ThoughtLeaders4 Disputes • March 2024

Disputes MAGAZINE

ISSUE 12

CLARITY IN CONFLICT: NEW PERSPECTIVES ON DISPUTE RESOLUTION

INTRODUCTION

"No matter how thin you slice it, there will always be two sides."

- Baruch Spinoza

We are thrilled to present Issue 12 of the Disputes magazine. Delving into the dynamic landscape of justice, this edition boasts a collection of articles illuminating the complexities and contradictions at the heart of legal disputes. Drawing from a range of complementary themes: Emerging Tech, Sovereign & States, Corporate Crime, Property Disputes, Financial Institutions, and HNWs in Disputes, each theme offers a comprehensive exploration of the issues at hand, shedding light of the ever-changing nature of legal conflicts.

We thank our community partners, contributors, and readers for their support in putting this edition together.

Do keep an eye out as we continue to offer various engaging events within the Disputes community.

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Disputes

2024 Upcoming Events

Tech Disputes
16 April 2024
Millennium Gloucester Hotel London Kensington

The Sanctions in Disputes Forum 2024
18 April 2024
Central London

The Media Disputes: Defamation, Privacy & Reputation Management Forum
16 May 2024
Central London

Crypto in Disputes
25 June 2024
Central London

EU Collective Redress Circle
12 - 13 September
Royal Berkshire, UK

Contentious Trusts Next Gen Summit
18 - 20 September 2024
The Conrad Hotel, Dublin, Ireland

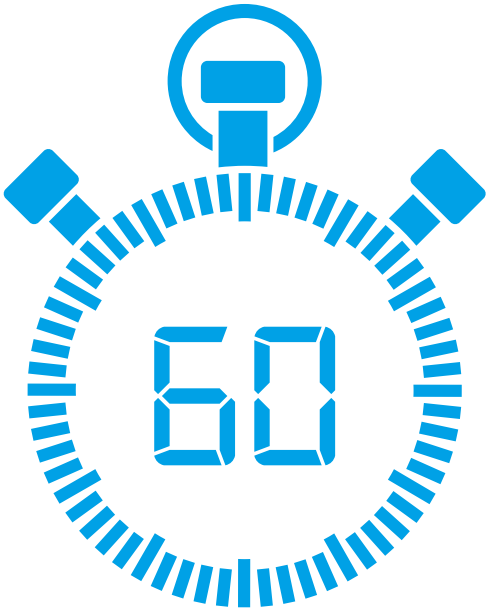
Group Litigation and Class Actions
16 - 17 October 2024
Central London

Corporate Disputes
26 - 27 November 2024
Central London

Funding in Disputes Circle
28 - 29 November 2024
Royal Berkshire, UK

60-SECONDS WITH:

JONATHAN UPTON BARRISTER SERLE COURT



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

A I love Italy - the food, wine, history, culture, climate - so it would have to be exploring the medieval hill towns (and vineyards) of Tuscany and enjoying lots of long, leisurely lunches with family and friends.

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

A Many of my cases involve difficult legal analysis so it's very satisfying when a draft judgment is circulated and the judge has accepted my arguments, particularly if I have advised on the case before proceedings were issued. But there's nothing quite like a good cross-examination!

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

A I once attended a hearing chaperoned by a private security officer who was ex-Israeli special forces. It was surreal but also rather exciting.

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

A In the early days of our relationship, my wife often rallied against my tendency to, as she put it, argue for the (expletive) sake of it. I think this can often become the default setting for those of us at the Bar; it's simply how we are trained to think and operate. It seemed novel to me at the time but resisting the impulse to take any opportunity to deploy a superb argument and focusing instead on the broader objective (e.g. staying married), has served me well.

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

A Honesty and integrity – the world would be a much better place but there would be a lot less work for the Bar.

Q **What book do you think everyone should read, and why?**

A David Copperfield. First and foremost, it's a fantastic story but it's also beautifully written and Dickens' characters are so rich. Gale on Easements comes in a close second.

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

A I sometimes wish I'd read Classics so it would have to be someone from the Ancient world. Being a lawyer, Cicero is an obvious choice. He lived though one of the greatest periods in history, knew all the main protagonists of the age and was an accomplished statesman, lawyer, philosopher and orator. He also knew a thing or two about rhetoric.

Q **What is the best film of all time?**

A *A Room with a View* (1985).

Q **What legacy would you hope to leave behind?**

A For my children to live happy and fulfilled lives.

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

A Fraud in its various guises, including fraudulent dispositions, sham transactions and allegations of dishonesty.

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

A It would be nice to appear in the Supreme Court again, next time as the leader.

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HMRC TARGETS CRYPTO TAX AVOIDERS: A COMPREHENSIVE LOOK AT THE NEW VOLUNTARY DISCLOSURE FACILITY

Authored by: Hinesh Shah (Senior Associate Forensic Accountant) – Pinsent Masons

Why HMRC is Taking Action

In a move aimed at addressing growing concerns surrounding non-compliance in the area of cryptocurrency taxation, His Majesty's Revenue and Customs ("HMRC") launched a groundbreaking voluntary online disclosure platform on 29 November 2023. This initiative is designed to encourage individual taxpayers to proactively disclose any unpaid tax on income and gains derived from crypto assets, such as exchange tokens (e.g., Bitcoin), non-fungible tokens (e.g., NFTs), and utility tokens (e.g., Ether).

The launch signifies a significant step towards tackling tax evasion and fostering transparency in the rapidly evolving world of digital assets.

48 other countries, including Australia, Austria, Canada, Denmark, Ireland, and South Africa, have expressed their intent to implement similar initiatives.

HMRC's decision to launch the voluntary disclosure facility underscores its concerns regarding non-payment of tax by crypto asset holders who have profited from significant income and/or gains. The tax authority is determined to recover unpaid taxes, improve its ability to ensure tax compliance and clamp down on tax evasion. The UK government has previously estimated that tax non-compliance on crypto asset holdings could "range from as high as 55% to 95%".

Many crypto asset holders may not have complied with tax rules because they were unaware of or didn't understand their tax obligations, although there will be some who have deliberately turned a blind eye. The new facility is seen as a helpful chance to fix past errors with only financial sanctions

(interest on unpaid taxes and applicable penalties) involved. Those who do not voluntarily disclose, and who HMRC subsequently investigate, will likely face much more severe repercussions.

What Does This Mean For UK Crypto Asset Holders:

For UK crypto asset holders, the voluntary disclosure facility brings forth several implications and requirements. First and foremost is the necessity to identify whether crypto asset activities have given rise to a 'taxable event'. Similar to other asset classes, taxable events can arise in multiple scenarios.

Exchanging one crypto asset for another, gifting crypto assets to relatives, and buying goods and services with tokens could all trigger a tax charge.

A portfolio analysis of each crypto asset will need to be prepared considering 'pooled cost' values when crypto assets have been purchased or sold at different points in time. Depending on the volume and value of transaction activity, there could be significant complexity in calculating cost bases and in the consideration of all relevant factors in preparing tax computations. Calculation of tax amounts owed will need to be broken down by tax year, with appropriate deductions made for taxable allowances (e.g., annual capital gains tax-free allowance or personal allowance for income tax).

To make a submission through the voluntary disclosure facility, individuals will need to provide detailed information, including personal details, the number of crypto asset transactions, acquisition costs, gains or profits made, and details of any crypto asset exchanges used. It is imperative, therefore, that individuals making voluntary disclosures maintain detailed records of their tax calculations – should HMRC have any follow-up queries - and seek guidance from professional advisers in complex scenarios.

Failure to declare unpaid tax within the stipulated timeframe could result in additional interest and penalties. Interest is calculated on a daily basis from the due date of the tax until it is paid. Payments for any unpaid tax must be remitted to HMRC within 30 days of submitting the disclosure.

Tax Enforcement and Investigations

HMRC has a data-sharing program with all UK crypto exchanges, encompassing crypto transaction data dating back to 2014 and Know Your Customer ("KYC") information for individuals who have signed up to any UK crypto exchange or wallet. This means HMRC have access to the requisite information to implement a robust approach to tracking crypto-related financial activities. With the introduction of the new disclosure facility, HMRC signals an expectation of increased enforcement and investigations. Undisclosed tax or income may trigger an enquiry when irregularities in information are detected via a Self-Assessment tax return.

Where HMRC suspect fraud, they may decide to investigate using the Code of Practice 9 (COP9 civil investigation of fraud procedure, or worse HMRC may commence a criminal investigation with a view to prosecution.

The duration and depth of investigations hinge on the conduct of individuals. Those who have taken reasonable care in reporting and paying taxes will be able to fix any irregularities over the last 4 years without triggering penalties. Where a taxpayer has been careless, HMRC can investigate and assess tax over a 6-year period and penalties are likely to be assessed. However, if there is evidence of deliberate inaccuracies or non-disclosure, with or without concealment of information, individuals may be required to declare and pay any tax due for a maximum of 20 years and associated penalties will be much higher for both careless and deliberate inaccuracies, penalties are lower in cases where the disclosure is 'unprompted' where the taxpayer tells HMRC about the inaccuracy before they have any reason to believe that HMRC have discovered it (i.e. through the online disclosure platform). In all other cases the disclosure is considered 'prompted' and penalties could be as much as 100% of the tax for UK matters.

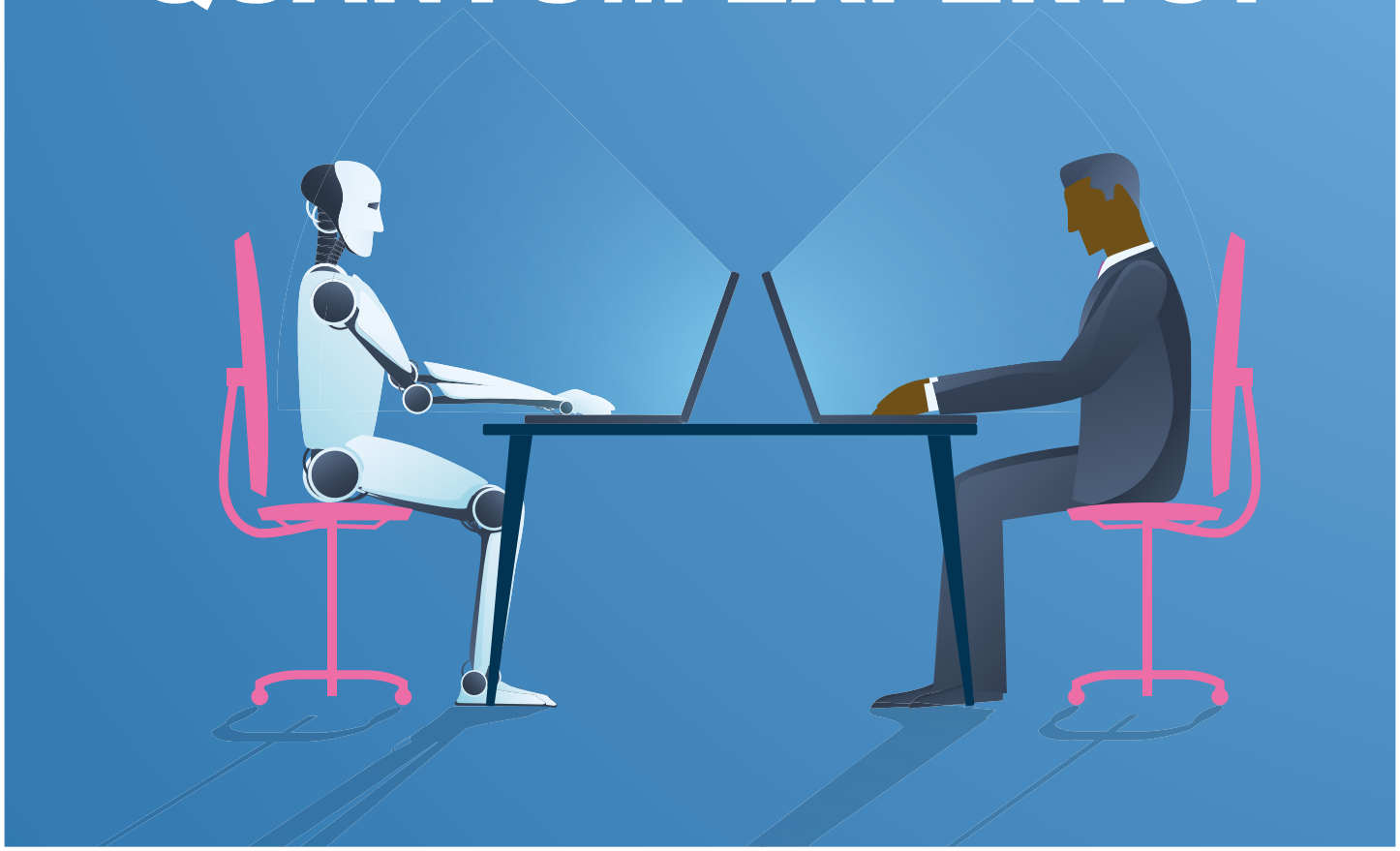
HMRC's proactive approach to address crypto tax avoidance is a pivotal step in ensuring a fair and transparent tax system. The voluntary disclosure platform not only provides an opportunity for crypto asset holders to rectify past non-compliance, but also sets the stage for a more accountable and regulated crypto ecosystem going forward.

Global Alignment

The launch of this facility comes only a few weeks after the UK government announced its intention, alongside the US, Ireland, and other nations, to implement the Crypto-Asset Reporting Framework ("CARF"). CARF, developed by the OECD under a G20 mandate, aims to combat offshore tax avoidance and evasion, aligning with the global surge in the use of crypto assets for investment and financial purposes.

Under CARF, crypto platforms will be required to share customer information with tax authorities from 2027, fostering automatic exchange of information between tax authorities on crypto exchanges. This will increase HMRC's visibility for potential enforcement against those who haven't paid taxes on crypto trading, and they are likely to toe a hard line with the voluntary disclosure facility now available.

WHY WON'T AI REPLACE QUANTUM EXPERTS?



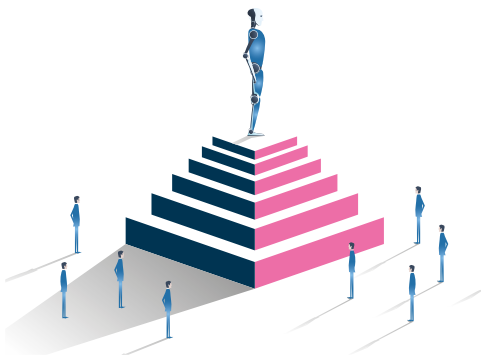
Authored by: Keming Liang (Director) – BRG

I recently had a conversation with a friend who expressed his worries about the potential implications of artificial intelligence ("AI"), such as ChatGPT, on the future of human labour. He voiced particular concerns regarding the displacement of humans' roles in business analytics, the field in which his expertise lies.

ChatGPT is an AI-driven chatbot that leverages natural language processing to conduct human-like conversations. The language model is adept at answering queries and can produce written materials, such as emails, social media posts, essays, etc.

It is undeniable that AI has transformed many sectors, including the legal and financial fields.

Within the finance sector, there exist AI-powered tools (e.g., Comparables.AI and Bizvalue.IO) that I understand can perform a business valuation in a matter of a few minutes. The same task often takes valuation professionals considerably more time, often days or even weeks, as forecast of corporate cash flows for a discount cash flow analysis or selection of comparable companies for a market approach generally requires careful consideration of many macro and company-specific factors.



Others have published posts[1] commenting on how ChatGPT may impact dispute resolution or international arbitration. In this post, I focus on my view as it relates to quantum experts.

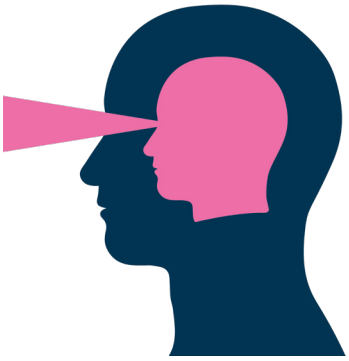
Quantum experts are professionals who specialise in assessing economic damages in litigation or arbitration cases.

Our expertise is particularly useful in complex matters for which damages are not readily discernible. One such good example is a scenario requiring the

1 Please see here and here.

estimate of expectation losses.

I have not yet seen an AI-performed valuation used in litigation or arbitration proceedings; however, it is not difficult to come up with contexts in which AI tools can be effectively employed. For example, before a shareholder dispute is initiated, counsel may perform a preliminary valuation with the help of AI-powered tools to assess the support – or lack thereof – for a party's view of the claim's value. Nonetheless, for the reasons below, I remain optimistic about the enduring value of my role as a quantum expert and am not overly concerned with being displaced by AI in the foreseeable future.



Human Judgement

Quantum assessments often necessitate a nuanced approach, requiring experts to exercise discretion and informed judgement. This could involve creating hypothetical counterfactual scenarios, selecting from different valuation methods, evaluating alternative data sources, and so on. These decisions require not only technical expertise but also a synthesis of professional acumen and a deep understanding of the intricacies of each case.

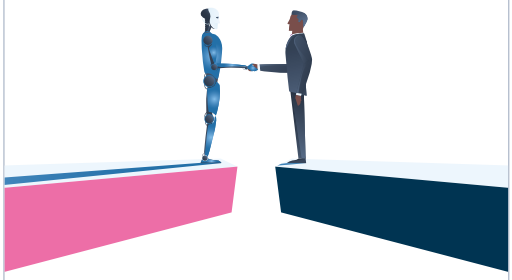
Despite its rapid advancements, AI is not yet capable of emulating the multi-faceted nature of human judgement, especially when it comes to creative thinking.

