

C/M/S/ Cameron McKenna

# Litigation Annual Review

Spring 2007



## Contents

- 3 **Foreword**  
Tim Hardy
- 4 **Health & Safety**  
Senior service  
Jan Burgess
- 5 **Intellectual property**  
A history of  
threatening behaviour  
Tom Scourfield
- 6 **Construction**  
Lex, LOIs and red tape  
Rupert Choat
- 7 **Arbitration**  
Keep it simple  
Guy Pendell
- 8 **Product liability**  
Extravagant claims  
Pawel Pietkiewicz
- 9 **Real estate**  
Six of the best  
Andrew Walker
- 10 **Financial services**  
Bigger stick, fewer beatings  
Simon Morris
- 11 **Employment**  
Have you heard the one about... ?  
Sarah Ozanne
- 12 **Professional indemnity**  
Twin peaks  
Richard Curd
- 14 **Information Technology**  
Forcing cooperation  
Susan Barty
- 15 **Mediation**  
Is mediation in Scotland  
here to stay?  
Rob Wilson
- 16 **Multi-party actions**  
The shape of claims to come  
Alison Newstead
- 17 **Legal privilege**  
Getting on the wrong side  
of the law  
Tony Marks
- 18 **Construction**  
Don't look back  
Caroline Cummins
- 19 **In court 2006**  
Our cases in the 2006 Law Reports  
CMS Cameron McKenna LLP

## Foreword

Welcome to our review of the dispute resolution landscape in 2006.

Our aim, as in previous editions, is to present a broad range of perspectives from many different areas of practice, with a simple brief to be concise, entertaining and jargon free. The legal profession is rarely associated with these three qualities, but practice makes perfect!

Nowadays, there is rightly more emphasis on bringing disputes before the courts only after all other avenues for settlement and compromise have been exhausted. We are proud of our work for many clients in finding commercial solutions to their disputes well away from the public gaze, helping to save them from reputational damage, expense and an inevitable drain on management resources.

Of course, not all disputes can be resolved in this way, which makes it less surprising that, of our cases which did end up in court in 2006, no less than 20 found their way into the Law Reports as involving a significant change in law or practice. This is another reflection of the quality of our litigation practice.

We have over 50 partners and 200 other lawyers involved in mediation, arbitration and litigation, each specialising in an industry sector such as energy, real estate, insurance, financial services, technology, media or construction.

Although this review reflects the variety and breadth of our practice, we do not assume that you will be interested in every topic. I hope you will enjoy the topics that are of interest to you and that you will let me know if you have any comments or require any further information.



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# Senior service

## Health & Safety

“age discrimination is the most common form of prejudice... a sobering thought for the 27 million of us who will be over 50 by 2030.”

UK age discrimination laws are now in force, completing the final piece of the EU jigsaw puzzle that is the Equal Treatment Directive. Since it will protect us all when we are old and may also protect us when we are young, it is arguably the most significant category of discrimination legislation to date.

It may have taken an age to arrive on the UK statute book but the evidence shows that it is much needed: a recent ACAS/Age Concern survey found that age discrimination is the most common form of prejudice in the UK, a sobering thought for the 27 million of us who will be over 50 by 2030.

The new laws make compulsory retirement below 65 difficult (albeit not impossible) to justify and impose a duty on employers to consider any request made by workers to continue working beyond 65. Even industries where employees have traditionally retired early may find a dramatically changing age profile among their workforce.

But little consideration seems to have been given to the impact of people working longer. Employers have a responsibility not to expose workers to foreseeable, avoidable health and safety risks. Particularly in jobs which require a high degree of physical fitness or stress, this may become an increasing burden: advancing years may bring greater risks of work-related personal injury and occupational illness not only for the aging employees themselves but also for others who may be affected by their work.

Stripped of the luxury of a blanket early retirement age, employers must conduct regular and vigorous risk assessments to satisfy themselves that they have taken all appropriate steps to mitigate the risk posed by a worker's declining performance. This will be neither easy nor cheap, and a difficult balancing act is required to ensure that the risk assessments cannot themselves be viewed as discriminatory.

It doesn't end there: employees who carry on working for longer will have longer exposure to toxic substances, occupational hazards, repetitive strain and stressful work situations. By staying in work longer, they will have more time to notice problems, will suffer more work-related injury and illness, and will bring more claims.

The equation also changes for younger workers suffering injury or illness through work: because they would have expected to carry on working for longer, their claims for future loss of wages will also be greater. Actuarial tables used to calculate personal injury compensation show that a 40 year-old man who cannot work again would get 12.34 times his net annual earnings were he to have retired at 55, but 18.05 were he to have retired at 65.

