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In-Depth: Mergers & Acquisitions Litigation (formerly The Mergers & Acquisitions Litigation Review) offers a high-level overview and analysis of the main litigation issues and trends surrounding M&A activity in key jurisdictions worldwide. It examines the most common types of disputes and claims that may be pursued, while also highlighting the procedural and substantive law affecting the legal merits of such claims.

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Introduction

Mergers and acquisitions (M&A) are typically significant events in the life of a buyer, a seller and a target and have an impact on a large number of stakeholders, often with conflicting interests, including shareholders, directors, employees, creditors, customers, suppliers and, on occasion, governments or other regulatory bodies. As such, it is no surprise that these transactions often give rise to disputes and litigation.

M&A disputes can be broadly classified into two categories: disputes that arise between a party to the transaction and a stakeholder in that party (e.g., a shareholder) and disputes that arise between the counterparties to a transaction (i.e., the buyer and the seller).

In this chapter, we examine the common traits of each of the two categories and how typical claims in each category are treated under English law.

Year in review

In many respects, the courts' approach to M&A disputes has remained consistent with established principles and past practice, with cases in recent years largely focusing on the application of those established legal principles in different factual contexts.

There have, however, been a number of important developments over the past year emanating from both the introduction of new legislation and decisions of the courts.

In terms of legislative developments relevant to the M&A context, the most significant is perhaps the enactment of the Digital Markets, Competition and Consumers Act 2024 (DMCCA 2024), which came into force on 1 January 2025. This landmark legislation strengthens the powers of the Competition and Markets Authority (CMA), expanding its jurisdiction over global mergers, enabling it to regulate tech giants, and empowering it to impose substantial fines for breaches of consumer law. This legislative change significantly increases the regulatory scrutiny of certain M&A transactions with a UK nexus and, as such, introduces new compliance risks for parties involved.

Another legislative development is the enactment of the Arbitration Act 2025, which came into force on 1 August 2025. This Act, which largely reflects the recommendations for reform published by the Law Commission in September 2023, makes a number of amendments to the Arbitration Act 1996, which applies to all arbitrations seated in England. The Act aims to modernise and streamline English-seated arbitration proceedings, and to reinforce the United Kingdom’s position as a leading centre for arbitration. The new Act will apply to arbitration proceedings commenced on or after 1 August 2025 (as well as to court proceedings brought in respect of arbitration proceedings commenced on or after that date). Given that arbitration remains a popular method for resolving cross-border M&A disputes, the changes implemented by the Act will be of relevance and benefit to those involved in such disputes.

In terms of future legislative developments, on 2 June 2025 the Civil Justice Council (CJC) published its eagerly awaited Final Report on Litigation Funding in which it makes 58 recommendations for the reform of litigation funding, including the implementation of urgent legislation to reverse the decision of the Supreme Court in *R (PACCAR) v. Competition Appeal Tribunal*.[1] The CJC also recommends that the current self-regulatory approach be replaced with one of formal, statutory (but light-touch) regulation that would include provisions addressing matters such as the capital adequacy of funders, the prohibition of funder control of litigation, and obligations to disclose the existence and source of funding. Funding provided to consumer parties and parties engaged in collective proceedings and group litigation would be subject to additional regulatory control. While it remains to be seen how and when these recommendations are implemented by the government, it is clear that the introduction of any regulation will impact upon disputes in the M&A space, and particularly securities litigation where litigation funding is common place.

Regarding developments in the case law, the past year has seen a number of significant court decisions in relation to the Financial Services and Markets Act 2000 (FSMA), particularly regarding the meaning of 'reliance' for the purpose of a claim under Section 90A and Schedule 10A. The meaning of 'reliance' in this context is of critical relevance for investors in index or tracker funds who – unable to evidence direct reliance on the published information of the companies in which they invest – have sought to rely on US-style ‘fraud on the market’ arguments to support their claims under the FSMA. As a result of conflicting court decisions (discussed further below), it is, however, currently unclear whether such arguments can be relied upon as a matter of English law.

Companies and directors facing claims by shareholders will welcome the recent decision of the Privy Council in *Jardine Strategic Ltd v. Oasis Investments II Master Fund Ltd and Others (No 2)*,[2] which overturned the longstanding shareholder rule exception to the law of privilege. The upshot of this decision (discussed further below) is that companies are now entitled to assert legal advice privilege against their shareholders, save where the usual exceptions apply, meaning that shareholders pursuing litigation against a company will now need to find supporting evidence for their claim in non-privileged documents.

A number of court decisions in relation to the interpretation of material adverse change clauses in share purchase agreements (SPAs) signifies an increasing use of such clauses in English-law governed transactions. In addition to the Court of Appeal’s decision in *Decision Inc Holdings Proprietary Ltd & Anor v. Garbett & Anor*[3] (discussed in detail in last year’s update), the recent decision of the High Court *in BM Brazil I Fundo De Investimento Em Participações Multistrategia & Ors v. Sibanye BM Brazil (Pty) Ltd & Anor*[4] provides important guidance on the interpretation of MAC clauses as a matter of English law.

Finally, the year has seen the first court decision concerning the judicial review of a final order under the National Security and Investment Act 2021 (NSI Act).[5] The NSI Act introduced a stand-alone statutory regime for UK government scrutiny of, and intervention in, acquisitions and investments for the purpose of protecting national security in the United Kingdom and the recent court decision provides valuable insight into the transaction and review process under the NSI Act. This is important for parties involved in sensitive M&A deals, for whom the government’s powers under the NSI Act remain a key consideration.

Legal and regulatory background

Shareholder claims typically arise under the legal framework governing shareholder control and directors' duties as set out in the Companies Act 2006 (CA 2006). In recent years, claims by shareholders under the FSMA have become more frequent, where a claim is made for loss claimed to have been incurred as a result of misleading or untrue statements in a company's public documents.

In the context of public M&A, bidders, targets and their respective advisers may face claims under the regulatory framework that sets out parameters on how such transactions should be conducted by the parties and disclosed to stakeholders, namely the Takeover Code, UK Listing Rules and Alternative Investment Market company rules, as well as related legislation, including the Market Abuse Regulation. One significant development in relation to the regulatory framework is the enactment of the DMCCA 2024, which came into force on 1 January 2025. Among other things, this landmark piece of legislation expands the merger review jurisdiction of the CMA and also introduces new reporting requirements in respect of certain M&A transactions with a UK nexus. This legislative change significantly increases the regulatory scrutiny of qualifying transactions and introduces new compliance risks for parties involved in M&A activity.

Counterparty claims may arise out of the parties' contractual documents governing the transaction or (less frequently) from non-contractual private law obligations owed in tort. The risk of such claims is, however, greatly impacted on by the surrounding political, regulatory and economic context in which deals happen. For example, over the past few years, the UK government has implemented various proposals aimed at giving itself greater powers to intervene in and block transactions on public interest and national security grounds.[6] The past year has seen a number of important decisions in relation to the exercise of these powers, which provide valuable insight into the government's review process.[7]

These new regulatory initiatives have been seen, in part, as a response to Brexit and a desire for the United Kingdom to determine its own merger policy, and also to address wider public concerns about core national infrastructure, national defence and cybersecurity. These rules have implications for transaction timetables and how counterparties allocate completion risk in transaction agreements, both of which could lead to potential counterparty claims, particularly as a consequence of uncertainty in the initial years as the regime develops. In addition, governmental entities may also sanction counterparties for non-compliance with the regime, with the possible introduction of both criminal offences and civil sanctions such as fines.

