

ALERT MEMORANDUM

# Recent Developments in UK Disputes: The Landscape in 2026 and Beyond

March 26, 2026

The last year has been a busy one for UK commercial disputes. There have been substantive developments in the law on fiduciary obligations, privilege and disclosure, FSMA and common law deceit, contract law, and contentious restructuring. Recent decisions in these areas have resulted in significant changes to the *status quo*.

Looking forward, several notable trends are poised to gain momentum. Collective redress is set to continue to be an increasingly prominent feature of the litigation landscape in England and Wales, whilst litigation funding stands on the cusp of meaningful reform following the Government's announcement of its intention to introduce legislation to address the consequences of *PACCAR*. The courts, meanwhile, are expected to continue refining the boundaries of the Part 26A restructuring plan process.

The legislative horizon beyond the courtroom is equally active. A series of Government consultations — encompassing AI regulation, copyright and AI, liability for AI-caused harm, and proposed reforms to the opt-out collective actions regime before the Competition Appeal Tribunal (CAT) — are expected to yield substantial legislative developments throughout 2026 and beyond.

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## The Horizon in 2026

### (a) *Litigation funding: time to reverse PACCAR*<sup>1</sup>

In a report published by the Civil Justice Council on 2 June 2025 (the “CJC Report”), the CJC made 58 recommendations for the reform of litigation funding following the Supreme Court’s ruling in *PACCAR*<sup>2</sup>, which had created significant uncertainty in the litigation funding market and the class actions regime in the CAT.

The Supreme Court’s 2023 decision in *PACCAR* confounded the expectations and established practice of the litigation funding market by holding that typical litigation funding agreements (“LFAs”) constitute damages-based agreements (“DBAs”), which are subject to a statutory regime (the “DBA Regulations”). Typical LFAs did not anticipate the application of the DBA Regulations, were not compliant with them, and therefore were unenforceable. Moreover, in the CAT, even if an LFA were compliant with the DBA regime, DBAs are unenforceable if they relate to an opt-out collective action.<sup>3</sup> The primary recommendation in the CJC Report was for the Government to urgently implement legislation clarifying that LFAs are not DBAs and should fall outside the scope of existing statutory restrictions.

Having taken account of the CJC’s recommendations, the Minister of State for Justice announced in December 2025 that the government “*intends to take action to mitigate the impact of the 2023 Supreme Court judgment in PACCAR and implement proportionate regulation of third-party litigation funding agreements*”. Detailed proposals from the Government on implementation remain to be seen, nonetheless, the Minister of State for Justice made two

unequivocal confirmations in her speech: (1) the Government will legislate to exclude LFAs from the DBA regulations; (2) the Government will introduce proportionate regulation of LFAs. This has been welcome news to litigation funders. To the extent that the Government adopts all recommendations made in the CJC Report, regulation is intended to: (a) preserve and enhance access to justice; (b) institute a proportionate but robust regulatory framework; and (c) harmonise multiple funding mechanisms under one overarching statutory regime.

Whilst the stated aims of the anticipated reforms include removing the uncertainty introduced by *PACCAR* and ensuring that litigation funding works fairly and efficiently for all, it remains to be seen whether the legislation will curtail the funding of speculative or weak claims, given the absence in the CJC Report of any recommendation that there be a cap on funders’ returns.

No target date has been provided for the implementation of any regulation, with the Government stating that it will be introduced “*when parliamentary time allows*”, but it is reasonable to expect that the framework will begin to develop during the course of 2026.

### (b) *Consultation on reforms to opt-out collective actions*

The Department for Business and Trade also completed a review of the opt-out collective actions regime in the CAT on the tenth anniversary of its introduction. Among other things, the Government sought views on access and funding, the scope of competition claims

<sup>1</sup> See Cleary Gottlieb Alert Memo on the CJC Report and its implications [here](#).

<sup>2</sup> R (*PACCAR*) v Competition Appeal Tribunal [2023] UKSC 28. See Cleary Gottlieb Alert Memorandum on this judgment [here](#).

<sup>3</sup> Section 47C(8) of the Competition Act 1998.

and the certification of cases, alternative dispute resolution, settlement under the regime and the distribution of damages. The Government's response, which will provide some clarity on the future of the regime, is anticipated in 2026. The Government has indicated that proposed changes to the regime will be subject to further consultation.

(c) *Liability for AI Harm*

Given the rapid proliferation of AI tools in the corporate and public sphere, it is unsurprising that the Government continues to grapple with precisely how to regulate AI. Its consultation on AI and Copyright, which closed on 25 February 2025 received over 11,500 responses. On 18 March 2026 the Government published its response to the consultation which confirmed that, in light of strong opposition from the creative industries, it has dropped its earlier preferred approach of an opt-out regime for AI training on copyrighted works. The Government no longer has a preferred option and will instead pursue further work across four areas: digital replicas, labelling of AI-generated content, creator control and transparency, and support for independent creatives.

Separately, in January 2026, the UK Jurisdiction Taskforce ("UKJT") launched a consultation on its draft Legal Statement addressing liability for harms caused by AI under English law. The purpose of the legal statement was to respond to the perception of uncertainty regarding in what circumstances, on what legal bases, and against whom English law will impose liability for AI-associated loss. As such, the statement is intended to explain how the common law is likely to deal with legal issues arising from the use of technologies in a rapidly-evolving digital landscape and solicits views from stakeholders as to the content of the statement.

The statement does not propose policy-based

reform of the law, rather it is premised on the belief that English law, "*as a well-developed flexible common law system*", already has the ability to provide certainty through the "*straightforward*" application of well-established legal principles. Where truly novel issues arise, the UKJT's view is that certainty can develop over time as the courts reach decisions from first principles and common law rules emerge to address new issues.

In assessing these questions, the UKJT provides the following preliminary guidance:

- (a) AI does not have legal personality, meaning it cannot be liable for harm. The nature of development and control, as well as the "*opacity*", of many AI systems, means that it can be difficult to establish how harm caused by a system can be linked to any individual party's act or omission. The supply chain involved in creating AI systems is also incredibly complex, with different actors at each level (*e.g.*, data providers, model developers, application developers, etc.). The first hurdle is establishing which party may be liable.
- (b) There are various potential sources of liability, depending on the factual context:
  - i. **Contractual:** as between parties in the supply chain, including the end user, if there is a breach of contract, representation, warranty, etc.
  - ii. **Negligence:** this would require a degree of negligent conduct by a party in the supply chain in the development or use of AI. The UKJT also identified the possibility that a party could be liable for failing to use AI for a task, when a professional exercising reasonable care and skill would have done so.

