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Disputes Digest

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Introduction

Welcome to the latest edition of Disputes Digest, our disputes law bulletin updating you on current legal issues affecting the market.

In this edition you will find updates and commentary on a range of issues, including articles on the **High Court's 'Financial List'** which is now up and running, current trends in **pensions litigation**, some key practical points to consider in **shareholder disputes**, and some of the changes introduced by the new **Consumer Rights Act**.

We also take a look at third party funding for potential litigants, covering all the key questions you might have with James Blick, director at independent broker TheJudge.

If you would like to discuss any of the issues in this edition, or wish to provide any feedback, please contact me, the author of the relevant article, or your usual contact at CMS. I hope you find the articles interesting and informative.

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The Financial List

The Financial List is up and running. We were already proud of the thinking power of London's judges, but the introduction of the List has given our system a shot in the arm. The London-based High Court is now even better equipped. As from 1 October 2015, to take on the world's financial disputes that qualify for specialist treatment because they involve very substantial sums of money (over £50 million), or are highly complex, or where there is particular public interest in sorting them out.

This change hasn't been achieved by recruiting more people or spending more money, but by shuffling the existing judges to get the financial specialists on the right cases and by tweaking the process of case management a little. And there's been one eye-catching addition, the Financial Markets Test Case Scheme.

Just occasionally, any lawyer practising in the field of complex financial disputes has come across a case where the High Court judge has had to lean heavily on the adversarial nature of the English system. In those cases, this has involved the presiding judge prompting the parties' advocates to set out their respective cases and then choosing between the competing sets of material, rather than adding much from the bench in the way of original thinking or informed specialist questioning. The introduction of the Financial List has brought even greater confidence that financial expertise will be there for those cases that need it. Cases qualifying for a place on the List will be assigned to one of the 12 nominated judges and will then stay with that judge, for most purposes, through to trial. These changes smooth the path for greater efficiency and consistency in the treatment of specialist cases.

Cases are started in the usual way and in the usual (Rolls) building. They are then assigned to the Financial List following application by one of the parties and with the court's approval.

The Financial Markets Test Case Scheme is also an innovation. The scheme applies to claims started in the Financial List which raise issues of general importance to the financial markets in relation to which immediately relevant authoritative English law guidance is needed. There is no need for a present cause of action between the parties to the proceedings. Where there is a qualifying claim, a person (or entity) who is or was actively in business in the relevant market may, by mutual agreement, issue proceedings against another person (or entity) who is or was actively in business in the relevant market, providing that other person has opposing interests as to how the law of England and Wales issue(s) raised by the qualifying claim should be resolved. These test cases will follow the procedure for other Financial List cases, with a few added twists.

Amongst those differences are a general rule that there shall be no order as to costs, and, in a case of particular importance or urgency, the trial may, at the court's discretion, be heard by a court consisting of two Financial List judges or a Financial List judge and judge from the Court of Appeal.

Is the Financial Markets Test Case Scheme a good thing or a bad thing? On this, the jury is out: we haven't seen what kinds of cases sign up for the scheme or are rejected by it; and we haven't seen how the case management machinery really runs in practice. But the intention of a group of respected judges has been made clear, and they will no doubt be keen to see this initiative succeed.

It's telling that, high up the list of Frequently Asked Questions the Court Service has compiled for its website, we find '*Is the Financial List a competitive response to other commercial dispute resolution facilities offered elsewhere in the world?*' The first word of the set answer is '*No*', but you might think the explanation that follows protests too much. Whatever the official line might be, one major measure of success for the Financial List will be how the following question is answered in 5 years' time: *'Are the world's largest and most complex financial disputes being resolved in London?'*

How's the Financial List doing so far? The first case was transferred to the List on 12 October 2015 and, as of the second week of November, the number of cases was building, but could still be counted on the fingers of one hand. The machinery and the people are in place, though, to make sure London is well placed to maintain its position as the best location in the world for high quality financial dispute resolution.

The list of nominated judges will, of course, change over time as individuals join, are promoted or retire. As at early November, it comprises 12 reassuring names: from the Commercial Court, Flaux, Blair, Hamblen, Knowles, Phillips, Popplewell; and from the Chancery Division Etherington, Asplin, Newey, Richards, Rose and Snowden. Some of these names are pretty new to the bench, but their specialist knowledge qualifies them for this task.