Shareholder claims

Shareholder claims: common claims and procedure

Claims for breach of directors' duties

In the context of M&A transactions, shareholders may bring claims relating to the relevant company's directors' duties in considering, negotiating or recommending a particular transaction. The CA 2006 sets out the main directors' duties, which include the duty to act in a way that promotes the success of the company for the benefit of the shareholders as a whole.[8]

As a general rule, directors' duties are owed directly to the company and not to any one shareholder, so only the company can enforce a claim for their breach (although see below on derivative claims).[9] However, in exceptional circumstances, a fiduciary duty can arise between directors and shareholders where there are special or unusual circumstances giving rise to a relationship that replicates the prominent features of a fiduciary relationship.[10]

In *Sharp v. Blank*[11] (also known as the *Lloyds/HBOS* litigation because it arose from the acquisition by Lloyds Bank of Halifax Bank of Scotland during the 2008 financial crisis), the directors conceded that they owed a duty of care to shareholders in relation to statements made in shareholder circulars seeking approval for the acquisition, as this document also included statements of personal responsibility from the directors, but denied that they owed such a duty in relation to more generic statements to the wider market in the form of regulatory stock exchange announcements or statements on investor calls. The directors' position was accepted by the court. Ultimately, the directors were found not to have breached the duty of care they owed in relation to the shareholder circulars, as they were required only to provide shareholders with sufficient information to enable them to make an informed decision and not complete disclosure of every consideration that might affect shareholder voting.

In general, claims for breach of directors' duties and fiduciary duties are subject to a limitation period of six years from the date the cause of action accrues.[12] Difficulties arise, however, when a breach of duty gives rise to multiple causes of action, in which case different limitation periods may apply to each cause of action. Care should be taken when advancing claims based on breach of directors' duties in the context of M&A transactions, particularly when the relevant events took place several years prior to the entry into of the relevant sale contracts.[13]

Derivative claims

Shareholders can also bring a derivative claim[14] on behalf of the company where there has been an actual or a proposed act or omission involving negligence, default, breach of duty or trust by a director or a third party. Such a claim may be brought only with the permission of the court (which has discretion whether to allow such a claim to proceed). Derivative claims are very rare in England, and in a recent decision, the English court confirmed the high bar for claimants seeking to bring a derivative claim under Part 11 CA 2006.[15]

Claims under the FSMA

FSMA 2000

Shareholders of a public company may also bring claims against the company or its directors on the basis of statements in published information in relation to the company's affairs, such as in prospectuses and listing particulars. Such claims may be brought under Section 90, 90A and Schedule 10A of the FSMA, which impose statutory liability on issuers of securities for untrue or misleading statements or dishonest omissions in certain published information relating to the securities, or a dishonest delay in publishing such information. There is increasing interest in such litigation in England, although most claims to date have been outside the M&A context.[16]

One example of Section 90A and Schedule 10A of the FSMA being used in this context can be found in the High Court decision in *ACL Netherlands BV v. Lynch*,[17] which arose out of a post-closing M&A dispute. Here, the Court held that the former chief executive officer (CEO) and chief financial officer (CFO) of a listed English company, Autonomy Corporation plc (Autonomy), were liable to Hewlett Packard (HP) under Section 90A and Schedule 10A of the FSMA for misleading statements and misrepresentations contained in Autonomy's annual and quarterly reports in the period leading up to the announcement of HP's takeover offer for Autonomy in 2011. Significantly, the Court approved the 'dog-leg' structure by which the claim was brought. The difficulty for HP was that if it brought a straightforward claim against Autonomy, as issuer of the relevant securities (i.e., its own shares), under the FSMA, it would essentially be suing itself, as HP had since acquired Autonomy. A workaround was therefore required that enabled HP to sue the defendants: Autonomy's former CEO and CFO. This was achieved by a dog-leg claim, through which:

1. HP notified its claim to Autonomy;
2. Autonomy, under the control of HP, admitted liability to HP; and
3. Autonomy then blamed and sued the two defendants, its former officers, for the loss.

While *ACL Netherlands BV v. Lynch* remains the only the FSMA case to date to have made it to full trial in the English courts, there has been a notable increase in claims in relation to the FSMA – possibly as a result of the growth of litigation funders, for whom such claims are an obvious attraction – and the past year has seen a number of important decisions in relation to the interpretation of the FSMA.

In*Allianz Funds Multi-Strategy Trust v. Barclays Bank plc,*[18]the English court considered for the first time whether 'price/market reliance'[19] was sufficient to satisfy the reliance requirement under Schedule 10A of the FSMA. Schedule 10A imposes 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 Schedule 10A. In *Allianz*, the High Court rejected the idea that price or market reliance of the sort seen in the United States was 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.[20]

The Court therefore held that Schedule 10A required reliance to be proved as a separate ingredient of liability, in addition to causation.[21] The applicable test of reliance or inducement was that found in the common law tort of deceit, which 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.[22]

The question of price and market reliance arose again in *Various Claimants v. Standard Chartered Plc*,[23] where claims based on such reliance had also been pleaded. On the basis of the decision in *Allianz*, the defendant sought to strike out the claims based on price and market 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 impact on a different number of claims, and that the question as to 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* is currently scheduled for October 2026. Pending the outcome of that trial, it remains unclear whether passive investors will be able to satisfy the reliance requirement under Schedule 10A FSMA on the basis of price and market reliance.

The final decision of note in this context is the Court of Appeal's decision in *Wirral Council v. Indivior plc*,[24] which concerned the first attempted use of representative proceedings under 19.8 of the the Civil Procedure Rules (CPR) for claims brought under Sections 90 and 90A and Schedule 10A of FSMA. Wirral Council, acting as the administering authority for the Merseyside Pension Fund, sought to bring representative proceedings against Indivior Plc, a pharmaceutical company, alleging fraudulent statements and omissions in published information related to the opioid crisis in the United States. The representative claimant proposed a bifurcated structure whereby common issues – such as the alleged misleading statements – could be addressed by way of representative proceedings, with individual issues such as reliance, causation and loss being dealt with at a later stage. Parallel multi-party proceedings alleging the same claims had also been issued, but these had been stayed pending the resolution of the representative proceedings.

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 courts of their ability to manage claims effectively. Indeed, the Court recognised that one of the objects of using the bifurcated representative procedure was undoubtedly to avoid courts taking the sort of case management decisions that had been taken in other Section 90A claims and requiring the claimants to make some progress on claimant-sided issues – if only by identifying which head of reliance each claimant relied upon or providing sample disclosure or witness evidence – in parallel with the defendant-sided common issues. The judgment highlighted the importance of a 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. The judgment also signals judicial caution against using representative proceedings to facilitate 'book-building' by funders (i.e., the practice of getting as many claimants as possible joined up to the representative proceedings without having to engage in any work relating to their individual claims in relation to the claimant-sided issues such as reliance and causation unless and until the common issues are decided in the claimants' favour).

FSMA 2023

In July 2023, the Financial Services and Markets Act 2023 came into force, which, among other things, imposes additional sustainability disclosure requirements.[25] These requirements came into force on 1 January 2024.[26] At the time of writing, no decisions have been given in relation to these requirements and it remains to be seen whether they will give rise to litigation.

Unfair prejudice claims

A shareholder may also petition the court, alleging that the company's affairs have been conducted in a way that has unfairly prejudiced the interests of some or all of its shareholders[27] (e.g., if the directors take actions to block a potential transaction that is in the interests of the company and its shareholders). Although possible in an M&A context, unfair prejudice claims are rare as they are often complex and challenging. A mere breakdown in trust and confidence between shareholders does not, on its own, constitute unfair prejudice, and there needs to be a clear element of fault on the part of one of the parties.[28] A shareholder is generally not entitled to complain about the way in which another shareholder exercises the rights attached to their shares unless it amounts to actively managing the company's affairs. In *UTB LLC v. Sheffield United Ltd*,[29] the court held that even if a shareholder's actions amount to managing the company's affairs, another shareholder will not be 'entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted'.

A shareholder may bring an unfair prejudice petition on the basis that another shareholder or other shareholders have not complied with the company's articles of association or other agreements between shareholders,[30] as long as they are not trivial or technical breaches that cause no real prejudice.[31]

Until this year, it had been thought that there was no statutory limitation period applicable to unfair prejudice petitions, although delay was a factor the court could take into account in determining whether to grant relief. However, in its landmark ruling in *THG Plc v. Zedra Trust Company (Jersey) Limited*, the Court of Appeal held that unfair prejudice proceedings are within the scope of the Limitation Act 1980 and that, unless a shorter limitation period applies, the applicable limitation period will be 12 years under Section 8. A shorter limitation period will apply where the claim is one for the payment of money in which case the applicable limitation period is six years under Section 9. The Supreme Court granted permission for an appeal, which was heard in February 2025; however, at the time of writing judgment has yet to be delivered.

