constitute or assist in a breach of the terms of the order.

It is a contempt of court for any person notified of a Worldwide Freezing Order knowingly to assist in or permit a breach of the order. Any person doing so who is subject to the jurisdiction of the English court may be imprisoned, fined or have its assets seized. However, the order must provide that, in respect of assets located outside England and Wales, the order does not prevent any third party from complying with what it reasonably believes to be its obligations, contractual or otherwise, under the laws and obligations of the country in which those assets are situated, or under the proper law of any contract between itself and the Defendant and any orders of the court of that country, provided that reasonable notice of any application to the local court for such an order is given to the Claimant to enable it to contest it in that jurisdiction.

Accordingly, compliance with the majority of Worldwide Freezing Orders is secured without the need to draw on any support from the courts of other jurisdictions, and is achieved by taking advantage of every connection the Defendant or anyone holding assets on its behalf may have with England and Wales. There are, however, often situations where the local courts will need to be involved. Most often, this will be because the assets are held in that jurisdiction by an institution which has no presence or connection with England & Wales such that there is no direct or indirect influence that the courts of England can bring to bear on the institution. Sometimes a local court order will be required to overcome any specific local laws (usually real estate laws) to realise and sell a specific asset. There may also be situations where many different assets are located within a particular foreign jurisdiction such that, due to the nature of the assets, an application may need to be made in the jurisdiction for an order mirroring the terms of the original freezing order.

As a result, where a freezing order extends to overseas assets, the risk of oppression to the Defendant increases, as there is a prospect of it having to defend multiple proceedings across several jurisdictions. In order to minimise this risk, all Worldwide Freezing Orders issued by the English courts should state that the Claimant must ask the permission of the English court before enforcement is attempted in another jurisdiction. When permission is sought, the court will weigh up the benefit to the Claimant against the cost and inconvenience to the Defendant of having to defend multiple claims.

The order operates against anyone who may have a business, financial or legal presence in England & Wales as the English court may enforce against any aspect of that presence in relation to breaches of the injunction committed elsewhere in the world.

In granting such orders, the court is conscious of the limits of its powers and is keen to ensure that any order granted will be capable of enforcement, either directly by it or with the support of the courts of local jurisdictions where the assets have been identified as located. It is naturally wary of any potential damage to its credibility and global respect if it were to be seen to be granting orders in the knowledge that they are likely to be left stagnating in a pool of similar orders while Claimants wait for the opportunity to use the order to attach to something within the jurisdiction.

In that regard, it should always be remembered that freezing orders are not a final remedy; they are a means to an end, the end being the preservation of assets pending the final determination of a claim and any subsequent enforcement proceedings. The author learnt this lesson while still a very junior solicitor in the case of *Town and Country Building Society v Daisystar Ltd and Another*, *The Times* (16 October 1989, Court of Appeal), where it was held that once a Claimant has obtained a freezing order, it has a duty to prosecute the action to trial, and not simply to "rest content with the injunction".

Freezing injunctions have been described as the "nuclear weapons" of the litigator's armoury due to their potentially destabilising effect on a Respondent. As a result, the court will grant a freezing injunction only where it is just and convenient to do so. In reaching that decision, the court will have to be satisfied that:

(i) there is an existing cause of action (i.e. a claim or judgment to be enforced in substantive proceedings);
(ii) the applicant must have a good arguable case (this means showing that the case is properly arguable and not fanciful);
(iii) the respondent must have assets to which the order can apply;
(iv) certain of the assets must be located within the jurisdiction;
(v) there is a real risk of the Respondent's assets being dissipated; and
(vi) it is just and convenient to make the order.

All of these criteria must be satisfied if a freezing injunction is to be granted, although fundamental to any such application is evidence of the risk of dissipation by the Respondent.

In 2017, the Court of Appeal considered the ambit of two of those conditions in the case of *Ras al Khaimah Investment Authority & Ors v Bestfort Development llp & Ors* [2017], namely:

1. the threshold for establishing that there are assets to which the order can apply; and
2. the circumstances in which the risk of dissipation can be overcome.

The applicant investment authority is responsible for investing the sovereign wealth of Ras al Khaimah (one of the United Arab Emirates) in projects in Georgia. It suspected one of its directors of breaching his fiduciary duties and brought proceedings against him in Georgia and the UAE. The authority also sought orders in the English High Court, freezing the assets of the LLPs which were owned by the director and registered in England and Wales. The judge held that the authority had a good arguable claim against the director and a good arguable case that, if the LLPs had assets, they were the assets of the director and were likely to be dissipated unless restrained.

However, the judge considered that there was insufficient evidence to establish that the LLPs were "likely to have" assets somewhere in the world that could be caught by the injunction.

The judge also held that the risk of dissipation was countered by the fact that the LLPs had complied with previous costs orders, and by the applicants' two to three-year delay in applying for relief.

The authority appealed, arguing that:

1. the judge had applied the wrong test for the existence of assets and should have asked herself whether there were grounds for believing that the LLPs were likely to have assets that could be caught by the order;
2. whatever the test, the LLPs had such assets; and
3. an established risk of dissipation could not be countered by compliance with costs orders or by any delay in applying for the freezing injunction.

In relation to these three aspects of the appeal, the Court of Appeal decided as follows:

<u>Test for the existence of assets</u>

It was not enough for an applicant to assert that the respondent was apparently wealthy and must have assets somewhere. The applicant had to "satisfy" the court that there were grounds for belief that assets existed. The judge had been entitled to accept evidence that many of the LLPs had closed their accounts or had only insubstantial sums in them, such that the necessary grounds for belief did not exist. Absent such grounds, the court would be at risk of acting in vain in granting an injunction where there were no assets against which it would bite.

Existence of assets in fact

Even though the director controlled all of the LLPs, it would be wrong for the court to take a broad brush and not look at each legal personality individually. While the director's ability to transfer assets from one LLP to another might be highly relevant to the risk of dissipation, it was not relevant to the prior question of whether there were grounds for believing that each had assets which could be caught by an injunction. The judge had been entitled to find that there was insufficient evidence that some of the LLPs had assets that could be caught by an injunction.

Risk of dissipation

There was a risk of dissipation and the factors relied on by the judge did not exclude that risk. While a failure to obey court orders might invite the making of adverse inferences, it did not follow that compliance would negate a risk of dissipation. Furthermore, while delay in seeking relief may be relevant, the delay in the instant case was not sufficient to suggest the applicant felt a lack of urgency or risk of dissipation.

Interim declarations

In addition to having a power to grant interim injunctions, the Civil Procedure Rules (more particularly, CPR 25.1(1)(b)), provide that the court shall have the power to grant interim declarations. While not encountered very often (and then usually in judicial review cases), in the case of *N v Royal Bank of Scotland* [2017] the Court of Appeal had to consider whether the judge at first instance had been right to grant an interim declaration.

The context was the regime created by Part 7 of the Proceeds of Crime Act 2002, which requires banks (and others) to refrain from dealing with property which is suspected as being the proceeds of crime and, where such suspicion exists, to make notifications to the National Crime Agency ("**NCA**") seeking consent to any such dealing.

In this case, RBS suspected that the credit balances on certain accounts in the name of *N* (its customer) constituted criminal property and, as a result, had frozen those accounts and made a report to the NCA. In response, N had sought: (1) a mandatory injunction requiring RBS to pay money from the frozen accounts to certain third parties; and (2) an interim declaration that the bank would not be committing any offence if it dealt with the money in that manner.

One of the issues which the Court of Appeal had to consider was whether an interim declaration was appropriate in that situation. It had some sympathy with the bank given its dilemma, but noted that any declaration as to whether RBS would be acting lawfully or not in transferring funds would be "*a final rather than a temporary answer*". It therefore expressed unease at being asked to grant an interim declaration in such circumstances. In addressing the threshold for granting such a declaration on an interim basis, Lord Justice Hamblen stated:

"*Assuming, however, that such an [final] answer can be given, it would be necessary to consider the degree of confidence which the court must have in the applicant's entitlement to a declaration before such relief could be granted. In my judgment the most appropriate evidential threshold in a case such as the present is the high degree of assurance which is generally required before mandatory injunctive relief will be granted. The need for a close consideration of the merits is particularly important in a case in which the grant of the interim declaratory relief is likely to be determinative of the issue, as in this case …*"

Such a threshold required considerable evidence, and certainly more than had been available before the judge at first instance in this case.

