BlaserMills Law

Guide to Litigation in England

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Contents

Introduction and Key Principles

This guide is a short overview of the litigation progress in England & Wales, intended to help you navigate unfamiliar waters.

The litigation process is governed by the Civil Procedure Rules **(the CPR)**.

All cases are subject to the 'overriding objective' which is the requirement for the Court to deal with cases justly and at proportionate cost. As set out at CPR 1.1(2), dealing with cases justly and at proportionate cost includes:

- dealing with the case in ways which are proportionate (i) to the amount of money involved (ii) to the importance of the case (ii) to the complexity of the issues; and (iv) to the financial position of each party;
- ensuring that a case is dealt with expeditiously and fairly; and
- allotting a case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

These are important points to bear in mind as they have a significant practical impact on how disputes are run and resolved.

Issues to Consider Before the Issue of Proceedings

Forum and Jurisdiction

The first thing to check is whether your contract contains an arbitration clause or a jurisdiction clause.

If it contains an arbitration clause, you will, broadly, have to resolve your dispute through arbitration. A guide to the arbitration process can be found on our website.

If your contract contains a jurisdiction clause this will confirm whether the English Court has jurisdiction to determine the dispute.

Sometimes contracts do not contain a jurisdiction clause and in these circumstances there are various default rules that are applied to decide whether the English Court has jurisdiction to hear the case.

Choice of Law

Typically, commercial contracts specify what law governs the obligations in the contract. You might see words like *"this agreement shall be governed and construed in accordance with the laws of England and Wales"*. English Courts will give effect to this choice of law. However, there are default rules to ascertain which law should apply in the absence of an express choice. The English Court can even decide disputes in accordance with foreign law if that is what the parties have chosen or that is what the default rules dictate.

Do You Need to Sue?

Generally, the Court will expect parties to consider the use of alternative dispute resolution **(ADR)**, before or during the course of proceedings. Further information on ADR processes is set out later in this guide.

If a dispute could be resolved through ADR (e.g. mediation or early neutral evaluation), recourse to litigation may not be necessary, as ADR could provide a cheaper, faster resolution of your dispute.

The CPR also states that an unreasonable refusal to participate in ADR, can lead to adverse cost consequences.

Can Your Opponent Satisfy a Judgment or Costs Order?

It is equally important for a Claimant and a Defendant to investigate, at the outset, whether their opponent has sufficient assets to satisfy a judgment and/or a costs order.

For a Claimant, a potential Defendant's weak financial position may dictate whether litigation is an appropriate step to take at all. If a judgment cannot ultimately be enforced, it may not be commercially sensible to become involved in litigation.

For a Defendant, if it appears that a Claimant would be unable to satisfy a costs order, there may be grounds for an interim application to be made to protect your position, such as an application for security for costs. Security for costs (broadly a payment of some form of security into Court by the Claimant) is an important protection for defendants to English litigation and further information can be found below in this guide.

Pre-Action Protocols and the Practice Direction on Pre-Action Conduct

There are various steps that parties are required to take before commencing proceedings, which are set out in the CPR. For certain cases there are specific pre-action protocols that must be followed, for example the 'Pre-Action Protocol for Professional Negligence'. Where there is not a specific applicable protocol, the general Practice Direction on Pre-Action Conduct and Protocols will apply.

The specific requirements will depend on the nature of your case, however, it will usually be necessary for a Claimant to send a 'letter of claim' to a Defendant, setting out the basis of their claim and the remedy sought (e.g. damages or an injunction), before proceedings are commenced. A Defendant should respond to this correspondence in a reasonable time, which is usually between 14 days and 3 months depending on the complexity of the case. The purpose of this correspondence is to share information and evidence, to seek to narrow the issues in dispute and to allow the parties to make informed decisions as to the way forward and whether litigation is necessary and appropriate in the circumstances.

Failing to comply with the pre-action requirements, can be brought to the attention of the Court and can lead to adverse cost consequences.

Insurance

It is important to review any insurance policy that you have, as it may provide cover for legal expenses or liability for a claim. For example, some corporate insurances provide so called 'Directors and Officers Cover', which covers directors' legal fees in certain circumstances.

In the event that you do not have insurance, or any existing insurance cover is insufficient, 'After the Event Insurance' **(ATE Insurance)** may be available, to provide cover for your legal costs and any adverse legal costs, up to a specified level. Whether ATE Insurance is appropriate, proportionate or available will depend on the specific facts of your case.

Document Preservation

Parties are under a duty, from the outset of a dispute, to preserve and retain all documents that may be relevant to the issues in dispute. This extends to both electronic and physical documents. It is important that you cease any document destruction processes, once you become aware of the likelihood of litigation.

Publicity

Legal proceedings are generally public, except in very limited circumstances. This means that non-parties to the litigation can typically (i) attend any hearing in the proceedings and (ii) obtain copies of any documents filed at Court. Reputational risks, although rarely enough of a reason not to become involved in litigation, should be considered early on and kept under review.

Statements of Truth

Parties in legal proceedings, or if appropriate, their legal representatives, are required to sign a statement of truth at various steps in the litigation process including when beginning the claim, filing any statement of case (e.g. a Claim Form or Particulars of Claim) or producing evidence. The statement requires the party producing the document in question to confirm (i) that the facts stated in the document are true and (ii) that they understand that proceedings can be brought against anyone who makes, or causes to be made, a false statement in a document verified by a statement of truth without an honest belief in its truth. For business clients, it is essential that any individual signing a statement of truth on behalf of the company has the necessary authority.

Which Court – County Court or High Court?

County Court

The County Court generally deals with claims with a value of £100,000 or less (although there are exceptions to this rule). There are various County Court Hearing Centres located around England & Wales.

High Court

The High Court tends to deal with higher value, more complex claims. It is split into various divisions, including the following:-

THE QUEEN'S BENCH DIVISION (QBD)

The QBD typically deals with claims concerning (i) breach of contract (ii) defamation (iii) negligence and other tortious claims (iv) non-payment of debts and (v) breaches of the Human Rights Act 1998.

THE BUSINESS AND PROPERTY COURTS

The Business and Property Courts include:

THE CHANCERY DIVISION

The Chancery Division is split into 'lists' dealing with separate specific areas of law (i) the Business List (ii) the Competition List (iii) the Insolvency and Companies List (iv) the Property, Trusts and Probate List and (v) the Revenue List.

