HFW LITIGATION

COMMERCIAL LITIGATION CASE UPDATE

SEPTEMBER 2025

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We are delighted to present the inaugural edition of the English Commercial Litigation Case Update, a summary of relevant recent key cases.

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If you are interested in receiving a bespoke training session on the cases referred to in this Update, or on any other cases or topics of interest, please contact your usual contact at HFW or the editors Andrew Williams and Nicola Gare.

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Commercial Litigation Case Update

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1. ANTI-SUIT INJUNCTIONS: BAYERISCHE LANDESBANK AND OTHERS V RUSCHEMALLIANCE LLC [2025] EWHC 924 (COMM)

Court: Commercial Court

Date: 11 April 2025

Summary

The Commercial Court revoked three anti-suit injunctions (**ASIs**) granted against RusChemAlliance LLC (**RusChem**), whilst upholding the original declaration regarding the court's jurisdiction, and in so doing upheld the guidance of the court in an early ASI involving RusChem.

Facts

Three German banks, Bayerische Landesbank, Landesbank Baden-Wurttemberg and Commerzbank AG (together the **Banks**), separately issued performance bonds in favour of RusChem.

Following enforcement of EU sanctions, the Banks refused to honour the bonds and as a result, RusChem commenced proceedings in Russia. The bonds were however governed by English law and contained ICC Paris arbitration clauses, and the Banks successfully applied to the English courts for final ASIs to prevent RusChem from pursuing the claims in Russia.

The ASIs and declarations granted by the court held that the arbitration agreements were governed by English law, that the English courts had jurisdiction to grant ASIs and RusChem had breached the arbitration agreements by commencing proceedings in Russia. The court also issued costs orders against RusChem.

In response, RusChem obtained ASIs from the Russian Arbitrazh court, requiring the Banks to take all measures within their control to cancel the effect of the English court's ASIs or otherwise face significant financial penalties.

As a result, the Banks made applications to the English courts to revoke the ASIs, as well as the declarations and cost orders, on the grounds of changes in circumstances.

The Commercial Court Judgment

The court revoked the ASIs, the declarations of breach of contract, and the costs orders. However, it held that it was an impossibility to revoke the decision regarding jurisdiction, as it represented historical legal determination.

Handing down its decision, the court confirmed that it possessed authority to revoke the final injunctive relief, under both CPR 3.1(7) and by its own inherent jurisdiction, citing the Court of Appeal's judgment in UniCredit Bank GmbH v RusChemAlliance LLC [2025] 1 WLR 3221, a case with almost identical facts, regarding an ASI against RusChem and an application to revoke it in the face of financial penalties.

Declaration of jurisdiction

Foxton J held that the court's jurisdictional ruling amounted to historical factual statement of English law and was not capable of revocation. If the decision on jurisdiction was revoked, it would not change the fact that the court had previously decided that it possessed jurisdiction. In giving the judgment, Foxton J distinguished declarations that reflect historical legal determinations and declarations that are responsive to evolving circumstances, such as financial relief.

Additionally, the court made clear that it considered the Banks had taken every step within their power to attempt to revoke the ASIs and hoped that the Russian court would understand the decision.

Declaration of breach of contract

Foxton J accepted that the events which followed the order constituted a material change of circumstance and that there may be grounds to counter the breach argument, such as waiver, and consequently revoked the declaration. Foxton J called the declaration 'forward looking', with events and information capable of change after the original order, differentiating it from the declaration of jurisdiction.

Costs Orders

The court held that these should be revoked as the substantive relief being discharged amounted to a material change. In addition, the court commented that they were forward facing and exclusively in favour of the Claimants, and not related to the court or its power to act.

Appeal

The court also dismissed the request for permission to appeal the order, noting that it was "in keeping with [the Banks'] effort to make every attempt to set aside every part of the orders made by the English court in their case", and finding that there was no serious issue to be tried and no other reason to allow an appeal.

HFW Comment

The English court's decision to revoke ASIs and related orders in this case demonstrates a pragmatic approach to evolving circumstances, especially where foreign countermeasures impose financial penalties. For businesses operating across borders, it highlights the importance of drafting robust dispute resolution clauses and being prepared to navigate conflicting legal obligations in hostile jurisdictions.

Please access the judgment here

2. BREACH OF CONSTRUCTIVE TRUST: STEVENS V HOTEL PORTFOLIO II UK LTD (IN LIQUIDATION) AND ANOTHER [2025] UKSC 28

Court: Supreme Court

Date: 23 July 2025

Summary

The UK Supreme Court held that a beneficiary, Hotel Portfolio II UK Ltd (**HPII**), could recover equitable compensation from a dishonest accessory to a breach of constructive trust of unauthorised profits, in so doing the Supreme Court overturned the Court of Appeal's decision and made it clear that in circumstances where there are multiple breaches of duty, each can be viewed as separate and distinct.

Facts

The first Defendant, Mr Ruhan, was a director of HPII, in which capacity and to whom he owed fiduciary duties.