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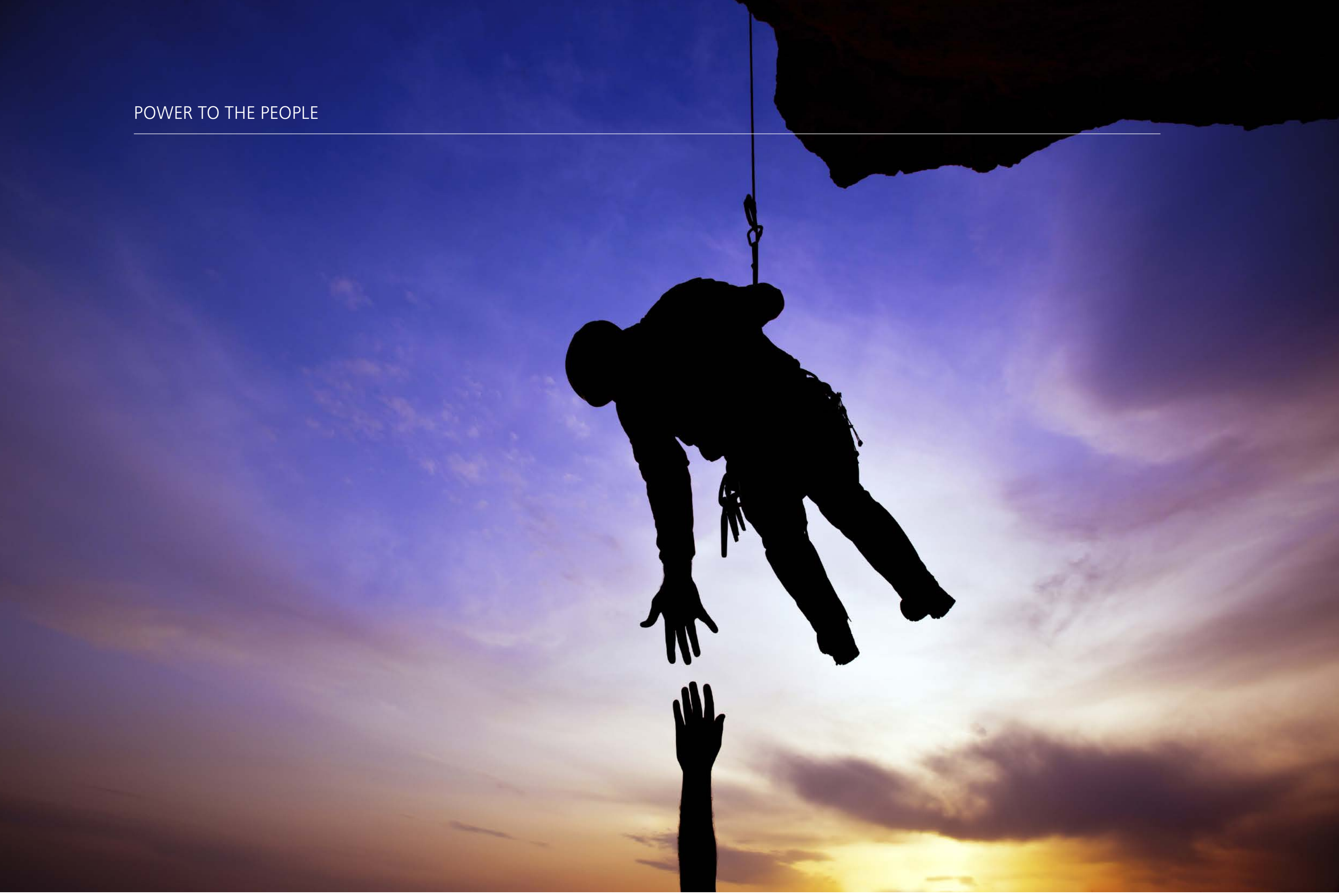

Power to the people

On 1 October 2015, the **Consumer Rights Act** (the Act) came into force. The Act is a key part of UK consumer law reform and is intended to improve and update consumer rights. Specifically it introduces, amongst other matters, a competition law collective 'opt out' action into the UK for the very first time.

This is a significant development. Under Part 1 of Schedule 8 to the Act, it is possible for claims for breach of competition law to be brought on behalf of a defined group, before the Competition Appeal Tribunal (CAT), without the need to identify all the individual claimants. This means that claimants may be included in such claims unless they actively 'opt out' of the proceedings (subject to some important safeguards, considered below).

In theory, this should make it easier for victims of competition infringements to obtain compensation.

To date, consumers have only been able to do so collectively using an 'opt-in' model and with a 'specified body' acting on their behalf, under s.47B of the Competition Act 1998. However, there has only been one body 'specified' for that purpose – the consumer body 'Which?' – and it has only ever brought one claim, which was withdrawn prior to judgment. A fundamental problem in that case was attracting sufficient numbers of claimants to agree to participate. The existing mechanism was therefore widely viewed as not having been successful, hence the need for reform.

Key features of the new collective action regime

Under the Act, the key changes are as follows.

- The mechanism for bringing collective actions has been widened beyond consumers to any group of claimants (including businesses).
- Actions may be brought on either an 'opt out' or an 'opt in' basis. 'Opt out' claims are to apply to UK domiciled claimants only but must be certified as suitable by the CAT before they can proceed.
- The CAT may authorise any person to act as the representative of the proposed class, regardless of whether that person falls within the class of persons to be represented. There is no restriction on trade associations or consumer bodies acting as the representative. The only pre-condition is that the CAT must determine it is 'just and reasonable' for the representative to act. However, there is a presumption that law firms and litigation funders will not be able to act as representatives.
- Contingency fees or damages based agreements in support of 'opt out' claims will be unenforceable. This is intended to prevent the abuse of the collective action regime. Contingency fees or damages based agreements remain permissible for private damages actions brought by individual claimants, and for non-competition specific group and individual claims.
- 'Loser pays' costs rules will continue to apply.
- Any unclaimed damages awarded will go to charity, generally the Access to Justice Foundation, although the CAT can order that they go towards the group representative's legal costs and expenses.

A US class action?

The new 'opt out' aspect of the collective action has attracted some controversy. In particular, many commentators have drawn parallels with US class actions, a hallmark of which is their 'opt out' regime and which, together with jury trials and awards of punitive and treble damages awards, is perceived by some to have developed a litigation culture fuelling unmeritorious claims.

Indeed, anxious to avoid US-style class actions coming to Europe, in 2013 the European Commission issued a non-binding Recommendation on common principles for injunctive compensatory collective redress mechanisms in the Member States (2013/396/EU). That Recommendation proposed that Member States should enact, by 26 July 2015, legislation to facilitate 'opt in' collective actions. Any exception to that principle was to be 'duly justified by reasons of sound administration and justice.'

The Act therefore goes a step further than that advocated by the European Commission and signals the UK Government's intention to promote the UK as a centre for pursuing 'opt out' collective actions. The Government has, however, recognised the need to impose safeguards to avoid frivolous or unmeritorious litigation. As noted above, these include a preliminary merits test and a requirement for the CAT to consider whether the claim should proceed on an 'opt-in' or 'opt-out' basis. Given 'opt out' claims apply to UK domiciled claimants only, this should discourage forum shopping. The Act also introduces a new 'opt-out' collective settlement regime, to allow businesses to settle cases quickly and easily, and there will be no punitive or treble damages (as is the case in the US).