While AI can make decisions based on predefined parameters and data inputs, it does not think per se. When asked about whether it can think, ChatGPT's response is:

"As a machine learning model, I don't 'think' in the same way humans do. Instead, I process and generate text based on patterns in the data I was trained on. My responses are the result of complex algorithms processing that data, not conscious thought or awareness. I don't have beliefs, emotions, consciousness, or self-awareness. I can provide information, answer questions, and generate text based on the input I receive, but I don't have independent thoughts or feelings."

(However, I was still surprised by ChatGPT's identification of itself as "I", which appears to me to be a form of self-awareness. This article[2] presents a good discussion on if ChatGPT can think.)

In addition, quantum experts' work must comply with professional standards and guidelines, which often entails a sensitive approach to information handling and reporting. There exists an inherent risk that the use of AI-powered tools could inadvertently breach obligations pertaining to confidentiality.



It was previously reported that Samsung employees accidentally leaked confidential data when using ChatGPT.[3]

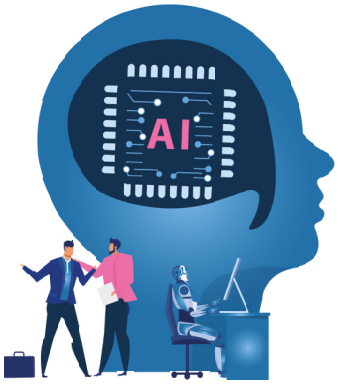
Context and Counterfactuals

To determine the economic loss a party may have suffered from an alleged wrong committed by another party, one must compare: (i) the financial position the allegedly wronged party is actually in, referred to as the "actual" scenario, with (ii) the financial position the allegedly wronged party would have been in but for the wrongful act complained of – this is referred to as the "but-for" or "counterfactual" scenario. Therefore, formation of hypothetical counterfactual scenarios is a common element of a quantum exercise.

To create such scenarios, quantum experts operate within complex and multi-faceted settings and often need to make a series of assumptions regarding macro factors such as economic conditions, regulatory environment, industry norms, and business-specific factors such as revenue growth, cost levels, and capital structure.

It is therefore critical for quantum experts to form a profound understanding of specific contexts.

While AI is known for its capacity to analyse vast amounts of data, it currently lacks the capability to fully grasp the intricacies and nuances of these contexts in the way that a human expert can. AI may also struggle with unstructured data or ambiguous information that does not fit neatly into pre-programmed algorithms. Unlike AI, human experts can draw on their professional experiences, intuition, and understanding of broader economic and business contexts to make sense of complex or ambiguous situations. For example, I imagine it would be difficult for AI to quantify the effect of the evolving and uncertain regulatory environment on the value of a media company in China. Regulations for the media sector in China sometimes change unpredictably. Even when the regulations are in place, their interpretation and enforcement can vary, leading to different impacts on companies. This variance is difficult to quantify for AI because AI powered tools rely on patterns and data, but the changes do not always follow a consistent pattern.



Communication Skills

Quantum experts do more than just crunching numbers. Efficient and effective communication lies at the heart of quantum work.

Quantum experts must be able to communicate complex analyses and findings in an understandable, engaging, and persuasive manner to a non-expert audience, such as the clients, legal counsel, an arbitral tribunal, a judge, or jury.

2 https://towardsai.net/p/l/can-chatgpt-think

3 https://mashable.com/article/samsung-chatgpt-leak-details

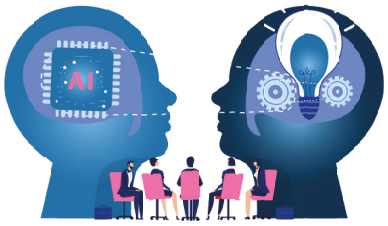
Furthermore, during hearings or trials, the role of quantum experts takes on an added dimension. They must not only articulate their perspectives, but also engage with opposing viewpoints and respond to challenging queries with both poise and precision. This represents a human element that AI cannot yet replicate.

Reliability and Transparency

AI tools also likely fall short of the requirements of reliability and transparency that are necessary to sustain the legitimacy of legal proceedings. Whether in litigations or arbitrations, judges or arbitrators are expected to render decisions that are methodologically reliable and transparent in their reasoning. "A statement of the reasons for a judicial decision is widely regarded to be a pre-requisite for an orderly administration of justice" (Christoph H. Schreuer, The ICSID Convention: A Commentary, p. 996).

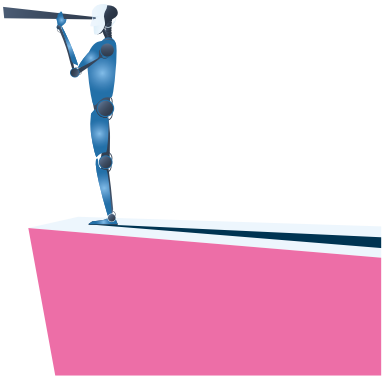
It is questionable whether a judge or arbitrator that relies on "AI quantum experts" can meet this standard for reliability and transparency.

Further, it has been widely observed since the launch of ChatGPT that large language models "hallucinate" wrong answers – a trend that some commentators believe[4] will continue for years to come. In the legal world, recent news reported an incident in which a lawyer representing his client in a personal injury lawsuit in Manhattan submitted a court filing that ChatGPT assisted drafting but later found that the case citations ChatGPT included in the filing were all bogus. Interestingly, when confronted with the fake citations, ChatGPT insisted that they were real and from reputable sources. The lawyer had a sanctions hearing in June 2023, after which the judge found that the lawyer acted in bad faith and imposed sanctions.



AI's reliability is also hampered by the fact that it may unintentionally incorporate biases present in their training data, leading to potentially unfair or incorrect outcomes. For example, in the U.S. criminal justice system, the use of AI tools to estimate a defendant's likelihood of committing a future crime has been criticised[5] as reflecting factors that are inaccurate and that seem racially biased. More recently, ChatGPT's refusal to write a poem about Trump's positive attributes—before proceeding to write one about Biden's—has led to criticism[6] of its possible political bias. Keep in mind that it's "garbage in, garbage out". An AI-powered tool is only as good as the data it's trained on.

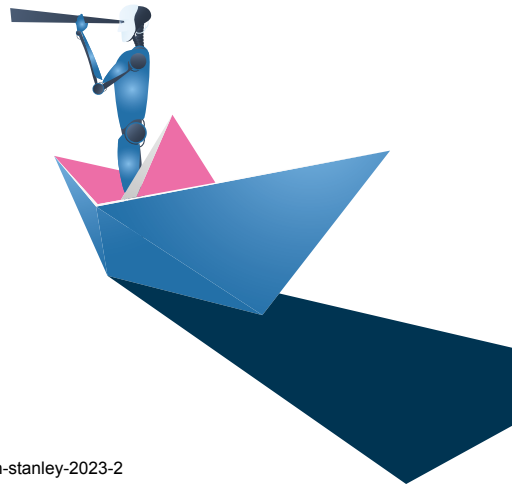
The lack of reliability, compounded with the opacity of AI algorithms, can be especially problematic. Google's CEO Sundar Pichai, in a recent interview[7], commented on the "mysterious" "black box" nature of Bard: "[Y]ou don't fully understand. And you can't quite tell why it said this, or why it got wrong." Thus, while it might be true that AI powered tools can produce a business valuation in a matter of a few minutes, the "black box" nature of the AI algorithms[8] is a significant issue in legal contexts where transparency and reliability are crucial. For example, the ICSID Convention, as construed by many tribunals, requires that the award enables a reader to follow the tribunal's reasoning "from Point A to Point B" (Tidewater v. Venezuela, ICSID Case No. ARB/10/5, Decision on Annulment, 64). Can a reader follow an AI's "black box" from input to output? Arguably, even the AI's designer cannot.



Conclusion

Considering the aforementioned points, I do not view AI as a threat to the profession of quantum experts. Rather, I think it is more constructive to view it as a potential collaborator. AI tools could streamline quantum work by automating routine tasks, performing data analysis, etc. By leveraging these capabilities, quantum experts can then focus on higher-value activities that require human judgment, contextual understanding, and persuasive communication skills. Indeed, in writing this article, I used ChatGPT as an editing tool and found it highly efficient. However, I emphasise that while AI is a powerful tool with vast potential, the complex and nuanced nature of damage assessment underscores the irreplaceability of human expertise.

The views and opinions expressed in this article are those of the author and do not necessarily reflect the opinions, position, or policy of Berkeley Research Group, LLC or its other employees and affiliates.



4 https://markets.businessinsider.com/news/stocks/chatgpt-ai-mistakes-hallucinates-wrong-answers-edge-computing-morgan-stanley-2023-2

5 https://www.theatlantic.com/ideas/archive/2019/06/should-we-be-afraid-of-ai-in-the-criminal-justice-system/592084/

6 https://www.forbes.com/sites/ariannajohnson/2023/02/03/is-chatgpt-partisan-poems-about-trump-and-biden-raise-questions-about-the-ai-bots-bias-heres-what-experts-think/?sh=697dea2a1371

7 https://www.cbsnews.com/news/google-artificial-intelligence-future-60-minutes-transcript-2023-04-16/

8 https://arbitrationblog.kluwerarbitration.com/2023/05/25/arbitration-tech-toolbox-looking-beyond-the-black-box-of-ai-in-disputes-over-ais-use/

DATA ADEQUACY AND INTERNATIONAL RELATIONS: THE PITFALLS OF A SHIFTING HUMAN RIGHTS LANDSCAPE

Authored by: Mariya Peykova (Barrister) – 3PB

The term 'data adequacy' is used by the EU to describe other countries, international organisations, or territories which the EU considers capable of providing an "essentially equivalent"[1] level of data protection to that which already exists in the EU.[2]

In 2021, and following the UK's exit from the European Union, the EU Commission adopted two adequacy decisions in respect of the UK, one under the General Data Protection Regulation ("the GDPR adequacy decision"),[3] and one for the Law Enforcement Directive ("the Law Enforcement adequacy decision").[4]

Both adequacy decisions include a 'sunset clause' in case of future divergences, which limit their duration to four years[5] – the adequacy decisions will expire on 27th June 2025.

It is notable that the adequacy decisions explicitly state that the obligations arising from legally binding international instruments, concerning notably the protection of personal data (in particular through the United Kingdom's adherence to the ECHR and Convention 108, as well as submission to the jurisdiction of the European Court of Human Rights), are an 'important element of the legal framework assessed in [these] Decisions'. Thus, it is obvious that one of the main factors in any adequacy assessment carried out by the EU is the human rights framework in the country being assessed. The European Commission is expected to commence work in late 2024 to decide whether the UK adequacy decisions should be extended for a period up to a maximum of another four years.

1 See Recital 104 of Regulation (EU) 2016/679.

2 The UK can also make its own adequacy assessments and decisions. Following the end of the Transition Period of the UK Exit from the European Union on 31 December 2020, sections 17A and 74A of the Data Protection Act 2018 conferred powers on the Secretary of State to make UK Data Adequacy Regulations, in relation to general and law enforcement processing respectively.

3 Commission Implementing Decision of 28.6.2021 pursuant to Directive (EU) 2016/679 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom

4 Commission Implementing Decision of 28.6.2021 pursuant to Directive (EU) 2016/680 of the European Parliament and of the Council on the adequate protection of personal data by the United Kingdom.

5 Preamble 289 of the GDPR adequacy decision and Preamble 173 of the Law Enforcement adequacy decision.

The UK's Human Rights Landscape

Recent years have seen successive governments propose or table legislation that could seriously undermine the UK's human rights record. In June 2022, the government launched a bill to repeal the Human Rights Act 1998 ("HRA 1998").

The Bill of Rights was heavily criticised as being deeply regressive, and was subsequently scrapped in the summer of 2023.

However, recent developments suggest that the current human rights framework is not safe from radical reform which could see the UK withdrawing from the ECHR, potentially undermining the protections currently in place. In addition, in a bid to remove some of the uncertainties created by the Retained EU Law (Revocation and Reform) Act 2023 ("REULA"), the government has introduced secondary legislation: the Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023 ('the Regulations'). The Regulations confirm that any references to fundamental rights and freedoms in the UK GDPR and the Data Protection Act 2018 ("DPA 2018") are to be read as references to the fundamental rights and freedoms as set out in the ECHR, and as implemented in the UK through the HRA 1998. Some commentators have argued that this introduces an additional layer of uncertainty in circumstances where there is no clarity on the scope of article 8 (right to private and family life) ECHR vis-à-vis the scope of article 8 (right to the protection of personal data) of the Charter of Fundamental Rights of the European Union ("the Charter").

It is unclear whether the rights under article 8 ECHR provide the same level of protection as the right to personal data under article 8 of the Charter. It is notable, however, that in the case of R (Davis & Watson) v Secretary of State for the Home Department [2015] EWHC 2092 (Admin), the High Court held that article 8 of the EU Charter 'goes further' and 'is more specific'[6] than article 8 ECHR. Whilst the adequacy decisions clearly state that adherence to the ECHR is crucial to the adequacy assessment process, they also expressly state that such adherence concerns 'notably the protection of personal data'.

In the light of this, it is arguable that in practice the Regulations have introduced changes which could potentially undermine individual rights, and consequently have a detrimental effect on future adequacy assessments.

Impact on International Relations and the Cost to Businesses

The flow of personal data to and from different countries is essential for the expansion of international cooperation and cross-border trade. A report published at the end of 2020 indicates that of the UK's international data flows, 75% were with the EU. Much UK economic activity is still dependent on these flows. The report concludes that this was especially true for the services sector, which comprises 79% of the UK economy. To illustrate the potential importance of EU-UK data flows, 46% of UK exports are to the EU, of which services account for 40%.[7] In the absence of an adequacy decision,[8] businesses on both sides of the Channel would have to rely on standard contractual clauses (SCCs) – provisions added into commercial contracts to allow for data transfers.

The UK government has estimated that adopting SCCs would impose a financial impact of £1.4bn on UK businesses trading with the EU over five years, much of which would be borne by small businesses.[9]

It is notable that the adequacy decisions facilitate the correct implementation of the EU-UK Trade and Cooperation Agreement, which anticipates the exchange of personal information, for example for the purposes of cooperation on judicial matters.

In conclusion, any changes to the human rights landscape in the UK which undermine the existing framework of individual rights and protections, could potentially have a detrimental effect on future data adequacy decisions. This will not only create an environment where individual rights are at risk, but will damage the UK's international reputation and relations, potentially affect future adequacy assessments, and result in heavy losses for UK businesses and the UK economy as a whole.

6 See paragraph [80] of Davis and Watson.

7 'The Cost of Data Inadequacy: The economic impacts of the UK failing to secure an EU data adequacy decision', UCL European Institute report with the New Economics Foundation, 23rd November 2020, accessible here.

8 Article 49 GDPR enables data transfers to take place in specific circumstances in the absence of an adequacy decision pursuant to article 45 (3).

9 https://www.cer.eu/insights/three-deaths-eu-uk-data-adequacy

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STATE IMMUNITY AND ARBITRATION AWARDS:

CAN THE EMPIRE STRIKE BACK?

Authored by: Catherine Eason (Partner) and Frances Jenkins (Senior Associate) – PCB Byrne

The growth of international private investment and the inevitable growth in disputes between Sovereign States and Investors has created a tension between the English Court's obligations under international treaties on the one hand, and the doctrine of State Immunity on the other.

A key issue for investors when considering which jurisdictions to enforce an award in, is the extent to which a Sovereign State may avoid the enforcement of an arbitration award in England by relying on the doctrine of State Immunity.

The English Court has recently considered two novel points relating to the State Immunity defence and clarified, for the first time that, issue estoppel can apply to a Sovereign State, and that Article 54 of the ICSID convention is a written submission to the English jurisdiction for the purposes of s.2(2) of the State Immunity Act 1978 (the "Act").

The two decisions considered in this article highlight the pro-investor enforcement regime in England and illustrate the limited scope of State Immunity in certain circumstances.

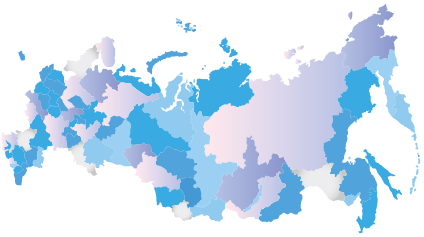
The Law on Sovereign Immunity

First, by way of introduction to the position under English law:

The Act provides that the English courts do not have jurisdiction to adjudicate disputes or permit enforcement actions against sovereign states unless an exception applies (s.1(1)).

Some of these exceptions include:

1. Where a state has submitted to the English jurisdiction by a prior written agreement (s.2(2)); and,
2. Where a State has agreed in writing to submit a dispute to arbitration, it is not immune from proceedings in the English Courts which relate to that arbitration (s.9(1))



Hulley & Ors v Russian Federation[1]

In the well-known Yukos saga, the English Court recently considered Russia's defence, on the grounds of State Immunity, to former Yukos shareholders' attempts to enforce various arbitration awards worth over US$ 50 billion, which were issued by the Permanent Court of Arbitration in July 2014 (the "Awards").

This decision is significant because it has brought welcome clarity to the issue of the interaction between the doctrines of issue estoppel and state immunity where, previously, there had been no clear authority.

In this case, Russia attempted to re-argue its failed case on the lack of jurisdiction of the arbitral tribunal, which had previously been dismissed by the Dutch Supreme Court.

Background

The background to this high-profile case is well known and highly complex. For that reason, only a very basic summary of the pertinent procedural background is described in this article.

Following the issue of the Awards, the Claimants commenced enforcement proceedings in England. Russia then challenged the jurisdiction of the English Court on the basis that Russia was immune under s.1(1) of the Act.

The Claimants argued that the exception in s.9(1) of the Act was applicable because Russia had agreed in writing to submit the dispute to arbitration under the Energy Charter Treaty ('ECT').

The ECT is a multi-lateral investment treaty which Russia signed in 1994, but never ratified.