As the workforce stays on longer, senior management may find early retirement an increasingly attractive proposition.



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# A history of threatening behaviour

## Intellectual property

“Many of our European neighbours restrict enforcement through laws of unfair competition, but none has a statutory threats regime.”

Question: when can claimants and their advisers become defendants? Answer: when a groundless threat of intellectual property infringement has been made.

In 1883, Parliament passed a new law to stop over-zealous enforcement of certain patents for steam engines following concern that this was having a disruptive effect on “modern” commerce. To prevent rights holders from disrupting the business of their competitors, owners should only threaten proceedings where they could justify them. They should not disrupt the businesses of ‘secondary infringers’ such as retailers and distributors by making threats of legal action against them without dealing with the primary source of the infringement, the manufacturers. Anyone aggrieved by such threats could apply to court for relief.

Some 124 years later, the landscape of all commercial life, including dispute resolution, has changed immeasurably. The commercial manufacture of steam engines has long since ceased, but the law on threats is still with us.

An allegation of infringement of certain IP can be an unjustified threat. A letter referring to a patent, trade mark or rights in designs can be actionable unless the letter is carefully worded to fall within certain narrow exceptions. Alleged infringement of other IP rights is not restricted.

Not just the rights owner, but also the advisers who wrote the letter share liability for such threats. This is often abused by defendants to drive a wedge between the rights owner and their legal team. The CPR encourages a cards-on-the table approach where parties have an open dialogue to air their grievances. Liability for threats undermines this objective: IP rights owners must contrive their pre-action letters to fall within the exceptions, or simply “sue first, talk later”.

There is also a concern that the threats provisions make the UK a less competitive jurisdiction. Many of our European neighbours restrict enforcement through laws of unfair competition, but no other European jurisdiction has a statutory threats regime. European-based rights such as the Community Trade Mark and Community Design are not given equal treatment in the UK as elsewhere. A threat of infringement of a Community Trade Mark made to a retailer in London would be actionable under our domestic threats provisions. The same rights owner could threaten the same retailer about sales in Paris without fear of liability.

In a recent survey conducted by CMS Cameron McKenna and the Law Society, 71% of respondents said they would support a move for reform or abolition of the threats provisions. We are at the forefront of the campaign for such reform, supporting our partner Isabel Davies, as the Chairman of the IP Working Group of the Law Society.

Watch this space. The age of steam may finally be coming to an end.



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# Lex, LOIs and red tape

## Construction

"...research confirmed that... Mr Justice Jackson, is one of the most appeal-proof High Court judges."

2006 started with the DTI's latest paper on the Construction Act's review and ended little further forward with rumours that the review might be binned. During the year, research confirmed that the Technology and Construction Court's head, Mr Justice Jackson, is one of the most appeal-proof High Court judges. Here are some vintage 2006 decisions:

- In the Wembley stadium litigation, he deplored Multiplex's breach of contract in failing to consult Cleveland Bridge before certifying a sum lower than CB had applied for, but ruled that it had caused no loss: Multiplex would have issued low certificates whatever CB said. Multiplex's action was ruthless but lawful in certifying the lowest sums it believed it could defend in adjudication.
- A contract must be clear if a developer is to replace the construction manager (unless, like Multiplex, he is named as certifier from the outset) as certifiers making decisions on construction contracts are required to act independently, impartially, fairly and honestly.
- A respondent in an adjudication may deploy defences he has not previously advanced if they fall within the adjudicator's jurisdiction. If the adjudicator ignores defence material he (incorrectly) thinks doesn't go to the issues, his decision is still enforceable.
- An adjudicator's decision is enforceable even if slightly late. In November, another TCC judge said the opposite. Hopefully clarity on this important issue will emerge in 2007.

2006 also gave us two cases on letters of intent:

- In one, clients unsuccessfully sued their architects for recommending that they enter into a LOI with their builders. The judge criticised LOIs' widespread use, identifying when they are appropriate and, impliedly, when they are not. Consultants who uncritically recommend them might be liable in negligence.
- In another, the judge decided that an LOI gave rise to a contract and so a builder was entitled to be paid for work after the LOI expired on the same basis as under the contract.

New red tape arriving in 2006 included anti-age discrimination rules and Building Regulations to increase the energy efficiency of buildings.

There were further good intentions in the TCC: in June, it began to pilot a judge-mediator service, which is due to run until 31 July 2007, and has so far received a mixed reception.

In October, modest changes to the Pre-action Protocol for Construction and Engineering Disputes were approved. They will come into effect in April.