Generally, the Chancery Division typically deals with claims involving, but not limited to:

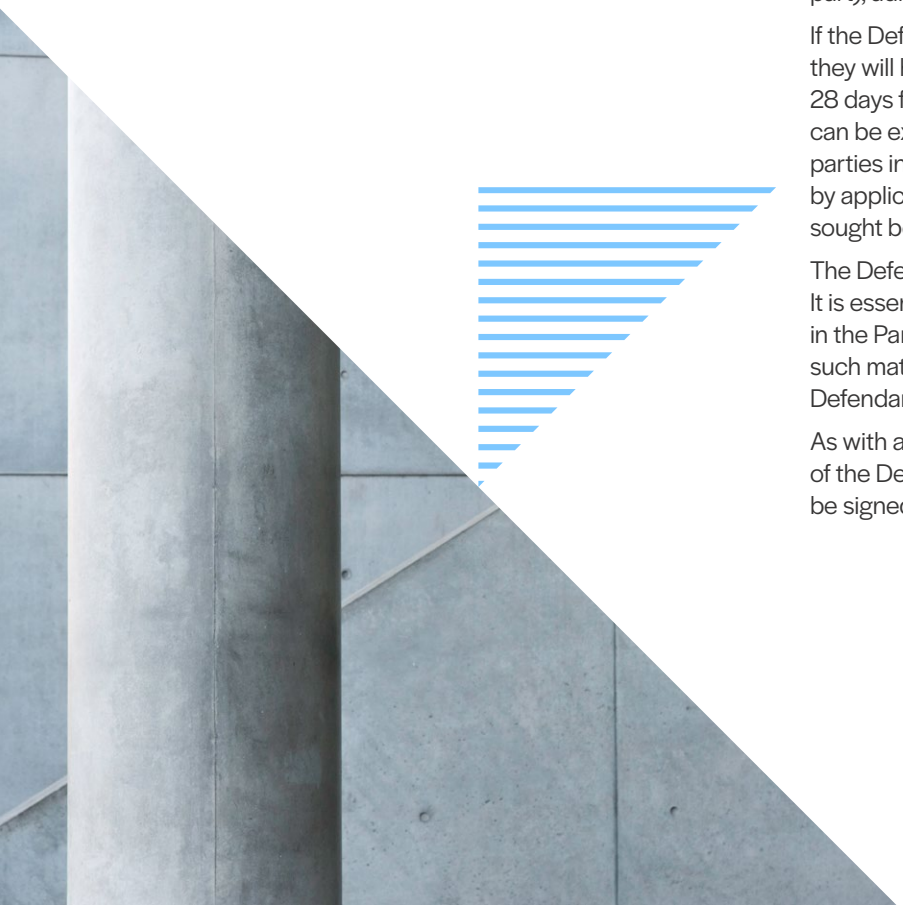
- Business disputes
- Trusts
- Commercial fraud
- Tax
- Intellectual property (the Intellectual Property Enterprise Court and Patents Court **(IPEC)** falling within the Insolvency and Companies List)
- Land
- Regulatory work
- Bankruptcy
- Professional negligence

THE TECHNOLOGY AND CONSTRUCTION COURT (TCC)

Claims may be brought in the TCC where they are technically complex. Generally the TCC will deal with disputes involving (i) construction (ii) engineering (iii) IT and (iii) complex accounts.

THE COMMERCIAL COURT

'Commercial' claims that can be brought in the Commercial Court are generally disputes arising out of (i) the buying and selling of commodities (ii) banking and financial services and (iii) the export and import of goods.



Commencing Proceedings – the Standard Procedure: Part 7 of the CPR

The Claim Form

A claim is started by issuing a Claim Form with the Court. A fee is payable which is determined by the nature and value of the claim. For money claims, generally, the Court fee will be 5% of the value of the claim, up to a maximum of £10,000.

The Claim Form must be issued and served in advance of any limitation period.

Statements of Case

PARTICULARS OF CLAIM

In the vast majority of claims, the Claimant will be required to file and serve Particulars of Claim.

The Particulars of Claim are intended to set out the legal and factual issues in dispute between the parties and the issues for the Court to determine.

It is essential that Particulars of Claim, as with any statement of case, are correct and that you advise us of all relevant factual information concerning your case. A statement of truth will need to be signed to complete the Particulars of Claim.

ACKNOWLEDGEMENT OF SERVICE & DEFENCE

A Defendant must, within 14 days of service of the Particulars of Claim, file an Acknowledgement of Service or file a Defence.

The Acknowledgement of Service requires a Defendant to confirm whether they intend to defend the claim (in whole or in part), admit the claim, or contest jurisdiction.

If the Defendant does file an Acknowledgement of Service, they will have an additional 14 days to file a Defence, a total of 28 days from service of the Particulars of Claim. This timeframe can be extended by a further 28 days by agreement of the parties in accordance with the CPR and/or by a longer period by application to Court. Any extension must be agreed and/or sought before the timeframe for filing the Defence expires.

The Defence is a response to the Particulars of Claim. It is essential that a response is supplied to all matters set out in the Particulars of Claim and that it is confirmed whether such matters are admitted, denied, or outside of the Defendant's knowledge.

As with any statement of case, it is imperative that the contents of the Defence are accurate. A statement of truth will need to be signed to complete the Defence.

Judgment in Default

If a Defendant fails to file an Acknowledgement of Service and/or a Defence, a Claimant is entitled to request Judgment in Default. Default Judgment can typically be obtained without a hearing.

Counterclaim

A Defendant is entitled, if appropriate, to bring a Counterclaim against a Claimant. A Defence must be filed to the Counterclaim or Judgment in Default could be entered.

Reply to Defence and/or Reply to Defence to Counterclaim

Whilst not mandatory, a Claimant and Defendant are entitled to file a 'Reply' to Defence or 'Reply' to Defence to Counterclaim as appropriate, if they choose to do so. There is no set timeframe within which either of these documents must be filed and served, but they should be filed/served with the Directions Questionnaire (referred to below), the deadline for which will be set by the Court.

Amending Statements of Case

A statement of case can be amended where either (i) the opposing party consents or (ii) the permission of the Court is granted.

There can be considerable cost consequences of amending a statement of case and it is standard practice that the party wanting to amend their statement of case pays the costs of and occasioned by the amendment. Typically, the later a statement of case is amended, the greater the costs of dealing with that amendment.

Request for Further Information

If a party's statement of case is unclear, the opposing party is entitled to make a 'Request for Further Information' pursuant to Part 18 of the CPR. This enables the opposing party (Claimant or Defendant) to raise questions, to elicit information about the Particulars of Claim and/or Defence.

Commencing Proceedings - the Alternative Procedure: Part 8 of the CPR

There is an alternative, more streamlined procedure provided under Part 8 of the CPR which can be used in circumstances where (i) the CPR expressly requires or permits the use of the Part 8 procedure or (ii) the case is unlikely to involve a substantial dispute of fact. Typically, Part 8 is used for disputes seeking a declaration that a statute or e.g. a shareholders agreement, bears the meaning that one party contends for.

