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Litigation

UK
Simon Bushell, Gareth Keillor and Nick Chapman
Seladore Legal Limited

practiceguides.chambers.com

2021

UK

Law and Practice

Contributed by:
Simon Bushell, Gareth Keillor and Nick Chapman
Seladore Legal Limited see p.25

Contents

1. General

1.1 General Characteristics of the Legal System

There are three distinct legal jurisdictions within the UK: England and Wales, Scotland, and Northern Ireland. Both England and Wales and Northern Ireland are common law jurisdictions, while Scotland has a mixed legal system which contains elements of civil law as well as common law. This chapter focuses on the legal regime in England and Wales and the English courts.

At its most basic, the legal regime has three elements:

- primary legislation in the form of Acts of Parliament;
- secondary legislation in the form of statutory instruments which provide detail of Acts of Parliament (or which alter their effect without Parliament needing to pass a new Act); and
- the residual common law.

If statutory legislation providing a complete answer to an issue has been enacted, the English courts are bound to follow the statute. However, to the extent that this is not the case, the main residual source of law is the common law, which arises as a precedent-based on the reasoning of earlier judicial decisions. The English courts are primarily adversarial in nature and the parties put forward their position both by way of written submissions and oral argument.

Brexit

At the time of writing, there is considerable uncertainty as to the terms of the UK's withdrawal from the European Union (EU). As things stand the UK is no longer a member of the EU, however, it is following the framework of EU legislation during a transition period. The EU can pass three types of legally binding legislation:

- regulations (with general application to and directly effective in all member states);
- directives (binding as to the objective that needs to be achieved, providing scope to member states to implement the measure in their own ways); and
- decisions (directly effective on the individual to whom it is addressed).

During the transition period, these sources of legislation remain in full effect.

The following chapter is therefore written on the basis of the current, applicable legislation, rules and principles. However, clearly the law concerning litigation within this jurisdiction may be significantly impacted by the UK's withdrawal from the EU as a result of Brexit. The extent of this impact will depend on what arrangements (if any) are agreed between the UK and the EU. This chapter does not speculate on what those arrangements may be.

1.2 Court System

The judiciary in England and Wales is drawn from highly qualified senior barristers and solicitors, generally with decades of experience appearing in court. The independence and security of the judiciary are foundations of the English legal system.

Depending on the value or complexity of the case, civil proceedings at first instance are usually commenced in either a County Court or the High Court of Justice. The High Court is based at the Royal Courts of Justice in London but also has many satellite locations known as district registries across the country. The High Court has three divisions:

- the Family Division, with jurisdiction to hear matrimonial disputes and cases relating to children's welfare;
- the Queen's Bench Division (QBD) with civil and criminal jurisdiction hears general common law cases arising out of contract and claims in tort arising from wrongs against the person or property, as well as specialist jurisdictions dealing with the validity of government, local authority and tribunal decisions; and
- the Chancery Division, which hears civil cases, primarily business and property disputes, and cases concerned with company and partnership law, trusts law, fiduciary relationships, bankruptcy and intellectual property.

The QBD and the Chancery Division

Since October 2017 the work undertaken by the QBD and the Chancery Division has been rationalised by the creation of the Business and Property Courts, a specialist centre for hearing financial, business and property litigation. The Business and Property Courts, which have brought together the work of the Chancery Division and various specialist courts of the QBD, are divided into separate specialist courts or lists. When initiating a claim, users must indicate which court, list or sub-list should be used for the claim and choose between a list of courts. These include:

- the Commercial Court, a specialist court within the QBD and part of the Business and Property Courts, which hears complex cases arising out of national and international business disputes, including banking and finance, reinsurance and commodities disputes. This is now a centre for high-value international commercial litigation; and
- the Financial List (Chancery and QBD), a specialist cross-jurisdictional list set up to hear claims:

(a) for more than GBP50 million which principally relate to loans, project finance, banking transactions, derivatives and complex financial products, capital or currency controls, bank guarantees, bonds, debt securities, sovereign debt, or clearing and settlement;
(b) requiring particular expertise in financial markets; or
(c) raising issues of general importance to the financial markets.

The objective of the Financial List is to ensure that cases which would benefit from being heard by judges with particular expertise in the financial markets or which raise issues of general importance to the financial markets are dealt with by judges with suitable expertise and experience.

The Financial List is currently conducting a pilot scheme, the Financial Markets Test Case Scheme, under which the court may grant declaratory relief in "friendly actions" involving financial market issues. The aim is to provide a mechanism for the court to provide guidance on relevant financial market issues without the need for a cause of action between the parties to the proceedings.

Other Specialist Courts

Other specialist courts include:

- the Admiralty Court (QBD), which deals with shipping and maritime disputes such as disputes arising from collisions at sea, salvage and damage to cargo;
- the Business List (Chancery), which deals with business disputes, which often concern business structures, claims against directors for breach of fiduciary duty, or disputes about contractual arrangements between investors;
- the Commercial Circuit Court (formerly the mercantile court) (QBD), which handles general commercial and business disputes, including claims concerning disputes over contracts and business documents, insurance, sale of goods, carriage of goods;
- the Competition List (Chancery), which deals with claims brought under Article 101 and Article 102 of the Treaty on the Functioning of the European Union 2007 and claims brought under corresponding provisions of UK domestic law in the form of the Competition Act 1998 (such as those dealing with the restriction of competition);
- the Insolvency and Companies List (Chancery), which deals with both personal and corporate insolvency and company law matters, such as applications concerning schemes of arrangements;
- the Intellectual Property List (Chancery), which deals with claims relating to intellectual property law, such as trade marks, and the Patents Court which deals specifically with larger, more complex claims and patent appeals;
- the Property, Trusts and Probate (Chancery), which covers a significant amount of Chancery work that is not heard by the Business List;
- the Revenue List (Chancery), which deals with claims involving major points of principle relating to taxation where HMRC (the UK Government department that is responsible for tax) is a party; and
- the Technology and Construction Court, which primarily deals with disputes arising in the fields of building, engineering and technology including IT infrastructure.

Further, there are a number of tribunals established within the jurisdiction which deal with specialist proceedings. These include the Employment Tribunal and the Competition Appeals Tribunal (CAT).

Appeals from the lower courts and the tribunals are, in the main, heard by the High Court (though in certain cases appeals may be made directly to the Court of Appeal). Appeals from the High Court are heard by the Court of Appeal. The Supreme Court of the UK hears appeals from the appellate courts of England and Wales, Scotland and Northern Ireland.

1.3 Court Filings and Proceedings

Open justice is a fundamental principle of the law of England and Wales. Accordingly, it is usual for civil litigation to be conducted in public, with the public and press in attendance. However, in specific circumstances (usually where the case concerns confidential information, national security or a need to protect children or vulnerable individuals arises), the court can order that hearings be conducted in private, that names be anonymised and restrictions be imposed on reporting about the proceedings.

Given the impact of COVID-19, the courts are now undertaking hearings remotely. The Protocol for Remote Hearings, which encourages the use of such hearings "wherever possible", provides that "remote hearings should, so far as possible, still be public hearings".

In keeping with the principle of open justice, the statements of case filed by the parties to a civil dispute (the claim form, defence and reply), are normally available to non-parties, on payment of a fee, without requiring permission from the court. Any judgments or orders given in public will also usually be available to a non-party. A non-party must, however, apply to court to see any other documents from the court file. It is possible for a party to a civil dispute to apply to the court for the court file to be kept confidential to non-parties.

The modernisation of the English courts has led to the development of an electronic filing and case management system

("CE-File"). CE-File operates across the Business and Property Courts in England and Wales together with the Senior Courts Costs Office. Professional users of these courts are now required to issue and conduct all new proceedings by electronic filing through CE-File (exceptions apply for litigants in person). Additionally, the courts have developed an online portal for litigants in person to issue and respond to civil money claims under GBP10,000. It is anticipated that online filing and electronic working will continue to be expanded across the entire court system in the coming years.

1.4 Legal Representation in Court

In civil claims allocated to the small claims track in the County Courts, any person accompanying the litigant may exercise rights of audience. Otherwise, rights of audience in the English courts are generally restricted to litigants in person, persons exercising rights granted by statute (for example, health and safety inspectors) or persons granted rights of audience by certain authorised bodies. The latter category includes:

- the Bar Council, which grants rights to barristers to appear in all courts;
- the Law Society of England and Wales, which grants rights to solicitors to appear before tribunals and the lower courts, such as the County Court but which requires solicitors to undertake an additional advocacy qualification to appear in the High Court and the Court of Appeal;
- the Costs Lawyer Standards Board, which allows costs lawyers to appear in all courts on costs issues following qualification;
- the Chartered Institute of Legal Executives, which allows Chartered Legal Executives to appear in certain lower courts, normally after undertaking an advocacy qualification; and
- the Chartered Institute of Patent Attorneys, whereby registered patent attorneys can acquire an advocacy qualification to conduct litigation in the High Court.

Foreign lawyers who are entitled to practise as legal professionals in a jurisdiction other than an EU member state can (and in most cases must) be registered with the Solicitors Regulation Authority (SRA) as a Registered Foreign Lawyer in order to practise law in England and Wales. This does not convert their qualification or act as a further qualification, and they still remain members of their home profession. Similarly, European lawyers must register themselves as a "Registered European Lawyer" if they are wholly, or partly, based in the UK.

A Registered Foreign Lawyer cannot conduct litigation in their own name, but if they work for a law firm can conduct litigation under the name of their firm. Foreign lawyers are unable to appear in open court, but can appear in open chambers if supervised by a solicitor or other lawyer in the firm who is entitled to conduct the litigation.

2. Litigation Funding

2.1 Third-Party Litigation Funding

Litigation funding has seen rapid growth in England and Wales in recent years and is now an accepted practice in litigation and arbitration proceedings. As, until fairly recently, third-party funding was prohibited on public policy grounds arising from long-standing concerns that a third party might manipulate the litigation process for their own advantage, it remains unregulated in England, though many major funders operating in the jurisdiction have signed up to the voluntary code of conduct: the Association of Litigation Funders.

Aside from the question of what economic risk a party is willing to take in relation to a dispute (see **2.5 Types of Costs Considered under Third-Party Funding**), clients and lawyers must consider whether a case is appropriate for litigation funding. Most importantly, it is essential to ensure that the third-party funder does not control the proceedings. While the funder can be involved in making certain decisions and kept up to date on developments, the funder must not lead or influence the decisions. Furthermore, care should be taken to ensure that the return due to the funder is not disproportionate to the risk taken in funding the proceedings.

2.2 Third-Party Funding: Lawsuits

Usually, third-party funders will have a preference for funding commercial claims or class actions (see **3.7 Representative or Collective Actions**), as these are most likely to offer the funder opportunities to make a return for the risks involved in funding.

2.3 Third-Party Funding for Plaintiff and Defendant

Litigation funding is available to both claimants and defendants but, as a general rule, third-party funders will rarely fund defendants unless they have a substantial counterclaim as the funder will usually share in the proceeds of any damages recovered.

Generally, the costs of third-party funding are not recoverable in litigation. In respect of arbitral proceedings, however, the court has refused to set aside an arbitration judgment that awarded the successful party its costs of funding on the basis that an arbitral tribunal's power to award costs is broad and not constrained by the Civil Procedure Rules.

2.4 Minimum and Maximum Amounts of Third-Party Funding

Third-party funders are able to determine the minimum and maximum amount that they wish to fund.

2.5 Types of Costs Considered under Third-Party Funding

Funders will usually consider funding most of the costs involved in commencing and prosecuting litigation or arbitration proceedings. As well as the funded party's costs, the funder might agree to pay court fees or tribunal fees and the costs involved in meeting an application for security for costs.

