SLAUGHTER AND MAY

July 2026

Disputes Briefcase

Need-to-know disputes updates
for General Counsel and their teams

Introduction

Welcome to Slaughter and May's Disputes Briefcase, a regular digest of key developments in litigation and arbitration, produced by members of our market-leading disputes team. Previous editions of Disputes Briefcase are available *here*. If you would like to receive future editions of Disputes Briefcase, and other insights from our Disputes and Investigations team, please email our *Editorial team*.

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Content

Opt-out action reforms

UK government sets out proposals for reforming opt-out collective actions under competition law regime

In July, the Department for Business and Trade published a *consultation paper* setting out a wide-ranging package of proposals to reform the opt-out collective actions regime before the Competition Appeal Tribunal (CAT), as well as proposals concerning changes to regulatory appeals and competition enforcement. The proposals follow a call for evidence (see our *February edition of Briefcase*).

The most important changes under consideration for opt-out collective actions include:

Scope and class representatives

The regime will remain limited to competition law claims, although the Law Commission has been asked separately to examine the case for a broader consumer class actions regime (see our *May edition of Briefcase*). The government does not propose new obligations for class representatives but is consulting on whether guidance or rule changes could clarify expectations around funding knowledge, the use of costs specialists, and the role of consultative panels.

Raising the bar for certification

A central theme of the consultation is the government's view that the current certification threshold is too low. Three key changes are proposed. First, the suitability test would shift from a relative to an absolute standard, requiring the CAT to assess whether it is proportionate for a claim to proceed as an opt-out collective action, rather than simply whether it is preferable to individual proceedings. Second, greater weight would be given to cost-benefit analysis at the certification stage, with the aim of preventing claims from proceeding where foreseeable returns to class members are negligible. Third, the CAT would be required to consider whether there is sufficient evidence for assessing damages on an aggregate basis. Together, these changes are intended to embed a meaningful merits consideration within the statutory threshold.

Litigation funding

The consultation proposes lifting the current prohibition on damages-based agreements (DBAs) in opt-out collective actions, with the aim of increasing competition in funding and improving access to justice for lower-value claims. To provide greater certainty for litigation funders, the government also proposes requiring the CAT to indicate the reasonableness of a funder's return and order of payment at certification, and introducing a presumption that funders receive their return when damages are awarded or a settlement is approved, rather than after distribution. The paper emphasises that those proposals are limited to the CAT and that nothing in the consultation prejudges the wider development of options for litigation funding reform being undertaken by the government following the CJC's review (see our February edition of Briefcase and Horizon Scanning article on the outlook for litigation funding).

Costs, ADR and settlement

The government is consulting on requiring both parties to submit costs budgets following certification and on introducing clearer sanctions for conduct that unreasonably inflates costs. The CAT would be empowered to encourage or require mediation after expert reports are exchanged, with costs consequences for failure to engage. A new mechanism for settlement offers with automatic cost-shifting consequences is also proposed, designed to incentivise reasonable settlement discussions.

CAT resourcing and efficiency

Finally, the consultation addresses CAT operations. Proposals include introducing fees for private litigation linked to claim value, increasing flexibility in panel composition to allow panels of fewer than three members for appropriate decisions, and committing to review the CAT Rules at least every three years.

Comment

Pitched by the Government to enable "swifter and simpler competition redress," the proposals represent the most substantial update to the opt-out collective actions regime since its introduction in 2015. The consultation closes on 25 September.

Mass consumer claims

Court of Appeal allows mass motor finance litigation to proceed as 'omnibus' claims – *Black Horse v Angel*

In *Black Horse v Angel*, the Court of Appeal upheld the High Court's decision allowing over 5,000 motor finance claims to proceed together on 'omnibus' multi-claimant claim forms. Although the Court stressed the fact-specific nature of the proceedings, the decision offers useful guidance on when large-scale group litigation may proceed as multi-claimant claims, rather than as separate individual claims.

Background

Over 5,000 claimants brought claims under the Consumer Credit Act 1974 against eight motor finance companies, alleging that undisclosed discretionary commission arrangements between the lenders and car dealers rendered the credit relationship unfair. The claims were issued on eight omnibus claim forms, one per defendant. Court rules (CPR 7.3) permit a claimant to "use a single claim to start all claims which can be conveniently disposed of in the same proceedings." The County Court judge disaggregated the claims, finding the 'convenience' test was not met. The High Court overturned that decision. The Court of Appeal unanimously dismissed the lenders' appeal.

'Convenience' test

The Court of Appeal summarised the principles as follows:

1. The burden of demonstrating convenience falls on the claimants.
2. 'Conveniently' carries its ordinary meaning.
3. The test is likely met where common issues bind all or most claimants, but this is not the only relevant factor.
4. A multi-party claim form need only be *a* convenient means, not *the* most convenient means.
5. A single final trial need not be practicable.
6. The interests of all parties, the court and the wider court system must be considered.

Efficient case management is also relevant to assessing convenient disposal under CPR 7.3.

