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Litigation 2022

Turks and Caicos Islands: Law & Practice
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TURKS AND CAICOS ISLANDS

Law and Practice

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1. GENERAL

1.1 General Characteristics of the Legal System

The Turks and Caicos Islands are a self-governing constitutional democracy under the British Crown. They have a written Constitution, the most recent version of which came into force on 15 October 2012. The Turks and Caicos Islands Constitution Order 2011 is an order made by Her Majesty in Council in exercise of the powers conferred upon Her by Sections 5 and 7 of the West Indies Act 1962.

The majority of local laws are enacted by the legislature for the Turks and Caicos Islands, which consists of Her Majesty (whose executive authority is exercised on Her behalf by the Governor) and a House of Assembly.

The Islands' legal system is based on English common law and the doctrines of equity with primary statutory law drawn from:

- certain acts of Parliament of England that were extended to the Bahama Islands (of which the Turks and Caicos Islands then formed part) in 1799 and that remain relevant;
- such subsequently enacted laws of the UK that specifically extend to the Turks and Caicos Islands;
- treaties and conventions relevant to the Turks and Caicos Islands;
- laws of The Bahamas, Jamaica or the former Federation of the West Indies that apply to the Turks and Caicos Islands; and
- the local laws enacted by the Turks and Caicos Islands House of Assembly.

The courts of the Turks and Caicos Islands hear cases based primarily on the adversarial model, very similar to that operated in England and Wales and other Caribbean countries. Proceedings are generally conducted through both written submissions and oral argument, and cross-examination of witnesses.

1.2 Court System

The judges and magistrates appointed to any court of the Turks and Caicos Islands are independent from the legislative and executive branches of government, which is a constitutional requirement. The legislature and the cabinet are constitutionally required to uphold the rule of law and judicial independence and are required to ensure that adequate funds are provided to support the judicial administration in the Islands.

The Judicial Service Commission for the Turks and Caicos Islands is created by Section 86 of the Constitution of the Turks and Caicos Islands. It advises the Governor with respect to:

- judicial appointments;
- disciplinary control over persons holding the offices of Chief Justice, President of the Court of Appeal, Registrar and Deputy Registrar; and
- removal from office of persons holding or acting in the offices of Registrar and Deputy Registrar (Section 87).

The Chairman of the Judicial Service Commission is appointed by the Governor acting in their discretion; two other members are appointed by the Governor acting after consultation with the Premier and leader of the opposition from among persons who hold, or have held, high judicial office.

The country's court system comprises the Magistrate's Court, the Supreme Court and the Court of Appeal.

Pursuant to the Turks and Caicos Islands (Appeal to Privy Council) Order, a final appeal from a judgment of the Court of Appeal lies with leave to Her Majesty in Council.

Other Courts and Tribunals

The Coroners Ordinance (Chapter 2.05) provides for a Coroner for the Turks and Caicos Islands. The Magistrate is the ex officio Coroner of the Islands.

The Labour Tribunal is a statutory body established by Section 93 of the Employment Ordinance (Chapter 17.08). It has jurisdiction to hear and determine any labour dispute or complaint or other matter referred to it under the Employment Ordinance or any other ordinance. The composition of the Labour Tribunal is prescribed by Section 94 of the Employment Ordinance.

1.3 Court Filings and Proceedings

Save for interlocutory hearings heard in chambers, and those matters of a sensitive or highly confidential nature that may be heard in camera (eg, matters involving children or persons with a disability, matters concerning national security and other matters involving confidential information where the court determines that the public interest is not served by the matter being heard in open court), the general rule is that judicial proceedings in the Turks and Caicos Islands are conducted in public and that all proceedings are available for the public to observe.

In appropriate cases, upon application by a party to proceedings, the Supreme Court may order its record relating to an action or part thereof to be sealed and thus kept confidential.

1.4 Legal Representation in Court

Individuals may appear in person in all courts in the Turks and Caicos Islands, but companies must appear by an attorney in the Supreme Court and higher courts.

The Turks and Caicos Islands Bar comprises lawyers who are described as attorneys and who are admitted on application to the Chief Justice pursuant to Section 4 of the Legal Profession Ordinance (Chapter 2.10) (LPO). Eligibility to be admitted is limited to Turks and Caicos Islanders, and any other applicant who has obtained the qualifications specified in Section 5(1) of the LPO and who has gained the experience specified in Section 5(2), and who in the opinion of the Chief Justice is otherwise a fit and proper person to be so admitted. The qualifications referred to include that such person:

- has been called to the Bar or admitted as a solicitor or an attorney in some part of the Commonwealth or the Republic of Ireland;
- has obtained a Certificate of Legal Education from the Council of Legal Education of the West Indies; and/or
- has not been disbarred or struck off the roll of attorneys of any court in any part of the Commonwealth or the Republic of Ireland or has not done any act or thing that would render them liable to be disbarred or struck off.

The experience referred to is as follows:

- in the case of all applicants, not less than three months' training in the practice of law under the supervision of an attorney admitted to practice in the Islands for not less than two years; and
- in addition to the experience referred to above, in the case of an applicant who is not a Turks and Caicos Islander, not less than five years' experience in practice outside the Turks and Caicos Islands since call or admission.

A foreign lawyer may be called by way of limited admission to conduct a case in the Turks and Caicos Islands courts; however, they must possess the qualifications specified in Section 5(1) or be exempted under Section 4(3). The Chief Justice may admit a person to practice for the purpose of the suit or matter concerned but not otherwise.

Foreign lawyers require a work permit (usually a temporary one), the application for which would be made on their behalf by the local law firm that engages their services.

Admission to the Bar is not required for work involving international commercial arbitration.

2. LITIGATION FUNDING

2.1 Third-Party Litigation Funding

There is no express prohibition or sanction relating to third-party funding; however, in cases where a third party is the real party interested in the litigation, it runs the risk that an adverse costs order may be made against it.

There is also an absence of legal protection insurance and "after the event" insurance and, as a result, all litigation is funded on a private client basis.

2.2 Third-Party Funding: Lawsuits

In theory, all lawsuits are available for third-party funding; however, it is really a matter between the litigant and potential funder as to whether the nature of the suit or the amount involved means third-party funding will be made available.

2.3 Third-Party Funding for Plaintiff and Defendant

There are no specific rules concerning third-party funding, so, in theory, it is equally available to plaintiffs and defendants.

2.4 Minimum and Maximum Amounts of Third-Party Funding

There are no specific rules concerning third-party funding, so the amount of funding to be provided by a third party is a matter to be decided between the funder and the relevant litigant.

2.5 Types of Costs Considered under Third-Party Funding

In the absence of any legislation/rules, this is very much a matter to be decided between the funder and the relevant litigant.

2.6 Contingency Fees

Contingency Fees

Contingency fee arrangements – that is to say, an agreement whereby the amount of the legal fees is contingent on the success of the claim and is dependent on the value of the damages recovered – are unlawful at common law and thus not permissible in the Turks and Caicos Islands. A contract that breaches the rule against champerty and maintenance is against public policy and is therefore unenforceable in the Turks and Caicos Islands.

Conditional Fee Agreements

Conditional fee agreements have been commonplace in England and Wales since their statutory introduction in 1995. A conditional fee differs from a contingency fee in that the fee, whilst still only payable in the event of success, is calculated as a percentage uplift on the normal hourly charging rate (ie, it is independent of the amount of damages recovered). There is no equivalent legislation in the Turks and Caicos Islands and conditional fee agreements are not present in the jurisdiction.

Damage-Based Agreements

Damage-based agreements (DBAs), a form of contingency fee arrangement, are now available in England and Wales for most contentious work (other than criminal or most family matters) under relevant legislation. Again, there is no equivalent legislation in the Turks and Caicos Islands and DBAs are not present in the jurisdiction.