Disclosure and Privilege

A new CPR for disclosure

Despite Sir Rupert Jackson's review in April 2013 of the rules of disclosure ("the Jackson Disclosure Reforms"), disclosure will be undergoing further changes following the report of the working group chaired by Lady Justice Gloster in November 2017, as disclosure and issues of privilege have continued to attract attention as the courts have performed a balancing act between the interests of justice and the rights of parties to privilege.

A working group, chaired by Lady Justice Gloster, and comprising a wide range of judges, lawyers, experts and representatives of professional associations, was tasked in 2016 to identify the key defects in the current disclosure scheme and propose solutions to counter excessive costs, scale and complexity of disclosure. The working group's proposals were submitted on 2 November 2017.

Although the Jackson Disclosure Reforms had introduced a broader "menu" of disclosure options, the working group noted that neither the profession nor the judiciary had adequately utilised the range of options, and that standard disclosure still remained the default regime for most cases.

The working group recommended that the Disclosure Rules and Practice Directions should be rewritten, reordered, and simplified into a single rule. The new proposals comprise a draft new CPR 31 and a Disclosure Review Document ("**DRD**"). Under the proposals, there would be mainly two types of disclosure: basic disclosure and extended disclosure, meaning standard disclosure would disappear in its current form. Basic disclosure would be given at the time of service of the particulars of claim or defence and include information on key documents relied upon by the disclosing party and documents necessary for other parties to understand the case. Basic disclosure could be opted out of by way of an agreement, and would not apply in certain situations.

If a more extended disclosure is required, the parties would have to agree in writing. Under the proposals, the court would take a more proactive approach in identifying the appropriate model, and would not to accept without question the model proposed by the parties.

Under the proposals, parties would complete a DRD prior to the first Case Management Conference. Its purpose would be: to determine the issues for disclosure; to set out proposals for the appropriate extended disclosure model; and to share information about the storage, search and review of the documents. Finally, the proposals also provide for a procedure which would allow parties to seek guidance from the court at a "disclosure guidance hearing".

Collateral use protection

The common law principle that the parties to litigation are subject to an implied undertaking not to use a disclosed document for a purpose other than the proceedings in which it was disclosed has been embellished by CPR 31.22(1) which provides:

"A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, except where:

(a) the document has been read to or by the court, or referred to, at a hearing which has been held in public;

(b) the court gives permission; or

(c) the party who disclosed the document and the person to whom the document belongs agree."

The collapse of the Icelandic Kaupthing Bank HF in 2008 gave rise to numerous proceedings in various jurisdictions. In *Robert Tchenguiz and Another v Grant Thornton UK LLP and*

Others [2017], allegations of conspiracy were made by the Claimants against the bank's administrators. In response, the administrators wished to review and possibly rely on documents that had been disclosed in the course of the numerous sets of proceedings relating to the bank's collapse. The Defendants sought declarations as to whether any of the following four amounted to a collateral use:

(i) The Defendants reviewing documents and witness statements for relevance to the current proceedings.

(ii) Listing that material to give disclosure to the claimants.

(iii) Providing material to the claimants for inspection.

(iv) Any of the parties reviewing the materials with a view to deciding whether to rely on or make use of them in the current proceedings.

It was held that each of the steps was a collateral use. CPR 31.22 refers to "use for any purpose" other than the proceedings in which the documents were disclosed. Therefore, it could not be argued that using the documents for a purpose that was, for example, benign or "inspired by practicality" should not be prevented. A review of documents disclosed in litigation would be a use for a collateral purpose if the purpose of the review was to advise on whether other proceedings would be possible or further informed. If, however, the purpose of the review of documents disclosed in litigation was to advise on that litigation, but the review showed that other proceedings would be possible or further informed, then the review would not have been for a collateral purpose (although any further step would be a use for a collateral purpose), but the use of the document for the purpose of seeking permission or agreement to take that further step would be impliedly permitted.

Grosvenor Chemicals Ltd v UPL Europe Ltd [2017] concerned an application under CPR 81.14(1) for permission to bring proceedings for committal for interference with the administration of justice. The interference relied on was the use of documents disclosed in an action for a collateral purpose, contrary to CPR 31.22. In its judgment, the High Court found that CPR 31.22 had been breached but denied the application to bring committal proceedings against UPL on the basis that the elements under CPR 81.14(1) were not met.

A successful application under CPR 81.14(1) has to demonstrate that: (a) there has been a "deliberate or reckless breach" of CPR 31.22; (b) there is evidence of a strong *prima facie* case of contempt of court; and, (c) it is in the public interest and proportionate to bring contempt proceedings. The High Court found no evidence of a "deliberate reckless" breach of CPR 31.22 (*Berry Pilling Systems v Sheer Products* applied) which requires that the relevant persons "must have known" that the documents at issue were subject to the rule, and known that the acts complained of were a breach of that rule, or in either case were "reckless". The High Court held that UPL was "entirely innocent" as it had no independent knowledge of the CPR or the relevant authorities, and had acted on the advice of its legal representative. The High Court also noted that UPL offered an apology and an undertaking that no further use of the disclosed documents can be made for any purpose other than the action. Additionally, the High Court found that there was no clear evidence of a deliberate attempt to breach the CPR and did not consider the Defendant to have been prejudiced in the underlying proceedings by the use of the disclosed documents.

<u>Investigations and litigation privilege</u>

In *Director of the Serious Fraud Office v Eurasian Natural Resource Corporation Ltd* [2017], the Serious Fraud Office ("**SFO**") had, in the course of an investigation, requested the production of a number of documents which the Defendant opposed on grounds that they were covered by legal advice privilege, litigation privilege, or both. The refusal concerned four categories of documents consisting of: (a) interview notes taken by lawyers in relation to evidence given to them by the Defendant; (b) accountants' reports; (c) factual updates, mainly consisting of documents used by lawyers to present to committees and/or the board; and (d) communications with a legally qualified businessman.

Litigation privilege requires that litigation be contemplated in order to apply. The High Court found that the Defendant had not demonstrated that it was "aware" of the circumstances which rendered litigation a real likelihood rather than "a mere possibility". The High Court considered that the Defendant did not contemplate a prosecution at the time of the production of the documents at issue, which could therefore not be covered by litigation privilege.

Regardless of whether prosecution is in reasonable contemplation, the High Court found that most of the documents at issue were not created with the "dominant purpose" of being used in the framework of a litigation. Overall, the High Court held that fact-finding aimed at obtaining legal advice on how to avoid an investigation is not covered by litigation privilege.

<u>Privilege and communications with litigation funders</u>

Re. Edwardian Group [2017] concerned whether communications with litigation funders in relation to the terms of funding are covered by legal advice privilege. The respondents relied on *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc* where it was held that privilege does not attach to a document which does not state the substance of the advice. However, the High Court ultimately chose to rely on two other cases: *Lyell v Kennedy (No. 3),* in which it was found that documents which would give away a "clue" as to the advice given were privileged; and *Ventouris v Mountain*, in which it was found that where the selection of documents "betrays the trend of the advice", the document would be privileged.

Referring to *Three Rivers DC v Bank of England (No 5)* at [19] and [21], the High Court recalled that legal advice privilege is not confined to the communications themselves, but also extends to other material which "evidences" the substance of such communications. This case shows that the substance of legal advice does not necessarily need to be expressly stated within a document in order for the document to be protected by privilege. Privilege may apply as such to documents which contain a "clue", or where the substance of the advice may be inferred from the document.

<u>Mistaken disclosure of privileged documents</u>

The Court of Appeal provided clarification as to the application of principles governing mistaken disclosure of privileged material under CPR 31.20. The rule requires to first determine whether the document at issue was disclosed by accident, or whether privilege was deliberately waived.