The future

The stage is now set for a significant rise in the level of private competition litigation in the UK, facilitated by the new 'opt-out' regime. The Act signals the Government's clear determination to encourage victims of competition infringements to recover their losses. But it remains to be seen whether this will facilitate legitimate claims or allow opportunistic representatives to pursue matters on behalf of others who have no interest in them.

The CAT will therefore need to play a critical role in policing the process. In particular, its approach to determining the eligibility of collection actions, and approving class representatives, will come under close scrutiny and likely form key battlegrounds in the early stages of the dispute. Time will tell if the Act will open the floodgates to unmeritorious claims. But one thing's for sure, the CAT is about to get a lot busier and businesses need to watch out.

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Introduction to third party litigation funding – Q&A with TheJudge

The idea of third parties funding litigation was once controversial. Indeed, procurement of funding for litigation by another person (maintenance), often in return for a share of the proceeds (champerty), was historically a criminal offence in England.

The origins of that criminality can be traced back to feudal times, when barons and other nobles waged private war on each other to settle their disputes, often trying to intimidate adversaries by procuring or supporting worthless claims. At the time, the position was so bad that Magna Carta (whose 800th anniversary is this year) enacted reforms expressly preventing the sale of any right to justice and placing the Crown under an obligation to guarantee due process of the law.

But it was not until the Criminal Law Act of 1967 that maintenance and champerty ceased to be a criminal offence. The legal landscape has changed a lot since then and, in the last twenty years or so, various permutations of third party litigation funding have evolved, including the introduction of legal aid, Conditional Fee Agreements (CFAs) and, most recently under the Jackson reforms, Damages Based Agreements (DBAs). However, third party litigation funding in its purest form – i.e. from funders otherwise unconnected with the dispute – is now coming to the fore, and it is big business.

In the UK the established third party funders are principally those who are approved members of the Association of Litigation Funders (ALF), and include the likes of Burford Capital, Harbour Litigation Funding and Calunius Capital, amongst others. They generally have access to funds immediately within their control and comply with the ALF Code of Conduct. As a result, their services are in demand and we are seeing an increasing number of clients turning to third party funding as a way of financing claims. Given the options available, parties often engage an independent broker to secure third party funding, and in doing save the time and expense of negotiating with funders direct. We recently discussed some common client questions with James Blick, director at TheJudge, one of the leading brokers in the market:

1. What is third party litigation funding?

Third party funding is an alternative way of financing the cost of litigation. At its simplest, it involves a professional litigation funding organisation that finances a party's legal costs in pursuing a claim, in exchange for which the funder takes a share of any damages or settlement obtained.

In recent years, we have seen third party litigation funding evolve into a recognised, established and competitive business. Investors are attracted to it because of the potential returns offered, which are non-correlated to traditional investment classes. For claimants, it provides a useful (and often essential) alternative litigation funding option, either to enable an impecunious, insolvent or financially distressed claimant to pursue its claim or to level the playing fields between financially unevenly matched parties.

However, this type of funding is not just relevant to those that cannot afford their litigation costs. We are frequently engaged by well-capitalised corporate clients that either have limited litigation budgets, a cautious attitude to litigation risk or are simply looking for ways to keep the cost of litigation off balance sheet.

2. What happens if the funded case is unsuccessful?

This type of litigation funding is often described as 'non-recourse', as the funder's only recourse is against the amount recovered from the opponent. If the case is unsuccessful, the funder loses its investment and receives no return. Furthermore, the funder can never take more than the claimant recovers, so if for example the claimant has a bad day in court, and is awarded a very small amount of damages, the funder cannot seek any payment from the claimant over and above the amount recovered.

In jurisdictions where the losing party in the litigation will be ordered to pay some or all of the legal costs of the winning party, the funding agreement will also often provide for how this is dealt with. For example, the funder may indemnify the claimant for any liability for the defendant's costs if the case is lost. Alternatively, as is common in the UK, the claimant may take out insurance (sometimes known as 'after the event' or ATE insurance) to cover this risk.

3. What type of cases will funders consider?

Litigation funders will potentially consider a wide range of case types. The majority of funders generally focus on commercial disputes, such as breach of contract claims, shareholder disputes, negligence claims against professional advisors, claims arising from corporate insolvency, intellectual property, breach of trust, competition and anti-trust litigation.

Group litigation is also an area that often attracts funders, especially claims involving groups of investors/ shareholders suing financial institutions or European Commission cartel follow-on-damages claims. Although the UK has one of the largest and most developed third party litigation funding markets, there are also established markets in many other jurisdictions, with most funders actively seeking international and cross border funding opportunities, particularly international commercial and investment treaty arbitration.

4. What sort of return are funders looking for?

Financing litigation is a high risk investment. Therefore, across the board, the funder's return on successful cases will need to be sufficient to cover its losses on unsuccessful cases, as well generating a return for investors.

On individual cases, if the funded case wins, the funder will be looking for repayment of its capital investment, plus a success fee to be paid out of the award of damages or settlement sum. The funding success fee may be calculated either as a multiple of the amount invested, or a percentage of the amount recovered by the claimant, or some combination of both. The level of the success fee will typically rise over time as the case progresses, to allow scope for early settlement on reasonable terms, whilst giving the funder a higher return if case takes longer to be resolved. However, there are countless ways of structuring the funder's success fee or return.

It is therefore vital to look at different options and scenarios before agreeing terms, in order to ensure that the funding terms are competitive and that the funding agreement provides for a fair sharing of the proceeds of success in a range of different potential outcomes.