Privilege

Until recently, shareholders seeking to bring claims against a company or its directors had a distinct advantage in that the company could not assert legal advice privilege against its shareholders, save in relation to documents produced for the dominant purpose of litigation between the company and those shareholders. This exception to the law of privilege, known as the 'shareholder rule', which had existed for almost 140 years, meant that shareholders were able to obtain and rely on privileged company documents in support of their claims. However, in a landmark decision in *Jardine Strategic Ltd v. Oasis Investments II Master Fund Ltd and Others (No 2)*[32] the Judicial Committee of the Privy Council abolished the shareholder rule, calling it a rule without justification. Although a decision of the Privy Council, the decision is binding on the domestic courts of England

and Wales by virtue of the Privy Council's decision to issue a *Willers v. Joyce* direction. As such, the shareholder rule no longer forms any part of the laws of England and Wales and companies are entitled to assert legal advice privilege against their shareholders, save where the usual exceptions apply.

Shareholder claims: remedies

For claims for breach of directors' duties under the CA 2006, a claimant will typically be entitled to recover reparative equitable compensation (where the question is what would have happened but for breach), although, in some circumstances, substitutive compensation will be appropriate (in which case the court tries to restore to the company that which was wrongfully paid out).[33] In addition, remedies may include injunctive relief, setting aside the transaction complained of or an account of profit, restoration of company property held by the director or, in the case of unfair prejudice, the purchase of a shareholder's shares at a certain value.[34]

A breach of duty may also be grounds for disqualification as a director under the Companies Directors Disqualification Act 1986.

Equitable compensation is compensatory in nature, meaning that it will be calculated such that the claimant is put in the position in which they would have been had the breach not occurred. By contrast, an account of profits aims to strip the defendant of any gains made from the breach, rather than compensating the claimant. In either case, the remedy is discretionary, meaning that the court will have regard to all the circumstances and facts of a case when determining whether and how much to award, including whether it is just to do so.

Shareholders cannot bring a claim to recover losses in circumstances where their loss merely reflects the loss suffered by the company. This is known as the 'reflective loss principle'. Following the decision of the Supreme Court in *Sevilleja v. Marex Financial Ltd*,-[35] the reflective loss principle is engaged only where the loss claimed by the shareholder takes the form of a diminution in the value of its shareholding or its distributions as a shareholder. If a shareholder brings a claim for a different type of loss, even if the company has a concurrent right of action in respect of substantially the same loss, the shareholder will be permitted to recover its loss.[36]

Exemplary or punitive damages are very rarely awarded in England.

Injunctive relief can be sought, for example, in circumstances where a shareholder is seeking to prevent a transaction from going ahead on the basis that it constitutes or involves an alleged breach of the directors' duties. An injunction is, however, available only at the discretion of the court and is subject to the *American Cyanamid* test.[37] The claimant would need to demonstrate that there is a serious issue to be tried between it and the defendant and that the balance of convenience justifies the injunction. Under the balance of convenience element of the test, the court would consider, among other things, whether monetary relief at trial would be an adequate remedy for the claimant and whether irreparable harm would be suffered by the claimant in the event that the injunction were not granted.

The assessment of whether the test is satisfied in each case is highly fact-specific.

Shareholder claims: defences

The type of defence to the claims set out above will depend on the particular circumstances of each case. Generally, if directors can establish that their actions had been honest and reasonable with regard to all circumstances, the court would reject a claim for breach of duty.[38] Directors will generally look to record in documents such as board papers the relevant considerations in the decision-making process and advice from professional or internal advisers. In addition, breaches of directors' duties can generally be ratified by an ordinary resolution of shareholders.[39] Similarly, claims based on false or misleading information in published statements can be countered by demonstrating that the directors had an honest belief in the statements at the relevant time.

Shareholder claims: advisers and third parties

A claim by a shareholder against a third-party adviser can typically be asserted only in tort. It will be necessary to establish that the third party owed a duty of care towards the claimant. For a shareholder to establish such a duty, the shareholder must typically show that the loss suffered by the shareholder was foreseeable, that there was a sufficiently proximate relationship between the shareholder and the third-party adviser, and that it would be fair, just and reasonable for a duty of care to be imposed. In practice, this will be easier for the company to establish than for its shareholders, as the relevant adviser will customarily be engaged by the company (meaning that they will likely owe duties to the company in both contract and tort). If a parent company and its subsidiary bring joint claims on the basis of an adviser's breach of duty, the subsidiary's claims may be struck out on the basis of the reflective loss principle.[40]

Shareholder claims: class and collective actions

There are several processes by which claims involving multiple claimants can be managed in a single collective proceeding. These include consolidation of similar actions brought by multiple claimants into one proceeding under a group litigation order (GLO) issued by the court and a representative action where one claimant brings a claim as a representative of others with the same interest.[41]

Litigation under a GLO is an opt-in process, meaning that each claimant must be party to an individual action first, before the claims are made the subject of a GLO.

There have historically been few collective actions in England. There are, however, a number of recent examples in the context of shareholder litigation, including the *Lloyds-/HBOS* litigation,[42] *The RBS Rights Issue Litigation*,[43] *SL Claimants v. Tesco*[44] *and Wirral Council v Indivior plc*[45] (discussed above). There are also a number of collective actions in other contexts, such as consumer litigation and product liability and in relation to environmental, social and governance (ESG) issues. The Competition Appeals Tribunal allows for class action litigation in certain antitrust-related disputes (including, more recently, in the cryptocurrency space).[46] As a result, group and collective litigation is rapidly evolving in England, leading to a number of recent developments in case law on subjects such as the level of damage required to sustain a representative action[47] and the lawfulness of litigation funding arrangements that are often used to support collective proceedings.[48]

The Civil Justice Council's recently published Report on Litigation Funding has made recommendations for reform that would reverse the decision of the Supreme Court in *PACCAR*[49] – a decision that created significant uncertainty and upheaval in the litigation funding market by finding that most litigation funding agreements were likely to be unenforceable due to non-compliance with the applicable statutory regime – while moving away from the current approach of self-regulation and establishing a statutory 'light touch' regulatory framework that aims to balance access to justice with appropriate protection for all parties involved. While the adoption of these proposals will depend on legislative processes, the Report's blueprint signals a notable shift in approach to litigation funding.

Shareholder claims: insurance and indemnification

Although it is not generally possible for a company to exempt[50] or indemnify[51] one of its directors from liability in connection with any negligence, default, breach of duty or breach of trust, a company can indemnify a director against liability and associated legal fees incurred by a director in the context of a third-party claim,[52] or purchase and maintain insurance for its directors against any potential liability.[53] It is not, however, open to a company to indemnify its directors for any civil proceedings brought by the company, any fines or liability in respect of criminal proceedings or penalties imposed by a regulatory authority in respect of non-compliance.

Company policies are generally divided into those that cover directors for personal liability where indemnification from the company is not permissible (Side A coverage), those that reimburse the company where it has made payment pursuant to a director's indemnity (Side B coverage) and those that cover the company against claims made directly against it by third parties (Side C coverage). The scope of directors' and officers' insurance policies generally cover any error, misrepresentation or breach of duty committed by a director in connection with a transaction but exclude matters such as fraud, illegality and dishonesty, wilful or intentional acts of non-compliance, or civil or criminal fines.

Shareholder claims: settlement

English court rules promote settlement discussions between parties and permit cases to be stayed for settlement discussions to take place,[54] encouraging settlement offers by imposing consequences on a party that either unreasonably refuses to participate in settlement discussions or mediation or rejects a settlement offer that it fails to beat at trial. These consequences usually take the form of adverse cost orders being made against the party in question. A detailed regime is provided by Part 36 of the CPR that allows settlement offers to be made with prescribed consequences if an offer is not accepted but is not subsequently beaten at trial.

Settlement dynamics in circumstances where there may be several thousand claimants and, as is increasingly the case for such matters, a litigation funder may be complex. There are competing interests, and there may be different groups of claimants sometimes represented by different counsel and with varying appetites for settlement. Often, disputes relating to the costs of proceedings continue after the court's decision or after the settlement of claims.