Common issues?

The Court held that common issues of law or fact need not bind every claimant. Where claims are similar in nature, arise from the same statutory provisions, and raise the same general issues – even if the underlying facts vary – common issues of law or fact are likely to exist, requiring only separate evaluation at the final stage. Although sceptical about the common issues identified by the High Court (concerning alleged breach of the FCA's CONC rules and whether the car dealers acted as agents for the defendants), the Court of Appeal could not say the High Court judge was wrong to treat them as relevant to the convenience test.

Lead cases

The Court endorsed trial of lead cases as a convenient route to disposal, holding that persuasive – rather than binding – outcomes across a range of fact patterns would drive commercial settlement. In *Johnson v Close Brothers*, the Supreme Court recognised the value of an authoritative ruling for claimants with similar claims, even where the ruling could not bind them. However, the Court rejected any suggestion that a large undisclosed commission gives rise to a presumption of unfairness, reiterating that the statutory test is entirely fact-specific; the size of a commission is simply one relevant factor and does not, of itself, equate to unfairness.

Comment

The Court emphasised that this case was an "unreliable vehicle for any statement of principle or guidance" on multi-claimant claims. Notwithstanding that caveat, the judgment confirms that case management considerations are relevant to the convenience test, that persuasive rather than binding outcomes from lead cases suffice, and that disclosure obligations may be imposed on defendants even at an early stage. The decision is likely to embolden claimant firms and funders attracted by the economies of scale offered by high-volume consumer claims and may inform the approach taken in similar cases. However, the Court of Appeal flagged the "vast increase" in multi-claimant claims in recent years as warranting further consideration by the Civil Procedure Rule Committee. It remains to be seen whether the Committee will take this up.

Split trials in securities claims

High Court defers reliance and causation to trial 2 but cautions against "one size fits all" approach – *Various Claimants v Entain*

The size, complexity and cost of securities law claims mean that claimants invariably ask the court to direct that the issues in dispute should be dealt with in two separate trials. Defendants usually agree - up to a point. The defendant's liability will always be an issue for the first trial, while an assessment of damages will always be postponed to a second (contingent) trial. The argument is over when reliance, causation and limitation – all issues for the claimant – should be tried. A new *judgment* reviews the authorities and provides useful guidance.

In *Various Claimants v Entain plc*, two separately-represented groups of shareholders have brought claims against Entain under sections 90 and 90A of FSMA. They allege Entain engaged in historic misconduct in its Turkish business (the subject of a DPA between Entain and the CPS in 2023) and that information and prospectuses published by Entain contained misleading statements or made omissions in respect of that misconduct. They allege aggregate losses exceeding £1.6 billion.

At a CMC in June, it was common ground that a split trial of some form was necessary. The dispute was over where the split should be: Entain argued that Trial 1 should determine all liability issues, including the "claimant-side" issues of reliance, causation and limitation, leaving only quantification of loss to Trial 2. The claimants contended that reliance, causation, limitation and loss should all be deferred.

The decision in Entain

Trower J adopted the claimants' proposed split. His reasons were broadly as follows:

First, he accepted that there was a significant risk of wasted costs if claimant-side issues were tried at Trial 1. The claims span a twelve-year period and involve 178 alleged misleading statements across 29 items of published information, giving rise to very many permutations of reliance and causation scenarios. If the defendant-side issues were resolved first, the scope of the claimant-side inquiry could be materially narrowed, avoiding the expense of adducing evidence on scenarios that ultimately proved irrelevant.

Second, the judge found that including reliance and causation in Trial 1 would create serious problems of practicality and manageability. Expert evidence on price impact, combined with individualised reliance evidence across multiple counterfactual scenarios, risked producing an unwieldy trial.

Third, the judge concluded that the claimants' proposed split was cleaner, noting a "continuum" between reliance, causation and quantum, which more naturally belonged together at Trial 2. He endorsed the view expressed by Michael Green J in *Standard Chartered* (another s.90/90A FSMA case) that "causation does really naturally go with quantum".

The judge also directed that sample claimants, once identified, should give disclosure on certain Trial 2 issues before Trial 1, striking a balance between cost control and ensuring litigation preparation was not loaded entirely onto Entain.

Key Takeaways

1. **No one-size-fits-all approach.** Trower J emphasised that the right trial split will depend on the facts of each case, and cautioned against treating any particular configuration as "orthodox" in FSMA shareholder claims.
2. **Proportionality in large-scale claims.** The decision underlines that the larger and more complex the case – for example in terms of the period of time in issue – the greater the importance of avoiding wasted costs and unmanageable trials.
3. **Pre-Trial 2 preparation matters.** Even where claimant-side issues are deferred, courts may direct early disclosure on those issues to maintain momentum and distribute the litigation burden more equitably between the parties.

Postscript - public access to documents

A final point of interest in the Entain case is Trower J's *decision* to make a Filing Modification Order (FMO), displacing the usual rule in PD 51ZH that obliges litigants in certain courts to make "Public Domain Documents" (including skeleton arguments, witness statements and expert reports) available to the public. FMOs are unusual and the judge's detailed consideration of the circumstances when they are appropriate is instructive.