5. What does a litigation funder look for when considering whether or not to fund a case?

Every funder is different and will have its own particular investment criteria, appetite and expertise. However, in general terms, there are several key features that are likely to make a case viable for third party funding:

- **Value**
  The claim must be of sufficient value to enable the funder to obtain a return on investment, whilst leaving the claimant with the majority of the winnings. The majority of the larger mainstream funders focus primarily on higher value cases, which have the potential to generate good returns if successful. However, there is also an emerging market for funding in relation to more modest claims.
- **Economics**
  The claim value is only one half of the equation. Funders will also need to consider the level of investment required to finance the legal costs to the end of the case. As a general rule, cases with a high costs to damages ratio will be easier to fund than those with a low costs to damages ratio, as the latter will allow less margin for the funder to make a return on investment, or risk leaving the claimant with too low a share of the recovery.
- **Merits**
  Funders will only consider cases where there is a good chance of ultimately being successful. Funders will usually wish to review the advice of the claimant's legal team on the strength of the case, in addition to conducting their own due diligence, either using in house legal expertise or seeking external advice.
- **Enforcement**
  Finally, a funder will need to be satisfied that the defendant has sufficient assets to satisfy the judgment and that those assets are in a jurisdiction in which enforcement will be possible. However, some funders do have internal expertise in international enforcement and debt recovery, which may enable them to finance cases which present a challenging enforcement risk.

6. How does third party funding work for collective actions?

Third party funding is commonly used as a means of financing collective actions or group litigation. When financing a collective action, the funder will typically fund the legal costs of the group as a whole, in exchange for a share of the collective recovery of damages or settlement achieved by the group.
This may involve the claimants entering into a costs sharing agreement, under which each claimant benefits from the third party funding, on the basis that a pro rata share of each claimant's damages is used to pay the funder's success fee.

The funder will generally prefer that the group remains as cohesive as possible during the litigation and effectively moves as one on key decisions, such as whether to accept or reject a settlement proposal.
Many collective actions will be managed by a steering committee, made up of elected claimant members or nominees, which is empowered to make certain decisions on behalf of the group as a whole. This avoids the logistical challenges of having to seek instructions from each individual member of the group at every stage in the litigation, meaning that important decisions can be made quickly and effectively in the interests of the group as a whole.

7. Is third party funding regulated?

Third party funding is currently not regulated in the UK However, in 2011 the ALF was established (see above). The ALF is a voluntary association, although its members must abide by the ALF Code of Conduct and comply with certain minimum capital adequacy requirements.

8. Will the funder take over control of the case?

In the UK, it is unlawful for litigation funders to try to control the case, other than in certain very limited circumstances. Furthermore, the ALF Code of Conduct also prohibits its members from taking control of the case or any settlement negotiations. However, as part of the funding agreement, third party funders will typically require the funded party to keep them updated about the progress of the case and significant events or developments. The funder's consent may also be required to certain key decisions, such as the decision to make or reject an offer of settlement.

Litigation funding agreements will also generally contain provisions for the fair resolution of any disagreement between the funder and the funded party, for example by instructing independent counsel to make a determination on the issue. However, such disagreements are very rare in practice, as in the majority of third party funding transactions, the interests of the funder and the claimant are closely aligned.

9. How big is the litigation funding market?

The market for third party litigation funding has grown significantly since its emergence in 2005/2006. Today, there are currently 7 funder members of the ALF, representing the largest and most well-established third party funders in the UK, as well as numerous other funders that are either newer entrants to the market, or have elected not to join the ALF. Some of the larger UK players are now in their second, third or fourth round of fund raising and have hundreds of millions at their disposal. Although there have also been some notable exits from the market, on the whole the industry is continuing to expand, both in terms of the number of funders operating and the amount of capital available.

Internationally, there are third party litigation funders active in the USA, Australia, France, Germany, the Netherlands, Switzerland, Hong Kong, Singapore and Canada, with new funds continually entering the market. The international third party litigation funding market has therefore changed beyond all recognition since its early days. It is now an established, growing and increasingly competitive business in the UK and internationally.

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Crowdfunding litigation

In our article on page 9 we talked about third party funding, which is now big business in the UK. However, because the litigation third party funding market is presently unregulated, parties to litigation are not restricted to the established third party funders – there are other options.

Indeed, a party whose business is not the third party funding of litigation can participate in such funding litigation, but it is not without risk. A Greek shipping magnate discovered this last year when, having lost the case, he was ordered to pay the other party's legal costs up to the amount funded (some £13.75m) on an indemnity basis (*Excalibur Ventures v Texas Keystone & Ors* [2014] EWHC 3436 (Comm)).

Of course, if you are not a Greek shipping magnate you can still provide third party funding, but you might need some financial help from others in order to fund the claim. In an attempt to achieve that aim, the recent phenomenon of crowdfunding has been expanded to the funding of litigation. In the US, firms such as Invest4Justice invite up to 10,000 individuals to invest in cases and their website refers to possible returns of up to 500% in just a few months, on the basis that 95% of legal disputes settle. In November 2014, LexShares (a US legal start up) was launched and it claims to have already crowdfunded a case worth an estimated $40m with an investment of $250,000.

In the UK, CrowdJustice has entered the market as a legal crowdfunder – the first of its kind in this jurisdiction. However, unlike its American counterparts, CrowdJustice encourages the public to make donations, not investments, in cases involving matters of public interest, including challenges to planning applications, nuisance and other NIMBY ('not in my backyard') claims. As such, there is no monetary reward for participants, just the satisfaction of supporting a potentially successful claim from which there may be some resulting common benefit. Any surplus funds are donated to charity, with 5% of all funds paid to CrowdJustice.