In the absence of any specific legislation or rules in the Turks and Caicos Islands to allow for any form of contingency fee, any arrangement that

amounts to a contingency fee would offend the rule against champerty and maintenance and would be unenforceable.

2.7 Time Limit for Obtaining Third-Party Funding

In the absence of any specific legislation or rules in the Turks and Caicos Islands concerning third-party funding, there are no time limits within which a party to litigation should obtain third-party funding.

3. INITIATING A LAWSUIT

3.1 Rules on Pre-action Conduct

There are no rules requiring pre-action conduct such as the pre-action protocols found under the Civil Procedure Rules in England and Wales, and in the absence of a contractual obligation such as a requirement to seek resolution by discussion or informal mediation, there is no obligation on a party to take any steps prior to issuing proceedings and there is no obligation on a potential defendant to respond to any pre-litigation correspondence. That said, it is usual in civil litigation to see correspondence between the disputing parties prior to the initiation of any court proceedings and a plaintiff may be penalised in costs if they have not sent a letter before action prior to initiating proceedings and a defendant may be penalised if they do not set out, in pre-action correspondence, a valid defence that is later relied upon.

The recent introduction of the Court-Connected Mediation Rules 2021 also establishes a regime within which parties may apply to the courts for access to Court-Aided Mediation services prior to issuing any claim. These new rules are discussed in further detail in **12.2 ADR within the Legal System**.

3.2 Statutes of Limitations

On 12 October 2021, the Limitation of Actions Ordinance 2021 came into operation. Prior to the enactment of the Limitation of Actions Ordinance, there was no single statute of limitations in force in the Turks and Caicos Islands, meaning that most civil/commercial causes of action justiciable before the Magistrate's Court and/or Supreme Court were not susceptible to being time-barred.

Parts II to V of the Limitation of Actions Ordinance give the ordinary time limits for bringing actions of various classes, including for the following common causes of action.

- Defamation or malicious falsehood: two years from the date the cause of action accrued (Section 6).
- Simple contract or tort: six years from the date the cause of action accrued (Section 7).
- Action on specialty: 12 years from the date the cause of action accrued (Section 11).
- Claiming contribution: two years from the date the right accrued (Section 12).
- Personal injury: three years from the date the cause of action accrued or the date of knowledge, if later (Section 13).
- Recovery of land: 12 years from the date the action accrued (Section 18).
- Recovery of rent: six years from the date the arrears became due (Section 31).
- Recovery of money secured by charge: 12 years from the date the right to receive the money accrued or the right to enforce the charge accrued (Section 32).
- Recovery by a beneficiary of trust property or for a breach of trust: six years (Section 33).
- Claims to the personal estate of a deceased person: 12 years from the date the right to receive the share or interest accrued (Section 34).

- Claims for an account: the limitation period that is applicable to the claim forming the basis of the duty to account.
- Enforcing a judgment: six years from the date that the judgment became enforceable. Arrears of interest for a judgment debt shall not be recovered after the expiry of six years from the date the interest became due.
- Recovery of an overpayment or claiming underpayment on remuneration: three years from the date of discovery of the payment/underpayment.

There are special provisions for negligence actions (excluding personal injury claims) where facts relevant to the cause of action are not known at the time of accrual. In such cases, an action shall not be brought after the expiry of six years from the date the cause of action accrued, or three years from the earliest date when the plaintiff first had both the knowledge required for bringing an action for damages and a right to bring such an action.

There is then an overriding limitation for negligence actions (not involving personal injury) that provides that no action can be brought after the expiry of 15 years from the date the act or omission occurred.

The ordinary time limits are subject to extension or exclusion in accordance with Part VI; for example, in cases of disability, fraud, concealment or mistake.

The Limitation of Actions Ordinance applies to arbitrations as they apply to actions in the Supreme Court.

The transitional provisions provide that nothing in the Ordinance:

- shall enable any action to be brought that was barred before the commencement of the Ordinance; or
- shall affect any action commenced before the commencement of the Ordinance; and
- a person who, prior to the commencement of the Ordinance, had a right of action that, because of the limitation period provided in the Ordinance, will expire on the commencement of the Ordinance or within one year from the commencement may bring that action within 12 months of the commencement of the Ordinance.

Section 50 of the Limitation of Actions Ordinance provides that any existing provision applicable to the Turks and Caicos Islands cease to have effect, except where the Limitation of Actions Ordinance refers to another enactment with the intention that both the Limitation of Actions Ordinance and the other ordinance will apply. Ordinances that previously provided for limitation periods – such as the Trusts Ordinance (Chapter 16.12), the Fatal Accidents Ordinance (Chapter 4.10) and the Public Authorities Protection Ordinance (Chapter 21.10) – would need to be reviewed in light of this provision.

The burden is on a defendant to raise limitation as a defence. There is no automatic bar on recovery. Parties may agree to vary or exclude limitation periods.

3.3 Jurisdictional Requirements for a Defendant

A defendant may be subject to suit in the Turks and Caicos Islands if they are validly served with proceedings issued out of one of the courts, whether within the jurisdiction of the court or outside it (in the case of the Supreme Court), and/or if they submit to the jurisdiction of the Turks and Caicos Islands courts. Thereafter, the courts apply the common law rules to determine

whether a party is subject to the jurisdiction of the Turks and Caicos Islands courts.

3.4 Initial Complaint

The nature of the originating process differs depending on the court and the nature of the claim.

Civil proceedings before the Magistrate's Court are commenced by filing a plaint. Civil proceedings before the Supreme Court are commenced by filing a writ of summons, originating summons, originating notice of motion or petition.

The Magistrate's Court is a court of summary jurisdiction and does not work with pleadings; however, it will permit an amendment to the plaint note after it has been filed.

The Rules of the Supreme Court set out the circumstances in which originating process and pleadings may be amended, either without the leave of the court, with the leave of the court, or by the consent of the parties.

3.5 Rules of Service

Personal service is required for proceedings against an individual brought in the Magistrate's Court or the Supreme Court.

In the case of proceedings against a company, service may be effected by addressing the document to the company and leaving it at, or sending it by a prescribed method (post, facsimile or email) to, the company's registered office or the office of the company's registered agent.

Parties outside the jurisdiction may be sued before the Supreme Court but service of originating process is only permissible out of the jurisdiction with the leave of the Supreme Court if one or more of the jurisdictional gateways set out in Order 11, rule 1 of the Rules of the Supreme Court 2000 is satisfied. Upon granting leave, the court will direct the time for filing an acknowledgment of service and the form of service outside the jurisdiction.

Upon receipt of the originating process, a defendant usually has a limited time to acknowledge that they have received the originating process and that there is an intention to defend it. The usual time for filing an acknowledgment of service at the Supreme Court Registry is 14 days (in the case of a party served within the jurisdiction) or 28 days (in the case of a party served outside the jurisdiction).

3.6 Failure to Respond

If a defendant to Magistrate's Court proceedings does not respond to a civil complaint, judgment may be entered against them, but the plaintiff must first prove their case.

In the Supreme Court, in certain limited cases, where a defendant who has been served with process fails to give notice of intention to defend or, having given notice of intention to defend, fails to file a defence, the plaintiff may enter a judgment in default simply by filing the judgment at court together with a proof of service.

In all other cases, the plaintiff will have to proceed with the action as if the defendant had given notice of intention to defend, though the plaintiff may apply to the court for judgment and on the hearing of the application, the court shall give such judgment as the plaintiff appears entitled to on their statement of claim.

If a judgment in default is entered against a defendant, it may be subsequently set aside if the defendant is able to show that it was wrongly entered or they are able to show some good reason why it should be permitted to defend the claim. In these circumstances, the court can exercise its discretion to set aside the default judgment.

3.7 Representative or Collective Actions

There are no specific provisions in the rules of court for collective/class action per se; however, Order 15, rule 12 makes provision for representative proceedings where numerous persons have the same interest. They may be begun by or against one or more of them, representing all or some of them.

