



Global Trends

Simon Bushell is described as a forceful, determined and clear-sighted litigator and has consistently been ranked in *Chambers UK* from the early days of his career. He is frequently lauded in *The Legal 500*, having been recently inducted into its Hall of Fame for Civil Fraud and praised as a Leading Individual in Commercial Litigation. He has regularly featured in *Who's Who Legal*, and was ranked as Top Recommended in both corporate law and litigation funding for *Spear's 500* in 2020.

Simon 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 coordinating parallel cross-border disputes.

Prior to founding Seladore Legal with Gareth Keillor, Simon was a partner at Herbert Smith Freehills from 1997 to 2013, after which he joined Latham and Watkins and became chair of their litigation department in London. Simon has more than 30 years' experience in high stakes commercial litigation.

It goes without saying that the past year has been a tumultuous one for the entire world, with, sadly, a large number of covid-related deaths and the worst economic crisis since the great depression. According to reports, by September 2020 every advanced economy was in recession or depression and all emerging economies were in recession. The pandemic has seen major changes to the ways we live our lives and operate businesses. While it would require a crystal ball to know how many of these changes will be here to stay, it seems inevitable that there will have been a paradigm shift in the way businesses and the economy operate, in particular through remote working and the decentralisation of many businesses. This, in turn, will impact on the dispute resolution market.

In our global overview last year, I referred to the sudden boom in the use of video conferencing in our profession, including by courts. At that point, I noted how courts were functioning remarkably well at that stage in the pandemic. Now, more than a year after the courts in England and Wales moved to remote working, hearings continue to be progressing largely smoothly.

A number of very large and complex cases have taken place as remote hearings in England. According to figures from the English Commercial Court, 498 hearings took place in the Commercial Court between March 2020 and September 2020, of which 493 took place remotely, with one being hybrid and four being in person. There has also been an almost total switch from hard copy paper bundles to electronic court bundles, which has meant a significant reduction in costs as well as being more beneficial for the environment.

Furthermore, while for most of us there has been little, if any, international business travel over the past year, in some ways the world has become more connected. The familiarity that we all now have with video conferencing means that we can connect much more easily with colleagues, peers and clients (and potential clients) in other jurisdictions. For those of us who engage in cross-border disputes, this has been a welcome change and has allowed lawyers and parties to attend (by video) hearings in other jurisdictions that they would not otherwise have been able to easily participate in. This all feels like progress.

There have also been other legal innovations. I mentioned last year that the UK Financial Conduct Authority had recently announced an intention to bring a test case in the English High Court to assist with the clarification of relevant terms in relation to business interruption insurance policies. This was something that was of fundamental importance to many businesses and it was plainly necessary that there was clarity for the business and the insurance market quickly. The litigation tool that was used to deal with this was a test case in which all the major insurers were parties. A representative sample of 21 types of policy issued by eight insurers was selected and all parties agreed to bear their own costs in relation to the litigation. The case