Shareholder claims: other issues

The UK market is increasingly seeing shareholders actively seeking to monitor and influence the companies in which they invest. In the context of M&A transactions, shareholders may be required to consent to the transaction (e.g., in the context of a Class 1 or related-party transaction under the Listing Rules). Alternatively, investors may seek to encourage or pressure a company to undertake a particular acquisition or sale as part of the broader strategy of the company. While activists predominantly rely on the various shareholder rights set out in the CA 2006 to achieve their aims, the UK market has seen an increasing willingness of investors to pursue litigation to enforce these rights, including through the use of derivative and unfair prejudice claims.

Most public bids in the UK market are implemented by way of scheme of arrangement, which (provided that it has sufficient shareholder support) will bind non-accepting shareholders. The scheme of arrangement process requires court approval to determine whether applicable statutory requirements have been complied with, whether there has been coercion of minority shareholders by the majority and whether the scheme is such that a target shareholder may reasonably approve the bid. In recent years there has been a trend of intervention by shareholder activists in public bids to attempt to force the bidder to improve the terms of their bid in a practice known as 'bumpitrage'. This is often conducted at court hearings on the basis that required disclosure in relation to the transaction was inadequate or the scheme unfairly undervalued the target, or both. There have been a number of recent examples that have not succeeded in blocking the relevant transaction but that illustrate that care needs to be taken by target companies and their boards in the context of public bids to ensure that the disclosure in scheme documentation does not open the door to criticism and challenge by bumpitraging activists.

Counterparty claims

Counterparty claims: common claims and procedure

Disputes and claims arising out of the contractual documents following an M&A deal are common and often relate to the parties' diverging interpretations of what has been agreed. Subjects that often arise include allegations of non-fulfilment of a condition precedent, breaches of warranty and indemnity disputes, and price adjustment disputes. Claims can also arise in misrepresentation where a party seeks to challenge statements made by the counterparty prior to the contract.

The limitation period for contractual claims is six years from the date of the alleged breach of contract,[55] although parties may shorten that for certain types of claims in the transaction documentation.

Conditions precedent

Parties will customarily set out what constitutes the required standard of fulfilment of a relevant condition (e.g., is the condition satisfied on making a notification to a particular regulatory authority or only once that authority provides an affirmative response, or only once an entirely unconditional affirmative response is provided by the authority?). In the absence of this detail, the court may be required to decide whether the condition is objectively satisfied and what the parties intended when they entered into the contract. Courts have upheld provisions that require fulfilment to the satisfaction of one of the parties, despite the fact that they confer wide discretion on the party in question.[56] Whether this determination must be made reasonably (or even in good faith) is an issue of construction; however, it may in some cases be possible to imply a period of time during which the satisfaction will not be unreasonably withheld.[57] The courts have shown a willingness to hold that such power is not completely unqualified and that 'in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith for the purpose for which it was conferred, and must not be exercised arbitrarily, capriciously or unreasonably'.[58] A party benefiting from a provision requiring its satisfaction should therefore be prepared to demonstrate that its decision is made in good faith and for proper purposes.

Generally, in the absence of express time limits or long-stop dates, a condition will need to be fulfilled within a reasonable time frame.[59] There is some ambiguity as to what constitutes a reasonable time frame; however, often, the court will look to the circumstances that actually existed, and a party responsible for fulfilment will generally not be in breach provided that any delay is attributable to factors it cannot control and if it has not acted in a way that is negligent or unreasonable on the facts.[60]

M&A agreements will usually set out which party is responsible for ensuring that the relevant condition is fulfilled and the standard of efforts it must apply to satisfy the condition. There is generally a spectrum of such endeavour obligations, ranging from reasonable endeavours, being the least stringent, to best endeavours, being the most.[61] Best endeavours are generally seen as requiring the relevant party to take all steps or courses of action that are capable of producing the desired results[62] and that a reasonable and prudent person acting in their own interests and desiring to achieve that result would take.[63] Although this is onerous, it is not an absolute obligation.[64] By contrast, a reasonable endeavours obligation seeks to balance the contractual obligation against any relevant commercial considerations, acknowledging that such an assessment should still reflect the circumstances and position of the obligor. Crucially, the obligor is not normally required to sacrifice its own commercial interests and may be entitled to consider the financial impact on its own business,[65] and may need to take only one reasonable course as opposed to all of them.[66] Despite their wide use, there is some uncertainty as to what efforts each different endeavours clause requires in practice, which can often result in disputes. Because of this uncertainty, parties will often set out the specific steps a relevant party should take to satisfy a particular obligation (e.g., specifying whether a party must take legal action or appeal to satisfy a particular obligation, or imposing a cap on the amount of expenditure a party may need to incur).

Recent years have seen a number of decisions[67] concerning the interpretation of 'material adverse change' (MAC) clauses, which are sometimes included as closing conditions in SPAs. MAC clauses typically give the buyer the right to withdraw from the transaction if certain events occur between exchange and completion that are 'materially adverse' to the target, its business or its assets. Historically, MAC clauses have been uncommon in English-law governed SPAs, but as more international buyers enter the market these clauses have become more common. The recent decision of the High Court *in BM Brazil I Fundo De Investimento Em Participações Multistrategia & Ors v. Sibanye BM Brazil (Pty) Ltd*

& Anor[68] provides important guidance on the interpretation of MAC clauses as a matter of English law, including the assessment of 'materiality'.

Indemnity and warranty disputes

Common areas where specific contractual protection is sought to allocate risk include potential tax liabilities, environmental risks, doubtful debts and other significant but contingent diligence concerns. Typically, this protection is achieved through indemnities, although in English law-governed share purchase transactions, protection for pre-completion tax liabilities of the target group typically takes the form of a stand-alone covenant to pay an amount equal to the relevant tax liability.[69] Although the purpose of these indemnities and covenants is to provide parties with clarity on how a particular liability should be apportioned, disputes are common where drafting is not specific or clear enough or where a novel situation arises post signing of the agreement. A party claiming under an indemnity or covenant must prove that the relevant trigger event has occurred. There is no duty to mitigate loss, in contrast to claims for damages for breaches of warranties.

Common warranty claims following an M&A transaction include claims in relation to the seller's contractual warranties as to the financial health of the target (accounts warranties) or compliance with law or licensing requirements.[70] A successful claimant will have to demonstrate that the party giving the warranty has breached it and that the effect of that breach is to reduce the value of the business being acquired. Disputes have also arisen in relation to coverage under warranty and indemnity (W&I) insurance, such as in *Finsbury Foods Plc v. Axis Corporate Capital Ltd & Ors*,[71] where a dispute arose between the buyer and the insurer over the scope and interpretation of the warranties, and whether the warranties given by the seller had been breached such that the W&I policy would respond.

In *Wood v. Capita Insurance Services*,[72] the Supreme Court analysed an SPA with a large number of 'detailed and professionally drafted' indemnities. The Supreme Court recognised that in most transactional contexts, the desire to conclude a deal and the nature of negotiations mean that unambiguous drafting may not always be achieved. As a result, to ascertain the objective meaning of the words used by the parties, it may be necessary for the court to take into account not just the literal meaning of the words used but also the commercial consequences of those words and the context of the contract in which they are used as a whole. A recent example involved the High Court considering the construction of an indemnity[73] for the costs of replacing damaged subsea export cables. The Court held that the relevant indemnity was limited to damage done to the cables during the period between signing and closing. This case underlines the potential importance, in deals involving a split exchange and completion, of giving individual consideration to what the parties intend by reference to the period 'prior to' or 'before' completion, in particular where used to delineate a party's contractual responsibilities or liabilities. The Court held that these terms have no common meaning, and that the provisions must be interpreted at the date they come into force with regard to specific wording of the provision, including the tense used, and the broader structure of the SPA, including the presence of overlapping warranties and their related limitations of liability.