- iii. Vicarious: while a person cannot be vicariously liable for actions taken by AI (because AI is not a legal person and therefore cannot itself be liable), an employer could be vicariously liable for harm caused by negligent use of AI by an employee.
  - iv. Negligent misrepresentation or misstatement: there must be an assumption of responsibility by a legal person to an identifiable person or group, and the party's reliance on the statement made by the AI tool must be reasonable.
  - v. No-fault: a party could be held strictly liable under the Consumer Protection Act 1987, to the extent an AI system is incorporated into a tangible product that is defective (this is unlikely to apply to intangible products like software, which are not generally considered "*goods*").
  - vi. Defamation: there are two types of "*publisher*" that can be liable for defamation: (i) the primary publisher (including the author or editor); and (ii) the secondary publisher, which disseminates the defamatory words. AI developers may be liable as "*editors*" where they have editorial responsibility or effective control over content, even if the AI tool generates statements autonomously.
- (c) Determining causation is complex, given the autonomy of certain AI tools. However, general principles of causation apply to AI harms and expert evidence may be required to fill any evidentiary gaps.
  - (d) Where AI outputs are pre-determined or a chatbot is presented as an authorised representative, statements made by the tool are likely to be treated as being made on behalf of the person it represents. Where AI is more autonomous, a case-specific assessment will need to be made to determine whether the provider of the tool is "*adopting*" the information.
- Although not instructive, the draft Legal Statement provides helpful guidance as to how the courts may use existing legal principles to address different types of harm caused by AI tools and how gaps in the current legal framework could be approached.
- Separately, the CJC has recently published an interim report and consultation on the use of AI for preparing court documents. The main recommendation of the report is that, where AI has been used to generate evidence on which the court is being asked to rely, legal representatives and/or expert witnesses involved in the preparation of that evidence should be required to make a declaration regarding their use of AI.

*Georgina Rawson*

## Continued Growth and Development of Class and Collective Actions

The last year has been a defining one for the maturing collective actions regime in the UK Competition Appeal Tribunal (CAT). The first wave of trial judgments brought mixed results for class representatives who faced heavy defeats in *Le Patourel v BT*<sup>4</sup>, *Boundary Fares v Stagecoach*, and *Spottiswoode v Nexans*<sup>5</sup>, and landmark success in *Kent v Apple*<sup>6</sup>, securing the first-ever collective damages award of c. £1.5 billion on behalf of approximately 36 million UK iPhone and iPad users. 2025 also saw the CAT applying greater scrutiny at the certification stage, and the Supreme Court's judgment in the *FX Collective Proceedings* significantly rebalanced the opt-out certification test, putting the merits of a claim for opt-out collective proceedings back in focus at the certification stage. Collective settlements were in the spotlight, and the CAT tightened procedural practice directions on skeleton arguments (PD 2/2025) and expert evidence (PD 3/2025), signalling tighter case management under the new leadership of Dame Kelyn Bacon DBE with an emphasis on efficiency and proportionality. The Department for Business and Trade also completed a review of the opt-out regime on the tenth anniversary of its introduction to assess whether the regime “*is delivering access to justice for consumers in a way that brings value without being disproportionately burdensome on business.*”

The last year has also seen high levels of activity in collective actions in the High Court, with a number of high profile collective claims launched, including a rare product liability claim against Johnson & Johnson in relation to asbestos contamination in talcum powder. Another high profile liability trial relating to ‘Pan-NOx emissions’ took place in late

2025. That group action against multiple automotive OEMs comprises 1.2m claimants across 13 Group Litigation Orders (“GLOs”).

(a) The first wave of trial judgments from the CAT

In *Justin Le Patourel v BT Group Plc*, the UK's first opt-out collective action to proceed to full trial, the CAT heard standalone claims seeking £1.1 billion on behalf of 3.7 million customers alleging abuse of dominance through unfair pricing in the market for unbundled residential telephone landline services. The damages sought by Mr Le Patourel on behalf of the class were calculated as the difference between the prices charged by BT and the “*competitive benchmark*”. The class representative was successful in establishing that BT held a dominant position in the relevant market. As to the competitive benchmark, the CAT did not accept either of the experts' widely diverging competitive benchmarks, rather it determined its own competitive benchmark adopting features from each expert's methodology to reach the “*appropriate outcome*”. The CAT considered a price of 20% above its competitive benchmark to be excessive and found that BT's prices “*significantly and persistently*” exceeded the competitive benchmark by 25% to 50%. Nonetheless, “*excessive*” prices are not “*unfair*” by definition. Applying the test in *United Brands*, the CAT determined that BT's prices were not so excessive as to constitute an abuse of dominance. Among other things, BT provided distinctive value to its customers and BT's prices bore a reasonable relation to the economic value of its service. The CAT dismissed the claim accordingly.

<sup>4</sup> [2024] CAT 76

<sup>5</sup> [2025] CAT 68

<sup>6</sup> [2025] CAT 67

In *Gutmann v First MTR South Western Trains Limited*<sup>7</sup>, the CAT handed down its second merits judgment in an opt-out collective proceeding. In this case, the underlying class comprised London Travelcard holders travelling beyond their Travelcard zones without the benefit of “boundary fares”<sup>8</sup>. The CAT rejected the claim that three major train operating companies had engaged in abusive conduct by failing to adequately raise awareness of “boundary fares” and/or make them sufficiently available to customers. In doing so, the CAT emphasised that competition law did not require a dominant company “actively to assist all its customers to pay the lowest price or to buy the optimal product for their needs” and that “competition law is not a general law of consumer protection”.

In *Spottiswoode v Nexans*, claims alleging that a high voltage power cables cartel caused overcharges that were passed on to domestic consumers of electricity via the UK Government’s 2009 Renewables Obligation scheme, failed. The CAT found that the Government would have approved the same subsidy levels even with a hypothetical overcharge on the power cables of as much as 26%.