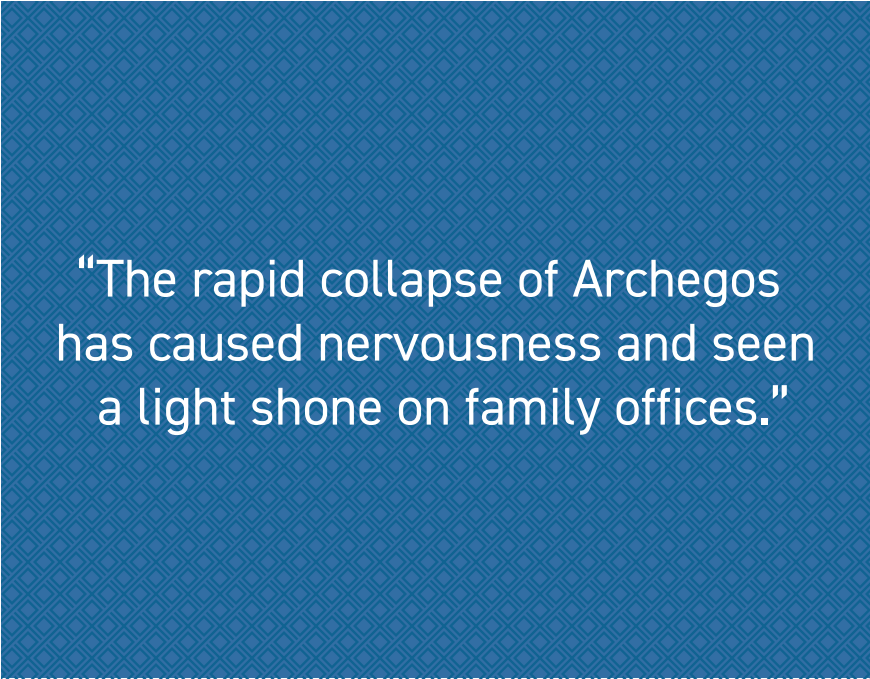


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proceeded incredibly quickly through the courts, with proceedings commencing in June, judgment at first instance in September and judgment from the Supreme Court in January 2021. This demonstrates that, despite a reputation for delay in litigation, in the most important cases, the courts can move very quickly indeed. It has been estimated that 370,000 policyholders may have been affected by the outcome of the test case.

While, hopefully, we are getting towards the end of the pandemic, the full economic impact is yet to hit home. It is inevitable that there will be a huge increase in insolvency-related work as businesses that have, to some extent, been kept alive on life support through the economic measures taken by governments across the world founder. Ultimately, this is part of the process of capitalism and it will allow new, and more efficient, businesses to spring up. However, for litigators it is also likely to lead to an increase in work, particularly in relation to the types of investigations and claims that will arise out of collapsed businesses.

There have already been some significant casualties. The sudden and spectacular collapse of Greensill Bank is likely to have knock-on effects, both politically in the United Kingdom in relation to lobbying and for litigators. In relation to litigation,



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a number of claims have already been commenced in the United States, and it seems inevitable there will be a major investigation, which in turn is likely to result in litigation. Further, third parties will be drawn in. There are already reports that Credit Suisse will be the subject of litigation and it is likely that, as time goes on, more parties will become embroiled in the fall out.

Similarly, the rapid collapse of Archegos has caused nervousness and seen a light shone on family offices, which to date have operated somewhat out of the spotlight. It may be that family offices now find themselves subject to the scrutiny of greater regulation and potentially litigation.

Finally, while we are now all well used to the new way of remote working, a recent English case is a warning as to the need to ensure that in the move to remote working lawyers remain as careful as ever. A junior lawyer who, like everyone else in the firm was working remotely, omitted to include a claim form (the document starting legal proceedings) from an email purporting to serve the claim, which included a number of other documents. The email was sent on 10 September, but the error was not spotted until 14 September. By the time the error had been spotted, a limitation period had expired and the claim was therefore out of time.

The court was not willing to extend the time and therefore the proceedings (said to be worth circa £683,000) were declared a nullity. The court recognised the difficulties that arise from remote working, particularly in supervising more junior staff, but was not willing to grant any leniency.

Given that it seems inevitable that some form of remote working will become the norm for law firms, this case is a lesson of the importance of ensuring that practitioners also develop new systems to ensure junior staff are fully supervised when working remotely. It is also a reminder that there may well be disputes arising out of the new way of working, including when there is, as there inevitably will be, a data or confidentiality breach due to people working remotely.

Finally, a growing area across the globe that I think it is important to keep an eye on is litigation relating to discrimination and social justice, and environmental issues. There is a 'perfect storm' of a growing awareness among society of these issues, and an increase in the availability of litigation funding and a growth of class action litigation, which enables individuals who might otherwise not have been able to pursue such claims to do so.

Furthermore, in England at least, the Supreme Court again confirmed this year that there is a basis, in certain cases at least, for a parent company to be liable for the acts of its subsidiaries where it is responsible for the management of those subsidiaries. I therefore expect to see a significant increase in environmental, social and corporate governance-related litigation.



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