A claim is still commenced by the issuing of a Claim Form, but a specific 'Part 8 Claim Form' must be used.

If a case is to proceed under Part 8, rather than filing Particulars of Claim and/or a Defence, the parties file very detailed witness evidence instead. Different procedural timescales apply in Part 8 proceedings and if it is an appropriate route for your case, we will advise further on the necessary requirements.

Case Management

After statements of case have been filed, the parties will be required to file Directions Questionnaires providing the Court with key information regarding the case, such as the anticipated number of witnesses, whether expert evidence is required and if so, in what field. This is to help the Court manage the case and allocate sufficient Court resources to it.

In most cases, a Case Management Conference **(CMC)** will take place. This hearing is intended to set the timetable (referred to as 'directions') for the preparation of the case for trial. Many of the topics dealt with in this guide will be dealt with at the CMC including disclosure, evidence and cost budgeting.

The parties will generally look to agree directions ahead of the CMC and in some cases, if directions can be agreed, a CMC hearing will not need to take place.

The Court will issue case management directions to the parties, following the CMC or upon receipt of agreed directions. The Court has the power to issue any directions it considers appropriate and can make any order it considers appropriate to further the overriding objective.

The case management directions will set a number of deadlines by which the parties are required to take particular steps. These time limits are strict and failure to comply with a deadline can lead to sanctions being imposed including cost penalties or even the striking out of a statement of case. In certain circumstances, the parties can agree an extension of time of up to 28 days to comply with any deadline set by the Court but only where this will not interfere with any hearing date.

Any such extension must be agreed ahead of the relevant deadline and the Court must be notified. If a longer extension of time is required, it is necessary to apply to the Court to seek permission and again, it is imperative that any such application is made ahead of any deadline.

A claim will be allocated to one of the 'tracks' considered below. Broadly speaking, as you move up the tracks, the process increases in complexity and formality in line with the value of the case.

THE SMALL CLAIMS TRACK

Most claims up to a value of £10,000 will be assigned to this track and will be heard in the County Court.

Case management directions will usually follow a fixed timetable. The County Court adopts quite a flexible approach to litigation procedure as litigants often act for themselves.

As a general rule (although there are very limited exceptions) legal costs are not recoverable from the losing party on this track.

THE FAST TRACK

Generally claims with a value over £10,000 but less than £25,000 will be assigned to the fast track and heard in the County Court.

The fast track is suitable where the Court considers that the length of the trial will not exceed one day and where limited expert evidence is required at trial.

Case management directions will usually follow a fixed timetable.

Whilst legal costs are recoverable in the fast track, due to the value of the claims in this track, recoverability of costs is likely to be limited once the Court has applied the proportionality test (see further below). The fast track is also subject to the fixed costs regime set out in CPR 45 which provides for, amongst other things, fixed trial costs which range between £485 and £1650.

THE MULTI-TRACK

All cases with a value over £25,000 are assigned to the multi-track.

Cases with a value between £25,000 and £100,000 are usually heard in the County Court.

Cases with a value in excess of £100,000 are dealt with in the High Court.

There is not a fixed timetable for directions in the multi-track and there is usually a much greater degree of flexibility for the parties to seek to agree directions for the progress of the case.

Legal costs are recoverable from the losing party in the multi-track and further information on costs is outlined later in this guide.

Generally, all Part 8 claims (see above) will be assigned to the multi-track.

Ending a Dispute

A case can be concluded, by agreement of the parties, at any stage during the litigation process. The terms of their agreement will be set out in a settlement agreement.

A party is also entitled to withdraw their claim or their defence at any stage. If a Defendant withdraws its defence, this will result in judgment for the Claimant and an order for costs in their favour. If a Claimant withdraws its claim and discontinues proceedings, generally, they will be ordered to pay the Defendant's costs.

Summary Judgment and Strike Out

There are a number of summary procedures available under the CPR, which may assist in bringing a claim to a conclusion at an early stage and without the need for a trial. This can assist both the parties and the Court to save time and costs. The following are commonly used summary procedures:

Summary Judgment

An application for Summary Judgment can be made by any party to a claim pursuant to CPR 24. It essentially requests that the Court make an early 'summary' determination of the claim/defence, to bring the matter to a conclusion and without the need for a full trial.

The Court may give Summary Judgment on the whole of a claim, or on a particular issue, where:

1. it considers that:
    i. the Claimant has no real prospect of succeeding on the claim or issue; or
    ii. the Defendant has no real prospect of successfully the defending the claim or issue; and
2. there is no other *"compelling reason"* why the case or issue should be disposed of at a trial.

An application for Summary Judgment must be supported by evidence in the form of a Witness Statement. No oral evidence is given at a Summary Judgment hearing. Therefore, in circumstances where there are significant disputes of fact, which are central to resolving the dispute, Summary Judgment would typically not be pursued.

There are a significant number of tactical considerations to assess in deciding whether an application for Summary Judgment is appropriate and these need to be considered on a case by case basis.

Most obviously, there are adverse cost risks to be considered, as the unsuccessful party to the application will usually be ordered to pay the successful party's costs. Consequently, an unsuccessful Summary Judgment application can result in having to pay an opponent's costs in advance of trial, and before the case is determined in full.

Strike Out

Pursuant to CPR 3.4, the Court has the power to 'strike out' any party's statement of case, if it appears to the Court that:

1. the statement of case discloses no reasonable grounds for bringing or defending the claim;
2. the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings; or
3. there has been a failure by a party to comply with a rule, practice direction or an Order of the Court.

If a claim is struck out, it no longer exists. Consequently, a Defendant would no longer have to file a defence to a struck out claim. A Claimant or Defendant may make an application seeking that the Court use its powers to strike out a Claim or Defence. Given the nature of this summary procedure, it is often sought in conjunction with and as an alternative to Summary Judgment. Similar cost risks apply to an application seeking a strike out.

The Court also has the power to order a strike out of its own volition and without any application having been made by a party. This assists the Court to actively manage the conduct of the cases before it.

Security for Costs & Interim Injunctions

Security for Costs

A Defendant (including a Claimant subject to a counterclaim) can, if certain limited conditions are met, apply for security for its costs of the proceedings. If successful, this would usually require a Claimant to pay a sum of money into an escrow account at Court as 'security' should the Defendant be successful in defending the Claim and obtain a costs order against the Claimant, but the Claimant refuses or is unable to pay the costs order.