Litigation funders and privilege

Litigation privilege does not apply to communications created to enable a funder to decide whether to fund a claim – *Uber v White*

The High Court has *held* that communications created during a litigation funder's pre-funding investigation of potential claims did not attract litigation privilege, because the dominant purpose was to inform the funder's funding decision, not to conduct the litigation. The decision in *Uber London v White* also offers guidance on the control of documents held by solicitors under prior retainers with funders.

Background

The proceedings concern claims for unlawful means conspiracy brought by a group of black cab drivers and an assignee of rights against three Uber group companies, alleging Uber misrepresented its business operating model to obtain a licence to operate in London's private hire market unlawfully.

In 2017, a litigation funder (H) instructed a claimant law firm (M) to investigate potential claims by cab drivers that included contacting the Licensed Taxi Drivers' Association (LTDA). M was subsequently engaged by the Claimants to bring the claims, and H agreed to fund them. The claims were issued in 2024 after the limitation period had expired, and the Claimants sought an extension of time, arguing they could not have discovered the alleged fraud before June 2018.

Ahead of a preliminary issues trial on limitation, Uber applied for disclosure of documents generated during the pre-funding period. Birt J granted the application, finding the documents relevant to what the Claimants might reasonably have discovered and that disclosure was reasonable and proportionate.

Privilege

The Court accepted that many documents might attract legal advice privilege, on the basis that a solicitor-client relationship existed between H and M, and correspondence between them may have been created for the dominant purpose of giving or receiving legal advice.

However, the Court rejected the claim for litigation privilege over communications between M and the LTDA. Although litigation was in contemplation, those communications were not made for the dominant purpose of conducting the litigation. Rather, they were created to enable H to decide whether to fund the claim. Birt J drew a clear distinction: a claimant's decision whether to litigate is part of the conduct of litigation, but a funder's decision to fund someone else's litigation is not.

Control

Birt J rejected the argument that the documents were not within the Claimants' control. The Court held that once the Claimants became clients of M, the firm owed them a duty to disclose all material information relating to their claims – including information acquired during its earlier retainer with H – unless H had given "informed consent" to non-disclosure. A retainer clause purporting to secure such consent was held to be insufficient, as there was no evidence of any individual Claimants' informed consent to forgoing rights to material information about their own claims.

Comment

This is an important decision for parties on both sides of funded claims. For defendants, it confirms that documents created for the purpose of enabling a funder to decide whether to fund claims will not attract litigation privilege, opening a potential avenue for defendants to obtain greater visibility of the genesis and funding of the claims. For claimants and funders, it serves as a reminder of the need to structure pre-funding investigations carefully.

The ruling on control is equally noteworthy. Where a solicitor acts first for a funder in assessing whether to fund a claim and later acts for a party in the proceedings, information gathered during the earlier retainer may be considered within the party's control for disclosure purposes.

The decision is one of several recent privilege rulings arising from group claims, and the area continues to develop. The High Court's decision on intra-client privilege in *Aabar v Glencore* (covered in our *May edition of Briefcase*) is being appealed to the Court of Appeal.

Funder return challenge fails

Funder's challenge to distribution in Merricks v Mastercard settlement fails – *R (Innsworth) v CAT*

The settlement in *Merricks v Mastercard* has proved highly contentious. The funder behind the claims, Innsworth, initially sought to dissuade the CAT from approving the settlement, arguing that it was premature and undervalued. When that challenge was unsuccessful, Innsworth applied for judicial review of the CAT's decision on how the £200 million settlement sum should be distributed. The High Court has now *dismissed* Innsworth's challenge.

Background

Merricks v Mastercard is a high-profile opt-out collective action concerning multilateral interchange fees. Although the claim was initially valued at £14 billion, the CAT approved settlement at £200 million in May 2025. After safeguarding £100 million for the class, it ordered that £46 million be ring-fenced for Innsworth's costs and that Innsworth receive £23 million as profit – a total of £68 million, which the CAT considered amounted to a return on investment of 1.5x. Read more in *our briefing* on the CAT's decision.

The High Court

Innsworth was granted permission to challenge the CAT's decision on a number of grounds. In June, the High Court held as follows:

1. **Error of law:** Innsworth was correct that the CAT had misunderstood the Australian authorities on which it based its approach. In assessing Innsworth's return as 1.5x, the CAT had done so by reference to both costs and profit, whereas the Australian cases focused on profit alone. However, this error "did not come close" to undermining the CAT's conclusion that a profit of 50% of the claimant's expenditure was just and reasonable. The Australian case law was only one factor; far more significant to the CAT were the poor outcome of proceedings and the principle that the regime should operate primarily for the benefit of the class.
2. **Net proceeds:** The fact that the CAT began by awarding £100 million to the class did not mean it had failed to have regard to the net proceeds of the settlement.
3. **Amount payable to the previous funder:** The CAT was entitled to direct that whatever Innsworth agreed to pay the previous funder should come out of Innsworth's profit element, rather than being treated as an expense incurred for the benefit of the class.