Article 45(1) of the ECT provided that, even though Russia had never ratified

the ECT, Russia agreed to apply the ECT provisionally pending its entry into force. Therefore, according to the Claimants, Russia had agreed in writing to submit disputes under the ECT to international arbitration under Article 26 of the ECT (Settlement of Disputes). Accordingly, the exception set out in s.9(1) of the Act applied and Russia's claims of state immunity should be dismissed.

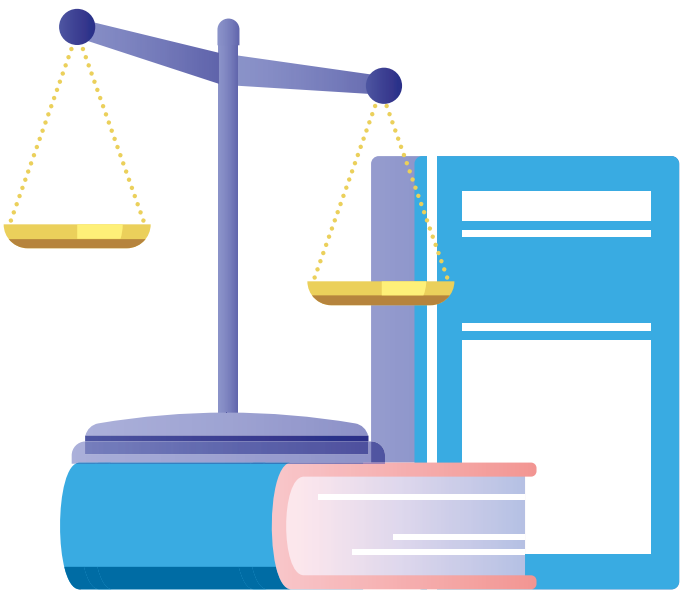
The Claimants' attempts to enforce the Awards in England however were brought to a halt as Russia challenged the Awards in the Hague courts on the basis that, amongst other points, the arbitral tribunal had no jurisdiction to hear the dispute. Ultimately Russia was unsuccessful before the Hague courts.

Enforcement Proceedings

The Court then considered Russia's arguments of State Immunity. The Claimants argued that a final and conclusive answer to Russia's argument about the applicability of Articles 45 and 26 of the ECT had been given by the curial courts and, therefore, this gave rise to an issue estoppel which prevented Russia from running the same failed case in England.

Russia however argued that, notwithstanding issue estoppel, the Court was under a freestanding duty pursuant to s.1(2) of the Act to decide state immunity on a case-by-case basis, and consider whether s.9(1) of the Act, applied to the fact of any given case, irrespective of issue estoppel.

The Court confirmed that foreign judgments can give rise to issue estoppel, but commented that there was a lack of clear authority on this point when a State is involved.



1 [2023] EWHC 2704 (Comm)

However, the Court said, there were no provisions in the Act which would make issue estoppel inapplicable to a State, assuming that the requirements for issue estoppel were met.

The Court then considered the application of the issue estoppel doctrine to the current case, finding both that it applied, and that Russia had waived its immunity.

It is now therefore clear that issue estoppel can apply to foreign judgments against a Sovereign State, and state immunity under the Act is not necessarily a successful defence when arbitration awards come to be enforced in England.

Infrastructure Services Luxembourg & Another V Kingdom of Spain[2]

A similar issue arose in a case in which the Claimants applied to enforce an ICSID award in the sum of around €120 million against the Kingdom of Spain ("Spain"). This decision is interesting as it demonstrates the Court's commitment to the UK's obligations under international law and the pro-investor stance which the Court appears to be taking when recognising and enforcing ICSID awards.

At a very high level, the Claimants brought arbitration proceedings against Spain under the ECT and obtained an ICSID award. Spain's application to annul the ICSID award was rejected by the ICSID ad hoc committee.

Following the Claimants' application to register the award in England, Spain resisted this application on the basis that (i) the English Court lacked jurisdiction to register the award, under s.1(1) of the Act, as Spain was a Sovereign State; and (ii) the arbitral tribunal lacked jurisdiction to make the ICSID award in the first place.

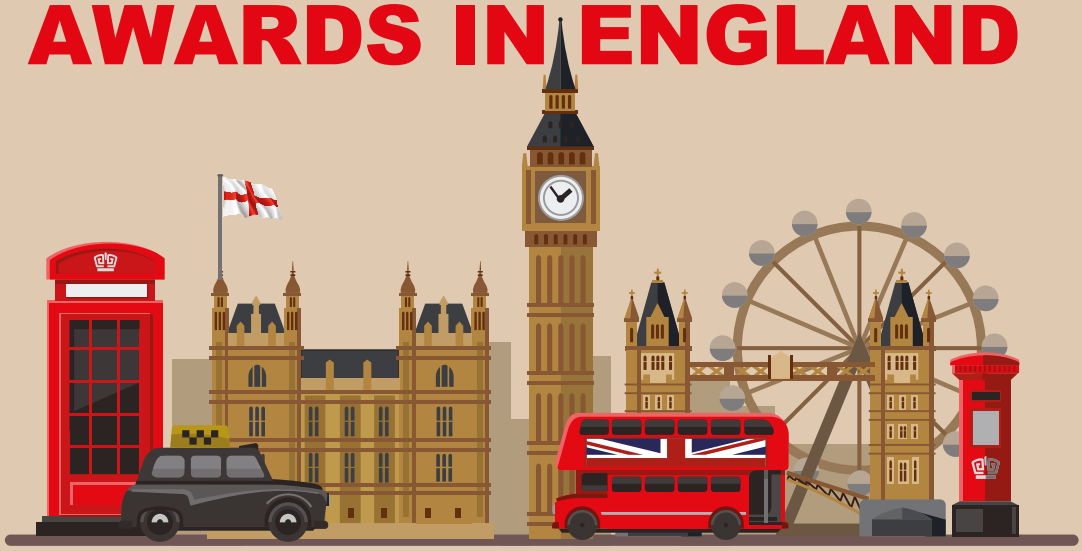
The Claimants relied on s.2(2) of the Act and argued that Spain had agreed to submit to the jurisdiction, and on s.9(1) of the Act, whereby Spain's agreement to arbitrate under Article 54 of the ICSID convention constituted an agreement in writing to submit a dispute to arbitration for the purposes of s.9(1) of the Act.

The Court agreed with the Claimants and confirmed, for the first time, that Article 54 of the ICSID Convention was a "prior written agreement" for the purposes of s.2(2) of the Act. Furthermore, the Court also considered that s.9(1) of the Act was satisfied by the ICSID Convention and the ECT.

Stepping back, these decisions paint a picture which highlights the English Court's commitment to its obligations under international treaties and the importance that it places on the rule of law, even as against Sovereign States.

2 [2023] EWHC 1226 (Comm)

SOVEREIGN IMMUNITY AND THE ENFORCEMENT OF ICSID AWARDS IN ENGLAND



Authored by: Lucian Ilie (Barrister) – Outer Temple Chambers

"Sovereign Immunity" is a principle of international law, which is applied in accordance with the law of the forum. The concept of "Sovereign Immunity" in the United Kingdom is rooted in common law principles.

Historically, it was encapsulated in the maxim "the King can do no wrong", meaning that the Crown and its agents could not be sued in civil or criminal court.

Over time, this principle has evolved, meaning that the concept of sovereign immunity is not absolute anymore but only restrictive to acts of a governmental nature (acta jure imperii). As a result, acts of a commercial nature (acta jure gestionis) do not enjoy immunity.

Under English law, the statute giving effect to the doctrine of restrictive immunity is the State Immunity Act 1978 ("the SIA"), which determines whether (i) a dispute involving a State entity can be adjudicated and (ii) the judgment arising from that adjudication can be enforced. The defence of Sovereign Immunity applies not only to the State itself and its various organs, agencies and instrumentalities but also to separate entities acting in the exercise of sovereign authority.

Immunity From Adjudication

As per section 1 of the SIA, the UK courts have no jurisdiction to adjudicate disputes against States unless one of the statutory exceptions in sections 2 to 11 applies, such as when dealing with (i) submissions to the jurisdiction of the English courts, (ii) commercial transactions, (iii) contracts to be performed in the UK; (iv) employment contracts; (v) personal injuries and damage to property; (vi) ownership, possession and use of property; (vii) admiralty proceedings concerning ships in commercial use, and (viii) arbitration agreements. These are exceptions to jurisdictional immunity and do not in themselves overcome enforcement immunity.

Immunity From Enforcement

As per sections 13(3) and 13(4) of the SIA, a party can be prevented from enforcing any judgment or arbitration award against the property of a State unless one of the two exceptions to immunity from enforcement/execution applies: (i) when the State in question provides its written consent to execution (submission to jurisdiction is not sufficient so an explicit waiver of immunity as to enforcement is needed), and (ii) where the property of the State in question is used for commercial purposes.

Put simply, a successful Sovereign Immunity plea will mean that the UK courts either will refuse to hear the dispute or will be unable to enforce any foreign judgment or award made against a sovereign State.

The Enforcement of ICSID Awards

Since its entry into force in 1966, the ICSID Convention has provided a framework for contracting States and investors of those States (i) to arbitrate investment disputes, and (ii) to recognise and enforce ICSID awards against any contracting State as if it were a domestic court judgment.

In England, the ICSID Convention (including the process for registration and enforcement of ICSID awards) has been implemented into domestic law through the Arbitration (International Investment Disputes) Act 1966 ("the 1966 Act") and CPR 62.21 (specific to ICSID awards). While the default position is that ICSID awards will be recognised as enforceable by the domestic courts without further review (cf. to Articles 53 and 54 of the ICSID Convention), States have been known to challenge ICSID awards at the recognition stage based on "Sovereign Immunity" defence by alleging that recognition of the ICSID award contravenes the State's right to immunity from jurisdiction under section 1 of the SIA.

Until recently, the English Commercial Court (which oversees the recognition and enforcement of ICSID awards) had an established approach towards the recognition and enforcement of ICSID awards.

However, in a recent judgment dated 19 January 2024 [Border Timbers Limited and another v Republic of Zimbabwe, 2024 EWHC 58 (Comm)], the Commercial Court took a "novel approach" by declining to set aside an order for the registration of an ICSID award against Zimbabwe, finding that sovereign immunity is irrelevant at the stage of registration of ICSID awards.

State immunity irrelevant in arbitration award registrations

In 2021, the Claimants obtained in the Commercial Court a without-notice order registering a USD 125 million ICSID award made in their favour. Zimbabwe applied to set aside the order on grounds that it was immune from the jurisdiction of the UK courts since the State waived its immunity pursuant to:

1. Section 2(2) of the SIA on the basis that Article 54(1) of the ICSID Convention constituted a prior written agreement to submit to the jurisdiction of courts of the UK; and/or
2. Section 9(1) of the SIA because of Zimbabwe's alleged agreement to submit the dispute to arbitration.

Mrs Justice Dias found that neither one of the exceptions applied: parting with a previous ruling of Mr Justice Fraser in Infrastructure Services Luxembourg v. Spain [formerly Antin, 2023 EWHC 1226 (Comm)], the judge found that Article 54 of the ICSID Convention was insufficient to satisfy the requirements for the submission exception contained in section 2(2) of the SIA, which requires an express submission to the jurisdiction of the courts.

In addition, Mrs Justice Dias determined that courts should be able to review the State's jurisdictional objections, even if they had been rejected in the arbitration, before applying the arbitration exception under section 9 of the SIA. Given that the existence of the arbitration agreement under the applicable BIT was disputed, Mrs Justice Dias considered that it did not constitute an agreement in writing for the purpose of section 9 of the SIA. Nevertheless, the judge declined to set aside the order on the basis that the defence of sovereign immunity did not arise at the stage of the registration but could only come into play later, at the stage of execution of the ICSID award.

In doing so, Mrs Justice Dias recognised that this was "a novel approach for which there is no direct authority" and granted Zimbabwe permission to appeal to the Court of Appeal.

Time will tell whether this "novel approach" will be followed when dealing with the enforcement of ICSID awards in England.

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LITIGATION FUNDING IN IRELAND

Authored by: Deirdre O'Donovan (Consultant) – William Fry

Historical Position

Historically, litigation funding arrangements were unlawful in Ireland, falling foul of the torts and offences of maintenance and champerty. Maintenance may be defined as the giving of assistance by a third-party, who has no interest in the litigation, to a party in litigation. Champerty has been described as a particular kind of maintenance. It arises where the third-party, who is providing assistance, receives a share of the litigation proceeds. As noted in a recent judgment of the High Court in Howley v Howard & McClean [2024] IEHC 15, "the purpose of and policy behind the tort and offence of champerty is to avoid trafficking in litigation, the stirring or encouragement of litigation for profit or intermeddling in court proceedings".

Ireland's continued recognition of these ancient torts and offences is an anomaly compared to other countries.

The primary argument in favour of legalising third-party funding arrangements is that they facilitate access to justice for litigants with fewer resources and who may otherwise be denied such access. However, the view remains that such funding may result in, for example, vexatious or frivolous litigation, funded parties being under-compensated or an increase in legal costs.

A 'Legitimate' Interest

The Irish Supreme Court considered the issues of maintenance and champerty and litigation funding in the seminal case of Persona Digital Telephony Limited v The Minister for Public Enterprise [2017] IESC 27 (Persona). The court confirmed that maintenance and champerty remain part of Irish law and consequently the funding arrangement in question was unlawful.

Notwithstanding this, the Irish courts have sought to soften the effect of the outright prohibition by distinguishing cases where the litigation funder has an indirect interest in the litigation.

In Thema International Fund plc v HSBC Institutional Trust Services (Ireland) Ltd [2011] IEHC 357, it was held that shareholders who funded the litigation of a company in which they had an interest had an indirect link to that company and the litigation. Therefore, that funding arrangement fell outside the scope of maintenance

or champerty. More recently, in Atlas GP Ltd v Kelly [2022] IEHC 443, a residents' group, which objected to a grant of planning permission, circulated flyers seeking financial support from residents to fund their action. The High Court noted that the residents' association and those to whom the flyer was aimed, had a legitimate interest in the proceedings and therefore the arrangement was lawful.

Moving Towards Change

The Irish legislature has recently effected some change in this area. The Courts and Civil Law (Miscellaneous Provisions) Act 2023, when commenced, will amend the Arbitration Act 2010 (2010 Act) to permit third-party litigation funding. Section 5A of the 2010 Act provides that the torts and offences of maintenance and champerty do not apply to international commercial arbitration or any proceedings or mediation or conciliation proceedings arising out of international commercial arbitration.

The Representative Actions for the Protection of the Collective Interests of Consumers Act 2023 (2023 Act), which transposed EU Directive 2020/1828 (Directive), was signed into Irish law on 11 July 2023, and awaits commencement. The Directive provides that qualified entities may bring representative actions as a claimant party on behalf of consumers. The Directive refers to the regulation of third-party funding of representative actions for redress measures insofar as it is allowed "in accordance with national law".

The 2023 Act permits third-party funding insofar as it is permitted "in accordance with law".

An amendment to the legislation had been proposed to disapply maintenance and champerty rules to the 2023 Act, but this amendment was not adopted.

On 17 July 2023, the Law Reform Commission (LRC) published a Consultation Paper on Third-Party Litigation Funding (Paper), inviting submissions and views on the legalisation and regulation of third-party funding in Ireland. The Paper discusses possible approaches to legalising third-party funding. These include either abolishing the torts and offences of maintenance and champerty outright or preserving the rules of public policy behind the torts and offences. The Paper notes that the "optimum method" for this jurisdiction, if legalisation becomes a reality in Ireland, is to retain the torts and offences but create a statutory provision permitting third-party funding in some cases as an exception.

The Paper also considers how the third-party funding industry should be regulated if such funding is legalised. In doing so, the Paper analyses a number of possible models including self-regulation, certification by the court and the introduction of a regulatory regime to be administered by a new or existing regulator. The December 2023 deadline for submissions has now passed and the LRC will shortly prepare a final report setting out its recommendations.

The Future of Litigation Funding in Ireland

There is a clear shift in attitude towards third-party funding of litigation in Ireland. Instead of being seen as a threat to the proper administration of justice and the integrity of the legal system, it is now seen more widely as a means of ensuring access to justice and equality of arms, when properly regulated.

The Irish legislature is coming under pressure to change the law in this area. The publication of the Paper by the LRC is a message to lawmakers that the issue needs to be comprehensively addressed. The Irish courts have expressed similar views. In Persona, Denham C.J. held that 'it might well be appropriate to have a modern law on champerty and the third party funding of litigation. However, that is a complex multifaceted issue, more suited to a full legislative analysis'.

Without change, Ireland faces being left behind where other common law jurisdictions including Australia, New Zealand, England and Wales and Canada have embraced the benefits of third-party funding and have developed litigation funding industries.

It seems that it is not a question of if litigation funding will be legalised in Ireland, but a question of when it will happen and what form it will take.

