HFW LITIGATION



COMMERCIAL LITIGATION CASE UPDATE

EDITION 3 / 2026

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

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ANDREW WILLIAMS
Partner, London
T +44 20 7264 8364
E andrew.williams@hfw.com



NICOLA GARE
Knowledge Counsel
(Dispute Resolution), London
T +44 20 7264 8158
E nicola.gare@hfw.com



JOANNE SAVORY
Associate, London
T +44 (0)20 7264 8824
E joanne.savory@hfw.com

The Commercial Litigation Case Update – Edition 3 / 2026

No.	Case Name	Page
1.	Various Claimants v Entain Plc [2026] EWHC 1511 (Comm)	3
2.	Lloyds Developments Limited v Accor Hotelservices UK Limited [2026] EWHC 1522 (TCC)	5
3.	Musst Holdings Ltd v Astra Asset Management UK Ltd and another [2026] EWHC 1599 (Ch)	7
4.	Skatteforvaltningen v MCML Ltd [2026] UKSC 19	10
5.	Nuray Houssein & Ors v London Credit Limited [2026] EWCA Civ 830	13
6.	The Wine Enterprise Investment Scheme Limited (In Liquidation) v Crowe U.K. LLP [2026] EWHC 1662 (Ch)	15
7.	Illiquidx Ltd v Altana Wealth Ltd & Ors [2026] EWCA Civ 874	17
8.	Loudmila Bourlakova & Ors v Semen Anufriev & Ors [2026] EWHC 1747 (Ch)	19
9.	Yodel Delivery Network Limited v Corlett & Ors [2026] EWHC 1741 (Ch)	21
10.	Health and Home Limited (in liquidation) & Anor v Elite Property Holdings Limited & Ors [2026] EWCA Civ 933	23
11.	Wild Justice & Badger Trust v Natural England (No.3) (Embargo Breach) [2026] EWHC 1932 (Admin)	25
12.	Disclosure Review Working Group - Survey of Legal Sector Stakeholders (July 2026)	27

1. Various Claimants v Entain Plc [2026] EWHC 1511 (Comm)

Court: The High Court (Commercial Court)

Date: 17 June 2026

Summary

The Commercial Court has made a filing modification order (**FMO**) in relation to certain documents whose public disclosure would risk compromising the fair conduct of separate criminal proceedings.

The FMO was made pursuant to the relatively new Practice Direction 51ZH (**PD 51ZH**), introduced under Part 51 of the Civil Procedure Rules, which provides for a two-year pilot scheme (from 1 January 2026 to 31 December 2027) with the aim of advancing the principle of open justice in the Commercial Court, the London Circuit Commercial Court, and the Financial List.

Facts

The application for an FMO arose after two groups of shareholders (the **Claimants**) brought proceedings against Entain Plc (**Entain**) under sections 90 and 90A of the Financial Services and Markets Act 2000. The proceedings concerned Entain's alleged failure to prevent the payment of bribes while carrying out business in Turkey, which is said to have occurred with the knowledge of certain persons discharging managerial responsibilities (**PDMRs**) at Entain. The Claimants argued that they suffered losses, when acquiring, holding or selling shares, due to their reliance on information that Entain published to the market.

Certain PDMRs, who have been named in the Claimants' statements of case, are separately charged with criminal offences said to arise from the same set of facts alleged in these proceedings. Pursuant to paragraph 10 of PD 51ZH, documents which have been used or referred to at a hearing in public in the relevant proceedings (the **Public Domain Documents**) must be filed with the court within a specified period, after which they become publicly accessible to third parties via the court's electronic filing and case management system, **CE-File** (together, the **Filing Requirement**). This obligation is subject to the court's power under paragraph 13 of PD 51ZH to make an FMO, via which it can qualify or waive the respective Filing Requirement.

In these proceedings, the Crown Prosecution Service (the **CPS**) made an application for an FMO to restrict the filing of documents on the basis that their public disclosure presented a material risk of compromising the fair conduct of the parallel criminal proceedings.

High Court Judgment

While noting that PD 51ZH does not identify factors which the court must consider when deciding whether to make an FMO, and that no previous decision had addressed the point, the court held that the principles in *Dring v Cape Intermediate* [2020] AC 629 remained applicable, adapted to reflect the procedures introduced by PD 51ZH. Accordingly, while the starting point was that access to Public Domain Documents advances the principle of open justice, the court was required to balance this against the risk of harm to the effective administration of justice or the legitimate interests of others, including those involved in related criminal proceedings.

In circumstances where all parties agreed there was significant overlap between the civil and criminal proceedings, the court considered that serious consideration should be given to restricting public access. While the parties accepted that substantial redactions would otherwise be required, the court noted that the parties were not well placed to assess what redactions were necessary; they were not parties to the criminal proceedings, nor would it usually be the CPS's role to act as the "gatekeeper" for such redactions.

The court therefore waived the Filing Requirement under paragraph 13(b) of PD 51ZH and, using its discretion under paragraph 13(e), required the parties to file a placeholder on CE-File. The court ordered that the placeholder identified the date and nature of the: (i) document; and (ii) hearing, and the party by whom it was filed, as well as draw attention to the rights of non-parties to make an application under paragraph 19 of PD 51ZH. The court also directed that any application by a non-party was to be notified promptly to the CPS and the criminal defendants.

In addition, the court made a reporting restriction order (an **RRO**) under section 4(2) of the Contempt of Court Act 1981 to avoid the risk of prejudice to the criminal proceedings arising out of the publication of any report of these proceedings. Together with the fact that the civil trial was listed after three of the criminal trials, the court considered that these measures struck the appropriate balance between open justice and minimising the risk of prejudice to the criminal proceedings.

HFW Comment

This decision is the first reported judgment which considers the granting of FMOs under the open justice pilot at PD 51ZH. It therefore provides valuable guidance on how the Commercial Court is likely to approach applications seeking to restrict public access to Public Domain Documents, particularly if the pilot is extended beyond 31 December 2027 and/or widened across other courts. The judgment demonstrates that the court will continue to apply the balancing exercise provided for in *Dring*, i.e. weighing the benefits of open justice against any risk of harm to the administration of justice or the legitimate interests of others.

The judgment further highlights that the existence of related proceedings (particularly criminal) may be a significant factor when assessing whether unrestricted public access is appropriate. In addition, parties should be alert that the court may consider additional factors, such as the availability of an RRO or the timing of the respective trial dates, in deciding whether to impose such a restriction on public access to potentially harmful information.

It is also notable that, when faced with parties who were poorly positioned to redact materials in proceedings to which they were not a party, the court avoided the redaction exercise altogether by waiving the Filing Requirement and substituting a placeholder identifying the document without disclosing its content; a solution which may offer a precedent for similar cases.

Please read the judgment here

2. Lloyds Developments Limited v Accor Hotelservices UK Limited [2026] EWHC 1522 (TCC)

Court: The High Court (TCC)

Date: 19 June 2026

Summary

In a £180 million dispute over a failed hotel development, the Technology and Construction Court (the **TCC**) ordered two directors (the **Directors**) of Lloyds Developments Limited (the **Claimant**) to hand their personal mobile phones to an independent reviewer for forensic examination of deleted messages.

The Directors had argued that recovering deleted messages was too speculative and intrusive to justify such an order. However, the TCC rejected the Directors' arguments and held that the Claimant had established grounds under common law, contractual rights, and the Civil Procedure Rules (the **CPR**) entitling it to delivery up of the phones, and that any privacy intrusion under Article 8 of the European Convention on Human Rights (**Article 8 Rights**) was proportionate and adequately protected by the review protocol already in place.

Facts

The Claimant, now in administration, claimed over £180 million from Accor Hotelservices UK Limited (the **Defendant**), alleging that the Defendant had fraudulently insisted on unaffordable design changes to a hotel development, causing the project to collapse. The Defendant denied fraud and contended that the Directors, Rishipal Singh and Richard Diamond, had misappropriated investors' money. Disclosure of the Directors' personal messages (WhatsApp, iMessage, and SMS) had been ordered on 14 October 2022 in accordance with the Claimant's Disclosure Review Document (the **DRD**), with various subsequent court orders requiring the Directors to hand their phones to an independent reviewer. The Directors refused, arguing that they were third parties and that forensic recovery of deleted messages was unlikely to succeed.

In January 2026, Alexander Nissen KC (sitting as a deputy judge) directed that the Claimant make a formal application to compel delivery up, relying on: (i) common law agency; (ii) the contract between the Claimant and the Directors obliging the Directors to assist with the litigation (the **Funding Agreement**); and (iii) CPR 31.17. By the time the matter reached the TCC, the dispute was limited to messages that may have been deleted.

High Court Judgment

The TCC found in favour of the Claimant on all grounds.