Security for Costs is a mechanism most commonly used where:

1. the Claimant is a company and there is reason to believe it will be unable to pay the Defendant's costs if ordered to do so, for example because it is technically insolvent; or
2. the Claimant is an individual resident in certain countries outside of the jurisdiction of England & Wales.

As standard, the unsuccessful party to the application will usually be ordered to pay the successful party's costs.

Interim Injunctions

In some cases, parties may seek an interim injunction. Interim injunctions do not tipically determine the overall litigation but rather require a party to do or refrain from doing something, to maintain a position until trial, where a decision will be made as to whether to impose a final injunction. This is often referred to as 'holding the ring'. Interim injunctions can be sought on an urgent basis where appropriate and necessary.

Injunctions are a complex area of the law and if they are relevant to your case, we will advise you further separately.

Disclosure

Disclosure is the process by which parties exchange 'documents' that are relevant to the issues in dispute. There are a number of different disclosure options available to the parties and their obligations under each can differ considerably.

In multi-track cases, parties will usually be required to serve disclosure reports and electronic document questionnaires, which provide further information on the relevant documents that may exist, where these documents may be located and stored and the work/cost involved in giving disclosure of them. The Court will use these documents to ascertain the basis upon which it considers a 'proportionate' search (see further below) can be undertaken.

Document Retrieval

Clients are best placed to understand their document storage systems and working practices regarding document retention, storage and destruction. You will need to provide us with the relevant information regarding these systems and practices. We can then advise you on the extent of the search that needs to be undertaken and whether the volume and/or type of documentation is such that a specialist document review platform is required.

There is a 'menu' of different options that can be used for the disclosure process, but the most commonly used is the 'standard disclosure' process.

Standard Disclosure Process

A standard disclosure obligation requires a party to disclose (i) the documents on which they rely and (ii) any relevant documents that adversely affect its own case or support the other party's case.

RELEVANT DOCUMENTS

What constitutes a relevant document, will depend on the legal issues raised in the Statements of Case. Documents not relevant to the pleaded case in question, do not have to be disclosed.

DOCUMENTS

CPR 31.4 defines document as being "anything in which information of any description is recorded". This can include, but is not limited to, originals, copies and drafts (no matter how rough) of hard-copy and electronic letters, emails, memorandums, faxes, notes, diary entries, recordings, photographs, drawings, and computer files, stored on any type of storage media. This could include computers, mobile phones and servers.

Most disclosure is of electronic documentation such as e-mails, PDF files, word documents, spreadsheets etc.

What constitutes a document even extends to metadata (information about computer files e.g. when they were created) and deleted documents which are stored on back-up tapes or servers.

THE PROCESS

Parties are required to carry out a 'reasonable and proportionate' search to locate the documents that they are required to disclose. This can be a point of serious contention, but broadly speaking, it means you have to undertake a careful search for relevant documents but you are entitled to have reasonable regard to the cost of the process i.e. you have to look under all of the relevant stones but you do not have to leave no stone unturned.

Disclosure usually takes place by way of exchange of a list of documents. This list sets out key information including the extent of the search undertaken by each party to identify relevant documents and divides relevant documents into three classes:

- Section 1: documents in the party's control which the other side can inspect and/or have copies of.
- Section 2: documents in the party's control which they object to the other side inspecting.
- Section 3: documents which the party is aware of but which are no longer in their control.

SECTION 1 DOCUMENTS

Following exchange of the list, each party offers their opponent the chance to inspect the original documents and/or supplies copies of any requested documents set out in section 1 of the list.

SECTION 2 DOCUMENTS

The usual ground upon which a party will object to inspection of a document is 'privilege'. The grounds of privilege that can be relied on include litigation privilege, legal advice privilege and privilege arising from without prejudice documents.

It is not a sufficient reason to withhold inspection that a document is confidential. Confidential documents, if relevant, must be disclosed in section 1 of the list and can be referred to in open court/at a public hearing. If you have concerns about the sensitivity of any documents, we will be able to advise you on the options available to you e.g. creating a 'confidentiality club'.

Whilst privileged documents must be listed and their existence disclosed, they do not need to be shown to an opposing party.

SECTION 3 DOCUMENTS

A document is usually listed in section 3, where a party knows of its existence but the document is not in that party's physical possession. Typically this is because the document has been destroyed or deleted.

DISCLOSURE STATEMENT

A list of documents contains a disclosure statement that must be signed before exchange of lists. The person signing the statement must confirm:

- the extent of the search undertaken for all relevant documents and that the search undertaken was reasonable;
- that they understand their duty of disclosure and have complied with that duty;
- whether any class of documents has not been searched on the grounds that it would be unreasonable to do so.

It is therefore essential that a record of the steps taken to search for relevant documents is maintained, including the individual(s) who conducted the search and how documents were located. This can then be referred to when signing the disclosure statement.

CONTINUING OBLIGATION

The obligation of disclosure continues throughout the course of proceedings. If any additional relevant documents come to your attention, after an initial list of documents is disclosed, it will be necessary to prepare a supplemental list and to follow the disclosure process for any additional documents identified.

It is important that you carefully consider the position before creating any new relevant documents relating to the litigation, other than communications sent to your lawyers. This extends to marking or annotating documents (even if they have been previously disclosed), as the annotated version may constitute a separate 'new' disclosable documents.

Disclosure Applications

SPECIFIC DISCLOSURE

If a party believes that their opponent has failed in its disclosure obligations, there may be grounds to apply for an order requiring the defaulting party to provide further and better disclosure by disclosing a specific class of documents or that it conduct a more extensive search for documents than that already carried out.

PRE-ACTION DISCLOSURE

In some cases, pre-action disclosure applications may be appropriate. These are made, prior to the commencement of proceedings and usually relate to the disclosure of a specific class of documents.

Disclosure Pilot Scheme

A mandatory Disclosure Pilot Scheme **(DPS)** is currently operating in the Business & Property Courts of the High Court until 31 December 2021. The 'standard disclosure' regime is not used under the DPS, but rather disclosure is determined largely on an issue related basis. If the DPS applies to your case, we will advise you further separately.

Evidence

Witness Statements

In any case where there is a dispute of fact, the parties will usually be ordered to exchange witness statements.

Any witness who is to give evidence will be required to provide a witness statement, setting out the evidence of that individual which is being relied on by the party calling that witness.

There is no 'property' in a witness, and even if a witness is associated with a particular party because, for example, they are an employee, there is nothing that prohibits that witness being called to give evidence by the opposing party.

There are various rules that must be followed in the preparation of witness evidence including the need for witness statements to not contain irrelevant or inadmissible evidence.