In *Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd* [2017], the Defendants' appeal against an interlocutory decision refusing to order the deletion of an email protected by legal professional privilege was granted. In its judgment, the Court of Appeal referred to the decision in *Al-Fayed & Ors v The Commissioner of Police for the Metropolis & Ors* which identified a number of principles relevant for the application of CPR 31.20, in particular where the court may prevent a party from using a privileged document if disclosure was made as a result of an "obvious mistake". According to *Rawlinson & Hunter v Director of the SFO*, the fact that a document is privileged does not necessarily make its disclosure an "obvious" mistake. As such, a mistake which may be considered "obvious" is one where the inspecting solicitor appreciated that a mistake was made, or if it would be obvious to a reasonable solicitor placed in the same position.

Following an assessment of the facts and circumstances of the case, the Court of Appeal was satisfied that the disclosure was a mistake on the basis of the "two solicitor situation", which is an extension of the principles in *Al-Fayed* and *Rawlinson* under CPR 31.20 which targets situations where the "obvious mistake" is only identified on the second-pass review. According to the principle, if the inspecting solicitor is unaware of the mistake, and a second solicitor realises it prior to use being made of the privileged document, it becomes an "obvious mistake" and the court has discretion to prohibit the use of such document.

Another development is the case of *Microgeneration Technologies Ltd v RAE Contracting Ltd & Ors* [2017] EWHC 185, which concerned an injunction seeking to restrain Microgeneration from making use of legal advice disclosed by mistake to one of the Respondents' witness statements. Microgeneration was notified of the issue by correspondence, yet it filed a witness statement referring to the privileged advice. The court applied the test of the reasonable solicitor placed in the same circumstances, and found that a reasonable solicitor would not have concluded that privilege had been waived by the Respondents.

<u>Without-prejudice communications</u>

EME Law LLP v Halborg [2017] was a judgment on appeal brought against an order for disclosure. The core issue related to the applicability of the without-prejudice rule. In its judgment, the High Court found that documents relating to negotiations in respect of the costs recoverable in litigation had to be disclosed to a third party who had an interest in the outcome of the negotiations. This ruling is an exception to the general rule which allows documents relating to negotiations to be withheld on the basis of the without-prejudice rule.

Costs and funding

The development of litigation funding over the past 10 years has provided funds to those who would otherwise not have been able to afford litigation to bring or defend proceedings; litigants can now hedge their risks and commercial funders can invest in and, to a degree, speculate on the outcome of litigation. It is a wonder why it took so long for the litigation business to realise the opportunities that funding creates. The reason is to be found in the medieval doctrines of maintenance and champerty, which had been deeply embedded in western litigation culture, primarily to support judicial independence and prevent abuse of the legal process. Anything that introduced third-party interests in the outcome of litigation was frowned upon as undermining the integrity of the process. Maintenance is "*the support by a person of litigation in which he has no legitimate concern without just cause or excuse*", while champerty "*is an aggravated form of maintenance ... which occurs when the person maintaining another stipulates for a share of the proceeds of the action or suit ...*"

The case of *Casehub Ltd v Wolf Cola Ltd* [2017] provided a useful reminder of where the law now stands on these doctrines. The Claimant purchase-claimed against Wolf Cola Ltd, for monies that had allegedly been unlawfully charged. The Defendant provided flexible storage solutions to businesses and individuals, charging them a monthly subscription fee. However, a number of the Defendant's customers were unable to access the service due to system problems and terminated their agreement within the first month, thereby incurring a cancellation fee. The Claimant took assignment from three such customers of their claims against the Defendant to recover their cancellation fees.

One of the issues before the court was whether the assignments contained in the claim-purchase agreements offended the rules against maintenance and champerty. After examining recent developments in this area, the judge concluded that the assignments effected under the claim-purchase agreements were enforceable. He considered that there were:

"*strong public policy grounds in favour of upholding the assignment*", noting that "*the courts recognise the need for innovative but responsible ways of increasing access to justice for the impecunious*".

The claimant thus had:

"*a legitimate and genuine commercial interest in being able to pursue the claims assigned to it in order to protect the liquidated sums it acquired under the claim purchase agreements*"

and had not breached the rules of maintenance and champerty.

A risk to litigation funders is their exposure to orders for security for costs. The Civil Procedure Rules (specifically, 25.14) allow the court to exercise its discretion in granting Defendants security for costs against someone other than the Claimant. The court may exercise its discretion if, for example, the person has contributed or agreed to contribute to the Claimants' costs in return for a share of any money or property which the Claimant may recover in the proceedings.

In the long-running group litigation of *re RBS Rights Issue Litigation* [2017] EWHC 463 (Ch) (the privilege aspect of which we reported on last year), a further issue the High Court had to consider was whether information about the funders of the Claimants should be disclosed as a preliminary step to allow the Defendants to assess whether they should apply for security for costs, either against the funders (under CPR 25.14) or the Claimants. The court granted the disclosure application. Dismissing the Claimants' argument that the application should be refused because an "*order against non-parties would always be exceptional*", the court considered noted that in group litigation (which is often only likely to go ahead with the deep pockets of third-party funders, who stand to make high financial returns if their case succeeds), they should expect liability for a costs order against them if the case does not succeed. While granting the disclosure application, the court sought not to encourage the Defendants to make an application for security for costs at this stage, noting that they faced considerable hurdles should they do so.

Undeterred, the Defendants pursued their application, seeking security for costs pursuant to CPR 25.14(2)(b) against two third-party funders of the claimants. One of the third-party funders was a commercial litigation funder. The other was described by the court as being "*closer to a 'pure funder' than a professional litigation funder*", given that litigation funding was neither their line of business nor their apparent primary motivation for providing funding. In fact, the court noted that its primary motive appeared to be to assist the Claimants in obtaining damages for their own benefit as compensation for wrong done to them rather than financial gain for themselves.

The court ultimately granted the order for security for costs from the commercial funder - *re RBS Rights Issue Litigation* [2017]. The Defendant had shown that there was a sufficient risk of non-recovery in the event of an adverse costs order, partly because the After-the-Event ("**ATE**") insurance of certain of the remaining claimants was insufficient to cover an adverse costs order against them, and therefore a proportion of the total adverse costs liability would fall on individual retail Claimants without deep pockets. The court was not persuaded by the commercial funder's argument that the security for costs applications should be dismissed on account of it having been made very late in the proceedings, which the funder said denied it any choice as to whether or not to proceed, having spent so much in the litigation already. While the court agreed that, on its face, the lateness seemed extreme given that proceedings had been ongoing for four years, that did not necessarily equate to delay; the reasons for lateness and its prejudicial effects were also relevant considerations. The court was willing to accept the Defendants' justifications as to delay, including that the Defendants had only recently learned about the insufficiency of the ATE coverage. The court commented that as a commercial litigation funder, it should have made it its business to be fully aware of the ATE coverage and any sufficiency thereof.

Interestingly, the court refused to make a security for costs order against the other funder, largely owing to the assessment that they were "*closer to a pure funder*". The court's handling of this application shows that the court will treat litigation funders very differently depending on the facts of each case.

In the case of *Premier Motorauctions Ltd v PricewaterhouseCoopers LLP* [2017], the Court of Appeal considered the threshold for security for costs applications under CPR 25.13, which provided that security for costs could be ordered where "*the claimant is a company ... and there is reason to believe that it will be unable to pay the Defendant's costs if ordered to do so*". The case concerned the extent to which ATE insurance policies could be considered adequate security for costs.

ATE insurance policies can be purchased before or after the proceedings have been issued, and are available to meet disbursements and some or all of the other side's costs should the claim be unsuccessful. The ATE policies in question could be avoided for non-disclosure or misrepresentation and the insurer declined to provide a bank guarantee or a deed of indemnity requested by the Defendant to seek to overcome the risk of non-payment under the ATE insurance.

