Devonshires

Litigation Know How:

Staying ahead of the game

Spring 2018

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Welcome

2017 saw Devonshires' Commercial Litigation team involved in some of the leading cases in the UK courts. For example, in June 2017 we acted for Canaccord Genuity Wealth (International) Limited in successfully defending a substantial claim for damages and quantum meruit for £5 million. We also acted for the partner of Sergei Pugachev, 'Putin's banker', in a widely publicised judgment concerning sham trusts and continue to represent a number of British Army soldiers in respect of historic offences arising from the 'Troubles' period in Northern Ireland. See page 17 for details of some of our recent work highlights.

In 2018, we expect to see the continued growth of ADR (alternative methods of dispute resolution) as a means of resolving commercial disputes, as the Court system can often be expensive and inflexible in the way it handles disputes. ADR has a number of different strands, all of which our team are experienced in, and can provide a quick and cost-effective means of resolving disputes.

Court fees continue to be an issue, and at times, a barrier to access to justice, and there needs to be put in place a better system for funding the Courts. While some firms have embraced high court solicitor-advocates, we prefer to use the specialist Bar as we feel this provides a better level of service to our clients.

Many law firms are looking at AI as a means to reduce costs and make collection of evidence and investigations a cost-efficient process. Earlier this year, our team was able to review four million documents on an AI platform with two fee earners by applying keyword searches, in order to successfully uncover a fraud. Five years ago, this would have taken a significantly greater amount of time and resources.

As well as changes in technology, the law itself is also constantly developing. From changes to the law surrounding tax evasion (pages 4 to 5), to the redefining of a test for dishonesty that has been a fundamental element of law university syllabuses for the last 25 years (pages 6 to 7), there is a lot to keep up with in the world of litigation. We hope you enjoy our latest Litigation Know How update!

Changes to Tax Evasion Laws: How to comply

The publication of the Paradise Papers put the spotlight on the world of tax havens and has led to increased scrutiny of companies' tax practices. This has already led to changes in the law, such as the Criminal Finances Act 2017. In this article, Pauline Lépissiér examines the impact of this and how businesses must reply.

What has changed?

The Criminal Finances Act 2007 ("The Act") is aimed at making relevant bodies (corporate or partnership) criminally liable if a person such as an employee, agent or other individual providing services on their behalf, commits a tax evasion offence. Previously, prosecutors were required to prove a direct involvement or awareness of senior members of a corporate body for it to be criminally liable for tax evasion.

The Act introduces two new offences: a failure to prevent facilitation of UK tax evasion offences and a failure to prevent facilitation of foreign tax evasion offences.

These offences do not seek to change substantive offences but widen the net of who can be found liable as a result of failing to prevent these criminal activities.

The penalties

The potential fines for bodies found guilty of an offence are unlimited. As well as causing severe reputational damage, a conviction could also result in bodies being ineligible to bid for public contracts and exposed to investigations from relevant regulatory bodies.

Offence components

When prosecuting a corporate body, there are three components:

1. *Criminal tax evasion by a taxpayer under existing law.*
For the UK offence, there must be an evasion at taxpayer level and for the foreign offence, an evasion according to the law of that country.

2. *Criminal facilitation of tax by an "associated person" of the relevant body acting in that capacity.*
An associated person of the relevant body i.e. an

employee or agent, must be acting in that capacity and be knowingly involved in the taxpayer-level evasion.

3. *Failure by the relevant body to prevent the associated person from committing the facilitating act.*

If components one and two are satisfied, then the relevant body will be criminally liable for the person who has committed tax evasion unless it has a defence.

The foreign offence: Additional requirements

Beyond these basic elements, the foreign offence has additional requirements, including any one of these three conditions:

a. the relevant body is incorporated or formed under the law of any part of the UK;

b. the relevant body carries on business or part of a business in the UK; or

c. any conduct constituting part of the offence takes place in the UK.

Dual criminality is also required which means that the actions giving rise to the tax evasion would be recognised as an offence in both the UK and the overseas jurisdiction.

How to prevent and prepare:

A relevant body has a defence if it can show that:

- there were reasonable prevention procedures in place based on the circumstances of the case; or
- it was not reasonable in the circumstances for there to be any prevention procedures in place.