December witnessed the birth of the Joint Contract Tribunal's Constructing Excellence partnering contract. An end at last to the claims culture in UK contracting? I'm not retraining quite yet: in the year ending 30 September, cases commenced in the London TCC were 8% up on the previous year.



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# Keep it simple

## Arbitration

“refer all contractual disputes and non-contractual disputes “arising out of or in connection with” the contract to arbitration”

Arbitration clauses are used in commercial contracts around the world every day. Some parties don't spare a thought for the clause they use, but getting it wrong can defeat the object of having it and can embroil the parties in public disputes, which waste their time and money. Here are ten simple rules for getting the right arbitration clause in your contract:

- **Keep it simple:** make sure your clause doesn't get too complicated, for example by trying to specify exactly how the arbitration will be conducted. One exception is when there are multiple contracts with multiple parties: provide for a single arbitration for disputes arising from all contracts rather than be forced to commence multiple arbitrations all dealing with essentially the same dispute.
- **Make sure all disputes are covered:** refer all contractual disputes and non-contractual disputes “arising out of or in connection with” the contract to arbitration. This will normally capture misrepresentation, tortious and even fraud claims as long as the dispute relates to the contract. If you have not separately done so, the law governing the contract and the arbitration should be identified.
- **Specify the institution:** state under which rules the arbitration is to be conducted. The institutions often have their own preferred wording: unclear or ambiguous choices can result in the institutions declining to be involved.
- **Decide whether you want a right of appeal:** this affects your choice of institution, since many have rules that exclude it.
- **Consider confidentiality:** institutions have different approaches to confidentiality. Make sure that you expressly provide for confidentiality in the arbitration clause itself, just to be sure.
- **Identify the seat of arbitration:** as well as fixing the location for the hearing, this will determine which country's legal system will govern the procedure of the arbitration. Also, where you arbitrate can be relevant to confidentiality. International contracts often choose a neutral city with established arbitration centres and trustworthy legal systems, such as London, Paris and Geneva.
- **Choose the language:** arbitrating in multiple languages or with translators can be complicated and time consuming.
- **Choose the number of arbitrators:** usually either one or three, to avoid deadlock. Identifying individuals is a bad idea, as their non-availability will just cause difficulty and delay.
- **Think about a combination clause:** you can provide for the parties to attempt direct negotiations and/or mediation before going to arbitration. You can also provide for particular single issue disputes to be dealt with by expert determination and the rest to be dealt with by arbitration.
- **Don't rule out interim relief:** ideally you should expressly allow parties to apply to court for interim relief in the early stages of a dispute. Beware those clauses that remove all rights to seek interim relief and even limit other kinds of interim or final order, which the arbitral tribunal might otherwise be able to make.



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# Extravagant claims

## Product liability in Central and Eastern Europe

“Product liability claims mainly affect products such as tobacco... but there is potential for every industry sector to be affected.”

The amount of compensation awarded in product liability cases in Central and Eastern Europe is constantly growing. The incredible sum of US\$44 million was awarded to a Ukrainian injured in a car accident caused allegedly by defects in the vehicle. Consumers are now seeking compensation for injuries caused by defects in every kind of product. An Estonian is claiming compensation for damage to his gums allegedly caused by a toothbrush...

Also growing is the number of product liability claims. Two main factors are responsible for this. First, there is a definite increase in claims awareness due to the activities of consumer interest groups and government information campaigns. The media provide a rich diet of stories about successful product liability claims and the enormous compensation available.

Second, there is wider access to professional legal advice. The number of practising lawyers is increasing, and a growing number of them specialise in product liability claims. The widespread use of success fee schemes causes the value of claims to rise. The availability of state-funded legal aid in some CEE countries is also a factor.

Although class actions are not yet permitted in Central and Eastern Europe, some attempts have already been made. In Poland, a health association filed an unsuccessful suit for about US\$155 million against the major international tobacco manufacturers, partly based on the class action concept. Legislative work to introduce class actions is already under way in some countries, of which Poland is one.

Product liability claims mainly affect products such as tobacco, medical devices, vehicles and pharmaceuticals, but there is potential for every industry sector to be affected. The Estonian toothbrush case clearly demonstrates this. The more claims there are, the greater the cost of introducing products onto CEE markets. Introducing class actions would only multiply the amount of compensation awarded. A new concept for product liability claims in many CEE countries is that of strict liability. Because it has only recently been introduced in product liability cases, most lawyers have little familiarity with it.

By contrast, a law firm with broad experience of managing product liability claims in CEE will know, for example, that the differences can sometimes be turned to the manufacturer's advantage and help to convince the judge not to hold them liable. Lawyers with experience of this kind have the potential to save considerable sums for any discerning manufacturer that chose to instruct them.