Until recently, the position regarding adverse costs was widely understood to be that if a funded claim has lost, a costs order could be made against the funder (as a third party) but only up to the amount that it had actually funded the case. However, the courts have recently confirmed that this is not an established rule or principle. It is a matter of discretion for the judge to determine how much of the successful party's costs a funder may be liable to pay, taking into account the conduct of the parties involved.

It is fairly common for a funded party to take out adverse costs insurance, commonly on the basis of an "after the event" (ATE) policy, which will usually insure both the party's own costs, including disbursements, as well as the risk of having to pay the opponent's legal fees if defeated. The funder may also agree to fund the costs of the premium for such cover.

2.6 Contingency Fees

In addition to third-party funding, there are two further notable schemes that allow a party to shift some of the economic risks involved in litigation onto others.

Conditional Fee Arrangements

Conditional fee arrangements (CFAs), allow lawyers to share the risk of litigation or arbitration with their clients. These may be used in civil litigation in England and Wales excluding, for example, family law proceedings. CFAs (which are regulated by the Courts and Legal Services Act 1990) are an agreement between a client and a lawyer whereby the lawyer agrees that some or all fees and expenses incurred will only be paid to the lawyer in certain circumstances, and usually only if a client wins the case – ie, a form of "no win, no fee" agreement. Usually, the lawyer will receive an uplift in fees in the event of a successful outcome, capped at 100% and expressed as a percentage of the lawyer's ordinary fee.

Damages Based Agreements

Damages Based Agreements (DBAs) are also a form of "no win, no fee" agreement, but with a success element or "contingency fee" based on the amount of damages recovered in the proceedings. DBAs have been permitted in civil litigation in England since April 2013 excluding, for example, most family law proceedings. DBAs are regulated under the Damages Based Agreement Regulations 2013, and the level of contingency fee that can be recovered by the lawyer is capped in most cases at 50% (employment tribunal matters are capped at 35% and personal injury matters at 25%).

Since the DBA Regulations came into force, there have been relatively few DBAs, at least in part due to uncertainties regarding the DBA Regulations. Following an independent review, a proposed redrafted version of the Damages Based Agreement Regulations was published in October 2019. The Ministry of Justice has indicated that it will consider the proposals and reform seems likely.

"Hybrid" DBAs

Currently, "hybrid" DBAs, where a lawyer receives a reduced hourly rate plus a contingency fee in the event of success, are not permitted under the DBA Regulations, but would be permissible under the proposed redrafted regulations. In any event, the current model does not prevent "sequential hybrid" DBAs where there are different fee arrangements for different stages of the case, although in such scenario it is not clear whether the lawyer is required to offset amounts received under the non-DBA funding from any contingency fee received under the DBA.

2.7 Time Limit for Obtaining Third-Party Funding

There are no formal time limits within which a party must obtain funding (it is quite possible to obtain funding even from a pre-action stage).

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

The Civil Procedure Rules contain various "pre-action protocols" that set out the steps which the court would normally expect the parties to take before commencing proceedings.

There are currently 16 specific protocols which apply to certain types of disputes, such as clinical or professional negligence disputes. If no specific protocols apply to a particular dispute, then the parties are expected to follow the general protocols set out in the "Practice Direction on Pre-action Conduct and Protocols". These general protocols provide, for example, that the claimant should write to the defendant with concise details of the claim, including the basis on which the claim is made, a summary of the facts, what the claimant wants from the defendant and how

any money claimed is calculated. The defendant should respond within a reasonable time (14 days to three months, depending on complexity) and confirm whether the claim is accepted or not (including reasons), and provide details of any counter-claim. The parties are also expected to disclose key documents relevant to the issues in dispute.

The parties are also expected to consider negotiation, or an alternative form of dispute resolution, before commencing court proceedings, and should continue to consider whether they might reach a settlement by such means throughout the proceedings.

Whilst the protocols are not mandatory, a failure to comply with them without good reason may attract sanctions. The court can take non-compliance with the pre-action protocols into account when making case management directions and orders as to costs. In deciding whether to impose sanctions, the court will consider the seriousness of any non-compliance and what level of compliance is required given the size and nature of the claim. There may of course be scenarios where compliance with the pre-action protocols is not possible, such as when seeking urgent injunctive relief or where the claim would become time-barred.

3.2 Statutes of Limitations

The Limitation Act 1980 governs limitation periods under English law. If a claim in an English court is governed by foreign law, the limitation regime of that foreign law will apply (although English law, as the applicable procedural law, will determine on what date proceedings have been commenced for the purpose of calculating whether a claim has been brought in time). The relevant limitation period depends on the type of claim being advanced, eg, claims in relation to a breach of a simple contract and tortious claims generally must be brought within six years. Claims regarding a breach of an obligation under a deed must be brought within 12 years.

The limitation period begins to run from the date of the accrual of the cause of action. In contractual claims, this is the date of the breach of contract, whereas in tortious claims it is the date the damage was suffered. Time ceases to run for limitation purposes once a claim has been instituted by issuing a claim form at court.

For the court to consider the impact of any limitation period, the defendant must raise the issue in its defence. If the limitation period has expired, the defendant has a complete defence to the claim.

At the time of writing, the usual rules regarding limitation have not been affected by the COVID-19 pandemic.

Exceptions

There are certain exceptions to the general limitation periods. For example, in respect of a tortious claim involving "latent" damage, the limitation period will be the later of either six years from the accrual of the cause of action, or three years from the date when the claimant knew or ought to have known the material facts regarding the loss suffered, the identity of the defendant and their cause of action. In addition, where an action is based on fraud and any fact relevant to the claimant's cause of action has been deliberately concealed by the defendant, the limitation period does not begin to run until the claimant has discovered the fraud or could have discovered it with reasonable diligence.

3.3 Jurisdictional Requirements for a Defendant

For as long as the UK remains subject to EU law, two principal sets of rules must be considered to determine whether the English courts have jurisdiction to hear a dispute: the European regime and common law rules.

The Recast Brussels Regulation

Regulation (EU) 1215/2012 (known as the Recast Brussels Regulation) takes precedence over the common law rules where it applies.

Under the Recast Brussels Regulation there is an effective hierarchy of provisions governing jurisdiction. First, there are a number of matters over which EU member states have exclusive jurisdiction, such as disputes in relation to immovable property or intellectual property rights. Next, the courts will consider whether there is a valid jurisdiction agreement between the parties. If not, an appearance by the defendant in the proceedings (by, for example, making an application other than to contest jurisdiction) will give the English court jurisdiction to hear the dispute.

In the absence of these scenarios, the general rule is that a defendant should be sued in the country in which the defendant is domiciled. There are some notable exceptions to this general rule, however, whereby a defendant who is domiciled in an EU member state may alternatively be sued in the courts of another member state. These exceptions include:

- claims where there is a close factual connection to another member state, such as the place of performance of a contract or, in respect of a tortious claim, the place where harm has occurred;
- claims which are closely connected to proceedings in another member state such as proceedings where the defendant is one of a number of defendants, third party claims, and counter-claims; and

- specific jurisdictional provisions in respect of certain claims such as insurance claims, consumer contracts and employment contracts.

If the Recast Brussels Regulation (or other European treaties) do not apply, the court will determine whether it has jurisdiction by applying common law rules. These rules generally provide that the court has jurisdiction where a defendant has been validly served with the proceedings within the jurisdiction, for example by way of personal service (discussed in **3.5 Rules of Service**). However, the defendant may argue that the English court should not exercise its jurisdiction if there is a more appropriate forum (known as the doctrine of "forum non conveniens"). The court will also have jurisdiction where the defendant otherwise submits to the jurisdiction by, for example, taking a step in the proceedings.

Serving the Claim Form Outside of the Jurisdiction

If the defendant cannot be served with the claim form within the jurisdiction, the claimant may obtain the court's permission to serve the claim form outside of the jurisdiction, provided the claimant shows that:

- there is a serious issue to be tried;
- there is a good arguable case that the claim falls within one of a number of "jurisdictional gateways" set out in the Civil Procedure Rules (and discussed below); and
- England is the most appropriate forum.

The "jurisdictional gateways" include:

- where the dispute relates to a contract made within the jurisdiction or which is governed by English law;
- a contractual claim where the breach of contract was committed within the jurisdiction;
- a tortious claim where the damage was suffered within the jurisdiction or resulted from an act committed within the jurisdiction; and
- where the defendant is a necessary and proper party to the claim (which has been validly served on another "anchor" defendant).

3.4 Initial Complaint

Generally, court proceedings are commenced by the issuing of a "claim form" at court. Exceptions to this, include bankruptcy or insolvency proceedings, which are commenced by way of a court petition.

The claimant is required to set out the names and addresses of the respective parties, a concise statement of the nature of the claim, the remedy sought and, where the claim is for money, the value claimed. The details of the claim (the "particulars of claim") may either be part of the claim form or a distinct document to be filed at court shortly after the service of the claim form on the defendant.

In order to issue a claim form, a fee is payable which is generally determined by reference to the value of the claim (the highest fee payable is currently GBP10,000 for any claims exceeding GBP200,000).

As set out in **1.3 Court Filings and Proceedings**, it is a requirement in cases in the Business and Property Courts to file documents (including the claim form) via the online CE-File portal (exceptions apply for litigants in person). It is anticipated that online filing and electronic working will expand across the rest of the court system in the coming years.

3.5 Rules of Service

The formal process for notifying a defendant of proceedings against it is by formally serving the claim form on the defendant.

The default position is that the court serves the claim form, however, in practice, the solicitor for the claimant will usually choose to serve the claim form itself so that it has control over the timing of service. Service of the claim form on a defendant in England and Wales must be effected within four months of the issuing of the claim form.

Service of the claim form may be effected by personal service, first-class post, fax, email or by leaving the claim form at a specified address. For individuals, service should be made to their usual or last known address. For companies, the address for service is their principal office, any place of business with a real connection with the dispute, or their registered office. Where a defendant has instructed solicitors to accept service on its behalf, the claimant can serve the claim form on the solicitors.

Difficulty Serving a Claim

If a claimant has difficulty serving a claim form on a defendant, for example, if the defendant is uncooperative and does not provide an address for service or it is otherwise not possible to determine the defendant's current address, the claimant may apply to court for either an order that service may be effected by an alternative method or an order that service be dispensed with. The court has previously allowed alternative service of the claim form by way of social media. The court will generally only dispense with service of the claim form in exceptional circumstances.

For defendants based outside the jurisdiction but within an EU member state, no permission from the court is required. However, outside EU member states, the claimant must first obtain the court's permission to serve the claim form outside

the jurisdiction. The claimant has six months from the date of issuing to effect service.

The general rule is that the claimant must serve the particulars of claim on the defendant within 14 days of the service of the claim form. In the Commercial Court, however, the particulars of claim must be served within 28 days of the filing of an acknowledgment of service which indicates an intention to defend the proceedings. There are certain prescribed documents that should be served along with the claim form and/or particulars of claim, including notes for the defendant on how to reply to the claim and a response pack.

It is important to note that if a defendant becomes aware that a claim form has been issued against it, the defendant may compel service of the claim form within 14 days.

3.6 Failure to Respond

For proceedings served within the jurisdiction, the defendant must generally file at court and serve on the claimant a statement of defence within 14 days of service of a claim, unless the defendant has acknowledged service of the proceedings within that timeframe, in which case the defence is due 28 after days. In the Commercial Court, the defendant must file and serve an acknowledgement of service within 14 days of service of the claim form in any event, and then file and serve its defence 28 days after service of a claim. If the defendant does not do this, the claimant may apply to court for default judgment against the defendant.

In claims seeking to recover money and/or the delivery of goods, default judgment may be obtained without a hearing by filing a standard-form request. In respect of default judgment in non-money claims the claimant must make an application to court and judgment may only be obtained at a hearing. Certain money claims may also require the court's permission to obtain default judgment, eg, where the claim form has been served outside the jurisdiction without permission under EU regulations or claims against vulnerable individuals.