In relation to warranty claims, disputes often arise in relation to whether the seller disclosed a particular fact or circumstance negating the warranty or if the fact or circumstance was otherwise known to the buyer at the time of purchase. The contract will often specify the standard in relation to any disclosure – for example 'fairly and clearly disclosed in writing'[74] – and there will be a factual dispute as to whether that standard has been met. There will often be a question of whether a breach of the warranty is material such that liability arises. In relation to breaches of an accounting warranty in which the seller typically warrants that the audited accounts of a certain date present a true and fair view of the target's financial position, the court has found that failure to comply with accounting standards is prima facie evidence that the resulting accounts do not present a true and fair view of the target's financial position.[75]

Almost all SPAs will include a provision requiring the buyer to give notice of any claims within a certain period of time. Often, these provisions will also prescribe what the notice is required to include. The English court has repeatedly required strict compliance with such notice provisions, in terms of both the deadlines and the notice contents. Recent examples of notices with which the English court has found to have failed to comply with the stipulated contractual requirements include a notice that:

1. failed to identify the particular warranties and other provisions on which the claims were based;[76]
2. failed to include a reasonable estimate of the amount of the claim;[77]
3. stated only the total amount claimed, rather than the amount claimed in respect of each breach of warranty alleged in the notice;[78] and
4. did not assert a claim but merely stated that the claimant may have claims that it might make in the future.[79]

Notice provisions often stipulate that the notice must contain 'reasonable detail' about the matter that gives rise to the claim. What constitutes reasonable detail will depend on all the circumstances of the case, including the recipients' knowledge. Requiring an explanation of details of which the recipients are already aware, unless such details are expressly required by the contract to be provided, has been found by the courts to be an unnecessary formality.[80]

Price adjustment disputes

Disputes frequently arise in circumstances where the parties have agreed to some form of post-completion price adjustment mechanism (such as a closing statement mechanism or earn-out).

For example, where parties have agreed to a closing statement mechanism, one party to the agreement is typically required to prepare and provide to the other a closing statement within a certain time period following the signing of the contract. The seller and buyer will typically agree to the principles on which the closing statement is to be prepared, which often seeks to ensure consistency with the target's accounts and specify certain accounting principles and treatments for matters specific to the transaction. Notwithstanding the consistency principle, where the parties agree to certain principles on which the closing statements are to be prepared, and the reference accounts (with reference to which closing statements are prepared) contain errors or departures from such agreed principles, absent clear and unambiguous wording in the contract that such errors are to be carried forward, the closing statements must comply with the agreed principles first and then seek to be consistent with any reference accounts.[81] There are other common reasons why a price adjustment dispute may arise, including a difference of view in relation to the applicable accounting treatments (e.g., whether something should be treated as cash or debt).[82]

Price adjustment disputes are typically resolved by way of an expert determination procedure, and the contract will set out the scope of the expert's determination and the process for any submissions by the parties. This is viewed as being a more cost-effective and simpler procedure than a court proceeding, where the expert (typically an accountant) is asked to determine whether the accounting treatments in the closing statements are correct. Where a dispute arises as to the jurisdiction of an expert, the court will have the final decision as to whether the expert has jurisdiction. This is the case even if a clause purports to confer that jurisdiction on the expert in a manner that was final and binding.[83] If there is a dispute that falls outside the scope of the jurisdiction of expert determination, it is within the jurisdiction of the court to make the decision. There may also be disputes about whether the expert's determination is binding. For example, if the expert departs from their instruction in a material respect[84] (e.g., valuing the wrong shares or the shares of the wrong company), then the determination may not be binding because the expert has not done what they were appointed to do.

The expert's decision will typically be final and binding unless there is fraud or a manifest error. The expert has a degree of discretion in interpreting contractual provisions without falling afoul of the manifest error limitation (e.g., with respect to determining the hierarchy of the prescribed principles to be applied when preparing completion statements).[85]

In a recent decision, the High Court found that an expert determination clause can be separable from the contract in which it is found, meaning that the clause may continue in force even though the contract itself has been terminated.[86] Whether the expert determination clause is so separable, however, will depend upon the precise terms of the contract.

Misrepresentation

Claims of misrepresentation in the context of an M&A transaction governed by a contract can arise where a claimant alleges that a statement made by the defendant during negotiations induced them to enter into the contract. Establishing misrepresentation requires the claimant to show that the defendant made a statement that was not true and that induced the claimant to enter into the contract. Claims for misrepresentation can be for innocent, negligent or fraudulent misrepresentation.

Fraudulent misrepresentation involves a claim in deceit and requires the claimant to establish that the defendant was acting dishonestly and had the intention to induce the claimant into the contract.[87] The principles are well established in case law and each case will turn on its own facts.

It is necessary to show that the misrepresentation induced the claimant to enter into the contract in question, which again is a question of fact, although where a fraudulent misrepresentation is established, there is a presumption that the claimant was induced.[88] Notably, statements made during a due diligence process can be actionable misrepresentations,[89] as, it seems, can draft disclosure letters qualifying the content of a seller’s warranties.[90]

Counterparty claims: remedies

The principal remedy for breach of contract is an award of damages calculated on a compensatory basis, meaning that the claimant should be put in a position it would have been in had the breach not occurred.[91] A claimant will be required to prove that the breach of contract caused the damages claimed and also that the damages are not too remote. A claimant may also recover interest on damages that accrue before judgment, on the basis that it could have made alternative investments and has suffered loss by being kept out of its money. Any claim for interest is subject to the usual rules about proof of loss, causation and remoteness.[92]

The time of assessment is at the time of the breach, and subsequent events influencing the claimant's loss should not be taken into account. Departure from the prima facie position that damages are assessed at the date of breach without hindsight must be justified and must occur only where it is 'necessary to give effect to the overriding compensatory principle'.[93]

The claimant is under a duty to mitigate its losses. In essence, this principle is complementary to the causation requirement, namely that the defendant's breach caused the damage to the claimant. If the claimant unreasonably fails to act to mitigate its loss or unreasonably acts so as to increase its loss, the law treats those actions as having broken the chain of causation and measures damages as if the claimant had instead acted reasonably.

By contrast, a claim under an English law tax covenant is a claim for a debt, rather than damages. Accordingly, if a seller is held liable, it will typically be for an amount equal to the relevant tax liability of the target company, rather than for the damage suffered by the buyer as a consequence of such tax becoming due. This prevents any arguments about what the buyer's loss (in contrast to the target's) actually is in a particular case and means that no mitigation is required.

The basis of the calculation of damages in indemnity claims will depend on the precise wording of the contract, but, on a general level, the claimant seeking to claim under an indemnity will not be under a duty to mitigate its losses. Questions as to causation and remoteness of loss also do not arise in indemnity claims.

Rescission is available as a remedy for successful misrepresentation claims. The consequence of rescission is that the parties are put in a position as if the contract had never existed. By contrast, the remedy for breach of contract is to put the parties in the position as if the contract had been performed. This has an impact on the calculation of damages, and in certain circumstances it may be an advantage for the claimant to seek rescission rather than damages in a misrepresentation claim. When assessing damages in claims for misrepresentation, consideration of what the buyers had subjectively factored into the purchase price is irrelevant. Instead, the court will assess the objective value of the assets purchased at the relevant date.[94] It is important to note that a claimant is unlikely to be successful in claiming misrepresentation where the claim is made on the basis of a contractual warranty. Contractual warranties have been held not to amount to representations of fact and were not capable of founding an action for misrepresentation.-

[95] It is for this reason that when drafting English law transaction documents, it is common practice to avoid the use of the word 'representation' throughout.

Counterparty claims: defences

Defendants to a breach of warranty claim will typically seek to argue that:

1. there has been no breach;
2. the breach was not material, so no liability can arise; and
3. the particular fact or circumstance giving rise to the claim was known to the buyer and therefore it cannot bring a claim.

In a claim under an indemnity, a defendant will seek to argue that the particular trigger event has not occurred. In either case, a defendant may argue that the claimant has failed to comply with notice provisions (which, as set out above, are construed strictly) and therefore the claim should be dismissed.[96] In addition, there may be contractual defences or limitations on liability. Almost all agreements will include some form of limitations on the seller's liability with respect to the warranties they give, and these sometimes extend to other provisions such as indemnities, tax covenants or even the agreement as a whole. Common limitation provisions include individual and aggregate liability caps, *de minimis* and thresholds to limit less material disputes, and time limitation periods (and one agreement may contain a number of different caps, thresholds and time limits in respect of different types of claim). Tax covenants will typically also contain their own set of exclusions from seller liability.