In respect of common law agency, as former agents, the Directors owed a duty to permit inspection of documents relating to the Claimant's affairs; a duty that survives termination and is not defeated because relevant material is mixed with personal or privileged content. Applying *Phones 4U (In Administration) v EE Ltd [2022] 1 All ER 239*, the TCC held that directors who choose to conduct company business on personal devices must accept the consequences of doing so. Furthermore, when the original order on disclosure was made, the interests of the Claimant and the Directors were aligned, with the Directors assumed to have been involved with the relevant part of the DRD which dealt with handing over the mobile phone content. Finally, safeguards built into the review protocol, such as the use of an independent reviewer, meant any privacy intrusion was minimal and proportionate.

In respect of contractual rights, clause 4 of the Funding Agreement required the Directors to comply with the CPR and court orders and provide all "*reasonable assistance* and comply with the Claimant's solicitors' "*reasonable requirements*" in conducting certain, defined proceedings and potential claims and "*provide reasonable access*" to all documents that the Claimant's solicitors are or may be liable to disclose under the CPR or by court order. The TCC held that this broad, unqualified wording covers a request to hand over phones needed to satisfy a disclosure order.

In respect of CPR 31.17, the TCC confirmed that, had the application been brought solely under that rule, it would have succeeded; the power in section 34(2) of the Senior Courts Act 1981 (**SCA1981**) is broad enough to permit an order for delivery up of a device itself, together with conditions protecting privacy.

HFW Comment

This decision closes a gap that many directors and employees assumed would protect them: the use of personal devices to conduct business.

The judgment makes clear that the material will not be placed beyond the reach of a disclosure order by: (i) the personal nature of a phone; (ii) the deletion of messages; or (iii) the termination of an individual's role. Article 8 Rights are not absolute and will not override disclosure obligations where proportionate safeguards, such as independent review, are in place.

The decision also confirms that broadly drafted obligations to provide "reasonable assistance" in funding or cooperation agreements can extend to delivery up of physical devices, even without an express reference to phones or data.

Parties entering litigation should therefore ensure that personal devices are identified, preserved and collected at the outset; that any review of mixed business and personal data is independently supervised rather than self-selected; and that cooperation clauses in funding, or similar, arrangements are reviewed for scope.

Please read the judgment here

3. Musst Holdings Ltd v Astra Asset Management UK Ltd and another [2026] EWHC 1599 (Ch)

Court: The High Court (Chancery Division)

Date: 26 June 2026

Summary

The Chancery Division has held that neither after-the-event insurance (**ATE**) premiums nor litigation funding fees are recoverable as damages in circumstances where the proceedings in which they were incurred are subject to the ordinary English rules for the recovery of costs.

Background

Proceedings between Musst Holdings Limited (the **Claimant**) and Astra Asset Management UK Ltd and another (the **Defendants**) had already resulted in two full trials. At the second trial, the court found that the Defendants had negligently made false representations to the Claimant.

The Claimant's case on costs as damages was that, but for those misrepresentations, it would have pursued all its claims in a single action, thereby avoiding a second ATE premium, a second litigation funding fee, and a second court issue fee. The court accepted that unchallenged evidence and the question of recoverability was heard at a further hearing on 29 April 2026.

The Legal Framework: Two Competing Principles

The Compensatory Principle

The Claimant relied on the broad restatement of compensatory damages in *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2026] UKSC 6 (***CCC***), where the Supreme Court departed from a longstanding Court of Appeal authority that had restricted "lost years" awards for injured children (*Croke v Wiseman* [1982] 1 WLR 71) (the **Compensatory Principle**). The Supreme Court's reasoning emphasised that a claimant who has plainly suffered loss must not be denied recovery merely because quantification is difficult.

The present case drew on that reasoning. Although the issue in *CCC* was far removed from costs as damages, the underlying principle was the same: where a recognised head of loss exists, the court should not refuse compensation because of an artificial or arbitrary limiting rule. The Claimant submitted that this principle entitled it to recover the additional expenditure caused by the Defendants' misrepresentations.

The Costs Principle

The Defendants relied on a competing rule, referred to as the "**Costs Principle**", under which the expense of bringing or defending a claim is not recoverable as substantive damages, whether in the same proceedings or in a follow-on action.

In *Hirachand v Hirachand* [2024] UKSC 43 (***Hirachand***), the Supreme Court confirmed that a party's entitlement to recover costs is governed by the Civil Procedure Rules costs regime (the **Costs Regime**) and is treated as distinct from the merits of any substantive claim, even where the costs would otherwise qualify as foreseeable consequential loss. The rationale is that permitting a party to circumvent the assessed-costs regime by repackaging unrecovered costs as a damages claim would undermine the policy objectives of the regime.

The court drew on the analysis of Professor Louise Merrett in her article "Costs as Damages" (2009) 125 LQR 468, also cited in *Hirachand*. Professor Merrett identified two interlocking policy justifications: the assessment rules are designed to encourage proportionate litigation spending, and that restraint would be rendered meaningless if any shortfall could simply be pursued as a separate damages claim.

The Exception and its Conditions

There is a recognised exception to the Costs Principle in solicitors' negligence claims where a former client sues over defective work that exposed it to unnecessary proceedings. The more difficult scenario is where the claimant and defendant are the same in successive actions.

Drawing on *Berry v British Transport Commission* [1962] 1 QB 306 and *Union Discount Co Ltd v Zoller* [2001] EWCA Civ 1755 (where recovery was permitted because US proceedings offered no realistic prospect of a costs award and the claimant had an independent cause of action for breach of an exclusive jurisdiction clause), Professor Merrett argued that recovery requires two cumulative conditions: (i) an independent cause of action; and (ii) proceedings not subject to the ordinary English costs rules. The court endorsed that analysis.

On that basis, a claimant with a separate cause of action can recover costs incurred in foreign proceedings, or in English proceedings where costs were not available under the ordinary rules, but the exception does not extend to costs of proceedings fully subject to the Costs Regime.

ATE Premiums

It was common ground that ATE premiums are not recoverable under the Costs Regime as a result of Section 58C(1) of the Courts and Legal Services Act 1990 (the **1990 Act**). Section 58C(1) is in materially the same form as Section 58A(6) of the 1990 Act, which the Supreme Court construed broadly in *Hirachand*.

The court adopted the Supreme Court's reasoning and applied it to Section 58C(1), holding that the prohibition extends to any form of recovery, whether framed as costs or as damages.

The court held that ATE premiums were not recoverable for two reasons: (i) Section 58C(1) prohibited recovery regardless of how the claim was framed; and (ii) the exception to the Costs Principle did not apply because, whilst the Claimant had a separate cause of action, both the first and second claims were subject to the ordinary rules for the recovery of costs.

Litigation Funding Fees

Litigation funding fees presented a more difficult question. Unlike ATE premiums, there is no statutory provision expressly prohibiting recovery of litigation funding agreement (**LFA**) fees as costs. The critical issue was therefore one of characterisation: if LFA fees are properly regarded as litigation costs, the Costs Principle bars recovery; if they fall entirely outside the Costs Regime, the Compensatory Principle should permit it.

In the absence of binding English authority, the court drew on *Hunt Leather Pty Ltd v Transport for NSW* [2025] HCA 53 (***Hunt Leather***), where the High Court of Australia held that a commission payable under an LFA was not recoverable as damages.

First, the fee was contingent on success, giving rise to a conceptual paradox identified in the Australian authorities: a claimant seeking to recover LFA fees as damages is asking the court to compensate a loss that does not arise until after the defendant has already been ordered to pay.

Second, the court observed that a claimant’s voluntary arrangements for the distribution of any damages award do not ordinarily affect quantification. Agreeing with *Hunt Leather*, the court held that fees payable under an LFA are voluntary or collateral payments and that neither “but for" causation nor reasonable foreseeability is sufficient to justify recovery.

In the alternative, the funder's fees should properly be characterised as litigation costs: the quid pro quo was an indemnity against the Claimant's exposure to its own costs and adverse costs orders, and the court saw no real commercial difference between ATE premiums and funder's fees. Permitting recovery would undermine the Costs Regime in the same way.

HFW Comment

This is an important decision for parties who use litigation funding or ATE insurance in commercial disputes. It establishes that Section 58C(1) of the 1990 Act bars recovery of ATE premiums as damages, regardless of how the claim is framed.

On LFA fees, the characterisation of funder’s returns as litigation costs, reinforced by *Hunt Leather*, will make it difficult for funded claimants to argue that such fees fall outside the Costs Regime.

Parties seeking to distinguish the decision will need to confront both the voluntariness analysis and the court's insistence that both of Professor Merrett's conditions (a separate cause of action *and* proceedings not subject to the ordinary costs rules) must be satisfied before the exception is available.