It is open to a defendant against whom a default judgment has been entered to apply to set aside the judgment. The court will grant such an application if the defendant can show that the default judgment was wrongly granted or that the defendant has a real prospect of successfully defending the claim.

3.7 Representative or Collective Actions

There are a number of means for bringing collective litigation (ie, class actions). The most common methods are the use of group litigation orders (GLOs) and claims by representative claimants.

GLOs are typically used to group together several claims where there is more than one claimant and the causes of action raise common or related issues of fact or law. These claims are then managed using specific procedural rules. Representative proceedings may be brought where more than one claimant has the same interest in the claim. The claim is begun by one or more persons as a representative of all others who have the "same interest" in the claim. To date the courts have taken a narrow view of what constitutes the "same interest".

Constraints in the Civil Procedure Rules have meant that representative and collective actions have historically been brought on an "opt-in" basis. However, recently, the Civil Procedure Rules have been interpreted so as to allow a representative claim to proceed on an "opt-out" basis.

There are separate procedures for bringing collective competition law claims before the Competition Appeal Tribunal (CAT). The Consumer Rights Act 2015, which came into force on 1 October 2015, expanded the CAT's powers, including the ability to order injunctive relief.

3.8 Requirements for Cost Estimate

There is no specific requirement that solicitors must provide their clients with costs estimates. However, the Code of Conduct of the Solicitors Regulation Authority, which regulates solicitors in England and Wales, provides that clients should receive the best information available about the likely overall cost of their matter, both at the time of engagement and when appropriate during the progression of their matter.

Where proceedings are subject to costs management, the court manages the costs to be incurred by the parties that are recoverable from the other side so as to promote proportionate costs. In such cases, the parties to those proceedings are required to file and serve costs budgets in a prescribed form setting out their expected costs of the proceedings through to trial. Even in proceedings which are not subject to formal costs management, the court has a general power to require a party to file and serve an estimate of their cost at any time deemed appropriate.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

The Courts of England and Wales have wide ranging powers to make interim orders upon application, including in respect of injunctive relief, which either prohibits a party from performing a particular act or compels the performance of a particular act.

4.2 Early Judgment Applications

There are two mechanisms by which a claimant may obtain early judgment in respect of their claim without a full trial being held: default judgment and summary judgment. Default judgment is dealt with at **3.6 Failure to Respond**. In order to obtain summary judgment, a claimant must demonstrate that the defence has no real prospect of success and there is no other reason why the case should go to trial. The summary judgment procedure is also available to a defendant to dispose of a weak or unfounded claim that lacks any prospect of success (again where there is no other reason why the case should go to trial).

The court has discretion to enter summary judgment of its own motion if the above criteria are satisfied.

4.3 Dispositive Motions

Depending on the facts, there are a number of avenues by which to dispose of a claim, or aspects thereof, without a trial. If a defendant contends that the English courts do not have jurisdiction to hear the dispute, it must note its intention to challenge jurisdiction in its formal acknowledgement of service of the claim form. The defendant then has 14 days in which to file an application notice with evidence in support. If it the defendant takes any other steps in the proceedings it may be taken as having submitted to the jurisdiction of England and Wales.

The courts are also able to strike out the whole or part of any statement of case either upon application by one of the parties or of their own motion. In particular, the court may do this if it appears that:

- the statement of case discloses no reasonable grounds for bringing or defending the claim;
- the statement of case is an abuse of the court's process;
- the statement of case is otherwise likely to obstruct the just disposal of the proceedings; or
- there has been a failure to comply with a rule, practice direction or court order.

Successfully obtaining either default judgment or summary judgment (see **3.6 Failure to Respond** and **4.2 Early Judgment Applications**) would also dispose of the proceedings subject to any further hearings to quantify damages.

4.4 Requirements for Interested Parties to Join a Lawsuit

If the claim form has not yet been served, a claimant may join additional parties without the permission of the court provided there is a cause of action by or against each party joined.

Once the claim form has been served, the court's permission is required to join parties to the proceedings. An application can be made by the existing parties to the proceedings or by a third party which wishes to join.

The court will permit a party to be joined if it is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings, or there is an issue involving the existing party and the new party which relates to the matter in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

The court may also order any person to cease to be a party if it is not desirable for that person to continue to be involved.

4.5 Applications for Security for Defendant's Costs

Once proceedings have been commenced, a defendant to a claim or counterclaim may apply for security for costs against the claimant or the counterclaimant. The purpose of the security for costs regime is to protect the defendant against the risk that it will not be able to enforce a later costs order in its favour. An order for security for costs will generally require the claimant to pay a specified sum into court or provide alternative security such as a bond or bank guarantee in respect of the defendant's costs.

The Civil Procedure Rules set out the grounds on which the court will order security for costs and include the following scenarios:

- the claimant is resident out of the jurisdiction covered by relevant EU regulations;
- there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;
- the claimant's address has changed since the claim was commenced with a view to evading the consequences of the litigation;
- the claimant has failed to provide their address in the claim form (or gave an incorrect address); and
- the claimant has taken steps in relation to their assets that make enforcing an order for costs against them difficult.

Where one of these grounds applies, the court has wide discretion as to whether to order security for costs and will consider whether it is just in the circumstances to make such an order.

4.6 Costs of Interim Applications/Motions

It is open to the court to make a "summary assessment" of the parties' costs at the end of the hearing of any interim application by reference to costs schedules filed and exchanged by the parties in advance of the hearing. This process includes an order as to those costs. The usual position is that the successful party is awarded at least a portion of their costs.

Alternatively, and particularly in respect of longer hearings involving higher costs, the court may direct that the costs should be determined by way of detailed assessment at the conclusion of the proceedings.

4.7 Application/Motion Timeframe

The timeframe for the court to deal with any application will be determined by the quantity and complexity of the issues to be considered. Applications on paper, which are heard without a hearing, can generally be dealt with in a shorter period. Where the application requires a hearing, the court generally seeks an estimate from the parties as to how much time will be needed.

Some courts, such as the Commercial Court, publish estimates of the waiting time for application and trial hearings by reference to the length of the hearings.

The process for listing urgent applications varies between the different courts (and the relevant court guide should be consulted); however, it is generally required that an applicant should certify that the application is urgent business and give reasons for this. Urgent applications are dealt with on an expedited basis and may even be heard during court vacations.

5. Discovery

5.1 Discovery and Civil Cases

The process by which a party provides the other parties with certain documents relevant to the issues in dispute is called "disclosure". Under English law, anything on which information of any description is recorded is potentially disclosable. Documents, telephone recordings and electronic material (such as emails, social media output and electronic databases), etc, fall within a party's disclosure obligations.

5.2 Discovery and Third Parties

Where there is some difficulty in obtaining relevant documents from other parties to proceedings, it is possible to obtain disclosure from third parties not named as a plaintiff/claimant or defendant.

The Civil Procedure Rules allow disclosure to be ordered against non-parties to proceedings where the documents sought are likely to support the case of the applicant or adversely affect the case of one of the other parties, and disclosure is necessary to dispose fairly of the claim or to save costs.

It may also be possible to obtain disclosure from a non-party by applying to the court for a witness summons, requiring a witness to produce documents to the court and/or attend court to give evidence.

Disclosure against non-parties who are "caught up in the wrongdoing" (whether innocently or not) can also be obtained by applying to the court for a so-called "Norwich Pharmacal Order", which requires the third party to disclose relevant documents or information. An application for a Norwich Pharmacal Order must be supported by evidence. Depending on the circumstances (including where any proceedings have already commenced), applying for a Norwich Pharmacal Order usually involves issuing a claim form against the third party and thereafter a hearing before the court.

5.3 Discovery in This Jurisdiction

At the beginning of 2019, the Disclosure Pilot Scheme (DPS) was introduced in the Business and Property Courts (see **1.2 Court System**).

Disclosure Pilot Scheme

The DPS is a mandatory pilot scheme that is now operating (subject to limited exceptions) in the Business and Property Courts. It was initially introduced for a period of two years concluding in December 2020, but has now been extended through to December 2021.

The scheme introduces a new approach to the disclosure process for civil claims falling within its scope. It was intended to promote a change of culture towards the disclosure process, aiming to encouraging a proportionate approach following criticism that the disclosure process had become extremely costly and unwieldy, in particular for defendants. Recent surveys on the impact of the DPS question whether this aim has been achieved.

Under the DPS, parties to litigation must provide limited disclosure with their statements of case ("initial disclosure"). Additional disclosure is to be provided later in the proceedings only if it is ordered by the court ("extended disclosure"), in which case it will be based on one of five "disclosure models".

Disclosure duties

The DPS has introduced "disclosure duties" that expressly apply to parties and their legal representatives. A person who knows that they are or may become a party to proceedings that have been commenced, or who knows that they may become a party to proceedings that may be commenced, is under the following duties to the court:

- to take reasonable steps to preserve potentially relevant documents in their control and to undertake any search for documents in a responsible and conscientious manner;
- to disclose, regardless of any order for disclosure made, known adverse documents, unless they are privileged;
- to comply with any order for disclosure made by the court; and

- to act honestly in relation to the process of giving disclosure and reviewing documents and to use reasonable efforts to avoid providing to another party documents that have no relevance to the issues.

Similarly, legal representatives are under the following duties to the court:

- to take reasonable steps to preserve documents within their control that may be relevant to any issue in the proceedings, and to advise and assist the party with regard to its compliance with its disclosure duties;
- to liaise and co-operate with the other parties to the proceedings so as to promote the reliable, efficient and cost-effective conduct of disclosure, including through the use of technology;
- to act honestly in relation to the process of giving disclosure and reviewing documents; and
- to undertake a review to satisfy themselves that any claim by the party to privilege from disclosing a document is properly made and sufficiently explained.

Initial disclosure

For cases falling within the DPS, when a party serves its statement of case it must also give limited disclosure known as "initial disclosure" by serving an Initial Disclosure List of Documents and copies of the documents in the list. These documents should be:

- the key documents on which it relies (expressly or otherwise) in support of the claims or defences advanced in its statement of case; and
- the key documents that are necessary to enable the other parties to understand the claim or defence they have to meet.

A party giving initial disclosure is not obliged to undertake a search for documents beyond any search it has already undertaken for the purposes of the proceedings. There are circumstances where initial disclosure will not be required.

Extended disclosure

Within 28 days of the final statement of case the parties should state, in writing, whether they are likely to request for further disclosure known as "extended disclosure". If this is indicated, the claimant must prepare and serve on the other parties a draft List of Issues for Disclosure within 42 days of the final statement of case. This list is then to be negotiated between the parties and will form part of the Disclosure Review Document (DRD), used when considering whether to order extended disclosure. The DRD must also set out further information relevant to disclosure, such as where documents are held, custodians, search terms, date ranges for searches, proposed use of technology and an estimate of costs.

Extended disclosure will generally take place later in proceedings (as had been the case before the DPS). The five disclosure models for extended disclosure include:

- Model A: no further disclosure beyond initial disclosure save for known adverse documents.
- Model B: limited disclosure, being the key documents on which the parties have relied and the key documents necessary to enable the other parties to understand the claim or defence they have to meet.
- Model C: request-led search-based disclosure, which will require parties to give disclosure of particular documents or narrow classes of documents.
- Model D: search-based disclosure with or without "narrative" documents. This requires parties to carry out a reasonable and proportionate search, and to then disclose documents which are likely to support or adversely affect their claim or defence or that of another party. This is the nearest equivalent to "standard disclosure", which often formed the approach to disclosure before the DPS.
- Model E: wide search-based disclosure, which will require a party to disclose documents likely to support or adversely affect its claim or defence or which may lead to a train of inquiry which may result in additional disclosure. This model is only to be ordered in "exceptional cases", and likely those involving an element of fraud or conspiracy.