Ruhan acquired three London hotels from HPII through a nominee (Mr Stevens, the second Defendant) and later resold them at a significant profit. This was a secret and unauthorised profit made by Ruhan in breach of his fiduciary duty to HPII, as its director. Accordingly, Ruhan was a constructive trustee of the dividend he received from this sale (approximately £95m). HPII was unaware of the dividend at the time.

Ruhan spent and lost the whole of the dividend. Stevens, dishonestly assisted Ruhan in the dissipation of it. The dividend could be traced or recovered by HPII.

In 2018, whilst in liquidation, HPII discovered the dividend and its dissipation and sued Ruhan and Stevens on the basis that Ruhan had received the dividend as an unauthorised profit and had caused HPII to lose the whole of the dividend and that Stevens had dishonestly assisted him in his breach of trust. At first instance, Foxton J found this to have been proved and ordered Stevens to pay compensation to HPII, which included the £95m for the loss of the dividend. Separately, Foxton J ordered Ruhan to account for the dividend. HPII was unable to recover any monies from Ruhan.

Stevens appealed the decision of Foxton J on the basis that HPII had suffered no loss by reason of the dissipation of the dividend, so that there was no loss for which he was liable to pay compensation. Stevens argued that both the dividend and its loss were part of a single fraudulent scheme which would not have occurred if Ruhan performed his duties as a fiduciary and trustee.

In the alternative, Stevens argued that, if the dissipation of the dividend caused a loss to HPII, its earlier receipt was an equivalent gain and therefore, both he and Ruhan could set-off the gain against the loss, producing a nil return for HPII. The Court of Appeal accepted Stevens' arguments and allowed his appeal. The Court of Appeal held that the claim for equitable compensation from Stevens failed because Ruhan had embarked on a single scheme or course of conduct which had caused no overall loss to HPII.

HPII appealed to the Supreme Court.

The Supreme Court Judgment

In the leading judgment of Lord Briggs (with whom Lord Reed, Lord Hamblen, and Lord Richards agreed and Lord Burrows dissented), the Supreme Court allowed HPII's appeal and restored the order of Foxton J.

The Supreme Court held that a constructive trust of unauthorised profits gives rise to an immediate proprietary interest of the beneficiary in the fund representing the unauthorised profits from the moment that the constructive trustee receives them. Accordingly, a dissipation of the fund held in constructive trust is a loss of a proprietary interest and a dishonest accessory to the dissipation is jointly liable with the trustee for the loss caused.

The Supreme Court considered the Novoship principle (which provides that a dishonest assister is severally liable to account only for the profits that it has personally made) and accepted that Stevens could not be held liable to account for Ruhan's unauthorised profits. However, the Supreme Court held that the making of unauthorised profits and the subsequent dissipation of such profits are separate and distinct breaches. The court held that Stevens had dishonestly assisted in the dissipation of the funds held in constructive trust and was thereby liable to compensate HPII for any loss caused by the dissipation.

The Supreme Court rejected the argument that the gain from the unauthorised profits could be set-off against the loss from its dissipation and held that allowing such a set-off would undermine the integrity of the constructive trust.

Lord Burrows dissented and accepted Stevens' argument that the scheme was a single dishonest plan, which had caused no net loss to HPII. Lord Burrows argued that equitable compensation should not be awarded where the beneficiary has suffered no net loss and that restoring Foxton J's order requiring Stevens to compensate HPII for the loss of £95m would effectively make the dishonest accessory liable for the trustee's profits, thereby being inconsistent with the Novoship principle.

HFW Comment

The Supreme Court's decision provides clarification on the nature of constructive trusts arising from unauthorised profits, confirming that such trusts confer immediate proprietary rights on the beneficiary. Therefore, any dissipation of funds constitutes a loss of property, for which a dishonest assister can be held jointly liable, even where they did not personally benefit.

The ruling strengthens the position of beneficiaries and sends a clear message that third parties who assist in the misuse of trust assets may face significant liability.

Please access the judgment here

3. ENFORCEMENT OF JUDGMENTS IN CRYPTO DISPUTES: JONES V PERSONS UNKNOWN AND ANOTHER [2025] EWHC 1823 (COMM)

Court: The High Court – King's Bench Division

Date: 10 June 2025

Summary

This case explores the boundaries of third-party intervention under CPR 40.9, particularly in the context of cryptocurrency litigation involving "Persons Unknown." The central legal issue was whether a non-party could be considered "directly affected" by a judgment that led to the dissipation of its digital assets, despite not being named in the original proceedings.

The judgment also reviews the nature of proprietary rights in custodial crypto wallets and the evidentiary burden required to establish a claim in unjust enrichment or constructive trust. It also reflects on the procedural expectations for promptness and the balancing of equitable considerations - such as delay and prejudice - when seeking to set aside a final order in complex digital asset disputes.