By contrast, in *Kent v Apple*, the class representative achieved a landmark victory, securing the first-ever collective damages award, an estimated £1.5 billion on behalf of approximately 36 million UK iPhone and iPad users who purchased paid iOS apps and in-app content between 2015 and 2024. The CAT ruled that Apple had abused its dominance by foreclosing competition in the iOS app distribution services market and the iOS in-app payment services market, by tying its payment services for iOS in-app payments to its App Store, and by charging excessive and unfair prices in the commission charged to developers. The overcharge

was calculated as the difference between the relevant competitive benchmarks (17.5% for app distribution; 10% for in-app payments) and the actual charges (30%), of which 50% was passed on from developers to the consumer class.

#### (b) *Developments in Certification*

The last year saw the CAT exercising a higher degree of scrutiny at the certification stage in its gatekeeper function for collective actions. The *Riefa*<sup>9</sup> claim against Apple and Amazon was refused because the class representative did not show sufficient independence, a clear grasp of her responsibilities, or an adequate understanding of the funding arrangements she had entered into. It was the first case to be dismissed outright at certification, with no opportunity for the proposed class representative to make further amendments and continue the claim. In *Roberts*<sup>10</sup>, environmental claims against the water companies were rejected because the Water Industry Act 1991 excluded them. The claim in *Rowntree v Performing Right Society*<sup>11</sup>, a proposed action on behalf of songwriters challenging the Performing Right Society’s royalty-distribution policies, was struck out because the class included songwriters without valid claims, there was no credible damages methodology, proportionality concerns existed, and alternative dispute resolution mechanisms were more appropriate.

Most significantly, in December 2025, the Supreme Court in *Evans* issued a judgment on the certification of collective proceedings. *Evans*<sup>12</sup> was the first time the Supreme Court has considered the factors relevant to the CAT’s exercise of its discretion in determining whether collective proceedings in the Tribunal should be certified

<sup>7</sup> [2025] CAT 64. See the Cleary alert memo on the case and its implications [here](#).

<sup>8</sup> Boundary Fares are an extension or add-on ticket sold for use with a London Travelcard allowing users to travel beyond the range of their Travelcard. If a travelcard holder unaware of the Boundary Fare were to purchase a point-to-point ticket for the full journey, they would in effect be paying twice.

<sup>9</sup> *Christine Riefa Class Representative Limited v Apple Inc. and Amazon.com, Inc.* [2025] CAT 68. See the Cleary alert memo on the case and its implications [here](#).

<sup>10</sup> [2025] CAT 17

<sup>11</sup> [2025] CAT 49

<sup>12</sup> *Evans v Barclays Bank Plc and others* [2025] UKSC 48.

on an “opt-out” or an “opt-in” basis. The Supreme Court (reversing the Court of Appeal) ruled that: (a) the vindication of rights through collective actions and deterring future wrongdoing; and (b) the protection of defendants from oppressive litigation, are both in the interests of justice. In balancing those interests, the merits of the claim are squarely in focus. Weak claims should not benefit from the legal and commercial advantages of opt-out proceedings (the “leveraging effect”),<sup>13</sup> even if they are capable of surviving a strike-out or summary judgment application.

(c) *Collective settlements*

Settlements and distribution of damages were in the spotlight in 2025. In *Merricks*, the CAT approved a £200 million settlement of a claim initially valued at £14 billion despite strong opposition from the funder, Innsworth. In so doing, the CAT emphasised that the settlement test is exclusively whether terms are “*just and reasonable*” from class members’ perspective and noted that “*the collective proceedings regime should operate for the benefit of class members and not primarily for the benefit of lawyers and funders.*” In the *Boundary Fares* settlement, the CAT approved a £25 million settlement with Stagecoach South Western Trains, but only £216,485 was ultimately taken up by the class, a result the Tribunal described as “*extremely disappointing.*” The CAT has signalled that it will probe distribution plans more closely at the certification stage to avoid a repeat of the disappointing uptake in *Boundary Fares* and that funders and insurers should not expect full contractual recoveries when class engagement is low.

(d) *Collective redress in the High Court*

The High Court continues to serve as a forum for collective redress through representative

actions under CPR r.19.8 and GLOs. The growth of collective actions in the High Court has been less pronounced than in the CAT in light of the limitations of the CPR r. 19.8 representative actions regime, which permits representative actions to be brought on behalf of people that have the “*same interest*” (a high hurdle), and the limitation of GLOs to opt-in proceedings (which necessitates book-building from claimant firms to reach a claim size that makes the group action commercially attractive to claimant firms and litigation funders).

For representative actions, the Supreme Court’s landmark decision in *Lloyd v Google*<sup>14</sup>, rejecting a mass data privacy claim on the basis that individual damages assessments were required, and the more recent securities litigation decision of the Court of Appeal in *Wirral Council* (see section 3 below) where the need for individual assessment of issues relating to liability was ill-suited to the regime, have emphasised the high threshold required to satisfy the “*same interest*” test, which undoubtedly has dampened enthusiasm for the procedure from claimant law firms and litigation funders.

**The horizon in for 2026**

2026 is set to be another year of evolution for class actions in the CAT with further government consultation on proposed changes to the opt-out collective actions regime, and the implementation of reforms to litigation funding arrangements widely used in the CAT. The CAT’s docket remains congested, with several major trials taking place, and a judicial review of the CAT’s settlement decision in *Merricks* brought by the funder may have significant implications for settlement practice in high-value collective actions. In the High Court, judgment is expected in Pan-NOx Emissions later this year.

*Raif Hassan*

<sup>13</sup> The term “*leveraging effect*” describes the additional settlement pressure that opt-out collective proceedings exert on defendants, arising from the aggregation of large claim values and the size of the class, rather than by reference to the underlying merits. Such pressure may arise at a stage when no determination has been made as to causation or loss, and before any evidential assessment of recoverable harm to individual class members.

<sup>14</sup> [2021] UKSC 50

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## Developments in Relation to FSMA and Common Law Deceit

The past year has seen a number of important decisions in relation to the Financial Services and Markets Act 2000 (“FSMA”), particularly in relation to ss. 90, 90A and Schedule 10A. With the revised UK Listing Rules<sup>15</sup> marking a clear shift from a rules-based to a disclosure-based approach – meaning that misleading statements or omissions in prospectuses or market announcements will likely attract closer scrutiny – and uncertainty persisting in relation to key aspects of the FSMA provisions, this is a trend we expect to see continue in 2026 and beyond.