There is no presumption that a party is entitled to extended disclosure, which will only be ordered if the court is persuaded that it is appropriate to do so. Irrespective of what order for extended disclosure is made, the parties remain under an overriding duty to disclose known adverse documents.

Following extended disclosure, each party is required to provide a "disclosure certificate" setting out the nature of the searches undertaken, the documents being disclosed, and the basis for withholding any document from production (eg, documents that are privileged or no longer within a party's control).

Discovery in Cases Where the DPS Does Not Apply

Broadly, for cases that fall outside the DPS, which include proceedings in the County Courts, the regime introduced by the civil litigation reforms in April 2013 still applies. The 2013 reforms introduced a menu of disclosure options which can be used to ultimately limit the scope of disclosure.

In order to help the court reach a decision in respect of disclosure, the parties are obliged in respect of larger cases to file a disclosure report before the initial case management conference

(CMC). However, it is often the case that "standard disclosure" is ordered with little regard to the other options available. Under "standard disclosure" a party is required to disclose documents which adversely affect its case, adversely affect another party's case or support another party's case, and to make a reasonable search for documents which meet this standard, by reference to any such documents which are or have been in its custody, possession or control.

Disclosure is provided by parties by way of a list of documents, which is then served on all other parties to the litigation. This list identifies the disclosable documents and indicates which of these documents the party claims to be entitled to withhold for inspection (for example, because a document is privileged), which documents are no longer in its custody, possession or control, and what has happened to any documents that are no longer in its custody, possession or control. A disclosure statement signed with a statement of truth explaining the extent of the searches undertaken must accompany this list.

It is also possible for a party to apply for specific disclosure of particular documents where it suspects that the other party has not provided full disclosure. Parties and their representatives are under a positive duty to ensure that all documents which should be disclosed are disclosed. This duty is a continuing one, and any new documents relating to the case must be disclosed on an ongoing basis.

Discovery Before Proceedings Have Commenced

Under both the DPS and non-DPS regimes it is possible to apply for disclosure before proceedings have started, provided that the application is supported by evidence, the applicant and respondent are likely to be parties to subsequent proceedings, the application relates to documents which would be disclosable under standard disclosure, and that disclosure before the proceedings have been started is desirable in order to:

- dispose fairly of the anticipated proceedings;
- assist the dispute to be resolved without proceedings; or
- save costs.

5.4 Alternatives to Discovery Mechanisms

This is not applicable. See **5.1 Discovery and Civil Cases** to **5.3 Discovery in This Jurisdiction**.

5.5 Legal Privilege

Privilege is a fundamental legal right and a powerful tool, granting parties the right to resist disclosure of confidential and potentially sensitive material in the context of arbitration, litigation and investigations. English law recognises two types of legal professional privilege: legal advice privilege and litigation privilege (although there are others, eg, without prejudice privilege and common interest privilege). Both enable a party to refuse to produce documents to which the privilege attaches to any third party (including to adversaries and the courts).

Legal advice privilege attaches to confidential communications (written or oral) between a legal adviser and their client which are for the purpose of giving or receiving legal advice. Litigation privilege attaches to confidential communications (written or oral) between a client or legal adviser and a third party where the dominant purpose for which the document is created is to give or receive legal advice, or to collect information of evidence in connection with litigation that is in contemplation or has commenced.

The general rule is that legal professional privilege extends to in-house counsel, provided that the communication is "legal advice". The exception to this is in investigations by the EU Commission for Competition, in connection with which communications with in-house lawyers will not be considered privileged.

Privilege does not attach to confidential communications generated by other professions (for example accountants or tax advisers).

In addition to the two types of legal advice privilege, "without prejudice" privilege also applies to communications between parties generated as part of a genuine attempt to settle a dispute. Joint and common interest privilege may also apply to documents shared between parties in certain circumstances where legal professional privilege already arises.

5.6 Rules Disallowing Disclosure of a Document

Evidence, whether oral or documentary, may be presented to the court to prove an issue in dispute and enable the court to determine issues of fact in the proceedings. Under English law, facts must be proved by evidence except where:

- presumptions apply;
- facts are formally admitted; or
- the court gives notice that the facts are so well established that they are to be accepted without admission or evidence.

Evidence is only admissible in civil proceedings if it is relevant (except where limited exceptions apply). The law on the admissibility of evidence exists in common law and legislation, but the trend in recent times has been towards a relaxation of the once rigid rules of evidence in the conduct of civil proceedings. Generally, the court has a wide discretion to permit, restrict or exclude evidence in proceedings.

Evidence can be adduced either through the process of disclosure (see **5.1 Discovery and Civil Cases**) or the giving of witness and/or expert evidence.

Witness Evidence

Factual witness evidence is given by way of a witness statement, accompanied by a statement of truth by the evidence giver. The Civil Procedure Rules provide specific requirements as to what witness statements can and cannot include. The court will also direct when such evidence should be shared between the parties. In civil proceedings, a witness statement is taken to be "evidence in chief" and usually a witness is not required to repeat their evidence at trial.

However, a witness can be cross-examined by the other parties and this often occupies a significant amount of the trial timetable. At the end of 2018, the Witness Evidence Working Group began a consultation process to review the current rules and practice and make recommendations for potential reform of the procedures for factual witness evidence in the Business and Property Courts. The Working Group has submitted its report and suggestions in December 2019, and it seems likely that in the coming years changes may be made to the process of giving factual witness evidence.

Expert Evidence

Expert evidence can only be adduced with the permission of the court. When considering this, the court is under a duty to restrict the evidence to that which is reasonably required to resolve the proceedings. The parties must provide an estimate of the cost of the proposed expert evidence and identify the issues to be addressed by that evidence when applying for the court's permission. The evidence of an expert is provided in a written report, and a party's expert can be cross-examined on the evidence they give at trial.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

English courts have the power to order a wide range of injunctive relief, whether requiring a party to perform a specified act (a mandatory injunction) or refrain from a particular act (a prohibitive injunction). The courts have wide discretion to order injunctive relief under the Civil Procedure Rules, and will generally do so when this is considered to be "just and convenient". Some of the more common examples of injunctive relief available include:

- a "freezing order" which restricts dealings with a party's own assets in order to prevent dissipation of those assets such that any judgment in favour of the claimant would be frustrated (discussed further in **6.6 Third Parties and Injunctive Relief**);
- a "proprietary injunction", which restrains a defendant from dealing with property and/or assets in which the claimant asserts a proprietary interest;
- an "information order" directing a party to provide information about the location of property or assets;
- a "search order" permitting a search of respondent's property for the purpose of preserving evidence and property; and
- an "anti-suit injunction" order restraining foreign legal proceedings.

It is possible to obtain injunctions during or in advance of proceedings (known as interim relief) or at trial (final relief). Final relief will be granted where a claimant establishes a legal or equitable right and the court considers it just to grant the order in the circumstances.

Interim Relief

When determining an application for interim relief, the court will consider whether there is a serious question to be tried and, if so, will apply the "balance of convenience" test. In applying this test, the court will consider whether damages would be an adequate remedy for the applicant following a trial. If so, the application will not usually be granted. If damages would not be an adequate remedy, the court will consider whether a "cross-undertaking" in damages from the applicant provides adequate protection for the respondent in circumstances in which the court grants the interim relief and that relief is then held at trial to have been wrongly granted. If not, the court is unlikely to grant the relief sought.

The court will only order interim relief before a claim has been made if the matter is urgent or it is otherwise desirable to do so in the interests of justice.

6.2 Arrangements for Obtaining Urgent Injunctive Relief

The courts are usually able to deal with urgent applications quickly. The different courts in England and Wales have different procedures for dealing with urgent applications. Urgent out-of-hours hearings in the Commercial Court are initially dealt with by a QBD judge who may dispose of the application or make orders for the matter to come before a Commercial Court judge. In the Chancery Division, there is usually a judge available to hear urgent out-of-hours applications or urgent applications during the court vacation. Applications of extreme urgency may be dealt with by telephone.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

Applications may be made to the court on an ex parte basis. The applicants, however, are subject to certain additional obligations, including a duty to give "full and frank" disclosure to the court. Simply put, this means that, as the respondent is not given an opportunity to respond, the applicant is required to disclose all matters (both factual and legal) that are material to the court in deciding whether to grant the order, including those matters which are harmful to his case. As noted in **6.1 Circumstances of Injunctive Relief**, the applicant may also be required by the court to provide a "cross-undertaking".

6.4 Liability for Damages for the Applicant

As noted in **6.1 Circumstances of Injunctive Relief**, an applicant for an interim injunction may be required by the court to provide a cross-undertaking in damages. The court may also order that the undertaking in damages be extended to anyone other than the respondent who may suffer loss as a consequence of the order sought.

If there are doubts as to whether the applicant has sufficient resources to make good on its undertaking in damages, the court may require the applicant to "fortify" the undertaking by paying money into the court or providing other security. When making an order for fortification the court will estimate the harm that the respondent might suffer as a result of the order sought by the applicant.

6.5 Respondent's Worldwide Assets and Injunctive Relief

An applicant may seek an injunction restraining a party from disposing of or dealing with its assets within the jurisdiction (a "freezing order"). The aim of a freezing order is usually to preserve an appropriate level of the respondent's assets until judgment can be obtained or enforced by a successful applicant. All types of assets can be "frozen" (excluding perishable items), whether or not they are legally registered in the respondent's name. In determining whether to make a freezing order, the court will consider whether it is just and convenient to do so. In addition, the applicant must show that there are assets to be frozen and that there is a risk that those assets will be dissipated if the order is not made.

It is well established that the court also has jurisdiction to grant freezing injunctions in respect of overseas assets (a "worldwide freezing order"). A worldwide freezing order may be sought where it is unlikely that the respondent has sufficient assets within the jurisdiction to meet the value of the applicant's claim. Even after a worldwide freezing order has been granted, the court will generally require that permission be sought before any steps are taken to enforce the order overseas.

The court may also, in certain circumstances, make a freezing order in support of foreign proceedings where it would be expedient to do so (although it will adopt a cautious approach).

6.6 Third Parties and Injunctive Relief

There are a number of ways that injunctive relief may be obtained against third parties who are not parties to the main proceedings, eg, by extending the scope of a freezing order to assets held by third parties where those assets are held on behalf of the respondent to the main freezing order. In addition, the court may freeze assets of a third party where this is necessary to support a freezing order against a defendant, eg, a company of which the defendant is a major shareholder.

Where a third party may be affected by the terms of a freezing order, the court will consider whether to extend any cross-undertaking in damages to protect such third parties.

6.7 Consequences of a Respondent's Non-compliance

A party who fails to comply with the terms of an injunction will be in "contempt of court", ie, acting in defiance of an order of the court. There are a number of sanctions which the court may impose in such circumstances, including fines, sequestration of assets, and in the most serious cases, committing an individual to prison. A third party who has notice of the terms of an injunction and breaches those terms may also be held in contempt of court.

7. Trials and Hearings

7.1 Trial Proceedings

Trials in the English courts are adversarial and involve oral argument by the parties' advocates. Unless there is good reason for them not to be, trials will be open to the public as the court is concerned to uphold the principle of open justice. This includes remote hearings. Generally, the parties are required to provide the court with a written outline of their case before trial, known as a "skeleton argument".

At first instance, one judge will preside over the trial and hear the evidence presented by the parties. The judge will not investigate the case. Typically, the parties' advocates will present their cases at the start of the trial by way of "opening submissions", with the claimant's advocate usually going first.

Written witness evidence and expert evidence is filed and exchanged in advance of trial and stands as "evidence in chief", by which it is meant that the witnesses and experts called are rarely required to repeat orally the evidence set out in their state-

ments. At trial, the parties' advocates are given an opportunity to cross-examine the witnesses and experts for the opposition.

At the end of trial, the advocates for the claimant and defendant will summarise their respective cases by way of "closing submissions".