3.8 Requirements for Cost Estimate

There are no requirements for an attorney to provide a client with a cost estimate of the potential litigation at the outset, though most clients request same and it is good practice to provide one.

4. PRE-TRIAL PROCEEDINGS

4.1 Interim Applications/Motions

It is possible to make interlocutory applications before trial or the substantive hearing of a claim. Indeed, in certain urgent cases, it is possible to seek orders prior to the formal issuing of proceedings. Such interlocutory applications are not limited to case management issues and parties are able to obtain remedies (such as interim injunctions) from the court.

4.2 Early Judgment Applications

In Supreme Court proceedings, in addition to the ability to enter judgment in default referred to in **3.6 Failure to Respond**, in circumstances where the defendant has acknowledged service giving notice of intention to defend, the party bringing a claim (whether as plaintiff or as counterclaiming defendant) may seek (prior to trial) one or more of the following.

- Summary judgment on a cause of action on the grounds that there is plainly no defence to the claim (or part thereof); a statement of claim must have been served on the defendant and the application must be supported by an affidavit that verifies the facts on which the claim or part of the claim is based and that must state that, in the deponent's belief, there is no defence to the claim or the part of it on which judgment is sought, except possibly in relation to the amount of damages claimed.
- The determination of any question of law or construction of any document arising in any cause or matter where it appears to the court that such question is suitable for determination without a full trial of the action and such determination will finally determine (subject to any possible appeal) the entire cause or matter, or any claim or issue therein.
- The determination of one or more preliminary issues.

A party may apply to have all or part of a pleading struck out on the basis that:

- it discloses no reasonable cause of action or defence, as the case may be;
- it is scandalous, frivolous or vexatious;
- it may prejudice, embarrass or delay the fair trial of the action; or
- it is otherwise an abuse of the process of the court.

Furthermore, it may order the action to be stayed or dismissed, or judgment to be entered accordingly, as the case may be. No evidence is admissible in support of any application made on the first of the above grounds.

Claims or defences can also be struck out if the relevant party has failed to comply with an order of the court.

4.3 Dispositive Motions

See **4.2 Early Judgment Applications**.

4.4 Requirements for Interested Parties to Join a Lawsuit

At any stage of the proceedings in any cause or matter, the Supreme Court may, on such terms as it thinks just and of its own motion, or on an application, order to be added as a party:

- any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectively and completely determined and adjudicated upon; or
- any person between whom and any party to the cause or matter there may exist a question or issue arising out of, or relating to or connected with, any relief or remedy claimed in the cause or matter, which in the opinion of the Court it would be just and convenient to determine as between them and that party as well as between the parties to the cause or matter.

Additionally, a defendant who has given notice of intention to defend may add a third party in circumstances where the defendant seeks a contribution or indemnity from a person not already a party to the action.

Interested parties may also intervene in proceedings in which they have not been joined in order to make submissions.

4.5 Applications for Security for Defendant's Costs

A defendant to a Supreme Court action may apply for an order that the plaintiff give security for the defendant's costs in circumstances where the plaintiff is ordinarily resident out of the jurisdiction, or is a nominal person suing for the benefit of some other person and the defendant is able to establish that the plaintiff may be unable to pay the costs of the defendant if ordered to do so.

The respondent to an appeal to the Court of Appeal may seek security for its costs of the appeal, and the Court may order that such security shall be given for the costs of an appeal as may be just.

Security can be effected by way of payment into court or into a particular account agreed upon by the parties, or through some other form of acceptable security, such as the attorney for the party that is required to give the security giving an undertaking.

4.6 Costs of Interim Applications/ Motions

The Turks and Caicos Islands courts can, and generally do, award costs to be paid by the unsuccessful party to the successful party.

This applies to the costs on interlocutory applications just as much as it does to the costs of the trial or the action as a whole, though in many interlocutory applications and motions that involve obtaining directions for the future conduct of the action the usual order is "costs in the cause", which means that the party in whose favour an order for costs is made at the conclusion of the cause or matter in which the proceedings arise shall be entitled to their costs of the application in respect of which such an order is made. There are certain cases where the Rules of the Supreme Court provide that an order for costs is deemed to have been made (see Order 62, rule 5) or where costs shall not follow the event (see Order 62, rule 6).

Unless the Supreme Court orders that the costs of an interim application are to be taxed and paid forthwith, the costs awarded on an interlocutory application are not recoverable until the action has come to an end.

4.7 Application/Motion Timeframe

Save in respect of certain interlocutory applications for which specific timeframes are provided by specific rules of court, interlocutory applications in chambers may be brought on two days' notice. Where circumstances dictate, a party can request that the application be dealt with on an urgent basis and even on an ex parte basis.

The Turks and Caicos Islands Supreme Court is generally responsive to urgent scenarios and an application for an injunction can be obtained, if the circumstances warrant it, without notice and/or by way of a telephone application to the Court.

5. DISCOVERY

5.1 Discovery and Civil Cases

Discovery is very much a part of the litigation process in the Turks and Caicos Islands. Indeed, after the close of the pleadings in an action begun by writ (ie, once all the required pleadings have been filed and served), subject to the provisions of Order 24 of the Rules of the Supreme Court, there is a mandatory requirement for there to be discovery, by the parties to the action, of the documents that are, or have been, in their possession, custody or power relating to matters in question in the action; although the parties are at liberty to agree to dispense with or limit the discovery of the documents that would otherwise be required.

If a party is not satisfied that the other party's discovery is complete, it may make application to the court for discovery of specific documents or categories of documents that it can show must be in the other party's possession, custody or control. The party can also ask the court to order the disclosing party to make an affidavit verifying that the list is correct.

The process of discovery in the Turks and Caicos Islands requires each party to disclose not only those documents that it views as favourable to its case but also those that adversely affect its case.

The Rules of the Supreme Court specifically leave it open to the parties to agree to dispense with or limit discovery of documents that they would otherwise be required to make. Furthermore, there is a general provision that discovery is to be ordered only if necessary (see Order 24, rule 8).

5.2 Discovery and Third Parties

It is possible to obtain discovery from third parties not named as parties to the proceedings if the documents sought are likely to support the case of one party and adversely affect the case of the other. For this to be permissible, the disclosure must be necessary in order to dispose fairly of the claim or to save costs. There are a number of ways this can be achieved.

- Serving the relevant witness with a subpoena compelling them to attend with the requested documents; this can sometimes be arranged prior to the trial in order that the parties have access to the documents ahead of time and can review them before the trial.
- Obtaining from the Court what is commonly referred to as a Norwich Pharmacal Order; this requires the third party to disclose relevant documents or information.
- Applications against banks to produce their records where these are relevant to the proceedings.

5.3 Discovery in this Jurisdiction

Discovery and inspection of documents is dealt with primarily by Order 24 of the Rules of the Supreme Court 2000, which provides for, inter alia:

- mutual discovery of documents;
- discovery of documents without order;
- orders for discovery;
- orders for the determination of issues before discovery;
- the form of list of documents and affidavits verifying same;
- orders for discovery of particular documents or classes of documents;
- inspection of documents referred to in a party's list of documents and those documents referred to in pleadings, affidavits and witness statements;
- orders for production for inspection and provision of copies;
- restrictions on the use of disclosed documents; and
- sanctions for failing to comply with the requirement or orders for discovery – these include the possibility that the action may be dismissed or, as the case may be, that the defence be struck out and judgment entered against the defendant.

5.4 Alternatives to Discovery Mechanisms

As discussed in **5.3 Discovery in this Jurisdiction**, the Supreme Court does have rules setting out discovery mechanisms. The same is not the case for the Magistrate's Court, where the system is very much "trial by ambush". Documents are only admitted into the record if entered into evidence via a witness' testimony.