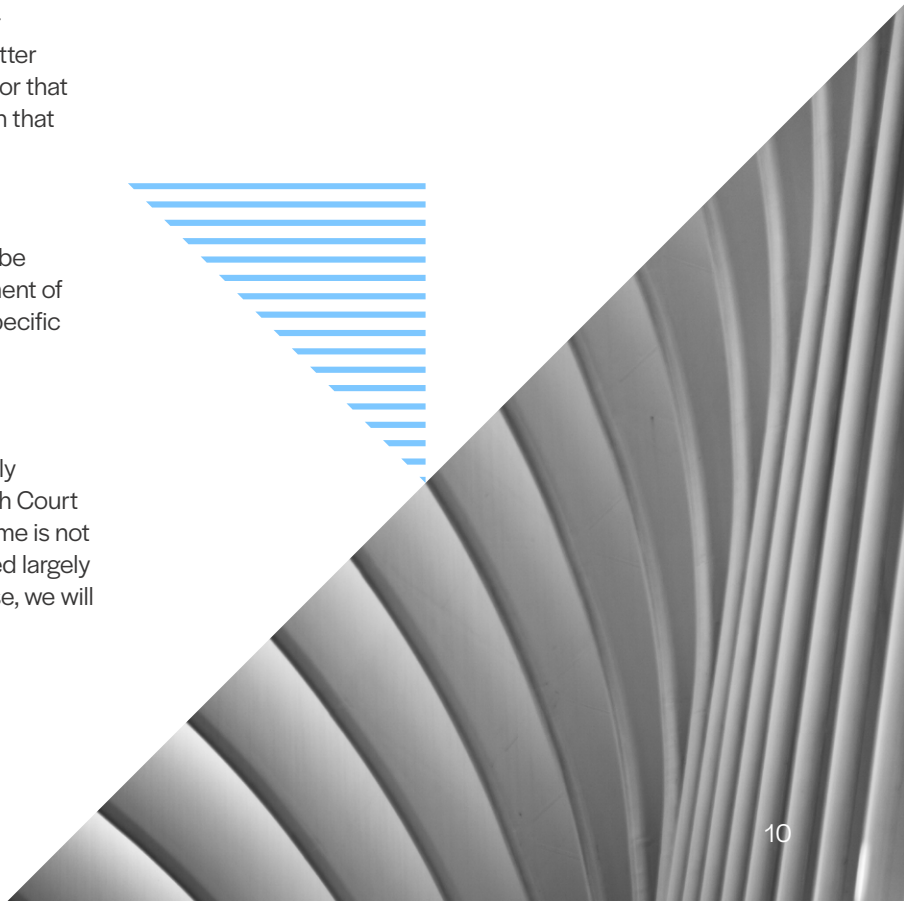
There are also rules that must be followed if a party is seeking to rely on 'hearsay' evidence, which is essentially 'second-hand' evidence that is not from an individual's own first-hand account of a matter.

Cross Examination

Whether or not a witness will be required to give live evidence in Court, will depend on the facts of each case and the issues in dispute between the parties. Any witness who is called to give evidence at trial, will be questioned (cross-examined) in Court on the contents of their statement.

Statement of Truth

It is essential that the content of any witness statement is accurate and complete. The individual making the statement is required to sign a statement of truth to confirm that the evidence they are giving is true.



Witness Statements in the Business and Property Courts

From 6 April 2021, there are additional specific rules that apply in relation to witness statements prepared for proceedings that are taking place in the Business and Property Courts of the High Court (including the Chancery Division, the TCC and the Commercial Court). These requirements include:

- The need for a witness to identify how well they can recall the matters addressed and whether their recollection has been refreshed by reference to documents. These documents should be limited to those documents that the witness created or saw at the relevant time.
- The witness must identify, by list, the documents the witness has been referred to when preparing the statement.

It is therefore essential that witnesses keep a record of any documents they may have reviewed, in advance of making their statement, from the outset of the litigation. For example, witnesses may have been involved in the disclosure process and may have collated relevant documents.

In addition to a statement of truth, witnesses giving evidence in the Business and Property Courts must sign a prescribed form of Certificate of Compliance, confirming they have complied with the above requirements.

Expert Evidence

Some cases, in particular in complex technical areas such as construction or financial services, require evidence from experts in relevant fields, for example evidence may be required as to how a particular industry functions. The permission of the Court is required if a party seeks to rely on expert evidence. Permission can be sought at the initial case management conference or by separate application to the Court.

Experts can be appointed by individual parties, or a single expert can be jointly instructed by multiple opposing parties where appropriate.

The overriding duty of any expert is to the Court, and they must act independently, regardless of the fact that they may have been instructed and had their costs paid by one particular party. To ensure transparency, an expert's report must set out the substance of the instructions received, the documents that the expert has had access to and the basis on which the report was prepared. The Court can, if necessary, order that the instructions be disclosed if there is any concern that the instructions provided are inaccurate or incomplete.

It is usual for the parties' experts to prepare a joint statement seeking to narrow the issues in dispute ahead of any trial.

Offers of Settlement

Parties are able to enter into settlement negotiations and put forward offers of settlement at any stage during the litigation process, including at trial. There are two key ways in which settlement offers can be made:-

Calderbank Offers

The most common method by which negotiations take place and offers are put forward is in correspondence marked as being sent 'without prejudice save as to costs'. This means that this correspondence is not brought to the attention of the trial judge, except in relation to the issue of costs and only after the substantive case has been determined. Importantly, this type of correspondence is not treated as any sort of admission of liability.

The Court will take these offers into account when making an order in respect of costs, but the issue of costs remains entirely at the discretion of the Court.

Part 36 Offers

Part 36 refers to the provisions of CPR 36 which govern this area.

Part 36 offers are specific offers of settlement that can be made by either a Claimant or Defendant, which can put pressure on an opponent to settle a dispute as there are automatic adverse cost consequences that apply if a party fails to 'beat' a Part 36 offer at trial. The existence of the offer would not be brought to the attention of the trial Judge, but would be referred to on the issue of costs, after the issue of liability and damages had been determined.

If a Part 36 offer is accepted within the 'relevant period', which is usually 21 days, then:

- acceptance of the offer will conclude the litigation without the need for a trial;
- the Claimant is entitled to payment of their costs, automatically, assessed on the standard basis up to the date of acceptance of the offer.

If the offer is not accepted and the case continues to trial, the Part 36 offer will be taken into account on the issue of costs and automatic consequences will apply as follows:

CLAIMANT BEATS OWN PART 36 OFFER

If at trial a Claimant beats its own Part 36 offer and is awarded the same or more than the amount that it offered to accept to conclude the case, the Claimant will be entitled to enhanced damages and costs. This is usually on the following basis:

- An uplift of up to 10% on any damages awarded up to £500,000 and up to 5% on any damages awarded up to £1million, equating to a total additional award of up to £75,000.
- Interest of up to 10% above base rate on the damages awarded from the expiry of the relevant period.
- Costs on an indemnity basis (see further below) from the expiry of the relevant period and further interest on such costs of up to 10% above base rate.

