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# Litigation & Dispute Resolution

Fifth Edition

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# England & Wales

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## Procedural

New developments

Last year saw the introduction of innovative changes to certain English Court procedures with the launch of the Financial List and the running of pilot schemes, namely: the Shorter Trials Scheme; the Flexible Trials Scheme; and the Financial Markets Test Case Scheme (the latter introduced via the Financial List). The common underlying objective of these new schemes is to enhance the efficiency and speed of procedures to ensure that parties continue to choose the jurisdiction of the English Courts to resolve international and financial disputes. At present, the schemes are confined to London. All three schemes commenced on 1 October 2015.

In the UK, the Rolls Building in London is the specialist centre for the resolution of international high-value financial, business and property litigation. It brings together the Commercial Court, the Technology and Construction Court, the Chancery Division (including the Patents Court and the Companies Court) and the London Mercantile Court. The Shorter Trials Scheme and the Flexible Trials Scheme were introduced into all courts in the Rolls Building. The aim of the schemes is to streamline court procedures for commercial and business cases, thereby saving time and cost for the parties, by achieving shorter and earlier trials. The Shorter Trials and the Flexible Trials pilot schemes will each run for a term of two years, terminating on 30 September 2017. Neither of these schemes is mandatory.

In summary, the two schemes address the following:

1. *The Shorter Trials Scheme* – The trial is to commence within ten months of the issue of legal proceedings. The maximum length of the trial is four days and judgment is to be delivered within six weeks of the trial. This scheme is intended to capture those cases that can be fairly tried on the basis of limited disclosure and oral evidence (whether by a witness or an expert). It is not suitable for cases that include allegations of fraud or dishonesty, or multiple issues or multiple parties.
2. *The Flexible Trials Scheme* – The parties to the litigation under the Flexible Trials Scheme agree to adapt the trial procedure normally prescribed under the Civil Procedure Rules (**CPR**) to suit their particular case. Trial procedure in the English Courts includes pre-trial disclosure, witness evidence, expert evidence and submissions at trial. This scheme offers the parties the flexibility to limit disclosure and confine oral evidence at trial to the minimum necessary to enable the fair resolution of disputes.

A new practice direction in the CPR, Practice Direction 51N, was created to provide further rules and guidance regarding the operation and mechanics of the Shorter Trials Scheme and


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the Flexible Trials Scheme. The parties must agree that their case is sufficiently suitable for them to opt-in to either scheme to benefit from the cost and time savings on offer. It will be interesting to see during the course of the two-year term whether parties elect for these schemes and whether the schemes achieve their intended aims.

The introduction of the Financial List resonates with the English Courts' approach to identifying and addressing emerging challenges in dispute resolution. It operates as a joint initiative involving both the Commercial Court and the Chancery Division. The Financial List is a specialist cross-jurisdictional list set up to handle claims related to the financial markets with the aim of providing efficient, targeted and high-quality financial dispute resolution.

The requirements for a case to be included in the Financial List are identified in CPR Rule 63A.1(2) as:

1. the claim must be valued at £50m or more; or
2. the claim requires particular expertise in the financial markets; or
3. the claim raises issues of general importance to the financial markets.

"Financial markets" has been defined broadly pursuant to CPR Rule 63.A1(3) and includes fixed income markets, the equity markets, the derivatives markets, the loan markets, the foreign currency markets and the commodities markets.

It is intended that the introduction of a Financial List will establish itself as an international benchmark, showcasing the quality and expertise of the English judiciary. This is supported by the Lord Chief Justice of England & Wales, who has noted that: "*The new list will not only encourage international litigants to continue to use our courts, the principles they embody and their jurisprudence, but in doing so they will help to raise standards. Setting the bar high here will help to raise the bar high across the world.*"[1]

As noted above, the Financial List also introduced a pilot Financial Markets Test Case Scheme. As with the Shorter Trials and Flexible Trials Schemes, this pilot has a term of two years, terminating on 30 September 2017. The scheme[2] facilitates the resolution of issues of general importance to the financial markets which requires immediate relevant English law guidance, without the need for a present cause of action between the parties to the proceedings. This scheme enables the English Court to grant declaratory relief in the action because it is in the public interest to do so. With the more proactive approach of regulators seeking to resolve consumer detriment issues, this could prove to be a valuable innovation, although it seems unlikely to be attractive to purely commercial entities which would not have any desire to seek a precedent simply for the broader benefit of the sector.

<u>Application for relief from sanctions</u>

*Devon & Cornwall Autistic Community Trust v Cornwall Council* [2015], *Mitchell MP v New Group Newspapers Ltd* [2014] and *Denton & Ors v TH White Ltd & Ors* [2014] are the key authorities that provide guidance and principles regarding the application for relief from sanctions under CPR Rule 3.9. Last year witnessed the English Courts bringing some consistency back. A party to litigation who intends to "*steal a march*" on the other party's non-compliance with the CPR should take heed of the recent decisions of the Court, particularly when the breach is not 'serious and significant'.

In the asbestos cancer case of *Albert Marchment v Frederick Wise and another* [2015], the English Court determined whether to grant relief from sanctions despite the claimant's significant breach of a court order by the four-week-late service of his expert's report. At the stage of the hearing when the relief from sanctions application was made, the trial was scheduled to be heard within four weeks.


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To determine whether to grant relief from sanctions, the Court applied the three-stage test in *Denton*. The Court did not provide in-depth analysis on its consideration regarding why the claimant satisfied the first two stages of the test, namely that: (1) the breach in relation to the late service of the expert's report was serious and significant; and (2) there were no good or excusable reasons for why the default occurred. Instead, the Court explored what it considered to be the most important stage, the third stage, which requires an evaluation of all the circumstances of the case so as to deal justly with the application for relief from sanctions.

The Court determined it would grant relief (albeit with costs penalties against the party making the application) based on the following factors:

- the relative non-culpable nature of the errors that caused late service, although serious in their consequences;
- the errors were of the claimant's solicitors rather than the claimant;
- the remainder of the Court's order could have been effectively complied with within the time left to trial had the defendant not opposed the application; and
- the fatal effect on the claimant's legitimate claim of debarring a vital link in his chain of causation and excluding him from a just determination of his claim on its merits.