### The Reliance Question: Can Passive Investors Sue?

Section 90A / Schedule 10A FSMA impose liability on issuers for, among other things, misleading statements or omissions in “*published information*” where the claimant investor acted “*in reliance*” on the information in question. The meaning of “*reliance*” is therefore a central element of liability under these provisions.

In *Allianz Funds Multi-Strategy Trust v Barclays Bank plc*,<sup>16</sup> the High Court considered for the first time whether “*price/market reliance*” of the sort commonly seen in US securities litigation was sufficient to satisfy the reliance requirement under Schedule 10A FSMA. This type of reliance is founded on the “*fraud on the market*” theory which in US securities litigation provides a rebuttable presumption of investor reliance. The theory rests on the assumption that, in an efficient market, the price of a company’s shares reflects all publicly available information, including any material misinformation which becomes embedded in the share price. Investors who trade at the market

price are presumed to have relied on the integrity of that price, and therefore indirectly relied on the misinformation (regardless of whether or not they in fact read the misinformation in question). Being able to establish reliance in this way is key to many securities class actions in the US. It is also of particular significance for investors in index or tracker funds who will likely be unable to evidence direct reliance on the published information of the companies in which they invest.

In *Allianz*, the High Court rejected the idea that “*price/market reliance*” of this sort is sufficient to establish liability under schedule 10A, holding that “*Parliament must have intended to give the term “reliance” some content and to limit the recovery of compensation to those investors who are able to prove something more than that they suffered loss as a consequence of a misleading statement or omission being made to the market*”. The Court therefore held that Schedule 10A requires reliance to be proved as a separate ingredient of liability, in addition to causation. This could not be satisfied in circumstances where the claimant investors (or their representatives, or third parties who directed or influenced their investment decisions) had not in fact read or considered at all the published information in which the misleading statements or omissions were said to be contained.

The question of “*price/market reliance*” arose again in *Various Claimants v Standard Chartered Plc*.<sup>17</sup> On the basis of the decision in *Allianz*, the defendant sought to strike out claims based on such reliance, but this application was refused. While the Court did not conclude that the decision in *Allianz* was wrong, it noted that this was a developing area of law with a potentially huge

<sup>15</sup> Which came into force on 29 July 2024.

<sup>16</sup> [2024] EWHC 2710 (Ch).

<sup>17</sup> [2025] EWHC 698 (Ch).

impact on a significant number of claims, and that the question of the claimants' alleged reliance was best resolved at trial, on the basis of actual (as opposed to hypothetical) facts, and with the benefit of expert evidence. The trial of *Standard Chartered* was scheduled for October 2026, but in December 2025 the case settled meaning that the question whether passive investors will be able to satisfy the reliance requirement under schedule 10A FSMA on the basis of “*price/market reliance*” therefore remains unresolved.

### Common Law Deceit: Reliance Revisited

In *Allianz*, having determined that reliance had to be proved as a separate ingredient of liability, the High Court held that it was the common law test for reliance in the tort of deceit that applied. While, as at the date of the decision in *Allianz*, that test was considered to be well established,<sup>18</sup> this settled understanding has recently been upturned by the decision of the Privy Council in *Credit Suisse Life (Bermuda) Ltd v Bidzina Ivanishvili*.<sup>19</sup>

In *Credit Suisse*, the Privy Council held that a claimant in the tort of deceit does not need to have been contemporaneously aware of, or have consciously understood, the relevant representation on which the claim is based. It is sufficient that the defendant's representations caused the claimant to hold a false belief which then caused the claimant to suffer loss. By rejecting the requirement for conscious awareness, the Privy Council overturned earlier authorities which had treated contemporaneous awareness and understanding of the representation as an essential element of reliance.<sup>20</sup>

In *Allianz*, the Court had stated that, in the context of an express representation, the test

“*requires the claimant to prove that they read or heard the representation, that they understood it in the sense which they allege was false and that it caused them to act in a way which caused them loss*”. It remains to be seen whether this holds true following the Privy Council's decision in *Credit Suisse*. If it is correct that conscious awareness no longer forms part of the test of reliance in the tort of deceit, then it seems that the bar to establishing reliance in claims under ss.90A / Schedule 10A may well have been lowered.

### Collective Actions: UK Courts Resist US-Style Class Actions

While we would expect any easing in the burden of proving reliance under s. 90A / Schedule 10A FSMA to have a marked effect on the number of claims, and particularly the number of collective claims brought under these provisions, a move to collective securities actions of the size and volume seen in the US likely remains some way off.

Unlike in the US, where securities claims can be brought on an opt-out basis, such collective actions in the UK must proceed either under GLOs (which is an opt-in procedure) or as representative actions under CPR 19.8. As shown by the recent decision of the Court of Appeal in *Wirral Council v Indivior plc*,<sup>21</sup> the English courts have to date shown reluctance to allow securities claims under FSMA to proceed by way of representative action.

In *Wirral*, the claimant sought to bring representative proceedings under ss.90, 90A and Schedule 10A of FSMA and proposed a bifurcated structure whereby “*common issues*” – such as the alleged misleading statements – could be addressed by way of the representative proceedings, with “*individual issues*” like reliance,

<sup>18</sup> See, for example, *Allianz* at [105]-[107].

<sup>19</sup> [2025] UKPC 53.

<sup>20</sup> See *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm).

<sup>21</sup> [2025] EWCA Civ 40.

causation and loss being dealt with at a later stage.

The Court of Appeal upheld the High Court's decision to strike out the representative proceedings, holding that the claims should proceed as multi-party litigation. The Court found that the representative proceedings would deprive the court of its ability to manage the claims, effectively recognising that one of the objects of the proposed use of the bifurcated structure was undoubtedly to avoid the Court taking the sort of case management decisions which had been taken in other s.90A claims which would require the claimants to make some progress on claimant-sided issues – if only by identifying which head of reliance each claimant relied upon and/or providing sample disclosure

or witness evidence – in parallel with the defendant-sided common issues. The judgment highlights the importance of the court's case management powers in ensuring that individual claimant issues such as reliance and causation are addressed early in securities claims to avoid speculative litigation and facilitate settlement.

Time will tell whether the English court will, in different circumstances, be persuaded to permit a claim under ss.90 / 90A FSMA to proceed by way of representative action.