Interim Applications

Similarly, interim applications are generally heard in public. The applicant should file and serve on the respondent an application notice with supporting evidence, including a draft of the order sought. The applicant may also be required to file a skeleton argument and a bundle of supporting documents. The respondent may then file and serve evidence in response. At the hearing of the application, the parties' advocates make oral submissions.

The judge (or master) who hears the application will generally make an order at the end of the hearing, or shortly afterwards. However, the judge may require one of the parties to draft the order following the hearing.

7.2 Case Management Hearings

Under the Civil Procedure Rules the court is required to manage cases actively, which includes setting the case timetable and giving procedural directions. As part of this, a case management conference will typically be listed early on in the proceedings (usually after statements of case have been served and before disclosure is given) in order to determine the directions necessary for the ongoing management of the proceedings. Where the proceedings are cost-managed, the court may give also directions as to costs at the case management conference. Where necessary, subsequent case management hearings may be listed to deal with ongoing procedural issues.

In complex cases, the court may order a pre-trial review hearing to take place in the run up to trial. The parties may be required to complete pre-trial checklists which will allow the court to determine if the parties have complied with all directions and, if not, establish why and what further directions may be necessary.

7.3 Jury Trials in Civil Cases

Generally, civil litigation cases are not determined by jury trials. However, it is open to a party to apply for a jury trial if there is a claim of false imprisonment, malicious prosecution or fraud. The court will not order a jury trial if it is of the opinion that the trial requires any prolonged examination of documents or accounts or any scientific or local investigation which cannot conveniently be made with a jury. The court also has the power to order jury trials for defamation cases, although the exercise of this power is now very exceptional.

7.4 Rules That Govern Admission of Evidence

The default position is that evidence is admissible unless there is a reason that it should be excluded (for example because it attracts legal professional privilege, as discussed in **5.5 Legal Privilege**). Hearsay evidence is admissible, albeit with specific procedural rules governing its use, including a requirement that a party seeking to rely on hearsay evidence should serve a "hearsay notice" prior to trial. There is no rule that evidence obtained illegally or improperly must be excluded, however, the court has wide discretion as to whether to allow evidence and, in exercising that discretion, it will weigh the public interest in discouraging the conduct by which the evidence was obtained against the public interest in establishing the facts of the case.

Among the restrictions on evidence are the following:

- statements made by a party in a genuine attempt to settle an existing dispute, whether orally or in writing, generally attract "without prejudice" privilege, which operates to prevent those statements being put before a court as evidence of admissions by the party who made them; and
- there is privilege against self-incrimination enshrined in statute, which provides that a person in any legal proceedings other than criminal proceedings may refuse to answer any question or produce any document or thing, if to do so would tend to expose that person to proceedings for a criminal offence in the UK or for the recovery of a penalty.

7.5 Expert Testimony

The permission of the court is required to admit expert evidence and an estimate of the costs of such evidence must be provided. The court order allowing expert evidence will generally give directions as to the nature of the expert evidence and give directions as to how the expert evidence is to be given (for example, whether there will be a single joint expert or different experts instructed by the parties). The court may also decide to appoint an expert itself, an "assessor", to help the court understand certain evidence.

Where the parties instruct different experts, the experts will generally produce a report which is exchanged with the other side. The court will decide whether the reports should be exchanged sequentially or simultaneously. Often, the court will require the experts to meet in order that they might produce a joint report or statement setting out the matters on which they agree and on which they disagree. Experts are typically cross-examined at trial by the advocate of the opposing party.

7.6 Extent to Which Hearings are Open to the Public

Open justice is a fundamental principle of the laws of England and Wales and court hearings (including remote hearings) are

generally held in public. There are, however, circumstances in which the court will order hearings to be private (see **1.3 Court Filings and Proceedings**).

Authorised transcribers can be arranged for any public hearing for a fee (this can be shared between the parties) and transcripts obtained.

7.7 Level of Intervention by a Judge

Judges often intervene during oral submissions at trial to ask questions of the parties' advocates, and sometimes witnesses' experts, in order to clarify their understanding of the issues.

7.8 General Timeframes for Proceedings

The Civil Procedure Rules set out time periods for many of the steps in the proceedings which can, with some exceptions, generally be extended by agreement between the parties or by an order of the court. The court may also stay the whole or part of the proceedings at any time for a range of reasons including in order to allow the parties to attempt to settle the dispute or to enforce compliance with court orders or judgments.

Cases are usually assigned a window of time by the court during which the trial hearing is listed to start. This window will be determined by the urgency of the matter and the likely length of the trial, as well as the court's availability. The parties will normally attempt to agree an estimate for how long will be needed for the trial, which will involve consideration of a range of factors including the number of witnesses and experts and the complexity and quantity of the issues to be decided.

For the period April to June 2020, the average time for a case on the multi/fast track (ie, claims above GBP10,000) to reach trial was 62 weeks from the issuing of the claim form.

8. Settlement

8.1 Court Approval

Litigation (and arbitral) proceedings are usually settled by way of a contractual agreement between the parties to the dispute. Only in very limited circumstances will there be a requirement for the court to approve the settlement of proceedings, for example where a child is a party to the proceedings.

8.2 Settlement of Lawsuits and Confidentiality

If the parties to the proceedings wish the terms of an agreed settlement to be directly enforceable by the parties as an order of the court, they will need to record the settlement in a court order. Often, parties will not want the exact terms of the settlement to be known to non-parties. Where this is the case the parties are generally able (except in the limited circumstances where the court's approval is necessary to settle) to balance the desire for enforceability and confidentiality by using a "Tomlin Order", a document in which the terms of the settlement are recorded in a confidential schedule rather than in the main body of the consent order, which will generally be made public.

While it is possible to use a Tomlin Order to keep the exact terms of a settlement agreement from becoming public, the fact that the parties have reached a settlement agreement will not usually be confidential, unless the court specifically grants an order that the contents of the court file are to be kept confidential to third parties, in which case non-parties are not able to see the consent order.

8.3 Enforcement of Settlement Agreements

Where the terms of a settlement agreement have been recorded in a contract and a party breaches the terms, the counterparty may bring a new action seeking damages for breach of contract.

Alternatively, where settlement has been by way of a Tomlin Order, the non-defaulting party may apply to convert the obligations contained in the settlement agreement into a court order without the need to bring a new action.

The UK is not a signatory to the newly established UNCITRAL Convention on the Settlement of Disputes Resulting from Mediation (the "Singapore Convention").

8.4 Setting Aside Settlement Agreements

A party seeking to avoid a settlement agreement, whether a contractual settlement or a settlement agreement annexed to a Tomlin Order, will need to commence a new action seeking either an order that the settlement agreement should be set aside or a declaration of invalidity.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

In its statement of case, the claimant will have specified the legal remedies it is seeking. Most commonly, damages are the primary remedy sought and awarded by the English court. However, the court also has the power to award a variety of equitable, restitutionary and statutory remedies.

Equitable remedies are judicial remedies developed by the Chancery courts. They are awarded solely at the discretion of the court and are available where the court considers that such relief is fair to do justice between the parties. There are numerous equitable remedies, but the four that are most frequently awarded are:

- declarative relief;
- specific performance;
- rescission; and
- rectification.

Declarative relief is where the court makes a binding declaration as to the rights and obligations of the parties, issues of fact or issues of law. Specific performance is a decree by the court to compel a party to perform its contractual obligations. Rescission is the setting aside of a contract which restores the parties to their original position prior to the contract being formed. If that is something which, in fact, is impossible to achieve due to a change of circumstances then rescission cannot be awarded. Rectification corrects a written contract to reflect the parties' contractual intention. Its main purpose is to correct mistakes made when recording agreements.

As well as the above, there are other equitable remedies available where a claim concerns a breach of trust. For example, the court can order an account of profits made by a trustee as well as the tracing of an ownership interest into trust property that has been wrongly disposed of.

Restitutionary awards address the unjust enrichment of one party at the expense of the other. This remedy seeks to reverse the unjust enrichment by restoring the relevant benefit or enrichment to the claimant. In contrast, damages focus on the damage suffered by the claimant, rather than the unjust enrichment of the defendant.

9.2 Rules Regarding Damages

Damages under English law are intended to be compensatory and are measured by the monetary sum required to put the claimant back into the position it would have been in had the contract been properly performed (for breach of contract actions) or the position it would have been in had the wrongful act not been committed (in actions based in tort). There is no statutory limit on the amount of damages that a claimant can recover. However, it is possible for parties to contractually agree to limit the damages that can be awarded (and generally enforced by the English court).

Before damages are recoverable certain requirements must be met. Generally, a claimant is required to prove that the defendant's actions caused the loss, that the loss suffered by the claimant is not too remote (in other words, the loss must be foreseeable), and that the claimant has taken reasonable steps to mitigate the loss suffered.

Parties may contractually agree that specific amounts are to be payable upon a breach of contract. Such damages are known as liquidated damages and such provisions in a contract are generally enforced by the courts. An exception to this general rule of enforcement is if the sum to be paid is to be regarded as a penalty, whereby the sum is disproportionate to the parties' interest in deterring the breach.

Punitive damages designed to punish the defendant are not recoverable in actions for breach of contract, and are only rarely available in tort cases.

Nominal damages may be ordered in cases where the claimant has suffered no recoverable loss due to the defendant's breach of contract or tort.

9.3 Pre and Post-Judgment Interest

Under English law, both pre-judgment and post-judgment interest is available.

Pre-judgment interest is available under contract, statute and equity. Generally, the court has discretion to award pre-judgment interest on a simple basis, at a rate the court considers appropriate, and for the period between the date on which the cause of action arose and the date of judgment or date of payment (whichever is the earlier). However, this discretion may be displaced by the parties' contract if it includes specific provisions regarding interest (these are generally enforced by the court). Alternatively, the discretion may be displaced if the Late Payments of Commercial Debts (Interest) Act 1998 applies. This act adds an implied term in business-to-business contracts, giving a prescribed rate of interest (8%) on the price of goods or services, plus a fixed sum and reasonable costs of recovering the debt.

If a successful claim is brought in the High Court, interest generally accrues at a rate of 8% from the date of judgment. In the County Court, interest also generally accrues at a rate of 8% from the date of the judgment for sums of no less than GBP5,000 or where a debt falls within the scope of the Late Payments of Commercial Debts (Interest) Act 1998.

9.4 Enforcement Mechanisms of a Domestic Judgment

A successful party has a variety of mechanisms available to it to enforce a judgment for the payment of money. The effectiveness of these mechanisms will, however, largely depend on the assets the judgment debtor has available to satisfy the award made against it.

To enforce a judgment debt it is possible for a judgment creditor to take control of the judgment debtor's goods, requiring a writ or warrant of control which gives an enforcement officer the power to take control of and sell a judgment debtor's goods, with the proceeds going to the judgment creditor. If a judgment

debtor is owed sums by third parties, the judgment creditor can seek a third-party debt order, which permits a sum to be frozen and seized for the benefit of the creditor.

It is also possible to obtain a "charging order" over a judgment debtor's beneficial interest in land, securities or certain other assets, preventing the sale of the asset without paying what is owed to the judgment creditor. An attachment of earnings order may also be obtained whereby the judgment debtor's employer makes deductions from the judgment debtor's salary. However, such orders are not common in commercial litigation matters.

Lastly, a party can apply for a "writ of sequestration" in circumstances where a person is in contempt of court for disobeying a court order (usually an injunction or an order to enforce a judgment). This allows sequestrators (ie, enforcement officers) to take control of the party's property until they have put right the contempt. Title to the property remains with the person in contempt, but the fact that their property is sequestrated puts pressure on them to comply with the court's order and to settle the judgment debt.

9.5 Enforcement of a Judgment from a Foreign Country

Enforcement of a foreign judgment in England and Wales is possible but the procedure varies depending on the country from which the judgment was obtained. As noted in **1.1 General Characteristics of the Legal System**, practitioners should be aware that this is an area of practice and procedure that may change depending on the outcome of the UK's "Brexit" negotiations.