Please read the judgment here

4. Skatteforvaltningen v MCML Ltd [2026] UKSC 19

Court: Supreme Court

Date: 1 July 2026

Summary

This unanimous Supreme Court decision upheld the narrow operation of the doctrine of issue estoppel, and confirmed the set of principles required to establish whether issue estoppel has arisen. Whilst it is capable of shutting a litigant out of an otherwise good claim or defence, it applies only to matters that were genuinely necessary to an earlier decision.

The ruling gives claimants facing a strike-out application, and defendants resisting repeat litigation, clearer guidance on when a prior judgment truly forecloses a later dispute.

Facts

The appeal concerned two sets of proceedings brought by Skatteforvaltningen, the Danish Customs and Tax Administration (**SKAT**), against a financial brokerage previously known as ED&F Man Capital Markets Ltd (**EDFM**), arising from Denmark's withholding tax regime under which certain non-Danish shareholders, including qualifying US and Canadian pension funds, could reclaim tax withheld by SKAT.

In 2018, SKAT sued EDFM and numerous other defendants for negligent misrepresentation in tax vouchers supporting refund applications, seeking restitution of related fees; fraud was alleged against other defendants but not EDFM. The defendants argued that SKAT's claims were inadmissible under the rule of English conflicts law barring enforcement, directly or indirectly, of a foreign state's revenue claims (the **Revenue Rule**). The High Court agreed and struck out all of SKAT's claims. SKAT did not pursue an appeal against EDFM on the Revenue Rule point, but its appeal on that point against the other defendants succeeded, first in the Court of Appeal and then in the Supreme Court.

In late 2022, SKAT issued fresh proceedings against EDFM alleging that it had knowingly operated a scheme to produce fraudulent tax vouchers to induce unwarranted refunds, substantially overlapping the 2018 vouchers plus a small number of additional ones.

EDFM sought to strike out the 2022 claim as an abuse of process and as barred by issue estoppel; the High Court rejected both grounds, and the Court of Appeal agreed there was no abuse of process but held, by a majority, that issue estoppel barred the claim entirely. SKAT appealed to the Supreme Court.

The Supreme Court's approach to issue estoppel

Issue estoppel is a powerful doctrine: once it applies, a litigant is barred from re-arguing a point decided against it, even if that ruling later proves legally wrong. Whilst the court recognised that issue estoppel may not apply where "*special circumstances*" arise where, following the earlier decision further relevant material becomes available, the application of this exception is narrow. Parties cannot therefore seek correction of an earlier decision in the same way as they can under the doctrine of precedent, which enables a party to distinguish or challenge an earlier ruling. Issue estoppel, once established, admits no such route back to the merits and should therefore be strictly construed. For that reason, the court held that the doctrine of issue estoppel must be kept within its narrow limits and not be given as broad a scope as the doctrine of precedent. The court considered and applied the "*well-established*" legal principles of issue estoppel.

First, issue estoppel can attach only to what was "*necessary and fundamental*" to the outcome of the earlier case, drawing on long-standing authority including *Concha v Concha* (1886) 11 App Cas 541, *Jones v Lewis* [1919] 1 KB 328, *Hoystead v Commissioner of Taxation* [1926] AC 155 and the Australian decision in *Blair v Curran* (1939) 62 CLR 464.

Second, whether an issue was actually pleaded and contested below is central to that assessment: matters that featured in a judge's reasoning, but were not indispensable to the result, cannot found an estoppel however clearly expressed. Litigants should not be compelled to argue every conceivable point, however marginal, merely to guard against an argued point later being treated as settled against them.

Third, the reach of an estoppel cannot be stretched by inference from what an earlier court decided. A decision on one set of facts does not automatically estop a party from litigating a different, even closely comparable, set of facts, regardless of whether the same reasoning might logically extend to them.

The Court of Appeal's alternative formulations

A notable feature of the Supreme Court's reasoning was its treatment of the two competing formulations of the relevant "issue" advanced in the Court of Appeal. The majority of the Court of Appeal (Newey and Popplewell LJJ) identified the issue determined in the 2018 proceedings broadly, finding that all private-law claims to recover withholding tax refunds paid out by SKAT, based on applications conveying incorrect information, were inadmissible under the Revenue Rule. On that formulation, the estoppel extended to the 2022 fraud claim and even to the five new vouchers not considered in 2018.

Nugee LJ, dissenting in part, took a different approach. He considered that the majority's formulation could not give rise to an estoppel because it amounted to a general proposition of law untethered to any particular facts. In his view, a party could only be estopped by a judge's conclusion on the facts of a particular case. He would therefore have confined the estoppel to the transactions common to both the 2018 and 2022 claims but would not have extended it to the five new vouchers.

The Supreme Court rejected both formulations. It held that the majority had wrongly expanded the scope of the issue estoppel arising from the 2018 claim to cover a different set of facts, and that Nugee LJ's alternative formulation suffered from the same fundamental difficulties. Neither approach respected the principle that only an issue which was necessary and fundamental to the earlier decision, and which formed its immediate foundation, could give rise to an estoppel. The correct approach was the "necessity requirement"; to ask what the trial judge *had* actually needed to decide on the claims as pleaded before him, not to extract broader propositions from his reasoning.

Applying the principles to the facts

Measured against these principles, the Supreme Court found that the Court of Appeal had framed the relevant issue too widely. The majority had treated the first-instance decision as establishing a broad proposition that any private-law claim to recover withholding tax refunds, where the underlying application conveyed misinformation, necessarily amounted to enforcement of foreign revenue law. In the Supreme Court's view, the trial judge had to decide only whether SKAT's specific 2018 claim, based on alleged negligent misstatements, was inadmissible under the Revenue Rule; he had not needed to, and did not, reach any wider conclusion covering fraud.

That distinction mattered because the 2022 claim rested on an entirely different footing: deliberate fraud, rather than negligence. An earlier decision can estop a later claim only where the same issue, not merely a similar one, was actually raised and necessarily resolved. Because the fraud allegations, and their characterisation under the Revenue Rule, had never been pleaded or decided in 2018, no estoppel could arise in respect of them.

HFW Comment

The Supreme Court judgment provides welcome clarity on the outer limits of issue estoppel, reinforcing that it is not a mechanism for extending the effect of an earlier decision to points that were never actually put in issue or necessary to the result.

Those advising on repeat or follow-on litigation should focus their analysis on precisely what the earlier court had to decide, rather than on the broader legal reasoning it may have offered along the way and should not assume that abuse of process and issue estoppel will produce the same outcome on a given set of facts.

Implications for commercial litigation

The decision will be closely read by parties considering, or resisting, a second round of litigation after an earlier claim has failed. An issue estoppel argument will succeed only where a precise issue can be identified as actually and necessarily decided in the earlier case, not merely one that the earlier court's reasoning might logically extend to cover.

For claimants, a change in the factual or legal basis of a claim, such as an upgrade from negligence to fraud, will generally take a later claim outside the scope of an earlier estoppel, even where the two claims share a common factual background.

For defendants, broader propositions drawn from a judge's reasoning, however logically compelling, cannot be used to block later claims resting on materially different allegations.

More generally, the decision reminds parties in commercial disputes of the value of precise pleading and issue framing, and of focusing on what a court's decision actually required it to decide, rather than the wider reasoning that may accompany it. Whether a point was "necessary and fundamental" to an earlier outcome is likely to remain the central battleground whenever issue estoppel is raised.

Please read the judgment here

5. Nuray Houssein & Ors v London Credit Limited [2026] EWCA Civ 830

Court: Court of Appeal (Civil Division)

Date: 1 July 2026

Summary

The Court of Appeal dismissed an appeal by CEK Investments Ltd, a company owned by Ali and Nuray Houssein (together, the **Borrowers**), confirming that a 4% monthly default interest rate in a short-term bridging loan was not an unenforceable penalty. The judgment restates the modern approach to default interest following *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67 (***Cavendish***), which is that a high default rate will not be penal if it protects a legitimate commercial interest and is not out of all proportion to that interest.

The decision also confirms that refinancing proposals do not constitute an effective tender. To stop contractual interest running, a borrower must have the full amount due immediately available, offer it unconditionally, and keep the tender open.

Facts

London Credit Limited (**LCL**) advanced a short-term bridging loan of approximately £1.88 million to the Borrowers. The loan was secured over several residential properties, including the Housseins' family home. The facility carried ordinary interest at 1% per month. On default, a further 3% per month became payable, producing a compound default rate of 4% per month.

LCL alleged that the Borrowers were in breach of a non-occupation covenant, because the Housseins were occupying their family home, and a substantial default interest liability accrued. In earlier proceedings, the High Court held that the default rate was penal, but that finding was overturned by the Court of Appeal in 2024 and remitted. On the remitted hearing, the High Court held that the clause was not penal. The Borrowers appealed again, arguing that the default interest provision was unenforceable and that interest should have stopped running because they had made repeated attempts to refinance and redeem the loan.

Court of Appeal Judgment

The Court of Appeal rejected both grounds of appeal.