So, is crowdfunding litigation a viable model for third party litigation funding and what are the potential pitfalls to consider in the UK, particularly if it is to evolve into a form of investment?

It is early days but already there are some key areas of concern. In particular there remains the risk that funders of unsuccessful claims will be liable for the defendant's costs (unlike in the US). Under the *Arkin* cap (established in the case of *Arkin v Borchard Lines Ltd (Nos 2 and 3)* [2005] 1 WLR 3055) such liability is limited to the amount of funding provided, however this may still be a considerable sum.

Unwary members of the public may not fully appreciate their potential personal costs liability. A costs order to that effect is at the discretion of the court, and the discretion is generally not exercised against 'pure' funders with no personal interest in the litigation and who do not stand to benefit from it. On that basis, it may be arguable that there is less of a risk to donors to public interest claims with no financial reward. However, it is equally arguable that such donors may still benefit from a successful claim, if, for example, it concerns a public interest issue that has a direct impact on the donor. Accordingly, there remains the risk of being found personally liable for the costs of defending a claim. It may be possible to mitigate that risk by obtaining ATE insurance but the premium payable is then a further cost to be crowdfunded. Alternatively, parties may take a view that it will be impractical for a defendant to enforce any costs liability, and they may not be inclined to do so on an individual basis.

To ensure that participants are made aware of this risk, the Financial Conduct Authority (FCA) may take a keen interest in crowdfunding litigation. The FCA has previously considered crowdfunding and in 2014 set out rules in the context of peer-to-peer lending and invest-based funding. Although it did not consider crowdfunding litigation specifically, if it takes off in the UK there may be some pressure from the FCA to ensure that it was appropriately regulated – in particular, by ensuring that the public understood the risks involved, even in the context of donations.

On a practical level, the amount obtained by crowdfunding would obviously need to be sufficient to cover the likely costs involved. If something unexpected happened then more funding may need to be obtained, which, if not available, may stop the action continuing. If the other side knew this they could deliberately adopt an obstructive approach in order to use up the claimant's available funds. The claimant's law firm might be willing to mitigate this by entering into a Conditional Fee Agreement in that eventuality, subject to being satisfied that any success fee would be paid by the funders. Linked to this is the question of the capital adequacy of the 'crowd'. The Association of Litigation Funders abides by a code which includes minimum capital requirements and requirements for members to undergo an annual audit. But this does not apply to the public and there is a risk that further funds may not be forthcoming to continue the claim or to pay any success fee, if successful. Solicitors may therefore be reluctant to agree to crowdfunding.

Finally, care needs to be taken to preserve privilege. Crowdfunders will likely want to know that the claim has a good prospect of success and may want to see the legal advice to support it. However, where there is potential for there to be numerous funders, necessary safeguards need to be in place to preserve confidentiality and to avoid privilege being waived, or the advice falling into the hands of the defendant (whether inadvertently or by design).

In light of the above, crowdfunding litigation may be more suited to the US than to the UK. It presents a number of legal challenges and logistical difficulties here which may prove problematic. It remains to be seen whether this form of funding will flourish or, like our feudal ancestors, be consigned to history. Time will tell.

ParkingEye Limited v Barry Beavis

The case of *ParkingEye Limited v Barry Beavis* [2015] EWCA Civ 402 is a recent example of crowdfunding litigation.

In April 2013 Mr Beavis was given a ticket of £85 for overstaying a two-hour parking limit by 56 minutes. Notices were scattered around the car park stating that failure to comply with the maximum permitted free parking period would attract such a charge. The notices further contained an undertaking that, by using the car park, motorists accepted their liability to pay the charge in the event of overstaying.

ParkingEye was contractually obliged to provide free parking and did not receive regular revenue from the car park, but could keep any charges collected for breach of the parking rules.

Mr Beavis refused to pay the charge and ParkingEye brought a claim against him in the County Court. The case considered two issues: (i) whether the charge was unenforceable at common law (because it was a penalty) and (ii) whether the charge was 'unfair' and so unenforceable under the Unfair Terms in Consumer Contracts Regulations 1999.

The County Court held that the charge was enforceable. This decision was upheld, on appeal to both the Court of Appeal and the Supreme Court.

To meet the case and filing fees of the Supreme Court Mr Beavis used crowdfunding through an online donation page, surpassing his target of £6,000 in 24 hours and ultimately raising £8,500. Mr Beavis' lawyers worked on the case pro bono.

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Group litigation in England and Wales

Readers will likely be familiar with the type of claim known as a 'class action' in the United States – a type of claim which allows multiple (and often large numbers of) claimants to bring a coordinated claim with a combined quantum figure against one or more defendants. Where individual claimants may have claims worth only a few thousand dollars, class actions in the United States are generally worth (or stated as being worth) millions of dollars at the very least, and claims can run into the billions of dollars in value.

Far less well-publicised, however, is the Group Litigation Order ('GLO') utilised in England and Wales. Unlike the US where one lead claimant can commence proceedings on behalf of a class of persons ('opt out'), in England and Wales it is an 'opt in' process; i.e. claimants must specifically provide their consent for claims to be advanced on their behalf. GLOs allow multiple parties (generally individuals) with similar claims to bring their claims under the same set of proceedings against one or more defendants, often leaving defendants facing proceedings with a very significant combined claim for loss or damages. Recent examples of Group Litigation in England and Wales include claims relating to allegedly defective breast implants, issues relating to landfill sites and litigation brought by shareholders in respect of the RBS rights issue in 2008.

Being involved in Group Litigation, however, raises issues in respect of efficient management of the proceedings, trial and keeping costs within reasonable limits. There are also some particular issues to be mindful of when in Group Litigation.

What is a group litigation order?