5.5 Legal Privilege

The Turks and Caicos Islands recognises the concept of legal professional privilege. Some documents, although they must be disclosed in the list of documents made in compliance with the Rules of the Supreme Court as relating to any matter in question between the parties, may be privileged from production. If it is desired to claim that any documents are so privileged, the claim must be made in the list of documents "with a sufficient statement of the grounds of the privilege" (see Order 24, rule 5(2)). Privilege may also be claimed by those who are not a party but against whom discovery is sought.

The principal categories of privilege may be summarised as:

- documents protected by legal professional privilege;
- documents tending to incriminate or expose to a penalty the party who would produce them; and
- documents privileged on the grounds of public policy.

The above principles are not confined to external counsel in the Turks and Caicos Islands, but extend to in-house counsel, provided that in-house counsel is acting in the capacity of a legal adviser and not as a business adviser, as well as confidential communications with any legal adviser, such as foreign lawyers.

5.6 Rules Disallowing Disclosure of a Document

In addition to legal professional privilege, a party is not compelled to give discovery that will tend to incriminate or expose to proceedings for a penalty themselves or their spouse or civil partner.

A party may withhold a document on the grounds that the disclosure of it would be injurious to the public interest.

A party may not disclose in civil proceedings confidential information covered by the Confidential Relationships Ordinance (Chapter 16.14).

6. INJUNCTIVE RELIEF

6.1 Circumstances of Injunctive Relief

An application for an injunction may be made by any party to a matter before or after the trial of the cause or matter, whether or not the claim for the injunction was included in that party's writ, originating summons, counterclaim or third-party notice.

An application for an injunction must be made by motion or summons; however, where the case is one of urgency, the application may be made ex parte on affidavit. Indeed, if the matter is really urgent, the application can even be made before the originating process has been filed in the court and may be granted on such terms providing for the issue of the writ or summons and such other terms as the court thinks fit.

The court has a wide inherent jurisdiction to make injunctions where it appears to the court to be just or convenient to do so. An order may be made unconditionally or upon such terms and conditions as the court thinks just, having regard to settled reasons or principles.

Interim and Permanent Injunctions

Injunctions may be temporary (interlocutory) – granted to preserve a state of affairs until the parties' rights are determined at trial (or granted at trial to preserve the position pending appeal) – or permanent.

An interim injunction can be granted until a specified day and is usually granted where the court is persuaded that the applicant would otherwise suffer irreparable harm. Such interim injunctions can be granted ex parte but when making such an application, the applicant has the burden of full and frank disclosure. The failure to give full and frank disclosure can itself be a basis for discharging the injunction in due course.

A permanent injunction is usually a form of relief sought that, upon determination, will settle the parties' rights and will be in place indefinitely unless it is restricted by the terms of the order or is subsequently removed by a further order of the court. The party seeking a permanent injunction has to demonstrate that not only are the present actions of the other party infringing their rights, but also that it is likely that there will be continuing conduct and consequential damage if the conduct is not restrained permanently by the court.

The procedure to be adopted by the court in hearing applications for interlocutory injunctions, and the tests to be applied, are well settled and were laid down by the House of Lords (as it then was) in American Cyanamid Co. v Ethicon Ltd [1975] A.C. 396; [1975] 2 W.L.R. 316.

Types of Injunctive Relief

The types of injunctive relief that can be obtained include:

- an order prohibiting a person from doing something (a prohibitory injunction), or requiring that person to do something (a mandatory injunction);
- an order restraining a defendant from removing from the jurisdiction assets that may in due course be attached for the purposes of satisfying the plaintiff's judgment (commonly referred to as a Mareva injunction);
- an order requiring a party to provide certain information;
- an order permitting a party's property to be searched in order to preserve evidence (these are sometimes referred to as Anton Piller orders); and
- an order preventing a party from commencing or continuing with proceedings outside of the jurisdiction (referred to as an anti-suit injunction).

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Urgent injunctive relief can be obtained within the same day and outside of court hours if circumstances genuinely require. A phone call to the Supreme Court Registry during working hours will generally secure an appointment before a Supreme Court judge. Documents such as affidavits, skeleton arguments and draft orders can be sent by email in the first instance with an undertaking to file at the Registry as soon as practicable. In circumstances of extreme urgency, including outside court hours, applications can be made by video link or over the phone.

Where time permits, the attorney representing the party seeking relief should draft:

- the originating process (assuming the application is being made in conjunction with the commencement of proceedings and not subsequent thereto) – usually a generally endorsed writ of summons setting out brief details of the nature of the claim and the relief sought;
- an affidavit sworn on behalf of the applicant setting out the nature of the relief sought, the evidential ground upon which the application is made and an explanation as to why the matter is urgent;
- a draft order; and
- a skeleton argument setting out the legal basis underpinning the application.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

Injunctive relief can be sought on an ex parte basis and, in the case of applications for Mareva injunctions and Anton Piller orders, usually is in order not to tip off the respondent that the application is being made.

In cases where notice would ordinarily be required but the application is being made on an urgent basis, the application may be made ex parte on notice. In other words, the respondent will be informed that the application is to be made but it will proceed whether the respondent appears or not. In these circumstances, if the respondent attends or is represented at the application, they have no obligation to say anything, which is usually the wiser course, but may make representations if it is thought that it will assist in defeating the application.

Generally, when an application has been made ex parte, the court will set a return date and require the applicant to issue a summons giving notice of the said date to the respondent. At that hearing the matter will be considered afresh on an inter partes basis with all sides being heard.

6.4 Liability for Damages for the Applicant

An order granting an interlocutory injunction may be made unconditionally or on such terms and conditions as the court thinks just. The long-established practice (whether the application is made on notice or ex parte) is to make any interlocutory order subject to a condition in the form of the applicant's undertaking to pay damages to the respondent (or any other party adversely affected by the order) for any loss sustained by reason of the injunction if it subsequently transpires that it ought not to have been granted. The purpose of such damages is to put the person affected by the injunction in the same position (as best as money can) that they would have been in if the injunction had not been granted.

The giving of such an undertaking is usually sufficient security and generally no fortification of the same is required.

6.5 Respondent's Worldwide Assets and Injunctive Relief

The Supreme Court of the Turks and Caicos Islands can grant an injunction extending to the

worldwide assets of the respondent, particularly if the respondent is within the jurisdiction and the Court is able to deliver a sanction on the defendant if its order should be breached.

To obtain such an order, an applicant must satisfy the Court that:

- they have a good, arguable case on a substantive claim over which the Court has jurisdiction;
- there are no assets, or insufficient assets, within the jurisdiction to satisfy their claim;
- there are assets outside the jurisdiction; and
- there is a real risk of dissipation or secretion of those assets so as to render any judgment that the applicant may obtain nugatory.

6.6 Third Parties and Injunctive Relief

A third party is bound by the terms of an injunction granted against a party as soon as the third party has notice of it, even though the respondent has not yet been served and does not know the order has been made. Where the third party is holder of an asset of the respondent (eg, their bankers), in many instances, the effectiveness of the injunction will depend as much on the restraining of the actions of the third party as those of the respondent. In an appropriate case, and in accordance with the relevant rules, a third party may be joined as a party to the action.

It tends to be more difficult to obtain such an order against a third party who is outside the jurisdiction, as the court tends to only grant orders that are effective and that can be enforced.

6.7 Consequences of a Respondent's Non-compliance

Where a person refuses, neglects, disobeys or otherwise fails to comply with the terms of an injunction, subject to the provisions of the Rules of the Supreme Court, the injunction order may be enforced by one or more of the following means.

- With the leave of the Court, a writ of sequestration against the property of that person.
- Where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body.
- Subject to the provisions of the Debtors Ordinance (Chapter 4.02), an order of committal against that person or, where that person is a body corporate, against any such officer.