Facts

In *Gary Jones v Persons Unknown*, the Claimant sought to recover Bitcoin lost to a sophisticated cyber fraud. Between January 2019 and January 2020, the Claimant had invested approximately £480,206 in Bitcoin via a fraudulent platform called ExtickPro. The aforementioned platform falsely displayed profits and eventually took control of the Bitcoin, transferring it across the blockchain. This led to the dissipation of 89.616 Bitcoin. The Claimant received only a nominal return of $2,100 and was unable to recover the rest.

The Claimant obtained an interim freezing injunction against various categories of Persons Unknown, as well as Huobi Global Ltd (**Huobi**), the cryptocurrency exchange in which the wallet at Huobi (the **tHEL wallet**) was held. The Claimant was able to obtain the injunction against Huobi because he had expert evidence that traced his Bitcoin to an address for the tHEL wallet. The freezing injunction froze assets valued at approximately £1.75m.

The High Court subsequently granted summary judgment in favour of the Claimant. The order confirmed that the tHEL wallet, under the control of Huobi, had been used to store the fraudulently obtained Bitcoin and required the fraudsters and Huobi (as a constructive trustee) to deliver up and/or to restore to the Claimant the 89.616 Bitcoin that had been transferred out of the account. Although Huobi did not take part in those proceedings, it complied with the order by transferring the specified amount of Bitcoin inclusive of costs to the Claimant's nominated crypto wallet. However, it became apparent that Huobi transferred Bitcoin from another wallet which ended in RwrmV and then looked to the tHEL wallet to reimburse it for the credit that it had made to the Claimant out of the RwrmV wallet.

Subsequent expert evidence revealed that the evidence presented in the original proceedings was inaccurate. Crucially, it emerged that the assets held in the tHEL wallet were not traceable to the fraud committed against the Claimant but instead belonged to Kyrrex Ltd (**Kyrrex**) and its customers. Upon discovering the debt, Kyrrex sought to obtain disclosure from the Claimant and proceeded to gather expert evidence.

Some two years after the original judgment was handed down, Kyrrex filed a CPR 40.9 application in the High Court. Amongst other things, the application sought to add Kyrrex as a fifth Defendant to the claim, to set aside the judgment, and to return the 89.616 Bitcoin to the tHEL wallet.

The High Court's Judgment

The High Court dismissed the application.

In reaching his decision, Judge Pearce applied the test under CPR 40.9, which requires that the applicant be "directly affected" by the judgment and that the court exercise its discretion to

determine whether the order should be set aside. In clarifying the second limb, the judge stipulated that this typically involves assessing whether the applicant has a real prospect of defending the claim. Although CPR 40.9 does not explicitly require promptness, the judge noted that undue delay may still weigh against the applicant.

Judge Pearce held that Kyrrex was not "directly affected" by the original judgment, as required under CPR 40.9. The Bitcoin transferred to the Claimant did not originate from the tHEL wallet, and even if Huobi later replenished its funds using assets from Kyrrex's account, this was a consequence of Huobi's own actions and not a direct result of the court's order. Accordingly, the judge described Kyrrex' situation as a "classic example of an indirect effect," which could be addressed through its contractual relationship with Huobi. Furthermore, Kyrrex' claim lacked a clear proprietary interest in the Bitcoin sufficient to support a constructive trust or unjust enrichment claim, and it failed to establish a viable legal basis for depriving the Claimant of the benefit of a judgment obtained against other parties.

The judge also considered the delay in bringing the application. Whilst not categorised as "gross," the delay was deemed significant and prejudicial, particularly in light of the dissolution of Huobi, which would hinder the Claimant's ability to seek relief elsewhere. As to other factors, Judge Pearce acknowledged that the misleading information presented in the original proceedings was entirely innocent and, on its own, did not justify setting aside the judgment. Regarding the Claimant's apparent lack of cooperation in providing disclosure, the judge noted that while this could be criticised, it had little bearing on the exercise of judicial discretion in this context.

HFW Comment

This case provides practical solutions to those involved in crypto disputes, as well as the tracing, risk of dissipation, and evidentiary challenges encountered in these cases, and clarifies the threshold for third-party intervention under CPR 40.9, emphasising that only those "directly affected" by a judgment should seek to set it aside. The case also underscores the importance of promptness, evidentiary clarity, and proprietary interests when challenging orders in complex cryptocurrency disputes.

Please access the judgment here

4. FRAUDULENT TRADING AND SECTION 213 INSOLVENCY ACT 1986, AND LIMITATION: BILTA (UK) LTD (IN LIQUIDATION) V TRADITION FINANCIAL SERVICES LTD [2025] UKSC 18

Court: Supreme Court

Date: 7 May 2025

Summary

In this case, the UK Supreme Court considered the scope of liability under section 213 of the Insolvency Act 1986 (**IA 1986**) for fraudulent trading and ruled that third parties who knowingly participate in fraudulent business activities can be held liable for fraudulent trading (regardless of whether those third parties are involved in the management or control of the business). The court also considered how limitation periods apply to companies that are dissolved and later restored, under section 32 of the Limitation Act 1980 (**LA 1980**).