Lewison LJ held that the Borrowers' refinancing proposals did not amount to an effective tender. Interest will not stop simply because a borrower expresses a willingness to redeem. A borrower must be in a position to pay the full amount due, must make that payment available unconditionally and must keep the tender open. Conditional refinancing proposals or indications that third-party funding may become available are not enough. On the facts, there was no unconditional offer of the full sum due supported by immediately available funds.

On penalties, the court applied the *Cavendish* test, namely whether the clause protected a legitimate interest and, if so, whether the detriment imposed was out of all proportion to that interest. The court accepted that LCL had legitimate interests beyond compensation for late payment, including managing a high-risk lending position, protecting the value and liquidity of its security, maintaining pressure for repayment and responding to increased credit risk. The court also recognised that in bridging finance, delay in repayment can materially alter the lender's risk profile and increase exposure to movements in property values and refinancing conditions.

The fact that the rate was high and at the upper end of market practice did not make it penal. The relevant question was whether it was extravagant, exorbitant or unconscionable when assessed against the lender's legitimate interests at the date of contracting. The Borrowers had not shown that the 4% monthly rate crossed that line. The court was unwilling to use the penalty doctrine as a broad mechanism for controlling the fairness of a commercial bargain.

The court's reasoning also emphasises timing. The penalty analysis is undertaken by reference to the position when the contract was made, not with hindsight. It was therefore relevant to consider what LCL could properly have sought to protect when agreeing the facility, including the need for prompt repayment and the risk that security might become harder to realise. Viewed in that context, the default rate was not disproportionate.

HFW Comment

The decision is helpful for secured lenders. It confirms that robust default interest provisions can be enforceable where commercially justified and tied to identifiable legitimate interests. However, it should not be read as blanket approval of very high default rates. The clause will still be assessed objectively as at the date of contracting, and the justification is likely to be stronger where the facility is short-term, the security position may change quickly, and default materially affects the lender's exit strategy.

For borrowers, the judgment underlines the importance of negotiating default interest provisions at the outset. A borrower seeking to stop interest running should not rely on expressions of willingness to pay or incomplete refinancing arrangements. A borrower should identify the sum due, ensure funds are immediately available, make an unconditional tender, and keep that tender open.

The case is also a reminder that the penalty doctrine does not permit the court to re-price a bad bargain. The focus remains on whether the contractual remedy is out of all proportion to the innocent party's legitimate interest in performance. In a high-risk bridging loan, a significant default rate may be capable of justification. The decision sits comfortably with the post-*Cavendish* trend of respecting commercial allocation of risk, while preserving the court's role in striking down clauses that are truly extravagant or unconscionable.

For drafting purposes, lenders should ensure that default interest provisions are supported by a clear commercial rationale. Borrowers should test those assumptions before signing and should consider caps, cure periods or other protections where the default rate may compound rapidly. Once default has occurred, offers to redeem must be precise, unconditional and backed by funds. Otherwise, the contractual interest clock is likely to continue running.

Our article on the case can be found here.

Please read the judgment here

6. The Wine Enterprise Investment Scheme Limited (In Liquidation) v Crowe U.K. LLP [2026] EWHC 1662 (Ch)

Court: The High Court (Chancery Division, Business List)

Date: 3 July 2026

Summary

Following a lengthy professional negligence trial, the Chancery Division, Business List, has confirmed that a claimant who wins on liability, but recovers only a fraction of what it claimed, may still end up paying the defendant's costs. The court also refused indemnity costs, despite serious criticism of the claimant's conduct, and gave detailed reasons for refusing permission to appeal. The decision is a valuable practical guide to costs strategy in any claim where quantum, not liability, is the real battleground.

Facts

The liquidators of The Wine Enterprise Investment Scheme Ltd (the **Company**) sued its former auditor, Crowe U.K. LLP (**Crowe**), for negligence across seven audit years, with claims ranging from £3,352,635 to £8,423,962. Following trial, the Company recovered only £101,965.95 plus interest - about 1.6% of its largest claim. The Company made a without-prejudice offer of £6 million in July 2024. Crowe then made a Part 36 offer of £3.175 million plus costs on 4 February 2025, which the Company rejected and, in September 2025, counteroffered £7 million. The court had to decide who should bear the costs, whether those costs should be assessed on an indemnity basis, and whether to grant permission to appeal.

High Court Judgment

The court held that Crowe, not the Company, was the "successful party" under CPR 44.2(2). Applying the well-established line of authority from *Roache v News Group Newspapers* [1998] EMLR 161 through to *Medway Primary Care Trust v Marcus* [2011] 5 Costs LR 808 (rather than the Company's preferred *Fox v Foundation Piling* [2011] 6 Costs LR 961 approach), it asked: "who, as a matter of substance, has won?".

It was common ground that the Company would not have brought the claim to recover such a small sum, and failing on six of its seven causes of action made its 'win' a Pyrrhic victory. It was ordered to pay 85% of Crowe's costs up to expiry of the Part 36 offer, and Crowe's costs (with interest) in full thereafter, applying the usual CPR 36.17(3) consequences without any injustice-based reduction.

On indemnity costs, Crowe relied heavily on the Company's shifting case theory, weak disclosure, and formulaic witness evidence said to breach Practice Direction 57AC. The court accepted there was force in much of this criticism and described the Company's conduct as "untidy, imperfect and lacking in focus". However, it held that this fell short of the "out of the norm" conduct required by *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hannah Aspden & Johnson* [2002] CP Rep 67 before indemnity costs can be justified.

Importantly, the court found the claim itself was not speculative, exaggerated, or opportunistic, a conclusion supported by the fact that Crowe itself had valued the claim at £3.175 million for Part 36 purposes. It also held that the Company's rejection of that offer, while "plainly a mistake" with hindsight, was not unreasonable given the genuine complexity of the issues at stake. Standard-basis costs were therefore ordered throughout, save for the 85% order described above.

On permission to appeal, the court dealt with several of the Company's proposed grounds, refusing permission on each. These included challenges to its findings on contributory negligence (and the 50% deduction applied), the credit given against damages for the benefit of monies invested in return for shares (following *AssetCo plc v Grant Thornton UK LLP* [2020] EWCA Civ 1151), an alleged procedural irregularity concerning the scope of the pleaded case on how shareholders would have learned of the fraud, and the court's approach to the seven separate causes of action pleaded across the audit years.

In each case, the court held there was no real prospect of success, while candidly acknowledging that other grounds remain outstanding and would need to be resolved at a further hearing.

HFW Comment

This decision is significant to anyone bringing or defending a substantial commercial claim, particularly where quantum is genuinely contested. It confirms that a defendant facing an inflated claim can protect its costs position with an early Part 36 offer, even if it does not ultimately avoid all liability**.** A modest, well-timed offer can flip the entire costs analysis in the defendant's favour, even where an adverse liability finding cannot be avoided.

Conversely, claimants (and their funders and insurers) should be alert to the real risk that recovering "something" will not be treated as success if the sum recovered is small relative to what was claimed and to the costs incurred in achieving it. Before issuing or continuing a claim, it is essential to stress-test the likely recovery against the amount claimed and the costs to be incurred. A large claim which is likely to yield only a small recovery carries a real risk of an adverse costs order, even if successful.

The judgment also confirms that indemnity costs remain difficult to secure; poor litigation conduct alone**,** without something genuinely exceptional, will not be enough. That said, parties should keep pleadings, disclosure, and witness evidence disciplined and consistent throughout the case.

Similarly, skeleton arguments should be exchanged in good time before any costs or consequentials hearing, to allow proper pre-reading and a genuine narrowing of the issues in dispute.

Parties considering an appeal should focus on genuine errors of principle. Findings of fact and discretionary costs decisions, such as the appropriate deduction for contributory negligence, are very difficult to disturb on appeal.

Please read the judgment here

7. Illiquidx Ltd v Altana Wealth Ltd & Ors [2026] EWCA Civ 874

Court: Court of Appeal (Civil Division)

Date: 10 July 2026

Summary

The Court of Appeal gave unanimous judgment on a matter concerning breach of non-disclosure agreements (each a **NDA**) and misuse of confidential information, upholding the previous decision of the High Court.

Facts

An advisory and broking boutique specialising in illiquid investments, Illiquidx Ltd (the **Respondent**), intended to set up a US-sanctions compliant fund for the purposes of exploiting undervalued Venezuelan debt. An investment fund manager, Altana Wealth Ltd (**Altana Wealth**), and its associated consulting company, Brevent Advisory Limited (together, the **Appellants**) entered into a joint venture (a **JV**) agreement and a NDA with the Respondent for the purpose of establishing a fund, the Altana Illiquidx Canaima Fund.