*Emma Williams, Katherine Trafford*

## 4

### Developments in The Law of Fiduciary Obligations

The past year saw a number of important appellate decisions in two key areas of the law of fiduciary obligations: (a) how fiduciary obligations are assumed; and (b) the remedies available for a breach of those obligations.

#### (a) *The assumption of fiduciary obligations*

Perhaps the most high-profile decision on fiduciary obligations in 2025 was *Hopcraft v Close Brothers*.<sup>22</sup> The case concerned commissions charged by car dealers when arranging financing which were not disclosed (or only partially disclosed) to consumers (so-called “secret” commissions). Claims were brought by consumers against lenders in the tort of bribery and for dishonestly assisting the dealers

in making secret profits, both of which required establishing that dealers were acting as fiduciaries when arranging financing.<sup>23</sup>

The Supreme Court held that dealers do not act as fiduciaries for consumers when arranging financing for the purchase of motor vehicles. In doing so, it held that “*fiduciary duties arise where a person consciously assumes (or undertakes) responsibility in relation to the management of property or affairs of another, in circumstances where he or she knows or ought to appreciate that this carries with it the expectation that he or she will act with loyalty to that other in that regard*”. The mere existence of trust and confidence between parties is insufficient. In this case, as “*arm's length part[ies]*

<sup>22</sup> [2025] UKSC 33. See Cleary Gottlieb Alert Memorandum on this judgment [here](#).

<sup>23</sup> The Court held that it is a “*central criterion*” of the tort of bribery that the recipient of the payment owes a fiduciary duty to the principal, which would be breached by the payment in question. The previous requirement for a lesser “*disinterested*” duty was held to be insufficient.

*to a commercial negotiation pursuing [their] own separate interests*”, the dealers could not have owed fiduciary obligations to the consumers.

However, whether a person has undertaken a fiduciary obligation is ultimately a fact-specific issue. While *Hopcraft* has authoritatively answered the question in the context of “secret” commissions, the issue is likely to arise in other commercial contexts.

The Supreme Court considered a similar question in *Mitchell v Sheikh Mohamed Bin Issa Al Jaber*<sup>24</sup>. That case concerned a dishonest transfer of certain shares by Mr Al Jaber, who had purported to act as a director of the transferor company. The question was whether Mr Al Jaber had assumed fiduciary obligations to the transferor company in purporting to act as its director.

The Supreme Court held that Mr Al Jaber had done so, since fiduciary obligations “*can arise where a stranger to a trust or agency relationship arrogates to himself a power or purports to exercise a power which carried with it fiduciary obligations and may properly be described as a fiduciary power*”.

(b) *Remedies for breaches of fiduciary obligations*

The Supreme Court reinforced English law’s strict approach to enforcing fiduciary obligations and its wide approach to fashioning remedies for breaches of those obligations in 2025.

In *Mitchell*, the Supreme Court considered whether a ‘but-for’ causation test is appropriate when quantifying equitable compensation for a breach of a fiduciary obligation. Following a dishonest transfer of shares by Mr Al Jaber in breach of his fiduciary obligations, the transferred shares became worthless. The Court of Appeal

held that the transferor suffered no loss in these circumstances, because there was no evidence that it would have realised the value of the transferred shares before they became worthless.

The Supreme Court reversed that decision on appeal, holding that the transferor company was entitled to equitable compensation of EUR 67 million. The Court held that the misappropriation of trust property creates “*an immediate loss of value*” for a beneficiary,<sup>25</sup> such that a supervening counterfactual event can only be relied on by a defaulting fiduciary if: (a) it shows that the event had an effect on the loss caused; and (b) it shows that it had “*no hand*” in the supervening event. Mr Al Jaber had failed to meet these requirements in this case, such that the shares’ subsequent loss of value was irrelevant.

The Supreme Court considered a similar issue – in the context of an account of profits upon a breach of fiduciary duty – in *Rukhadze v Recovery Partners*.<sup>26</sup> Three individuals, who had been found at trial to have pursued a business opportunity for their own benefit in breach of their fiduciary obligations, were ordered to account for around \$170m in profits to their principal, less a 25% equitable allowance for work done to generate the profits.

The fiduciaries argued that this remedy was too harsh and that compensation should be the difference between the profits actually earned and the profits they would have earned with full informed consent of their principal. The Supreme Court unanimously rejected this; the fiduciaries committed a wrong by making unauthorised profits, not by failing to get the principal’s informed consent to making those profits, such that the fiduciaries’ counterfactual was irrelevant. The only requirement is for the principal to establish that the

<sup>24</sup> [2025] UKSC 43

<sup>25</sup> This is a function of the possibility of assessing loss at the date of trial, as against the date of breach, when calculating equitable compensation. This distinguishes the approach as compared to calculating compensation at common law, which is usually done as of the date of breach.

<sup>26</sup> [2025] UKSC 10.

fiduciary would not have made the relevant profits “but for the breach of [fiduciary] duty”.

These principles were reiterated in *Stevens v Hotel Portfolio II*,<sup>27</sup> in which the beneficiary company (HPII) brought a claim against Mr. Stevens for dishonestly assisting a constructive trustee in dissipating the trust fund, which consisted of an unauthorised profit made in breach of trust. Mr. Stevens claimed that he owed no compensation because the original unauthorised profit had caused no loss to HPII, since that profit could not have been made by the trust itself.

Lord Briggs, for a majority of the Court, rejected this argument. He held that a constructive trust is not “just a remedy” for a breach of trust, but instead gives the beneficiary an independent proprietary interest in the trust assets. The wrongful dissipation of the trust fund made the recalcitrant trustee (and a dishonest assistant to such a trustee) liable to compensate the beneficiary for the loss of its proprietary interest, even though the profit caused the beneficiary no loss.

<sup>27</sup> [2025] UKSC 28.

<sup>28</sup> [2025] EWCA Civ 708

### (c) *Reflections and looking forward*

Fiduciary obligations impose a heavy burden. Fiduciaries must strictly comply with them or face significant consequences beyond the compensatory remedies ordinarily available to litigants under the common law.