In considering the threshold for making an order under CPR 25.13(2), Lord Justice Longmore considered that the court only needed a reason to believe that the Defendant would not be able to pay its costs; the court did not have to be satisfied on the balance of probabilities. His Lordship then considered the terms of the ATE insurance in question, examining a long list of avoidance provisions. Having acknowledged the tendency for judges at first instance to accept that an ATE policy could stand as security for costs (where it had been "*properly drafted*" and "*depending on the terms of the policy in question*"), he noted that where the ATE policy contained provisions allowing for the policy to be avoided, there was a risk that could justify the making of an order. In the present case, given the existence of an avoidance provision (where the Insured makes any material non-disclosure or representation), an order for security for costs would be made.

A further issue in relation to ATE insurance policies arose in *Bailey v GlaxoSmithKline UK Ltd* [2017]. Here the Claimants alleged in their claim that the anti-depressant drug manufactured by the Defendant was defective. The Defendant applied for security for costs against the Claimants' litigation funder who was balance-sheet insolvent, had to rely on a shareholder for liquidity, and was not a member of the Association of Litigation Funders. The judge considered whether the ATE policy would override the need for security for costs. The claimants argued that any security should be reduced by the sum of £750,000, which was the whole of the sum covered by the ATE policy. Given the recently decided *Premier Motorauctions* (above), Fosket J observed that the ATE policy did not contain anti-avoidance provisions, which could have provided better assurances to the Defendant, but it did set out conditions precedent which, if not met, allowed the insurers to avoid the policy. He commented:

"*I consider that the risk of the ATE policy being avoided at some stage can be reflected by deducting two-thirds of the sum of £750,000 (namely £500,000) from the amount of security* *otherwise to be provided. This reflects my assessment that it is more likely that the policy will remain intact and remain available for the payment of part of the Defendant's costs if the Defendant is successful, but that there is a more than minimal risk that it will not remain intact.*"

The judge therefore adopted a mathematical approach to the *Premier Motorauctions* decision by concluding that some of the ATE could be taken into account.

One further feature of costs on which we have reported in recent years is the increase in the control exercised by judges on costs issues. In the case of *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017], the Court of Appeal dealt with the issue of Cost Management Orders ("**CMOs**"), a feature of the costs regime in the English courts which is intended to allow for greater control by judges. The issue which arose concerned whether it was possible to depart from the costs budget approved by the judge without "*good reason*". The 'losing' party who was due to pay the costs in the case asserted that the costs budget acted as a cap on fees payable to the 'winner' such that the payment of an amount less than the budget could be justified without "*good reason*", but that "*good reason*" was required in the event of any increase.

The Court of Appeal decided that, taking the plain terms of the relevant CPR provision, any departure from a costs budget required "*good reason*", whether that departure was to increase or decrease the amount payable. The expectation was therefore that the CMO would usually be followed.

Mediation and ADR

The Republic of Ireland brought the Mediation Act 2017 into force in January 2018. The Act encourages the use of mediation which has the potential to:

(i) achieve better outcomes for the parties;

(ii) reduce costs and thereby improve access to justice; and

(iii) ease strain on the courts system.

The Act places on a statutory footing the obligation to consider mediation. This obligation brings with it the requirement for litigants to confirm to the courts that they have considered mediation. The Act does not apply to arbitrations and certain disputes under tax and customs legislation.

Section 14 of the Act requires "practicing solicitors":

(i) prior to issuing proceedings, to advise clients to consider mediation as a means of resolving their dispute and provide clients with information on mediation services and to make a statutory declaration which would accompany the originating document filed at court confirming compliance with such duties; and

(ii) to provide their clients with information on mediation services and on the advantages and benefits of mediation, and to make a confirmatory statement.

The Act requires the parties and mediator to sign an agreement to mediate. This agreement sets out the formalities of the mediation including how the mediation is conducted, the location, confidentiality, the issue of costs, the right to seek legal advice and other terms which the parties or mediator may agree. Signing of an agreement to mediate temporarily stops the clock from running under the Statute of Limitations for a specified period, during which the mediation process is conducted.

Under the Act, all communications and all notes and records relating to the mediation will be confidential and will not be disclosed in any proceedings before a court. However, this confidentiality protection will not apply where disclosure is necessary in order to implement or enforce a mediation settlement.

The Act defines the role of the mediator as to assist the parties to explore ways to resolve their dispute by agreement. It is the mediator's responsibility to ensure the outcome of the mediation is determined by mutual agreement if possible, and the mediator may only advance his or her own proposals if all parties invite him or her to do so.

A court may have regard to any "unreasonable refusal" or failure by a party to consider or attend mediation when considering an award of costs, meaning that a party 'unreasonably refusing' to engage with the mediation process runs the risk of having to discharge the costs incurred by the other side.

Most of the provisions of the Act are already encouraged or enforced by the English courts, although the added bureaucracy of statutory declarations seems excessive. In England, the use of mediation continues to increase although, in the absence of any controls or generally accepted accreditation and training, the quality of mediators is normally transmitted by informal comments, and there is some concern that the process risks becoming overly formulaic and thereby just another step in the litigation process, as opposed to an alternative to it. Parties to mediation, including the mediator, need to be alert to the risks and open to the opportunities of using other forms of Alternative Dispute Resolution, either as part of, or instead of, mediation. That said, the true benefit of mediation is that it gets senior decision-makers within the litigating organisations together for a period of time and very often, it is that dynamic alone that results in a settlement.

<u>The courts' oversight of regulatory investigations</u>

The review in last year's chapter considered deferred prosecution agreements ("**DPAs**"), notably the second DPA (involving the anonymised XYZ Ltd). DPAs are a recent addition to the UK's Serious Fraud Office ("**SFO**") toolkit, with which to combat serious and complex economic crime. The SFO is the UK's law enforcement agency and, since 2014, it has entered into four DPAs.

A DPA is only available to a body corporate, a partnership or an unincorporated association for specific criminal offences (including false accounting, fraud and bribery) and, crucially, requires court approval. A court will approve a DPA if it considers: (1) the DPA to be in the interests of justice; and (2) its terms are fair, proportionate and equal.

In 2017, the SFO entered into two high-profile DPAs: one with Rolls-Royce Plc and Rolls-Royce Energy Systems Inc (together "**Rolls-Royce**") on 17 January 2017, and the other with Tesco Stores Limited on 10 April 2017.

The SFO's extensive four-year investigation into Rolls-Royce culminated in a DPA under which Rolls-Royce is to pay penalties and costs exceeding £500 million. This represents the largest financial penalties imposed by the SFO in any DPA so far (*Serious Fraud Office v. Rolls-Royce Plc and Rolls-Royce Energy Systems Inc.* [2017]). It related to Rolls-Royce's alleged criminal conduct over a period of 24 years in the sale of aero engines, energy systems and related services in seven jurisdictions and involved three of Rolls-Royce's business sectors. The criminal charges included six counts of conspiracy to corrupt, five counts of failure to prevent bribery, and one count of false accounting.

Specifically, the criminal allegations included:

- agreements to make corrupt payments to agents in connection with the sale of Trent aero engines for civil aircraft in Indonesia and Thailand between 1989 and 2006;

- the concealment or obfuscation of the use of intermediaries involved in its defence business in India between 2005 and 2009 when the use of intermediaries was restricted;
- an agreement to make a corrupt payment in 2006/2007 to recover a list of intermediaries that had been taken by a tax inspector from Rolls-Royce in India;
- an agreement to make corrupt payments to agents in connection with the supply of gas compression equipment in Russia between January 2008 and December 2009;
- failure to prevent bribery by employees or intermediaries in conducting its energy business in Nigeria and Indonesia between 2011 and 2013, with similar failures in relation to its civil business in Indonesia; and,
- failure to prevent the provision by Rolls-Royce employees of inducements which constituted bribery in its civil business in China and Malaysia between 2011 and 2013.

The key conditions of the DPA required Rolls-Royce to:

- agree to disgorgement of profits in the sum of £258,170,000;
- pay a financial penalty of £239,082,645 (this figure being the result of a 50% discount after taking into account Rolls Royce's "*extraordinary cooperation*");
- reimburse the SFO's costs of £12,960,754;
- acknowledge no tax benefit could be sought for the above three payments;
- cooperate with all relevant authorities in relation to any investigation or prosecution of current or former officers, directors, employees, agents or other third parties; and,
- conduct an independent compliance review.