Facts

The case arose from missing trader intra-community (**MTIC**) VAT fraud involving carbon credit trading under the EU Emissions Trading Scheme in 2009. In this case, five companies (including Bilta (UK) Ltd) engaged in trading and later entered liquidation with substantial VAT liabilities owed to HMRC.

The five companies in this case were: Bilta, Weston Trading UK Ltd, Nathanael Eurl Ltd (**Nathanael**), Vehement Solutions Ltd, and Inline Trading Ltd (**Inline**) (together, the **Claimants**). The Claimants alleged that Tradition Financial Services (**Tradition**) had dishonestly assisted their directors in the breach of their fiduciary duties and had knowingly participated in the fraudulent trading of the businesses under section 213 of the IA 1986.

The court also considered how limitation periods applied to Nathanael and Inline, two companies that were dissolved and then later restored, under section 32 of LA 1980.

UK Supreme Court Judgment

When considering section 213 IA 1986, the Supreme Court held that liability is not limited to those in management or control of a business. The court considered section 213 (2) IA 1986, which states that "*any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions*" and determined that the IA 1986 included outsiders who have transacted with a business knowing that that company is engaged in fraud.

The court also considered section 32 of the LA 1980 and determined that where a company is dissolved and then restored to the register, the company is deemed to have continued in existence as if it were never dissolved. The fact that a company has been restored under section 1032 of the Companies Act 2006 does not automatically suspend the limitation period. Instead, the court determined that it must assess, on the balance of probabilities, whether the fraud could have been discovered during the period in which the company was dissolved. In this case, the court held that the Claimants failed to provide sufficient evidence to show that the fraud could not have been discovered. Therefore, Nathanel and Inline's claims for dishonest assistance against Tradition remained time-barred. Bilta, Weston Trading UK Ltd, and Vehement Solutions Ltd's claims had already been determined to be statute-barred, and so were not considered during this hearing.

HFW Comment

This decision is a landmark ruling for insolvency practitioners and creditors. It confirms that third-party service providers could be held liable for fraudulent trading if they knowingly assist, even without having formal control over the company. The judgment improves the tools available to liquidators pursuing recovery in fraud cases and sends a clear message that wilful blindness will not be an acceptable defence.

The judgment also clarifies that, under section 1032 Companies Act 2006, restored companies will be treated as having continuously existed. Therefore, limitation periods will continue to apply, unless fraud was genuinely undiscoverable during the period of dissolution. However, as the judgment does not determine what officers the company will be deemed to have during the period of dissolution, the burden is therefore on the company to show whether it could have identified a fraud.

Please access the judgment here

5. FREEZING ORDERS: MOLD INVESTMENTS LTD V HOLLOWAY AND OTHERS [2025] EWCA CIV 986

Court: Court of Appeal

Date: 29 July 2025

Summary

The Court of Appeal unanimously allowed an appeal against an order directing that an application to set aside a freezing order (alleged to have been obtained using fabricated evidence) be heard at a stand-alone hearing with cross-examination of factual and expert witnesses, and estimated at taking some 5 days. In so doing, the court gave guidance on the proper approach to disputed questions of fact on applications to discharge freezing orders, ordering that the Defendant's application be heard together with the trial of the substantive claim.

Facts

The issue before the Court of Appeal arose following an application by Matthew Holloway (**D1**) to set aside the freezing order, and subsequent extension to cover all of the assets in companies in which both he and Andrew Jacques (**D2**) were interested, in favour of Mold Investments Ltd (**Mold**). At the relevant time both D1 and D2 were directors of Mold. The claim exceeded £55 million.

The original injunction, granted without notice in August 2023, was based on WhatsApp messages said to show D1 and D2's intention to dissipate assets. The Claimant later obtained an extension of the injunction based on further anonymous communications allegedly threatening Mold's representative, Mr O'Grady.

D1 consistently denied any involvement in the messages and alleged they were fabricated by Mr O'Grady and a third party, Mr Hazlehurst, using burner phones. In December 2024, D1 applied to set aside the injunctions on the basis of fraud on the court and non-disclosure. D1 argued that new evidence (including phone forensics, missing metadata, and the loss of key devices) supported his case. Mold opposed the application, arguing that the allegations lacked particularity and should have been raised earlier.

The Chancery Court Judgment

The court allowed D1's application. Whilst noting concerns over the timing and presentation of D1's case, the court found that recent disclosures, such as the late revelation that Mr Hazlehurst's original phone had been replaced, meant the application could not reasonably have been brought earlier.

The court concluded that this was one of the rare cases where cross-examination and the use of expert evidence at the interim stage was justified. D1's conduct and case framing were criticised, and the court noted the seriousness of the fraud allegations and the limited overlap with the main claim, as supporting the need for a discrete evidentiary hearing. D1 was ordered to provide detailed particulars of the allegations, to identify the persons implicated, specify any particular motives for their actions, and set out his positive case. The court made it clear that it would not permit a fishing expedition in order to enable the case to be formulated at the hearing, nor would it allow a cross-examination ambush.