The courts are likely to see determined attempts in the future by litigants to overcome the high bar for finding a fiduciary obligation, so as to access the wide-ranging remedies available for breaches of those obligations. Given their complexity, however, the scope of these remedies will also remain a key focus area, including in established categories of fiduciary relationships (like companies and their directors). One appeal to the Supreme Court in a relevant case – *Saxon Woods Investments v Costa*<sup>28</sup> – has been listed already.

*Siddharth Aatreya*

## 5

### Privilege, Disclosure, and Pragmatism: The English Courts’ Evolving Approach

Over the past year, English courts have continued a trend towards pragmatism in disclosure disputes, aligning parties’ obligations with commercial reality.

Recent privilege decisions emphasise the importance of clearly recording parties’ intentions and expectations regarding when

documents – including those created before formal proceedings commence – will attract privilege. In shareholder actions, abolition of the “*Shareholder Rule*” has significantly reduced shareholder claimants’ leverage, as shareholders can no longer assume access to company legal advice. Companies can now take legal advice in relation to shareholder disputes in confidence,

without concern about the potential risks of highly-sensitive disclosure of that advice in proceedings with shareholders.

In 2025, the courts reaffirmed that they will closely scrutinise claims to resist disclosure on grounds of potential foreign law breaches and prosecution risks abroad. Even where the high evidential threshold is met, this may not suffice to resist disclosure where documents are important to the fair disposal of proceedings. These developments, alongside the new Practice Direction 51ZH providing for greater public access to court documents, will likely increase focus on disclosure and confidentiality considerations.<sup>29</sup>

### Key Developments

#### (a) *Litigation Privilege*

A party's right to withhold documents on the grounds of litigation privilege requires the documents in question to have been created for the dominant purpose of conducting litigation that is reasonably in prospect. In *Krishna Holdco Ltd v Gowrie Holdings Ltd*,<sup>30</sup> the High Court confirmed that in assessing "dominant purpose", the assessment is a matter of substance over form. A document may not, on a myopic view, appear to have been created for the dominant purpose of conducting litigation, but viewed in the wider context of litigation, may benefit from litigation privilege.

In *Krishna*, the parties were embroiled in unfair prejudice proceedings concerning their jointly-owned company. Following an earlier judgment requiring the respondent to purchase the petitioner's shares in the jointly-owned company which was the subject of the dispute, a satellite dispute arose over the disclosure of

draft and final versions of a PwC valuation report concerning the company's trading subsidiaries, which the defendant withheld on grounds of litigation privilege. In seeking to avoid disclosure of the report, the defendant sought to rely on a narrow interpretation of the dominant purpose test, which was rejected by the court, which emphasised the need to take a "realistic and, indeed, commercial view of the facts". The relevant question was not what a document relates to, but why the transaction was pursued. The High Court was satisfied that the proposed sale of the trading subsidiaries, which was based on the valuation report, arose not from ordinary commercial negotiations but as a response to a strategic threat arising as part of the wider dispute, rendering the valuation report privileged.

This decision clarifies that documents ostensibly relating to commercial transactions may nonetheless be privileged if the transaction was pursued as a strategic response to a dispute. Parties should keep clear records of the context in which documents are created and the reasons for doing so. However, privilege remains a matter of substance over form: documents do not become privileged merely by being labelled as such.

#### (b) *Legal Advice Privilege*

In *Jardine Strategic Ltd v Oasis Investments II Master Fund*,<sup>31</sup> the Judicial Committee of the Privy Council brought welcome certainty regarding the "Shareholder Rule", confirming the English High Court's November 2024 judgment<sup>32</sup> that the principle is without justification and it should no longer be recognised in England and Wales.<sup>33</sup> The dispute concerned whether claimant shareholders received "fair value" following an amalgamation of two companies. The Privy

<sup>29</sup> PD51ZH is a pilot which currently applies only in the Commercial Court, London Circuit Commercial Court and the Financial List.

<sup>30</sup> [2025] EWHC 341 (Ch).

<sup>31</sup> See Cleary Gottlieb Alert Memorandum on this judgment [here](#).

<sup>32</sup> *Aabar Holdings SARL v Glencore Plc & Ors* [2024] EWHC 3046 (Comm).

<sup>33</sup> The Board made a so-called *Willers v Joyce* direction, declaring that their judgment "should be regarded by courts in England and Wales as abrogating the Shareholder Rule for the purposes of litigation in those courts" at [113].

Council rejected the original justification for the Shareholder Rule, finding that the notion of shareholders having a proprietary interest in company funds used for legal advice was inconsistent with a company's separate legal personality. The Privy Council also rejected arguments that joint interest privilege justified the Shareholder Rule, finding that this would make it extremely difficult for directors to know when legal advice would be protected, forcing them to assume they could not take legal advice in confidence, contrary to public policy objectives.

This decision represents the final nail in the coffin for the Shareholder Rule, confirming that a company's privilege belongs to the company and is not shared with shareholders by virtue of shareholding alone. The implications will be felt keenly in shareholder actions, where claimants can no longer benefit from the leverage of assuming that legal advice obtained by defendant companies would be available to them.

#### (c) *Without Prejudice Privilege*

In *Mornington 2000 LLP v Secretary of State for Health and Social Care*,<sup>34</sup> the High Court held that whilst without prejudice privilege protects statements made during genuine settlement negotiations, this protection does not automatically extend to actions taken or documents created in connection with those negotiations, absent clear agreement between parties.

The Secretary of State argued that an independent third-party audit report regarding working conditions in a factory producing Covid-19 tests could be withheld on the basis of without prejudice privilege. The report was commissioned during settlement negotiations,

with discussions marked “*without prejudice*”. The High Court held that an independent third-party document containing no negotiation statements, offers or admissions, could not fall within the public policy rationale behind without prejudice privilege. The High Court also distinguished between agreement about a without prejudice process generally and agreement about a specific report's status, noting that the latter cannot be inferred from the existence of the former.

Following the judgment, it is clear that parties should expressly agree and record how documents created in the context of settlement negotiations are to be treated. Absent clear agreement, English courts will likely take a strict approach towards allowing documents created in the context of without prejudice discussions to be deployed in support of proceedings.

#### (d) *Disclosure in Cross-Jurisdictional Proceedings*

In 2025, English courts considered three cases – *Eurochem*,<sup>35</sup> *Standard Chartered*,<sup>36</sup> and *Aabar*<sup>37</sup> – where parties sought to resist disclosure on grounds that production would breach foreign law and risk criminal prosecution abroad.