To establish reasonable prevention procedures, Government guidance sets out six principles that businesses should consider:

1. Carry out risk assessments which must be documented and kept under review.
2. Proportional risk-based prevention procedures depending on the nature, scale and complexity of your activities.
3. Ensure top-level commitment from the management, who should foster a culture in which any activity intended to facilitate tax evasion is never acceptable.
4. Apply due diligence procedures to mitigate identified risks.
5. Effectively communicate prevention policies and procedures, including training: these must be embedded and understood throughout the organisation.
6. Monitor and review preventative procedures and improve where necessary.

Although the Government recognises that some procedures may take time to implement, it still expects corporate bodies to react swiftly. With the offences now firmly in place, organisations should already have some reasonable procedures in place and a plan for implementing more complex ones including a clear timeframe.

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Oh my Ghosh: Honesty has been redefined

A recent legal case has redefined the test for criminal dishonesty, which could have a major impact on numerous regulatory and fraud cases. All regulated businesses and individuals should be aware of these issues. In this article, Sam Moodey looks into this case in detail and considers what steps businesses of all sizes should be taking.

Facts of the case

The case involved a sophisticated ploy (known as 'edge sorting') used by Philip Ivey, a professional gambler, to increase the odds of winning bets whilst playing a game called Punto Banco at a casino in London. His tactic was to persuade the croupier to distribute cards in such a way that he could see a particular edge of the cards before they were dealt. He did this by claiming that his request was based on superstition. He then relied on minute differences in the patterns on the back of the cards to identify what the number on the front of the card was likely to be, and whether it was likely to be low or high.

Mr Ivey won around £7.7m in a single night using this strategy. However, after conducting investigations, the casino refused to pay the winnings on the basis that he had cheated. He subsequently brought a civil claim for recovery of the winnings.

The question was whether Mr Ivey had 'cheated' within the meaning of section 42 of the Gambling Act 2005. If so, he would have breached the implied term of the contract between himself and the casino, and therefore forfeits his winnings.

Mr Ivey maintained that what he had done was legitimate gamesmanship. The High Court judge found that Mr Ivey had given truthful evidence of what he had done and accepted that he was genuinely convinced that what he did was not dishonest. However, he lost because the Court agreed that Mr Ivey had cheated simply because he had acted deliberately to gain an unfair advantage and his opinion was irrelevant as a matter of law.

The Court of Appeal upheld the High Court judgment. In her dissenting judgment, Lady Justice Sharp stated that a necessary element of Mr Ivey's actions was dishonesty according to the Ghosh test and this therefore gave Mr Ivey a further avenue of appeal to the Supreme Court.

Redefining dishonesty

The Supreme Court dismissed Mr Ivey's appeal and in doing so, re-defined the criminal test for dishonesty. The decision found that a previous two-stage test for dishonesty, known as the "Ghosh test" named after a legal case in 1982, was unnecessary. Part of this test asked whether a defendant knew that their action would be regarded by others as dishonest but conducted it anyway.

This previous test had the strange logical consequence that a person was not dishonest if they had deluded themselves to such an extent that whilst everyone else believed their actions were dishonest, they themselves believed they were honest.

Concluding that the Courts had taken a wrong turn in 1982, the Supreme Court set a new test which removes this subjective element. Accordingly, the Court held that, because Mr Ivey had taken steps to fix the deck, he had been dishonest.

What this means in practice

The remarks in the Supreme Court were technically 'obiter' and may well come under challenge in the future. However, cases in the Court of Appeal have already started to follow this and it is likely that the decision will have a significant effect on dishonesty related matters. The impact is particularly intense because a wide range of complex criminal offences, including a number of fraud offences, are based on the concept of dishonesty

"Simplifying the test for dishonesty makes it easier for all to understand, which will be beneficial in more complex cases and for those bodies exercising regulatory or disciplinary powers (such as the Solicitors Regulation Authority or Financial Conduct Authority) where the issue of an accused's honesty is being questioned."

Trials may now be more straight-forward because the focus will be on the accused's knowledge and what they did which will then be looked at more objectively to decide whether they have been dishonest.

Thus, Ivey confirms that it is open to, inter alia, a jury, regulatory body or other enforcement organisation to conclude that an individual has acted dishonestly, even where they may genuinely have thought they were behaving honestly. When the honesty of an individual is called into question, organisations should therefore take heed of this change in the law, as well as ensuring that they have clear risk-based policies to combat behaviour of this nature in the first place. Although ultimately time will tell, the Ivey test may pave the way for increased convictions for the wide variety of dishonesty-related offences.

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A guide to E-Disclosure and avoiding pitfalls

From the moment your organisation becomes aware that it might become involved in a dispute, you have a duty to retain relevant documents and ensure they are not deleted either intentionally or because of data retention policies. As first published by external agency, IT Group.