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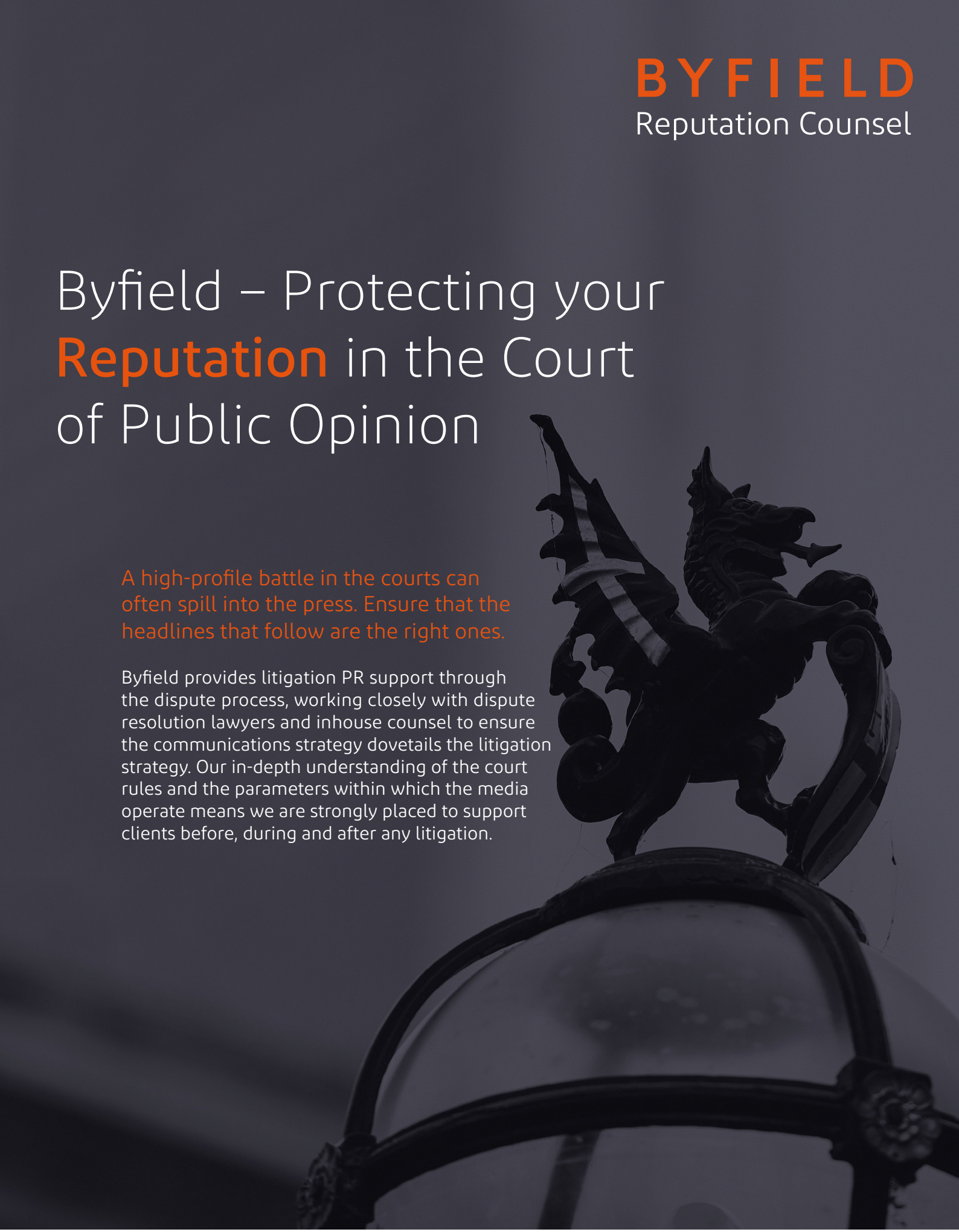

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THE RISE OF INDIAN DISPUTES IN LONDON

Authored by: Ishaan Bhardwaj (Lord Denning Scholar) – Lincoln's Inn and Anurag Bana (Senior Legal Advisor) – IBA

Introduction

India has enjoyed stellar economic growth over this past decade. The IMF estimates it will become the world's third-biggest economy by 2030.

Historically, London has been a leading centre for large-scale Indian disputes.

The key theme of this article is that London will go from strength to strength in Indian disputes, reinforced by India's integration into global trade networks. Particularly salient for London will be the growth of a worldwide Indian business community or diaspora. This global business community is operating out of regions like the UAE, Singapore and of course, London.

Furthermore, this article will question the assumption that competition between centres threatens London in a globalised world. In reality, London stands to learn and benefit from the success of jurisdictions like Singapore or Paris.

Case Study 1: State Bank of India & Ors v Vijay Mallya [2018] EWHC 1084 (Comm)

This recent debt £1.145 billion debt enforcement claim by Vijay Mallya, the former boss of insolvent Kingfisher Airlines, has been pursued in English courts. The airline, established in 2005, saw its debt1 grow beyond $1.35 billion by 2015, one of its main creditors being the State Bank of India.

The High Court dealt with two distinct issues. The first was registration of a judgment of the Bangalore Debt Recovery Tribunal (DRT) and whether it could properly be registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933 in England. The second was whether a worldwide freezing order should be set aside. This section will focus on the former issue. On both accounts, the Court found against Mr Mallya.

The Registration Order was made under the 1933 Act, applying to India through the Reciprocal Enforcement of Judgments (India) Order 1958.

Under paragraph 4 of the 1958 Order, a "court" (including tribunals) for the purposes of the 1933 Act includes "all other Courts whose civil jurisdiction is subject to no pecuniary limit". Crucially the judgment had to be sealed with a seal showing the "jurisdiction of the Courts is subject to no pecuniary limit".

The Court held the purpose of the 1958 order was to extend the reciprocal enforcement regime to appropriate Indian courts.

It would be wrong to take an unduly technical approach. This judgment was the first reported case of the DRT registered in English courts, signalling a pragmatic attitude to registering Indian judgments within the English High Court and enforcing against assets in England

1 https://www.reuters.com/article/kingfisher-airlines-jaitley-debt-idUSKCN0WC0Q8/

and Wales. This is doubly significant[2] as India's debt recovery laws are mandatory statutes, and such debts must be brought before the DRT.

This case demonstrates London's profile for politically sensitive claims involving fraud allegations. It reflects trust in the neutrality of senior English judges.

Pragmatic enforcement supports London as a jurisdiction to bring billion-dollar Indian debt claims.

Case Study 2: Bank of Baroda and ors v GVK and ors [2023] EWHC 2662 (Comm)

This case[3] demonstrates the global reach of Indian business clients choosing to litigate in London. A consortium of six Indian banks won an estimated US$2 billion debt recovery case against GVK, a Singaporean-registered but Indian operating company, in the English courts.

The evidence handled is notable, including two senior Indian judges writing on Indian law. One issue was whether a moratorium on debt repayments by the Reserve Bank of India (RBI) applied. The claimants were foreign branches of Indian banks incorporated in the Middle East, including Bahrain. The defendants were incorporated in Singapore. Mr Justice Sen argued that all companies were Indian. He argued that "the Claimants are all banks incorporated in India, having registered offices in India, and as such are Indian entities" at [85]. The foreign branches could not constitute separate legal entities. The Claimants disagreed on a technical distinction; whilst foreign branches of Indian banks were subject to the RBI, they were not subject to Indian laws. Thus, the RBI moratorium did not extend to foreign borrowers.

The Court found against the defendant, but this litigation reflects this article's theme.

As India globalises and becomes embedded in regional trade, the global Indian business community operating out of regions like the Middle East and Singapore will be London's key future clients.

Globalisation and India Disputes

India is setting up arbitral centres domestically and in High Courts in Delhi and Mumbai. The Delhi International Arbitration Centre held its first-ever edition of Delhi Arbitration Weekend[4] in February 2023. Furthermore Singapore has a tradition of continual technological innovation, with a practice of proactively marketing[5] itself to Indian clients, targeting major cities and states like Bangalore and Gujarat. Furthermore, it is geographically more favourable.

However, London retains enduring advantages. This is supported by data. The Portland Commercial Courts Report 2023[6] identified the number of Indian clients markedly increasing in London's Commercial Courts. India was singled out as "having sharply increased" from 5 to 44 litigants. [1]

This is founded on London attracting Indian business, talent, and capital as UK-India trade ties strengthen.

Indian entities have more assets in the UK than ever before. This is a decisive factor for initiating proceedings in cases of "recovery and enforcement of awards".[2] The UK's Department for International Trade revealed[7] India was the second largest UK investor per 2021/2022 figures, just behind the US. This will expand following UK-India trade talks. Industries like steel, banking, and jewellery will figure prominently here.

Conclusion: Beyond Zero-Sum Competition

India's economic growth means seeing rising centres like Singapore as healthy competition, not a threat. Lord Neuberger made this point in June 2022, at a talk hosted by One Essex Court.

The zero-sum debate of pitching one jurisdiction against another is sterile. Multi-jurisdictional work, particularly in terms of enforcement, will be critical for London, and involve close collaboration with other jurisdictions.

Both cases reflect the rise of a global business community registering companies overseas and litigating in London. In this globalised era, one jurisdiction's loss is not always another jurisdiction's gain.

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2 https://www.lexology.com/commentary/arbitration-adr/india/khaitan-co/arbitrability-of-disputes-under-debt-recovery-laws
3 https://www.bailii.org/ew/cases/EWHC/Comm/2023/2662.html
4 https://dhcdiac.nic.in/daw/speakers.php
5 https://economictimes.indiatimes.com/news/company/corporate-trends/singapore-international-arbitration-centre-opens-an-office-in-gift-ifsc/articleshow/60001219.cms
6 https://portland-communications.com/publications/commercial-courts-report-2023/
7 https://www.gov.uk/government/news/uk-and-india-agree-to-deeper-trading-relationship

60-SECONDS WITH:

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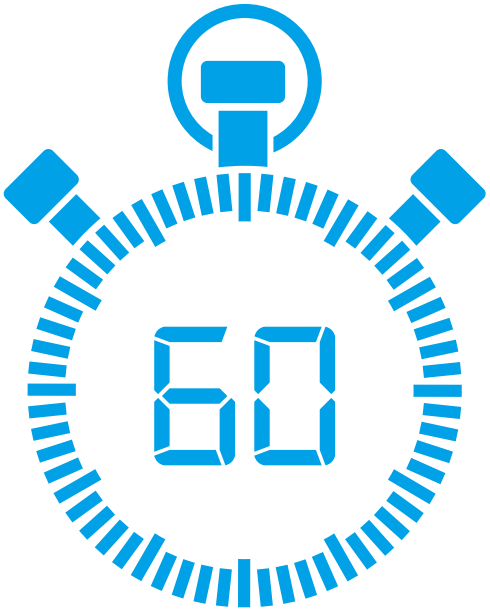

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I would travel the world, learn how to cook exotic dishes and help my daughter with her maths homework.

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

A Telling the clients that they have won.

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

A I can't think of one specific example, but the most exciting aspect of my career has definitely been meeting different people: clients, colleagues and other practitioners. It has taught me to be open, to listen and to always try and see the other person's point of view. I learned so much from all these people and, as a result, made some of my closest friends.

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

A Don't be afraid to make mistakes. Everyone makes mistakes. Instead, learn the skill of being able to fix them.

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

A Kindness. I live by the motto that in the world where you can be anything, you should be kind.

Q **What book do you think everyone should read, and why?**

A *The Eighth Life* by Nino Haratischwili. It's a brilliantly written family saga spread over a century. Nino is such a talented storyteller. A word of warning though: make sure that you don't have any commitments when you start it. It's impossible to put down!

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

A Alexei Navalny. I consider him to be the most courageous man of our time and he is my personal hero. I will always be grateful to him for everything that he has done for my birth country.

Q **What is the best film of all time?**

A *Love Actually.* I watch it every Christmas and I laugh and cry each time.

Q **What legacy would you hope to leave behind?**

A I am not really one for legacies. I prefer to live in the present.

Q **Do you have any hidden talents?**

A I have written poetry in the past and I am currently working on my first novel. Watch that space!

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

A I would like to win my cases and do right by my clients. That's the only goal that matters to me.

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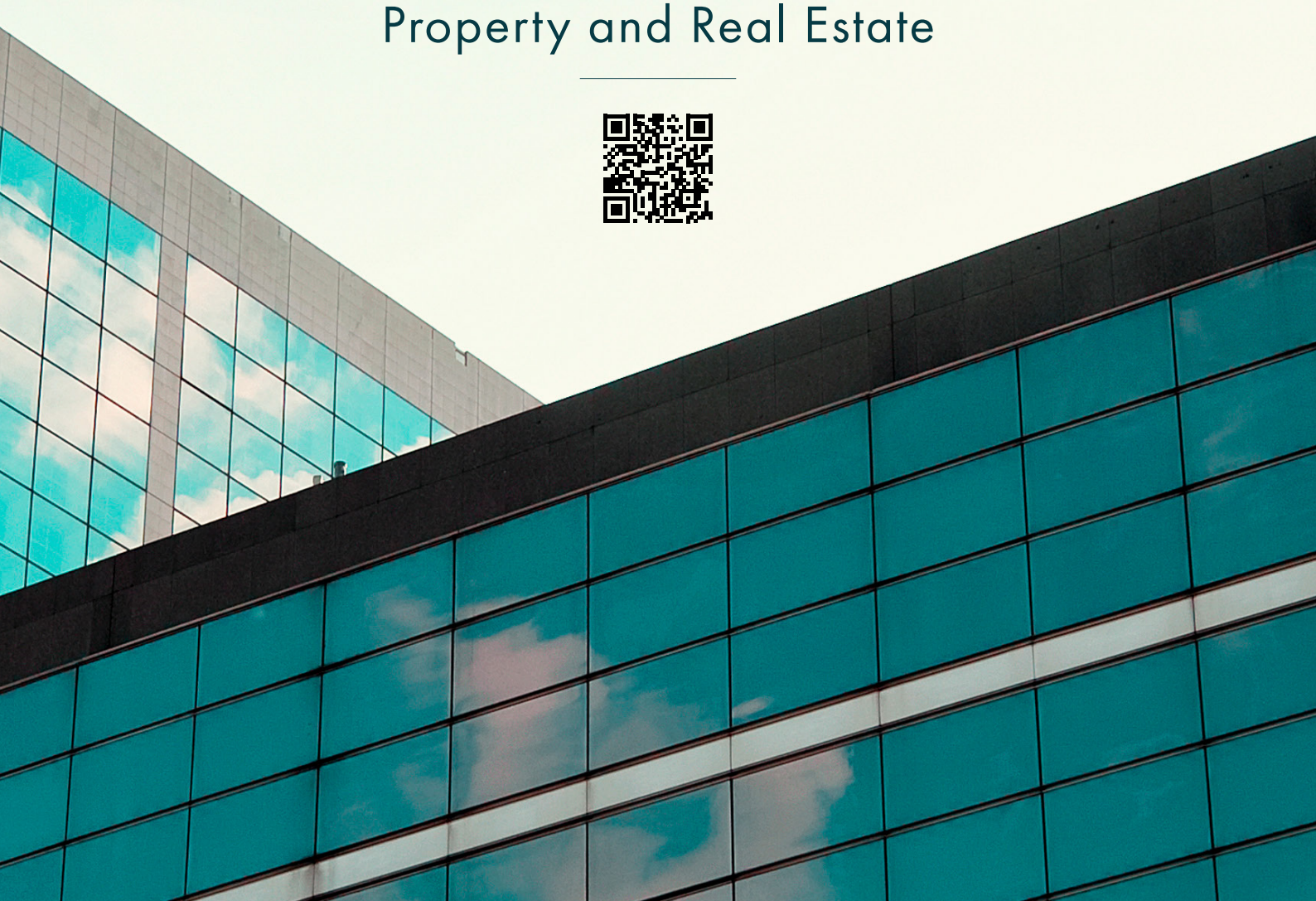

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ECCTA – EXPANSION OF CORPORATE CRIMINAL LIABILITY FOR FRAUD UNDERLINES IMPORTANCE OF EFFECTIVE CORPORATE COMPLIANCE PROGRAMMES

Authored by: Neil McInnes (Partner) and Fiona Cameron (Senior Practice Development Lawyer) – Pinsent Masons

The Economic Crime and Corporate Transparency Act 2023 ("ECCTA") transforms the law of corporate criminal liability for a wide range of economic crimes as well as introducing a new offence of corporate failure to prevent fraud. It also expands the investigatory powers of the Serious Fraud Office (SFO).

The changes to corporate criminal liability in ECCTA make it easier to prosecute corporates for the failings of their staff and others associated with an organisation.

The changes are likely to lead to an increase in internal investigations in this area for UK companies and underscore the importance of fraud prevention measures within corporate compliance programmes.

Looking first at corporate criminal liability, ECCTA provides that, from 26 December 2023, organisations can be liable for fraud and other economic crimes if any "senior manager" commits those crimes in the discharge of their role or in the course of their work. Senior managers are any individual who plays a significant role in the making of decisions about how the whole or a substantial part of the activities of an organisation are managed or organised; or in the actual managing or organising of those activities. The definition is likely to be sufficiently wide to extend to regional directors of organisations, for instance, or potentially project managers, depending on the size and importance of a project to the organisation.

Until this law change, generally organisations could only be found liable for the economic crimes of a person who had the status and authority to constitute the organisation's "directing mind and will". Known as the "identification doctrine", this meant a corporate conviction for fraud and related offences required evidence of intentional wrongdoing or dishonesty at the directing mind level, such as by main board members or by the senior management team. For offences of fraud, bribery and other economic crimes, this often has proven difficult to establish evidentially in all but the smallest organisations.

So a key change within ECCTA significantly enhances the tools available to law enforcement and cures what has been seen as a failure of the traditional identification doctrine. As a result, organisations are considerably more exposed to committing primary economic crime offences than they were.

A range of economic crimes will be covered by this law change including the Fraud Act 2006; Bribery Act 2010; international sanctions regulations; and the Proceeds of Crime Act 2002.

In practice, organisations may need to plan an increased examination into the role of managers where any misconduct is detected or suspected. If these managers qualify under ECCTA as "senior managers", to what extent is their conduct now attributable to the organisation? Internal investigation protocols may need to be updated and fact-finding processes may need to review manager conduct with additional scrutiny - in the context of their specific roles within an organisation.

Compliance programmes will increasingly need to consider provisions targeting preventative measures for the wide variety of additional personnel who could potentially attribute liability to the organisation by their misconduct.

This means risk assessment, training, onboarding and vetting for that cohort of people.

ECCTA also introduces a new UK corporate criminal offence of failure to prevent fraud. This has grabbed many of the headlines already but is arguably no more significant than the "senior manager" liability changes discussed above. The new failure to prevent offence applies to various economic crime offences (known as "fraud offences"), including but, crucially, not limited to fraud. "Large" corporates and partnerships will be criminally liable for the acts of a person associated with them who commits a fraud offence for the organisation's benefit or for the benefit of any person to whom the associated person provides services on behalf of the organisation – for example, a customer. However, an organisation which is the victim of a fraud offence will not criminalised for failing to prevent its own losses.