In each case, the High Court ordered disclosure following the application of the three-stage *Bank Mellat v HM Treasury* test which considers whether: (1) compliance would entail a breach of foreign criminal law; (2) there was real risk of prosecution; and (3) the prosecution risk outweighed the documents' importance to fair disposal of English proceedings.<sup>38</sup>

In *Eurochem*, the High Court confirmed that disclosing parties must demonstrate that relevant foreign laws “*are regularly enforced*” to

<sup>34</sup> [2025] EWHC 540 (TCC), at [72].

<sup>35</sup> *LLC Eurochem North-West-2 v Société Générale SA* [2025] 6 WLUK 298.

<sup>36</sup> *Persons identified in Schedule 1 v Standard Chartered Plc* [2025] EWHC 2136.

<sup>37</sup> *Aabar Holdings v Glencore Plc* [2025] EWHC 2243.

<sup>38</sup> [2019] EWCA Civ 449, at [63].

show real threat. In *Standard Chartered*, the High Court clarified that prior enforcement action is not decisive when assessing future risk, and that even if proved, real prosecution risk rarely justifies dispensing with disclosure. The Court of Appeal upheld the decision on appeal and found that the judge had correctly applied the “*real or actual risk*” test from *Bank Mellat*. In *Aabar*, the Commercial Court ordered disclosure under a restrictive confidentiality ring, demonstrating its willingness to accommodate mitigation measures. These cases demonstrate that the evidential threshold for resisting disclosure based on foreign law is high, requiring strong evidence of real criminal prosecution risk. Even where such risk exists, disclosure may be ordered where documents are critical to the fair disposal of English proceedings.

#### (e) *Disclosure in the Context of Jurisdiction Challenges*

In *Alesayi v Bank Audi SAL*,<sup>39</sup> the High Court dismissed a defendant’s appeal against specific disclosure in the context of a jurisdictional challenge, clarifying that the correct test is whether: (a) there is a *prima facie* case on jurisdiction; and (b) the material sought is reasonably necessary for just disposal of the jurisdiction application. Despite acknowledging that disclosure orders in jurisdictional challenges are uncommon, the High Court rejected arguments that exceptional circumstances must exist for such orders. This confirms that, where the two-stage test can be satisfied, specific disclosure is available and may provide strategic advantage in establishing or challenging jurisdiction.

*Christine Barthelemy, Georgie Evison,  
Katherine Trafford*

<sup>39</sup> *Alesayi v Bank Audi SAL* [2025] EWHC 440 (KB).

## 6

### Developments in Contract Law

The English courts handed down two significant decisions relating to principles of contractual law in 2025.

#### (a) *Deemed Fulfilment*

In *King Crude v Ridgebury* (“*King Crude*”), the Supreme Court determined that there is no principle of deemed fulfilment of a condition precedent in English law and provided a definitive answer to this issue which has “*long been a matter of debate*”.<sup>40</sup>

The decision derives from a dispute relating to the “*Mackay principle*”, a principle established in Scottish case *Mackay v Dick*,<sup>41</sup> which effectively means that, where a party wrongfully prevents the fulfilment of a condition precedent to its debt obligations, that condition is treated as being fulfilled. The Supreme Court definitively determined that this principle forms no part of English law.

<sup>40</sup> *King Crude Carriers SA and others v Ridgebury November LLC and others* [2025] UKSC 39.

<sup>41</sup> *Mackay v Dick* (1881) 6 App Cas 251.

In its decision, the Supreme Court confirmed that the *Mackay* principle was “*a doctrine borrowed from the civil law*” and did not develop from any English legal authority. The Supreme Court also noted that there would be absurd practical consequences if the principle were to be recognised in certain contexts (*e.g.*, concerning the sale of goods or land), upholding the general precept that English contractual law is premised on applying and interpreting the terms agreed by the parties and not treating conditions precedent as fictionally satisfied.

The Supreme Court was content that the rejection of the *Mackay* principle would not cause injustice, since the law provides an adequate remedy in damages instead. The decision is consistent with the emphasis in English law on freedom of contract and promotes certainty and predictability in commercial contexts.

The main practical takeaway is that, if parties to a contract want deemed fulfilment in particular contexts, they will need to include express drafting to that effect. The significance of the decision is not confined to its context (*i.e.*, the shipping market) and parties are encouraged when using standard forms to ensure that any reliance on deemed performance is provided for expressly.

#### (b) *Repudiatory Breaches*

In September 2025, the Court of Appeal handed down judgment in *Kulkarni v Gwent Holdings Ltd*,<sup>42</sup> which concerned the question of whether a repudiatory breach of contract could be “*capable of remedy*” within the meaning of a contractual provision. The Court was clear that the question of remediability of breaches is confined to the contractual and statutory context. It has no place under the common law rules on repudiation where, upon a breach that is so serious that it is repudiatory, an innocent party is entitled to either affirm the contract or terminate without being subject to ‘cure’ by the defaulting party.

The Court held that “*material and persistent*” repudiatory breaches were capable of remedy on construction of the agreement when taking a forward-looking, practical approach to remediation. Indeed, guidance from the court is that in the contractual or statutory context, the assessment of remediability of a breach should be approached in a “*common sense way*” and parties are encouraged to focus on whether a breach can be put right for the future rather than whether past harm can be undone. In the contractual termination context, parties that intend certain breaches to give rise to an unfettered contractual right to terminate without opportunity for the defaulting party to remedy the breach should make that express in their contract.

*Mallika Sen, Caitlin Gluckstein*

<sup>42</sup> [2025] EWCA Civ 1206.

## The Future for Restructuring Plans

Part 26A restructuring plans look likely to continue to evolve in 2026, with the *Argo Blockchain*<sup>43</sup> restructuring plan sanctioned shortly before the new year engaging novel questions, including whether a restructuring plan triggers mandatory de-listing under the NASDAQ rules<sup>44</sup> and whether exceptionally low turnout at the meeting to vote on a plan could invalidate the approval process.

Since the process was introduced in 2020, companies have been increasingly turning to Part 26A restructuring plans as a flexible alternative to traditional schemes of arrangement. One of the most attractive characteristics is the power to bind dissenting classes of creditors, by way of a cross-class cram down (typically of out-of-the-money creditors), provided certain fairness conditions are met.