A theme which emerged from the previous DPAs (the first being Standard Bank Plc and the second being XYZ Ltd), was that an offer of a DPA appeared dependent on the entity self-reporting its discovery of unlawful conduct, coupled with significant cooperation with the SFO during its investigation. It is striking that Rolls-Royce did not self-report what Levison LJ described as "*egregious criminality over decades*". However, the judge was struck by Rolls Royce's "*full and extraordinary cooperation*" which it provided to the SFO, which included:

- providing reports to the SFO in respect of its internal investigations into its energy, defence, civil and marine businesses;
- deferring interviews until the SFO had first completed its interviews;
- disclosing all interview memoranda and waiving any claim for legal professional privilege on a limited basis;
- allowing the SFO access to over 30 million documents;
- consulting with the SFO regarding developments in media coverage; and,
- seeking the SFO's permission before the winding-up of companies that may have been implicated in the SFO's investigation.

In particular, Levison LJ acknowledged: "*The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but the nature and extent of the co-operation provided by Rolls-Royce in this case has persuaded the SFO not only to use the word "extraordinary" to describe it but also to advance the argument that, in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset. Given that what has been reported has clearly been far more extensive (and of a different order) than is may have been exposed without the co-operation provided, I am prepared to accede to that submission.*"

The Rolls-Royce DPA confirms that a failure by an entity to pro-actively self-report is not in itself an impediment to securing a DPA so long as the entity subsequently provides substantial cooperation to the SFO. The use of DPAs is likely to increase in future so, hopefully, the court will provide further guidance regarding the nature of the co-operation required to approve a DPA and explain how the level of co-operation correlates with the discount on the financial penalty.

The SFO's fourth DPA (with Tesco Stores Ltd ("**Tesco**")) was the first to relate exclusively to false accounting offences. In short, profits were alleged to have been grossly overstated. The financial penalty imposed on Tesco was £128,992,500 plus the reimbursement of the SFO's costs.

Usually, the terms of DPAs are made public, along with the judge's decision and the accompanying statement of facts. However, the publication of these materials for the Tesco DPA has been postponed to avoid the risk of prejudice to the SFO's prosecution of three former executives of Tesco for fraud and false accounting. The trial against those Defendants commenced in September 2017 but the judge dismissed the jury in February 2018 following one of the Defendants falling ill. The SFO has sought a retrial and a date for the next hearing is due to be set. Consequently, the publication of the materials regarding the Tesco DPA continues to be postponed.

A striking feature of the Tesco DPA was the effective co-ordination between the SFO in settling its criminal investigation and the UK's Financial Conduct Authority's ("**FCA**") in settling its regulatory investigation. On 28 March 2017, the FCA issued a Final Notice against both Tesco plc and Tesco for findings of market abuse in relation to its profit misstatement. Unlike the SFO, the FCA did not impose a financial penalty but required Tesco Plc and Tesco to compensate certain net purchasers of Tesco Plc ordinary shares and certain listed bonds who purchased those securities and still held on to them during a prescribed period. The estimated cost of this restitution was approximately £85 million (excluding interest).

We would expect that this will encourage more instances of prosecutor and regulator collaboration to achieve all-encompassing justice by means of imposing a deterrent financial penalty and seeking restitution for victims.

The Criminal Finances Act 2017 came into force on 30 September 2017 and introduced new strict liability corporate criminal offences of failing to prevent the facilitation of UK or foreign tax evasion. These new offences adopt the model of section 7 of the Bribery Act 2010 (being the failure to prevent bribery). There is a defence where "*B* [the entity] *had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place or it was not reasonable in all the circumstances to expect to have any prevention procedures in place*". This echoes the defence of adequate procedures under the Bribery Act 2010. Significantly, DPAs also are available for these tax evasion offences.

The introduction of these tax evasion offences reflects significant pressure from the SFO for offences which overcome the hurdles under English law to the establishment of corporate criminal liability. Broadening the scope of DPAs to include these offences could be perceived as Parliament's endorsement of the DPA as a successful alternative to corporate prosecution. Time will tell as to whether the SFO's appetite to offer DPAs extends to tax evasion offences.

Last year (2017) saw the introduction by the FCA of significant changes to its enforcement decision-making process. These changes take the form of guidance and are not binding rules. The key changes related to settlement and the introduction of partly contested cases.

Settlement can be reached at any stage of the FCA's enforcement action. Prior to 1 March 2017, there was an early settlement scheme which provided for graduated reductions in penalty depending on what stage full settlement was reached with the FCA, namely:

- **Stage 1 penalty discount of 30%**: for settlement after service of the draft warning notice.
- **Stage 2 penalty discount of 20%**: for settlement prior to the expiry of the deadline for making written representations to the Regulatory Decisions Committee ("**RDC**") regarding the warning notice.
- **Stage 3 penalty discount of 10%**: for settlement prior to the issue of the decision notice.

Pursuant to the guidance, the FCA abolished stages 2 and 3 discounts. The FCA considered that demarcating, at an early stage, between those cases which could be settled at stage 1, and those which would be contested would increase transparency.

Another significant change has been the introduction of focused resolution agreements ("**FRAs**"), which allow the FCA, or the party subject to enforcement, to narrow the issues in dispute between them by identifying the areas of agreement and dispute. The process involves the FCA issuing a warning notice and setting out an agreed position on one or more, but not all, of the issues relevant to a proposed enforcement action. Such FRAs are with the discretion of the FCA but should streamline enforcement action by narrowing the issues to be addressed by the RDC. As a further incentive, penalty discounts are available for FRAs at stage 1, but the level of discount depends on how much is agreed with the FCA:

- **Penalty discount of 30%**: full agreement to all relevant facts and breaches (but disputing the penalty size).
- **Penalty discount of 15%–30%**: full agreement to all relevant facts (but disputing the breaches or the penalty size).
- **Penalty discount of 0%–30%**: limited scope of agreement to one or more relevant issues (remaining issues to be resolved by the RDC).

It will be interesting to see the risk appetite of firms and individuals who enter into FRAs for full agreement of all facts and breaches but challenge the penalty size in hopes of reaching a smaller penalty figure and thereafter enjoying a further reduction via the 30% penalty discount, versus accepting a full settlement at stage 1 with a 30% reduction on a non-disputed penalty.

The procedure for finalising Decision Notices was considered in *FCA v Macris* [2017] UKSC 19, in which the Supreme Court examined the meaning of "identifies" for the purposes of section 393 of the Financial Services and Markets Act 2000 ("**FSMA**"). Briefly, section 393 of FSMA provides that where a warning notice or decision notice "identifies" a third party and, in the opinion of the FCA, is "prejudicial" to that person, then he must be given a copy of that notice, have an opportunity to make representations in response to it, and also to refer the matter before the Upper Tribunal of the Tax and Chancery Chamber.

In 2012, Mr Macris was the International Chief Investment Officer of JP Morgan Chase Bank NA and the head of the bank's Chief Investment Office. Following the FCA's investigation into the "London Whale" trades which caused the bank losses of US$6.2 billion, the bank agreed a regulatory settlement under which it paid a financial penalty of £137,610,000. The FCA served its warning notice, decision notice and final notice on the bank on 18 September 2013. The next day, the FCA published its decision notice and final notice.

The warning and decision notices did not identify Mr Macris by name or job title but there were multiple references to conduct by "*CIO London management*". The FCA did not consider Mr Macris was identified in these notices and so he was not provided with copies.

Mr Macris complained to the Upper Tribunal that statements made in the notices about "*CIO London management*" identified him, were prejudicial to him and he was entitled to be notified. The Upper Tribunal and Court of Appeal upheld Mr Macris's complaint.