Broadly, losses will be calculated according to normal contract law principles, which means that a loss must arise naturally in the ordinary course of things from a particular breach or must be within the reasonable contemplation of the parties as a result of specific circumstances known to the parties at the date of the contract.[97] Sellers will often seek to exclude liability for indirect or consequential losses. A common issue that arises is that the distinction between direct and indirect or consequential losses is not always an easy distinction to draw. For example, there have been a number of cases where loss of profits has been held to be a direct loss and therefore recoverable.[98] As a result, parties will often look to expressly exclude loss of profits (and sometimes loss of goodwill) in addition to indirect or consequential losses.[99]

Counterparty claims: arbitration

Arbitration as a method to resolve commercial contractual disputes is very common, and sophisticated parties to M&A transactions will often choose to refer their disagreements to an arbitral tribunal.

A wide range of international transactions may be subject to arbitration seated in England, and London is a well-known centre for international arbitration. The Arbitration Act 1996 (as amended by the Arbitration Act 2025)[100] applies to all arbitrations seated in England, and there is a considerable body of case law relating to issues arising out of arbitrations seated in England. England is widely considered to be arbitration-friendly, and the court will give effect to arbitration agreements and have wide discretion, where requirements are met, to issue anti-suit injunctions to restrain a party from continuing proceedings initiated in breach of an arbitration clause. The court also has the power to order disclosure and compel witness evidence in support of arbitration proceedings (seated in London or elsewhere). Furthermore, the grounds on which a party can apply to the court to challenge an arbitral award are limited. It is possible (unless the parties have agreed otherwise) to appeal an arbitration award on a point of law,[101] although the applicant is required to demonstrate that the tribunal made an obvious error.

Counterparty claims: other issues

Disclosure in English court proceedings can be extensive. In recent years, reforms have been introduced to seek to streamline the process. A new disclosure regime (which was initially introduced as a pilot scheme) under the CPR[102] came into force in October 2022, which requires parties to give initial disclosure aimed at providing the opposing party with documents relied on towards the beginning of proceedings. In addition, parties are required to agree a list of issues for disclosure to seek to limit disclosure on issues that do not require substantial volumes of documents to be reviewed and produced. Notwithstanding the new regime, the basic principle of disclosure in the English court remains the same: the parties are expected to conduct proceedings with their cards on the table, namely providing to the opposing party documents that either undermine a party's case or support the other party's case.

England is also an adverse costs jurisdiction, where the court has broad discretion to award legal fees in favour of one party or the other. The default position is that the unsuccessful party to litigation will be ordered to pay the successful party's legal costs. This applies both to the case as a whole and on an ongoing basis to any interim applications made to the court. This can result in significant costs orders being made against unsuccessful parties and in a successful party recovering the majority of its legal costs from pursuing or defending a claim.

Cross-border issues

In the context of M&A transactions, the process of initiating a claim against a foreign defendant may be simple if the parties have agreed that any dispute arising out of the contract will be subject to the jurisdiction of the English court.

If other parties not domiciled in the United Kingdom are also involved, the English court has wide-reaching jurisdictional rules that allow claimants to bring defendants into proceedings in England even if they have no nexus to England, provided that certain jurisdictional thresholds are met.

There are certain circumstances where the English court will reject or stay a claim against an English defendant (e.g., if the proceedings are brought in breach of an arbitration clause or if the parties to the contract expressly agreed that the courts of another jurisdiction should determine any dispute).

Following Brexit, the Recast Brussels Regulation, which previously governed the English court's jurisdiction over parties domiciled in the European Union, has ceased to apply.

Common law rules on jurisdiction now apply to defendants instead. Common law rules start with the question whether the defendant can be properly served with the proceedings in England and Wales. Where a defendant cannot be served within the jurisdiction, the court's permission may be required to serve a defendant out of the jurisdiction. To obtain the court's permission, the claimant must show that a jurisdictional ground giving the English court jurisdiction over the matter applies,[103] the claim raises a serious issue to be tried and England is the proper place in which to bring the claim.[104]

The court's permission to serve out of the jurisdiction is not required where the contract contains a jurisdiction clause in favour of the English court.[105]

Outlook and conclusions

The choice of English law as the governing law of an M&A transaction is popular, even with parties who have no other nexus to the United Kingdom and whose businesses are located elsewhere. While in 2020 and 2021, there was a marked recovery in deal activity following the pandemic, but that recovery period was short-lived. From 2022, deal activity cooled off, in part due to the Russian invasion of Ukraine, as well as political transition in UK government and resulting economic instability. This trend continued into 2023 and 2024, with factors such as rising interest rates, high inflation, energy insecurity and geopolitical uncertainties (including expansion of economic sanctions and the war in the Middle East) all continuing to jeopardise financing opportunities. While 2025 has brought interest rate cuts in certain markets and some easing of inflationary pressures, ongoing geopolitical tensions and uncertainties (including the United State's fluctuating tariff policy) have seen deal volumes in the first half of 2025 down on the same period in 2024. Market volatility is expected to persist for the remainder of 2025 and into 2026.

Downturns in the market are generally associated with more protracted deal lead times and increased levels of litigation as parties become focused on scrutinising the reasons for underperformance and parties' motivation to litigate generally increases. If the current economic environment persists or worsens, we would expect M&A litigation to increase.

Other likely areas of development relate to the increasing role of third-party litigation funders and the issues that come with their involvement in the parties' ability and willingness to bring claims, claims brought by large groups of claimants (another rapidly developing area of law and practice) and shareholder claims. These issues will almost certainly be impacted by the extent to which the government adopts the recommendations contained in the CJC's Final Report on Litigation Funding (discussed above).

While ESG and climate issues are yet to yield significant M&A disputes, the increasing regulatory focus on these issues across jurisdictions means they have remained, and will continue to remain, in relief for investors. In the United Kingdom, for example, recent years have yielded a string of court decisions allowing claims against parent companies for alleged ESG failures at foreign subsidiaries to proceed on the basis that the parent had, arguably, assumed a duty of care in respect of its subsidiaries' activities.[106] There are also some signs of the courts being reluctant to extend too far into the role of ESG enforcement, including the decisions preventing the continuation of derivative claims against Shell's directors.[107] However, notwithstanding that decision, ESG and climate risks in a corporate group remain potential sources of M&A litigation.

We also expect that issues relating to data protection (an increasingly regulated area with substantial risk and potential regulatory and private law liability) and liability for cyberattacks, ransomware and other data security risks will continue to become more prominent. Rapid technological and associated regulatory change in the artificial intelligence space, as well as in cryptocurrency, is also expected to prompt disputes as the regulatory sector adapts to those developments and as regulatory change affects M&A deals. Managing and litigating these risks may well take place in the M&A context as well as more generally. We also expect traditional M&A disputes over purchase price adjustments and W&I to continue and potentially to increase.

Finally, the expansion of economic sanctions resulting from Russia's invasion of Ukraine in 2022 has also led parties to terminate contracts or to restructure commercial operations so as to avoid the application of sanctions. This has, in turn, led to disputes in relation to, for example, parties' contractual termination rights, the interpretation of *force majeure* clauses,[108] and, in the case of companies with complex corporate structures, compliance with warranties. We expect these trends to continue as long as sanctions remain in place.