In *Argo Blockchain*, the court was forced to treat the plan as a cross-class cram down, given the “*failure in strict legal terms*” by the company to obtain the necessary creditor approval at a properly-convened meeting. This meant that the court had to consider the plan under the “*no worse off*” test pursuant to 901G of the Companies Act 2006, which the judge described as a “*substantially stricter assessment*” of the fairness of a plan.

This was the first substantive consideration of fairness in cross-class cram downs since *Petrofac* and the court carefully considered principles applied by the Court of Appeal in *Adler, Thames Water*, and *Petrofac*, and by the High Court in *Waldorf* and *River Island* (in which Sir Alastair

Norris set out eleven guiding principles for determining whether the court should exercise its discretion to sanction a plan).<sup>45</sup> There are a number of interesting findings in the judgment:

- (a) In determining the balance of fairness, the weight applied to the likely return to the dissenting class in the relevant alternative will usually depend upon the “*nature and objectives*” of the proposed plan. For example, if the plan is akin to a ‘wind-down’ plan, more weight is likely to be attached to the fact that a dissenting class will be out of the money in the relevant alternative than if the plan is intended to “*enable recapitalisation and future profitable trading*”.
- (b) In considering the different treatment of classes of creditors and whether benefits are fairly allocated, more weight will be placed on the “*value of the respective contributions*” made by plan participants to generate the benefits of the restructuring. In other words, there will be an assessment as to whether one class is getting “*too good a deal*” or *vice versa*.
- (c) It is necessary to consider what steps have been taken to involve stakeholders and whether any alternative proposals have been considered or discussed. While there is no strict pre-condition that negotiations have taken place, and in some circumstances this may not be possible or reasonable, the court will want to be satisfied that there has been proper engagement with stakeholders taking account of the circumstances.

<sup>43</sup> *Re: Argo Blockchain* [2025] EWHC 3395 (Ch).

<sup>44</sup> Following initial advice to the contrary, the NASDAQ Panel confirmed that the restructuring plan was not a ‘bankruptcy’ or ‘business combination’ under NASDAQ Rules 5110(a) or 5110(b) and therefore did not require a de-listing.

<sup>45</sup> *Adler* [2025] 1 All ER (Comm) 26; *Petrofac* [2025] EWHC 859 (Ch); *Thames Water* [2025] EWCA Civ 475; *Waldorf* [2025] EWHC 2181 (Ch); *River Island* [2025] EWHC 2276 (Ch).

*Argo Blockchain* is illustrative of how the assessment of fairness and attendant considerations is likely to develop in the coming year. The Court of Appeal in *Thames Water* envisaged that the approach to the courts' discretion would need to be worked out on a case by case basis, "*building on the jurisprudence developed over a century and more of experience of schemes of arrangement*" and it is likely that it will take some time for the limits of Part 26A plans to be settled.

Much of the unresolved debate relates to the balance of fairness as regards the out-of-the-money creditors. The landscape in this regard has developed substantially since *Virgin Active*,<sup>46</sup> in which the High Court held that it was permissible for "*little or no weight*" to be given to the views of out-of-the-money creditors and that *de minimis* returns could satisfy the jurisdictional threshold to approve a plan.

There is now a general recognition that plans in which the cross-class cram down power is engaged must be fair, but where exactly the balance of fairness lies is still in flux:

1. *Thames Water*.<sup>47</sup> A group of dissenting creditors challenged the sanction of a plan, on the basis that it unfairly treated the out-of-the-money creditors. However, in July 2025 the appeal was dismissed, with the court focussing on the allocation of "benefits preserved or generated by the restructuring" ultimately finding that, under the plan, both assenting and dissenting creditors contributed equally to the benefits.<sup>48</sup>
2. *Waldorf*.<sup>49</sup> In November 2024, sanction of a plan was refused by the High Court, on the basis that there had been an insufficient attempt to consider the fair allocation to stakeholders of the benefits that would be generated by the restructuring; the company had therefore not satisfied the burden of establishing the plan was fair. Permission was granted for a 'leapfrog' appeal to Supreme Court. However, the company has since pursued an alternative Part 26 scheme of arrangement and the hearing has been vacated.
3. *Petrofac*.<sup>50</sup> In May 2025, two plans were sanctioned together by the High Court. This decision was later set aside by the Court of Appeal; Petrofac had not established that the plans were fair, because there was an unfair and unjustified allocation of the benefits of the restructuring between 'new money' investors and the dissenting creditors. In considering the risk of unfairness to certain classes of creditors, the Court of Appeal in *Petrofac* clarified the purpose of the Part 26A process: "*the proper use of the cross-class cram-down power is to enable a plan to be sanctioned against the opposition of those unreasonably holding out for a better deal, where there has been a genuine attempt to formulate and negotiate a reasonable compromise between all stakeholders*". Permission to appeal to the Supreme Court was denied, on the basis that: (a) the company had reached an agreement in principle out of court on an alternative proposal, and (b) a hearing of similar issues was to take place in February 2026 in *Waldorf* (which is, of course, now no longer proceeding).

<sup>46</sup> [2021] EWHC 1246 (Ch).

<sup>47</sup> [2025] EWCA Civ 475.

<sup>48</sup> Subject to a minor amendment relating to a proposed release.

<sup>49</sup> [2025] EWHC 2181 (Ch).

<sup>50</sup> [2025] EWCA Civ 821.

For now, the following questions remain unanswered:

1. What constitutes fair treatment of out-of-the-money creditors and the proper methodology for measuring their recovery in the 'relevant alternative scenario' (*i.e.*, the most likely eventuality if the restructuring plan is not sanctioned).
2. Whether the allocation of benefits of the restructuring is fair and justified as between different parties (*e.g.*, new money creditors and out-of-the-money creditors).
3. What constitutes sufficient engagement and/or negotiation with dissenting creditors to demonstrate that there has been a genuine attempt to negotiate a reasonable compromise.

4. What evidence will be sufficient to demonstrate that the allocation of the benefits of the plan is fair and justified.

As matters stand, it is likely that we will see the law develop iteratively in first instance decisions (as in *Argo Blockchain*) throughout 2026 and beyond, unless and until another sanction decision is challenged before the Supreme Court, and we can also expect to see parallel developments in the broader restructuring market which may impact the use of restructuring plans.

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