E-disclosure refers to the search for disclosure of all relevant electronic documents. With the majority of documents starting life electronically, the early discovery of this information is vital if parties wish to develop a thorough case.

Here we guide you through the search and disclosure process, including potential challenges to consider and the pitfalls to avoid:

Searching for documents

An early assessment of what systems you have and what material they hold is critical. This can be a complicated task given the growing volume and diversity of data created by organisations.

As well as paper documents, materials on mobile phones, file systems, archives and computer systems on the premises, it is likely that you will have to review and search where data is held by third parties, such as computer support organisations, storage archivists and increasingly, cloud storage data centres.

Even if you do not envisage your business ever becoming involved in litigation, it is advisable to prepare and maintain an up-to-date register of your key systems.

Considerations when searching

Many organisations will find that their email is no longer held on their own email server as it has been outsourced to the cloud via services such as Microsoft365 or Google apps for business. Depending on your email retention policies, older emails might be stored in offsite enterprise vaults. These email archives keep original versions of every email sent or received and therefore may display a different view from the one seen in a particular user's mailbox.

Also bear in mind that if you operate a "bring your own" device policy, emails, photographs, text messages and other materials potentially containing work data may be held on your staff's personal devices.

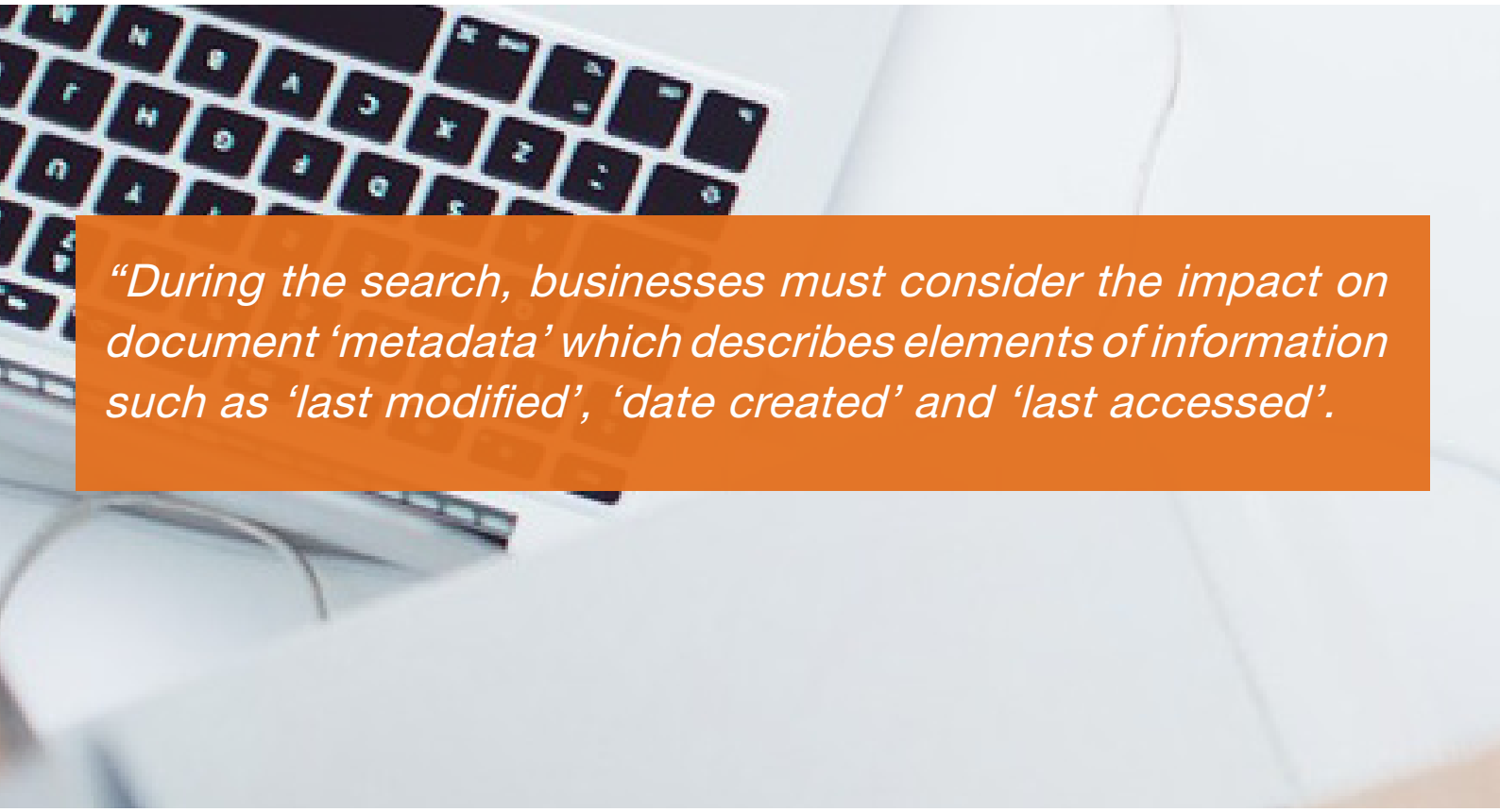
If your business uses 'procurement portals' or 'supplier sharepoints', each of these must be considered as part of the scope for an "all material" search. Often the searching within these portals is poor and bulk download facilities can be limited.