There was no question that if Mr Macris was identified in the warning and decision notices, then statements contained therein were prejudicial to him. The issue for the Supreme Court turned on whether Mr Macris was "identified" for the purposes of section 393 of the FSMA. By a majority of four to one, the Supreme Court concluded that Mr Macris had not been identified. Lord Sumption (with whom Lord Neuberger and Lord Hodge agreed) considered:

"*… a person is identified in a notice under section 393 if he is identified by name or by a synonym for him, such as his office or job title. In the case of a synonym, it must be apparent from the notice itself that it could apply to only one person and that person must be identifiable from information which is either in the notice or publicly available elsewhere. However, resort to information publicly available elsewhere is permissible only where it enables one to interpret (as opposed to supplementing) the language of the notice ... What is not permissible is to resort to additional facts about the person so described so that if those facts and the notice are placed side by side it becomes apparent that they refer to the same person.*"

This judgment reveals the competing interests of the FCA, firms and third parties. While the FCA and the firm may agree to settle a matter, the third party may want to challenge unfair allegations, so as to reduce the adverse effect such statements contained in those notices may have to his reputation and employment prospects. Time will tell whether the narrow interpretation of "identifies" strikes a fair balance between individuals and regulators.

Cross-border issues

Unsurprisingly with London's role as a global financial hub, financial transactions continue to generate significant cross-border litigation issues. This is often caused by the numerous related agreements, sometimes involving the same but often additional parties, which comprise the totality of the transaction concerned. Where the jurisdiction clauses in those agreements conflict, the court's task is to decide whether to treat each agreement and its jurisdiction clause separately, with the risk that different aspects of the overall dispute will be tried in different jurisdictions, or whether to take a holistic view and identify the commercial centre of the transaction and apply the jurisdiction clause most applicable to the transaction as a whole.

In 2017 the English courts handed down a number of judgments on governing law and jurisdiction in cross-border financial transactions. With some of the cases being appealed to the Court of Appeal and more cases to come in 2018, it will be some while before anything close to definitive guidance emerges on such issues, and the same can be said in relation to the operation of Article 3 (3) of the Rome Convention, which precludes parties selecting a foreign choice of law and jurisdiction, to escape mandatory domestic legislation where every other aspect of the agreement is domestic. These judgments demonstrate the complex procedural issues that financial institutions face before they can even begin to engage with the substance of their disputes.

<u>Deutsche Bank AG v Comune di Savona [2017]</u>

Deutsche Bank AG ("Deutsche Bank") v Comune di Savona ("Savona") [2017] concerned interest rate swaps (the "Swaps") entered into by the parties in June 2007 under an International Swaps and Derivatives Association ("**ISDA**") Master Agreement dated 6 June 2007 (the "**Master Agreement**"). The Master Agreement was governed by English law and contained an exclusive English jurisdiction clause in the ISDA standard form. Prior to the Master Agreement, Deutsche Bank and Savona had concluded a written advisory agreement (the "**Advisory Agreement**") in March 2007 under which Deutsche Bank agreed to provide, for no consideration, certain advice and assistance concerning Savona's existing derivative commitments and a possible restructuring of its present debts. The Convention was governed by Italian law and contained an exclusive jurisdiction clause in favour of the Court of Milan.

In June 2016, in light of rumoured legal action by Savona, Deutsche Bank issued a claim in the English High Court against Savona and sought 12 negative declarations concerning the validity and interpretation of the Swaps. In December that year, Savona challenged the English Court's jurisdiction in relation to six of the 12 declarations pursuant to Article 25 of the Recast Brussels Regulation 1215/2012 (Article 25), on the basis that they were subject to the Italian jurisdiction clause. Savona subsequently conceded that the English court did have jurisdiction over declarations concerning the terms of the Master Agreement but retained its challenges relating to the nature and extent of advice provided by Deutsche Bank and Savona's understanding of the Swaps. In March 2017, Savona commenced proceedings in Milan against Deutsche Bank for breaches of the Advisory Agreement relating to advice given by Deutsche Bank concerning the Swaps.

The High Court upheld Savona's remaining jurisdiction challenges, which related to matters arising from the Advisory Agreement and so fell within the exclusive jurisdiction of the Italian courts. In reaching this conclusion, the High Court held that, given two competing jurisdiction clauses, it had to construe each, as far as possible, as having mutually exclusive scope. The High Court noted that the Advisory Agreement concerned Deutsche Bank's advisory role and in the Master Agreement Deutsche Bank was a counterparty, therefore, any dispute which essentially concerned Deutsche Bank's role as adviser fell more naturally within the Advisory Agreement's jurisdiction clause.

The judge rejected the argument that the English clause, because it was contained in ISDA market-standard terms, had to be given a universally consistent interpretation which should in some way override the clause in the Advisory Agreement. That argument ignored the fact that the Advisory Agreement was already in existence by the time the Master Agreement was concluded and, as it was not amended or qualified by the Master Agreement, it was relevant in construing the Master Agreement's jurisdiction clause.

The High Court's decision is currently subject to an appeal.

<u>Dexia Crediop S.p.A. v Comune di Prato [2017]</u>

In *Dexia Crediop S.p.A. v Comune di Prato* [2017], one of the main questions facing the Court of Appeal was asked to consider whether a swap under a 1992 English law ISDA Master Agreement was invalid or unenforceable under mandatory provisions of Italian financial services law. Comune di Prato argued that the mandatory rules applied pursuant to Article 3(3) of the Rome Convention on the basis that, apart from the choice of English governing law, "all other elements relevant to the situation at the time" were connected to Italy.

Article 3(3) of the Rome Convention states:

"Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

The Court of Appeal reversed an earlier High Court decision and found that Article 3(3) did not apply as there was an "international and relevant element in the situation", which made it impossible to say that "all elements" were located in a country other than England. Such elements included: (i) the choice of an international standard form agreement; (ii) the fact the contract envisaged the use of more than one currency and the involvement of more than one country; and (iii) Dexia's "back-to-back" swaps with banks outside of Italy.

The Court of Appeal held that "Once an international element comes into the picture, Article 3(3) with its reference to mandatory rules should have no application."

The Court of Appeal followed *Banco Santander Totta SA v Companhia Carris De Ferro De Lisboa SA* [2016], in which the Defendants argued that pursuant to Article 3(3) of the Rome Convention, as all the relevant elements of a Swaps agreement were connected with Portugal, the mandatory Portuguese rules applied to the Swaps. These rules affected capacity to enter into the Swaps and entitled termination of them in the event of "abnormal change of circumstances". The Court of Appeal held that Article 3(3) of the Rome Convention did not displace a contractual choice of English law with any mandatory rules of Portuguese law even where both contracting parties were Portuguese. In the leading judgement, Sir Terence Etherton, MR held that the elements relevant to the situation at the time are "*not confined to factors connecting the contract to a particular country in a conflict of laws sense*", and that the choice of law agreed by the parties could be displaced only pursuant to Article 3(3) where the "*the situation is purely domestic*."

<u>Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar Tankers Management Inc. [2017] EWHC 161 (Comm)</u>

Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar Tankers Management Inc. [2017] concerned asymmetric or hybrid jurisdiction clauses and whether they confer exclusive jurisdiction on the English courts for the purposes of Article 31(2) of the Brussels I Recast, which states that where there is an exclusive jurisdiction clause, the court of another Member State shall stay the proceedings until the court given jurisdiction under the agreement declares that it has no jurisdiction.

In this case, an asymmetric jurisdiction clause was agreed pursuant to a loan agreement between Commerzbank Aktiengesellschaft ("**Commerzbank**") and a ship management company, Liquimar Tankers Management Inc ("**Liquimar**") which confined Liquimar to commence proceedings in England only. Following a default under the loan agreement, Liquimar commenced proceedings against Commerzbank in Greece. Commerzbank later commenced parallel proceedings in the English court. As a result, Liquimar applied for a stay of Commerzbank's claim under Article 29(1) of Brussels 1 Recast until the Greek proceedings had been heard, on the basis that Article 31(2) did not apply.

Before the High Court, Liquimar argued that:

(i) Asymmetric jurisdiction clauses generally do not qualify as exclusive jurisdiction clauses within Article 31(2) of Brussels 1 Recast as they expressly permit one party to bring proceedings in any court of competent jurisdiction.