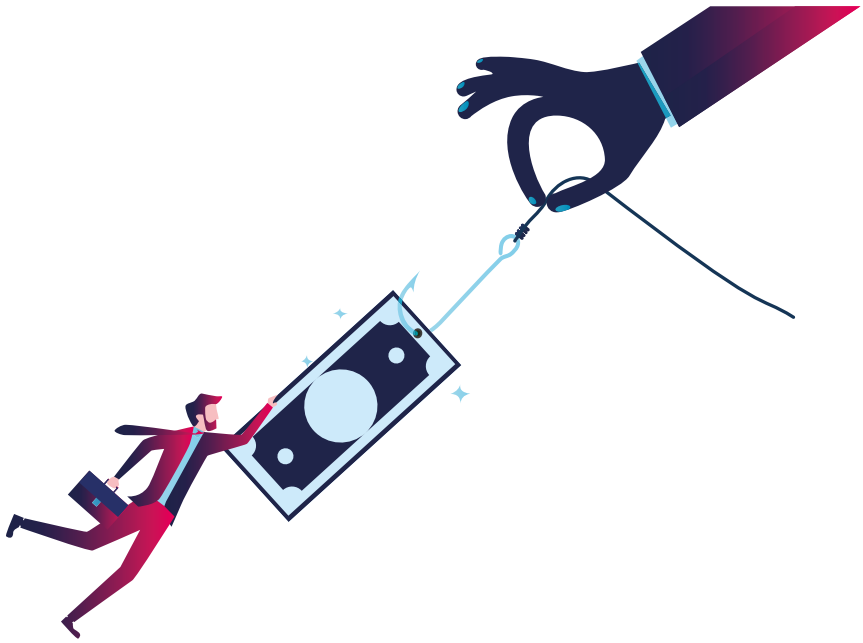
The only available defence for an organisation charged with the new offence will be for it to demonstrate that it had in place reasonable prevention procedures, or that it was not reasonable in all the circumstances to expect it to have had any procedures in place. The latter limb of the defence is unlikely to be available except in rare cases.

At the time of writing, statutory guidance remains to be published on the reasonable prevention procedures organisations should consider putting in place.

Its future release in 2024 will be a significant event for corporate compliance programmes – and so organisations should take steps now.

Given the ambit of the new failure to prevent fraud offence, success in enhancing an organisation's fraud prevention procedures is likely to require a holistic approach – bringing together legal, compliance and finance and accounting skillsets, supported by senior management teams – not least to ensure adequate weight is given to strengthening and stress-testing financial systems and controls that act as a crucial line of defence against fraud and similar offences.

One further law change in ECCTA requires a final honourable mention. Section 211 of the Act adds important enhancements to the SFO's armoury, by allowing its specialist investigatory powers to be used more often before it opens a formal investigation. The powers include the ability to compel evidence from corporates and others, where non-compliance is a criminal offence. Previously these pre-investigation powers could only be exercised in cases of foreign bribery – now this restriction has been removed. What it means is that where there are warning signs and early signals of fraud and other economic crime, the SFO has greater scope to act immediately. It may be a significant milestone in allowing the SFO to quicken the pace of its assessment of cases – with the corollary that this may impact and drive corporate self-reporting too.



CORPORATE AND WHITE-COLLAR CRIME IN IRELAND: PRIORITIES AND TRENDS IN A NEW ERA OF CORPORATE ENFORCEMENT

Authored by: Larry Fenelon (Partner) and James McDermott (Senior Associate) – Ogier

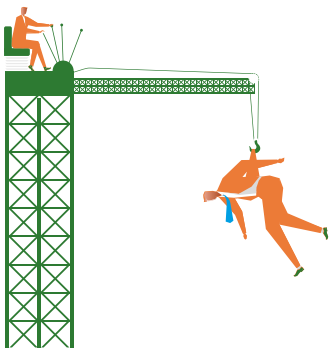
This article is an up-to-date summary of the corporate and financial crime landscape in Ireland. It examines emerging trends that may shape the future of corporate criminal enforcement in Ireland.

Background

The corporate criminal and regulatory framework in Ireland has been significantly overhauled in recent years, with a new Corporate Enforcement Authority ("CEA") established to replace the Office of the Director of Corporate Enforcement, which grew to be seen as ill-equipped to deal with Ireland's rapidly developing corporate environment.

The CEA is an independent statutory agency, which is equipped to deal with the large, complex investigations that have become commonplace in Ireland since its establishment as a go-to destination for the world's largest multinational corporations.

At the same time, the Garda National Economic Crime Bureau (a branch of the Irish police force, the "GNECB") has flexed its muscles in prosecuting corporate fraud, recently securing the first criminal conviction for insider trading in Ireland in October 2023, following an investigation with the Central Bank of Ireland ("CBI").



Enforcement Bodies and Powers

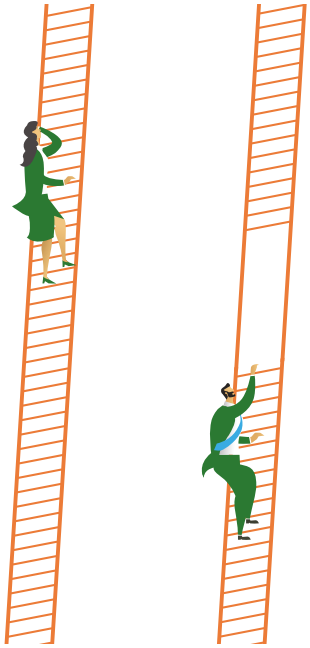
The Irish corporate criminal enforcement framework is made up of several multidisciplinary independent bodies, including the CEA , the Competition and Consumer Protection Commission and the CBI aided by the Irish police, as well as the specialist branch of the Irish police, called the GNECB.

Garda National Economic Crime Bureau

The GNECB (formerly known as the Garda Bureau of Fraud Investigation) is a specialist unit within the Irish police force (known as An Garda Síochána) which is responsible for the investigation of fraud and economic crimes and all foreign bribery and corruption offences. The GNECB also acts as the central repository for economic crime related intelligence.

The GNECB encompasses a number of units, including for example, the Anti-Bribery & Corruption Unit and the Money Laundering Investigation Unit.

These units interact with certain regulatory bodies, for example the Central Bank of Ireland, which has a statutory mandate to supervise regulated entities and investigate contraventions of anti-money laundering laws.



Furthermore, the GNECB sends a number of specialist Gardaí (Police) on secondment to the Competition and Consumer Protection Commission and the Corporate Enforcement Authority.

Corporate Enforcement Authority

In a major overhaul of the corporate enforcement regime the CEA was established in July 2022 under the Companies (Corporate Enforcement Authority) Act 2021.

The CEA's statutory mandate is principally: to prosecute breaches of the Companies Act 2014; to impose sanctions on company directors under the Companies (Statutory Audits) Act 2018; and to act as the primary enforcement agency for certain investment vehicles under the Irish Collective Asset-management Vehicles Act 2015.

The CEA's primary functions under the functions under the Companies Act 2014 include:

- Promoting compliance with company law;
- Investigating instances of suspected breaches of company law;
- Taking appropriate enforcement action in response to identified breaches of company law;
- Supervising the activities of liquidators of insolvent companies; and
- Operating a regime of restriction and disqualification sanctions on directors of insolvent companies.

Where appropriate, the CEA will refer serious offences to be prosecuted by the Director of Public Prosecutions (the "DPP").

Criminal Assets Bureau

In response to a high-profile period of proliferation of organised and violent drug crime in the 1990s, Ireland established a robust regime for the seizure of unexplained wealth, based primarily around the multi-agency Criminal Assets Bureau ("CAB").

The statutory objectives of the CAB, as set out in s.4 of the Criminal Assets Bureau Act 1996 are: (a) the identification of the assets, wherever situated, of persons which derive or are suspected to derive, directly or indirectly, from criminal activity; and (b) the taking of appropriate action under the law to deprive or to deny those persons of the assets or the benefit of such assets.

The CAB can use many powers normally reserved for the Gardaí, including search warrants and mandatory orders to furnish documents and information to the CAB.

In addition, the CAB can apply pursuant to s.2 of the Criminal Assets Bureau Act 1996 ex parte to the High Court for short-term 'interim' orders to prevent a person from dealing with assets on the basis that they are the proceeds of crime. Crucially, the standard of proof applied in determining these applications is the balance of probabilities (i.e. the civil standard of proof). S.2 of the Criminal Assets Bureau Act 1996 allows for the longer-term freezing of assets for a minimum of seven years. At the expiry of seven years, the CAB can apply to transfer the asset in question to the State or to any other body that the Court may direct.

Dawn Raids and Powers of Search and Seizure

In Ireland the following bodies have the power to carry out a dawn raid:

- The Corporate Enforcement Agency
- The European Commission
- The Central Bank of Ireland
- The Competition and Consumer Protection Commission

- The Data Protection Commission
- The Commission for Regulation of Utilities
- The Commission for Aviation Regulation
- The Revenue Commissioners
- The Health Information and Quality Authority
- The Health and Safety Authority
- The Environmental Protection Agency
- The Workplace Relations Commission
- The Commission for Communication Regulation (ComReg)
- The Pharmaceutical Society of Ireland
- The Food Safety Authority

It is clear that entities may be the target of more than one of the above bodies. For example, a telecoms provider who is suspected of a breach of competition law could be the target of a raid by any combination of: the European Commission, the CCPC and/or ComReg).

In Ireland, a number of bodies have the power to carry out unannounced inspections of business premises to obtain documents and information. Dawn raids are frequently carried out with the assistance of An Garda Síochána and are used to gather evidence and information relevant to an investigation. Most of the statutes which confer powers on authorities to carry out dawn raids also create a number of offences relating to the obstruction of the exercise of those powers.

Corporate Offences

Corporate Fraud

The Criminal Justice (Theft and Fraud Offences) Act, 2001 (as amended by the Criminal Justice (Theft and Fraud Offences) Amendment Act 2021) is the primary source of legislative provisions governing corporate fraud issues, including the criminal offences of theft, deception, forgery, and false accounting.

The Criminal Justice (Theft and Fraud Offences) Amendment Act 2021 was introduced to transpose Directive (EU) 2017/1371 and created the new offence of fraud which affects the financial interests of the EU and re-enforcing the corporate liability for offences committed by agents, employees and others acting in the interests of a company.

Anti-Competitive Behaviour

The Competition Act 2020 is the primary statutory framework governing compliance with competition law in Ireland.

Section 4 of the Competition Act 2002 provides that it is prohibited for "undertakings" to enter into agreements, take decisions, or engage concerted practices that have as their object or effect the prevention, restriction, or distortion of competition in trade in any goods or services.

This includes price fixing, bid-rigging, market sharing or artificially limiting production to maintain prices.

An "undertaking" is defined broadly and includes any person, body corporate, or unincorporated body of persons engaged for gain in the production, supply, or distribution of goods or the provision of a service.

Under the Act, a conviction for cartel activity such as price fixing can carry criminal penalties of up to ten years imprisonment for individuals, and fines of up to €5 million or 10% of turnover for individuals and undertakings. A company director convicted of an offence faces automatic disqualification from acting as a director for five years.

Corruption/Bribery Offences

Ireland introduced wide-ranging reforms to its anti-corruption laws thorough the Criminal Justice (Corruption Offences) Act 2018 (the "2018 Act"), which was heavily influenced by the UK's primary anti-corruption legislation, the UK Bribery Act 2010. The offences proscribed by the 2018 Act include active and passive corruption and corruption in relation to office, employment, position, or business.

The 2018 Act also provides for a new corporate liability offence, by which a corporate body may be held liable for the actions of its directors, managers, employees, agents, subsidiaries, or persons otherwise acting in the interests of the company, with the intention of obtaining and advantage for the corporate entity.

As some of the offences are explicitly stated to have extra-territorial effect, Irish persons, companies, and other organisations registered in Ireland can commit an offence contrary to the 2018 if they commit acts outside Irish territory which would constitute an offence if committed in Ireland.

Money Laundering, Terrorist Financing and Sanctions

The Fifth Anti-Money Laundering Directive (MLD5) was transposed into Irish legislation by Criminal Justice (Money Laundering and Terrorist Financing) (Amendment) Act, 2021. The 2021 Act expanded the category of "designated person" to include Virtual Asset Service Providers (VASPs) (which must register with the Central Bank of Ireland and other specified entities.

Prior to establishing a business relationship with certain clients, designated persons will be required to adhere to strict Customer Due Diligence (CDD) measures, including establishing relevant beneficial ownership information. Furthermore, additional CDD requirements will apply to high-risk third countries

The move to include VASPs as a designated person (which will be regulated by the Central Bank of Ireland) is Ireland's first move to regulate digital, crypto and/or other non-fiat currencies, which are seen as highly vulnerable to money-laundering and terrorist funding risk. As a major hub for the global tech industry, Ireland's regulation of VASPs is likely to the be subject of scrutiny and the regime

introduced by the 2021 Act will likely be a feature of crypto-asset related investigations and regulatory sanctions in Ireland.

Future Developments

Increased Activity From The CEA

The CEA has had a relatively quiet first 18 months, however it is clear that it is intent on further increasing its powers. A public consultation is currently underway on the proposed Companies (Corporate Enforcement and Regulatory Provisions) Bill 2023, which is aimed at enhancing corporate governance and company law enforcement.

In its response to the consultation, the CEA has proposed that it be given additional powers to: (i) enhance its investigative capabilities; (ii) increase its access to certain Court documents; and (iii) permit the sharing of certain information with other statutory bodies.

It can be expected that the CEA will continue to increase its investigation and enforcement activities in 2024 and beyond.

Deferred Prosecution Agreements in Ireland

In a 2019 report on "Regulatory Powers and Corporate Offences" the Irish Law Reform Commission recommended that Deferred Prosecution Agreements, based on those deployed by UK agencies, be introduced in Ireland.

The report took some encouragement from the breadth of remedies secured in the UK by use of DPAs and recommended that to ensure consistency with requirements of Irish constitutional law, DPAs in Ireland must be: (a) placed on a statutory basis, (b) subject to judicial oversight, (c) subject to guiding principles, and (d) contain sufficient procedural safeguards.

It is envisaged that the CEA and/or the Director of Public Prosecutions would work closely with the relevant regulator to determining whether a Deferred Prosecution Agreement would be suitable in any given case. In all cases, the Irish Courts would have to be satisfied that the DPA was both (a) fair and proportionate and (b) in the interests of justice. Finally, the report recommends that that any DPA in Ireland must be dealt with in open Court and the relevant arrangements be made public.

Despite the recommendations, DPAs have not yet been introduced in Ireland and it remains unclear whether the CEA has the same appetite to see their introduction in the near future.

Increased Focus on Personal Accountability

In keeping with a general shift in regulatory focus towards individual accountability (as best illustrated by the Central Bank of Ireland's "Senior Executive Accountability Regime", which shares many features with the UK's "Senior Managers and Certification Regime"), Ireland's strengthening corporate crime framework has serious implications for directors of Irish companies.

Across Irish legislation (particularly the Companies Act, the Competition Act and the Corruption Act) there are provisions imposing criminal liability on directors and officers of bodies corporate. Personal criminal liability for a director can arise where an offence is committed with the consent, connivance of or attributable to any neglect by the director.

In a 2023 press release, the CEA issued a press release for the attention of persons considering accepting directorships in companies, warning that "acting as a director of a company about which a person knows little or nothing can expose that person to criminal liability".

The CEA also noted that a "person who takes little, if any, active role in the management of a company or, for example, acts merely as a post box or as a signatory of company documents is likely to encounter, potentially significant, difficulties in satisfying a court that they have acted responsibly."

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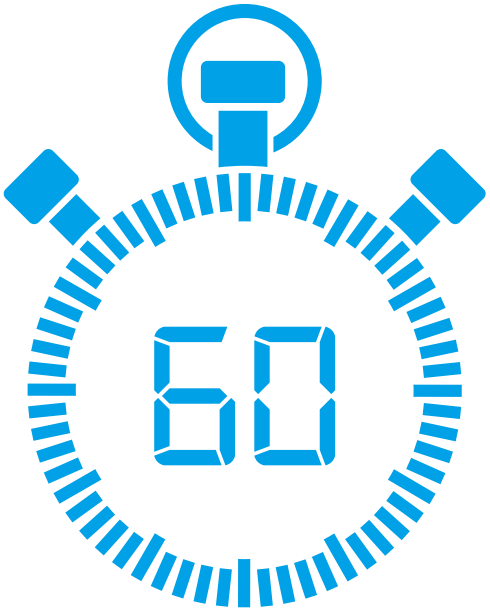


Q **Imagine you no longer have to work. How would you spend your weekdays?**

A I genuinely enjoy my job enormously, but when the day comes to hang up my boots (not for quite a long time I hope) I'd like to do the kind of travel that juggling a demanding job and young children doesn't realistically allow, in particular exploring some of the wilder parts of the planet – I've always lusted after the life of an adventurous archaeologist (too much Indiana Jones, perhaps).

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

A I love solving very difficult problems to achieve great outcomes for clients, but more than that I get immense satisfaction from seeing the fantastic people that I am lucky enough to have alongside me develop and operate at their full potential – there really are few more rewarding things in my job than seeing the team operate at its best.

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

A The list is long, but it's a very early experience for me. As a trainee, I was sent to Lithuania for six months as part of a large team which was drafted in at almost no notice to deal with a huge suspected fraud and consequent bank insolvency. It was the frozen middle of winter in Vilnius, the oligarch owner and CEO of the bank had vanished, customers were lined up outside every branch, and the magnitude of the issues was enormous. It was one of those all-hands-on-deck experiences which, as a junior, presents opportunities for you to dive right in and show what you can do, and to learn a huge amount about the job and yourself in the process – it was profoundly formative.