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# Six of the best

## Real estate

**“Landlords... should closely monitor late payment of rent and take action before the tenant goes under”**

2007 promises to be another busy year, as we continue working with our clients to avoid, manage and resolve their property disputes. Here are six issues to keep an eye on as the New Year unfolds:

- Tenants should seek advice early before serving a break notice. Conditional break options usually require tenants to be in compliance with their obligations to repair the building and to reinstate any alterations by the break date. Further, what works are required to achieve delivering up vacant possession can be fraught. Since landlords have no obligation to tell their tenants what works are needed, the tenant must decide for himself what needs doing and make sure it gets done. The wording of the break clause is also important: some may require compliance at the break date, but others when the notice is served. Getting this wrong means the lease will continue and, with it, a potentially hefty ongoing liability for rent.
- Tenants should also familiarise themselves with the new procedures for statutory lease renewals of commercial premises. If they don't act soon enough to agree a time extension for starting court proceedings, they could lose their statutory right to a new lease. This would allow landlords, especially those with an eye on redevelopment, to grant them a new lease on less favourable terms, such as by excluding security of tenure, or even make them vacate the premises.
- Landlords should be wary of an increasing number of tenant insolvencies. They should closely monitor late payment of rent and take action before the tenant goes under, perhaps by accepting more flexible terms. They should also remember that each of the different insolvency regimes imposes different restrictions on the ways they can deal with tenant default, so they should conduct an early review of their options, agree a strategy and then implement it.
- Landlords should monitor the progress of a Law Commission proposal to introduce a new statutory regime for terminating tenancies instead of forfeiture. This is likely to severely curtail a landlord's ability to peaceably re-enter commercial premises and bring matters to a head with the defaulting tenant.
- Landlords should also watch out for further proposals to replace their current right to seize a tenant's goods from the premises and sell them to pay rent arrears with what appears to be a rather less effective recovery process for commercial rent arrears.
- Last but not least, both landlords and tenants should make use of the revised dilapidations pre-action protocol that should help them identify the issues between them and provide a better platform for resolving their dispute via a negotiated settlement instead of court proceedings.



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# Bigger stick, fewer beatings

## Financial services

“The FSA only seems comfortable taking action where there is proximity between the senior manager and the rule breaches in question.”

The FSA now has wide enforcement powers but only invokes them in extreme or unusual circumstances. Why is this?

The thrust of FSA regulation is that prevention is better than cure. Its current campaign on treating customers fairly is a key aspect of this approach, requiring retail firms to ensure customers get a fair deal from every facet of their operation, from product design to delivery and from post-sale service to complaints handling.

When something does go wrong – perhaps a retail investor is badly advised on a product or a wholesale investor is not given best execution - formal enforcement powers are rarely required. Instead of compelling firms to compensate investors or improve systems, the FSA expects the firm concerned to put the matter right by itself. Reputable firms will always look after their customers. In the rare event that the FSA needs to tell the firm what to do, the firm will nearly always do what it is told.

In our experience - having handled over 150 enforcement cases – the FSA only takes enforcement action against firms to deal with what it calls egregious conduct. Where a firm's senior management has been sloppy and has not responded appropriately to a problem, the FSA uses enforcement action to put a stick of dynamite under them.

The best advice is never to let serious problems like this happen. If they do, firms have to report them, so the challenge is to satisfy the FSA in the way they are reported that the firm has located the root cause, made sure it won't recur and paid attention to the interests of affected customers.

As for disciplinary action against individuals, action is commonplace against junior staff but not against senior managers. The FSA only seems comfortable taking action where there is proximity between the senior manager and the rule breaches in question. Instances are so far confined to those in relatively small firms whose actions clearly resulted in serious rule breaches.

This is surprising given that one of the main reasons for the introduction of the approved persons regime, which calls for customer-facing staff and senior management to be individually registered with FSA, was to enable the FSA to take action not just against individual crooks – the insider dealer and the thief – but against errant managers too.

But senior managers should not think themselves immune from FSA action. If they do not keep a close eye on their systems and controls to ensure that they have identified and are managing all material risks, they could very well feel the FSA's icy hand on their velvet collar.



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# Have you heard the one about...?

## Employment

**“...the responsibility is always on the employer to defend itself, and victimisation or harassment can never be justified.”**

Have you heard the one about the Christian, the Jew and the Muslim? Since 2003, such a question should no longer be heard in the workplace as new laws were introduced protecting employees against religious discrimination. However, the scope of the law is much further reaching than such an obvious potential case of harassment, and recent cases have only provided limited assistance to employers hoping to find a path through the legal maze.