The court also directed that all factual witnesses whose statements had been served, excluding solicitors, could be cross-examined and stressed the importance of identifying any privilege issues likely to arise.

Directions were given for a five-day hearing and related expert and factual evidence. The court warned that any further delay would result in the application being rescheduled to the end of the judicial queue.

The Court of Appeal Judgment

Mold appealed on the basis that the court did not have authority to order that the application to set-aside the freezing injunction be dealt with by reference to oral evidence over 5 days in what was effectively a satellite trial.

The Court of Appeal upheld the appeal but on the grounds that the set aside application should be heard at the trial of the substantive claim and not at a separate hearing. The reasoning being that this would save time as there were overlapping issues, would prevent evidence being given twice, and would save disproportionate costs being incurred in a separate hearing.

HFW Comment

Whilst it chose not to order a "mini-trial" in this matter, the judgment provides helpful guidance on how disputed factual evidence should be dealt with. The court has made it clear that in the appropriate circumstances it will consider departing from the standard procedure and allow evidence and cross-examination at an interlocutory stage where serious fraud allegations are advanced with sufficient clarity and supporting evidence.

Please access the judgment here

6. ISSUES AROUND THE USE OF GENERATIVE AI IN LITIGATION:

- **R (on the application of Ayinde) v London Borough of Haringey [2025] EWHC 1040 (Case 1)**
- **Hamad Al-Haroun v Qatar National Bank QPSC and QNB Capital LLC [2025] EWHC 1588 (Comm) (Case 2)**
- **Ayinde v London Borough of Haringey and Al-Haroun v Qatar National Bank [2025] EWHC 1383 (Admin) (Case 1 and 2 joint hearing)**
- **Bandla v SRA [2025] EWHC 1167 (Admin) (Case 3)**

Court: High Court – Various

Date: April-June 2025

Summary

These three cases highlight a growing concern in the legal profession: the misuse of generative AI. In each case, the legal teams relied on case law that turned out to be AI-generated and falsely invented (known as 'hallucinating').

Facts

In Case 1, a junior barrister and the respondent's legal team referenced five Generative AI "hallucinated cases" in their submissions. As a result, the legal team were summoned by the President of the King's Bench Division to explain themselves to the court under the Hamid jurisdiction (which empowers the court to enforce the duties lawyers owe to the court).

In Case 2, a solicitor was found to have relied on their client's research (which was produced by Generative AI), without reviewing the authorities cited. Again, the legal team was ordered by the court to account for their behaviour under the Hamid jurisdiction.

Cases 1 and 2 were subsequently referred to the Divisional Court under the Hamid jurisdiction and a joint highly critical judgment was published. The legal teams were referred to their respective regulatory bodies.

In Case 3, a former practising solicitor listed 27 fake cases in an appeal against their being struck off the Roll of Solicitors. The solicitor denied that the cases were AI generated, instead asserting that they were found through a Google search.

The Judgments

The following judicial guidance was given in the joined Cases 1 and 2:

- AI must be used within a regulatory framework that ensures compliance with professional and ethical standards.
- Legal professionals must maintain the integrity and professionalism expected by the court.
- Freely available generative AI tools (e.g., ChatGPT) cannot conduct reliable legal research due to risk of hallucinations.
- Lawyers must verify AI-generated research using authoritative sources before relying on it professionally.
- The duty to verify rests on the lawyer even when delegating to others (e.g., trainees, pupils, or third-party AI users).
- All legal service providers must understand and comply with their duties when using AI.

In both Cases 1 and 2, the court declined to initiate contempt proceedings and instead referred the matters to the appropriate regulator – being the Bar Standards Board (Case 1) and the Solicitors Regulation Authority (both Cases 1 and 2).

In Case 3, the appellant's grounds of appeal were struck out on the basis that fake authorities were cited in the grounds – whether these were AI generated remained undetermined, but the appellant asserted that the cases were discovered through a standard Google search. Costs were awarded against the appellant on an indemnity basis.

HFW Comment

These cases make it clear that reliance on fictitious case law, whether AI generated or not, is unacceptable. The inclusion of fictitious case law has a number of potential consequences for legal teams – including costs consequences, referral to regulatory bodies such as the Bar Standards Board or the Solicitors Regulation Authority, or even proceedings for contempt of court in certain circumstances.

These judgments are a reminder of the duties of solicitors – including the duty not to mislead the court, and the duty to act in a way that upholds public trust and confidence in the solicitors' profession. It is shocking that anyone would think that this was a professional way to behave, and that these duties seem to have been forgotten when using Generative AI, and this case acts as a warning to all that when using Generative AI, the sources must be checked before any reliance on them can be made. In short there is still no substitute for instructing a member of the highly respected legal profession. – especially when navigating new technologies.