The Court also refused permission for Innsworth to advance two additional grounds. The first related to the alleged market value of Innsworth's services (said to be £179 million). The second concerned the appropriateness of unclaimed amounts going to the Access to Justice Foundation (a charity), rather than to Innsworth.

Key takeaways

1. The CAT has a "very wide scope" to decide how settlement proceeds should be distributed as between the funder and the class.
2. The bar for setting aside a CAT decision is high. Even where the CAT falls into error, its decision will only be set aside where the error is sufficiently material to "undermine the cogency" of its conclusion.

Comment

This is the latest in a line of cases (including *Evans v Barclays*) in which the courts have emphasised the deference to be afforded to the CAT as an expert, specialist tribunal.

Both the CAT and the Court stressed the fact-specific nature of this settlement. However, parties considering funder returns in future may well seek to leverage the Court's observation that a profit return of 50% of expenditure is "not a bad result".

State immunity and New York Convention

Court of Appeal confirms ratification of New York Convention does not waive state immunity – *CC/Devas v India*

The Court of Appeal has held that a state's ratification of the New York Convention does not, by itself, amount to a submission to the adjudicative jurisdiction of the English courts under the State Immunity Act 1978 for the purposes of enforcement proceedings. The decision in *CC/Devas v Republic of India* confirms that the reference in Article III of the Convention to enforcement of arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon" preserves state immunity on its own terms.

Background

The claimants, Mauritian investors and their US assignees, obtained arbitral awards exceeding EUR 195 million against India arising from the termination of a satellite spectrum contract and sought to enforce those awards in England. India applied to set aside the enforcement order, asserting sovereign immunity under section 1 of the SIA. The claimants argued that, by ratifying the New York Convention, India had, by prior written agreement, submitted to the jurisdiction of the English courts within the meaning of section 2(2) of the SIA, relying on the Supreme Court's analysis of Article 54 of the ICSID Convention in *Infrastructure Services Luxembourg v Spain* (see the Arbitration round-up *May edition of Briefcase*).

The decision

The Court of Appeal unanimously dismissed the appeal, upholding Sir William Blair's first instance decision. Phillips LJ (with whom Lewison LJ and Newey LJ agreed) held that the reasoning of the Supreme Court in Infrastructure concerning Article 54(1) of the ICSID Convention could not simply be "read across" to Article III of the New York Convention. Unlike ICSID — which is necessarily concerned with awards to which a contracting state is a party and expressly preserves only immunity from execution — the New York Convention applies to all foreign arbitral awards regardless of the parties and makes express reference to the "rules of procedure" of the enforcing territory. As state immunity is classified as a rule of procedure under both international and English law, it falls squarely within that expression. The Court noted that the appellants could not articulate any coherent definition of "rules of procedure" that included defences such as limitation but excluded state immunity. The Court's conclusion was further reinforced by the unanimous decision of the High Court of Australia reaching the same conclusion between the same parties, and by the consistent approach taken by the German Federal Court of Justice and a US District Court.

Comment

This decision provides important clarity on the limits of the New York Convention as a gateway to enforcement against sovereign states. Parties holding arbitral awards against states cannot rely on the Convention alone to overcome state immunity; they must instead demonstrate that the state has submitted to the jurisdiction through a separate mechanism, such as an agreement to arbitrate engaging section 9 of the SIA. The emerging international consensus — now reflected in decisions from England, Australia, Germany and the United States — significantly narrows the scope for creative enforcement strategies against sovereign award debtors. Award creditors should ensure they can rely on the underlying arbitration agreement, rather than the Convention itself, as the basis for establishing jurisdiction.

Climate litigation trends

Report highlights continued global expansion of climate change litigation as corporate claims gain ground

The Grantham Institute's recently released *snapshot of global trends in climate change litigation* charts the continued global expansion of climate change litigation in 2025, including claims against corporates. That trend is further illustrated by a Paris court decision against TotalEnergies, published on the same day as the report. At the same time, legislators in certain jurisdictions are considering measures to limit the scope of corporate climate claims.

Grantham Institute report

Last year, 249 new climate cases were filed, with cases now filed in 62 countries. The United States remains the most active jurisdiction, with Brazil, Australia, the UK and Germany completing the top five.

Although no case has yet resulted in an order requiring corporate behaviour change or payment of damages, courts appear increasingly willing to entertain such claims. 'Climate-washing' cases are the most prevalent type of case against corporate actors (albeit with some signs that claimant focus is shifting to other claims), with 65% of such cases having been decided in the claimants' favour.

The report also indicates that new claimant groups are emerging, with insurance companies pursuing subrogation claims and shareholder derivative actions being brought in the aftermath of extreme weather events. Alongside this, it is expected that the next wave of climate litigation may emerge in carbon dioxide removal and storage infrastructure, emissions associated with powering large data centres, and the nexus between climate change and broader environmental harms.