The fundamental principle of the law on religious discrimination is that it is unlawful for an employer to discriminate (including victimisation and harassment) against job applicants or employees on the basis of their religion or belief. There are limited exceptions for such treatment and it is possible for an employer to provide a business justification for its actions. However, the responsibility is always on the employer to defend itself, and victimisation or harassment can never be justified.

One potential trap for employers is the use of policies and practices that appear to promote equal treatment under the new law but which, in fact, have a discriminatory effect. Last year, both British Airways and the BBC came under fire in the media for having policies that allow employees to wear jewellery as long as, where possible, it is hidden under clothes. On the face of it, this would appear to be a fair and even-handed policy, but both organisations stand accused of repressing the freedom of employees to express their faith. This may be true, but what are the alternatives?

On the one hand, employers could allow employees to express their religious and other beliefs freely, but this is likely to result in staff handbooks the size of telephone directories as employers attempt to juggle their policies and practices around employees' different requirements. In addition, a change in the law may soon extend protection to those expressing philosophical beliefs, which some argue could include those held by organisations such as the BNP. The free expression of such beliefs in the workplace could lead to mayhem of a kind no crucifix, kippah or niqab could ever produce.

On the other hand, employers could forbid any expression of religion or belief in the workplace. A neutral workplace may be the ideal for most employers, but this would inevitably result in claims of discrimination from employees prevented from complying with the strict codes of their religion.

So what are employers to do? Unfortunately, there is no magic answer, and so far the courts have provided only watery guidance. It therefore seems that for the time being employers are destined to be the real victims of the law on religious discrimination as they risk criticism whatever approach they take.



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# Twin peaks

## Professional negligence

“...it is human nature to find something unsatisfactory about ruling in favour of a professional who has acted negligently...”

You are a mountaineer about to embark on a hazardous climb. You get your dodgy knee checked out by the doctor who gives it the all clear. Halfway up the mountain, you find that your knee is still dodgy, despite what the doctor told you. On your way down the mountain, you are injured in an accident that has nothing to do with your knee. Can you sue the doctor on the basis that you would not have started the climb if he had correctly diagnosed your knee?

Since 1997, our imaginary doctor has been safe from suit on this basis. But the issues have remained less clear cut when deciding whether or not a disappointed client can recover damages from a negligent professional advisor.

This is partly because it is human nature to find something unsatisfactory about ruling in favour of a professional who has acted negligently, and against an individual client who has suffered financially. In this situation, the mountain peak which the courts feel unable to scale is that that the two events are not so closely linked that one can be said to have been caused by the other.

This year we acted in *Andrews v Barnett Waddingham*, in which an aggrieved client tried to sue his pensions advisor. After taking pensions advice, Mr Andrews invested in a with profits policy with Equitable Life. The advice he received included incorrect information about the compensation he would receive if Equitable Life were to become insolvent.

Equitable Life then suffered its now notorious downturn in fortunes but did not actually become insolvent. Mr Andrews stood to be about £1 million worse off than if he had made his pensions investment in other ways.

His complaint against Barnett Waddingham was that he would not have taken out the with profits policy if he had been properly advised about his right to compensation. Their advice to take out a with profits policy was not itself negligent, only the bit about his right to compensation.

The trial judge decided in favour of Mr Andrews on the basis that the advice he had been given was inextricably linked with the loss he had suffered; but the Court of Appeal disagreed, finding that Mr Andrews' loss was unconnected to the negligent advice.

The case confirms that disappointed clients must scale twin peaks before they can recover compensation from negligent advisers: the first is to show that they would not have entered into a loss-making transaction but for the negligent advice they received and the second, more difficult ascent, is to show a true connection between the mistake made by their professional adviser and the loss they have suffered.



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# Insurance Broking Practice and the Law

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Covering all the practical and legal issues affecting day-to-day practice, *Insurance Broking Practice and the Law* is our definitive guide to the role and responsibilities of insurance brokers.

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# Forcing cooperation

## Information Technology

“...the Court of Appeal decided that there was no general rule against granting an injunction, which effectively compelled performance.”

How difficult is it to make someone do what they have agreed to do in a contract for business services? In theory, you can get a mandatory injunction but the courts have always ruled that injunctions, which compel someone to carry on a particular business, should only be granted in exceptional circumstances.

Back in 1988, the House of Lords clarified that there were two main obstacles to obtaining a mandatory injunction against a business: first, the difficulty of specifying precisely what the court should order the business to do; and, second, the fact that punishment for non-compliance – which is a contempt of court – is generally not a suitable way of forcing a business to be run in accordance with a court order.