As a consequence of granting relief from sanctions, the trial date was adjourned. Typically, abandoning a trial date would be a factor of "*great weight*" in determining whether to grant relief from sanctions and the Court appreciated that this would, in practical terms, be determinative the other way. However, the Court considered, among other points, that this was a short and inexpensive trial, and the gap would be filled, so no Court or public resources would be wasted by the adjournment, and the matter could be relisted within a reasonable time.

In a recent case, the Commercial Court considered an application made by the claimant for a retrospective extension of time due to late service of its Particulars of Claim, and a corresponding application made by the defendant to strike out the £27m claim on the grounds that the Particulars of Claim were served late.

Pursuant to a court order, the Particulars of Claim were to be filed and served by Wednesday 14 January 2015. In error, the claimant's solicitors posted the Particulars on Tuesday 13 January 2015 by second-class post instead of first-class post. Due to the specific CPR rules regarding service by second-class post, this resulted in the Particulars arriving with the defendant's solicitors on Thursday 15 January 2015. As such, the Particulars were not served in time, despite the delay in service being measurable in hours rather than days. On Friday 16 January 2015, the defendant's solicitors alerted the claimant's solicitors that valid service of the Particulars had not been effected. In response, the claimant's solicitors promptly sought to address its error by:

- effecting or re-effecting service on Monday 19 January 2015 by delivering a copy of the Particulars by hand, sending them by email and first class post; and
- requesting the defendant's consent to an order for an extension of time.

When the defendant refused to provide its consent, the claimant made a court application for the retrospective extension of time and thereafter the defendant applied for a strike-out.

The Commercial Court held that the justice of the case required an extension to be granted to the claimant, dismissed the application to strike-out, and granted relief from sanctions. With regards to the latter, the Commercial Court determined the delay in service of the Particulars was not a serious or significant breach of the CPR rules. The Court considered the default in service caused no real or significant impact on the course of the litigation


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between the parties, or on other court users. Mr Justice Popplewell perceived the defendant's conduct as "opportunistic" for taking unreasonable advantage of the claimant's mistake "*... in the hope of obtaining a windfall strike-out when it was obvious that an extension of time was appropriate*". The Commercial Court's dismal view of the defendant's behaviour was evidenced further by its order for the defendant to pay the claimant's costs on an indemnity basis.

In the Commercial Court case of *Vincent Aziz Tchenguiz and others v Grant Thornton UK LLP and others* [2015], the claimants served Particulars of Claim which were 94 pages in length. The defendants objected to this service as, pursuant to section C.1.1 of the Commercial Court Guide, the claimants had not first obtained permission of the Commercial Court to serve their Particulars as they exceeded the 25 page limit. The claimants had no choice but to submit an application to the Commercial Court to obtain retrospective permission to serve their Particulars.

The Commercial Court was heavily critical of the Particulars not being concise as the Particulars contained 50 pages of "*... narrative, liberally interspersed with assertions of fraud, falsity, dishonesty and improper motive which* [were] *not at that stage particularised*". It was unconvinced by the reasons provided by the claimants for the necessity of the length, as it considered the Particulars were not properly drafted and disregarded the practice and procedure of the court.

The Commercial Court struck out the Particulars. The Commercial Court went further by disallowing the costs of drafting those Particulars, and imposing a deadline for the claimants to serve within 21 days fresh Particulars of Claim no longer than 45 pages in length.

Within the judgment, Mr Justice Leggatt provided a series of helpful principles regarding the formation of statements of case in English Cases, noting that "*Statements of case must be concise. They must plead only material facts, meaning those necessary for the purpose of formulating a cause of action or defence, and not background facts or evidence. Still less should they contain arguments, reasons or rhetoric*."

## Injunctions

Freezing orders

Freezing orders are powerful tools that restrict the commercial freedom of an individual or entity to dissipate or dispose of assets that could be the subject of enforcement should the claimant be successful in its claim. However, they are susceptible to attempts to circumvent their restrictions. The Supreme Court recently had to consider whether the Commercial Court standard form freezing order, which does not contain a specific provision preventing the respondent from entering into loan agreements, could represent a significant gap in the effectiveness of preserving assets. The concern was that the drawdowns under those loans would not fall within the meaning of "assets" which had been "frozen" under the order.

*JSC BTA Bank* (the **Bank**) *v Ablyazov* [2015] concerned long-running and complex commercial litigation relating to allegations that the respondent presided over the misappropriation of over US$10bn of the Bank's funds over a four-year period for his personal gain. This resulted in the Bank obtaining judgments against the respondent in England & Wales amounting to US$4.4bn. The Bank was successful in obtaining a freezing order on 12 November 2009 (the **Freezing Order**). The Freezing Order was almost identical to the Commercial Court standard form freezing order and prevented the respondent from removing, disposing of, dealing with, or diminishing the value of any assets in England & Wales up to the value of £451m. The Freezing Order did not prohibit the respondent from



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spending £10,000 a week for his ordinary living expenses, or from spending a reasonable amount on his own legal expenses.

Shortly before the Freezing Order was granted, the respondent entered into a loan facility agreement and, following the Freezing Order, three further loan facility agreements. This enabled the respondent to borrow US$10m under each agreement; an aggregate of US$40m. The terms of the loan agreements enabled the proceeds to be used by the respondent at their sole discretion and for the respondent to direct the lender to transfer the proceeds of the loan facility to any third party. All loan agreements had been fully drawn down and the respondent had directed significant payments (including US$16m to his former solicitors; US$500,000 for a property in London; US$119,000 to corporate services providers associated with him; and US$390,000 to lawyers acting for other defendants to the Bank's claims).

The Supreme Court was requested to consider the following issues:

1. whether the respondent's right to draw down under the loan agreements was an "asset" within the meaning of the Freezing Order;
2. if so, whether the exercise of that right by the respondent directing the lender of the relevant loan agreement to pay a sum to a third party constituted "disposing of" or "dealing with" or "diminishing the value" of an "asset"; and
3. whether the proceeds of the loan agreements were "assets" within the meaning of the Freezing Order.

With respect to the first issue, the Supreme Court held that the respondent's contractual right to draw down under the loan agreements did not qualify as an "asset" within the meaning of the Freezing Order against which the Bank could enforce its judgments. Although the right to draw down money under the loan agreements was a *chose in action*, and therefore capable of being the subject of a freezing order, there was "*settled understanding*" in case law that borrowings were not covered by the standard form of freezing order. The Supreme Court declined to overturn such case law, given the need for clarity and certainty. Consequently, the first and second issues were answered in the negative.