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

A To make sure I make enough time for my children. It's not always easy given professional demands, but it is always important.

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

A Empathy. It's extremely important in a team and client-focussed business like the law, but also something the world could do with a lot more of generally.

Q **What book do you think everyone should read, and why?**

A I've been quite vocal about the importance of gender equity at Linklaters, and in that context I have two recommendations – *Wild Swans* by Jung Chang and *The Silence of the Girls* by Pat Barker. Both books are female accounts of stories that have almost exclusively been told through a male lens, the former being the story of the author, her mother and grandmother from imperial China through to the 20th century, and the latter being the story of the Trojan war from the perspective of Briseis.

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

A It's tough to pick just one, but I'll go with Ernest Shackleton – his aptly named Endurance expedition is one of the greatest stories of human spirit and teamwork out there.

Q **What is the best film of all time?**

A It might not be the best film, but it's up there and it's my favourite: *Gladiator*.

Q **What legacy would you hope to leave behind?**

A We're extremely lucky at Linklaters to have a firmly embedded collegiate culture, in which the best lawyers are provided with the best support so that they can achieve the best results for their clients and themselves. It's very important that all partners ensure they preserve that culture for future generations of our people and our clients.

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

A The very well-documented rise in the prevalence of class actions and group litigation. It's a trend that looks almost certain to continue and which is transforming the landscape of high-stakes commercial litigation.

Q **Do you have any hidden talents?**

A I don't think so, but there's still time.

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

A The volume of collective proceedings in the Competition Appeal Tribunal has exploded over the last few years, but none of those proceedings have yet gone to a final judgment and there have been no material settlements. In view of the consequent need for more legal certainty through judicial precedent, I'm looking forward to defending some of the key collective proceedings through those processes.

SPIKING THE GUNS OF TRIGGER-HAPPY CONTRACTORS:

PROVIDENCE BUILDING SERVICES LTD V HEXAGON HOUSING ASSOCIATION LTD

Authored by: Nick Kaplan (Barrister) – 3PB

A recent decision of the Technology and Construction Court ("TCC") in the case of Providence Building Services Limited v Hexagon Housing Association Limited, considered the meaning of the termination provisions in the most widely used form of construction contract in the UK.

The issue concerned the circumstances in which a contractor could terminate for repeated failures by its employer to make payment on time.

The Judge concluded that, on the natural and ordinary meaning of the relevant contractual provisions, the contractor could validly terminate for repetition of an employer default, only if it had already acquired the right to terminate in respect of an earlier instance of the same breach/default.

The decision is an important one for the construction industry that employers and contractors alike should be familiar with. It is, perhaps surprisingly given how widely used the JCT form is, the first case to decide this particular issue, which concerns one of the most important provisions in the JCT form.

The decision is a salutary reminder to contractors to think very carefully before pulling the termination trigger. The Judge's obiter comments on the (arguably more ambiguous) employer termination provisions serve as a similarly stark warning for employers wishing to terminate for contractor default.

The Contractual Provisions

Clause 8.9.1 of the contract provided that if Hexagon failed to make a payment by the final date for a payment in any payment cycle, Providence could give Hexagon a notice that its failure was a "specified default". I will refer to a clause 8.9.1 notice as an "NSD".

Clause 8.9.3 then provided that, following such a NSD being given by the Providence, Hexagon had a period of 28 days to remedy the specified default by making payment of the sums due in full. Clause 8.9.3 also provided that, if Hexagon failed to make payment in full within that 28-day period, Providence thereafter had 21 days within which it could issue a notice to terminate.

Notably, the right for Providence to terminate for continuation of a default under 8.9.3 was a discretionary right, which Providence could either exercise or not exercise, only if Hexagon had failed to make payment within the 28-day notice period following service of the NSD.

In that context, clause 8.9.4 then provided as follows:

"If the Contractor for any reason does not give the further notice referred to in clause 8.9.3, but (whether previously repeated or not) … the Employer repeats a specified default… then, upon or within 28 days after such repetition, the Contractor may by notice to the Employer terminate the Contractor's employment under this Contract."

Background

Hexagon engaged Providence to carry out construction works under the terms of the JCT Form of Design and Build Contract 2016, which was subject to certain bespoke amendments agreed between the parties.

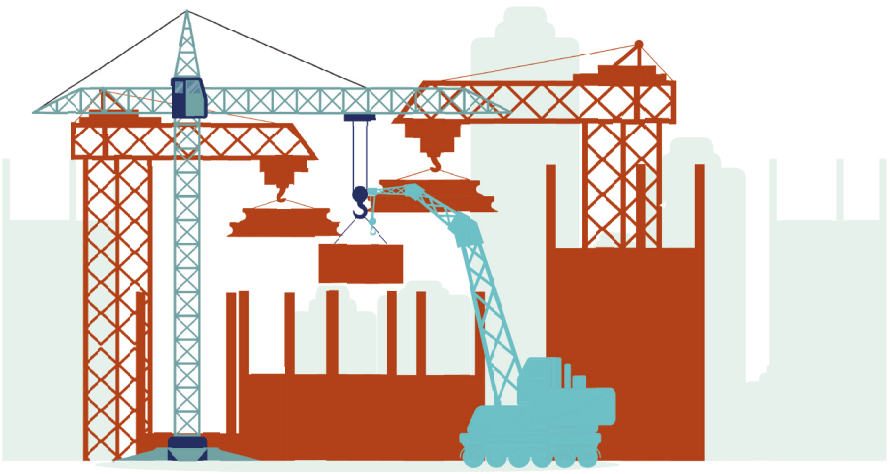
The termination provisions were largely unchanged from the standard JCT wording, save that, in respect of employer defaults, the notice periods within clause 8.9 were increased from a period of 14 days (the standard provisions) to a period of 28 days (see above).

Hexagon was late in paying the sum due under Payment Notice 27. Providence served a NSD under clause 8.9.1. As explained above, that NSD required Hexagon to remedy the specified default within 28 days. Shortly after receipt of the NSD, Hexagon paid the sums due and thereby rectified the default before the expiry of the 28-day cure period allowed in clause 8.9.3.

Plainly, at this stage, the contractual default provisions were working as intended; the cash was flowing again.

Notably, however, because the default was rectified within the '28-day' cure period under clause 8.9.3, Providence did not acquire any right to terminate for continuation of the default under clause 8.9.3. So far, so normal.

In payment cycle 32 Hexagon was late in paying again. In that payment cycle Hexagon should have made payment by 17 May 2023. It didn't do so.



On 18 May 2023 (i.e., the day immediately after payment should have been made), Providence issued a notice purporting to terminate under clause 8.9.4. It did so on the grounds that Hexagon had repeated its default.

Although Hexagon paid the sum due in full on 23 May 2023, Providence took the view that this was too little too late. Thereafter it withdrew from site.

The Dispute

Having paid the sum due on 23 May 2023, Hexagon challenged the validity of the termination notice and referred the issue to adjudication for a temporarily binding decision.

Hexagon's case was that the right to terminate for a repeated breach only accrued if Hexagon had failed to pay within the 'cure period' for the first default but Providence had (for any reason) not exercised its clause 8.9.3 right to terminate. In other words, its case was that a right to terminate under 8.9.3 must have arisen for continuation of the first default before a right to terminate under 8.9.4 could arise for a repetition of the default.

In effect, Hexagon argued that the provisions of clause 8.9 must be read as setting out a series of escalating steps whereby Providence had a series of opportunities to notify Hexagon of its defaults, and Hexagon had a corresponding series of opportunities to remedy those defaults. It is only if a default is not remedied that Providence acquires the right to terminate. If Providence then chooses not to terminate under 8.9.3, the contract continues at its indulgence and Hexagon is 'skating on thin ice' thereafter, such that any repetition of a default can result in immediate termination by Providence. However, where the original default is remedied, no right to terminate arises and the process restarts at clause 8.9.1.

Providence argued, on the contrary, that the contract gave it the right to terminate immediately for any repetition of a specified default, whether or not the original breach/default had been cured in time. In effect it read the provisions

as operating like a 'yellow card/red card' system in a football match. Any NSD issued at any time operates as a yellow warning card, any subsequent repetition then allows for an immediate red card ending the contract even if the first default leading to the yellow card was cured in time.

Providence's submissions focused heavily on the words 'for any reason' in clause 8.9.3 which, it argued, included the reason that no right to terminate under 8.9.3 ever arose.

Hexagon, in contrast, submitted that the words 'for any reason' needed to be read in their full contractual context. In particular, Hexagon said, the words "if the Contractor for any reason does not give the further notice referred to in clause 8.9.3…", refer back to the fact that Providence has a discretion to terminate under clause 8.9.3 which it could exercise or not for any reason; but, critically, only if and after a right to terminate under 8.9.3 had arisen.

The adjudicator found in Hexagon's favour. Providence was aggrieved at the decision and issued a Part 8 claim seeking a declaration that a right to terminate under clause 8.9.3 did not need to arise, prior to Providence being able to terminate for repetition of a default under clause 8.9.4.

The same arguments that had been before the adjudicator in writing were aired orally before the Judge.

The Decision

The Court agreed with Hexagon's interpretation of the clause. The Judge considered that, as a matter of the ordinary and natural meaning of the language used in clause 8.9 as a whole, the right to terminate for repeated breach under clause 8.9.4, only arose if a right to terminate under clause 8.9.3 had first arisen but had not been exercised.

The Judge gave a declaration that Providence's termination notice was invalid for the purposes of clause 8.9.4, and that it failed to lawfully terminate Providence's employment under the contract.

Conclusions

Termination is, for obvious reasons, the 'nuclear option' for those dissatisfied with another party's performance (or non-performance) of a contract. The Judgment in this case is a stark warning to parties to carefully consider all possible interpretations of contractual termination provisions before pulling the termination trigger.

For contractors in particular, the Judgment confirms (at least for now) that their rights to terminate for late payment are carefully circumscribed by the JCT termination provisions, which effectively prevent trigger-happy contractors withdrawing from contracts on the basis of relatively minor delays in payment (even if repeated).

For employers under JCT contracts, while the 'employer termination' provisions at clause 8.4 of the contract are differently (and more ambiguously) worded, the Court's obiter remarks indicate that they may be construed in the same way as the Judge interpreted clause 8.9.

Employers, therefore, must think equally carefully before terminating for repetition of a contractor default.

Post Script

The decision has not been without its critics. Unsurprisingly, it has proved unpopular with contractors. However, the fight is not yet over as the Court of Appeal recently granted Providence permission to appeal the decision. Watch this space.

Nick Kaplan is a Barrister at 3 Paper Buildings specialising in construction law. Nick acted for Hexagon in the adjudication and as junior counsel for Hexagon in the Part 8 proceedings commenced by Providence.

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WE THREE KINGS

Authored by: Jennifer Doggett (Trainee Solicitor) – Charles Russell Speechlys

Bearing the gift of reminding practitioners that certain "living legal fossil(s)" can subsist when dealing with the administration of estates.

In the recent case of King v Stephen King[1], a dispute between the two surviving sons of a deceased father, surrounding who should administer the estate, engaged provisions under the NCPR in the rehearing of the grant of letters of administration (Grant) application.

Key Takeaways

- While the Chancery Division of the High Court has jurisdiction over disputes as to whether a person has an entitlement to take out a Grant, disputes surrounding how the court should exercise its discretion to choose between candidates applying for a Grant, will fall within the definition of "non-contentious business," and will be within the jurisdiction of the Family Division.
- There is doubt about the continued survival of the "living legal fossil" that is an appeal by way of a rehearing, given that these provisions seem to be "at odds with the overriding objective that is now to be found at Rule 3A NCPR 1987".
- While these rules survive, in these circumstances, the Court may choose to award the Grant to either of the applicants, or to appoint an independent administrator instead.

Background

Eric King (the Deceased) died intestate in 2021. Following his death, one of his sons, Philip (Philip) filed a caveat to prevent the issue of a Grant over the Deceased's estate.

Court proceedings ensued between Philip and his brother, Stephen (Stephen), and in August 2023, the District Probate Registrar made a Grant in favour of Stephen. Philip appealed against this Grant.

At the time of these proceedings, six other parties came forward, claiming to be the children of Philip and Stephen's deceased brother, Eric (Eric). These parties (Eric's Alleged Children) claimed their own entitlements to apply for a Grant over their (alleged) grandfather's estate, and an entitlement to an equal division of Eric's share of the Deceased's estate.

The NCPR

The Non-Contentious Probate Rules 1987 (NCPR) were applicable in this matter, meaning that the Rules of Supreme Court 1965 governed these proceedings, rather than the Civil Procedure Rules. Therefore, Philip applied for a rehearing of the application for the Grant, under Rule 65(1) NCPR 1987, which provides that: "An appeal against a decision of a district judge or registrar shall be made on summons to a judge."

While the NCPR goes no further than to establish the right to appeal, Rule 1(1)

1 [2023] EWHC 2822 Fam

of RSC Order 58[2] provides that: "…an appeal shall lie to a judge in chambers from any judgment, order or decision of a master, the Admiralty Registrar or a registrar of the Family Division." As noted by David Rees KC:

"To the eyes of those accustomed to modern litigation, this survival of an old-style appeal by way of rehearing lying to a Judge, as of right, seems extremely surprising; a living legal fossil, to be compared to the coelacanth. The continued existence of such a right is in my view at odds with the overriding objective that is now to be found at r.3A NCPR 1987 […] Those responsible for any review of the NCPR 1987 may wish to consider whether the continued existence of an appeal by way of rehearing, as of right, remains appropriate."

While the Chancery Division of the High Court has jurisdiction over disputes concerning whether a person has an entitlement to a Grant (for example, where there is a dispute as to whether that person is a child of the deceased, in proceedings often referred to as "interest actions"), disputes surrounding how the court should exercise its discretion to choose between candidates applying for a Grant, will fall within the definition of "non-contentious business," and will be within the jurisdiction of the Family Division.

In the present case, Philip, Stephen, and Eric's Alleged Children, sought to be awarded a Grant over the Deceased's estate.

Where there are conflicting claims for a Grant, Rule 22.1 of the NCPR sets out the order of priority for awarding a Grant where there is an intestacy.

As the Deceased was divorced, his children (and any of Eric's children, as Eric had predeceased the Deceased) had priority to apply for the Grant.

However, as the legitimacy of Eric's Alleged Children's claims remained in dispute, David Rees KC directed that any disputes regarding their entitlements should be dealt with via separate proceedings in the Chancery Division of the High Court. Therefore, only Philip and Stephen's claims would be considered at this hearing.

Where there is a dispute between parties wishing to take out a Grant, Tristram & Coote's[3] sets out a list of factors which should be considered by the Court, including:

- Objections based upon characteristics of an applicant which render them unsuitable to act as an administrator. These may include dishonesty, bankruptcy, insolvency, or ill-health.
- Objections based upon a conflict of interest between the applicant and the estate.
- The practice, in this type of dispute, to award a Grant to the applicant who:
  - is entitled to a larger share of the estate, though, the Court is not bound to follow this practice;
  - made the first application for the Grant, however, David Rees KC stated that this point "does not, in my view, carry any great weight particularly where (as here) the case has been fully argued at an attended hearing."

Under the NCPR, the Court can find in favour of either of the applicants or else appoint an independent administrator "if by reason of any special circumstances it appears to the High Court to be necessary or expedient to appoint [an independent] administrator."

The Issues

Philip declared multiple objections to Stephen's continued administration of the estate, including allegations of dishonesty, conflicts of interest, and misconduct.

The alleged misconduct included that: Stephen had overvalued the Deceased's freehold property on the Inheritance Tax return, Stephen had improperly taken possession of the Deceased's UK property, one of Stephen's sons had fraudulently acquired £5,000 from the Deceased's bank account and fled to Australia and, "extraordinarily," according to David Rees KC, that Stephen had made a bonfire out of Philip's old school reports.

Judgment

David Rees KC found no real merit in Philip's allegations and that they represented "symptom[s] of the difficulties that plainly exist between these two brothers," and further, that:

- It was "clear" that Philip should not be appointed, as he was "[in] capable of undertaking the task in a proportionate and constructive manner" and because "[t]he role of personal representative is fiduciary in its nature and requires the individual appointed to act for the benefit of the estate as a whole";
- Regarding Stephen remaining in post, "the balance is more finely struck." There were benefits to keeping Stephen in place, particularly as Stephen had already taken steps to administer the estate. Appointing an independent administrator would duplicate some of this work, thus incurring further cost to the relatively modest net estate (of £512,809.11) and delaying the administration. However,
- Appointing an independent professional "would take the matter out of [the] hands of one branch of family" and enable the independent consideration of the claims brought by Eric's alleged children. This independent evaluation could avoid later, potential disputes.

Overall, David Rees KC determined that there were special circumstances, which made it necessary and expedient to pass over both Stephen and Philip's claims, and to instead appoint an independent professional.

This case serves as a reminder to quarrelling, potential administrators, that the court may exercise its discretion to replace each of them, where necessary, with an independent administrator.

2 Ord. 58 RSC 1965. Ord. 58 r. 1(1)

3 Tristram, Thomas Hutchinson Tristram and Coote's probate practice 32nd ed. / R. D'Costa, P. Teverson, T. Synak

EMPOWERING TOMORROW: INTRODUCTION OF NEW VEHICLE OF ESTATE PLANNING IN POLAND (FAMILY FOUNDATION)

Authored by: Angelika Ziarko (Senior Associate) and Tadeusz Zbiegień (Associate) – Kubas Kos Gałkowski

Up until the beginning of 2023 there was no convenient solutions for estate planning in Poland that would ensure the continuation of the business on one hand and the protection of assets of the other.

That changed on 26 January 2023, when the Polish Parliament adopted an act on the family foundation. The act entered into force on 22 May 2023.