On 8 July 2019, the parties entered into the NDA. At clause 1 of the NDA, a "*Confidentiality Undertaking*" was given, which stated that "*Confidential Information*"[1] could only be used for the purpose of sourcing, evaluating, introducing and presenting the business opportunity. The permitted disclosure terms outlined in clauses 1.1(a) – 1.1(b) of the NDA stated that the parties were only permitted to disclose Confidential Information, if it was in the *"public domain"* at the time it was shared, or later became publicly available through lawful means as opposed to by breach of the NDA. Clauses 1.1(c) and 1.1(d) of the NDA stated that information was not confidential if the recipient already knew of it independently, had developed it themselves, or later lawfully obtained it from a third party who rightfully possessed or controlled it and was free to disclose it.

The JV failed and no joint fund was established. However, in July 2020, Altana Wealth proceeded to set up its own fund for distressed Venezuelan debt. Thereafter, on 13 February 2025, the Respondent succeeded in its High Court claim brought on the grounds that the Appellants had both misused its Confidential Information and trade secrets, in breach of the NDA. The Appellants gave notice of their intention to appeal on 27 June 2025.

The Appellants' grounds of appeal were as follows:

(a) Ground 1(i): The correct interpretation of the phrase "*public domain*" in clauses 1.1(a) and 1.1(b) was "*any information which was available or had been disclosed without being subject to a duty of confidentiality*"

(b) Ground 1(ii): The High Court failed to adequately examine clauses 1.1(c) and 1.1(d). If these had been properly considered, the information used by the Appellants would have been captured by these provisions.

(c) Ground 2: The information used by the Appellants was already in the *public domain.*

Court of Appeal Judgment

Ground 1(i)

The Court of Appeal rejected the first ground of appeal on the basis that the phrase "*public domain*", as used in a professionally drafted agreement between commercial parties, retained its well-established legal meaning under the law of equity. Applying *Attorney-General v Observed Ltd* [1990] 1 AC 109*,* information only qualified as being in the "*public domain*" if that information was "*so generally accessible that, in all the circumstances, it could not be regarded as confidential*".

Confidentiality was "*a relative, not an absolute concept,*" and confidential status would only truly be lost if the specific information became "*generally accessible".* LJ Arnold found no evidence of this, nor of any

[1] As defined in the NDA and repeated at [28] of the judgment.

inconsistent wording within the NDA to suggest that the parties intended the phrase "*public domain*" to bear any other meaning. The Appellants also did not adduce any factual evidence in support of this view.

The Court of Appeal rejected the Appellants' argument that the broad definition of "Confidential Information" required a correspondingly broad interpretation of the NDA exceptions. It was held that the scope of the confidentiality obligations and exceptions depended upon the agreed contractual wording, and that the established legal meaning of "*public domain*" should therefore apply in this case.

Ground 1(ii)

The Court of Appeal rejected the Appellants' reliance on clauses 1.1(c) and 1.1(d), noting that these arguments and much of the supporting evidence had not been properly advanced at the High Court trial.

This ground and the evidence relied upon was dismissed on the basis that it failed to show that the Respondent's specific business opportunity, fund concept or detailed structure were independently known to the Appellants or that this information had been obtained lawfully from a third-party source.

Ground 2

The burden was on the Appellants to prove that the information was in the "*public domain*" in 2019.

However, the evidence relied upon by the Appellants failed to demonstrate anything beyond the limited generic publicly available information at the relevant time. The evidence, consisting of generalised marketing materials and emails, did not disclose, nor independently establish knowledge of, the Respondent's specific business opportunity to create a sanctions-compliant fund.

Individuals acting on behalf of the Appellants also had no knowledge of the opportunity before their dealings with the Respondent. The key issue was that, even if some individual aspects were publicly available, the full-package concerning the exploitation of undervalued Venezuelan debt through a sanctions-compliant structure was not. The Court of Appeal therefore dismissed the final ground of appeal.

HFW Comment

This judgment serves as a reminder that commercial parties should expect the courts to interpret contractual provisions in accordance with their ordinary and natural meaning, and highlights the need for clear and concise drafting, particularly where parties use significant and well-established legal terms such as *"confidential information"* and "*public domain*".

Commercial parties should ensure that they fully understand the scope of their contractual confidentiality obligations, including any exceptions to those obligations. Failure to comply with such provisions could expose parties to liability for misuse of confidential information and trade secrets.

Please read the judgment here.

8. Loudmila Bourlakova & Ors v Semen Anufriev & Ors [2026] EWHC 1747 (Ch)

Court: High Court (Chancery Division)

Date: 10 July 2026

Summary

The High Court dismissed an application by two sets of defendants to strip legal professional privilege (**LPP**) from the claimants' communications with private investigators. The defendants relied on the "iniquity exception", alleging that the claimants' use of covert investigators to obtain confidential and privileged material was sufficiently iniquitous to displace privilege.

The court restated the requirements of the iniquity exception, confirming that fraud or dishonesty is not a prerequisite but that the alleged misconduct must take the solicitor-client relationship outside the "ordinary run" of a professional engagement. None of the four alleged iniquities was established.

Facts

The application arose in a long-running, multi-billion-dollar dispute over the estate of a wealthy Russian businessman, contested between his widow and daughter (as **Claimants** and **Respondents** in this application) and his sister, brother-in-law and a former family-office manager (as **Defendants** and **Applicants** in this application). All parties alleged fraud and dishonesty against one another. Since 2020, the Respondents' solicitors had instructed CT Group, as investigators, and, separately, a firm called Marengo, to obtain evidence for the litigation. During those investigations, both firms encountered the Applicants' confidential and, on occasion, privileged information. Some of that material was deployed in a freezing-order application that was subsequently withdrawn after the evidence was found to be based substantially on forged documents.

The Applicants then sought to establish that the iniquity exception stripped privilege from the underlying communications, which would potentially unlock a much larger tranche of documents. They alleged four distinct iniquities: (i) instructing CT Group to run covert investigations over four years; (ii) providing CT Group with material from covert recording devices at the family's Monaco home; (iii) instructing **Review Counsel** to screen privileged material out of the disclosure the Respondents' own solicitors received; and (iv) instructing Marengo to follow and eavesdrop on the Applicants during a London visit.

High Court Judgment

The court dismissed the application, finding that none of the four alleged iniquities was established on the balance of probabilities.

The court confirmed that the iniquity exception requires: (i) documents that would otherwise attract privilege; (ii) an iniquity established on the balance of probabilities; and (iii) a sufficient connection between the iniquity and the documents in question.

Adopting the Court of Appeal's approach in *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28, the judge held that the exception "*extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy*" and does not require dishonesty. However, iniquity in a general sense is not sufficient; it must either take the solicitor-client relationship outside the normal scope of a professional engagement, or involve an abuse of a relationship that otherwise falls within the ordinary course of that engagement.

The court clarified that a client's subjective belief in the lawfulness of an investigation is relevant both to whether iniquity exists at all and to whether the solicitor-client relationship remained within the "ordinary run". It also rejected the Applicants' reading of *Barclays Bank v Eustice* [1995] 1 WLR 1238 as making such beliefs categorically irrelevant.

The Applicants had also argued for "per se" iniquity, contending that it was inherently iniquitous to instruct investigators to obtain a rival's confidential or privileged material without consent, regardless of any belief in lawfulness.

The judge rejected this argument.

The judge accepted that the Respondents and their solicitors genuinely, and not unreasonably, believed that CT Group's investigations were being conducted lawfully and that any privileged or confidential material obtained came from a "whistleblower" rather than from hacking. He rejected the Applicants' case that the solicitors or their clients were "privilege hunting" from the outset, or that they intended CT Group to gain any advantage from sight of privileged material even after the risk became apparent in 2023.

The appointment of separate Review Counsel to screen out privileged documents was found to be a legitimate, and arguably prudent, step rather than an iniquitous one. As to the eavesdropping allegation, the judge observed that listening in on a conversation involving the Applicants' lawyer "reflects no credit" on the parties, but held that it fell short of iniquity. The fourth allegation, concerning the covert recordings, failed because the recordings had not, on the evidence, been supplied to the investigators for the purposes of this litigation.

HFW Comment

This judgment is a significant restatement of the scope and limits of the iniquity exception to legal professional privilege.

It confirms that the exception sets a high bar and that the court must assess, on the balance of probabilities and often on incomplete evidence, whether the client's conduct crosses the line into genuine impropriety that takes the solicitor-client relationship outside the ordinary scope of a professional engagement.

Crucially, the rejection of "per se" iniquity means that parties will not be stripped of privilege merely because their investigators came into contact with an opponent's confidential or privileged material, provided there was a genuine belief in the lawfulness of the investigation and reasonable steps were taken once the risk was identified. This preserves the ability of litigants to instruct investigators to gather evidence of suspected fraud without automatically forfeiting privilege over communications with their lawyers about those investigations.