However, on the third issue, the Supreme Court held that, on the facts of the case, the proceeds of the loan agreements were "assets" within the meaning of the Freezing Order. Although the respondent did not own the assets (whether legally or beneficially), the respondent had the power directly or indirectly to dispose of or deal with the proceeds of the loan agreements as if they were his own. The Freezing Order did not prevent the respondent from incurring liabilities as "*... the fact that he incurs a liability at some stage to reimburse the lender is immaterial*", but the Supreme Court was clear that "assets" in the Freezing Order included the proceeds of such loan agreements.

In the future, applicants must be attentive when drafting freezing orders to ensure the relevant assets of the respondent fall within the scope of that order. Should a broader meaning be required to be given to a freezing order than the standard form language would accommodate, the applicant should amend the draft form of order appropriately.

Applications for interim freezing orders in support of foreign proceedings are made using *section 25* of the *Civil Jurisdiction and Judgments Act 1982*. Typically the Court will require the applicant to provide an undertaking in damages to the Court in any application for interim injunctions. In the case below, the High Court considered whether applicants for a freezing order in support of foreign proceedings under *section 25* ought also to issue a claim form.

At the time of the hearing for interim relief in *Ras Al Khaimah Investment Authority and others v Bestford Development LLP and others* [2015], the applicants had not issued a substantive claim in either the foreign jurisdiction or in England & Wales.


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The respondents asserted that a claim form ought to be issued by the applicants in accordance with note 25.4.2 to CPR Rule 25.2(3). Pursuant to CPR Rule 25.2(3): "*Where* [the court] *grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced*". Note 25.4.2 states that CPR Rule 25.2(3) "*... applies where the court grants an interim remedy in support of foreign proceedings yet to be commenced (perhaps on the undertaking recited in the order that proceedings will be commenced in the foreign jurisdiction).*"

The High Court confirmed that CPR Rule 25 is only concerned with claims *within* the jurisdiction (i.e. England & Wales). The High Court considered that where the English Court grants interim relief under *section 25* in support of *foreign proceedings*, the order should include an undertaking by the applicant to commence proceedings in the foreign jurisdiction.

Anti-suit injunction

*Section 37* of the *Senior Courts Act 1981* enables the Court to grant anti-suit injunctions to restrain the commencement or continuation of foreign proceedings if those foreign proceedings have been brought in breach of a contractual agreement to refer disputes to arbitration. The Court has a wide power to grant anti-suit injunctions under *section 37* in all cases in which it appears to the Court to be just and convenient to do so. Section 37 does not require the arbitral proceedings to have commenced.

In *Southport Success S.A v Tsingshan Holding Group Co. Ltd* [2015] the Court examined whether, in circumstances where an arbitration had been commenced, it must consider the requirements of s*ection 44* of the *Arbitration Act 1996* when determining whether to grant or refuse an anti-suit injunction rather than the requirements of *section 37* alone. Under *section 44*, the Court also has the power to grant an interim injunction for the purposes of, and in relation to, arbitral proceedings but only in cases of urgency; or where an application is brought by a party to the arbitral proceedings made with the permission of the arbitral proceedings or with the agreement of all parties; or where the arbitral tribunal is unable to, or has no power to, act effectively.

In this case, the claimant issued arbitration proceedings against the defendant in London. The claimant later received notification that the defendant had commenced proceedings in a Chinese court. Relying on *section 37,* the claimant successfully obtained a without-notice anti-suit injunction to prevent the defendant from pursuing those proceedings in China.

At the hearing, the defendant challenged the jurisdiction of the Commercial Court to grant the anti-suit injunction. The defendant alleged that when an arbitration had in fact been commenced, the jurisdiction arose under *section 44* and not *section 37*. Further, the defendant argued that the conditions set out in *section 44* must be satisfied even if the injunction was in fact granted under *section 37*. The defendant in this instance asserted that the conditions of *section 44* had not been met.

In reaching its decision, the Commercial Court (Mr Justice Phillips) applied the reasoning of the Supreme Court in *AES Ust-Kamenogorsk Hydropower LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] that an injunction granted under *section 37* "*... is not 'for the purposes of and in relation to arbitral proceedings', but for the purposes of and in relation to the negative promise contained in the arbitration agreement not to bring foreign proceedings, which applies and is enforceable regardless of whether or not arbitral proceedings are on foot or proposed.*" The Commercial Court considered it did not have to take into account whether the *section 44* requirements were satisfied when deciding whether to grant an anti-suit injunction under *section 37*. The anti-suit injunction was left in place.


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As such, *section 37* is not fettered by the additional specific requirements of *section 44*.

In determining whether to grant or refuse an anti-suit injunction under *section 37*, the Court will take into consideration whether there has been a delay in making the application for an anti-suit injunction. In *Essar Shipping Ltd* (**ESL**) *v Bank of China Ltd* [2015], ESL applied for an injunction to restrain the Bank of China from continuing legal proceedings in a Chinese court in breach of a London arbitration agreement. ESL commenced the proceedings nine months after the commencement of proceedings in the Chinese court, and seven months after ESL had challenged the jurisdiction of that Chinese court. ESL explained that it deferred its application for an anti-suit injunction in the English Courts pending the jurisdictional challenge in the Chinese court. Around the time of the anti-suit injunction, the Chinese court had dismissed ESL's jurisdictional challenge and ESL was appealing that decision.

In dismissing ESL's application, the Commercial Court determined that there was a lack of promptness in issuing the anti-suit injunction. This lack of promptness was "… *so serious that the proposed injunction would be neither just nor convenient and ought to be refused*".

## Cross border issues

Special care is required when drafting a dispute resolution clause. While often falling within the category of what are described as "boilerplate clauses", it would be incorrect to accord them any less attention than the rest of the agreement. This is particularly so when parties enter into multiple agreements with conflicting dispute resolution clauses, as the *Fiona Trust*[3] "one stop" presumption (discussed below) may not always apply.