However, after 2003, things seemed to become a little easier, apparently reflecting a more commercial approach by the courts. First, an IT company which had transferred hosting of a former client's website to its own servers was ordered to reinstall it onto the original servers. In this case, the court placed more emphasis on the question of which party would be likely to suffer the greater damage if an injunction were to be granted. The court therefore awarded the mandatory injunction, requiring the restoration of the website to the original hosting facility.

Then, in 2005, an injunction was granted against the owner of two ships ordering him not to do anything inconsistent with the charter agreement he had entered into. The ship owner argued that this would be tantamount to forcing him to perform the charter agreement but the Court of Appeal decided that there was no general rule against granting an injunction, which effectively compelled performance. This was even though the commercial relationship was a long-term relationship and involved a substantial degree of co-operation. In effect, businesses are expected to make arrangements work in their own interests and be ready, if necessary, to sort out any problems later.

Despite this evidence of the courts being more willing to grant mandatory injunctions, the pendulum appeared to swing back in 2006 in another IT case. This time, an IT service provider was seeking to prevent the termination of an outsourcing contract but the court's reluctance to compel the parties to work together led it to refuse an injunction.

The lesson from all of this is not to rule out mandatory injunctions but to be realistic about the situations in which they will be appropriate. Even if mandatory injunctions are now less of an exceptional remedy, they will always be a very special one.



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# Is mediation in Scotland here to stay?

## Mediation

“...the Rules Councils of both the sheriff court and the Court of Session are considering new rules that will encourage the use of mediation by parties in Scotland.”

It may not be true that the Scots litigate more than the English but it could be said that the Scots have been slower to embrace alternative ways of resolving their disputes.

One alternative that has become popular south of the border is mediation and, although we've had it for a number of years in Scotland, it has never really been viewed as a real alternative to litigation – that is, until now.

Awareness and understanding of what mediation can offer is growing. Increasingly, like-minded people have come together through events sponsored by mediation providers, local mediation schemes or the Scottish Mediation Network. The Scottish Executive is already funding mediation schemes in Aberdeen and Glasgow sheriff courts similar to those in the county court schemes in England. Edinburgh sheriff court is continuing to operate a mediation scheme for summary cause and small claims following a year-on-year increase in the number of referrals by the courts.

Against this background, it is not surprising that the Rules Councils of both the Sheriff Court and the Court of Session are considering new rules that will encourage the use of mediation by parties in Scotland.

The Sheriff Court Rules Council proposed new Sheriff Court Rules in June 2006. They are still under review but, if enacted, will require parties to consider using mediation and alternative dispute resolution procedures before and during litigation with (for the first time in Scotland) financial consequences for failure to do so.

Some will still ask why anyone should be forced to mediate their dispute. In answer, we would suggest that they should not be forced. However, as long as they expect to recover their costs at the end if they succeed, they should be encouraged to act reasonably in the way they prosecute claims.

The Rules Council of the Court of Session is considering similar rules to those proposed by the Sheriff Court Rules Council, but issues remain as to what costs sanctions should be available and how unreasonable conduct can be assessed whilst maintaining confidentiality between clients and agents.

If new rules are introduced, they will go a long way towards bringing Scotland's procedure on the use of mediation into line with the position already adopted in England. It remains to be seen whether the new rules will also encourage parties (and their lawyers) to take a less confrontational approach to resolving disputes!



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# The shape of claims to come

## Multi-party actions

“These signs of a growing appetite for multi-party actions have prompted the arrival of US class action law firms...”

Over the past 20 years, there has been a succession of lengthy, complex and, above all, costly multi-party actions in the pharmaceutical industry, such as the MMR vaccines litigation and the oral contraceptives litigation. Huge sums of public money have been spent pursuing claims, which were often speculative and ultimately unsuccessful.

These cases would not have been possible without funding from legal aid, which provided a ready purse for claimants and their solicitors, not least in hiring an army of experts to help them prove their allegations. But legal aid also shielded claimants from the risk of having to pay costs if they lost, leaving defendant companies to pick up bills in excess of £5 million, even when the claims against them had collapsed.

In response to growing concerns about the spiralling costs of such actions and the potential for claimants to abuse the system, access to legal aid was made generally more restrictive in 2000 and, in particular, was withdrawn for all personal injury cases except those with significant wider public interest. Among other cases, legal aid was refused to claimants trying to sue Merck over its Vioxx drug and the number of pharmaceutical multi-party actions nose-dived.

The obvious effect of this was that claimants started exploring other ways to fund their claims. Whilst US-style contingency fees are not currently available in the UK, conditional fee agreements have been steadily growing in popularity. These protect claimants from having to pay their own solicitor's costs if they lose, and usually involve them taking out insurance against the risk of having to pay the defendant's costs. Where the claimant wins, their solicitors recover their costs, plus an uplift of up to 100%, from the defendant.