Endnotes

1 [2023] UKSC 28. ^ Back to section

2 [2025] UKPC 34. ^ Back to section

3 [2023] EWCA Civ 1284. ^ Back to section

4 [2024] EWHC 2566 (Comm). ^ Back to section

5 *L1T FM Holdings UK Ltd) v. Chancellor of the Duchy of Lancaster in the Cabinet Office* [2024] EWHC 2963. ^ Back to section

6 For example, Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2020 and the National Security and Investment Act 2021. ^ Back to section

7 *L1T FM Holdings UK Ltd) v. Chancellor of the Duchy of Lancaster in the Cabinet Office* [2024] EWHC 2963 (this is the first court decision concerning the judicial review of a final order under the National Security and Investment Act 2021 (NSI Act) and provides useful insight into the transaction and review process under the NSI Act); *R (on the application of L1T FM Holdings UK Ltd) v. Chancellor of the Duchy of Lancaster in the Cabinet Office* [2024] EWHC 2963 (this is the first court decision concerning an application for interim relief against a final order under the NSI Act. The decision emphasises the importance that is accorded to the executive’s judgment in matters of national security.) ^ Back to section

8 Section 172 Companies Act 2006. In *Saxon Woods Investments Ltd v. Costa* [2025] EWCA Civ 708, the Court of Appeal affirmed that the duty to act in good faith under section 172 of the Companies Act 2006 is not purely subjective. Directors must act honestly by objective standards, and deliberate deception of the board or shareholders will almost always constitute a breach of fiduciary duty, regardless of the director's subjective belief in the benefit to the company. Directors' duties may also be imposed on individuals who are not named directors but who act as directors by virtue of their conduct: *ACL Netherlands v. Lynch* [2022] EWHC 1178. ^ Back to section

9 Section 170(1) Companies Act 2006; *Percival v. Wright* [1902] 2 Ch 421; *Sharp v. Blank* [2015] EWHC 3220 (Ch). ^ Back to section

10 See, for example, *Coleman v. Myers* [1977] 2 NZLR 255. The duty owed by directors may also extend to considering the interests of creditors in circumstances where they know or ought to know that the company is insolvent or bordering on insolvency or that an insolvent liquidation or administration is probable: *BTI 2014 LLC v. Sequana SA and Others* [2022] UKSC 25. The duty does not, however, extend to considering the interests of fellow directors: *Patel v. Parker* [2023] EWHC 1979 (Ch). ^ Back to section

11 *Sharp v. Blank* [2019] EWHC 3096 (Ch). ^ Back to section

12 Sections 2, 5 and 9 Limitation Act 1980. The limitation period may be extended in certain circumstances, such as fraud, concealment or mistake. ^ Back to section

13 *MW High Tech Projects UK Ltd v. Greenhalgh* [2022] EWHC 2000 (TCC). ^ Back to section

14 Part 11 CA 2006. ^ Back to section

15 *ClientEarth v. Shell Plc and others* [2023] EWHC 1897 (Ch). ^ Back to section

16 For example, *SL Claimants v. Tesco Plc* [2019] EWHC 2858 and, more recently, *Various Claimants v. Serco Group plc* [2023] EWHC 119 (Ch). ^ Back to section

17 [2022] EWHC 1178 (Ch). ^ Back to section

18 [2024] EWHC 2710 (Ch). ^ Back to section

19 That is, reliance founded on the fraud on the market theory commonly seen in US securities law actions, which affords investors trading in efficient markets a rebuttable legal presumption of reliance on the basis that, in an efficient market, the prices of a security reflects all publicly available information, including any material misrepresentations. ^ Back to section

20 At [104]. ^ Back to section

21 At [104] to [108]. ^ Back to section

22 At [109] and [129]. ^ Back to section

23 [2025] EWHC 698 (Ch). ^ Back to section

24 [2025] EWCA Civ 40. ^ Back to section

25 Section 21 FSMA 2023. ^ Back to section

26 Financial Services and Markets Act 2023 (Commencement No. 4 and Transitional Saving Provisions) (Amendment) Regulations 2023. ^ Back to section

27 Part 30, Sections 994–999 CA 2006. ^ Back to section

28 *O'Neill v. Phillips* [1999] 1 WLR 1092. ^ Back to section

29 *UTB LLC v. Sheffield United Ltd* [2019] EWHC 2322 (Ch) at [419]. ^ Back to section

30 *Re Compound Photonics Group Ltd* [2022] EWCA Civ 1371 (although, on the facts of that case, no breach was found in relation to the duty of good faith contained in the relevant shareholder agreement because the majority shareholders rationally and genuinely considered that their conduct was necessary and in the interests of the company). An appeal of this decision is currently outstanding before the UK Supreme Court. ^ Back to section

31 *Re Saul D Harrison* [1994] BCC 475. ^ Back to section

32 [2025] UKPC 34. ^ Back to section

33 *Davies v. Ford* [2023] EWCA Civ 167. ^ Back to section

34 See *Re Stratos Club Ltd* [2020] EWHC 3485 (Ch) in which the Court, in dealing with an unfair prejudice petition, held that a director breached his duties, which resulted in unfair prejudice to the petitioner. The remedy the Court awarded was requiring the respondent to purchase the petitioner's shares at pre-covid value. ^ Back to section

35 [2020] UKSC 31. ^ Back to section

36 *Sevilleja v. Marex Financial Ltd* [2020] UKSC 31; *Naibu Global International Co plc v. Daniel Stewart & Co plc* [2020] EWHC 2719. ^ Back to section

37 *American Cyanamid Co (No 1) v. Ethicon Ltd* [1975] UKHL 1. ^ Back to section

38 Section 1157 CA 2006. ^ Back to section

39 Section 239 CA 2006. ^ Back to section

40 *Naibu Global International Co Plc v. Daniel Stewart and Co Plc* [2020] EWHC 2719 (Ch). ^ Back to section

41 Part 19 Civil Procedure Rules. ^ Back to section

42 *Sharp v. Blank* [2019] EWHC 3096 (Ch). ^ Back to section

43 *The RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch). ^ Back to section

44 *SL Claimants v. Tesco plc* [2019] EWHC 2858 (Ch). ^ Back to section

45 [2025] EWCA Civ 40. ^ Back to section

46 *BSV Claims Limited v. Bittylicious Limited & Others* (CAT Case No. 1523/7/7/22). ^ Back to section

47 *Prismall v. Google UK Limited* [2023] EWHC 1169 (KB). An appeal of this decision was dismissed by the Court of Appeal: [2024] EWCA Civ 1516. ^ Back to section

48 *R (PACCAR Inc) v. Competition Appeal Tribunal* [2023] UKSC 28. ^ Back to section

49 *R (PACCAR Inc) v. Competition Appeal Tribunal* [2023] UKSC 28. ^ Back to section

50 Section 232(1) Companies Act 2006. ^ Back to section

51 Section 232(2) Companies Act 2006. ^ Back to section

52 Section 234 Companies Act 2006. ^ Back to section

53 Section 233 Companies Act 2006. ^ Back to section

54 A recent decision confirmed the English court's power to stay proceedings for, or order, parties to engage in ADR: *Churchill v. Merthyr Tydfil CBC* [2023] EWCA Civ 1416. ^ Back to section

55 Section 5 Limitation Act 1980. ^ Back to section

56 *R&D Construction Group Ltd v. Hallam Land Management Ltd* [2010] CSIH 96. ^ Back to section

57 *Cream Holdings Ltd v. Davenport* [2010] EWHC 3096 (Ch). ^ Back to section

58 *Novus Aviation Ltd v. Alubaf Arab International Bank BSC (c)* [2016] EWHC 1575 (Comm). ^ Back to section

59 *Smith v. Butler* [1900] 1 QB 694; *United Dominions Trust (Commercial) Ltd v. Eagle Aircraft Services Ltd* [1968] 1 WLR 74. ^ Back to section

60 *Jolley v. Carmel Ltd* [2000] 3 EGLR 68. ^ Back to section

61 *Rhodia International Holdings Ltd v. Huntsman International LLC* [2007] EWHC 292. ^ Back to section

62 *Rhodia International Holdings Ltd v. Huntsman International LLC* [2007] EWHC 292; *Jet2.com Ltd v. Blackpool Airport Ltd* [2011] EWHC 1529. ^ Back to section

63 *Terrell v. Mabie Todd & Co Ltd* [1952] 69 RPC 234; *IBM United Kingdom Ltd v. Rockware Glass Ltd* [1980] FSR 335. ^ Back to section

64 *Midland Land Reclamation Ltd v. Warren Energy* [1997] EWHC 375 (TCC); *Jet2.com Ltd v. Blackpool Airport Ltd* [2011] EWHC 1529. ^ Back to section

65 *Phillips Petroleum Co UK Ltd v. Enron Europe Ltd* [1997] CLC 329; *Rhodia International Holdings Ltd v. Huntsman International LLC* [2007] EWHC 292; *Gaia Ventures Ltd v. Abbeygate Helical (Leisure Plaza) Ltd* [2019] EWCA Civ 823. ^ Back to section