In *Trust Risk Group SpA* (**Trust Risk**) *v AmTrust Europe Limited* (**ATEL**) [2015],[4] the parties entered into a terms of business agreement (**TOBA**) in July 2010. The TOBA was a non-exclusive insurance brokering agreement that, among other issues, addressed the premiums and commission payment arrangements between the parties. The TOBA was subject to English law and to the jurisdiction of the English Court. Six months later, the parties and ATEL's US parent company entered into a single overarching agreement (the **Framework Agreement**) which provided for exclusivity arrangements for medical malpractice insurance in the Italian market. Crucially, the Framework Agreement attached the TOBA in a schedule. Unlike the TOBA, the Framework Agreement was subject to Italian law, with jurisdiction providing for arbitration in Milan.

The relationship between the parties broke down and Trust Risk commenced arbitration proceedings in Milan under the Framework Agreement. On discovering there was a deficit in the account in which premiums were held pursuant to the TOBA, ATEL applied for interim relief in the English Commercial Court. Trust Risk challenged the jurisdiction of the English Court claiming there was a single, composite and overarching agreement between the parties (being the Framework Agreement). Trust Risk asserted that the TOBA ceased to exist as a separate agreement after execution of the Framework Agreement. The Commercial Court rejected Trust Risk's challenge on jurisdiction. It determined that it had jurisdiction in relation to disputes arising out of the TOBA.

Trust Risk appealed, asserting that treating the TOBA and Framework Agreement as two freestanding contracts led to different dispute regimes governing the same issues and, in relation to exclusivity, to conflicting provisions. Trust Risk asserted the correct approach was to apply the "one stop" presumption formulated by Lord Hoffman in *Fiona Trust*. The Commercial Court summarised the *Fiona Trust* presumption as follows: the construction of an arbitration clause should start from the assumption that the parties (as rational



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businessmen) are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal. Applying the *Fiona Trust* presumption, Trust Risk claimed that the Framework Agreement was a single complete agreement governing the parties' relationship including the terms of the TOBA, which were scheduled to it and subordinate to it.

The Court of Appeal dismissed the appeal. It determined that the "one stop" presumption does not apply when the overall contractual arrangements contain two or more differently expressed choices of jurisdiction and/or law in respect of different agreements. Instead, what is required is a "*careful and commercially-minded construction*" of the agreements providing for the resolution of disputes. The TOBA and the Framework Agreement specifically dealt with different aspects of the relationship between the parties. The Court of Appeal considered that "*Where the contracts are not "part of one package", it may be easier to conclude that the parties chose to have different jurisdictions to deal with different aspects of the relationship.*"

The issue of competing jurisdiction clauses was also considered by the Commercial Court in *Monde Petroleum SA* (**Monde**) *v WesternZagros Limited* (**WZL**) [2015], in the context of a settlement agreement and an underlying consultancy services agreement. The parties entered into a consultancy services agreement which had a dispute resolution clause providing for arbitration in London under the ICC rules. A dispute arose regarding payment for the consultancy services, with the parties subsequently entering into a settlement agreement which contained a dispute resolution clause providing that the English Courts were to have exclusive jurisdiction.

Monde commenced proceedings in the Commercial Court, claiming that it was induced to enter into the settlement agreement by WZL's misrepresentation and/or duress. Shortly afterwards, Monde commenced an ICC arbitration claiming damages for wrongful termination of the consultancy services agreement. Monde's position was that the Commercial Court had jurisdiction to determine its claim pursuant to the settlement agreement and that issuing the arbitration claim was a protective measure to prevent the claim being time-barred in case the Commercial Court claim could not be pursued. WZL counterclaimed for declaratory relief in the arbitration proceedings and claimed damages for an alleged breach of confidentiality by Monde of the arbitration proceedings. The arbitral tribunal issued an award determining that:

1. it had no jurisdiction to determine WZL's claim for declaratory relief; and
2. it had jurisdiction regarding the claim for breach of confidentiality. The arbitral tribunal dismissed the claim for damages for breach of confidentiality on the merits and ordered WZL to pay Monde's costs of the arbitration proceedings.

Monde sought to enforce the award as an English Court judgment, in response to which WZL applied to the Commercial Court for an appeal pursuant to *section 67* of the *Arbitration Act 1996*. WZL alleged that the arbitral tribunal erred in deciding that it lacked jurisdiction to determine the declaratory relief counterclaims. The basis for WZL's assertions was its consideration that the counterclaims for declaratory relief raised in the arbitration fell within the scope of that arbitration agreement contained in the consultancy services agreement. WZL claimed that the jurisdiction clause in the settlement agreement did not terminate, supersede or otherwise render the arbitration agreement in the consultancy services agreement ineffective.

The Commercial Court considered the issues against the background of the *Fiona Trust* presumption, assessing whether the parties could be said to have intended the jurisdiction


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clause in the settlement agreement to supersede the provisions of the arbitration agreement, considering (perhaps predictably) that it would look at the wording and the surrounding circumstances. Given this approach, the Commercial Court considered that the settlement agreement should be construed on the basis that the parties were likely to have intended that it should supersede the arbitration clause in the consultancy services agreement. It determined that the arbitral tribunal had correctly decided it had no jurisdiction for WZL's counterclaims; WZL's *section 67* appeal failed.

## Enforcement of judgments

For the enforcement of foreign judgments, the starting position is that final and conclusive foreign judgments for a definitive sum are generally enforceable. There are, however, four material exceptions to this which derive from the *2001 Brussels Regulation*:

- where the judgment has been obtained by fraud either on the part of the judgment creditor or the Court;
- where enforcement would be against public policy;
- where the judgment is for a fine or a penalty; and
- if the proceedings in which the judgment was obtained were contrary to natural justice.

In *Dr Richard Barry Smith v Xavier Huertas* [2015], the Commercial Court (Mr Justice Cooke) considered the circumstances in which public policy can be relied on as a ground for resisting enforcement of a judgment from an EU member state. The Commercial Court determined that it can only refuse enforcement on public policy grounds in "exceptional" cases where:

1. there had been a manifest breach of a rule of law or a right fundamental to the UK; and
2. the system of legal remedies in the relevant member state did not afford a sufficient guarantee of the individual's rights.

Dr Smith, a company director, had been convicted in French criminal proceedings of fraudulently diverting funds from a company in liquidation. His case was that the judgment should not be recognised and enforced in the UK because the French criminal proceedings had violated his article 6 *ECHR* rights and constituted a breach of natural justice.