CLAIMANT BEATS DEFENDANT'S PART 36 OFFER

If at trial a Claimant beats the Defendant's Part 36 offer and is awarded the same or more than the amount that the Defendant offered to pay to conclude the case, the Defendant's offer is not taken into account and costs will be determined at the Court's discretion.

CLAIMANT FAILS TO BEAT DEFENDANT'S PART 36 OFFER

If a Claimant is successful at trial but is awarded less than a Defendant's Part 36 offer, thereby failing to beat the offer, the Claimant will usually only be awarded its costs up to the end of the relevant period. Further, the Claimant will usually be required to pay the Defendant's costs from the expiry of the relevant period to the end of the case, plus interest, regardless of the fact that the Defendant lost the overall case.

A party must consider very carefully whether to put forward a Part 36 offer, or whether to accept or reject a Part 36 offer made by an opposing party.

There can be merit in making a Part 36 offer at an early stage, as it can offer a great deal of costs protection, especially if the Part 36 offer is pitched at a conservative level and it can help to focus parties' minds on the issue of settlement.

It is imperative that any Part 36 offers put forward or received, are reviewed regularly as litigation progresses.

The Trial

In readiness for trial, there are various steps that the parties will need to take, which usually include (i) agreeing and preparing trial bundles (ii) agreeing and preparing authorities bundles (iii) the preparation of Skeleton Arguments, which are usually drafted by Counsel (see below) and set out a summary of the key legal arguments of the parties.

At the trial, each party's case will be put to a Judge, who will determine the claim.

In the majority of cases, a barrister, referred to as Counsel, will be instructed to present your case at trial. A barrister is, amongst other things, a specialist advocate. In many cases, Counsel will be instructed at a much earlier stage in the proceedings and will have had input at key stages in the litigation process as matters progress.

Generally the order of proceedings at a trial will be as follows:

- The Judge will have been allocated reading time and will have read the key documents identified in the parties' Skeleton Arguments.
- The Claimant's Counsel and the Defendant's Counsel will each make an opening speech.
- Witnesses of fact will be called by each Counsel in turn to give evidence and will be cross-examined by the opposing Counsel. A party's own Counsel may then ask a witness some questions to 'redirect' them to their evidence. This is an exercise in damage limitation on the oral evidence just given, not an opportunity to give completely fresh evidence.
- Expert witnesses will be called by each Counsel in turn to give evidence and will be cross-examined by the opposing Counsel.
- The Defendant's Counsel and the Claimant's Counsel will each make a closing speech.
- Judgment will be given by the Court. In a multi-track case, the Court invariably gives a written Judgment.

Appeals

Although there are limited and specified instances in which a party may be entitled to bring an appeal (i.e. if the Judgment of the court was wrong or unjust because of serious procedural irregularity) there is no automatic right of appeal against a Judgment. As such, Judgments are, broadly, final.
If a party does have grounds to appeal, then it must first seek permission of the Court before it can commence its appeal. Permission can be sought at the first instance hearing, failing which, or in the event that permission is refused, a request can be made directly to the relevant appeal Court.

Strict time limits apply, which are dependent upon the type of appeal that is being brought. However, generally, if permission is sought at the first instance hearing and refused, then a request for permission must be filed in the appropriate appeal Court within 7 days of that refusal. If permission was not sought at the first instance hearing, then a party will, in most cases, have 21 days from the date the lower court made its decision, to seek permission to appeal.

Costs

The general rule is that the unsuccessful party pays the successful party's costs but it is open to the Court to make any order that they see fit to make, to reflect the justice of the case. A party will only rarely recover its costs in full, as costs will be subject to various limits imposed by the CPR and assessment by a Judge. Typically, a successful party would recover 60-70% of their costs, unless awarded 'indemnity costs' (see further below).

When deciding the issue of costs, the Court is to have regard to all the circumstances of the case, including the conduct of the parties and settlement offers made both on a 'without prejudice save as to costs' basis and pursuant to CPR 36.

Costs Budgeting

In certain cases, parties are required to file costs budgets (see further below). This includes all multi-track cases except those (i) where the claim is for a sum in excess of £10 million or (ii) that are subject to the Part 8 alternative procedure. However, the Court has the power to order that parties file costs budgets in any case.

Costs budgeting involves the preparation of a detailed budget, known as a 'Precedent H' setting out the costs that each party anticipates it will incur for specific stages of the litigation process through to and including trial. Parties should seek to agree budgets with their opponent, following which a budget discussion report should be prepared confirming the areas agreed and not agreed, and in respect of the latter, the reasons why. The issue will then be determined by the Court, within its case management powers, and usually at the CMC.

Once budgets are set, the Court will expect parties to adhere to them and the budget will be taken into consideration when costs are ordered. If costs exceed the budget, the Court will usually only depart from the budget in circumstances where there is a good reason to do so and this will usually only be in exceptional cases. Therefore, if it transpires that the costs set in the budget for a particular phase are unlikely to be sufficient, parties should seek to agree an increase with their opponent or seek a variation to the budget, by way of an application to the Court, before such costs are incurred.

Assessment of Costs

In deciding what sum the losing party should pay towards the winning party's costs, the Court will conduct an assessment. This can be a summary or a detailed assessment. Broadly speaking, an assessment of costs involves the Court (either the trial Judge or a specialist Costs Judge) considering a schedule of the winning party's costs and forming a view (by reference to various rules in the CPR) on whether the costs were reasonable and proportionate given the matters in issue.

SUMMARY ASSESSMENT

The Court will conduct a summary assessment where the relevant trial lasted one day or less and the legal costs were less than £100,000. All other disputes will be subject to detailed assessment. A summary assessment is a 'broad brush' exercise where the trial Judge considers the costs incurred by the wining party and takes a view on whether they are broadly in line with what they would expect them to be given the dispute in issue. It is meant to be a quick and simple process (and it usually is). Where (as in most cases) a case is subject to cost budgeting, the Judge would typically order payment of the full amount of the winning party's costs if they are in line with the budgeted costs in the Precedent H costs budget.