Pursuant to Civil Procedure Rules (CPR) 19.10 to 19.15, GLOs can be issued by the High Court of England and Wales where claims involve common issues of fact or law. The benefit of managing the claims together is that the determination of these common issues can be applied to all of the claims. The GLO, if granted, will:

- Contain directions about the establishment of a group register on which the claims to be managed will be entered;
- Specify GLO issues of fact or law that will identify the GLO claims; and
- Specify the court (the 'management court') which will manage the claims on the Group register.

The GLO will also set a deadline by which any new claims must be added (or else they cannot be added to the Group Litigation). In practice, this will generally lead to claimant law firms seeking to advertise and find as many additional claims to add to the proceedings as possible before the deadline expires.

The GLO may also give directions in relation to costs – often costs must be divided between common costs (which are shared across each claimant) and claimant specific costs.

Case management and trial

The Group Litigation will be managed via regular Case Management Conferences in front of the managing judge or master. The judge or master will, as in other claims, give directions for the service of pleadings (which may include (i) generic pleadings in respect of the general background and issues of fact and law, and (ii) claimant specific pleadings in respect of each individual claimant's position), disclosure, witness statements, expert evidence and trial.

One key difference, however, is that with a significant number of claimants, it is impossible for each of those claims to be heard at trial. As such, in Group Litigation, the parties will generally agree on a limited number of 'test' or 'lead' cases which are representative of the overall group of claims and which will be heard at trial in order to determine the GLO issues of fact or law. These can then be applied to the remaining untried claims on the basis that these issues are common between all claims, thereby reducing the cost of dealing with all of the claims as a whole.

Potential issues

There are, however, a number of potential pitfalls with Group Litigation that law firms and their clients should be mindful of:

- From the claimants' perspective, where there is more than one firm acting for the claimants, the respective solicitors must coordinate with each other and consider setting up a solicitors' group led by one firm. The relationship between members of this group should be set out in writing as there is no guidance in the Civil Procedure Rules/Practice Directions;
- Where there are multiple defendants, it may be more difficult to coordinate with co-defendants as there may not necessarily be a common interest. Defendants should nonetheless make an effort to coordinate where possible (e.g. in respect of counsels' submissions at trial, to ensure that multiple counsel do not make the same points where it is not necessary);
- Costs can easily spiral when there are multiple parties involved (as opposed to just one claimant firm and one defendant firm), as there can often be correspondence exchanged or applications made raising issues which do not apply to all of the parties, but which all of the parties must consider and deal with in response. There are also multiple sets of pleadings, disclosure and other procedural documentation which will increase costs generally.

Conclusions

In the not too distant past it was always difficult under the English and Welsh system to shepherd together a critical mass of claimants with similar complaints and, even if you could find them, the prospect of the claimants exposing themselves individually to the costs of the other side if the claims failed were particularly unappealing (especially if the individual claims were relatively small).

However, the advent of the Internet and, in particular, social media makes it much easier to find, locate and engage with the individuals, and the increasing availability of litigation funding (coupled with ATE insurance) has led to an increase in this format of litigation. There are potentially huge rewards for funders and claimant law firms on offer. This format of litigation will therefore grow in popularity as claimant law firms become more adept and comfortable with it and it is an area that General Counsel should keep a close eye on.

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Current trends in pensions litigation

The legal requirement to provide equal pension ages for men and women under occupational pension schemes was established by the European Court in 1990 in the seminal *Barber* case. However, the requirements for implementation of equalisation were poorly understood by advisors for many years thereafter. As a result, companies who thought they had equalised their pension schemes often hadn't. The consequences of failing to equalise properly could be financially catastrophic.

Equalisation – 25 years later and it's all done and dusted … or is it?

Whilst most professional negligence cases don't make it to court, it has been common knowledge that throughout the nineties and into the noughties there was a steady stream of claims being brought and settled. Many of them will have followed hot on the heels of an application to the court to determine whether or not a scheme had been properly equalised. If the scheme had not been properly equalised, then a negligence claim against one or more of the advisors would invariably follow.

There is reason to believe that these claims may be becoming less common. The Limitation Act 1980 imposes a longstop of 15 years since the relevant negligent act or omission on negligence claims. Given that most pension schemes dealt with equalisation in the mid to late 90s we are already past this limitation period, although claimants might still seek to get around limitation issues in a variety of ways. For example, they may claim a continuing duty of care on the part of the original advisor, or in some cases seek to extend the longstop date as a result of concealment of the claim by the defendant.

If the circumstances are right, the claimant can even argue that by failing to advise the claimant, for example, in 2006, that it had a claim for something that was wrongly done in the mid-90s, the advisor is also responsible for the claimant's 'loss of opportunity' to claim for that earlier loss. In theory, that would allow for a 30 year 'lookback' … so the claims may not be finished just yet.

…and the skeleton in the closet

Despite more than a quarter of a century of equalisation, there remains one benefit that is unequal in most UK final salary pension schemes. The Guaranteed Minimum Pension (GMP) is provided under contracted-out schemes as an alternative to the state second pension (formerly SERPS). GMPs are inherently unequal because they reflect unequal state pension ages. The government has opined that, whilst pension schemes cannot equalise GMPs, they must equalise 'for the effect' of GMPs, the effect being to make the overall scheme pension for a male different to a female.

How to equalise GMPs is unclear – the government has suggested one method but it happens to be the most expensive of a number of possible alternatives and has not been widely adopted. The risk of claims is out there for schemes which have paid out benefits that have not been equalised for the effect of GMPs or have purported to equalise but have done so on a basis that turns out to be invalid. Where schemes have completely wound up, trustees might be exposed or may look to run-off insurers where the equalisation risk has not been excluded from cover.

New kids on the block

Whilst we have been wrestling with equalisation issues for two decades, two new issues have surfaced relating to scheme closures and inflation protection of pensions.