The Commercial Court found that Dr Smith's allegations failed to give rise to an infringement of the claimant's rights to defend himself. It was key that such allegations could and should have been pursued in the French courts and/or the European Court of Human Rights rather than at the enforcement stage only. Dr Smith failed to overcome the strong presumption that the criminal proceedings in the French Courts were compliant with Article 6 of the *ECHR* to enable the Commercial Court not to enforce the French judgment against him.

## Privilege

Privilege generally acts to prevent disclosure of documents and information to the other side in any litigation, to the courts and to regulators. While the English Courts have evolved the laws on privilege, potential difficulties arise when the established principles of privilege conflict with statutory disclosure requirements.

The claimant in *Hallows v Wilson Barca* [2015] had the registered title to a piece of land in London (the **Property**). The defendants were the claimant's previous solicitors, who advised on the registration of the Property. The claimant claimed that the defendant failed to register the rights of way he acquired to the Property, which would have materially affected the value of any subsequent development of the Property.


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The claimant's solicitors determined it would be helpful to obtain the views of the relevant Local Planning Authority (the **LPA**) on whether planning permission would be granted to the claimant. Obtaining the LPA's views would assist with the claimant's damages as part of its claim against the defendant regarding the potential development value of the land. When writing to the LPA, the claimant's solicitors explained that their client was considering the merits of a possible application for planning for a single dwelling. The claimant's solicitors did not explain that the advice sought from the LPA was based on a hypothetical case and was to be used for the purposes of litigation and subject to legal professional privilege, but they did request the "*... Pre Planning Advice* [to] *be treated confidentially at this time*". The LPA provided its advice via a letter.

Subsequently, the defendant's solicitors sought information in relation to planning matters from the LPA, pursuant to the *Freedom of Information Act 2000*. They were provided with the pre-planning advice which was given to the claimant's solicitors. Issues of privilege in the advice therefore arose.

The High Court (Chancery Division) identified the following three key issues:

1. whether the pre-planning advice was protected by legal privilege;
2. whether the privilege had in some way been lost; and
3. if the privilege existed and remained, then what relief should be granted.

Privileged communication

The Court considered that the dominant purpose in seeking the pre-planning advice from the LPA was for it to be used by the claimant in the litigation against the defendant. As a result, the Court determined that the pre-planning advice was *prima facie* protected by litigation privilege.

The Court did not find anything immoral in the way the claimant's solicitors approached the LPA for their advice. It considered that the claimant was entitled to seek the views of LPA as to whether planning might be granted for any development and to pay for those services. Had the claimant's solicitors submitted an application to the LPA making clear that this was a hypothetical case for the purposes of litigation, the Court considered there was a real risk the LPA would refuse to assist.

Litigation privilege lost

The Court noted that the LPA was a public authority, which must adhere to its statutory duty to provide information to any member of the public. Pursuant to *section 42* of the *Freedom of Information Act 2000*, the LPA could refuse to provide information protected by legal professional privilege.

The Court rightly determined that the claimant's solicitors took the risk that the advice received from the LPA could enter the public domain. There can be no "*restraining of a local authority*" to carry out its statutory duties under the *Freedom of Information Act 2000* unless the LPA was put on notice of the legal professional privilege. In this case, the LPA was not put on any such notice. The privilege in the pre-planning advice could no longer attach the instant it was made public under the *Freedom of Information Act 2000*; the claimant had impliedly waived the privilege that existed.

Relief

Despite determining there was no legal professional privilege in the pre-planning advice, the Court continued to examine whether it would have granted any form of relief had the advice been protected by privilege. The Court considered it would have been inappropriate to grant


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equitable relief. The disclosure of the pre-planning advice to the defendant's solicitors was only made possible by the claimant solicitors' method in obtaining that advice. The risk of losing privilege was therefore created by the claimant's solicitors. In this instance, that risk went against them and the defendant's solicitors had not acted improperly by requesting the information under the *Freedom of Information Act 2000*.

Whilst this case does not establish any new law, it does provide a timely review of key aspects of privilege in the unusual context of interaction with public authorities.

The main types of privilege acknowledged in English law are legal advice privilege, litigation privilege, joint privilege, common interest privilege, without-prejudice privilege and the privilege against self-incrimination. Such claims of privilege are open to the court's scrutiny. In *Property Alliance Group Ltd v Royal Bank of Scotland plc,* the claimant pursued claims based, in part, on the alleged manipulation of LIBOR, by the bank.

The High Court was asked to determine the claimant's application for an order for the bank to disclose certain categories of LIBOR-related documents. The Court considered the above categories of privilege in respect of the following types of documents:

1. Internal reports, reviews and summaries relating to allegations of LIBOR misconduct produced by the bank's ESG committee (a "high-level" committee of senior employees at the bank set up to oversee and coordinate the bank's investigations into LIBOR misconduct). The bank asserted *legal advice privilege* over such documents on the basis that the ESG meetings were scheduled for the bank to receive legal advice from their external legal advisors.
2. Documents relating to civil proceedings brought by the US CFTC, several US states' Attorneys General, the bank's customers and third parties in the US and England as well as criminal proceedings brought by the US DOJ. The bank asserted *litigation privilege* and *legal advice privilege* in respect of such documents.
3. Communications between the bank and the UK's regulator at the time, the Financial Services Authority (**FSA**), in advance of and in connection with the FSA Final Notice (which found that the bank had undermined the integrity of LIBOR and imposed a fine). The bank claimed *without prejudice privilege* over such communications on the grounds that they represented negotiations aimed at settlement with the FSA.
4. Allegedly privileged documents which the bank had disclosed to foreign regulators on a non-waiver basis. The bank submitted that the documents retained their privileged status because such documents were provided: (1) on the basis that confidentiality and privilege would be preserved against third parties; and, (2) for the limited purpose of the ongoing investigations.

In relation to the <u>first category</u>, the Court found that the key issue in deciding whether such documents were privileged was to identify the precise nature and role of the ESG. The Court found that the claimant was entitled to be concerned that the bank's description of the ESG had changed and that the bank had been afforded enough chances to explain the basis of its claim to legal advice privilege. The Court ordered that such documents be inspected by the Court to decide whether or not privilege applied. The Court ordering inspection expressed doubt that the entirety of the documents in this category would be privileged, if part of the ESG's role was overseeing investigations and reporting to the bank; any legal advice clearly would be, but it did not follow that any factual summary would be.