EU Judgments

Currently, if the foreign judgment was obtained from the courts of an EU member state, then Regulation (EU) 1215/2012 (the "Brussels Regulation Recast") will apply. To enforce such a judgment, a judgment creditor must obtain a prescribed certificate from the awarding court and serve both the certificate and the judgment on the judgment debtor (with a translation, if required). Following this relatively simple process, the judgment creditor may enforce the judgment as though it were an English judgment. Accordingly, the same mechanisms for enforcement set out in **9.4 Enforcement Mechanisms of a Domestic Judgment** are applicable in such circumstances.

Under the 2007 Lugano Convention, judgments of the courts of Norway, Switzerland and Iceland may generally be enforced in England. To enforce a judgment a creditor must apply to the English courts for the registration of the foreign judgment. At this stage, the judgment debtor may file an appeal against registration, but the grounds to do so are limited.

Foreign Judgments from UK Overseas Territories, Commonwealth Countries and the Rest of the World

Where a judgment was obtained from the courts of certain UK overseas territories or of certain Commonwealth countries, enforcement may be possible under the Foreign Judgments (Reciprocal Enforcement) Act 1933 and the Administration of Justice Act 1920. The process for enforcing a judgment under both these statutes is similar: both require the judgment to be registered with the English courts. The judgment creditor must make an application to register the judgment whilst submitting an authenticated copy of the judgment, a certified translation and a witness statement setting out the basis upon which enforcement is sought. Once registered, there is a period of time permitted for the judgment debtor to apply to set aside the registration, specified in the registration order, and once elapsed (or if the judgment debtors' application has been rejected) the foreign judgment can be enforced as though it were an English judgment.

To enforce a judgment under the Hague Convention of Choice of Court Agreements which, at present, covers Mexico, Singapore, Montenegro, Denmark and EU countries (although EU judgments are, for the time being, enforced under the Recast Brussels Regulation) a two-step process of registration and then enforcement must be followed.

Foreign judgments from the rest of the world, or from countries which fall into one of the above regimes but do not otherwise fulfil the enforcement requirements, must be enforced as a debt. This requires the judgment creditor to commence fresh legal proceedings before the English court. Although this process can sometimes be costly and onerous, often summary judgment can be obtained early in the process on the basis that there is no proper defence to the claim.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

The appeals process is determined by the seniority of the judge and the court which made the decision which is the subject of the appeal. In most cases (insolvency and family proceedings have different appeal routes):

- a decision of a district judge sitting in the County Court may be appealed to a circuit judge;
- a decision of a circuit judge or recorder sitting in the County Court may be appealed to a High Court judge sitting in the High Court;
- a decision of a master or district judge sitting in the High Court may be appealed to a High Court judge sitting in the High Court;

- a decision of a High Court judge sitting in the High Court may be appealed to the Court of Appeal; and
- a decision of the Court of Appeal may be appealed to the Supreme Court.

A second appeal, ie, an appeal from a decision of the County Court or the High Court which was itself made on appeal, should be made to the Court of Appeal.

In certain circumstances, it may be possible to appeal directly to the Court of Appeal or Supreme Court where the appeal would ordinarily be heard by a lower court, known as "leap-frogging" and occurring where the appeal raises an important point of principle or practice (or there is some other compelling reason for the Court of Appeal to hear the appeal).

Cases dealing with EU law may be appealed to the General Court of the EU and the more senior European Court of Justice. Where an appeal concerns issues of human rights, it is also possible to appeal to the European Court of Human Rights.

It should be noted that, in certain circumstances, it is possible for witnesses and non-parties to appeal a decision, for example where there are adverse findings of fact against a witness.

10.2 Rules Concerning Appeals of Judgments

With some limited exceptions, an applicant must obtain the permission of the court before they can appeal a decision. An application for permission to appeal may be made to the court which rendered the relevant decision. The applicant can also apply for permission to the higher court in which the appeal would be heard, even if permission from the lower court is refused.

The court will only give permission to appeal a decision where it is satisfied that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard.

It is important to note that a party that applies for permission to appeal may be required to provide security for the costs of the other side.

10.3 Procedure for Taking an Appeal

An application for permission to appeal from the lower court is made orally at the hearing at which the decision to be appealed is made, and the other party is invariably given the opportunity to reply. Once a party gives notice of its intention to appeal, the lower court may then choose to adjourn the hearing to give that party the opportunity to apply for permission to appeal, ie, to prepare the application and grounds of appeal as well as any skeleton argument dealing with costs, where necessary.

An application for permission to appeal to a higher court must be made in writing by way of an application notice, filed within a time period directed by the lower court or, where no direction is made, within 21 days of the decision of the lower court. The application notice should include the grounds of appeal. The respondent is required to file and serve any statement in opposition within 14 days of service of the application notice or skeleton argument, if later. The default position is that the application will be considered on paper without a hearing, although the judge considering the application has discretion to direct that an oral hearing should take place.

10.4 Issues Considered by the Appeal Court at an Appeal

Appeals are limited to a review of the decision of the lower court, unless the court considers that it would be in the interests of justice to hold a rehearing or if procedural rules permit a rehearing for the particular type of appeal.

An appeal will be allowed where the decision of the lower court was wrong or unjust because of a serious procedural error or other irregularity.

A "wrong" decision will involve an error of law, an error of fact and/or an error in the exercise of the court's discretion. In general, the appeal court will be reluctant to overturn the trial judge's findings of fact where the trial judge had an advantage over the appeal court (by, for example, hearing witness cross-examination at trial).

The appeal court will not usually consider new evidence that was not before the lower court unless it can be shown that the evidence could not have been obtained with reasonable diligence for use in the lower court proceedings or the evidence would probably have an important influence on the result of the case. These criteria will apply even more strictly on a second appeal.

10.5 Court-Imposed Conditions on Granting an Appeal

The court may direct that the appeal or the permission to appeal are subject to certain conditions such as payment of security for costs by the appellant or payment into court of the judgment debt.

10.6 Powers of the Appellate Court after an Appeal Hearing

The appeal court has all the powers of the lower court in relation to the whole or part of an order of the lower court. Specifically, the appeal court has the ability to:

- affirm, set aside or vary any order or judgment made by the lower court;
- refer any claim or issue for determination by the lower court;
- order a new trial or hearing; or
- make orders as to the payment of costs and interest.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

The general rule is that the successful party in the proceedings will be awarded their costs incurred in relation to those proceedings. However, the court has wide discretion to order costs as it sees fit (see **11.2 Factors Considered When Awarding Costs**). The trial judge will decide which party is responsible to pay the other's costs (if applicable) and whether those costs are to be assessed on the standard basis or the indemnity basis (this being closer to full recovery).

There are also specific rules that deal with the award of costs in certain scenarios (for example uncontested claims, enforcement proceedings and some personal injury claims).

11.2 Factors Considered When Awarding Costs

Unless agreed between the parties, or fixed by reference to specific court rules, the court will need to assess costs. In fast-track cases, the costs assessment may be by way of summary assessment (see **4.6 Costs of Interim Applications/Motions**), whereby the judge will assess the costs to be paid at the end of the trial hearing. For other cases, detailed assessment is usually ordered, whereby there will be a separate hearing to determine the quantum of costs to be paid.

This process is usually presided over by a specialist costs judge. A substantial portion of the costs incurred by the successful party may be recoverable after assessment, but this is unlikely to amount to a full reimbursement (even where indemnity costs have been awarded).

Where the proceedings are subject to costs management (see **3.8 Requirements for Cost Estimate**), the parties are required to exchange costs budgets setting out estimated costs for each stage of the proceedings. In determining the amount of costs recoverable, the court will have regard to these costs budgets and will be unlikely to award more than the costs set out in these budgets without good reason.

The court will also have regard to the proportionality of the costs incurred by reference to:

- the sums in issue in the proceedings and/or the value of any non-monetary relief;
- the complexity of the litigation; and
- any conduct of the parties which may have generated additional unnecessary work.

Higher awards of costs can also be made where a party makes a settlement offer (a "Part 36 offer") that is refused, and then obtains a better result as a consequence of the hearing.

11.3 Interest Awarded on Costs

The court has the power to impose interest on costs, including from a date earlier than the date of the costs award in order to compensate the recipient for the period between incurring their costs and receiving payment. However, the default position is that interest on an award of costs runs from the date of the order.

The default interest rate on judgment debts (including in respect of costs) in the High Court is currently 8% per annum.

12. Alternative Dispute Resolution

12.1 Views of Alternative Dispute Resolution within the Country

There are a number of different forms of alternative dispute resolution (ADR) available in England and Wales including mediation, arbitration (see **13. Arbitration**), expert determination and early neutral evaluation.

Mediation is a flexible and confidential form of ADR and generally involves the appointment of a neutral third party to help achieve a settlement. The parties are never under an obligation to settle, therefore mediation can be a useful precursor or complement to more formal dispute resolution methods such as litigation or arbitration.

Expert determination is usually sought where a valuation is required or where expert opinion is needed on a technical point. The process involves a binding contractual commitment between the parties to abide by the findings of the expert. This arrangement may be put in place on an ad hoc basis after a dispute has arisen, but is more commonly provided for in commercial agreements as a way to limit potential legal costs in the event of a dispute.

Early neutral evaluation involves the appointment of a neutral party, often a judge or QC, who hears submissions from the parties and gives a view as to which party is likely to be successful at trial. The process is non-binding and does not generally require a party to settle as a result of the evaluation.

12.2 ADR within the Legal System

The pre-action protocols set out in the Civil Procedure Rules (see **3.1 Rules on Pre-action Conduct**) note that litigation should be a last resort and require the parties to consider negotiation or ADR before commencing court proceedings and continue to consider whether they might reach a settlement throughout the proceedings.

If a party refuses unreasonably to participate in ADR, the court may stay the proceedings and require the parties to participate in ADR or impose costs sanctions on the reluctant party at the end of trial. It has been held that a failure to respond will generally be considered unreasonable.

For most claims, the parties are required to file directions questionnaires in advance of the first case management conference, which ask for confirmation that the legal representatives have explained to their client the need to try to settle and the possibility of costs sanctions if they refuse. The directions questionnaire also asks the party to confirm whether they wish a one-month stay in order to attempt settlement.

In recent years, the Civil Justice Council has published several recommendations aimed at introducing methods to encourage parties to settle their disputes by way of ADR rather than litigation. Compulsory ADR was not proposed and remains unlikely for the foreseeable future.

12.3 ADR Institutions

There are a number of institutions which promote or offer a platform by which various forms of ADR can be pursued.

The London Court of International Arbitration (LCIA) offers a set of procedural rules to govern arbitral proceedings and mediation, as well as model dispute resolution clauses for parties to incorporate into their contracts. The Chartered Institute of Arbitrators offers training and professional qualifications for arbitrators and mediators.

The Centre for Effective Dispute Resolution (CEDR), a not-for-profit organisation headquartered in London, encourages the use of ADR to resolve disputes, as well as offering a range of mediation services, including mediation training and advice on negotiation and conflict management.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

The Arbitration Act 1996 governs the conduct of arbitrations seated in England and Wales, although parties can contractually agree that any institutional or other rules may also apply. Additional provisions are typically recorded in a standalone arbitration agreement or within an arbitration clause of a contract.

The UNCITRAL Model Law has not been adopted in England and Wales, although the drafting of the Arbitration Act was influenced by it. The Arbitration Act is based upon three principles:

- that, through arbitration, disputes should be resolved fairly by an impartial tribunal without unnecessary delay or expense;
- that parties should be free to agree how their disputes are resolved (subject only to such safeguards as are necessary in the public interest); and
- that domestic courts should not intervene unless necessary and authorised by the Arbitration Act (as a general rule, the court will only intervene when it is satisfied that the applicant has exhausted any means available via the arbitral process).