Once all of the systems have been identified, speak to an e-Disclosure consultant. They will be able to advise you how each of the systems is best searched in line with the specification. It is likely that they will have 'plug-ins' to many of the most common systems, which could dramatically reduce your search costs.

Common pitfalls

Depending on the complexity of the search criteria, the speed of your systems and if there is a requirement to search for deleted material, there are different ways to tackle the search process. It may be done on your systems whilst in situ, or alternatively a 'mirror' or 'forensic image' of your systems will be conducted using powerful specialist tools which are set up offsite.

"During the search, businesses must consider the impact on document 'metadata' which describes elements of information such as 'last modified', 'date created' and 'last accessed'.



"During the search, businesses must consider the impact on document 'metadata' which describes elements of information such as 'last modified', 'date created' and 'last accessed'.

It is possible that this data could be altered by conducting the wrong search type or by collecting documents together on a portable drive. Imagine trying to explain that you have had a documented equality policy since 2001 when the "date created" on the document you disclose suggests that it was created last week because the metadata has been updated.

Also consider that some documents don't appear responsive to search terms. These could be photo files or paper documents which may have been scanned to make them electronic but have not been "optical character recognised" (OCR'd) so they may be readable to the human eye but are not searchable.

There are processes which can be put in place to identify likely documents which typically should have text within them, but appear to be 'empty', such as .TIFF and PDF files.

Disclosing your documents

Once the documents have been identified, they need to be made available for review. This may be internal or require your legal advisors to help identify legally privileged or not relevant (but confidential) data. This data can be easily identified using search terms and excluded from any searching prior to the review process. In past reviews, lawyers from different countries have needed to look at the document repository on a centralised review platform, which can be easily done.

Special handling must be considered when using emails, specifically attachments. We often find that critical documents are forwarded as attachments on email. Although these documents may be for disclosure, comments in covering emails may be privileged which means they should not be disclosed, so must be kept separate.

If you are disclosing information because of a commercial dispute, then it is likely that you will be expecting to receive a bundle of documents in return from your counterparty. This production and exchange process can cause many complications.

In our experience, early communications with the counterparty will iron out any issues which may arise.

Cyber security should be front of mind as it is paramount that you protect your sensitive information throughout the entire process. Make sure that you carefully select your e-Disclosure advisor, ensuring that they have at least ISO 27001 (Information Security Management) and that access to your data on the review platform is protected by authentication methods and not just username and passwords.

E-disclosure investigations can be complex, so putting the most efficient and appropriate procedures in place is essential to get the right results and potentially reduce costs. Seeking specialist advice and technology providers can take the strain out of the process and avoid some of the potential pitfalls.

For further information on the new measures or guidance on putting prevention procedures in, please contact IT Group on 0845 226 0331 or enquiries@itgroup-uk.com or a member of Devonshires' Commercial Litigation Team (see page 19 for contact details).

Crowdfunded Litigation - The future?

With the growth of the internet and social media, it is hardly surprising that the concept of crowdfunding has in recent years extended far beyond its first origins in the publishing industry and in the funding of military conflict through war bonds. In this article Matthew Garbutt explains how crowdfunding can be used as a an effective model for funding a wide variety of litigation.

From its growth through the music industry in the late 1990s, when a number of innovative musicians sought online funding for the recording of their music, websites such as Crowdcube and Crowdfunder UK now offer start ups and entrepreneurs easy access to funding where traditional lending, if available, may come with unacceptable strings attached.

Today it is estimated that crowdfunding initiatives in one form or another have raised in excess of £25 billion worldwide and the concept of legal crowdfunding is becoming a small but significant mechanism for funding difficult cases, particularly those which have a high public profile or public interest.