However, on inspection, the Court upheld the bank's claim to legal advice privilege for this category of documents, finding that the documents related to communications between a


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client and his lawyer in respect of regulatory investigations and records of decisions taken in respect of such discussions.

In respect of the second category of documents, the claimant had only brought a challenge against the bank's claim to litigation privilege and not its claim to legal advice privilege. Given that the legal advice privilege claim was unchallenged, the Court stated that it did not need to make a finding as to whether or not litigation privilege applied.

As to the third category, the Court concluded that a firm that is the subject of a regulatory investigation has the right to claim without prejudice privilege over communications which were part of genuine settlement discussions between that firm and the FSA (now the FCA). The Court recognised this right for the first time in English litigation by way of analogy with the without-prejudice rule relating to settlement in civil litigation. However, where the basis on which any final notice issued by the FCA is at issue in civil litigation proceedings, the content of the settlement discussions with the FCA would be disclosable. In this case, the bank supported its denial of misconduct in connection with GBP LIBOR by positively relying on the fact that the Final Notice only related to other currencies, and there was no finding on GBP LIBOR. As this went to the basis on which the Final Notice was issued, the Court ordered inspection of this category of documents.

The Court found that the fourth category of documents could be inspected by the same logic as for the third category, i.e. that the bank could not rely on absences from regulators' findings as indicating the limits of its misconduct while maintaining a claim to privilege over what was asserted to such regulators. Nevertheless, for the first time the English Court confirmed that providing privileged communications to regulators under a limited waiver of privilege agreement did not waive privilege as against third parties.

This decision will be of particular interest to financial institutions, given that it is the first time that an English Court has recognised that without prejudice privilege can extend to settlement discussions with regulators, and that limited waivers of privilege when documents are disclosed to regulators are permitted. The decision is also a useful reminder of the limited scope of privilege. It follows that parties should note that broad claims to legal advice privilege over whole documents in wide-ranging reports and summaries may be susceptible to challenge (even if, on the court's inspection, the legal advice privilege in the instant case was maintained). Parties should also take care not to lose privilege through the claims they make in defence of their claim.

## Regulatory investigations

The rise in global regulatory investigations has seen significant fines issued against financial institutions involved in the various benchmark-rigging cases. In the UK, the Financial Conduct Authority (**FCA**) is responsible for ensuring that financial markets function properly, and achieves this objective with the assistance of its enforcement division which investigates financial institutions and approved persons where misconduct is alleged. It is unusual for approved persons who have been subject to a terminated FCA investigation into their conduct to challenge why the FCA decided to terminate its investigation. However, the case discussed below explored the basis for the FCA's decision not to pursue an investigation, and the extent to which that could be challenged. The cases examined below represent examples of an increase in the use of courts (and tribunals) to engage in disputes arising from regulatory investigations, a trend that looks set to continue.

In *R (on the application of Julien Grout) v FCA* [2015], the High Court dismissed a judicial review application, brought by a former JP Morgan Chase Bank NA (**JP Morgan**) junior



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trader, of the FCA's decision to terminate its investigation into his conduct in connection with mismarking and potential manipulative trading practices. His conduct was in relation to the US$5.8bn trading loss sustained by JP Morgan, which has colloquially become known as the 'London Whale' affair.

In December 2013, the FCA terminated its investigation into Mr Grout. While he was at that time still subject to on-going US civil and criminal proceedings for his conduct, he was no longer working in the UK financial services industry (and was unlikely to in the future), and he no longer resided in the UK. In those circumstances the FCA determined it was inappropriate to continue to devote substantial resources to an investigation into Mr Grout's conduct.

Mr Grout challenged the FCA's rationale. He claimed he was being treated differently to others in the same, or materially similar, positions because:

1. the FCA's investigations against those individuals remained ongoing (this included the "London Whale" trader);
2. the FCA placed too much weight on the fact there were US proceedings against him; and
3. the FCA's resource reasoning was irrational, as time and resources continued to be devoted to the ongoing investigations for those other individuals.

Ultimately, Mr Grout wanted the FCA's investigation to continue so that he could clear his name.

The High Court dismissed the judicial review. It found that the FCA's decision to terminate was "*entirely rational*". The High Court outlined the factors underlying the general reluctance by the English Court to interfere with the decisions of an independent prosecutor or investigator whether to investigate and prosecute, or to discontinue investigations and prosecutions. These factors included:

- the powers in question are entrusted solely to the relevant authority;
- such decisions involve balancing policy and public interest considerations; and
- the powers are conferred in very broad and unprescriptive terms.

The High Court considered that Mr Grout already had a route via the US criminal proceedings to clear his name.

Following an investigation by the FCA into the conduct of financial institutions or corporate entities, the FCA publishes a warning or decision notice setting out its findings as well as the penalties that apply. Where such a notice identifies a third party in such a way that it could prejudice him, this third party should receive a copy of the notice and be afforded an opportunity to make representations in relation to it. The failure of the FCA to provide this notice (per *section 393* of the *Financial Services and Markets Act 2000* (**FSMA**)) has given rise to several recent challenges.

Challenges to such failures by the FCA lie to the Upper Tribunal Tax And Chancery Chamber (the **Tribunal**). In 2016, the Tribunal dismissed an application brought by Mr Christopher Ashton, a former Barclays Bank PLC (**Barclays**) trader, and member of a FX chat room nicknamed "the Cartel".

Mr Ashton alleged that the FCA breached *section 394(4)* of the *FSMA* by including in certain of its notices (the **Notices**), certain statements and conversations through which his involvement could be identified, and which he did not have an opportunity to contest.

In deciding the application, the Tribunal applied a two-stage test. First, it considered whether statements in the Notices could have been interpreted as referring to a third party. Secondly, it considered whether, based on the external information that a market participant might have reasonably known at the time the Notices were published, a reader would have



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identified Mr Ashton from the relevant passages. The first stage of the test was decided in Mr Ashton's favour. However, Mr Ashton failed at the second stage to satisfy the Tribunal that anything in the Notices would identify him.

This application followed similar applications made by other traders in the UK, including Christian Bittar and Achilles Macris. In November 2015, the FCA was granted permission to appeal the latter case to the Supreme Court to clarify the threshold of identification under *FSMA*. The outcome of the case will provide much-needed guidance in an area which will become more prominent in due course, given the more active enforcement activities of UK regulators.