DETAILED ASSESSMENT

Costs that are not summarily assessed, will be subject to the detailed assessment procedure. This requires the party whose costs are to be paid to prepare an itemised bill of costs, setting out every single item of time recorded. This can amount to thousands of entries. The paying party them serves a 'Reply' either accepting or disputing each time entry. It is a cumbersome process. If the parties cannot agree the level of costs to be paid, the matter will be referred to a Costs Judge, who will scrutinise the bill of costs and determine the amount to be paid. Invariably the detailed assessment procedure incurs significant further costs for the parties and it can take many months to reach a conclusion, therefore, it is usually in the interests of the parties to seek to agree costs.

STANDARD BASIS

Generally, costs will be assessed on the standard basis. This means that the Court will consider whether the costs incurred were both reasonably incurred and proportionate. Any doubt as to reasonableness is resolved in favour of the party ordered to pay the costs order. In determining whether the costs incurred were proportionate the Court will consider various issues including: (i) the value of the claim (ii) the complexity of the claim (iii) whether the parties' conduct increased costs and (iv) wider issues of importance to the parties such as reputation.

INDEMNITY BASIS

In certain circumstances, where the Court deems it appropriate (broadly because the paying party's conduct was 'out of the norm') there may be grounds for costs to be determined on the indemnity basis. This is a much more generous assessment, which only requires the Court to consider whether the costs were reasonably incurred. Any doubt will be resolved in favour of the party who is receiving the costs award. Typically, an order of indemnity costs means recovering between 80-100% of your costs.

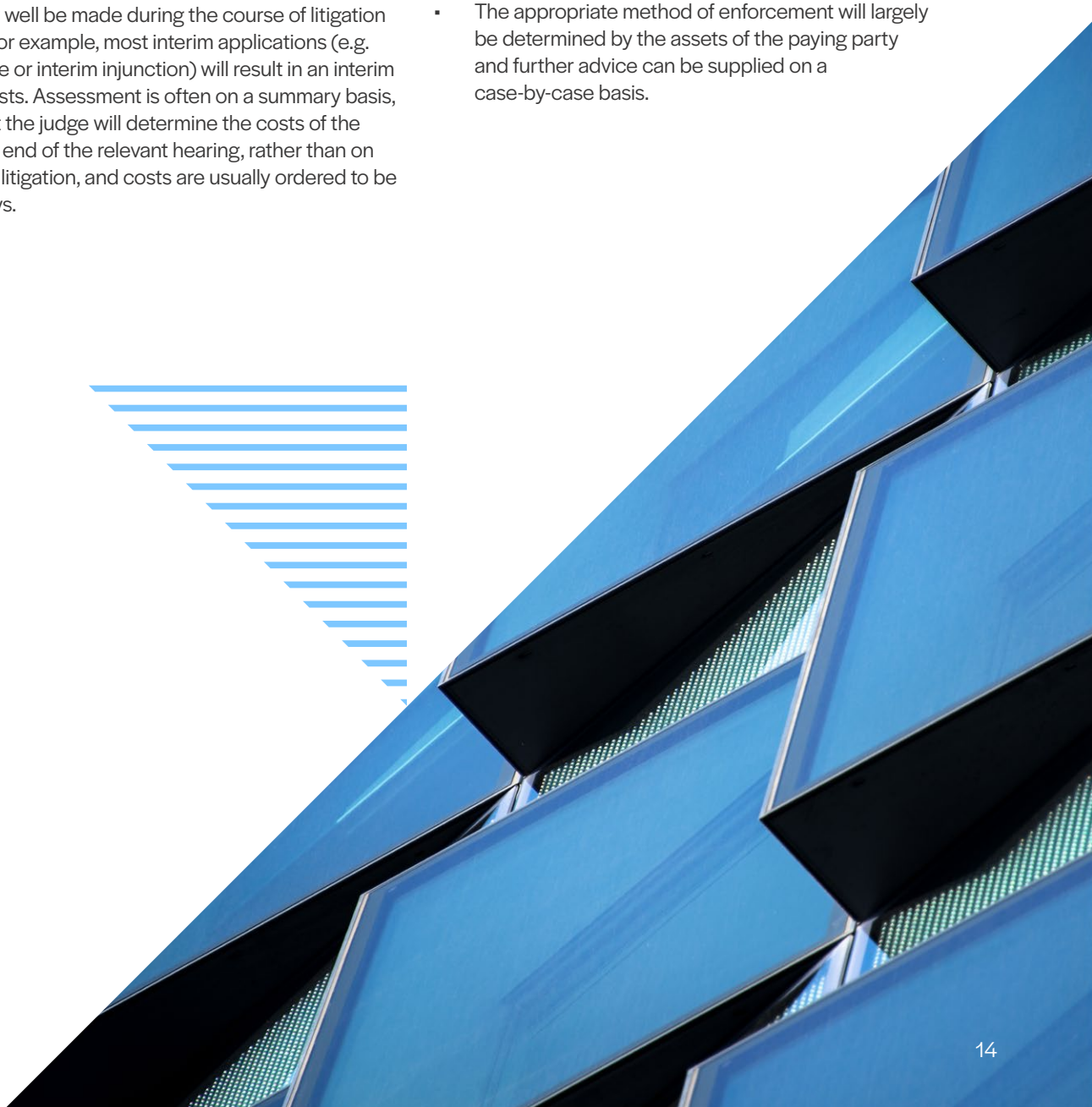
INTERIM COSTS ORDERS & SUMMARY ASSESSMENT

Costs orders may well be made during the course of litigation and before trial. For example, most interim applications (e.g. specific disclosure or interim injunction) will result in an interim assessment of costs. Assessment is often on a summary basis, which means that the judge will determine the costs of the application at the end of the relevant hearing, rather than on conclusion of the litigation, and costs are usually ordered to be paid within 14 days.

Enforcement of a Judgment

If a party is awarded judgment in their favour, whether that be for damages and/or costs, in many instances steps will need to be taken to enforce that judgment. Options include:

- Obtaining a charging order on property, securities or over a debtor's interest in other assets and applying for an Order for Sale;
- Applying for a Third Party Debt Order, which obligates a third party to pay monies due to the debtor to you as a creditor. This is commonly used to obtain monies from banks and other financial institutions;
- An attachment of earnings order, via which a proportion of a debtor's earnings will be deducted from their salary and paid directly to the creditor;
- Taking control of goods by writ or warrant of control, this is the process by which a Court Officer is appointed to seize and sell goods to satisfy a judgment;
- Bankruptcy or liquidation proceedings.
- The appropriate method of enforcement will largely be determined by the assets of the paying party and further advice can be supplied on a case-by-case basis.



Representative Experience

Commercial Disputes

Excalibur v Texas Keystone & Others [2013] EWHC 2767 (Comm)

$1.65 billion Commercial Court claim for a 30% share of 4 Kurdish oilfields allegedly the subject of a joint venture between Excalibur and Gulf Keystone.