Recent developments

Two recent developments illustrate the tension between the expansion of climate litigation and a potential pushback now underway:

NAAT et al v TotalEnergies

A Paris court has given a partial victory to claimants in ruling that TotalEnergies had failed to meet its obligations under France's 2017 Duty of Vigilance Law, which requires French companies to publish and implement an annual plan to identify climate risks and appropriate mitigations.

Although the Court did not grant the specific measures sought, it gave TotalEnergies six months to publish a revised vigilance plan that includes Scope 3 emissions (i.e. those resulting from the use of TotalEnergies products), which account for 90% of its carbon footprint. If the company's emission reduction measures are deemed insufficient at the next hearing in January 2027, the Court may order additional measures.

Smith v Fonterra & Ors

The New Zealand government has introduced a bill to bar tort liability for climate change damage caused by greenhouse gas emissions. The bill directly responds to Smith v Fonterra & Ors, in which the Supreme Court allowed a claim in public nuisance, negligence and a proposed novel 'climate system damage' tort against six major emitters to proceed to trial (scheduled for April 2027). See our blog post on Smith *here*.

The New Zealand government cited the need for legal certainty and the importance of attracting overseas investment and supporting economic growth, and noted that the complex range of environmental, economic and social factors involved in climate change make it unsuitable to be resolved via tort law. The bill has passed its first reading and is now before a select committee. Similar legislation to limit corporate climate litigation has been proposed in the US and Germany.

Comment

The Grantham Institute's findings confirm that climate litigation continues to expand in volume, geographic reach and ambition. The two developments highlighted above illustrate a central tension in this area: while courts in some jurisdictions have shown increasing willingness to hear climate claims against companies under existing legal frameworks, legislators may intervene to limit the scope of corporate climate claims. Parties exposed to climate litigation risk should consider how these developments may affect their exposure.

Other recent developments and what to watch out for

Here is a round-up of other recent noteworthy developments in litigation and arbitration, and what to watch out for in the coming months:

New “Business and Property Division” to be established in High Court restructuring

The judiciary *has announced* the creation of a new Business and Property Division within the High Court, which will replace the Chancery Division and sit alongside the King’s Bench and Family Divisions. Among other reasons the change aims to strengthen the international reputation of the Business and Property Courts – which are currently split across the King’s Bench and Chancery Divisions and include courts such as the Commercial Court – by bringing them under a single coherent structure. The individual courts of the Division will continue their work as before. The restructure is intended to take effect in the Autumn.

High Court largely rejects claims in Pan-NOx emissions litigation

The High Court has delivered a landmark judgment in the Pan-NOx litigation (*Various Claimants v Mercedes Benz*), largely rejecting claims brought by around 1.6 million vehicle owners alleging that major manufacturers unlawfully fitted diesel vehicles with prohibited emissions “defeat devices”.

Cockerill LJ dismissed all defeat-device allegations against Ford, Nissan and Renault, upholding only limited claims against Mercedes-Benz and Peugeot-Citroën relating to specific vehicle calibrations. The Court adopted a narrow interpretation of “defeat devices,” holding that the term captures only those devices which detect a regulatory emissions test and objectively operate with the purpose of causing the emissions control system to function more effectively during a test cycle than it would on the road. In other words, there needs to be an intention to cause the emissions control system to operate differently when it senses it is being tested.

Notably, Cockerill LJ declined to follow post-Brexit CJEU case law on the meaning of the Emissions Regulation, finding that the CJEU’s decisions appeared to contain errors and that the English court had better access to relevant material to determine the meaning of the key provisions.

A further trial is listed for October to determine the consequences of any actionable breaches and any issues relating to damages or other remedies.

FOS decisions quashed for lack of jurisdiction over consumer credit complaints

The High Court has quashed four Financial Ombudsman Service decisions, holding that the FOS had unlawfully expanded its jurisdiction over consumer credit complaints by relying on a concept of “corrective responsibility” that has no basis in law (*R(Barclays & Ors) v FOS*).

The case arose after the FOS, following the Supreme Court’s decision in *Smith v RBS* (see our *January 2024 edition of Briefcase*), adopted a new interpretation of its jurisdictional time limits. It asserted that a creditor’s failure to correct unfairness in a subsisting credit relationship amounted to a continuing “event complained of,” with the effect that complaints would remain permanently in time for as long as the relationship continued. Four major banks sought judicial review of that approach and, in what is understood to be the first instance of the regulator opposing the FOS, the FCA intervened in support of the banks.

Dias J held that “corrective responsibility” could not be derived from the authorities and that the FOS’s interpretation was wrong in law. The Court drew a distinction between considering the entire credit relationship as context for assessing fairness – which is permissible – and asserting jurisdiction over the entire relationship, which is not. The Court also rejected the FOS’s alternative argument that a single in-time act could open jurisdiction for the whole credit relationship.