Please access the judgments here:

Case 1

Case 2

Case 1+2 Appeal

Case 3

7. JURISDICTIONAL CHALLENGES IN INTERNATIONAL FRAUD CASES: SUCDEN FINANCIAL LIMITED V TMT METALS AG, PRATEEK GUPTA, MINE CRAFT LIMITED [2025] EWHC 2006 (COMM)

Court: Commercial Court

Date: 3 July 2025

Summary

The second Defendant (**Gupta**) challenged the English court's jurisdiction to hear the dispute, and the means of service in respect of claims brought against him by the Claimant (**Sucden**). The judge found in favour of Sucden, holding that at least one of the alleged misrepresentations occurred in London and the resulting damage was sustained in England. The court held there was a serious issue to be tried and that England was clearly the most appropriate forum.

The judgment provides a helpful review of the jurisdictional gateways, which provide the requirements to be satisfied in order to show that England is the proper place for the dispute to be heard. The 25 jurisdictional gateways are set out in paragraph 3.1 of CPR PD 6B, with each gateway corresponding to a different legal basis for asserting jurisdiction.

Facts

Sucden is a derivatives and commodities broker incorporated in England & Wales. At the time, Gupta was resident in Dubai and the sole director of the first Defendant (**TMT**), a metals trader incorporated in Switzerland.

In 2010, TMT entered into a contract with Sucden, under which Sucden was to provide a futures and options trading facility. The contract provided for English law and jurisdiction. In 2022, Sucden made margin calls on TMT, who did not pay.

Sucden's case was that it was induced to refrain from taking enforcement action against TMT when it was provided with a bill of lading as security for TMT's liability and a memorandum of deposit (**Memorandum**) signed by Gupta on behalf of TMT. The bill of lading provided for bundles of nickel full plate cathodes. However, when the container was opened low value composite rather than high value nickel was found.

Sucden issued proceedings in England including, (1) a contractual claim for debt or damages against TMT; (2) a claim in tort for deceit or fraudulent misrepresentation against TMT and Gupta; and (3) a claim in tort against all three Defendants for the alleged conspiracy.

On 18 April 2024, Sucden was granted summary judgment for the contractual claim against TMT.

Sucden sought to serve Gupta out of the jurisdiction under gateway 3.1(3) of CPR PD 6B, which allows service on a foreign Defendant who is a necessary or proper party to a claim against a Defendant already served within the jurisdiction. TMT was served in England via an agent under CPR 6.11(1), relying on the agent for service of process clause in the Memorandum permitting such service.

Gupta's challenge focused on whether Sucden was entitled to rely on CPR 6.11(1) to serve TMT. On behalf of Gupta, it was argued that that rule only applies where the claim is "*solely in respect of*" the contract containing the service clause. As the claim against TMT included non-contractual elements, it was argued that CPR 6.11(1) was inapplicable.

The Commercial Court's Judgment

Although it was recognised that Gupta's arguments presented an arguable obstacle to reliance on gateway 3.1(3), the court ultimately found that Sucden had a good arguable case under gateway 3.1(9), which covers tort claims where damage was sustained in England.

In this case, the court found that:

- Gateway 3.1(9) was satisfied, as the claim in tort involved damage sustained within the jurisdiction. The court accepted that one of the misrepresentations took place at a meeting in London, and the resulting delay in enforcement action constituted sufficient damage in England.
- Gateway 3.1(3) (which applies where the foreign Defendant is a necessary or proper party to a claim against another Defendant served within the jurisdiction) was also relied upon. However, the court found it unnecessary to reach a final view on that given the strength of the case under gateway 3.1(9).

As a result, service out of the jurisdiction on Gupta was permitted.

The court also held that the England was the appropriate forum based on:

1. Sucden's presence in the jurisdiction;
2. the fact that Gupta was in the jurisdiction for the London meeting held in 2022; and
3. the fact that the Memorandum was governed by English law.

The challenge to the order for alternative service was dismissed in accordance with the CPR's "overriding objective" on the basis of not delaying the proceedings any further.

HFW Comment

This judgment confirms the strength of gateway 3.1(9) in fraud claims where damage occurs in England. It reinforces the English court’s readiness to assert jurisdiction in multi-jurisdictional disputes where key events and harm are connected to the forum.

Please access the judgment here

8. LITIGATION FUNDING: SONY INTERACTIVE ENTERTAINMENT V ALEX NEIL CLASS REPRESENTATIVE LTD [2025] EWCA CIV 841

Court: Court of Appeal

Date: 4 July 2025

Summary

The Court of Appeal has dismissed the argument that any cap on the funder's return, which is linked to the damages recovered automatically converts a Litigation Funding Agreement (**LFA**) into a Damages Based Agreement (**DBA**). Thereby confirming that litigation funding agreements amended in light of the Supreme Court's ruling in *PACCAR* are not DBAs and *are* legally enforceable.

Facts

This decision addressed five appeals heard together, all involving similar issues about the enforceability of LFAs that were originally heard before the Competition Appeals Tribunal (**CAT**).

Each case involved an LFA that was revised following the decision in PACCAR so that the fee would be calculated as a multiple of the funder's expenditure, rather than a percentage of the proceedings recovered. The CAT held that these revised LFAs did not constitute DBAs, rejecting the Defendant's arguments to the contrary. This finding has now been upheld by the Court of Appeal.