Devonshires recently advised the commuter pressure group, the Association of British Commuters, in its challenge by judicial review of the Secretary of State's handling of the Southern Rail franchise operated by Govia, funded entirely through the website CrowdJustice.com. The proceedings reached oral permission stage at which the Court reached a precedent-setting finding that it had jurisdiction to consider the Secretary of State's handling of private contracts for public services. However, after many months of delay, the Government finally issued a £13.4m fine against Govia effectively bringing the action to a close.

Costs- be aware!

The key concern for potential funders is the exposure to adverse costs orders. That is to say, if the Court makes a costs order against the crowdfunded party then there is a potential exposure to the crowdfunders themselves. Some comfort can be derived from the Arkin principle *(Arkin v Borchard Lines Ltd and others* [2005] EWCA Civ 655) in

The key concern for potential funders is the exposure to adverse costs orders. That is to say, if the Court makes a costs order against the crowdfunded party then there is a potential exposure to the crowdfunders themselves.

which it was established that a third-party funder cannot be held liable for the costs of the other side in excess of the level of the individual's contribution.

There are ways to further ameliorate this risk. The crowdfunded party can set aside money to meet any adverse costs orders or, in certain cases, obtain an after-the-event insurance policy to cover the risk. In a judicial review of pure public interest, it is possible to agree that the parties will be responsible for their own costs and will not seek recovery from the other side. This application of crowdfunding is likely to grow strongly in the coming years.

The future

We are also likely to see legal crowdfunding extended to the commercial litigation sphere by which individual funders will contribute purely for a monetary return and with little or no interest in the dispute itself. A potential mechanism would be for the funder to purchase shares in a special purpose vehicle which then enters into a third party funding arrangement with the litigant and the legal team. It is important to note that such arrangements will need to be subject to FCA regulation in order to ensure that the interests of investors are protected and it is likely that the existing best practice regimes applicable to existing third party litigation funding will need to be bolstered.

Explanations of the risks of litigation are often hard to convey to even the most engaged client and so ensuring that third parties with little experience of litigation are aware of the risks will be challenging.

The challenge is even greater when one considers that explaining that risk to funders will require the disclosure of legally privileged material. Non-disclosure agreements will be a pre-requisite.

Certainly such investments will only be appropriate for sophisticated investors seeking to supplement a broad portfolio of investments with a high risk opportunity.

Legal crowdfunding is likely to remain a niche funding option for difficult cases that attract widespread public interest, but it is worth considering whether there is an angle to bring or re-frame a claim in a manner that can attract such funding. In due course we expect to the see the adoption of crowdfunding in commercial claims but significant hurdles must be overcome to manage the risk to investors and litigants alike.

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Court Fees Update

	Fee Payable	
Civil Court Fees: Issuing Money Claims	**Court Issued Claim**	**Filed online: Secure Data Transfer or Money Claim Online**
Value: Up to £300	£35	£25
Greater than £300 but no more than £500	£50	£35
Greater than £500 but no more than £1,000	£70	£60
Greater than £1,000 but no more than £1,500	£80	£70
Greater than £1,500 but no more than £3,000	£115	£105
Greater than £3,000 but no more than £5,000	£205	£185
Greater than £5,000 but no more than £10,000	£455	£410
Greater than £10,000 but no more than £15,000	5% of the value of the claim	4.5% of the value of the claim
Greater than £15,000 but no more than £50,000		
Greater than £50,000 but no more than £100,000		
Greater than £100,000 but no more than £150,000		N/A
Greater than £150,000 but no more than £200,000		N/A
Greater than £200,000	£10,000	N/A

Civil Court Fees: Issuing Non-Money Claims	
County Court possessions	£355
Possession Claims Online	£325
Starting proceedings in County Court for any remedy other than recovery of a sum of money or possession of land (as above)	£308
Starting proceedings in the High Court	£528
Filing proceedings against a party or parties not named in the proceedings	£55
Application for permission to issue proceedings	£55

Making an application	
Making an application on notice where no other fee is specified, (except as otherwise specified)	£255
Making an application without notice where no other fee is specified (except as otherwise specified)	£100
Making an application for a witness summons	£50
Application to vary a judgement or suspend enforcement	£50

Hearing fees	
On the multi-task	£1,090
On the fast track	£545
On the small claims track where the sum claimed:	
Does not exceed £300	£25
Exceeds £300 but does not exceed £500	£55
Exceeds £500 but does not exceed £1,000	£80
Exceeds £1,000 but does not exceed £1,500	£115
Exceeds £1,500 but does not exceed £3,000	£170
Exceeds £300	£335