Recent developments in arbitration

The ICC's revised 2026 Arbitration Rules entered force on 1 June 2026 and apply to arbitrations commenced from that date. They introduce targeted updates aimed at enhancing efficiency, clarity and case management. Among the most notable changes is dispensing with the requirement for a mandatory Terms of Reference – a document which typically sets out the parameters of the dispute and important procedural information for the arbitration, but which attracted criticism by adding unnecessary cost and delay. Other changes include:

- a new 'highly expedited' arbitration procedure;
- an increase in the threshold for the existing expedited procedure to disputes less than USD 4 million;
- a new early determination mechanism;
- changes to the emergency arbitration provisions; and
- expanding requirements relating to the impartiality and independence of arbitrators and tribunal secretaries.

Aside from the Court of Appeal's decision in CC/Devas v India (covered above), recent arbitration developments from the English courts include:

- **Late amendments to challenges:** In *E v F*, the Commercial Court refused a state's application to make substantial amendments to its challenge under ss67-68 of the Arbitration Act 1996 against an investment treaty award. The proposed amendments were introduced 162 days after the award – more than five times the 28-day statutory limit to bring a challenge. The Court held that the amendments should not be permitted, notwithstanding the absence of irremediable prejudice to the opposing party, given the overriding importance of finality in arbitration.
- **Anti-suit injunctions:** In *Chubb Insurance v Fertitta Entertainment*, a business interruption insurance dispute arising from COVID-19 losses, the Commercial Court dismissed a jurisdiction challenge and granted a final anti-suit injunction restraining a party from pursuing US proceedings. The Court also awarded damages and other relief for breach of the arbitration agreement. Although the parties were Bermudan and US companies and the policies covered US risks and losses, the policies provided for London-seated arbitration and stipulated that English law govern the existence of the arbitration agreement and the selection of arbitrators. The Court held that, as the arbitration agreement was governed by English law, foreign law was irrelevant to any jurisdictional challenge and that a closer connection to another forum did not constitute a strong reason to refuse relief.

Directors' duties and good faith

The Supreme Court has held in *Saxon Woods v Costa* that the requirement to act "in good faith" under section 172(1) of the Companies Act 2006 applies to a director's conduct as well as to their subjective belief about what is best for the company. A director who genuinely believes a particular strategy would promote the company's success cannot pursue it through covert or disloyal means that subvert the board's collective decision-making.

Mr Costa, the chairman of a company subject to a shareholders' agreement requiring an exit by end-2019, disagreed with the agreed timetable. He covertly pursued a slower sale strategy, concealing his actions from the board and misleading his fellow directors. The exit was delayed past 2019 and subsequently destroyed by the Covid pandemic.

The Supreme Court unanimously dismissed Mr Costa's appeal, confirming the Court of Appeal's finding of breach of fiduciary duty and its unconditional buy-out order (see our *July 2025 edition of Briefcase*). Lord Briggs held that the duty of good faith under section 172 is rooted in the fiduciary duty of loyalty and cannot be reduced to a purely subjective test of the director's thought processes. Where a director covertly subverts a strategy resolved upon by the board, that conduct is manifestly disloyal and constitutes a breach of duty, regardless of the director's genuine belief.

Competition litigation developments

Since *Evans v Barclays*, there has been a rise in defendants seeking to have claims certified on an opt-in rather than an opt-out basis and, in some instances, asking the Competition Appeal Tribunal to reconsider previous rulings on certification. Since the May edition of Briefcase, the CAT has handed down rulings in *Rodger v Alphabet* and *Ennis v Apple*, refusing (in Ennis) to decertify the claim and (in Rodger) to vary the collective proceedings order. Notwithstanding these setbacks, we anticipate that defendants will continue to ask the CAT to revisit previous certification decisions, given the significant potential for reducing damages.

In other competition news, the CAT has approved a 'drop-hands' settlement in the dispute between the *Consumers' Association (Which?) and Qualcomm*. Following trial in October 2025, it became clear that the claim had "no realistic" prospect of success.

Finally, the Supreme Court has *granted* the class representative in *Roberts* permission to appeal the judgment handed down by the *Court of Appeal* in March. It remains to be seen whether the Supreme Court will agree with the CAT and Court of Appeal that Professor Roberts' abuse of dominance claims against six water companies are excluded by *section 18(8) of the Water Industry Act 1991*. Given that this is the first environmental collective action, the outcome will be watched closely.

AI round-up

In the *May edition of Briefcase*, we covered recent developments regarding privilege and AI. For a recap, see *our blog*.

AI continues to raise novel issues in disputes. In June, a freelance HR consultant used Garfield, an AI-powered law firm, to successfully sue a former client for £7,000 in unpaid fees. Garfield's platform supported the case from pre-action through to trial prep, generating the letter before action, preparing and issuing the claim form, drafting witness statements and assisting with the directions questionnaire and trial bundles. This is the first victory of an AI-powered law firm before any court worldwide. Read more in *our blog*.