The Court of Appeal judgment

The key outcome is that LFAs which calculate a funder's return as a multiple of their financial outlay - even if that return is capped by reference to the damages recovered - do not constitute DBAs under section 58AA(3)(a)(ii) of the Courts and Legal Services Act 1990.

The appellants had argued that any cap on the funder's return, whether express or implied that is linked to the damages recovered, meant the return was determined by reference to the amount of the financial benefit obtained, thereby making the LFA a DBA, with the consequence that unless it fulfilled the statutory requirements of a DBA it would be void. The court rejected this interpretation, holding that the basis for calculating the funder's return remained based upon the amount invested, not the damages recovered. The cap merely limited the return; it did not change the method of calculation. Importantly, accepting the appellants' argument would have rendered most LFAs unenforceable.

The court also addressed the inclusion of clauses in two of the LFAs, which provided for a percentage-based return if the law changed in the future. It held that these clauses are currently of no contractual effect and do not convert the LFA into a DBA. The court emphasised that these clauses were included to anticipate possible legal developments and were not intended to circumvent existing rules.

On the issue of severability and whether an unenforceable clause could be removed without affecting the rest of the agreement, the court declined to rule, holding that it was unnecessary given that the inclusion of percentage clauses had no legal effect.

HFW Comment

The Court of Appeal's decision is likely to be positively received by the broader funding industry, given that since the Supreme Court's ruling in *PACCAR* most LFAs now stipulate that the successful funder's payment will be based on a multiple of the capital deployed or committed. If

the appeal had been successful, such agreements would have become invalid, resulting in significant disruption for the funding industry.

This judgment coincided with the publication of the Civil Justice Council's Report on Litigation Funding in early June, which suggested several changes to the law regarding litigation funding, including a recommendation that the government introduce legislation clarifying the status of LFAs with a damages based reward mechanism to ensure that they are not automatically classified as DBAs in future – effectively overturning the UK Supreme Court decision in PACCAR. The government's response is awaited.

Please access the judgment here

9. PART 36 OFFERS: HENDERSON & JONES LIMITED V SALICA INVESTMENTS LTD AND OTHERS [2025] EWHC 838 (COMM)

Court: High Court – Commercial Court

Date: 7 April 2025

Summary

The Commercial Court held that a Part 36 offer without a clear definition of "Relevant Period" should be interpreted to refer to the definition found in Part 36.5(1)(c) of the Civil Procedure Rules (**CPR**), namely that. it should be interpreted in the way in which a reasonable solicitor would have understood it, with the correct interpretation being no less than 21 days.

Facts

In this case, a litigation funder (Henderson & Jones Limited) (**Claimant**) took an assignment of a claim, and subsequently brought a claim against four Defendants, including and most relevant for these purposes the first Defendant Salica Investments Limited, and the fourth Defendant Dominic Perks (together **Defendants**), for breach of confidence.

In the substantive proceedings, the court found in favour of the Claimant, determining that it was entitled to recover compensation in the sum of £2,154,285 plus interest.

Following disagreement between the parties on all consequential orders made by the court, the Commercial Court scheduled a further hearing to deal with a number of issues connected to the Claimant's Part 36 offer. The Defendants also sought permission to appeal.

The Commercial Court Judgment

The court considered the appropriate amount of interest that should be applied on the judgment sum. The Claimant sought interest of 6% above the Bank of England's (**BoE**) base rate, whilst the Defendants argued that interest should be set at 1% above the BoE base rate, in line with the Commercial Court's practice.

The court reviewed several cases which dealt with the interest to be awarded in Part 36 offers and agreed with the Claimant that the question of interest should be approached broadly and, on a case-by-case basis (especially where a private individual or small business is involved). Considering these arguments, the court agreed to a rate of 5% above the BoE base rate, basing its decision on BoE data and what would be reasonable for the Defendants in this specific case.

The second issue was whether the Claimant's Part 36 offer was compliant – specifically in relation to the fact that the offer did not define the "Relevant Period". On this point, the court held that a reasonable solicitor would "fully understand" that the reference to "Relevant Period" was to the period of 21 days as referenced in CPR Part 36.5(1)(c), and especially in this matter where in previous Part 36 offers by the Defendants and Claimant, the period had been so defined. The court also noted that the Defendants had not raised the point at the time the offer was made.

The court determined that the offer complied with CPR 36.5 and was, a valid Part 36 offer.

The court also determined that the Claimant's Part 36 offer was beaten at trial (i.e., that the Claimant obtained a better outcome at trial than the terms of their Part 36 offer). As a result, the court applied the costs consequences set out in CPR 36.17(4), which are as follows:

- Interest on the judgment sum at up to 10% above base rate;

- Costs on the indemnity basis;
- Interest on those costs up to 10% above base rate; and
- An additional amount not exceeding £75,000.

The Defendants also sought permission to appeal, which was refused.