There may be trouble ahead…

Over the last 15 years or so, final salary pension schemes have been hit by a triple whammy of falling investment returns, low interest rates and rising life expectancies which have combined to send the majority of schemes significantly into deficit. In response, many schemes have been closed to future accrual of benefits or switched to a less generous accrual basis. IBM recently tried to take such an approach in *Project Waltz* and the High Court declared it to be unlawful.

In his extraordinarily long judgment, the judge reasoned that, over the years, IBM had acted in relation to its pension scheme in a way that gave its employees a 'reasonable expectation' that no more adverse changes would be necessary. Without an adequate reason, IBM could not now disappoint those expectations without breaching its duty of good faith to its employees. The judge was also unimpressed with the manner in which IBM had carried out its consultation, which the judge said was neither open nor transparent.

Whilst the IBM case very much turned on its own facts, there will doubtless be pension scheme trustees and unions out there poring over their own schemes' histories, asking themselves whether they could be in IBM territory and whether their own closures or reductions in accrual might have to be re-visited.

RPI v CPI

In 2010 the government announced that the measure of inflation for determining the statutory minimum level of inflation-proofing of pensions would move to the Consumer Prices Index (CPI) instead of the Retail Price Index (RPI). CPI typically runs at around 1% less (per annum) than RPI although it is expected that, over time, the gap will widen. To put the significance of this change into context if 1% doesn't sound like very much, BT thought that this would knock around £3 billion off its scheme liabilities.

Pension scheme rules mostly contain their own provisions for inflation-proofing of pensions and for many schemes it does not automatically follow that a lowering of the statutory minimum will result in a lowering of the benefits under that particular scheme. There have been two recent court cases (*Arcadia* and *Qinetiq*) in which schemes have been allowed to adopt CPI as the relevant measure of inflation rather than RPI. If the gap between the two indices does widen, as expected, further cases may follow as employers seek to control the costs of the pension liabilities.

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The Brussels Regulation (recast)

The Brussels Regulation 44/2001 was, for many years, the key EU instrument on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. An empirical study carried out on the application of the Regulation in Member States in 2004/2005 recognised that although the Regulation was generally considered to be a success, applying it gave rise to some practical problems.[1]

Following a lengthy review process, Regulation 1215/2012 (the 'Regulation (recast)') was adopted by the European Council in December 2012 and came into effect on 10 January 2015; it applies to proceedings instituted on or after that date. Although the basic rules remain the same (for a refresher on these, please see the text box below), the Regulation (recast) introduced several key changes. This article provides a summary of those changes, along with an update on the cases in which the Regulation (recast) has been applied.[2]

The Default Rule
The default rule, which provides that a person should be sued in the Member State in which they are domiciled (Article 4), remains the same.

Alternative Jurisdiction Grounds
The following alternative grounds to found jurisdiction also remain largely unchanged:

— **In matters relating to a contract:** in the Member State courts for the place of performance of the obligation in question (Article 7(1)(a)) or if the action may be combined with an action against the same defendant in matters relating to rights *in rem* in immovable property, in the court of the Member State in which the property is situated (Article 8(4));

— **In matters relating to tort:** in the Member State courts where the harmful event occurred or may occur (Article 7(2));

— **In closely connected claims:** all defendants to the claims may be sued in one Member State where any one of them is domiciled (Article 8(1));

— **As a third party:** in an action on a warranty or guarantee or in any other third-party proceedings, in the court seised of the original proceedings (Article 8(2));

— **On a counter-claim** arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending (Article 8(3)).

Exclusive Jurisdiction
As with the old Regulation, the following courts continue to have exclusive jurisdiction, irrespective of the parties' domicile and/or choice of court agreements (Article 24):

— **The courts of the Member State in which property is situated:** in proceedings relating to rights *in rem* in immovable property or tenancies of immovable property;

— **The courts of the Member State in which the company, legal person or association has its seat: in proceedings relating to:** (a) the validity of the constitution, (b) the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or (c) the validity of the decisions of their organs;

— **The courts of the Member State in which a register is kept:** in proceedings relating to the validity of entries in public registers;

— **The courts of the Member State in which a deposit or registration has been applied for, has taken place or is deemed to have taken place:** in proceedings concerned with the registration or validity of patents, trade-marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence;

— **The courts of the Member State:** in proceedings concerned with the registration or validity of any European patent granted for that Member State;

— **The courts of the Member State:** in which the judgment has been or is to be enforced.

Jurisdiction Agreements

As with the old Regulation, the Regulation (recast) gives parties autonomy to agree that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen between them (Article 25). The agreement is deemed to provide the chosen court with exclusive jurisdiction, unless otherwise stated. The Regulation (recast) also now provides that this freedom of choice applies to all parties, *regardless of their domicile*. So even where non-EU domiciled parties have entered into a jurisdiction agreement conferring jurisdiction on a Member State court, all Member State courts will be required to honour that choice.

The Regulation (recast) also clarifies that questions about the validity of the jurisdiction agreement should be decided in accordance with the law of the Member State of the court designated in the agreement.[3]

Court First Seised Rule

Enforcement of the parties' choice has been further reinforced by changes to the court first seised rule. Under the old Regulation, the court first seised rule required any Member State court other than the court first seised to stay the proceedings until the jurisdiction of the court first seised was established. Although the rule was meant to avoid parallel proceedings and conflicting judgments, it had been open to abuse, particularly where the parties had entered into a jurisdiction agreement.