In June, the Court of Appeal considered a criminal case where a prosecution witness had used an AI tool to prepare for their cross-examination at trial. The Court reaffirmed longstanding principle in this new context: coaching witnesses on the substance of their evidence, by whatever means, including through the use of AI, is prohibited. Witnesses should be "firmly discouraged" from using AI to prepare for giving evidence. Although a criminal case, the principle applies equally in the civil courts. Read more in our *blog*.

In other AI news, the first claim arising from the Grok deep fake scandal has now been filed. Labour MP Jess Asato has filed a claim against xAI, seeking to hold it accountable for the fact that its chatbot, Grok, was able to create fake, sexualised images of her. This case raises important questions about data protection, misuse of private information, and the extent to which developers should implement safeguards. To read more, click *here*.

As reported in *February*, the Civil Justice Council has been *consulting on the use of AI in preparing court documents*. In a *recent update*, the CJC noted consensus among legal professionals that no additional safeguards or disclosures are necessary for most documents, including pleadings and skeleton arguments. However, given divergent views on AI use in preparing witness statements, the Working Group will consider whether a "proportionate and workable approach" can be developed for witness statements. It will also look at introducing proportionate transparency for AI and expert evidence. Recommendations are anticipated later in 2026.

In July, the UK Jurisdiction Taskforce published its *Legal Statement on Liability for AI Harms*. The statement aims to reduce perceived uncertainty by addressing when and how English law is likely to impose liability for non-deliberate harm resulting from AI use. The statement concludes that, in most cases, liability will be determined by contractual principles or the law of negligence. While stressing that liability remains highly fact-specific, the statement works through detailed scenarios illustrating how the courts would likely approach issues such as causation, vicarious liability, defamation, professional negligence and more. Of particular interest is the repeated reminder that AI does not have legal personhood, and the detailed scenarios in which professional users (including lawyers and in-house counsel) may be held liable. Risk areas for lawyers include using AI where it should not have been used; failing to use it with sufficient care or following sufficient testing; and jeopardising privilege. The statement also notes that lawyers could be liable for failing to use AI in where a competent member of the profession would have done so.

Disclosure: directors required to hand over personal devices

In *Lloyds Developments v Accor Hotel Services*, the High Court ordered two former directors to hand over their personal mobile phones to an independent reviewer so that WhatsApp, SMS and IMessages (including deleted items) could be searched for evidence in relation to a £180 million deceit claim. The Court acknowledged Article 8 privacy rights were involved but noted that these were not absolute. A balancing exercise was required, and protections could be put in place to minimise the risk of personal, confidential or legally privileged material finding its way into the hands of the claimant. This case serves as an important reminder that directors who use their personal devices for work purposes and become embroiled in litigation may be required to hand them over to an independent reviewer. The fact that many of the messages had been deleted (so that the chances of recovering them were slim) made no difference to the Court's decision.

Consumer claims: SRA consulting on requirements when law firms use or arrange litigation funding

The SRA has launched a *consultation* seeking views on the obligations that should be imposed on law firms that use or arrange litigation funding for high volume consumer claims (HVCC). This follows concern that many law firms using or arranging litigation funding for HVCC are failing to manage risk, conduct adequate due diligence on funders, and act in clients' best interests – leading to the collapse of several law firms. To reduce the risk of recurrence, the SRA proposes introducing: new independence requirements; an obligation for law firms to provide a "prominent" funding information document setting out key details before consumers sign up; an obligation to notify the SRA when the firm use or arranges third party litigation funding; obligations to conduct (and maintain) a third party funding risk assessment; as well as a requirement for law firms to prepare and keep under review a plan for how the law firm would manage any early closure/collapse. The deadline for responses is 17 September.

The SRA has expressed its views on litigation funding reform more broadly, noting that it would welcome compulsory regulation. It will continue to engage with stakeholders considering the CJC's recommendations on litigation funding (covered in the *July 2025 edition of Briefcase*) to share its perspective. It will be interesting to see what reforms happen in the funding sphere, particularly given the recent change of Prime Minister.

Contract law update

In our July *Contract Law Update* we provide a round-up of recent developments in contract law. Our Update covers:

- **Loss of bargain damages:** The Supreme Court in *Great Asia v Orion (The Lila Lisbon)* considered whether loss of bargain damages for loss of profit could be recovered where a contract was terminated for non-repudiatory breach. The Court held that a contractual right to terminate does not necessarily entitle a party to loss of bargain damages. However, where an express compensation clause sets out recoverable losses in unqualified terms, it will be given effect — and there is no requirement for clear words to confer such a right where the party has in fact suffered the relevant loss. Parties should consider including express drafting on the damages recoverable upon termination.

- **Warranties and representations:** The High Court in *Hoffman v Finalto* held that statements in a management warranty deed amounted to representations, even though a warranty does not, without more, carry with it a representation. Relevant factors included that the statements provided information unlikely to be within the buyer's knowledge, the sequencing of execution (the statements were made prior to and induced entry into the SPA), and certain clauses in the deed and disclosure letter. The decision highlights the importance of including express non-reliance and no-representation statements to prevent claims in misrepresentation (save for fraud).