Subject to exception in certain limited circumstances, it is a necessary prerequisite to enforcement of an injunction that a copy of the order has been served personally on the person required to do, or abstain from doing, the act in question; and, in the case of an order requiring a person to do an act, that copies have been so served before the expiry of the time within which they were required to do the act. Furthermore, there must be prominently displayed on the front of the copy of the order served on the respondent a warning that disobedience to the order would be contempt of court punishable by imprisonment or (in the case of an order requiring a body corporate to do, or abstain from doing, an act) punishable by sequestration of the assets of the body corporate and by imprisonment of any individual responsible.

Third parties who have knowledge of an injunction and who assist the respondent in breaching its terms are also liable to be held in contempt of court.

7. TRIALS AND HEARINGS

7.1 Trial Proceedings

In the normal course, a trial in the Turks and Caicos Islands of an action begun by writ will involve the following steps.

- The plaintiff setting down of the action for trial.
- The defendant identifying to the plaintiff, at least 14 days before the date fixed for trial, those documents central to their case that they wish included in the trial bundle.
- The plaintiff lodging at least two clear days before the date fixed for trial a bundle for use of the judge.

Prior to the setting down of the action for trial, the parties will have exchanged written witness statements from each of the witnesses they intend to call to give evidence. Those witness statements are usually directed to stand as the respective witnesses' evidence in chief, though at trial the witness may be asked supplemental questions by counsel for the party calling them before being tendered for cross-examination. The adversarial system prevails and the evidence of the witness is tested by cross-examination. The party calling the witness may then re-examine the witness, though the scope of re-examination is limited. The same procedure is adopted for witnesses of fact and expert witnesses.

Once all the evidence has been heard by the court, each party is entitled to make its legal submissions and closing statements in respect of the respective merits of their cases. Submissions are generally put in writing and submitted to the court, with some oral submissions still allowed to supplement them.

7.2 Case Management Hearings

Applications for interlocutory relief are usually made in chambers and must be made by summons that must be served on the other party. Save in respect of certain applications where specific provisions apply, a summons must be served on every other party not less than two days before the day specified in the summons for the hearing of the application; it must be served within 14 days of its issue; and any evidence relied on in support of the application must be served with the summons. Applications of this nature almost always involve hearings at which the court hears oral argument, though in applications of substance, the parties' representatives are expected to lodge skeleton arguments in advance of the hearing.

At least one case management hearing (referred to in the Rules of the Supreme Court as a directions hearing) is required in an action begun by writ with a view to providing an occasion for the consideration by the court of the preparations for the trial of the action so that:

- all matters that must or can be dealt with on interlocutory applications and have not already been dealt with may, so far as possible, be dealt with; and
- such directions may be given as to the future conduct of the action as appear best adapted to secure the just, expeditious and economical disposal thereof.

Standard directions may be agreed by the parties, not more than one month after the pleadings are deemed to be closed, provided that the only directions are as to the mode of trial and the time for setting down, in which case the action is to be set down within six months.

7.3 Jury Trials in Civil Cases

Pursuant to Section 15 of the Civil Procedure Ordinance (Chapter 4.01) (CPO), in every action,

unless under the provisions of that ordinance a trial with a jury is ordered or either party has given notice of demand for a jury, the mode of trial shall be by a judge without a jury. An order for trial by jury in civil cases is rarely made, although technically still available to the parties. In considering whether to direct a trial without a jury of any action, the court will take into account whether the action, matter or issue requires any prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in its opinion conveniently be tried with a jury.

7.4 Rules that Govern Admission of Evidence

The Evidence Ordinance (Chapter 2.06), the Evidence (Special Provisions) Ordinance (Chapter 2.07) and Order 38 of the Rules of the Supreme Court provide a framework in respect of the admissibility of evidence at trial and the procedure in connection with the use of evidence.

In summary, most evidence can be admissible, although the weight given to it may be negligible depending on the circumstances. The court will not admit prejudicial evidence where to do so is unfair to the other party. To that extent, hearsay evidence is divided into different classes and can usually be adduced by the service of requisite notice and counter-notice. As far as practicable, all questions concerning the giving of hearsay evidence should be dealt with and disposed of before the trial, but it would ultimately remain at the discretion of the court whether to allow such evidence if it does arise at the trial.

7.5 Expert Testimony

Expert testimony is permitted at trial subject to the court ruling that the relevant witness is qualified as, and accepted as, an expert. Experts' reports are required to be exchanged well in advance of the trial and experts are encouraged to meet with a view to determining what they can agree on and what matters they differ on. The number of experts a party can call, and the experts' respective disciplines, is determined at a directions hearing.

7.6 Extent to Which Hearings Are Open to the Public

As stated in **1.3 Court Filings and Proceedings**, the general rule is that hearings of trials are open to the public; there are circumstances in which a civil action may be held in camera and the public excluded. The test is whether public access would defeat the ends of justice, such as in cases in which particulars of a secret process must be disclosed. An application for the trial to be heard in camera because of privileged and confidential information that may arise in the evidence can be denied if the court, in the course of exercising its inherent jurisdiction, forms the view that the case is of fundamental importance and should be held in public. The court may give directions with a view to avoiding unnecessary reference to information that could be commercially damaging and where there would be no interference with the presentation of the case.

It is only recently that proceedings before the Supreme Court have started to be recorded and the court does not produce transcripts, though a party may request an electronic copy of the recording, from which it can arrange privately for a transcript to be prepared.

7.7 Level of Intervention by a Judge

Judges can, and usually do, intervene where it is appropriate; however, the level of intervention differs from judge to judge. A judge may feel it appropriate in certain circumstances to raise questions and issues with counsel for the parties in chambers – in the absence of any witness giving evidence and/or the parties themselves. Judges often indicate which way they are thinking in terms of an issue, though making it clear they have not made a final decision on the issue.

When witnesses are being questioned, judges sometimes intervene to ensure that they fully understand the evidence that is being given or where there has been an omission of evidence relating to facts that are relevant to the determination of the case.

Decisions and orders are far more likely to be given or made at the hearing of an interlocutory application; however, where the application involves detailed argument, particularly on the law, decisions will generally be reserved. Judgments following trials are usually reserved, though sometimes judges of the Supreme Court and the justices of appeal sitting in the Court of Appeal will give their decision with written reasons to follow.

Arguments as to costs are generally heard after the decision and the reasons for the same have been communicated to the parties.

7.8 General Timeframes for Proceedings

Much depends on the nature of the action, the level of discovery involved, the number of interlocutory skirmishes and interim appeals, whether expert evidence is required, whether overseas counsel are instructed, and the desire of one or more of the parties to have the matter tried. However, in most civil/commercial cases, if the parties are diligent and follow the timetable set out in the rules of court for the service of pleadings; the automatic directions pertaining to discovery; and the "usual" directions relating to witness statements, experts' reports, setting down and the preparation of the trial bundle, the trial of an action can take place within eight to 12 months of its commencement – or sooner if the subject matter justifies an expedited trial. The more typical scenario is between one and two years to trial, although this can be cut if the issue is relatively straightforward and the parties wish for an early hearing.

8. SETTLEMENT

8.1 Court Approval

Parties to civil litigation in the Turks and Caicos Islands are always at liberty to resolve their dispute at any time and do not necessarily need the approval of the court, save in specific circumstances where a child or protected party is involved.

A plaintiff in an action begun by a writ may, without the leave of the court, discontinue the action or withdraw any particular claim not later than 14 days after service of the defence; however, if a party wishes to discontinue an action, claim or counterclaim at a later stage, the leave of the court is required. There are generally costs consequences when discontinuing an action.

8.2 Settlement of Lawsuits and Confidentiality

It is open to the parties to agree that the terms of any settlement and indeed the fact of the same together with the negotiations resulting therein should remain confidential. Save in respect of those settlements for which the court's approval is required, the terms of settlement do not need to be communicated to the court, and the parties may enter into their own agreement and obtain what is known as a Tomlin order or simply ask the court to discontinue or dismiss the proceedings with no further order. To that extent, the settlement of the lawsuit will remain confidential.