Available data shows that the introduced mechanism is rather popular – in 2023 over 400 family foundations were registered and over 800 applications for the registry of such foundation were filed.

The Purpose of Introduction of a Family Foundation Into the Polish Law

The issue of succession posed a challenge for entrepreneurs and business individuals in Poland, as prior to the introduction of the aforementioned act, a practical solution for effective estate planning to secure business continuity and asset protection beyond a single generation was lacking. That is why a new vehicle, e.g. a family foundation, was introduced into the Polish legal system.

Family foundation is a legal entity established by the founder for the purpose of accumulating assets, managing them in the interests of the beneficiaries, and providing benefits for the beneficiaries.

It is formed on the basis of the founder's statement (unilateral deed (statement) of incorporation), or in their last will and testament. Founders can create a family foundation based on their assets, e.g., real estate, movables, stocks, and shares. The minimal value of the assets is PLN 100,000 (ca. EUR 22,000).

The primary objective of the family foundation is twofold: firstly, to safeguard the assets of the family business, and secondly, to manage them in accordance with the founder's specified intentions outlined in the statute of the foundation. The foundation is entitled to administer its assets and property and to dispose of them, while the beneficiaries appointed by the founder sharing in the foundation's profits.

The family foundation is permitted to engage in business activities within the limits set by the law, such as involvement in commercial enterprises, investment funds, and the acquisition and divestment of shares, stocks, and securities.

The concept of a family foundation hinges on the formal separation of business and family. Under this arrangement, family assets are transferred to the foundation's ownership, serving the dual purpose of furnishing financial support to the family and bringing the founder's vision to life,

while at the same time preserving the values instilled by the founder in their business.

Advantages of Incorporating of a Family Foundation

Incorporating of a family foundation has many advantages, while key benefits being inter alia:

- Family foundation provides the founder with a real opportunity to maintain the unity and integrity of the family estate and tis assets.
- It also gives the founder substantial control over the family assets, even after the founder's passing and prevents their division and fragmentation among heirs.
- The law provides for highly adaptable and flexible regulation regarding the distribution of the profits and benefits to appointed beneficiaries.
- Family foundation guarantees the continued operation of the company in alignment with the founder's specified intention, after their passing, and that it would be managed and administered by qualified and skilled individuals.

Aside from the aforementioned benefits, the lawmakers also introduced preferential terms regarding the taxation of family foundations. Said regulations may be the starting point for tax optimisation and effective structuring of the corporate framework for a specific family foundation may potentially lead to substantial tax reductions.

Overall, family foundations in Poland may serve as a versatile and beneficial vehicle for wealth management, estate planning, and the achieving the goals and intentions of the founder.

Resolution Of Disputes Relating to Family Foundation in Arbitration

There is also yet another benefit when it comes to family foundations – it is possible to incorporate an arbitration clause into the statute of the family foundation and resolve disputes relating to the family foundation in arbitration. In this regard, Polish legislators drew inspiration from comparable approaches found in other jurisdictions, such as Switzerland, Austria, and Germany.

The newly introduced legislation permits the resolution of disputes related to family foundations through arbitration.

This grants the involved parties the option to decide whether they wish to pursue their cases in a state court or before an arbitral tribunal. Prior to the enactment of the mentioned act, Polish legislation lacked comparable provisions that would allow the resolution of such disputes through arbitration. This was primarily due to the nature of an arbitration agreement, which is fundamentally a mutual agreement – e.g. a legal act between two persons. Conversely, the establishment of a family foundation through a deed (statement) of incorporation is classified as a "unilateral legal act" and in the context of unilateral legal acts, such as a last will and testament, Polish law did not permit the inclusion of an arbitration clause.

The transfer and administration of private assets, often of considerable value, can lead to diverse disputes, both internally between the foundation's corporate bodies, its members and beneficiaries, and with external third parties. These conflicts may involve many various disagreements on various legal grounds, potentially more intense than "usual" corporate or commercial disputes taking into account their familial aspect. Given the arbitration's attributes, such as confidentiality, professionalism, expeditiousness, and flexibility, it is likely to be the preferred method for resolving such disputes.

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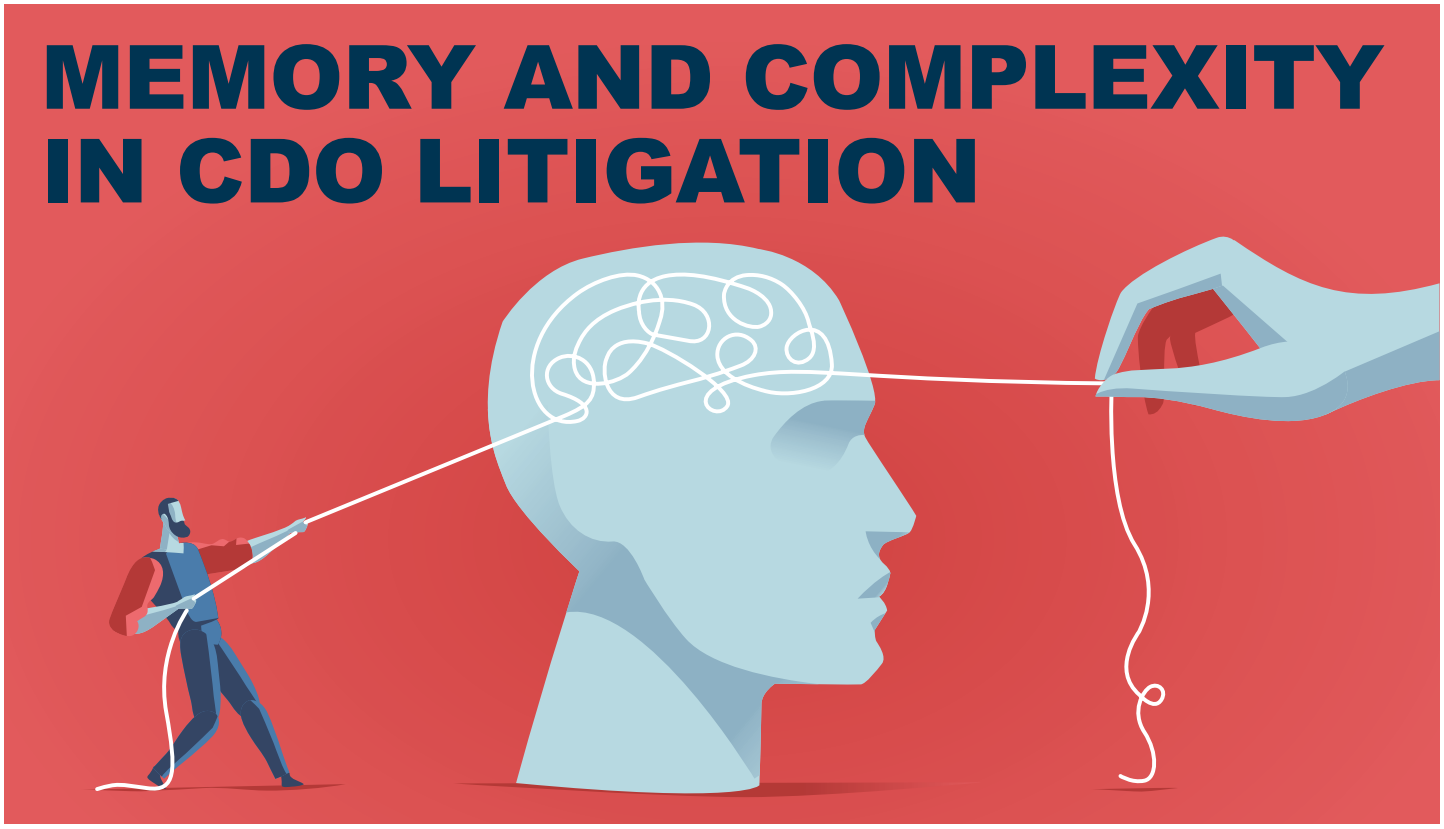
MEMORY AND COMPLEXITY IN CDO LITIGATION

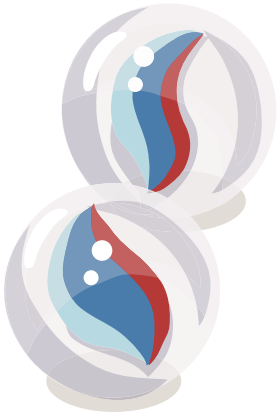


Authored by: David Simpson (Barrister) – 3VB

When it comes to collateralised debt obligations, the English courts seem to be agreed that they are one of "complex" (Mr Justice Hamblen in Cassa di Risparmio v Barclays Bank [2011] EWHC 484 (Comm) at [1]), "highly complex" (Mr Justice Males in UBS v Kommunale Wasserwerke Leipzig [2014] EWHC 3615 (Comm) at [161]), or so complex that "some of the banking witnesses in this case struggled to explain the concepts themselves" (Mr Justice Cockerill in the recent case of Loreley 30 v Credit Suisse [2023] EWHC 2759 (Comm) at [1]).

Actually, CDOs are perfectly straightforward. All you need to do is imagine a grown-up version of Pascal's marble run.[1]

A bagful of marbles is dropped through the funnel in the top and ping down through the pins before landing in one of the columns at the bottom. Place your bets on where they end up and you will get short odds on the central column which according to normal distribution should be full; place your bet on the outer columns and you'll get much longer odds because they might not get any marbles at all.



So it is with a CDO. For the bag of marbles read a "warehouse" of securities (often mortgage backed but they don't need to be). For the funnel read a portfolio of credit default swaps. For the pins read, well, the vicissitudes of life. And for the columns read a note structure where the senior tranches attract low risk and low coupon and may be redeemed early, whilst the subordinated notes attract higher risk and correspondingly higher coupon but may be wiped out. Simple really.

Much as with marbles, the disputes to date on CDOs in the English courts break down into a number of categories. Obviously the preliminary question of who gets to complain to whose dad first (i.e. jurisdiction: UBS AG v HSH Nordbank AG [2009] 1 C.L.C. 934). Then the more substantive issues, such as whose pocket money is at risk if the marbles have to go back to the shop (Royal Bank of Scotland Plc v Highland Financial Partners LP [2010] EWCA Civ 809, where the collapse of Lehman meant that the note structure was never constituted and the securities was sold at a loss). And of course, most importantly, whether a cat's eye is really as good as an oily and how many galaxies are worth the same as a dobber (a lot) – i.e. misrepresentation.

Which brings us back to Loreley, where the claimant investment fund's case was essentially that the bank structuring a particular CDO had made false representations about the reference portfolio of MBS within the CDO, because a separate part of the bank had been involved in packaging a number of the MBS within that portfolio and had entered into a

1 I only have a thousand words, so if you don't know what this is, I recommend a Google search.

settlement agreement with the US Department of Justice arising from false representations said to have been made to investors (i.e. different investors) about the quality of those MBS. The claim failed on limitation, so almost all of the judgment is obiter, but those obiter findings included

1. That the part of the bank selling the CDO was unaware of the actions of the part of the bank which had packaged the MBS (because it was on the other side of an information barrier),
2. That no actionable misrepresentation had been made, and,
3. That the claimants had not in any event been aware of the representations they now pleaded and had not in fact relied upon them.

The judgment is perhaps most interesting for giving Cockerill J the platform to revisit and expand upon the principle she had enunciated in Leeds City Council v Barclays Bank plc [2021] QB 1027, namely that a claimant bringing a claim based upon an implied misrepresentation must be able to demonstrate that it was actually aware of and actually understood the implied representation relied upon. As Her Ladyship put it at [421]:

"The law does require that a representation (however made) is received by the representee and that to satisfy the requirements of reliance the representee must be aware of it/have it actively present to their mind when they act on it."

This principle is clearly of some consequence to securities claims under s90 of FSMA 2000 where each individual claimant is required to adduce evidence of their awareness and understanding of any implied misrepresentation in offering documentation relied upon to found a claim.

However, to my mind this case is also interesting because it highlights a particular tension between principle and procedure in modern banking litigation: namely the principle that a claimant must prove what was "actively present to their mind" whilst at the same time the procedural rules on witness evidence in PD57AC demand unvarnished and "unrefreshed" recollection.

As the facts of this case demonstrated, where the factual matrix is mind-bogglingly complicated and the transaction in issue took place many years earlier and was itself one of many such transactions entered into by the same investor, it requires almost super-human feats both of memory on the part of witnesses and of judicial mind-reading on the part of the court to establish what was in fact happening in the grey matter of the relevant individuals at the relevant time. These are issues that affect claimants and defendants, individuals, customers, investors and financial institutions equally in this field of litigation (and indeed corporate defendants have the added complication that relevant individuals may well have moved on since the events in issue).

These are also precisely the points that Mr Justice Leggatt (as he then was) was making in the well-known introduction to his judgment in Gestmin v Credit Suisse [2013] EWHC 3560 (Comm) when he explained that "Memory is especially unreliable when it comes to recalling past beliefs" [18] and that the process of civil litigation itself "subjects the memories of witnesses to powerful biases" [19].

The new practice direction was of course a response to the concerns His Lordship and others identified and it has gone a long way to preventing the over-lawyering of witness evidence.

However, the frailty of human memory remains and, as this case demonstrates, needs to be borne in mind when applying principle to practice in disputes with this level of complexity.

David Simpson is a barrister in 3 Verulam Buildings. He specialises in banking litigation and represented the defendant bank in Gestmin v Credit Suisse [2013] EWHC 3560 (Comm).

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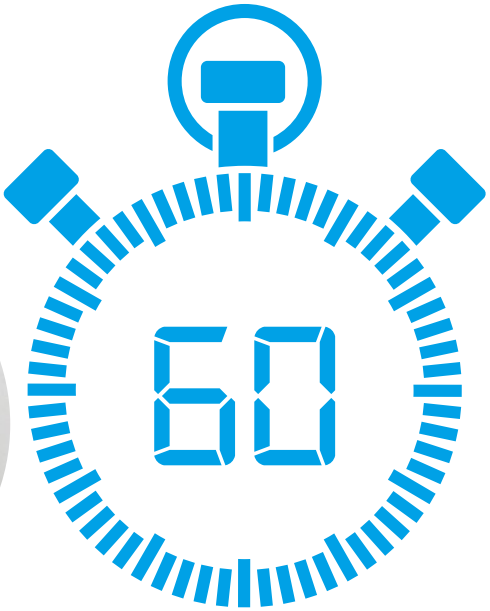

Q **Imagine you no longer have to work. How would you spend your weekdays?**

A By being a full-time Dad. After that chapter, I would like to pick up outdoor adventures again. I have always wanted to sail around the world and climb a few more mountains.

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

A Playing a role in shaping a rapidly growing industry with my colleagues as it transitions into an institutional asset class. Equally rewarding is sharing my passion for investing and pushing our team to become better investors and managers of risk.

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

A Got into litigation funding! This is the steepest learning curve I have found in my career. Or perhaps this says more about my intellect.

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

A On Life: Take a deep breath and count to 10.

On Work: Show up every day. Find a mentor. Don't work with assholes.

On Investing: Worry about the downside and the upside will take care of itself.

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

A Resilience.

Q **What book do you think everyone should read, and why?**

A The Churchill biographies by Manchester. For all his flaws, Churchill remains one of the great leaders of our time. Manchester's account is brutally honest and exceptionally detailed.

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

A I can't say Winston Churchill again. Stephen Fry would be a fascinating dinner companion.

Q **What is the best film of all time?**

A *Legends of the Fall.*

Q **What legacy would you hope to leave behind?**

A My kids! When I'm gone I'll be too dead to enjoy the adulation I expect will be showered upon my memory. Whatever my legacy is, I hope my kids do not suffer lifelong embarrassment.

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

A The transformation of litigation funding into an institutional asset class and investment management business. There are a few barriers to scale to resolve along the way, and it will be exciting to see how the industry tackles these opportunities.

Q **Do you have any hidden talents?**

A I am undefeated at Hide-and-Go-Seek.

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

A To build the best team in legal finance.

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"FIRSTLY, DON'T PANIC"

TRANSPARENCY IN THE FAMILY COURT: A NEW ORDER

Authored by: Frederick Tatham (Partner) – Farrer & Co.

For better, for worse, for richer, for poorer, 29 January 2024 is a significant date for financial claims in the Family Court. It is the date on which, for the first time, as a starting point, the media can report on proceedings in the Financial Remedies Court under a new pilot scheme. The official guidance endorsed by the President of the Family Division for judges and professionals where a reporter attends a hearing begins with the recommendation, "Firstly, don't panic".

The veil of privacy is lifting. Are practitioners ready?

What claims?

The pilot includes the main types of financial claims in family proceedings:

1. Financial claims on divorce.
2. Financial claims between unmarried parents under Schedule 1 of the Children Act 1989.
3. Financial claims after an overseas divorce under Part III of the Matrimonial and Family Proceedings Act 1984.

Where?

The Central Family Court (London), Birmingham and Leeds, with the intention to extend to the High Court in November 2024. It will thereby encompass the majority of high value financial claims on divorce.

When?

29 January 2024 for 12 months.

The changes

Listing: what's in a name?

The names of the parties will be published in the online court lists, which will state that the proceedings involve financial remedies.

This will happen in all courts, not merely those in the pilot, and will include the High Court where names have been anonymised in the past. First names and subject matter (e.g. "Financial remedies") will be included. Reporters

will more easily be able to identify high profile cases.

Attendance

Reporters are in principle entitled to attend any in person hearing (in person) or any remote hearing (remotely), except a Financial Dispute Resolution hearing at which no attendance is permitted. For reasons of logistics and court resources, it may not always be possible for a reporter to attend an in person hearing remotely. Reporters are encouraged to inform the court and the parties in advance of their intention to do so, but this is not a requirement. The court may exclude a reporter, but only under limited circumstances.