- **Penalties:** The Court of App`eal in *Houssein v London Credit* upheld the High Court's finding that a contractual default interest rate of 4% per month for an event of default (rising from 1% per month) was not a penalty. The judge identified the strong presumption that properly advised commercial parties of comparable bargaining power are the best judges of what is legitimate and went on to consider each event of default in turn, finding that the default rate was not extortionate by reference to the lender's legitimate interest in the performance of the primary obligations that triggered it. The Court of Appeal noted that whether a clause amounts to a penalty is a value judgment, and a first-instance judge's evaluative judgment will be overturned only where there is an identifiable flaw.

- **Interpretation:** The Court of Appeal in *Magic v The Greater Good Fresh Brewing Co* held that a contractual right to "nominate" a director to the board was a right to appoint, not merely to propose a candidate for consideration. Although "nominate" could bear either meaning, the agreement made clear that the investor was entitled to nominate someone to the board, and a mere right to nominate with no corresponding duty to appoint would render the agreement redundant. The decision demonstrates the importance of both text and context in contractual interpretation and highlights the need for clear drafting to avoid the risk that different judges reach different conclusions on the same text.

- **Causation:** The Court of Appeal in *Logix v Siam Aero* held that the intervention of third-party fraudsters broke the chain of causation between a seller's breach of a confidentiality clause and the buyer's loss. While the chain of causation will not be broken where there is a contractual duty to prevent the very intervention that occurred, a general confidentiality obligation does not constitute such a duty. The decision illustrates that breach must be more than a mere opportunity or occasion for loss, and parties may consider express drafting to address specific risks (such as fraud or cyber) rather than relying on general confidentiality clauses.

Other recent developments in contract law include:

- **Consumer claims:** The Court of Appeal in *Alesayi v Bank Audi SAL* dismissed an appeal by a Lebanese bank, upholding a High Court ruling that its customer, a private individual, may pursue their US$24 million claim against the bank as a consumer claim in the English courts. The case turned on whether, for the purposes of the consumer jurisdiction gateway in the *Civil Jurisdiction and Judgments Act 1982*, the relevant banking contract was concluded in 1994, when the customer first opened their accounts, or in 2016, when they signed updated banking terms. The Court held that a contract will be treated as "newly concluded" where the changes are so significant in their legal effect that they create a new legal relationship between the parties, akin to a novation. On the facts, the Court found that the 2016 terms met that threshold, as they comprehensively restated and replaced the earlier arrangements.

- **Sanctions provisions:** The Court of Appeal in *Tonzip v 2 Rivers* provided important guidance on the interpretation of sanctions-related contractual protections, holding that a clause entitling a party to refuse instructions where compliance would "expose" it to sanctions risk sets a lower threshold than requiring proof of an actual sanctions breach. The dispute arose after a charterer instructed a vessel owner to load cargo from a Russian oil company linked to a sanctioned individual. Although ownership of the company had purportedly been transferred following the sanctions designation, the vessel owner remained concerned about the possibility of ongoing control and refused to proceed. The Court held that it was sufficient for the vessel owner to form an objectively reasonable view that proceeding created a real sanctions risk, and confirmed that clauses framed by reference to sanctions "exposure" can be relied upon without proof that sanctions have in fact been breached. Read more in our June 2026 *Global Investigations Bulletin*.

Foreign judgment debt can be a "debt" under Insolvency Act

The Supreme Court ruled on 27 July that a foreign judgment for a debt or definite sum of money gives rise to a legal obligation to pay the sum concerned and can form the basis for an English statutory demand (or winding-up petition), without the need for the judgment debtor to have the foreign judgment first recognised by the English court. The unanimous decision in *Drelle v Servis-Terminal LLC [2026] UKSC 29* overturns last year's Court of Appeal judgment and emphasises the importance of the "obligation principle" (often referred to in the authorities as the doctrine of obligation) and gives "debt" as that term is used in s.267, Insolvency Act 1986 a broad meaning.

2026 Horizon scanning: Crisis management

As part of our **2026 Horizon Scanning programme**, we review the evolving risks and legal challenges that organisations may face in 2026. Our insights cover **enforcement priorities**, **expanding corporate liability**, **developments in litigation funding** and **trends in class actions**. Plus, we explore the **activist agenda** and the **shifting cyber risk landscape** - offering expert perspectives to help you to prevent a crisis and respond with confidence. Read our **Crisis Management collection** or listen to our **podcast**.

Our other recent content

- *The Crime and Policing Act 2026*
- *Global Investigations Bulletin*
- *The expanding reach of Article 102*
- *The ROGON judgment and the bounds of competition law*

Contacts

If you would like to discuss any of the above in more detail, please contact your relationship partner or email one of our Disputes team.

Trusted to advise on our clients' most complex and strategically significant litigation and arbitration, we are recognised in particular for our expertise in heavyweight commercial litigation, major class actions and group litigation, banking disputes and competition damages actions.

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