HFW Comment

This decision shows that the courts can be flexible when considering the interest rates associated with Part 36 offers and consider interest on a case-by-case basis, leading to greater flexibility, but creating less certainty for parties in the future.

Whilst the court found that the Part 36 offer was not defective by lack of reference to the Relevant Period being 21 days, it still advisable to ensure that the strict provisions of CPR Part 36 are adhered to in order avoid time and costs incurred in satellite litigation.

Please access the judgment here

10. SHAREHOLDER RULE: JARDINE STRATEGIC LTD V OASIS INVESTMENTS II MASTER FUND LTD AND OTHERS [2025] UKPC 34

Court: Privy Council

Date: 24 July 2025

Summary

In a landmark judgment handed down in July 2025, the Judicial Committee of the UK Privy Council (**JCPC**), in hearing a case on appeal from the Bermudan courts, departed from the exception to legal advice privilege applying as between a company and its shareholders and declared that the 'Shareholder Rule' (as it's known) was abrogated for the purpose of English litigation meaning that the judgment would impact English law

The decision follows a 2024 case[1] in which the Shareholder Rule was criticised, and on which we wrote earlier in the year[2].

This judgment is relevant to company directors and in-house legal teams, who will now be able to seek legal advice on behalf of their companies secure in the knowledge that the advice will not automatically be exempt from privilege if a dispute with shareholders arises.

Facts

The underlying dispute arose from the amalgamation of Jardine Strategic Holdings Ltd (**Jardine Strategic**) and another company to form Jardine Strategic Limited (**Company**). Following the amalgamation, the Company was required to pay a fair value for the cancelled shares of Jardine Strategic to its shareholders. Legal action was then taken in Bermuda by a group of 90 shareholders who were unhappy with value offered by the Company (**Shareholders**).

As part of that process, the Shareholders applied to the court for an order that the Company produce the legal advice that it had obtained when assessing the fair value of the cancelled shares. Documents containing legal advice would ordinarily be subject to legal advice privilege, meaning that the opposing party in litigation would not be entitled to see such documents. However, the Shareholders sought to invoke the 'Shareholder Rule,' which had for decades been recognised as an exception to legal advice privilege, and which enabled shareholders to obtain copies of legal advice given to companies in which they held shares when in proceedings against the Company. The Company argued that the Shareholder Rule should be abandoned.

What is the Shareholder Rule?

The Shareholder Rule exception was established in 1887 and was further developed in the 19th century[3] by analogy to the Trustee Rule, which provides that trustees could not claim privilege against their beneficiaries for materials which they had obtained at the beneficiaries' expense. The justification for the Shareholder Rule, in essence, was that a company (similarly to a trust) obtaining legal advice did so by using assets ultimately belonging to the shareholders (analogous to beneficiaries of a trust), and as such it could not prevent its shareholders from viewing that advice.

An alternative justification emerged, namely that the relationship between a company and its shareholders was one of 'joint interest.' As such a company should not be entitled to withhold documents containing legal advice from its shareholders.

The Privy Council's Judgment

[1] Aabar Holdings SARL v Glencore Plc and others [2024] EWHC 3946 (Comm)

[2]

[3] The rule was first applied in Gouraud v Edison Gower Bell Telephone Co of Europe (1888) 57 LJ Ch 498

In March 2025, the JCPC[4] heard the appeal from the Court of Appeal for Bermuda. In reaching its decision, the JCPC observed that the original proprietary justification had not been followed in case law or in academic texts for some time.

As to the alternative argument of joint interest between the company and its shareholders, the JCPC held that it cannot be said to exist universally between a company and its shareholders, many of whom (as in the present dispute) may have divergent views and objectives.

The JCPC also emphasised the importance of legal professional privilege in general, referring to earlier case law[5] describing privilege as a fundamental human right and a condition "*on which the administration of justice as a whole rests.*"

Applicability under English law

Although the JCPC is not an English court, the decision is binding as a matter of English law by virtue of the JCPC giving a Willers v Joyce[6] direction to the effect that it's decision would apply to English law, as a result, the Shareholder Rule exception is no longer recognised in English law.

HFW Comment

This decision provides clarity on the question of privilege as between a company and its shareholders. Most significantly, companies (acting through their directors) can now seek legal advice in relation to the running of a company without fear that, if a dispute arises between the company and its shareholders, that legal advice will need to be produced to the shareholders.

However, the Shareholder Rule exception and the judgment concerned privilege extending over legal advice obtained by a company. If a dispute arises between a company and its shareholders, litigation privilege may still apply to confidential communications falling within that category of privilege.

This article was originally published as an HFW Insight, available at this link.

Please access the judgment here

[4] The case was heard before Lord Briggs, Lord Leggatt, Lord Burrows, Lady Rose, and Lord Richards. Lord Briggs and Lady Rose gave the judgment in this case.
[5] R v Derby Magistrates' Court, Ex p B [1996] AC 487.
[6] Willers v Joyce (No 2) [2016] UKSC 44

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