(ii) Further, even if the asymmetric jurisdiction clause in question comes within Article 31(2), the court must apply Article 29(1) and stay the proceedings until the first seized court determines whether it has jurisdiction (i.e. the Greek court).

(iii) Asymmetric jurisdiction clauses are not compatible with Article 25 of Brussels 1 Recast, which requires parties to identify the jurisdiction under which a putative Defendant can expect to be sued, and so such clauses cannot trigger Article 31(2).

The High Court dismissed Liquimar's stay application and held that the English court was able to hear and determine the dispute in question without having to defer to the Greek courts which had first seized the case. In this case, the judge held that the reference in the Brussels I Recast Regulation to "an agreement [which] confers exclusive jurisdiction" includes asymmetric jurisdiction clauses such as those in the present case: "*where a clause confers* *exclusive jurisdiction on the court or courts of a Member State when one party sues, the clause will still be an exclusive jurisdiction clause for the purposes of [the Recast Regulation] even where, if the other party to the clause sues, the clause shows the parties to have agreed that jurisdiction is to be conferred differently, or allowed to engage differently.*" Furthermore, the judge said that the conclusion that an asymmetric jurisdiction clause was exclusive was consistent with the aims of the Brussels I Recast Regulation, which were enacted to enhance the effectiveness of exclusive jurisdiction clauses and to avoid abusive tactics.

The Law Debenture Trust Corporation v Ukraine [2017]

The Law Debenture Trust Corporation v Ukraine [2017] concerned a US$3 billion Eurobond note issued by the state of Ukraine with Russia as the sole subscriber. After refusing to sign an Association Agreement with the European Union in 2013, Ukraine stated that Russia exerted "massive, unlawful and illegitimate" economic and political pressure in forcing the Ukraine administration into accepting Russian financial support. The Eurobond agreements were governed by English law, with the Law Debenture Trust Corporation appointed as trustee (representing the interests of the sole noteholder, Russia). In 2014, Russia invaded Crimea, severely impeding Ukraine's ability to meet its obligations under the Eurobond notes at maturity. Consequently, the Trustee (acting on the direction of Russia) commenced proceedings in the English Commercial Court for summary judgment for non-payment under the Eurobond notes, contending that the debt was a simple English law obligation.

In its defence, Ukraine made four arguments which are set out below with the judge's findings

No capacity and authority to enter into Eurobond notes

The Eurobond transaction is void pursuant to Ukrainian law. Under Ukrainian law, Ukraine had no capacity to enter into it due to restrictions in its constitution and budget laws, and importantly, the Minister of Finance had no actual authority to sign the various agreements and issue the Eurobond notes.

Held: This was the first case in which English courts had to consider the question of a state's capacity to contract and the judge held that the law of the contract must be used to determine that issue and not the law of the state in question, derived. As a result, once the state was recognised as sovereign under international law, it would have the ability to contract under English law, regardless of any local law restrictions.

Therefore, after having established that Ukraine had the capacity to contract and to borrow, the judge also held that the Ukrainian finance minister had the usual authority to sign the various transaction documents on the basis that he had previously signed 31 similar transactions and also had "ostensible" authority, having been held out by the Ukrainian Cabinet as someone with the authority to contract.

Breach of implied terms

Russia, by invading Crimea, was in breach of implied terms, including a term not to demand repayment if it unlawfully deprived Ukraine of the benefit of the loan, and by its acts deliberately interfered with Ukraine's capacity to repay.

Held: There was no room to imply the terms as argued by Ukraine because that would render the notes untradeable and unworkable thus contradicting their express terms. Lastly, the issue of whether Ukraine was entitled to refuse payments under international public law as a countermeasure to Russia's invasion of Crimea was not justiciable before the English courts.

Duress

Wrongful and illegitimate acts by Russia amount to duress under English law, such that the transaction documents in relation to Eurobond notes were void.

Held: This defence failed because such matters were acts of foreign states which lay on the plane of international law and so were not justiciable by the English courts.

Public international law
Ukraine was entitled to refuse payments under international public law as a counter-measure to Russia's invasion of Crimea.
Held: This issue was not justiciable before the English courts.

Deutsche Bank v CIMB Bank Berhad [2017] EWHC 81 (Comm)
Deutsche Bank v CIMB Bank Berhad [2017] EWHC 81 (Comm) concerned a dispute between the London branch of Deutsche Bank as the confirming bank under a series of letters of credit, and the Singapore branch of the Malaysian issuing bank, CIMB Bank Berhad. Before the English Courts, Deutsche Bank commenced proceedings to recover from CIMB Bank Berhad, as the issuer of the letter of credit, €10m which Deutsche Bank paid out to the seller of the underlying goods. In its defence, CIMB Bank Berhad argued that the documents presented to Deutsche Bank were non-conformant and hence did not admit that Deutsche Bank made the payments in question.
CIMB Bank Berhad issued various proceedings in Singapore against Deutsche Bank and its customer and associates, alleging a conspiracy to defraud and seeking declarations that the customer was liable to indemnify CIMB Bank Berhad and that CIMB Bank Berhad was not liable to pay Deutsche Bank under the letters of credit. CIMB sought a stay of the English proceedings.
In this case, the judge held that the confirming bank was obliged to prove that it had, in fact, made the payment to the beneficiary. As a result, Deutsche Bank was ordered to plead a response to CIMB Bank Berhad's Request for Further Information of how Deutsche Bank had made those payments.
The High Court refused CIMB Bank Berhad's stay application and held that the risk of inconsistent decisions did not point to either court being more appropriate, and it was CIMB Bank Berhad's decision to issue proceedings in Singapore that created the risk. Either court could determine the compliance of the documents equally well. The crucial enquiry regarding the fraud was whether Deutsche Bank had sufficient knowledge that the documents were forged and that evidence was in London. The court also noted that both proceedings were in their early stages and, although all relevant parties were involved in the Singapore proceedings, this was not decisive. It held that it was inappropriate to stay Deutsche Bank's action so that it could be decided along with CIMB Bank Berhad's claims against other parties, which were of no concern to Deutsche Bank's.

Enforcement of judgment and awards

Midtown Acquisitions LP v Essar Global Fund Limited [2017] EWHC 519 (Comm) considered the enforcement of a Judgment by Confession (similar to an English consent judgment) obtained in New York. The High Court rejected the Defendant's challenge to enforcement, holding that a New York Judgment by Confession can be considered a judgment under English law and that there is no requirement for action (or *lis*) under English law. The Defendant challenged the Judgment by Confession on jurisdictional grounds and sought summary judgment.

It was argued by the Defendant that an action is necessary for a judgment, meaning that the Judgment by Confession could only be enforced by the English courts following an action. However, despite there being no action in New York, the Judgment by Confession is described as a judgment, looks like a judgment, and was issued by the New York court which ordinarily issues judgments. Additionally, there is a comparable procedure in the CPR.

The judge was not persuaded that the absence of action must inevitably mean that the Judgment by Confession is not a judgment capable of enforcement under English law.

On whether the Judgment by Confession was final and binding, despite being capable of being appealed and challenged like other judgments, the judge agreed with the claimants that it cannot be disregarded. On the basis that the Judgment by Confession was final, the court assessed whether it was decided "on the merits". As the Judgment by Confession was entered because there was proof that the Defendant confessed its liability to a specific sum and authorised the entry of judgment, held that the merits had been considered. Therefore, the judge held that the Claimant had established a good arguable case and that the Judgement by Confession could be considered a judgment under English law.

On the Claimant's application for summary judgment, the test was whether the Defendant had no real prospect of defending the claim. To resist this, the Defendant argued that the Judgment by Confession was obtained by fraud and in breach of natural justice. For fraud, the judge considered that there had to be conscious and deliberate dishonesty to impeach an English or foreign judgment. As the Defendant disavowed any allegation of dishonesty against the Claimant's conduct in New York, the judge held that reliance on the fraud exception has no prospect of success. On the alleged breach of natural justice, the Judge held that as the Judgment by Confession was obtained under an established procedure in a sophisticated jurisdiction, this argument was weak. This was strengthened by the fact that challenges to the procedure have failed in the US as they are based on the debtor waiving their right to due process in a knowing, intelligent, and voluntary way.