8.3 Enforcement of Settlement Agreements

Settlement agreements are contracts, the breach of which will give rise to a claim for breach of contract enforced by way of fresh proceedings. In order to avoid the need for this, parties generally put the terms of settlement in a schedule to a Tomlin order, which means that the underlying action is stayed, save for the enforcement of the terms of settlement. This means that in the event

of a breach of the settlement terms by one party, the other may enforce them by applying to the court that made the consent order by way of a summons in the original action.

8.4 Setting Aside Settlement Agreements

As stated above, settlement agreements are contracts and thus may be set aside on the same basis as any other contract. For example, allegations of fraud or undue influence could be made, but unless the settlement agreement was part of a Tomlin order, a new action would need to be commenced seeking the declaration of invalidity.

9. DAMAGES AND JUDGMENT

9.1 Awards Available to the Successful Litigant

It is not possible in a guide of this nature to set out in detail all the remedies open to a successful party in civil/commercial litigation – entire textbooks are devoted to this – but there are many awards and orders that may be sought depending on the nature of the dispute and the issues between the parties.

The most common relief sought before the Turks and Caicos Islands courts is payment of money, whether it be repayment of a debt, damages or restitution.

Equitable remedies – such as injunctions, specific performance, declaratory relief, rectification, rescission, accounts and enquiries – are also available.

In actions relating to companies, the Companies Ordinance 2017 and the Insolvency Ordinance provide statutory relief to aid, amongst others, directors, prejudiced members, unpaid creditors, and the company itself in the form of, amongst other things:

- the appointment of an interim supervisor;
- the appointment of a receiver;
- the appointment of an administrator;
- the appointment of a liquidator; and
- an order for the sale of a party's shares in the company.

9.2 Rules Regarding Damages

The general rule regarding damages is that they should be compensatory only; that is, awarded to compensate a party for its loss and to put the party into the same position, or as near to it as possible, if, in the case of a contract, there had not been a breach or, in the case of a tort, the wrongful act had not been committed or the proper act had not been omitted.

Subject to the compensatory principle, there is no limit on the amount of damages that may be awarded unless the parties have, by way of contract, agreed a maximum amount that can be claimed, though it should be noted that a party claiming damages is under an obligation to mitigate their loss and to take reasonable steps to do so.

Punitive damages are not available under Turks and Caicos Islands law, which, like English law, has always rejected the notion that any damages payable should be paid as a penalty.

In very limited circumstances, exemplary or aggravated damages can be claimed so long as these are specifically pleaded together with the facts relied upon. Such awards are only made in three categories of cases, as set out by the House of Lords (as it then was) in the case of Rookes v Barnard [1964] AC 1129. The three categories are:

- oppressive, arbitrary or unconstitutional actions by the servants of government;
- where the defendant's conduct was calculated to make a profit for themselves; and
- where a statute expressly authorises the same.

9.3 Pre- and Post-Judgment Interest

By Section 19(2) of the CPO, subject to rules of court, in proceedings before the Supreme Court for the recovery of a debt or damages the Court may include in any sum for which judgment is given simple interest at such rate as the Court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and:

- in the case of any sum paid before judgment, the date of the payment; and
- in the case of the sum for which judgment is given, the date of the judgment.

In certain cases, the Court may award equitable interest, which is compounded at such rests as the Court thinks fit.

By Section 20 of the CPO, subject to any contract between the parties providing for a higher rate of interest on a debt, all judgments for the payment of money shall carry interest from the date when the judgment is entered until it is satisfied, or so much of it as is outstanding from time to time, at such rate as may be prescribed by rules of court, or in default of such prescription, at the rate of 6% per annum. The default rate of 6% per annum presently applies.

9.4 Enforcement Mechanisms of a Domestic Judgment

Judgment for a sum of money payable on a certain date may be enforced by several means, which are cumulative and not alternatives, and include:

- a writ of seizure and sale – expressed in the general form of a direction to the court-appointed bailiff to seize in execution such goods of the judgment debtor that may be sufficient to satisfy the amount of the judgment debt, together with interest and the costs of execution, including the bailiff's costs and charges;
- garnishee proceedings, whereby proceedings are issued against a third party who owes a debt to the judgment debtor – this can include money held by a financial institution for the judgment debtor;
- a charging order, which creates a charge in favour of the judgment creditor over certain of the judgment debtor's assets;
- the appointment of a receiver by way of equitable execution;
- the appointment of a liquidator;
- an order for committal; and
- a writ of sequestration.

9.5 Enforcement of a Judgment from a Foreign Country

Although the laws of the Turks and Caicos Islands include the Overseas Judgments (Reciprocal Enforcement) Ordinance (Chapter 4.01), which makes provision for the enforcement in the Turks and Caicos Islands of foreign judgments, the Governor has not issued any order extending the provisions of that Ordinance to any overseas country, with the result that the means by which a foreign judgment is enforced in the Turks and Caicos Islands is to issue fresh proceedings before the courts here suing on the foreign judgment and then to seek summary judgment within the action on the basis that there is no defence to the claim.

10. APPEAL

10.1 Levels of Appeal or Review to a Litigation

Appeals from decisions, orders and judgments of the Magistrate's Court and other tribunals and inferior courts (save for the Labour Tribunal, appeals from which are made directly to the Court of Appeal) are made to the Supreme Court.

Decisions, orders and judgments of the Supreme Court may be appealed to the Court of Appeal, leave to appeal having been obtained if it is required.

From the Court of Appeal, an appeal lies in certain circumstances (set out in **1.2 Court System**) to Her Majesty in Council.

There is also the right to apply for judicial review, by which the Supreme Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons or bodies that perform public duties or functions.

10.2 Rules Concerning Appeals of Judgments

The rules concerning appeals from the Magistrate's Court to the Supreme Court are set out in Part XIV of the Magistrate's Court Ordinance (Chapter 2.03) and, in the case of appeals from decisions of the Magistrate's Court exercising its civil jurisdiction, in Order 55 of the Rules of the Supreme Court – which also deals with every other appeal that, by or under an enactment, lies to the Supreme Court from any court, tribunal or person (other than an appeal from the Magistrate's Court in a criminal matter).

Appeals from the Supreme Court to the Court of Appeal are governed by the Court of Appeal Ordinance (Chapter 2.01) and the Court of Appeal (Practice and Procedure) Rules, which provide that the Court of Appeal Rules of the Bahama Islands shall apply mutatis mutandis to appeals from the Supreme Court of the Turks and Caicos Islands.

Generally, when a party in a civil action is dissatisfied with a decision, order or judgment, they have a general right of appeal in relation to final orders made against them; however, in the case of interlocutory orders made by the Supreme Court, they must obtain leave to appeal to the Court of Appeal. If the Supreme Court refuses to grant leave, an application for leave to appeal may be made to the Court of Appeal.

10.3 Procedure for Taking an Appeal

An appeal from the Magistrate's Court to the Supreme Court must be made within five days after the day on which the Magistrate has given their decision and is made by the appellant serving a notice in writing on the Magistrate and on the other party of their intention to appeal and also the general grounds of their appeal, and the appellant must enter into satisfactory security before the Magistrate for the due prosecution of the appeal in the Supreme Court.

An appeal from the Registrar to a Judge of the Supreme Court is brought by serving – on every other party to the proceedings in which the judgment, order or decision was given or made – a notice to attend before the judge on a day specified in the notice and, unless the Court otherwise orders, the notice must be issued within five days after the judgment, order or decision appealed against was given or made and served not less than two clear days before the day fixed for the hearing.

In the case of appeals from the Supreme Court to the Court of Appeal, the appellant must do the following.

- Give notice in writing, within 28 days of the judgment, decree or order from which the appeal is made, to the Registrar of the Supreme Court, and to the opposite party or parties in the action, of their intention to appeal and the general grounds of their appeal.
- File and serve a notice of appeal within the following periods (calculated from the date on which the judgment or order of the court below was signed, entered or otherwise perfected); that is to say:
  (a) in the case of an appeal from an interlocutory order, 14 days; and
  (b) in any other case, six weeks.