Conditional fee agreements have also led claimants' solicitors to review their businesses and refocus the types of instructions they are willing to accept. Over the past five years, multi-party claims have expanded into new sectors such as waste, children's homes, care homes and dissatisfied holidaymakers. Employers' liability is another growth area, bringing claims such as those for 'vibration white finger' and with them, an increased burden on management time, resources and corporate reputation.

These signs of a growing appetite for multi-party actions have prompted the arrival of US class action law firms to pursue multi-party actions in the UK. And the signs from government are that they may be welcomed: the DTI has recently finished consulting on another initiative to improve access to justice potentially involving a new type of 'representative' action - brought not by consumers but on their behalf by interested bodies able to demonstrate that they have the consumers' interests at heart. Class actions here we come.



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# Getting on the wrong side of the law

## Legal privilege

“...if POCA overrides solicitor-client confidentiality, does it also override legal privilege?”

In litigation, the client's right to confidentiality in the advice they receive from their solicitors is recognised by the concept of legal privilege. But the solicitors' duty of confidentiality to their clients is not absolute, and no single piece of legislation compromises it more explicitly than the Proceeds of Crime Act 2002.

Although hardly a central feature of every day dealings between solicitor and client, POCA outlines circumstances where a solicitor must disclose aspects of its client's affairs to the Serious and Organised Crime Agency. These involve arrangements that facilitate the retention, use or control of criminal property, better known as money laundering.

In broad terms, POCA criminalises not only those who commit money laundering but also those who become concerned in an arrangement which they know or suspect to be money laundering. The only escape route for them is immediately to report their knowledge or suspicion to SOCA and get its consent to continue their involvement in the transaction. If they tip their client off about their actions, they commit another offence. This does not only affect solicitors but it *particularly* affects solicitors, professionals and the financial services sector.

And if POCA overrides solicitor-client confidentiality, does it also override legal privilege? In a case called *Bowman v Fels*, the Court of Appeal decided that it did not: if the solicitor's knowledge or suspicion derived from privileged communications from his client, he should not disclose anything to SOCA without first asking the client to agree to waive privilege in the information to be disclosed. In doing so, where he obtained the information in privileged circumstances, he would not be guilty of tipping off.

*Bowman v Fels* also decided that a solicitor was not entering into or becoming concerned in money laundering by acting for a party in litigation. Most unsatisfactorily, it left unresolved whether the same applied to pre-litigation steps or to alternative dispute resolution through mediation or arbitration.

In Westerns, the goodies wore white hats and the baddies wore black hats, but real life does not offer so straightforward a means of differentiation. If the private sector, and particularly the legal profession, is to be made to act as SOCA's eyes and ears on money laundering activities (under threat of criminal sanctions, no less), it does not seem right that the obligations imposed by POCA should be left so unclear that we do not always know when we are required to take action.



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# Don't look back

## Construction

“Part of the key to success will be the adoption and implementation across the industry of the 2012 Construction Commitments”

Personally, I've decided to be upbeat and confident about it. I'm not advocating complacency but I want to outlaw cynicism and negativity. Most of what I read about it is positive and good. It has the smell of success. Of course, I'm talking about the building work for the 2012 Olympic Games.

There is a lot to do. To name a few of the projects, there's the 80,000 seat Olympic Stadium (oh no, not another), the Olympic Village and the Aquatics Centre (for which the design is not yet finalised) not to mention all the land remediation and infrastructure needed to provide transport and facilities for the Games and afterwards.

The opening ceremony will take place on 27 July 2012 come what may. An application for an extension of time will just look silly. So surely we must adopt a cautious approach to the building works to make sure we're not made a laughing stock in front of the whole world? Come on, look at the Wembley debacle! This is not the right time to try anything new fangled, or is it?

If the world is watching, not only must we get the work done on time, but the projects must be built to the highest standards in terms of design, safety and sustainability. So says the Olympic Delivery Authority. The ODA has set itself up to succeed and I think it will. Part of the key to success will be the adoption and implementation across the industry of the 2012 Construction Commitments – that target behaviours or practice which, if changed in accordance with the Commitments, might lift performance all round and allow the industry finally to move away from its adversarial heritage.

The ODA seeks to inspire and to motivate – to present the huge task as a fabulous opportunity to celebrate British talent and management ability. It is the right approach.

And if things go wrong? The ODA will have other tools in its toolbox to ensure that the show gets on the road. Disputes are endemic in the construction industry and there are reasons – not just excuses – for that. The ODA's solution is to identify potential disputes early on and manage them through Dispute Review Boards – where experienced and expert panels will act as advisers, negotiators and/or mediators in order to resolve issues before they become disputes. These Boards have been seen to work effectively on large projects across the world.