A new order: The Transparency Order

Where a reporter attends a hearing, the court will consider making a standard Transparency Order (for which a precedent has been created). This may be made at any stage, but is likely to be at the first hearing attended by a reporter. It will usually be expressed to last 'until further order' but may be time limited. The court retains the discretion to direct that no reporting is permitted at all, but the precedent anticipates that a reporter may publish what is said in court, subject to any restrictions set out in the order which are designed to preserve the anonymity of the parties and confidentiality of sensitive information. The precedent provides for witnesses (except expert witnesses) not to be identified.

Judges may opt to make an interim Transparency Order to prevent reporting while the proceedings are ongoing, adjourning the question of a final Transparency Order to the conclusion of the trial.

Documents

In a significant change to previous practice, the starting point is that counsel's position statements and

Form ES1 (the joint case summary) will be provided to journalists in attendance. Provision of Form ES2 (the joint asset schedule) requires the court's permission. The guidance says it is not envisaged that documents will be redacted save that the court may permit redaction if the documents include information prohibited from publication under the Transparency Order, notably information likely to be in the ES2 such as details of properties, private companies and specific financial instruments. A reporter may quote from a document provided to them within the scope of the Transparency Order. If a document is referred to during a hearing, this does not entitle the reporter to see the document, but they may seek permission.

Comment

The guidance flows from the President's review of transparency in family justice, which was published in October 2021. The Transparency Implementation Group was formed to oversee his recommendations. The guidance adopts the TIG's recommendations published in April 2022. The direction of travel towards greater transparency is clear, although it has stopped short of routinely naming parties to divorce proceedings, which some high-profile High Court Judges had advocated should be the starting point in law.

It is early days, but some initial thoughts are below:

- It is only 'guidance'; judges may make whatever order they consider appropriate, from naming the parties to restricting reporting entirely and/or excluding reporters. However, it is anticipated that judges will likely follow the guidance in ordinary circumstances. It is likely that the right case will need to be considered at Court of Appeal level to determine the controversial question of whether anonymity should apply as a starting point.
- Despite the changes, the extent to which reporters attend and report on hearings remains to be seen. An anonymised story remains less likely to generate interest.
- There must be a real risk of 'jigsaw' identification. Reporters may report without naming the parties and judgments may be anonymised, but little investigation will be required to establish the parties' identities when they are named on free-to-access online lists the day before the hearing.
- There may be tactical advantage to one party in increased press interest and the guidance may be said to license this. It specifically directs that lawyers acting in proceedings may approach reporters on behalf of their clients if so instructed. It also makes clear that reporters are not required to reveal their sources and that it is inappropriate for a judge or legal representative to ask a reporter who told them about the hearing or to explain their attendance lest this has a 'chilling' or 'intimidating' effect. It also states that it is inappropriate to require or request sight of a report for approval prior to publication.
- Routinely disclosing documents to the press will affect their contents. There may be a temptation to 'play to the gallery' and include sensational and/or pejorative content, or the reverse.
- If both parties are minded to avoid publicity, there may be an additional incentive to settle, particularly at FDR which no reporter may attend, or pursue non-court dispute resolution such as mediation or arbitration.
- Legal costs may increase. Considerable time may be required to settle the terms of a Transparency Order and consider appropriate redactions in advance of and during a hearing. In some cases, the issue may be adjourned to a further hearing at additional cost to the parties.
- Information security could be compromised. The Transparency Order directs that documents provided to a reporter must not be shown to any other person, must be held securely/confidentially by the reporter and 'must be kept for no longer than necessary whereupon it must be securely destroyed or deleted'. This is all well de lege, but de facto one wonders whether this is practicably enforceable. How long is it 'necessary' for a reporter to keep the information and how can data security be assured? It is remarkable that documents which, if mistakenly lost, could result in serious consequences for practitioners for breaches of data security, will now be routinely handed to journalists. It is also remarkable from a party's perspective that copying/retaining private documents belonging to their spouse can result in serious civil and criminal consequences, yet documents containing their private information will now routinely be provided to journalists.

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CHATS ABOUT CHATTELS: DO DISPUTES ALWAYS LEAD TO SETTLEMENT?

Authored by: Judith Swinhoe-Standen (Associate) – Stewarts

Spats over chattels can appear in probate disputes and divorces in particular. Such disputes may seem simple on the surface, but they are often a key sticking point with the potential to scupper a wider settlement at the eleventh hour.

How Can A Dispute Arise Over Chattels?

In a probate context, disputes can arise:

- As a result of construction issues in the will or otherwise where it is not entirely clear what the testator's intentions were for the chattels;
- If (as is more common) the specific chattels are mentioned in a letter of wishes rather than in the will, where the executors choose not to comply with the wishes expressed;
- Where the chattel in question is no longer in the deceased's possession at the time of their death; or
- Where there is a misunderstanding as to who is entitled to which item(s). This might be the case where the specific chattels are not mentioned in the will or letter of wishes and are instead either referred to in general terms (for example, "my jewellery") or swept up in the residue clause.

In a divorce context, when the couple's joint possessions are being shared between them, they can find it difficult to agree who should keep what.

How Does A Chattel Dispute Play Out?

Almost all chattel disputes settle, often because the items are of a value disproportionate to the legal costs that would be required to take the matter to trial.

Most lawyers will advise their clients that although it might be painful for their client to give up an item carrying such sentimental value, it is generally not worthwhile pursuing a claim on that basis or as a matter of principle.

Chattel disputes that do reach court tend to be part of a wider dispute (for example, the construction of various clauses of the will in Almond v Goff [2021] EWHC 1703 (Ch)) or are ancillary to the main dispute (for example in X v X [w2019] 10 WLUK 896 where the court ruled that an agreement to deliver up chattels on a divorce was not enforceable as it was only an agreement rather than a court order).

If the deceased has left an item to a beneficiary in a will but has disposed of the chattel before their death, that legacy will fail. This might seem unfair to the intended recipient, especially if they are not compensated for it with an alternative item or a monetary sum.

Practical Considerations

Understandably, it is often emotionally difficult for a party to concede a chattel. It is not usually enough to be offered the equivalent monetary value or to reach a compromise by selling the item and splitting the sale proceeds. It is the specific item to which they have an attachment, and having possession of it might be the most tangible way in which they can remember the person who has died.

Even if the dispute is over a collection of items, it is often difficult to contemplate dividing the collection between the parties to a dispute because this can risk decreasing the significance or value of the items as a whole. A notable exception to this was in Butler v Butler [2016] EWHC 1793 (Ch) concerning a collection of Chinese porcelain pots. In this case, the court found that the parties' parents had collected the pots without intending that they should be preserved as a single collection. Therefore, they could justifiably be divided between the parties.

What Does A Settlement Look Like?

Unless the dispute is over a single chattel, it is almost inevitable that each party has to concede at least something. In principle, this is no different to any money dispute. However, in a dispute over chattels, the difference is that the result is binary: you either get the item or you don't.

A compromise on chattels can take various forms. One option is to sell the item and divide the proceeds. A more bitter pill to swallow might be for one party to retain the item and compensate the other parties financially.

If the dispute is over a collection of items, the items can be valued and divided into portions of equal value among the parties to the dispute. Alternatively, as was ordered in Butler v Butler, the parties take turns selecting items from the collection until all items have been claimed.

If the chattels form part of a wider dispute, it is worth considering the issue early and treating it as just as important as the other aspects of the dispute. It is not unheard of for a settlement to be agreed on all counts other than the chattels before falling apart at the last minute due to deadlock on an item of jewellery, for example. Resolving the question early minimises the scope for hiccups at a late stage.

The Meaning Behind A Chattel Dispute

Lawyers are likely to advise their clients they will be throwing good money after bad if they pursue a dispute over chattels. Ultimately, a client might agree that in the grand scheme of things it is not worth the stress and cost of pursuing the item. However, it is worth keeping in mind the reason why chattels are often a sticking point: they hold important meaning, and relinquishing the item is equivalent to relinquishing the meaning behind it.

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RISE IN PRIVATE WEALTH LITIGATION

Authored by: Elizabeth Sainsbury (Partner) & Michael Welsh (Associate) – Farrer & Co.

Introduction

According to the Financial Times, almost 390 probate disputes were brought before the High Court over the first nine months of 2023, which is more than double that in the same period in 2016.[1]

This article will look at this recent trend within the private wealth sphere and consider the potential reasons as to why there has been such an increase in cases in recent years.

Complexity With Capacity

Within many types of private wealth disputes, capacity plays a vital role. When preparing a will, the testator must have the requisite testamentary capacity in order to execute a will. If they do not have testamentary capacity, their will won't be valid. Similarly, in relation to the creation and administration of a trust, the settlor, trustee and / or protector must also have the requisite capacity (albeit the complexity of a transaction or settlement may require a higher level of understanding than that required for preparing a will), otherwise the intended outcome may well be declared void or voidable.

The issue of capacity has likely been on the rise as a result of an ageing population and expanding life expectancy, with men born in 2020 expecting to live on average to age 87.3 years and women to age 90.2 years in the UK.[2]

According to the NHS, as many as 1 in 11 people over the age of 65 now live with dementia. Accordingly, there is now a much larger vulnerable population in comparison to a few decades ago.

People are therefore preparing wills and / or creating and administering trust structures often later in life. Their capacity may be in question, or fluctuating, which naturally opens up a line of vulnerability and potential attack in relation to their decision making by disappointed family members and beneficiaries. This has also been exacerbated by the Covid-19 pandemic, which placed great pressures on parties to execute wills without legal assistance and sometimes in rushed circumstances.

Additionally (and typically seen in conjunction with capacity issues), there has also been a general increase in the involvement of third parties during the preparation of testators' wills. It is well established under common law that if an individual is unduly influenced

1 Financial Times (https://www.ft.com/content/8ee1f35e-8ab3-4897-b8d3-c7431df40193)

2 Office of National Statistics (https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/lifeexpectancies/bulletins/pastandprojecteddatafromtheperiodandcohortlifetables/2020baseduk1981to2070)

to execute a will, it will not be legally valid. With the vulnerable population increasing, this has created a breeding ground for third parties to place themselves in a position of influence – for example, by moving into the individual's home to provide care – to coerce the testator in preparing their will on favourable terms. Again, it is expected that the Covid-19 pandemic has played a key part in the increase in undue influence cases, primarily due to vulnerable parties being heavily reliant on family members and third parties as a result of the Government's lockdown measures, allowing them the potential to exert influence over the testator.

Public Knowledge and Awareness

The media has also taken a greater interest in private wealth litigation in recent years, with the press reporting on disputes with significant sums and famous faces, thus equipping the public with more knowledge and awareness of the issues and their potential rights when considering their own position and potential claims.

For example, Amy Winehouse's[3] and George Michael's[4] estates were reputedly subject to claims under the Inheritance (Provision for Family and Dependants) Act 1975 following their deaths, with both claimants seeking greater financial provision from the celebrities' fortunes.

Both of these disputes (amongst other high-profile cases) have been widely reported in the press, including in the Daily Mail and the Sun, providing the public with a surface-level understanding of the law and what is required in order to bring a claim.

Coupled with this increased knowledge and awareness, access to legal advice in respect of private wealth disputes has increased significantly year on year. IRN Research said in The Wills, Probate & Trusts Market Report 2023 that the wills, trust and probate market had an estimated value of £2.6bn in 2023; a 5.4% increase on the previous year, with a "stronger demand" for contentious probate work.[5] IRN Research also found that as of 2022, the number of firms that offer advice in respect of contentious wills, trust and probate had "doubled since 2018."[6] Firms are also increasingly providing services on a "no win no fee" basis, which can be attractive for potential litigants. When factoring in the general public's growing awareness of private wealth litigation as well as the greater access to legal specialists, it is no surprise that cases are on the rise.

Shift In Wealth

In addition to the factors above, the level and type of wealth accrued by different generations plays a significant role in the likely increase in disputes. According to the Financial Times in 2019, one in five UK baby boomers (being people born between 1946 and 1964) are millionaires,[7] and it is estimated that £5.5tn will be passed down successive generations in the UK in the next 30 years.

In addition, the average British household's net assets has increased by 20% in real terms from the 12 years prior as of 2020,8 meaning that there is generally a larger amount of wealth and assets being passed down to successive generations. [Enlarge] Again, this provides more scope for litigation.

Baby boomer wealth also resulted in an increase in trust structures being established in the 1970s and 1980s. The current beneficiaries of those trust structures may now form part of a large class of beneficiaries (often broadly defined in trust documents as "remoter issue and descendants"), who may be unhappy with a perceived diluted entitlement to family wealth between their fellow siblings and cousins, and/or may disagree with the way in which the structure is being administered. Again, this dissatisfaction with the transfer of wealth, and also perhaps the restriction on access to assets, has already resulted in an increase in court proceedings, and that trend is expected to continue.

Conclusion

It is undeniable from the statistics that private wealth litigation is on the rise. It is difficult to determine the exact cause of this increase, however it is safe to conclude that the developments above will have been contributing factors. Whilst impossible to prevent disputes, testators and power-holders (such as settlors, trustees and protectors) should be taking advice early when issues arise or are anticipated, significant decisions are made, and/or a crossroads is reached, in order to minimise the risk of future challenges.

3 Daily Mail (https://www.dailymail.co.uk/news/article-7293575/Amy-Winehouses-ex-husband-Blake-Fielder-Civil-making-1million-grab-estate.html)
4 The Sun (https://www.thesun.co.uk/tvandshowbiz/17101180/bitter-feud-george-michael-97million/)
5 New Law Journal (https://www.newlawjournal.co.uk/content/uk-wills-probate-trusts-market-report-2023)
6 National Will Register (https://www.nationalwillregister.co.uk/news/number-of-contentious-probate-firms-doubled-since-2018-as-demand-for-wills-increases/)
7 Financial Times (https://www.ft.com/content/c69b49de-1368-11e9-a581-4ff78404524e)
8 Financial Times (https://www.ft.com/content/8ee1f35e-8ab3-4897-b8d3-c7431df40193)

TRUST ISSUES

IS IT ALL A SHAM?

Authored by: David McGuire (Principal Associate) – Weightmans

Sham Trusts

A sham is an act done or document(s) created which are intended to give the appearance of creating legal rights and obligations different to the actual rights and obligations the parties intended to create.

Strictly speaking, it is the trust document which is a sham, rather than the trust itself.

If it is held that the trust instrument is a sham, the trust was never created in order to be categorised as a sham.

Objective vs Subjective Approach

When identifying a settlor's intentions in trust documents the Court will typically interpret the trust documents objectively. If that document is considered to have created a trust, there is a strong presumption that the trust has been validly created.

However, parties with claims against the settlor (for example creditors, divorcing spouses or those otherwise entitled to assets under forced heirship) can seek to challenge the trust as a sham

have been intention to mislead third parties. It suffices for these purposes if the settlor and/or trustee are recklessly indifferent to signing the document and without knowing or caring what they are signing.

In circumstances where a settlor declares themselves a trustee, the intention of the settlor determines whether the trust document is a sham. Where the settlor transfers assets to trustees, there must be a common intention of the settlor and the trustees to mislead.

Indicators

Some typical indicators which can assist in proving a sham include:

- Where a settlor retains secret control of the trust. Where a settlor who is also a beneficiary exercises controlling powers additional to those within the trust deed, for example prohibiting disclosure of the trust to others, and any other trustees consent/comply with those requests/ powers, then the trust can be held to be a sham.
- Where a settlor never intends for property to be held on the purported

trusts. For example where a peppercorn sum is settled in trust initially and the settlor states that they intend to transfer other more substantial property into trust at a point in the future. If in reality there is no such intention of doing so, the trust is vulnerable to being considered a sham.

- Where trustees do not exercise their powers independently and simply respond to the requests or directions of another party. A scenario where there is little to no paperwork documenting the trustees exercising their discretion independently can assist a challenger.

Case Law

Rahman v Chase Bank (CI) Trust Co Ltd [1991] JLR 103 – A trust purportedly created by a settlor was held to be a sham by virtue of the settlor dealing with the assets as though they remained his absolute property (for example by giving investment directions without consultation with the trustee).

Midland Bank v Wyatt [1995] 1 FLR 697 – A trust document stored in a safe was held to be a sham on the basis it was created in case it was ever needed in the future and in the event of a claim by creditors.

Minwalla v Minwalla [2004] EWHC 2823 (Fam) – A trust document was held to be a sham as two letters of wishes were prepared, one stating a husband was a beneficiary, the other not. It was inferred that one could be elected over the other depending on the circumstances. The trustee also permitted the husband to deal with assets as if they remained within his ownership.

JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2017] EWHC 2426 (Ch) – It was held that no one operating the trusts had an intention independent of Mr Pugachev, including the "recklessly indifferent" solicitor who prepared the documents. It was held that Mr Pugachev retained ultimate control over the assets in the trusts and it followed that the trust documentation was a sham.

Consequences

Proving that a trust document is a sham is notoriously difficult, primarily because of the challenges facing a claimant in obtaining sufficient trust documentation and information to show (amongst other things) the role and control of the settlor in the administration of the trust.

Where a claimant does succeed in showing that a trust document is a sham, the consequences ultimately depend on what other arrangement was made, having regard to the settlor's true intentions.

Those intentions could be that the settlor intended to be the beneficial owner of the trust property or for the trustee to hold the property upon bare trust for the settlor.

The consequences of that can be severe and include the settlor being subject to tax and criminal liability, together with the assets being open to attack by creditors or spouses.

Avoiding Challenges

Whilst the potential for a trust to be challenged as a sham cannot be entirely eliminated, a settlor can take a number of steps upon the trust being created to mitigate against the risk of a successful attack. In particular, appointing reputable independent trustees who will be truly independent and not simply operate at the direction of the settlor is encouraged. The exercise of the settlors' powers also should be limited to those afforded to them in the trust document and comprehensive records should be kept when trustees exercise their powers /decision making.

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1 For more details visit https://www.weightmans.com/people/david-mcguire/.

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