10.4 Issues Considered by the Appeal Court at an Appeal

An appeal to the Supreme Court from the Magistrate's Court – and every other court, tribunal or person from which an appeal lies to the Supreme Court – shall be by way of rehearing.

An appeal from the Supreme Court to the Court of Appeal is by way of a review and the Court of Appeal is usually constrained to have before it only the evidence that was before the lower court. The Court of Appeal is tasked with determining if the trial judge erred in such a way that it is appropriate to alter the trial judge's decision or send the matter back for rehearing. If the judge in the lower court has been given a discretion and has exercised it, the exercise of that discretion cannot be overturned simply because the Court of Appeal might exercise its discretion in a different way. The appellant has to demonstrate that the exercise of the discretion was unreasonable and that the trial judge took into account something that they should not have taken into account, or failed to take into account something that they should have. New arguments on the law may be allowed at the discretion of the Court of Appeal.

10.5 Court-Imposed Conditions on Granting an Appeal

As stated in **10.3 Procedure for Taking an Appeal**, a party appealing from the Magistrate's Court to the Supreme Court is required to enter into security for the due prosecution of the appeal.

When granting leave to appeal, the relevant court can impose conditions. If there is money due and owing to a party, the court can require the appellant to pay the money into court. The court can make orders preventing the sale or disposal of property pending the hearing of the appeal.

10.6 Powers of the Appellate Court after an Appeal Hearing

In the case of an appeal to the Supreme Court from an inferior court, tribunal or person, the Court may give any judgment or decision or make any order that ought to have been made by the court, tribunal or person and make such further or other order as the case may require, or may remit the matter with the opinion of the Court for rehearing and determination by it.

The Court of Appeal has jurisdiction to determine appeals from any judgment or order of the Supreme Court given or made in civil proceedings, or to order a new trial if the Court thinks fit, and, for all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall, subject as aforesaid, have all the powers, authority and jurisdiction of the Supreme Court. The Court of Appeal shall not alter or reverse a judgment or order of the Supreme Court in any case in which the Court is satisfied that the effect of the judgment or order is to effect substantial justice between the parties.

The relevant appellate court may also, at the time of its decision, make any orders relating to the payment of costs and interest that may have the effect of reversing any previous orders made in the course of the litigation.

11. COSTS

11.1 Responsibility for Paying the Costs of Litigation

The party seeking to bring a claim, make an application within an action, or file any affidavit to be used as evidence therein, is required to pay the applicable court fee. As parties progress through litigation, each party normally pays its own expenses and attorney's fees.

Interlocutory orders may be made during the litigation, which order one party or another to pay the other party's costs associated with the interlocutory application but, unless the order is made in terms that the party against whom costs were ordered must pay them "forthwith" (allowing them to seek taxation of the costs then and not have to wait until judgment has been given in the action), the usual order is to preserve the status quo until the end of the litigation.

As stated in **4.6 Costs of Interim Applications/ Motions**, the usual rule regarding costs is that they follow the event. Costs are usually awarded on the "standard" basis, which means that the party in whose favour the costs award is made, when seeking to recover those costs, must show that the costs claimed were reasonably incurred.

Unless the amount of costs to be recovered by the successful party can be agreed with the other party, the party to litigation in the Supreme Court seeking to recover its costs must apply to the Court for what is known as "taxation" – essentially a court assessment of the costs claimed. That process allows the paying party to challenge the costs sought to be recovered.

In limited circumstances, a party may be ordered to pay costs to be taxed on the indemnity basis. This means the burden of proof moves to the paying party to show that costs claimed were unreasonably incurred. An order for indemnity costs usually allows the beneficiary of such an order to recover close to the full amount expended.

11.2 Factors Considered when Awarding Costs

The starting point is that costs follow the event (ie, the winner is normally awarded their costs); however, the court always retains a discretion.

There are many factors on which a judge can exercise their discretion so as not to give the winner their costs, including:

- whether the overall winner won on every issue, or lost on some;
- the way in which the successful party conducted itself; and
- whether the losing party had made any payment into court or settlement offer prior to, or during, the litigation.

If a successful party has obtained judgment for a sum of money, that party may nevertheless be deprived of its costs – and in some cases forced to pay the losing party's costs – if the amount awarded is equal to, or less than, a payment into court made by the defendant.

11.3 Interest Awarded on Costs

Once the amount payable to a party in respect of costs has been determined (whether by agreement or following taxation), the costs form part of the judgment and interest may be awarded on the same at the judgment rate (6% per annum).

Interest runs from the date of the judgment until the costs are paid.

12. ALTERNATIVE DISPUTE RESOLUTION (ADR)

12.1 Views of ADR within the Country

Though some domestic contracts include mediation and/or arbitration clauses, the arbitration agreements are usually inadequately drafted and a culture of ADR is yet to become established in the Turks and Caicos Islands. Indeed, the Arbitration Ordinance (Chapter 4.08) came into force ten years before the UNCITRAL Model Law was adopted by the United Nations Commission on International Trade Law and is as sparse in its provisions as the Arbitration Act 1889 of England and Wales. The law in the Turks and Caicos Islands regarding arbitration therefore remains much the same as it was in England and Wales before the Arbitration Act 1934.

12.2 ADR within the Legal System

Traditionally, the legal system in the Turks and Caicos Islands did very little, if anything, to promote ADR, though parties to divorce or other family proceedings often agreed to seek to resolve their differences through informal mediation. As of 15 October 2021, the new Court-Connected Mediation Rules 2021 (the "Mediation Rules") came into operation. The Mediation Rules were issued by the Chief Justice with the stated overriding objective of "dealing with cases justly" and recognising the "duty of the court to promote settlement or reconciliation wherever possible". The Mediation Rules apply to all proceedings in the Magistrate's and Supreme Courts save for insolvency proceedings, non-contentious probate proceedings and such other proceedings in the Supreme Court as may be identified by the Chief Justice not to be suited to mediation from time to time.

Parties may be referred to mediation by the Registrar, Magistrate or Judge. In making a referral, the following matters may be considered:

- the relationship between the parties;
- the willingness of the parties to resolve their dispute by a collaborative process;
- the number of parties;
- the complexity of the issues in the suit; and
- whether the mediation, rather than litigation, will be more beneficial to the parties as they seek to resolve their dispute.

Suitably qualified mediators may apply to the Registrar of the Supreme Court for appointment as court-connected mediators by the Mediation Committee. In order to be considered for placement on the roster, applicants need to provide evidence:

- of having satisfactorily completed the training for mediators leading to certification by the University of the West Indies;
- that they are a fit and proper person; and
- that they do not hold a criminal conviction involving fraud or other dishonesty.

Mediators whose training and certification was obtained in another jurisdiction may apply to the Chief Justice for inclusion in the roster. The Chief Justice shall refer the application to the Mediation Committee with her advice.

Mediators are bound by a Code of Conduct set out in the First Schedule to the Mediation Rules and must be wholly independent and impartial.

Parties or counsel in a complex case may apply for their case to be mediated by co-mediators. In fact, as the new service is being rolled out, all the mediations will be mediated by co-mediators for the first three months, with one of those mediators being experienced and appointed from outside the jurisdiction.

Referral by Registrar

Any party to the proceedings may request a referral after the filing and service of the claim/defence, as the case may be, and the Registrar may make a Referral Order to send the file to the ADR Administrator.

A Registrar's Referral Order will be made before the file is first placed before the Magistrate/Judge.

Even absent a request for a referral by either party, the Registrar/Clerk of Court must invite the parties to a pre-proceedings case management meeting to discuss the possibility of the dispute being resolved through mediation.