Shareholder dispute for **Edwardian Hotel Group Limited.**

Breach of directors' duties claim against AIM listed oil and gas company.

Unfair prejudice claim for minority shareholder in gold trading company.

Acted on high profile breach of confidentiality injunction and related proceedings against former senior director of major media finance company raising issues of breach of confidentiality, fiduciary duty, contract, data protection and whistle blowing legislation.

Kagalovsky and Wilcox Ventures Ltd v Elena Turevych and T&T Incorporators LLP [2014] EWHC 3876 (QB)

Successful defence of committal application brought against a corporate service provider for alleged contempt in compliance with third party disclosure orders and witness summons'. Claimant was the Russian oligarch Konstantin Kagalovsky. Claim raised significant human rights issues around the privilege against self-incrimination.

Huntington v Imagine Group Holdings & Imagine Group Limited [2007] EWHC 1603 (Comm)

Claim by high profile insurance industry executive for repudiatory breach of service contract for failure to confirm and pay bonus entitlement within parameters of the bonus scheme and claim for accelerated payment of sums due under a long term incentive plan ("LTIP").

Representation of Labour Party in relation to challenge of disciplinary process by members of Party: [2021] EWHC 1909 (QB).

Representation of Labour Party in relation to injunction sought by candidate in Liverpool Mayoral election: [2021] EWHC 577 (QB).

Representation of Labour Party in relation to challenge to suspension of Chris Williamson MP from the Labour Party: [2019] EWHC 2639 (QB).

Representation of Labour Party in high profile ICO investigation (Operation Cederberg) into political parties' use of data analytics and potential breaches of the Data Protection Act.

Arbitration

$25 million investment treaty arbitration for oil and gas client against Eastern European State.

$12 million LCIA arbitration against major listed oil and gas company.

Arbitration relating to repudiatory breach claim against private equity owner of a number of shopping centres.

LCIA Arbitration relating to ballast water treatment plant.

Acted for **Gulf Keystone Petroleum Limited** in obtaining a rare injunction from the English courts in respect of an ICC arbitration brought against it in New York in relation to a contract dispute over oil assets valued at more than US$1.5 billion.

Financial Services Disputes

Bank A v Bank B

Confidential dispute relating to failure to execute Swiss Franc stop loss orders when Swiss Central Bank removed Euro currency peg.

Fund Management Group v Seed Investor

Confidential dispute between fund management group and their seed investor as to whether a revenue sharing payment hurdle has been met.

Aim Listed Oil and Gas Company v Former Corporate Finance Advisers/CEO

Confidential claim against former corporate finance advisers of AIM listed oil company for breach of corporate finance advisory agreement and claim against former CEO for breach of directors' duties and service agreement in relation to his part in the matter. Internal investigation carried out.

Raiffeisen Bank v RBS [2010] EWHC 1392 Comm

Advised Austrian bank RZB in fraudulent misrepresentation claim against RBS in relation to RBS' role as syndicate manager for a syndicated loan for Enron in which RZB participated.

LLP dispute for AI driven hedge fund.

Defending claims alleging misstatements in bond listing prospectus.

Regulatory Litigation

Market abuse and Insider Dealing investigation into share dealing in AIM companies by two individuals/FINMA Request for Information

FCA investigation into alleged market abuse and insider trading by shadow director of AIM company. Co-ordinating strategy between London and Swiss legal teams resisting FINMA request for information and assistance on behalf of FCA.

Market abuse and Insider Dealing investigation into share dealing in AIM companies by two individuals

FSA investigation into alleged market abuse and insider trading by authorised person and client. Complicated fact pattern where authorised person approached AIM listed company and procured an offer of shares at a deep discount to the prevailing market price before selling short to major market participant in advance of (unknown) resignation of key non-executive director.

Tax Litigation/Professional Negligence

£50 million dispute with HMRC in relation to recovery of unpaid capital allowances on failed bio-ethanol project.

R (on the application of Cartref Care Homes Limited & Others) v HMRC [2019] EWHC 3382 (Admin)

Judicial review into the loan charge introduced by Finance Act (No.2) Act 2017 on the grounds that it was in breach of s. 4 HRA 1998 constituting a disproportionate interference with the taxpayer's rights under Article 1 Protocol 1 to the ECHR to the peaceful enjoymnt of their possessions.

Successful multimillion pound settlement against Big Four Accountancy Firm relating to negligent tax advice on disposal of a group of properties.

R (on the application of Derry) (Respondent) v Commissioners for Her Majesty's Revenue and Customs (Appellant) [2019] UKSC 19

Supreme Court ruling in favour of the taxpayer confirming that the taxpayer had correctly included his carry-back loss relief claims in the prior year's tax return and that HMRC had failed to challenge the claim correctly, by failing to open an s.9A TMA 1970 enquiry into the return, within the statutory time limit.

W Resources plc v HMRC [2018] UKFTT 746 (18 December 2018)

Successful appeal against VAT deregistration and refusal of input tax recovery claim, on grounds that a holding company making, or intending to make, supplies for a consideration to its subsidiaries necessarily carried on an economic activity for the purposes of VAT.

Sanctions

Advised various metal trading companies on application of the EU Iranian sanctions regime in relation to a possible joint venture with a Chinese company supplying Iranian sourced copper concentrate.

Advised Oil company in relation to application of the EU Russian sanctions regime in relation to potential purchase of oil and gas production assets from a Russian counterparty.

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Profile

Nick leads the commercial Dispute Resolution team at Blaser Mills Law.

Nick is a highly experienced litigator recommended in the UK Legal 500 as *"outstanding", "an extremely good litigation strategist"* and who has *"tremendous knowledge and experience...always available and responds to challenges in a calm, decisive and unphased manner."*

He specialises in complex high value commercial disputes typically with a significant international element.

Nick represents clients in both High Court litigation and arbitration (LCIA, ICC, AAA, LME, WIPO) and also has extensive experience of alternative dispute resolution including mediation, early neutral evaluation and adjudication.

Nick was a key member of the Defence team awarded "Dispute Resolution Team of the Year" at the 2014 Legal Business Awards and "Litigation Team of the Year" at the 2014 Lawyer Awards.

Career History

- **2021:** Partner, Blaser Mills Law
- **2016-21:** Partner, Greenwoods GRM LLP (previously GRM Law)
- **2005-16:** Memery Crystal LLP (partner 2011-2016)(senior associate 2005-2011)
- **2003-2005:** Assistant, tax litigation, McGrigors
- **2003:** Qualified, SJ Berwin
- **2000:** City University, Postgraduate Diploma in Law
- **1995-1999:** French and German, Cambridge

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