The Judge held that the English court has jurisdiction and granted summary judgment against the Defendant on the basis that there was no realistic prospect of its success at trial. The Judge granted a stay of execution.

The English courts' supervision of international arbitration

<u>Ordering security pursuant to section 103(5) of the Arbitration Act</u>

In *IPCO (Nigeria) Limited (respondent) v Nigerian National Petroleum Corporation (appellant)* [2017], the Supreme Court made clear that security may not be required from an award debtor as a condition to permitting any challenge to the recognition or enforcement of an arbitration award by the English court.

Sections 103(2) and 103(3) of the Arbitration Act set out the grounds upon which enforcement of an arbitration award might be refused. Section 103(5) of the Arbitration Act provides that the English court may adjourn enforcement proceedings where an application to set aside or suspend an award has been made at the seat of the arbitration. Section 103(5) is then followed by a stand-alone sentence which states:

"*It* [the Court] *may also on the application of the party claiming recognition or enforcement of the award order the other party to give suitable security.*"

The power to order security has been an important tool applied by the English courts to discourage an award debtor from bringing frivolous challenges at the seat of the arbitration. That is, under S103(5) of the Arbitration Act, if the judgment debtor challenges the award in the jurisdiction comprising the seat of the arbitration and seeks to have the enforcement of the award adjourned in England pending the outcome of that challenge, the Court may require the award debtor to provide security as a condition to having the enforcement proceedings put on hold. However, in the present case the Supreme Court was being asked to consider whether security could be required from an award debtor who wishes to challenge the enforcement of an award in England & Wales.

In the case of *IPCO*, security had been ordered earlier in the proceedings pursuant to section 103(5) in an amount of US $80 million, to be paid by Nigerian National Petroleum Corporation ("**NNPC**") pending challenge to the arbitration award in the Nigerian courts. Several years later, in 2012, the award creditor IPCO brought a new application in the English court that the proceedings should be remitted to the Commercial Court to determine whether the award should be enforced, or whether grounds of public policy or fraud existed for refusing enforcement (section 103(3) of the Arbitration Act). The Court of Appeal ordered that this issue should be remitted to the Commercial Court, and that as a condition of the continued adjournment of enforcement, NNPC should pay a further US $100 million by way of security.

The Supreme Court considered that this was an incorrect application of section 103(5), and that security is only payable as the price for adjournment to allow for the progress of foreign proceedings at the seat of the arbitration. Security is not payable pursuant to section 103(5), in order to allow for adjournment of enforcement pending determination in the English courts of a challenge under section 103(2) or 103(3). The Supreme Court also held that CPR 3.1(3) (permitting the court to make any order subject to conditions) did not apply here, as sections 103(2), 103(3) and 103(5) of the Arbitration Act are intended to give effect to Articles V and VI of the New York Convention, and as such constitute a code which is intended to reflect a common international approach.

Re-imposing confidentiality of an award following challenge proceedings

In *UMS Holdings Ltd v Great Station Properties SA* [2017] EWHC 2473 (Comm), the Commercial Court had to determine: (i) whether an arbitration award was deemed to have entered the public domain following a section 68 challenge process in the English courts which was held in public; and perhaps more uniquely (ii) whether the English court had jurisdiction to order that the award return to a confidential state even if the award or portions of it had entered the public domain in the course of section 68 proceedings.

The court had no difficulty in determining that the arbitration award had entered the public domain. The court considered as relevant that:

(i) the section 68 application and related proceedings took place in public;

(ii) prior to the section 68 hearing the court was asked to read the entirety of the award;

(iii) over the course of the hearing parts of the award were read out and the court was invited to read other parts of the award itself; and

(iv) detailed submissions were made in open court concerning the content of the award; and the judgment quoted parts of the award and referred to other parts.

On the basis of all these facts, the court had "no doubt" that the arbitration award had entered the public domain.

It followed that the contractual obligation to keep the award confidential (as embodied, in that case, in Article 30 of the LCIA Rules) no longer existed However, the judge concluded that the court had an inherent jurisdiction to regulate the consequences of its order that the section 68 challenge be heard in public, noting the parallel power of the court pursuant to CPR 31.22(2), which provides that the court may restrict the use of a document which has been disclosed in proceedings even when it has been read out in a public hearing.

The scope of the arbitration clause

In *Autoridad del Canal de Panama v Sacyr SA and others* [2017] the Court considered the meaning of a "matter" under section 9 of the Arbitration Act 1996, and whether English proceedings brought under a number of guarantees concerned a "matter" which the parties had agreed to refer to arbitration under the underlying main contract and one other related guarantee.

The case concerned a significant engineering project enlarging the Panama Canal in which the Claimant, Autoridad del Canal de Panama, employed contractor Grupo Unidos por el Canal, a Panamanian company, to carry out the work. This arrangement was made under a 2010 process of assignment which provided for a number of advance payments and eventual repayment guaranteed by Sacyr SA and other shareholders in the contractor, the Defendants in the English proceedings. Although the initial guarantees were subject to English law and exclusive jurisdiction of the English courts, the main contract and a further guarantee provided for ICC arbitration in Miami, Florida. The Commercial Court therefore needed to decide whether the English proceedings should be stayed in favour of arbitration pursuant to section 9 of the Arbitration Act 1996 on the basis that they had been brought in respect of a "matter" agreed to be referred to arbitration.

In this case, the judge accepted that there may be overlap between the issues under the guarantees and the issues in the defences raised in the arbitration pursuant to the main contract, but ultimately concluded that the "matter" at the centre of the proceedings was the English law guarantees, not the question of default of the contractor. This decision indicates that the English court will primarily consider the substance and context of the issues between the parties as opposed to the form they take when considering the application of the term "matter" for the purposes of section 9 of the Arbitration Act 1996.

Glencore Agriculture BV v Conqueror Holdings Ltd [2017] involved the chartering of a vessel to carry corn between Ukraine and Egypt pursuant to a standard form agreement which provided for arbitration in accordance with LMAA terms 1997. A dispute arose over certain delays and the charterer sought to commence an arbitration. However, the charterer sent the letter before action and certain other correspondence to the business email address of a junior Glencore employee who, it transpired, had left the business. As a result, none of the communications were seen by Glencore's chartering or legal departments. Only once the arbitration award was issued in favour of the charterer and distributed by post did Glencore become aware of the arbitration. Accordingly, Glencore sought to set aside the award via section 72 of the Arbitration Act 1996.

In the circumstances and applying agency principles, Popplewell J held that the junior employee did not have actual or implied authority to accept service on behalf of Glencore given that he had merely represented the operational branch of the organisation in connection with the contract. As a result, the initial notice of arbitration and subsequent communications had not been effectively served.

The decision serves as a salutary reminder to ensure that the appropriate contact details are used and individuals notified when commencing arbitration proceedings, and that a claimant should be particularly cognisant of this in the event that a respondent does not participate in the arbitration proceedings.

The decision in *Sino Channel Asia Ltd v Dana Shipping & Trading PTE Singapore and another* [2017] also concerns authority to accept service of a notice of arbitration. In that case, a ship owner entered a contract of affreightment with a charterer who negotiated through an agent. It was agreed that the agent would sign on behalf of the charterer and take the profit from the contracts, aside from certain entitlements. The ship owner only ever communicated through the agent or an agreed broking channel and accordingly the ship owner believed that the agent was part of the charterer's company. Subsequently, a dispute arose and the ship owner gave a notice of arbitration to the agent. The charterer only learnt of the arbitration once an award had been issued, and the charterer sought relief under section 72 of the Arbitration Act 1996 by challenging the authority of the agent.

On appeal, the Commercial Court's judgment was overturned. The Court of Appeal held that service of a notice of arbitration could be served on an agent with implied and ostensible actual authority to accept service and that therefore the arbitration award was valid and binding. However, in analogous cases on this issue, it was recommended that it be closely scrutinised by the court. Additionally, Gross LJ emphasised that this case was based on a rare fact pattern and it was important to concentrate on the actual circumstances of the relationship between agent and principal.

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