Referral by the Court

Where proceedings have commenced, a Judge or Magistrate may, in performing case management, introduce the suitability of mediation for that case, and shall secure the consent of the parties to refer the matter to mediation. This may be at any stage of the proceedings where the Court is of the view that mediation would facilitate the resolution of the dispute by the parties.

Where one party desires to submit a dispute to mediation and the other party unreasonably refuses mediation, the Magistrate or Judge may take that party's refusal into account when making a costs order in the proceedings.

Once the Referral Order is made, the mediation session hearing must be held within 21 days and, although sessions can be adjourned from time to time as necessary, under no circumstances must any mediation exceed 60 days.

Outcome of Mediation

Upon the conclusion of the mediation sessions where there is a settlement of all or some of the issue in the dispute, the terms of settlement shall be set out and the signed terms of settlement shall be prima facie evidence of settlement and shall be adopted by the Judge/Magistrate as the judgment of the court.

Where no settlement is reached, an order will be made for the suit to take its normal course.

Court-Aided Mediation

Parties who require the resolution of a dispute, but do not wish to file papers before the court, may access the Court-Aided Mediation services for a fee. Such parties will have access to the roster of mediators and the services of the ADR Administrator.

12.3 ADR Institutions

The Mediation Rules provide for the establishment of a Mediation Committee by the Chief Justice comprised of the following persons:

- a Judge (who will be the Chairperson);
- the Chief Magistrate;
- the Registrar of the Supreme Court; and
- a representative of the Bar Association who may hold the position of membership for one year.

The Mediation Committee is responsible for compiling the roster of mediators (including assessing applications for entry on to the roster by suitable candidates) and for monitoring the observance of the Code of Conduct and implementing the Disciplinary Rules. The Mediation Committee will report to the Chief Justice. The ADR Administrator is an official appointed by the Chief Justice to be responsible for the management of court-connected mediation and who manages the roster of mediators.

Aside from the Mediation Committee, some members of the local Bar are members or fellows of the Chartered Institute of Arbitrators.

13. ARBITRATION

13.1 Laws Regarding the Conduct of Arbitration

Arbitration in the Turks and Caicos Islands is governed by the Arbitration Ordinance (Chapter 4.08). An arbitration agreement is referred to in the Arbitration Ordinance as a "submission". By Section 2 of the Arbitration Ordinance, "submission" is defined as "a written agreement to submit present or future differences to arbitration, whether or not any arbitrator is named therein". As such, the only real legal requirement regarding a reference to arbitration in the Turks and Caicos Islands is that the arbitration agreement is in writing.

The Arbitration Ordinance governs domestic and international arbitration proceedings.

Until the very recent roll-out of the Turks and Caicos Islands Legal Information Institute (which is referred to further in **14. Outlook and COVID-19**) there was no organised system for the reporting of cases in the Turks and Caicos Islands, so it was difficult to research a body of local case law. This new resource is still in its early stages of development; however, based on personal experience, the national courts are pro-enforcement of arbitration agreements. Section 3 of the Arbitration Ordinance provides that: "A submission, unless a contrary intention is expressed therein, shall be irrevocable except by leave of the court and shall have the same effect in all respects as if it had been made an order of court".

The Turks and Caicos Islands are not a contracting party to, and have not ratified, the New York Convention. They are a party to the Geneva Protocol on Arbitration Clauses.

The Limitation of Actions Ordinance 2021 (discussed in detail at **3.2 Statutes of Limitations**) applies to arbitrations as they apply to actions in the Supreme Court.

13.2 Subject Matters Not Referred to Arbitration

The Arbitration Ordinance does not contain any restriction on the subject matters that may be referred to arbitration, though the concept of what is capable of being arbitrated is usually circumscribed by the notions of what constitutes public justice and cannot be dealt with privately. Certainly, it is not permissible to arbitrate any matter that would violate the Turks and Caicos Islands' most basic notions of morality and justice.

13.3 Circumstances to Challenge an Arbitral Award

By Section 16(2) of the Arbitration Ordinance, the Supreme Court may set aside an arbitral award where an arbitrator, umpire or referee has misconducted themselves, or the arbitration award has been improperly procured.

Furthermore, pursuant to Order 73, rule 2(2) of the Rules of the Supreme Court 2000, an application may be made to a single judge in Court for a declaration that an award is not binding on a party to the award on the ground that it was made without jurisdiction.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

Section 10 of the Arbitration Ordinance provides that: "Any award on a submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect".

In respect of foreign arbitration awards, Order 73, rule 6 provides that: "Where an award is made in proceedings on an arbitration in any country to which the Overseas Judgment (Reciprocal Enforcement) Ordinance extends, being a country to which the said Ordinance has been

applied, then, if the award has, in pursuance of the law in force in the place where it is made, become enforceable in the same manner as a judgment given by a court in that place, the Overseas Judgments (Reciprocal Enforcement) Rules shall apply in relation to the award as they apply in relation to a judgment given by a court in that place, subject, however, to the following modifications:

- for reference to the country of the original court there shall be substituted references to the place where the award was made; and
- the affidavit required by rule 5 of the said Rules must state (in addition to the other matters required by that rule) that to the best of the information or belief of the deponent the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place".

Unfortunately, as stated in **9.5 Enforcement of a Judgment from a Foreign Country**, the provisions of the Overseas Judgment (Reciprocal Enforcement) Ordinance have not been extended to any country, with the result that any foreign award will have to be enforced at common law, which requires bringing proceedings on it.

14. OUTLOOK AND COVID-19

14.1 Proposals for Dispute Resolution Reform

At the beginning of November 2020, the Chief Justice of the Turks and Caicos Islands appointed a four-member technical team to produce new Civil Procedure Rules for the Judiciary of the Turks and Caicos Islands. The aim is to modernise the existing Rules and to produce rules of procedure that reflect a consciousness of natural and other disasters that may affect the efficient and effective operation of the courts. Amongst other things, focus is to be on:

- the overriding objective – the philosophy underpinning litigation and court proceedings;
- case management;
- case-flow management – judicial organisation, management and responsibility;
- backlog reduction;
- alternative or appropriate dispute resolution; and
- initiation of proceedings, including electronic filing of process and other documents.

It is hoped that the new rules will come into force in early 2022.

14.2 Impact of COVID-19

Initially (in mid-March 2020), the majority of the courts ceased conducting cases. There was a rapid response, permitting filing and service of process by email (which had not hitherto been permitted) and payment of filing fees online, all of which has provided a positive advance towards proper electronic filing. Since the courts resumed business, all hearings before the Court of Appeal and Supreme Court and the vast majority of hearings before the Magistrate's Court have been over Microsoft Teams; though, with the country's low number of positive COVID-19 cases, there is a slow move back towards "in-person" hearings.

There has been no legislation passed dealing specifically with the courts and, as stated in **3.2 Statutes of Limitations**, there are no general limitation periods to suspend. None of the specific ones referred to have been suspended.

Online Reporting of Cases

On 17 November 2020, the TCI Legal Information Institute was launched, which provides a mechanism by which electronic publication of judgments and other sources of law can be

accessed in one location. It provides subscription-free access to the comprehensive set of local Turks and Caicos Islands judgments, as well as links to primary legal material, including judicial writings and updated legislation.

GrahamThompson was founded in 1950 and is at the forefront in serving the principal economic sectors of the Bahamas, and Turks and Caicos Islands, the tourism industry and the financial services and banking sectors. The firm's expertise in the offshore financial arena – including private client; trust and estates; and corporate, commercial and securities – is internationally recognised, as is the firm's expertise in real estate and development. GrahamThompson's litigators are highly sought-after experts who provide effective and specialised representation and advice across a wide spectrum of disciplines, including the banking and finance, corporate and commercial, employment and labour, insurance, intellectual property, insolvency, regulatory and manufacturing sectors. GrahamThompson operates four offices: Nassau and Lyford Cay in New Providence; Freeport, Grand Bahama; and Providenciales, Turks and Caicos Islands.

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