The decision will provide comfort to clients and solicitors who engage investigators under contractual assurances of lawful conduct and who take active steps such as appointing independent Review Counsel to prevent their legal team from reviewing an opponent's privileged material. Conversely, it serves as a warning that, while such steps are protective, the court's assessment is fact-sensitive and conduct that does not reflect well on the parties may be scrutinised closely, even if it ultimately falls short of the iniquity threshold.

Please read the judgment here

9. Yodel Delivery Network Limited v Corlett & Ors [2026] EWHC 1741 (Ch)

Court: High Court (Chancery Division)

Date: 10 July 2026

Summary

The High Court considered a series of post-trial costs applications following the dismissal of a substantial counterclaim brought by the defendants, Shift Global Holdings Limited (**Shift**) and Corja Holdings Limited (**Corja**), against the claimant, Yodel Delivery Network Limited (**Yodel**). The decision addresses several important issues relating to security for costs, non-party costs orders, funding disclosure, and the costs consequences of unsuccessful litigation.

The court refused an application by Shift and Corja to release £1.525 million held as security for costs, holding that security should generally remain in place until all costs liabilities covered by the security have been satisfied. The court also ordered additional security for the costs of future detailed assessment proceedings and made another defendant, Mr Jacob Corlett, personally liable for certain costs under section 51 of the Senior Courts Act 1981 (**SCA 1981**), and ordered disclosure of the identities and funding arrangements of third-party funders who had financed the litigation.

Facts

The dispute arose from litigation between Yodel and companies associated with Mr Corlett. Following trial, the court dismissed Shift and Corja's counterclaim and ordered them to pay Yodel's costs on the indemnity basis, together with an interim payment on account of costs exceeding £2.7 million. At the time of the judgment, £1.525 million had already been paid into court by Shift and Corja as security for costs.

After the counterclaim failed, Shift and Corja applied for an order permitting the security monies to be paid out to Yodel in partial satisfaction of the outstanding costs liability. They argued that the purpose of the security had crystallised, as Yodel now had an established entitlement to recover costs. Yodel opposed the application, contending that the security remained necessary because substantial additional costs were likely to become payable following detailed assessment and there were ongoing concerns regarding Shift's ability to satisfy future costs liabilities.

Evidence before the court showed that Shift's litigation expenses and adverse costs liabilities had been funded largely through investors rather than from its own resources. Shift maintained that it would continue to raise funds from investors to meet future liabilities if required. Yodel, however, argued that this dependence on investor support demonstrated why the security remained essential.

Yodel also sought further security for the anticipated costs of detailed assessment proceedings, a non-party costs order against Mr Corlett personally, disclosure of the identities and funding arrangements of litigation funders, and an extension of time for commencing detailed assessment proceedings.

High Court Judgment

The court rejected Shift and Corja's application to release the £1.525 million held as security for costs. It emphasised that security for costs is not simply a fund available to satisfy whichever element of a costs liability an unsuccessful party chooses. Rather, it serves as continuing protection against the risk that a successful litigant may be unable to enforce a future costs order. The court concluded that releasing the security would leave Yodel exposed to the risk of non-payment of potentially significant additional costs following detailed assessment. Given Shift's reliance on investor funding and uncertain financial position, the original rationale for ordering security remained valid.

The court further held that a successful defendant can generally seek to retain adequate security until all liabilities in respect of which the security was ordered have been resolved. Although there may be circumstances in which early release is justified, no such circumstances existed on the facts before the court. Accordingly, the application for payment out of the security fund was refused.

Yodel's application for additional security in respect of the costs of detailed assessment was partially successful. The court accepted that security could be ordered for those future costs but declined to calculate the likely

recovery on an indemnity basis. Instead, it assessed likely recoverable costs on a standard basis and ordered Shift and Corja to provide a further £48,000 as security. The court also indicated that failure to provide that security could result in them being debarred from participating in the assessment proceedings.

On Yodel's application under section 51 SCA 1981, the court held that Mr Corlett should be made personally liable for certain costs. The court rejected arguments that the application was barred by issue estoppel or the principle in *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313. It held that non-party costs applications are frequently brought after a party has demonstrated an inability to satisfy costs orders and that there was no abuse of process in bringing the application at that stage. However, the court distinguished between High Court and Court of Appeal proceedings, concluding that it lacked jurisdiction to impose liability on Mr Corlett for costs awarded by the Court of Appeal. Mr Corlett was therefore made jointly and severally liable for the costs of the injunction proceedings and the costs of the counterclaim proceedings in the High Court.

The court also granted Yodel's application for disclosure of the litigation funder's identity. It ordered Shift to disclose the identity of individuals and entities that had funded the litigation, together with information concerning the amounts provided, the terms of the funding, and the funders' involvement in the proceedings. The court considered that, given the uncertainty regarding Shift's finances and its failure to comply with an earlier disclosure order, Yodel was entitled to understand precisely who had financed the litigation and to evaluate potential future cost recovery options.

HFW Comment

This decision provides important guidance for parties involved in high-value commercial litigation, particularly where claims are funded by investors, group companies, or other third parties.

First, the judgment confirms that security for costs remains a protective mechanism rather than a readily accessible fund for the payment of interim liabilities. Parties who have provided security should not assume that it will be released to satisfy a judgment or an interim costs order. Where there remains a genuine risk of non-payment of future costs liabilities, the court may permit the successful party to retain security until a detailed assessment has concluded and all relevant liabilities have been satisfied.

Second, the case highlights the increasing willingness of courts to scrutinise litigation funding arrangements. The order requiring disclosure of both funders and funding terms demonstrates that parties relying upon investor-backed litigation may face greater transparency obligations, particularly where there are concerns regarding costs recovery. Funders who exercise influence over litigation or possess a direct interest in its outcome may also face the prospect of future costs applications.

Third, the judgment serves as a reminder of the potentially significant personal exposure of directors, controllers and key individuals behind corporate litigants. The court was prepared to make Mr Corlett personally liable for substantial costs under section 51 SCA 1981, reinforcing the principle that individuals who are closely connected to, control or promote unsuccessful litigation may not always be able to shield themselves behind the corporate structure.

For clients pursuing or defending substantial commercial disputes, the decision underscores the strategic importance of considering costs recovery at every stage of proceedings. The availability of security, the identity of litigation funders and the possibility of non-party costs orders may all materially affect the practical value of a successful outcome and the ability to enforce costs awards in practice.

Please read the judgment here.

10. Health and Home Limited (in liquidation) & Anor v Elite Property Holdings Limited & Ors [2026] EWCA Civ 933

Court: Court of Appeal (Civil Division)

Date: 23 July 2026

Summary

The Court of Appeal has upheld a decision refusing a retrospective time extension and relief from sanction following the late service of a witness statement in insolvency proceedings. The judgment provides important guidance on when a hearing convened on an application notice will be characterised as a "trial" for the purposes of Rule 32.10 of the Civil Procedure Rules (**CPR**).

Background

The liquidators of Health and Home Limited (the **Claimants**) brought claims under the Insolvency Act 1986 against Elite Property Holdings Limited (**Elite**) and others. After the trial concluded in October 2024, with judgment reserved, Decolace Properties Limited (**Decolace**) applied to register a transfer of title for eleven UK properties owned by Elite, asserting that Elite had agreed to sell them for £16.75 million in March 2019.

The Claimants obtained a freezing order. Following an initial hearing, directions were given for the further conduct of Decolace's application (the **Directions Order**).

The Directions Order

The Directions Order required Points of Claim and Defence, standard disclosure, and CPR Practice Direction (**PD**) 57AC-compliant witness statements. It directed a "*final hearing for the determination of*" Decolace's application, to include "the live evidence of witnesses", listed for three days. Witness statements were originally due on 21 April 2025, but Decolace's solicitors obtained four successive agreed extensions, with the final deadline set for 3 June 2025.

On 3 June 2025, Decolace's solicitors wrote to say that service had become impossible, and no further extension was sought. Decolace served its evidence eight days late. The judge directed a formal application for a retrospective extension and relief from sanction, which the judge subsequently refused, compelling Decolace to withdraw its substantive application.

Court of Appeal Judgment

CPR 32.10 provides that if a witness statement for use at trial is not served in time, the witness may not be called unless the court grants permission.

The CPR contains no general definition of "*trial*", and the Court of Appeal emphasised that the relevant inquiry was what constitutes a trial in the specific context of this rule. The purpose of CPR 32.10, the court observed, is to ensure compliance with witness statement deadlines so that parties can prepare for hearings at which oral evidence will be heard.

Court of Appeal's Analysis

The Court of Appeal concluded that the judge had been correct to characterise the hearing as a trial for the purposes of CPR 32.10, for the following reasons:

(i) The hearing concerned the beneficial ownership of eleven properties, raising contested questions of fact going to substantive rights and liabilities.

(ii) The nature of the originating document is not determinative (as both parties accepted): application notices under CPR Part 23 do not ordinarily lead to trials, but nothing in the rules precludes that outcome.