66 *Rhodia International Holdings Ltd v. Huntsman International LLC* [2007] EWHC 292. ^ Back to section

67 *Decision Inc Holdings Proprietary Ltd & Anor v. Garbett & Anor* [2023] EWCA Civ 1284; *BM Brazil I Fundo De Investimento Em Participações Multistrategia & Ors v. Sibanye BM Brazil (Pty) Ltd & Anor* [2024] EWHC 2566 (Comm). ^ Back to section

68 [2024] EWHC 2566 (Comm). ^ Back to section

69 Some reasons for using a covenant, rather than an indemnity, are discussed later. ^ Back to section

70 For a recent example of such a claim, see *Inspired Education Online Ltd v. Crombie* [2025] EWHC 1236 (Ch). ^ Back to section

71 *Finsbury Foods Plc v. Axis Corporate Capital Ltd & Ors* [2023] EWHC 1559 (Comm). See also, *Project Angel Bidco Ltd (In Administration) v. Axis Managing Agency Ltd* [2024] EWCA Civ 446. ^ Back to section

72 *Wood v. Capita Insurance Services Limited* [2017] UKSC 24. ^ Back to section

73 *Gwynt Y Mor Ofto Plc v. Gwynt Y Mor Offshore Wind Farm Ltd* [2020] EWHC 850 (Comm). Another recent case concerning the construction of an indemnity in an SPA is *PA (GI) Ltd v. Cigna Insurance Services (Europe) Ltd* [2023] EWHC 1360 (Comm). ^ Back to section

74 *Triumph Controls UK Ltd v. Primus International Holding Company* [2019] EWHC 565 (TCC). ^ Back to section

75 *Macquarie Internationale Investments Limited v. Glencore UK Limited* [2010] EWCA Civ 697. ^ Back to section

76 *Teoco UK Ltd v. Aircom Jersey 4 Ltd & Anor* [2018] EWCA Civ 23. ^ Back to section

77 *Zayo Group International Ltd v. Ainger & Ors* [2017] EWHC 2542 (Comm). ^ Back to section

78 *Decision Inc Holdings Proprietary Ltd v. Garbett* [2023] EWCA Civ 1284 ^ Back to section

79 *TP ICAP Ltd v. Nex Group Ltd* [2021] EWHC 1375 (Comm). See also *Ipsos SA v. Dentsu Aegis Network Ltd* [2015] EWHC 1171 (Comm). ^ Back to section

80 *Dodika Ltd v. United Luck Group Holdings Ltd* [2021] EWCA Civ 638. See also *TP ICAP Limited v. Nex Group Limited* [2022] EWHC 2700 (Comm);*Drax Smart Generation Holdco Ltd v. Scottish Power Retail Holdings Ltd* [2024] EWCA Civ 477. ^ Back to section

81 *Shafi v. Rutherford* [2014] EWCA Civ 1186. ^ Back to section

82 See, for example, *Adie v. Ingenuity Digital Ltd* [2024] EWHC 2902 (Ch) where the issue was whether the buyer was permitted to deduct certain written-off invoices from EBITDA for the purpose of calculating a post-completion price adjustment. ^ Back to section

83 *Barclays Bank PLC v. Nylon Capital LLP* [2011] EWCA Civ 826. ^ Back to section

84 *Jones v. Sherwood* [1992] 1 WLR 277. ^ Back to section

85 *Flowgroup Plc (in liquidation) v.* Co-operative*Energy Limited* [2021] EWHC 344 (Comm). ^ Back to section

86 *Dandara South East Ltd v. Medway Preservation Ltd* [2024] EWHC 2318 (Ch) ^ Back to section

87 *The Kriti Palm* [2006] EWCA Civ 1601. For more recent decisions summarising the principles applicable to claims for fraudulent misrepresentation, see *GI Globinvestment Ltd and others v. XY ERS UK Ltd and others* [2025] EWHC 740 at [970]*ff* and *Lowry Trading Ltd v. Musicalize Ltd* [2024] EWHC 142 at [44] to [47]. ^ Back to section

88 *BV Nederlandse Industrie Van Eiprodukten v. Rembrandt Enterprises Inc* [2019] EWCA Civ 596; *Kings Security Systems Ltd v. King & Anor* [2021] EWHC 325. ^ Back to section

89 *MDW Holdings Limited v. Norvill and Others* [2021] EWHC 1135 (Ch). The decision was upheld on appeal: [2022] EWCA Civ 883. ^ Back to section

90 *Veranova Bidco LP v. Johnson Matthey Plc* [2025] EWHC 707 (Comm)] ^ Back to section

91 *The Hut Group Ltd v. Oliver* Nobahar-Cookson*and others* [2014] EWHC 3842 (QB). ^ Back to section

92 *Sempra Metals Ltd v. HM Commissioners of Inland Revenue and another* [2007] UKHL 34. See also *JSC BTA Bank v. Ablyazov and others* [2013] EWHC 867 (Comm). ^ Back to section

93 *Ageas (UK) Limited v.* Kwik-Fit*(GB) Limited, AIG Europe Limited* [2014] EWHC 2178 (QB). See also *Munn v. ETL Holdings (UK) Ltd* [2023] EWHC 2998 (Ch). ^ Back to section

94 *Glossop Cartons and Print Ltd and others v. Contact (Print & Packaging) Ltd and others* [2021] EWCA Civ 639. ^ Back to section

95 *Idemitsu Kosan Co Ltd v. Sumitomo Co Corp* [2016] EWHC 1909 (Comm). ^ Back to section

96 *Decision Inc Holdings Proprietary Ltd v. Garbett* [2023] EWCA Civ 1284. ^ Back to section

97 *Hadley v. Baxendale* (1854) 9 Ex. 341. ^ Back to section

98 *British Sugar v. NEI Power Projects Ltd* (1998) 87 BLR 42; *Deepak v. ICI* [1999] 1 Lloyd's Rep 387. ^ Back to section

99 e.g.,*Pinewood Technologies Asia Pacific Ltd v. Pinewood Technologies Plc* [2023] EWHC 2506 (TCC). ^ Back to section

100 This received Royal Assent on 24 February 2025 and came into force on 1 August 2025. ^ Back to section

101 Some arbitral institutions' rules exclude appeals on points of law. See, for example, the LCIA Arbitration Rules, Article 26.8, which provides for the parties' waiver of a right to any form of recourse regarding the award, insofar as such a waiver is not prohibited by the applicable law. Under the Arbitration Act 1996, parties are permitted to opt out of Section 69 allowing challenges to an award on a point of law. ^ Back to section

102 Civil Procedure Rules, Practice Direction 57AD, which applies in the business and property courts. The business and property courts deal with the majority of commercial disputes in England and Wales and comprise, for example, the Commercial Court and the Technology and Construction Court. ^ Back to section

103 A number of different jurisdictional grounds are available, which are contained in Paragraph 3.1 of Practice Direction 6B of the Civil Procedure Rules, Part 6. In October 2022, the grounds for service out of the jurisdiction were expanded to facilitate, for example, certain claims for breach of fiduciary duty that occurred in England and Wales and for claims in tort, breach of confidence and breach of fiduciary duty where the claim is governed by English law. ^ Back to section

104 Civil Procedure Rules 6.36 and 6.37. *VTB Capital Plc v. Nutritek International Corp* [2013] UKSC 5. ^ Back to section

105 Civil Procedure Rules 6.33(2B). ^ Back to section

106 *Okpabi v. Royal Dutch Shell* [2021] UKSC 3; *Vedanta Resources v. Lungowe* [2019] UKSC 20. ^ Back to section

107 *ClientEarth v. Shell Plc* [2023] EWHC 1897 (Ch). See also *McGaughey v. Universities Superannuation Scheme Ltd* [2023] EWCA Civ 873. ^ Back to section

108 In *RTI Ltd v. MUR Shipping BV* [2024] UKSC 18, the Supreme Court held that a *force majeure* clause that required the affected party to use reasonable endeavours to overcome a *force majeure* event did not require that party to accept an offer of non-contractual performance from the other party absent clear wording to that effect. ^ Back to section

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