Where there is an allegation that a person is in possession of criminal property (or the proceeds of crime), the English Court has the power to issue a freezing order over such property. Challenges arise where different jurisdictions engage in assessments of such property against similar statutes. In *Serious Fraud Office v Saleh* [2015], the High Court dismissed Mrs Saleh's application to discharge a property freezing order (**PFO**) obtained by the SFO pursuant to the *Proceeds of Crime Act 2002* (**POCA**) in respect of the proceeds of sale of 800,000 shares belonging to Mrs Saleh. The proceeds of sale amounted to £4.4m plus interest, which were held in a UK account.

By way of background history, original forfeiture proceedings in Canada against Mrs Saleh's shares had been withdrawn, as a result of which the Canadian court granted an order for the restoration of shares to the lawful owner. The Canadian court's judgment was that the 800,000 shares issued to Mrs Saleh were property lawfully acquired by her and were neither crime-related proceeds nor offence-related property as defined in the Criminal Code of Canada.

Mrs Saleh challenged the PFO on numerous grounds including that the SFO was unable to establish that the shares, and the money representing them, were "*property obtained through unlawful conduct*", and therefore recoverable property pursuant to *sections 304* and *305* of *POCA*. To support this line of argument, she relied on the Canadian court's decision that the shares were not crime-related proceeds, or offence-related property.

The High Court considered that the purpose of the Canadian order was to deal with the aftermath of the forfeiture claim having been withdrawn (i.e. to restore the shares to their lawful owner). The High Court determined that the references within the Canadian order to the shares being "*neither crime related proceeds nor offence related property*" were incidental. These references could not be interpreted as "*... a declaration of the status of the shares that was intended to be binding on the world at large…*", as that was not the function that the Canadian court was being asked to perform by making such an order. It was not "*immediately attractive*" that a Canadian order to restore the shares to their lawful owner could preclude international prosecuting authorities from commencing proceedings pursuant to their domestic legislation against the proceeds of sale of those shares located within their jurisdiction. As a result, the High Court held that the terms of the Canadian order did not preclude the SFO from obtaining a PFO.

A recent regulatory development which involves the Courts is the introduction of deferred prosecution agreements. In the United States, deferred prosecution agreements are a commonly used tool by US government agencies who file criminal charges against a company or individual in the US Court, but defer the prosecution on terms.

On 24 February 2014, *section 45* and *Schedule 17 of the Crime and Courts Act 2013* introduced deferred prosecution agreements into the laws of England & Wales. Unlike its American counterpart, the deferred prosecution agreement under this *Act* is an agreement reached between a UK prosecutor and an organisation (i.e. it excludes individuals) enabling



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the prosecution of an organisation's alleged criminal offences to be suspended for a defined period so long as the organisation complies with the terms of the agreement. Critically, the deferred prosecution agreement takes effect after examination by and on the order of the English Court (a contrast with its US equivalent) that the agreement is in the interests of justice and its terms are fair, reasonable and proportionate.

On 30 November 2015, the English Court approved its first deferred prosecution agreement (the **DPA**) which was entered into between the Director of the SFO and Standard Bank Plc (now known as ICBC Standard Bank Plc (**SB**)).

The DPA related to SB's failure to prevent bribery by its former sister company (Stanbic Bank Tanzania Limited (**STB**)) and/or certain individuals, contrary to *section 7* of the *Bribery Act 2010*. The SFO alleged that a US$6m payment was made to a local partner in Tanzania by STB, intending thereby to induce representative(s) of the Government of Tanzania to show favour to STB and SB in the process of appointing or retaining them for a financing transaction. The financing transaction was to raise funds on behalf of the Government of Tanzania; STB and SB were mandated to raise US$600m on behalf of the Government of Tanzania by way of a sovereign note private placement.

Under the terms of the DPA, which will last for three years, SB is required to pay:

1. US$16.8m fine;
2. US$8.4m in disgorgement of profits;
3. US$7.04m in compensation and interest to the Tanzanian government; and
4. £330,000 (US$500,000) in SFO legal fees.

SB is also required to cooperate with relevant authorities as required in respect of the conduct, and is to undergo an independent review of its internal compliance procedures.

While it is unlikely to feature regularly as a prosecutorial tool, the deferred prosecution agreement represents an important development in which the English Court will play its part.

## Settlement and mediation

The general rule on costs in English litigation is that the unsuccessful party to the litigation will be ordered to pay the costs of the successful party. However, while this is the general position, under CPR Rule 44 (the governing provision), the English Court has a wide discretion as to the award of costs. Consistent with the English Court's overriding objective and the desire to settle matters where possible, this can include modifying an order for costs to which a successful party would otherwise be entitled owing to an unreasonable refusal by that party to mediate.

In *Murray and another v Bernard* [2015], the High Court allowed a party to take up an offer to mediate, which it had earlier refused, without suffering any penalty in costs. The English Court noted that in looking at whether to penalise a party for a failure to mediate, "*The relevant question is not a game in which the claimants will have one and one opportunity only to mediate for the purposes of the cost rule.*" The Court would look at the situation as a whole. Therefore, despite the claimant initially declining to take the opportunity to mediate, they had subsequently and quickly changed their minds and so could not be criticised for refusing to mediate. As a result, the English Court held that the general rule on costs would apply.

This case should not be taken as a green flag for adopting what is a high-risk strategy of refusing early requests to mediate, where it would be reasonable in all the circumstances to do so. Such actions could have adverse cost consequences.


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In terms of settlement agreements, fraud is one of very few circumstances which enables a party to re-open and rescind the terms of a settlement agreement. However, the mere existence of fraud may not be sufficient in itself. In *Hayward v Zurich Insurance Company Plc* (**Zurich**) [2015], the Court of Appeal refused to set aside a settlement agreement despite the emergence of new evidence of fraud, as it considered Zurich had some knowledge of the fraud at the time of the settlement.

Briefly, Mr Hayward suffered an accident at work and issued proceedings against his employers. His employers' defence was conducted by its insurers, Zurich. Liability was admitted subject to a 20% deduction for contributory negligence. The issue for consideration was quantum, Zurich contending that Mr Hayward had exaggerated the consequences of his injury for financial gain. However, the trial on quantum never occurred as the parties reached a settlement.

A few years later, Mr Hayward's neighbours provided Zurich with new evidence showing that Mr Hayward's injury claim was dishonest, as a result of which Zurich applied to the Court for the settlement agreement to be set aside. The court at first instance granted this.