(iii) The Directions Order directed a "*final hearing for the determination of*" Decolace's application, the outcome of which would have bound the parties and given rise to a res judicata. The procedural

machinery was that ordinarily associated with trial preparation: pleadings, standard disclosure, and PD 57AC-compliant witness statements, were all required. Because PD 57AC governs witness statements "*for use at trials*", the court regarded the direction under paragraph 1.3(3) applying it to these proceedings as a "*strong indication*" that a trial had been contemplated.

(iv) The provision for live evidence, which the court accepted had been "*poorly drafted*", was nonetheless properly read as imposing an obligation rather than conferring a discretion. That pointed to a hearing at which CPR 32.2(1), 32.4 and 32.5(1) would apply, and to directions whose overall purpose was to secure the "*full investigation and trial*" contemplated by CPR 1.4(2)(c).

The court dismissed several factors relied upon by Decolace: the absence of a PD 57AD disclosure review document, the lack of any express reference to CPR 32.10 in the Directions Order, and the failure to follow standard trial direction templates were each described as insignificant.

The absence of a notice of trial date, a trial fee notice under CPR Rule 3.7A1, and the listing of the hearing as an "*application*" in the cause list suggested that the court's administrative staff had treated the matter as an application rather than a trial. The Court of Appeal held, however, that these administrative steps could not alter the true effect of the Directions Order as a matter of construction.

Decolace's own former solicitors had referred to the hearing as a "*trial*" on multiple occasions, undermining any suggestion that Decolace did not understand it to be a trial for the purposes of CPR 32.10.

Relief from Sanction

Applying the *Denton v TH White Ltd* [2014] framework, the Court of Appeal noted that the judge's refusal of relief from sanction was a discretionary case management decision carrying a high hurdle on appeal.

Decolace did not challenge the findings that the breach had been serious and significant, that no adequate reason had been advanced for it, and that it ought to have applied for an extension considerably sooner.

HFW Comment

This decision confirms that a hearing convened on a CPR Part 23 application notice can properly be characterised as a trial for the purposes of CPR 32.10 where the substance of the hearing and the procedural framework through which it has been prepared point to that conclusion. The question turns not on the procedural label but on what directions were given and why.

The case is particularly relevant in the Business and Property Courts (now Business and Property Division) and in insolvency proceedings, where substantive disputes are frequently resolved through applications. Where a directions order provides for pleadings, standard disclosure, PD 57AC-compliant witness statements, and live evidence, practitioners should proceed on the basis that CPR 32.10 applies in full.

Please read the judgment here

11. Wild Justice & Badger Trust v Natural England (No.3) (Embargo Breach) [2026] EWHC 1932 (Admin)

Court: High Court (Administrative Court)

Date: 28 July 2026

Summary

The High Court recently considered a breach of a Court Embargo arising from the circulation of a press release to journalists before the formal handing down of an embargoed judgment.

Although the court found that the conduct constituted a significant breach of the Court Embargo, it concluded that the circumstances did not warrant contempt proceedings. Instead, the court issued a detailed judgment emphasising the important distinction between a Court Embargo and a journalistic embargo, and providing practical guidance on the handling of confidential draft judgments subject to embargo.

The decision serves as an important reminder to litigants, public bodies, charities, corporates and communications teams that embargoed draft judgments remain subject to strict court-imposed confidentiality obligations until the judgment has been formally handed down.

Facts

The issue arose following the circulation of a Confidential Embargoed Draft Judgment (**CEDJ**) in judicial review proceedings brought by Wild Justice and the Badger Trust (the **Claimants**) against Natural England (the **Defendant**).

The claimants' solicitors, Leigh Day, circulated the draft judgment to their clients together with clear warnings regarding the Court Embargo and the prohibition on disclosure of either the judgment or its substance before hand-down. The solicitors also subsequently advised that a draft press release was not to be sent to journalists, even under embargo, before confirmation that the judgment had been formally handed down.

Despite those warnings, Badger Trust's Chief Executive sent a press release to approximately 85 journalists at 9:26am on the day of the hand-down, before the court had formally released the final judgment. The press release was subject to a noon journalism embargo, but circulation to the journalists itself occurred prior to the hand-down and therefore breached the Court Embargo.

Once the breach was identified, the Claimants' solicitors acted immediately by notifying the parties, contacting the court, and investigating the circumstances. The evidence demonstrated that the breach resulted from a miscommunication within Badger Trust regarding the distinction between the timing of circulation and the timing of publication. The court accepted that explanation and the apologies subsequently provided.

High Court Judgment

Fordham J concluded that there had been a breach of the Court Embargo and described the breach as significant. However, after considering the circumstances, the court held that contempt proceedings were not justified. The prompt reporting of the breach, full cooperation with the investigation, candid disclosure of relevant documents, and acceptance of responsibility weighed heavily against any further sanction.

The court nevertheless emphasised that the distinction between a Court Embargo and a journalism embargo remains a matter of fundamental importance. The judgment repeatedly stressed that the two concepts serve entirely different purposes and must not be conflated. A journalism embargo regulates publication by the media, whereas a Court Embargo imposes a legal obligation of confidentiality in relation to the judgment itself until formal hand-down.

The court noted that similar breaches had occurred in a number of recent cases and expressed concern that misunderstandings surrounding embargoed judgments continue to arise. In response, the judgment endorsed practical measures aimed at reducing future breaches, including clearer explanations to clients about the nature of Court Embargoes and advance identification of all individuals who may need access to a draft judgment before hand-down.

The court concluded by reiterating that no party in receipt of a CEDJ may communicate the outcome or substance of an upcoming judgment to journalists or any other third parties before receipt of the final handed-down judgment. Such conduct constitutes a breach of a duty owed to the court, may be investigated fully, and in appropriate circumstances may amount to contempt of court.

HFW Comment

This judgment will be of particular interest to businesses and/or organisations which routinely engage in litigation attracting public interest.

Many organisations have well-developed media and stakeholder management processes, but the court has made clear that those processes must not blur the distinction between a Court Embargo and a conventional media embargo. A press release marked as "embargoed" for publication purposes may still create serious difficulties if it is circulated before a court has formally handed down its judgment.

The decision also highlights a broader governance issue. Modern litigation frequently involves legal teams, communications professionals, executives, board members, external advisers and sector stakeholders. The greater the number of individuals involved, the greater the risk that information will be disseminated beyond those who are entitled to receive it. Clients should therefore consider implementing clear internal protocols identifying who may receive an embargoed draft judgment, who may prepare external communications, and who retains ultimate responsibility for ensuring compliance with the Court Embargo.

The judgment is further notable because it continues a line of authorities in which the Administrative Court has sought to reinforce respect for the handing down process. Although the court stopped short of contempt proceedings in this case, the judgment signals an increasing judicial willingness to scrutinise embargo breaches closely and require detailed explanations from those involved. Organisations should therefore assume that any breach, however inadvertent, may trigger a formal investigation and require disclosure of internal communications and decision-making processes

From a risk management perspective, the case illustrates the importance of embedding litigation-related obligations beyond the legal function. Many embargo breaches arise not from deliberate misconduct but from operational misunderstandings between legal, communications and leadership teams. The practical suggestions endorsed by the court, including repeated training on embargo obligations and advance agreement of approved recipients, are likely to represent emerging best practice for organisations managing high-profile disputes.

More broadly, the judgment serves as a reminder that procedural obligations owed to the court are not mere technicalities. The court viewed the breach as significant despite the absence of any intention to undermine the administration of justice. In an environment where litigation outcomes can have immediate reputational, regulatory and market consequences, organisations would be well advised to treat embargo compliance with the same degree of rigour as other critical legal and regulatory obligations.

Please read the judgment here

12. Disclosure Review Working Group - Survey of Legal Sector Stakeholders (July 2026)

Summary

A review of the disclosure reform under Practice Direction (**PD**) 57AD of the Civil Procedure Rules (**CPR**) has confirmed that further reform is needed. The Disclosure Review Working Group (**DRWG**) survey confirms widespread dissatisfaction with the current regime and signals appetite for targeted reform, but not a return to CPR Part 31.

The DRWG has published the results of a comprehensive survey of legal sector stakeholders assessing the effectiveness of the disclosure regime under PD57AD. The survey ran from 17 November 2025 to 4 February 2026 and attracted 215 respondents, including lawyers, judges, and eDisclosure/eDiscovery vendors.

It reveals a clear consensus that the reforms have not achieved their intended objectives. Only 19% of respondents considered the regime a success, while 64% disagreed or strongly disagreed. Cost remains the primary concern: 67% reported that disclosure costs have increased since the reforms, and 54% believed the same exercise would have cost less under the former CPR Part 31 regime. Despite this, the survey does not support a wholesale return to CPR Part 31. A majority of 51% favoured retaining PD57AD, subject to modification, with key areas for reform including simplification of the Disclosure Review Document (**DRD**), a reduction in the number of disclosure models, and clearer guidance on technology-assisted review and artificial intelligence.