Correct at time of publication. A full list of Civil and Family Court Fees can be found in document EX50: https://formfinder.hmctsformfinder.justice.gov.uk/ex50-eng.pdf

Recent Case Highlights

Over the last year, Devonshires' Commercial Litigation team has continued to represent a wide array of clients, including ultra high net worth individuals, large multinational companies, regulatory bodies, housing associations, and SMEs. Outlined below are just some of our recent highlights:

In June 2017, we successfully defended a substantial claim for damages and quantum meruit brought by Medsted Associates Limited against our client, Canaccord Genuity Wealth (International) Limited in the High Court. Medsted acted as an introducing broker for Canaccord and a dispute arose as to the contractual terms which governed the relationship. Despite Medsted earning revenue by being paid commission and rebate in respect of the trading being carried out by the introduced clients, their position was that, in breach of the contract, Canaccord failed to pay commission. Only a nominal amount of damages was awarded. The Lead Partner was Philip Barden, who was assisted by Pauline Lepissier and Courtney William-Jones.

In July 2017, we represented the Twelfth to Fourteenth Defendants in proceedings in the High Court (Chancery Division) to attack New Zealand trusts holding assets across a number of different jurisdictions on the basis that the trusts were shams/illusory. Our clients were the infant children of a former Russian oligarch known as 'Putin's Banker', Sergei Pugachev. The judgment was a leading decision on sham trusts and the role of protectors and settlors in the establishment and administration of trusts. The Lead Partners were Philip Barden and Matthew Hennessy-Gibbs, who were assisted by Nikki Bowker.

We continue to act on behalf of the Solicitors Regulation Authority as an intervention agent and were involved in 6 interventions closing solicitor's firms in 2017. This included the closure of Neumans LLP, who were referred to the SRA in respect of substantial costs being improperly claimed from Central Funds in respect of a Defendant's costs order. Separately, we have acted in numerous applications to set aside interventions, delivery up applications, disciplinary proceedings, and other litigation on behalf of the SRA. The Lead Partner responsible for SRA matters is James Dunn, who is assisted by many other members of the team, including Pauline Lepissier, Gabriella Coombe and Sam Moodey.

In October 2017, we successfully brought a summary judgment application on behalf of our client, a Persian-American antiques dealer against another antiques dealer, in respect of a contractual dispute that originally commenced in 2010. Our client was awarded over $750,000 and the matter is now proceeding to trial in June 2018. The Lead Partner was Philip Barden, who was assisted by Sam Moodey.

Earlier this year we successfully settled a dispute for a global facilities management provider arising from a PFI contract. The dispute arose out of differences in interpretation of the contractual provisions relating to delivery of a particular service. Reaching a settlement involved not only the release of several millions of pounds to our client but also agreeing an operational model which should work for the parties for years to come. The Lead Partner was Philip Barden, who was assisted by Nikki Bowker.

Commercial Litigation Seminar Programme 2018/19

Devonshires Commercial Litigation Team is pleased to present the 2018/19 Commercial Litigation seminar programme.

Seminar Programme

Social Media and Reputational Management

17 May 2018

Workshop session at Devonshires' Risk Management event in Leeds

Fraud & Corruption Update

17 May 2018

Workshop session at Devonshires' Risk Management event in Leeds

Social Media and Reputational Management seminar

05 June 2018

Half day session with drinks and networking

Contracts seminar

20 September 2018

Half day session with drinks and networking

Alternate Dispute Resolution

11 October 2018

Breakfast briefing

Fraud & Corruption Update

07 November 2018

Half day session with drinks and networking

Judicial Review

15 January 2019

Breakfast briefing

Devonshires IT Seminar: The Complete Guide to Procurement, Outsourcing, Data Security and Disputes

21 February 2019

Half day session with drinks and networking

How to Book

For more information on our seminar programme or to join our mailing list, please contact seminars@devonshires.co.uk
Invitations outlining programme and speaker details will be issued for each event with a registration link.
All sessions are free to attend.

Devonshires seminars are CPD accredited by the Solicitors Regulation Authority

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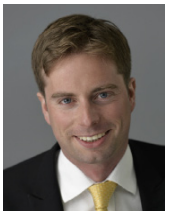

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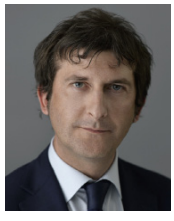

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