The Court of Appeal had to determine whether the new evidence of fraud was sufficient to unravel the settlement agreement. It considered that if Zurich had been aware of Mr Hayward's exaggerated claim at the time of the settlement and yet settled the claim, there was no reason why Zurich should not be held to the terms of the settlement agreement, even where new and more compelling evidence of the same fraud emerged later. The Court of Appeal provided a succinct and helpful rationale: *"It cannot be right that a defendant who has made an allegation of fraud against the claimant but decided in the end not to have it tested in the court should be allowed, whenever he chooses, to revive that allegation as a basis for setting aside the settlement. It may stick in the throat that the claimant can retain the reward of his dishonesty, but the defendant will have made the deal with his eyes open to the possibility of fraud, and there is an important public interest in the finality of settlements."*

Leave for this decision to be appealed to the Supreme Court was granted.

### Arbitration and expert determination

Pursuant to *section 70(3)* of the *Arbitration Act 1996,* challenges to arbitral awards must be brought within 28 days of the date of the award. *Emirates Trading Agency LLC v Sociedade de Fomento Industrial Private Limited* [2015], reinforced the importance of adherence with this strict time limit. Emirates Trading Agency LLC sought to challenge the ICC tribunal's final merits award on the grounds of lack of substantive jurisdiction under *section 67* of the *Arbitration Act 1996*. This was despite Emirates Trading Agency LLC having failed to challenge the ICC tribunal's earlier partial award which determined that the ICC tribunal had jurisdiction. The partial award on jurisdiction was final and binding on the parties once the 28-day time period for challenging the award expired. The Court held that the failure to challenge the partial award meant that the finality of that award created an issue estoppel as between the parties which precluded either party challenging it before the ICC tribunal, or as a ground of challenge to a subsequent decision of the ICC tribunal.

The English Courts are generally reluctant to interfere with expert determinations, but the Court of Appeal in *Rebeka Begum v Subrina Hossain and Sunam Tandoori Limited* [2015] considered whether an expert's valuation should be set aside on the basis that the expert materially departed from his instructions.

In this case, a settlement agreement had been executed under which Ms Hossain was to purchase Ms Begum's shareholding in Sunam Tandoori Limited. The purchase price was


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to be determined by an independent valuer (i.e. the expert). The settlement agreement set out the expert's mandate to conduct a valuation on the basis of a fair value of the shares. The expert was to have access to all the books, records and documents in the control or possession of Sunam Tandoori Limited, which included handwritten takings. The expert reached a valuation price but did not take into account any handwritten takings, as he adopted the view that these required revision to the trading accounts that fell outside of his role and necessitated the expertise of an independent forensic accountant.

The Court of Appeal considered "… *as a matter of ordinary construction,* [the expert] *is required to arrive at his valuation by considering the content of all those documents and not simply some of them*." By ignoring the handwritten takings, the expert acted outside of his mandate and his valuation was therefore set aside. This case serves as a powerful reminder for parties to ensure that the scope of what is to be remitted for expert determination is clearly drafted and properly applied.

## Costs and funding

Following the introduction of the new costs management rules into the CPR Rules from 1 April 2013, the English Courts have taken an increasingly proactive role in controlling the costs of litigation. For cases commenced on or after 1 April 2013, where costs are to be assessed on the standard basis, the Courts will only allow costs that are proportionate to the matters in issue.

When considering whether costs are "proportionate", the English Court will assess whether the costs incurred bear a reasonable relationship to factors such as:

a) the sums at issue in the legal proceedings before it;
b) the value of any non-monetary relief at issue in those legal proceedings;
c) the complexity of the litigation;
d) any additional work generated by the conduct of the paying party; and
e) any wider factors involved in those legal proceedings, such as reputation or public importance.

Ensuring a party's costs for the litigation are proportionate is critical as CPR Rule 44.3(2)(a) enables the English Court to disallow or reduce costs which are disproportionate in amount even if such costs were reasonably or necessarily incurred.

One of the mechanisms used to manage costs in proceedings is the cost budget, a document which sets out (using standard phases of the legal proceedings) the estimated costs of those proceedings. This budget is then used as a basis on which the judge can assess the proportionality of the costs estimated.

In *CIP Properties (AIPT) Lmited v Galliford Try Infrastructure Ltd & Ors* [2015], the Technology and Construction Court was extremely critical of the cost budget submitted by the claimant. At that stage of the legal proceeding, the claimant had incurred £4.22m in costs and its costs budget was approximately £9.5m (both for incurred costs and for future costs to be incurred until the end of the trial).

The Technology and Construction Court determined that the claimant's cost budget was unreliable, disproportionate and unreasonable, a view no doubt influenced by the claimant's inability to explain why it had incurred significant costs. The Technology and Construction Court found that the contingency document which accompanied the claimant's cost budget contained many assumptions that were "*... so widespread in nature and effect, that they*


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*alone render the claimant's costs budget wholly uncertain and therefore unreliable*".

When determining proportionality, the Technology and Construction Court concluded that the claim was not particularly complex considering there was no requirement for extensive witness statements, the issues of liability and quantum required expert evidence, and the defendant effectively would be doing most of the work in the litigation proceedings. The claimant's costs were viewed as disproportionate when compared to both the defendant's costs of £4.48m (both incurred and estimated) and the value of the claim, which was £18m.

With regard to reasonableness, the Technology and Construction Court was blunt with its determination: "*... I am left with a set of claimant's costs which are out of all proportion to those of anyone else, with no proper reasons put forward to justify the differences. On the face of it, therefore, the claimant's costs are unreasonable on this basis alone*."

The Technology and Construction Court significantly reduced the claimant's costs budget to £4.28m (both for incurred costs and for future costs to be incurred). This case serves as a clear warning that the English Court will not hesitate to challenge a party on its cost budget, and use the tools available to it to ensure that only costs considered proportionate are allowed.

**Acknowledgment**

The authors acknowledge with thanks the contribution of Suzanne Labi to this chapter.

* * *

**Endnotes**

1. Speech delivered by the Lord Chief Justice at Mansion House on 8 July 2015.
2. Practice Direction 51M of the CPR.
3. *Fiona Trust & Holding Corp v Privalov* [2008]
4. Trust Risk was the appellant/defendant. ATEL was the respondent/claimant.



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