These founding principles provide parties significant autonomy to determine the composition of the tribunal, the procedural rules, and the basis upon which the tribunal is to render an award.

13.2 Subject Matters Not Referred to Arbitration

In principle, virtually all commercial disputes can be referred to arbitration. There are a few exceptions to this such as disputes as to breach of statutory employment rights, insolvency and criminal matters.

13.3 Circumstances to Challenge an Arbitral Award

There are three ways in which an arbitration award can be challenged in an English court under the Arbitration Act. These are:

- a challenge of the tribunal's substantive jurisdiction;
- a challenge on the ground of serious irregularity affecting the tribunal, proceedings or award; and/or
- an appeal on a point of law.

If a party to fails to challenge the arbitral proceedings or the award promptly or within a specified time limit, it may lose the right to object at all.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

The Arbitration Act provides for the enforcement of awards made domestically as well as the recognition and enforcement of foreign arbitral awards.

Domestic Arbitral Awards

Domestic arbitral awards can be enforced by summary procedure or by action on the award for failure to comply (although this latter method is rarely used in practice). An award can be enforced summarily in two ways: it can be enforced in the same manner as a judgment or order of the court, or it can be "converted" into a court judgment. Both require the enforcing party to apply to the court for permission. If permission is granted, all methods available to enforce a court judgment can be used to enforce the award.

Foreign Arbitral Awards

With regard to foreign arbitral awards, the UK is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention"). The Arbitration Act establishes a specific regime for the enforcement of awards made in the territory of a state that is also a party to the New York Convention. To enforce such awards, parties must apply to the English court, attaching originals (or certified copies) of the arbitration agreement and the award. The parties' application may be decided on paper or following an oral hearing.

If enforcement is permitted, the court will make an order which will specify a period of time (typically 14 days if the other party is within the jurisdiction) for the other party to apply to set aside the order. If this period of time elapses, or once the other party's application to set aside is unsuccessful, the award may be enforced in the same way as an English judgment. There are only limited grounds upon which the English court can refuse to enforce a New York Convention award. The Arbitration Act mirrors the New York Convention in this respect.

For foreign arbitral awards that are not subject to the New York Convention, an alternative, although similar, procedure of recognition and enforcement must be followed. A key difference, however, is that the English court has greater scope to refuse to enforce the award.

14. Recent Developments

14.1 Proposals for Dispute Resolution Reform

The Brexit "transition period" is due to end on 31 December 2020, the impact depending heavily on the terms of the agreement (if any) reached between the UK and the EU, which will have notable implications for the UK's procedural laws – particularly in respect of matters of jurisdiction and choice of law.

There has been some indication that changes will be made to clarify (and potentially ease) the impact of Brexit on litigants. The UK's Civil Procedure Rule Committee has recently indicated that litigants will not need permission from the English court to serve a claim out of the jurisdiction where the claim is within an English choice of court clause. This would effectively preserve the position as it stands under the Recast Brussels Regulation (see **3.3 Jurisdictional Requirements for a Defendant**).

Beyond Brexit, there continue to be discussions around the Disclosure Pilot Scheme that is operating in the Business and Property Courts (see **5.3 Discovery in This Jurisdiction**). The Pilot was intended to make disclosure more straightforward and cost-effective. Reports issued by the Disclosure Working Group, which oversees the Pilot, show that court-users feel it is having the opposite impact. The Pilot has been extended through to the end of 2021 and the Disclosure Working Group has discussed some possible revisions to the Pilot's processes (most notably around the requirements for document preservation, simplifying the Disclosure Review Document, and clarifying the disclosure "models"). It remains to be seen whether the Pilot's approaches will become permeant fixtures.

14.2 Impact of COVID-19

The COVID-19 pandemic has increased the speed at which English court processes are modernising, particularly (and unsurprisingly) in respect of the use of remote hearings. Other parts of the English process remain unchanged – eg, there have been no changes to the standard approach to limitation periods (see **3.2 Statutes of Limitations**).

Modernisation was already in progress in the UK – the move towards a greater embrace of technology and virtual hearings began in 2016. However, the effect of the pandemic has been that reforms that would normally take months or years to implement have instead come into effect in a matter of days. Most notably, the Protocol regarding Remote Hearings, which encourages the use of such hearings "wherever possible" and provides practical guidance in respect of how those hearings should take place, was issued by a collection of senior judges on 20 March 2020.

The shift appears to have been successful, with a range of remote hearings having taken place across the various levels of the judiciary. In doing so, the courts have sought to ensure core constitutional values are retained. The Protocol regarding Remote Hearings is clear that "remote hearings should, so far as possible, still be public hearings" and that "the principles of open justice remain paramount".

Seladore Legal Limited is a disputes-only law firm specialising in major and complex litigation and arbitration, with a particular emphasis on multi-party, multi-jurisdictional disputes. By specialising solely in litigation, the firm minimises the prospect of commercial and legal conflicts of interest. It is made up of experienced litigators who have previously worked at other top-tier UK, USA and international law firms and regularly acts in significant commercial disputes across a range of different sectors.

Authors

Simon Bushell is the senior partner at Seladore Legal Limited, specialising in international commercial litigation and arbitration, including civil fraud and asset tracing. Simon has over 28 years' experience in high-stakes commercial litigation. He acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in co-ordinating parallel cross-border disputes and proceedings. Simon became involved in Russian and CIS-related disputes nearly two decades ago and continues to handle matters with a connection to the region.

Gareth Keillor is a partner at Seladore Legal Limited. Gareth has over 13 years' experience in a wide range of commercial disputes of varying size and complexity, including High Court litigation and offshore jurisdictions (most notably BVI, Cayman Islands, Isle of Man, Guernsey, Jersey and Bermuda), as well as arbitrations. He has acted for a wide variety of international clients, from major companies to ultra-high net worth individuals and has a particular interest in fraud cases, commercial contract disputes, shareholder disputes and disputes involving injunctive relief. He has considerable experience in disputes arising out of Russia, Ukraine and the CIS.

Nick Chapman is a New Zealand qualified senior associate at Seladore Legal Limited. He has a wide range of experience in complex and high-profile cases. He specialises in domestic and international disputes, with a particular focus on banking and financial services litigation, class action litigation, as well as TMT, public and insurance law issues. He has notable in-house experience, having undertaken an 11-month secondment with a major telecommunications provider.

Seladore Legal Limited

24 Greville Street
London
EC1N 8SS

Tel: +44 (0)20 3008 4432
Email: info@seladorelegal.com
Web: www.seladorelegal.com

SELADORE LEGAL

Trends and Developments

Contributed by:
Simon Bushell, Gareth Keillor and Kevin Kilgour
Seladore Legal Limited see p.30

Introduction

UK litigation in 2020 has seen the continuation of trends from previous years, but has also been very significantly impacted by COVID-19. This has not only seen a big shift in the use of technology in litigation, but has also seen certain types of claims come to the forefront.

The trends started in 2020 as a result of COVID-19 are in all likelihood set to continue for some time yet. Indeed, together with the potential impact of Brexit, it is predicted there will be a marked increase in the amount of litigation in the UK over the coming years.

Impact of COVID-19 on English Litigation

The rise of remote and hybrid hearings

When the impact of COVID-19 initially began to be felt in the UK at the beginning of Spring 2020, litigation practitioners (like everyone else) were not sure how long the pandemic would last or how easy it would be to co-ordinate litigation outside of the office and court environments.

There was an initial rash of short adjournment applications seen by English courts (and indeed arbitral tribunals) as parties tried to grapple with the logistical challenges. However, these early delays did not last long, as judges very quickly began to show little sympathy for practitioners who sought to avoid hearing dates on the basis that COVID-19 was affecting preparation.

This judicial attitude was shaped to a large degree by strongly worded statements released by the Lord Chief Justice in late March 2020 in which he made it clear that, to avoid the inevitable backlogs that would otherwise arise, judges should not adjourn hearings wherever possible and should embrace technology to ensure hearings could go ahead. Shortly thereafter, the new Coronavirus Act 2020 came into force and introduced provisions which expanded the availability of video links in court proceedings.

As a result, UK litigators very quickly saw the rise of fully remote and hybrid court hearings (where some of the participants attend court and others attend using an internet video or audio link). By the end of March 2020, around 500 remote or hybrid court hearings had taken place, but by the end April 2020 that number had already grown to around 3,000.

Influential decisions for commercial litigators

For commercial litigators, two hearings in particular helped to shape attitudes throughout the profession. The first was The National Bank of Kazakhstan v Stati and Ors [2020] EWHC 916 (Comm). The case attracted a good deal of press attention and was described as a "first for commercial court" as it saw a large commercial hearing take place remotely over four days using the internet video service, Zoom. Significantly, it was the first English commercial court case ever to be streamed live on YouTube. Commercial court practitioners tuned in from their home offices to watch precisely how a remote hearing like this, involving cross-examination of witnesses, would work. The hearing ran smoothly and set the tone for litigation throughout 2020.

The second case of particular significance at that time was Re Blackfriars Ltd [2020] EWHC 845 (Ch). This was a pre-trial review in respect of the trial of a claim said to be worth more than GBP250 million. It was due to take place over five weeks in June 2020 and involved four witnesses of fact and 13 expert witnesses. The claimant liquidators sought an adjournment of the trial citing the practical difficulties created by the UK-wide "Lockdown" which the UK Government had imposed. In his decision, John Kimbell QC (sitting as a Deputy High Court judge) acknowledged the technological and practical issues the parties would face, but refused to adjourn the trial to 2021.

As a result, throughout 2020, disputes lawyers have become well accustomed to co-operating in order to ensure the smooth running of remote hearings. In litigation, courts have issued guidance in relation to the preparation and handling of electronic bundles, and in arbitrations, parties have commonly agreed virtual hearing protocols. Instructing solicitors and advocates have also had to find new ways of working. WhatsApp groups are now regularly set up for the provision of instructions during hearings and have taken the place of the hurriedly scribbled post-it notes that were often passed across the benches to advocates in ordinary court hearings.

It remains to be seen how quickly in person commercial court hearings resume during 2021, but it is safe to say that courts and practitioners now have a new found confidence in using technology to conduct remote court hearings in a smooth and cost effective way. In all likelihood, even once the pandemic is past, remote and hybrid hearings will continue to take place far more regularly than was ever the case in previous years.

How has COVID-19 informed causes of action?

Although the use of technology enabled court hearings to go ahead, COVID-19 still severely impacted business and investment decisions across the board. That included decisions to commence disputes. In the early months of the pandemic, businesses appeared in the main to focus on urgent issues arising from the pandemic and tended to put decision-making in relation to commencing court claims on hold.

As a result, the Lord Chief Justice's Report 2020 (which was laid before Parliament in November 2020) reported that there had been a fall in receipts of High Court claims throughout April and May 2020. However, overall, the number of new High Court claims being filed in 2020 has remained as high as it was in 2019. Practitioners are also optimistic that, following the easing of the pandemic, the coming years will see a fresh wave of litigation.

In particular, it is anticipated that the supply issues encountered by businesses during the pandemic will see an increase in claims involving arguments concerning force majeure and frustration, with suppliers seeking to rely on contractual exclusions to excuse non-delivery or to support termination. The courts have already begun to see cases of this nature, such as Fibula Air Travel v Just-US Air [2020] EWHC 3048 (Comm) which was decided at the end of October 2020.

Claims arising from corporate insolvency and insurance

It is also likely that, as a result of the issues facing businesses in 2020, that English courts will experience a rise in the number of claims arising from or involving corporate insolvency, as well insurance claims in respect of business interruption. Indeed, in an effort to streamline the number of likely cases, 2020 saw the High Court give judgment in the landmark business interruption insurance test case of The Financial Conduct Authority v Arch and Ors [2020] EWHC 2448 (Comm). In expedited (and live-streamed) proceedings, the court considered 21 sample policy wordings from eight insurers against certain agreed factual assumptions and, in the majority of cases, found in favour of the FCA (who had advanced claims for policyholders). Amongst the policy wordings considered were provisions providing cover resulting from business interruption arising from diseases and hindered access to premises.