Background

PD57AD was introduced on 1 October 2022. It largely reproduced the earlier Disclosure Pilot Scheme under PD51U, which had itself been introduced in response to long-standing concerns that the disclosure regime under CPR Part 31 was not working as intended. The impetus for reform came from several sources, including feedback from clients using the English courts and, in particular, from the GC100 Group, which argued that reform was needed to reduce costs and simplify the disclosure process.

The DRWG's survey was designed to assess whether the reforms had achieved their stated aims: reducing costs; improving the accuracy of disclosure; reducing the burden on the courts; encouraging greater cooperation between parties; and responding to developments in technology, including artificial intelligence.

In total, 215 respondents took part, drawn from across the legal profession and including practitioners with experience of a wide range of Business and Property Court cases.

Key findings

On the central question of whether the reforms have been a success, the results are emphatic. Only 19% of respondents agreed or strongly agreed that the PD51U reforms, as embodied in PD57AD, have succeeded. By contrast, 64% disagreed or strongly disagreed, representing a striking level of dissatisfaction across the profession.

Cost was identified as the main source of concern. 67% of respondents felt that disclosure costs had increased since the reforms took effect, and 54% were of the view that the same exercise would have cost less under the previous CPR Part 31 regime, with the majority estimating a decrease of at least 10%. This is particularly notable given that reducing costs was a principal objective underpinning the move away from CPR Part 31. The front-loading of costs appears to be a significant contributor, with parties now incurring substantial time and expense before the case management conference, particularly in negotiating the DRD, the Issues for Disclosure, and search parameters.

On the question of whether to retain, modify, or abandon the regime, 51% of respondents favoured retaining PD57AD subject to modification, while only 13% supported retaining it essentially unchanged. Respondents were more evenly split on abandoning PD57AD altogether and returning to CPR Part 31: 40% were in favour and 48% opposed. The DRWG has confirmed that it will not recommend a straightforward return to CPR Part 31 and expects to consult on a series of recommendations later in 2026 or early 2027.

HFW Comment

The survey results paint a picture of a disclosure regime that has delivered certain gains but has not achieved the step change in cost and efficiency it was designed to produce. Respondents identified clear benefits worth preserving, including better tailoring of disclosure to the type and size of the case, a sharper focus on relevant datasets, more methodical disclosure planning, earlier engagement between parties, and the value of lighter-touch disclosure models in appropriate cases. There was also strong support for retaining existing safeguards, including the obligation to disclose known adverse documents.

However, the DRD emerged as one of the most contentious features of the regime. Respondents raised concerns about its timing, format, complexity, and the level of costs required to produce it. A majority of 55% favoured a reduction in the number of disclosure model options, with many citing continuing difficulty in distinguishing between Model C (disclosure of particular documents or narrow classes of documents) and Model D (narrow search-based disclosure, with or without narrative documents) in practice. This practical difficulty adds cost and generates satellite disputes without a corresponding gain in the quality of disclosure.

Several reform themes emerge from the survey: simplification of the DRD; reduction or reframing of the disclosure models; clarification of the position on Model C and narrative documents; improvement of the List of Issues process; clearer cooperation mechanisms; and clearer guidance on technology-assisted review and artificial intelligence. All of these point towards the same underlying objective: parties should be able to judge a disclosure regime by its ability to help them identify, collect, and exchange the material that genuinely matters, at a cost proportionate to what is at stake.

The DRWG's decision not to recommend a return to CPR Part 31 is significant. It signals that the core architecture of the reformed regime – issue-based disclosure, multiple models, and early engagement – is regarded as sound in principle. The challenge lies in execution. The current framework imposes procedural burdens that, in practice, have driven costs up rather than down and generated satellite litigation over process rather than substance. If the forthcoming consultation delivers meaningful simplification of the DRD, a clearer model structure, and workable guidance on the use of technology, the regime may yet fulfil its original promise. Practitioners and clients will be watching closely to see whether the DRWG's next steps translate the survey's findings into practical reform.

Our article on the DRWG survey can be found at this link.

Contacts



ADAM RICHARDSON
Partner, Singapore
T +65 6411 5327
E adam.richardson@hfw.com



ALISTAIR FEENEY
Partner, London
T +44 20 7264 8424
E alistair.feeney@hfw.com



ANDREW WILLIAMS
Partner, London
T +44 20 7264 8364
E andrew.williams@hfw.com



ANNE-MARIE OTTAWAY
Partner, London
T +44 20 7264 8054
E anne-marie.ottaway@hfw.com



BARRY VITOU
Partner, London
T +44 20 7264 8050
E barry.vitou@hfw.com



BRIAN PERROTT
Partner, London
T +44 20 7264 8184
E brian.perrott@hfw.com



CHRISTOPHER FOSTER
Partner, London
T +44 20 7264 8088
E christopher.foster@hfw.com



DAMIAN HONEY
Partner, London
T +44 20 7264 8354
E damian.honey@hfw.com



DAN PERERA
Partner, Singapore
T +65 6411 5347
E dan.perera@hfw.com



DAVID SUTTNER
Partner, Perth
T +61 (0)8 9422 4731
E david.suttner@hfw.com



EDWARD BEELEY
Partner, Hong Kong
T +852 3983 7737
E edward.beeley@hfw.com



GAVIN VALLELY
Partner, Melbourne
T +61 3 8601 4523
E gavin.vallely@hfw.com



GEOFFREY CONLIN
Partner, Rio de Janeiro (CAR)
T +55 (11) 3179 2902
E geoffrey.conlin@hfw.com



GEORGE LAMPLOUGH
Partner, Hong Kong
T +852 3983 7776
E george.lamplough@hfw.com

HFW LITIGATION



GUY MARRISON
Partner, London
T +44 (0)20 7264 8006
E guy.marrison@hfw.com



JAMES JORDAN
Partner, Singapore
T +65 8123 3558
E james.jordan@hfw.com



KAREN CHEUNG
Partner, Hong Kong
T +852 3983 7628
E karen.cheung@hfw.com



KEVIN WARBURTON
Partner, Hong Kong
T +852 3983 7629
E kevin.warburton@hfw.com



MAURICE THOMPSON
Partner, Melbourne
T +61 (0)3 8601 4503
E maurice.thompson@hfw.com



MICHAEL BUFFHAM
Partner, London
T +44 (0) 20 7264 8429
E michael.buffham@hfw.com



MICHAEL BUISSET
Partner, Geneva
T +41 22 322 4801
E michael.buisset@hfw.com



MICHAEL MAXWELL
Partner, Perth
T +61 (0)8 9422 4701
E michael.maxwell@hfw.com



NEIL ADAMS
Partner, London
T +44 (0)20 7264 8418
E neil.adams@hfw.com



NICK BRAGANZA
Partner, Dubai
T +971 4 423 0587
E nicholas.braganza@hfw.com



NICOLA GARE
Knowledge Counsel
(Dispute Resolution), London
T +44 20 7264 8158
E nicola.gare@hfw.com



OWEN WEBB
Partner, Melbourne
T +61 (0)3 8601 4526
E owen.webb@hfw.com



PAUL BUITENDAG
Partner, Melbourne
T +61 (0)3 8601 4522
E paul.buitendag@hfw.com



PAUL D EVANS
Partner, Perth
T +61 8 9422 4703
E pauldevans@hfw.com

HFW LITIGATION



PETER MURPHY
Partner, Hong Kong
T +852 3983 7700
E peter.murphy@hfw.com



PETER SADLER
Partner, Perth
T +61 (0)8 9422 4702
E peter.sadler@hfw.com



RANJANI SUNDAR
Partner, Sydney
T +61 (0)2 9320 4609
E ranjani.sundar@hfw.com



RENA SOLOMONIDIS
Partner, Melbourne
T +61 (0)3 8601 4501
E rena.solomonidis@hfw.com



RICHARD JOWETT
Partner, Melbourne
T +61 3 8601 4521
E richard.jowett@hfw.com



RICK BROWN
Partner, London
T +44 20 7264 8461
E rick.brown@hfw.com



SARAH HUNT
Partner, Geneva
T +41 22 322 4816
E sarah.hunt@hfw.com



SCOTT CRUICKSHANK
Partner, BVI
T +1 (284) 494 6048
E scott.cruickshank@hfw.com



STEPHEN THOMPSON
Partner, Sydney
T +61 (0)2 9320 4646
E stephen.thompson@hfw.com



SUZANNE MEIKLEJOHN
Partner, Singapore
T +65 6411 5346
E suzanne.meiklejohn@hfw.com



VINCENT BÉNÉZECH
Partner, Paris
T +33 1 44 94 40 50
E vincent.bénézech@hfw.com

hfw.com

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