2012 will be a triumph. It must be. It shall.



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# 2006 cases in the Law Reports

	Case	Citation	Court	Judge	About
<b>Reinsurance</b>	Bonner v Cox	[2006] All ER (D) 50 (Jan)	Court of Appeal	Waller, Tuckey and Moses LJ	Duty of reinsured in contract for excess of loss reinsurance
<b>Commercial</b>	Koshy v DEG-Deutsche	[2006] All ER (D) 136 (Jan)	Chancery Division	Rimer J	Striking out
<b>Insolvency</b>	Demarco v Perkins	[2006] All ER (D) 150 (Jan)	Court of Appeal	Parker LJ	Damages for loss of opportunity
<b>Insolvency</b>	Fourie v Roux	[2006] All ER (D) 156 (Jan)	Chancery Division	Warren J	Order for costs
<b>Construction</b>	Alfred McAlpine v SIAC Construction	[2006] All ER (D) 193 (Jan)	Technology & Construction Court	Jackson J	Application of Pre-action protocol
<b>Pharmaceutical</b>	Sayers v SmithKline Beecham	[2006] All ER (D) 239 (Jan) [2006] All ER (D) 442 (Jul) [2006] All ER (D) 127 (Dec)	Queen's Bench Division	Keith J	MMR/MR vaccine litigation
<b>Professional indemnity</b>	Andrews v Barnett Waddingham	[2006] All ER (D) 284 (Feb)	Court of Appeal	Brooke, Richards LJ and Sir Paul Kennedy	Causation and negligence
<b>International arbitration</b>	ABB v Hochtief Airport	[2006] All ER (D) 172 (Mar)	Commercial Court	Tomlinson J	Setting aside arbitration award
<b>Clinical negligence</b>	Farraj v King's Healthcare NHS Trust	[2006] All ER (D) 382 (May)	Queen's Bench Division	Swift J	Duty of care owed by laboratory
<b>Environment</b>	R v Chester City Council	[2006] All ER (D) 151 (Jun)	Court of Appeal	Buxton, Richards LJ and Sir Christopher Staughton	Pollution control permit
<b>Pharmaceutical</b>	Pfizer v Dainippon Sumitomo Pharma	[2006] All ER (D) 172 (Jun)	Chancery Division	Pelling QC	Service out of the jurisdiction
<b>VAT</b>	Abbey National v HM Revenue and Customs	[2006] All ER (D) 336 (Jun) [2006] All ER (D) 44 (May)	Court of Appeal	May, Jonathan Parker LJ and Sir Peter Gibson	VAT exemptions
<b>Intellectual property</b>	Canady v Elektromedizin	[2006] EWCA Civ 1061 11 July 2006	Court of Appeal	Jacob LJ and Sir Peter Gibson	Alleged patent infringement
<b>Banking</b>	Mahme Trust Reg v Lloyds TSB	[2006] All ER (D) 50 (Jul)	Chancery Division	Evans-Lombe J	Liability for unlawful payments, Indemnity costs
<b>Insurance</b>	Goshawk Dedicated v ROP	[2006] All ER (D) 147 (Jul)	Commercial Court	Morison J	Injunction to restrain foreign proceedings

# 2006 cases in the Law Reports

	<b>Case</b>	<b>Citation</b>	<b>Court</b>	<b>Judge</b>	<b>About</b>
<b>Pensions</b>	Harland and Wolff Pension Trustees v Aon Consulting	[2006] All ER (D) 216 (Jul)	Chancery Division	Warren J	Pensions – equal treatment
<b>Employment/insolvency</b>	Bezant v Cork	[2006] All ER (D) 19 (Aug)	Chancery Division	Thomas Ivory QC	Whether claimant still a creditor
<b>Hotels &amp; Leisure</b>	Bouverie No. 1 v De Vere Hotels & Leisure	[2006] All ER (D) 25 (Sep)	Chancery Division	Rimer J	Alleged breach of management agreement and trademark infringement
<b>Consumer credit</b>	OFT v Lloyds TSB, Tesco, Amex	[2006] 2 All ER 821	Court of Appeal	Waller LJ, Lady Justice Smith and Lord Justice Moore-Bick	Consumer credit agreements
<b>Professional indemnity</b>	Haward v Fawcetts	[2006] 3 All ER 497	House of Lords	Lords Nicholls, Scott, Walker Brown, Mance	Limitation – when time begins

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- Financial services and City regulation
- Fraud investigation and asset recovery
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- Health & safety
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# Not just another glossy



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