Fraud and asset recovery

As can often occur following times of financial difficulty, it is also expected that claims involving fraud and asset recovery will increase in a manner akin to that seen following the financial crisis of 2008/09 (during which period, KPMG reported that the UK courts dealt with cases of fraud exceeding GBP1.1billion in value). According to KPMG's latest published estimates (at the time of writing), the first half of 2020 saw the value of alleged fraud in London and the South East of the UK alone triple to around GBP500 million (of which commercial businesses were said to be the biggest victims).

In addition to claims against fraudsters and their assets (including claims for freezing relief and disclosure), it is expected that claims against professional third parties for failing to protect customers and clients against fraud will continue to be seen. For at least the last couple of years, English courts have shown a tendency to hold professional third parties to account, and the claims brought in 2020 suggest that victims of fraud will continue to try to exploit this avenue of recovery against parties with "deep pockets".

For example, 2019 saw the Supreme Court (in Singularis v Daiwa [2019] UKSC 50) uphold the first ever successful claim against a bank for breach of its Quincecare duty not to make payments out of an account where there are grounds for suspecting the payment instruction is fraudulent. On the back of this, 2020 has seen a number of claims involving allegations that banks and other financial institutions have breached their Quincecare duty (see, for example, the case of Stanford International v HSBC [2020] EWHC 2232 (Ch) concerning an alleged Ponzi scheme).

Other professional third parties have also seen similar claims of breach of duty by victims of fraud. For example, in 2020, the Court of Appeal (in the case of Assetco Plc v Grant Thornton UK LLP [2020] EWCA Civ 1151) confirmed that the auditor, Grant Thornton, was liable for losses arising from its failure to detect instances of management fraud. In October 2020, the Supreme Court even upheld a claim against a solicitor for negligence in connection with a fraudulent mortgage transaction, where the claimant was herself party to the underlying fraud (see Stoffel v Grondona [2020] UKSC 42).

Cryptoassets

There has been a continuation of litigation concerning cryptoassets throughout 2020 and this is only predicted to grow. 2019 saw a number of cases seeking remedies in respect of cryptoassets. Importantly, these included the claimant-friendly decision in the case of Ang v Reliantco [2019] EWHC 879 in which the court confirmed that even a sophisticated investor of substantial amounts of cryptocurrency could use consumer law to avoid an exclusive jurisdiction clause and so sue in the English High Court.

The cases in 2019 culminated in the "Legal Statement on Cryptoassets and Smart Contracts" which was issued by the UK Jurisdiction Taskforce in November 2019 and which (together with the subsequent Commercial Court decision in AA v Persons Unknown [2020] WLR (D) 50) clarified that cryptoassets can be property and so can, for example, be the subject of relief

from the court such as proprietary and freezing injunctions. As a result, 2020 has seen cases such as Toma v Murray [2020] EWHC 2295 in which a claimant in a proprietary tracing claim sought to continue an interim injunction restraining the defendant from dealing with Bitcoin held in a coin depot account.

In 2020, a report by Willis Towers Watson suggested that COVID-19 has seen an increase in appetite for cryptocurrency among investors, but also notes that this has been accompanied by a marked increase in cryptocurrency fraud, including cryptocurrency investment scheme scams (where scammers impersonate legitimate crypto traders). It stands to reason therefore that the trend for litigation concerning cryptoassets, and particularly claims involving allegations of fraud, is likely to continue.

Other Trends and Developments Seen in 2020

Litigation funding

Litigation funding has continued its move into the mainstream throughout 2020 with a number of London law firms having struck portfolio deals with litigation funders (an arrangement which allows multiple claims to be funded under one agreement). In addition, there has been increasing interest from law firms and other professionals such as forensic investigators in offering funding for litigation themselves. Litigation funders' assets are reported to have grown significantly in the last five years and, in 2020, funders have, on the back of expectations about future appetite for litigation arising from COVID-19, looked to raise funds and been successful in doing so (with litigation often considered to be a recession proof investment by investors).

Whilst this anticipated growth in the litigation funding market should help to fuel the amount of UK litigation, the prevalence of funding today now means that funding has become an identified strategy point in litigation. Defendants can often quickly identify when a claimant (or group of claimants) is being funded and may look to gain a strategic advantage by "playing the funder, not the claimant", by for example seeking to increase costs risk for the funder through interlocutory applications, and particularly applications for security for costs and non-party costs orders against funders.

The potential effectiveness of such strategies has only increased in 2020 as a result of the Court of Appeal's decision in the case of ChapelGate Credit v James Money [2020] EWCA Civ 246 in which the court declined to apply the Arkin cap (which caps a litigation funder's liability to the amount of funding provided) and instead ordered the funder to pay the full amount of adverse costs of GBP4.3 million (in a case where the funder had only provided GBP1.25 million of funding).

Group litigation/class actions

Although class actions are not as common in the UK as they are in, say, the USA or Australia, the last few years have seen an increase in class actions which has in part been encouraged by successes achieved by litigation funders and claimant law firms, such as the substantial settlement which was reached in 2017 in the RBS rights issue litigation which arose from the last financial crisis.

This trend has continued in 2020 which has seen the English courts dealing with high profile class actions concerning well-known names such as Mastercard, Volkswagen, BHP Billiton, Morrisons Supermarkets and British Airways.

It is thought that the recent rounds of fund raising by litigation funders (who are often key in initiating class actions) may see a growth in this area in the coming years. A particular potential growth area in this regard could well be cyber-related class actions. Both the British Airways and Morrisons class actions mentioned above related to data breaches. Further, in late 2019, the Court of Appeal considered the important case of Lloyd v Google [2019] EWCA Civ 1599 and decided to allow a representative action (which had an effect similar to an "opt out" class action) to proceed against Google in respect of alleged use of browser-generated information without consent. That decision is expected to be reconsidered by the Supreme Court in late 2020 or early 2021. If the claimants are successful, this could well open the floodgates for cyber-related class actions and, according to recent press reports, there are already cyber-related class actions on the horizon against Virgin Media, Oracle, Salesforce and others.

Clarification of the rule against 'reflective loss'

The rule against reflective loss is an English law principle which prevents shareholders of companies claiming for loss which is "reflective" of loss suffered by a company (and so reinforces the rule that, in an action for a wrong done to a company, the company is the proper claimant). There had been some uncertainty as to whether the rule only affected shareholders, or whether it also prevented creditors of a company taking action where the company itself had a cause of action available to it.

However, in a significant decision in 2020, the Supreme Court in Sevilleja v Marex Financial Limited [2020] UKSC 31 (a case concerning the recently recognised tort of asset stripping to avoid a judgment) has now conclusively determined that there exists a "bright line" between the position of shareholders (whose claims may be barred by the reflective loss rule) and other parties, such as creditors, whose claims are not affected by the rule.

The effect of this decision is that creditors of insolvent companies may now have more direct routes to recovery against third parties available to them (using, for example, economic torts such as causing loss by unlawful means), rather than necessarily having to participate in (or even fund) a liquidation of the insolvent company in order to get redress.

Procedural reforms in commercial litigation

English commercial litigators have in 2020 had to continue to get to grips with the disclosure pilot. The pilot is a series of rules introduced in 2019 which changed the way in which disclosure of documents has been approached in most English High Court commercial disputes. The pilot was introduced with a view to addressing concerns about the cost of disclosure exercises in commercial cases, some of which had become enormous undertakings as a result of the vast amount of electronic data involved.

Key elements of the pilot are:

- it requires parties to produce "initial disclosure" with their statements of case of key documents;
- it relies on a good deal of co-operation between the parties to produce a "Disclosure Review Document" which includes agreeing a list of issues for disclosure; and
- it offers the court a menu of disclosure options, which are intended to allow the court to pick a process for exchanging documents and/or limiting disclosure which is tailored to the specific case.

In 2020, further reforms were introduced to the disclosure pilot (aimed at, for example, keeping "initial disclosure" proportionate) and a number of clarifications provided. This was in response to feedback from practitioners, as 85% of practitioners were reported to have said that the pilot did not save costs overall and 72% said that the pilot in fact increased burdens on the court.

The pilot has now been extended for a further year and will run until the end of 2021, and so we will see whether the reforms have the effect of changing attitudes in the profession.

There are also reforms afoot in relation to witness evidence in English commercial cases. In October 2020, a report by the Witness Evidence Working Group suggesting reforms was endorsed by the English Business and Property Courts. The proposed reforms are aimed at streamlining witness evidence, including by reducing references to other documents in witness statements. These reforms are being introduced in light of concerns that witness statements have become "over-lawyered" and too long and argumentative. A process is now underway to identify cases and firms to "test drive" the proposed reforms.

Conclusion – a Look Ahead to 2021

The trends identified above all look set to continue into 2021. With the UK and other nations having entered a second "lockdown" in November and December 2020 due to a second wave of COVID-19 cases, notwithstanding the workarounds many have found, businesses and supply chains look likely to continue to suffer interruption, at least until a large scale vaccination has taken place.

Brexit of course is also likely to be a hot topic entering 2021. It remains to be seen whether Britain will end 2020 and the transition period with or without a further deal, and whether the new trading conditions will have the effect of exacerbating the difficulties presently being felt by businesses.

In the short term, at least, further economic turbulence looks likely and as this tends to create the conditions for disputes to arise, the outlook for the UK litigation market presently looks buoyant.

Seladore Legal Limited is a disputes-only law firm specialising in major and complex litigation and arbitration, with a particular emphasis on multi-party, multi-jurisdictional disputes. By specialising solely in litigation, the firm minimises the prospect of commercial and legal conflicts of interest. It is made up of experienced litigators who have previously worked at other top-tier UK, USA and international law firms and regularly acts in significant commercial disputes across a range of different sectors.

Authors

Simon Bushell is the senior partner at Seladore Legal Limited, specialising in international commercial litigation and arbitration, including civil fraud and asset tracing. Simon has over 28 years' experience in high-stakes commercial litigation. He acts for a broad range of clients, including large corporates, private equity houses, financial institutions, banks and ultra-high net worth individuals, in addition to foreign government agencies and state-owned companies. He has undertaken investigations into complex, worldwide frauds, conspiracies and insolvencies, and has wide experience in co-ordinating parallel cross-border disputes and proceedings. Simon became involved in Russian and CIS-related disputes nearly two decades ago and continues to handle matters with a connection to the region.

Kevin Kilgour is a partner and solicitor advocate at Seladore Legal Limited, with more than 13 years' experience of commercial litigation, mediation and arbitration in a wide variety of sectors. He has particular experience of acting in relation to complex contractual disputes, tort claims (including fraud and economic torts), shareholder and joint venture disputes, and has acted on a number of Russian and CIS-related matters. He regularly advises on applications for peremptory relief, including freezing injunction applications.

Gareth Keillor is a partner at Seladore Legal Limited. Gareth has over 13 years' experience in a wide range of commercial disputes of varying size and complexity, including High Court litigation and offshore jurisdictions (most notably BVI, Cayman Islands, Isle of Man, Guernsey, Jersey and Bermuda), as well as arbitrations. He has acted for a wide variety of international clients, from major companies to ultra-high net worth individuals and has a particular interest in fraud cases, commercial contract disputes, shareholder disputes and disputes involving injunctive relief. He has considerable experience in disputes arising out of Russia, Ukraine and the CIS.

Seladore Legal Limited

24 Greville Street
London
EC1N 8SS

Tel: +44 (0)20 3008 4432
Email: info@seladorelegal.com
Web: www.seladorelegal.com

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