Under the old Regulation, if the parties had given jurisdiction to a particular Member State court to settle their disputes, and one party commenced proceedings in another Member State court in breach of that agreement, the former court had to stay the proceedings pending the decision of the latter. This gave rise to a tactical approach regularly adopted by parties wishing to delay proceedings or increase costs (applying pressure on their opponent) by commencing proceedings in jurisdictions where the court system was known to be slow-moving. The manoeuvre earned itself the nickname 'Italian torpedo' – based on the belief that Italian courts are notoriously slow-moving – and has been a source of frustration for non-offending parties who simply wish to resolve disputes in the agreed jurisdiction.

While the court first seised rule remains in the Regulation (recast) (Article 29), it is now subject to the rule that where there is an exclusive jurisdiction agreement in place, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction (Article 31(2)). In other words, the tactical advantage of the court first seised rule has been removed.

In addition, if the court designated under the agreement establishes that it has jurisdiction, all other Member State courts must decline jurisdiction in favour of that court (Article 31(3)).

Existing Proceedings in a Non-Member State

The Regulation (recast) has also addressed the widely publicised decision in the case of *Owusu*.[4] Following *Owusu*, a Member State court seised of jurisdiction under the old Regulation could not decline jurisdiction in favour of a non-Member State court, even if the non-Member State court was a more appropriate forum to hear the case.

Articles 33 and 34 of the Regulation (recast) (read in conjunction with Recital 24) give a Member State court discretion to stay proceedings where there are:

- proceedings involving the **same parties and the same cause of action in a non-Member State**, provided: (a) it is expected that the judgment of the non-Member State will be capable of recognition and enforcement in that Member State; and (b) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice; or
- proceedings involving a **related cause of action in a non-Member State**, provided: (a) it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings; (b) it is expected that the judgment of the non-Member State will be capable of recognition and enforcement in that Member State; and (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.

The courts of a Member State may also dismiss the proceedings if the proceedings in the court of the non-Member State are concluded and have resulted in a judgment capable of recognition and (where applicable) enforcement in that Member State.

[1] Study on the Application of the Brussels I Regulation in the Member States was carried out by the Institute for Private International Law at the University of Heidelberg under the direction of Prof. Dr. Burkhard Hess, Prof. Dr. Thomas Pfeiffer (both Heidelberg) and Prof. Dr. Peter Schlosser (Munich) (Study JLS/C4/2005/03).

[2] This article does not address the specialist provisions relating to insurance, consumer and employment contracts.

[3] See Article 25 and Recital 20.

[4] *Owusu v Jackson* [2005] EUECJ C-281/02.

The Arbitration Exclusion

Arbitration was specifically excluded from the scope of the old Regulation, a decision which has been the subject of much debate. The exclusion was highlighted in the *West Tankers*[5] decision where it was held that a Member State court could not prevent a party to an arbitration agreement from commencing court proceedings in another Member State court, even where that would be in breach of the arbitration agreement.

Arbitration is still excluded from the scope of the Regulation (recast) and no changes have been made to the wording of the exclusion. However, two changes have been made in the Regulation (recast) to strengthen support for the parties' choice of arbitration. These are:

- **Recital 12:** a new Recital inserted in the Regulation (recast) to clarify the scope of the arbitration exclusion as follows:
  - The Regulation does not prevent the court of a Member State from referring parties to arbitration, staying or dismissing proceedings, or from examining whether an arbitration agreement is null and void, inoperative or incapable of being performed in accordance with their national law.
  - The Regulation does not apply to any matters concerning the arbitration proceedings or to any arbitral award.
  - Any ruling relating to whether an arbitration agreement is null and void, inoperative or incapable of being performed is not subject to the recognition and enforcement rules in the recast Regulation.
- **Precedence of New York Convention:** Article 73(2) of the Regulation (recast) states that the Regulation shall not affect the application of the New York Convention. This is a key change as it gives Member State courts the ability to recognise and enforce arbitral awards without having to take into account the rules imposed by the Regulation (recast). It is expected that this will deter parties from bringing proceedings in breach of arbitration agreements as in doing so, they will face the risk of an arbitral award that takes precedence over judgments of an EU Member State court.

Recognition and Enforcement of Judgments

The Regulation (recast) also aims to simplify the procedure for seeking recognition and enforcement of judgments in all Member State courts. A key change is the removal of the need to obtain a declaration of enforceability from the Member State court which granted the judgment (Article 39).

Missed opportunities

Whilst the Regulation (recast) seeks to address the problems created by the old Regulation there are still areas of concern. For example, it is expected that the test for Member State courts to stay their proceedings in favour of a non-Member State court may be interpreted differently by each Member State and lead to lengthy debates and possible satellite litigation. In addition, the lack of provisions requiring Member State courts to stay proceedings in favour of arbitration where there is a valid arbitration agreement is a missed opportunity.

Subsequent Developments since January 2015

The Hague Convention on Choice of Court Agreements

When the Regulation (recast) came into force, a perceived missed opportunity was the position (or rather, further lack of uniform position) in relation to jurisdiction agreements conferring jurisdiction on a non-Member State court. The EU's agreement to ratify the Hague Convention on Choice of Court Agreements was considered to be the answer. This Convention was 'designed to offer greater legal certainty and predictability for parties involved in business-to-business agreements and international litigation by creating an optional worldwide judicial dispute resolution mechanism alternative to the existing arbitration system'.[6] Unfortunately given that as at January 2015, Mexico was the sole ratifying country, this was considered to be a less than ideal solution.

However, the Convention finally came into effect on 1 October 2015 with the Latvian presidency of the EU depositing an instrument of ratification on behalf of 28 EU Member States. The United States and Singapore have also signed the Convention although both are yet to ratify it. Although not there yet, the long term objective of the Convention is to create an international legal regime governing the recognition and enforcement of foreign judgments in civil or commercial matters (similar to that established for arbitration agreements by the New York Convention).

[5] *Allianz SpA v West Tankers Inc* [2009] EUECJ C-185/07.

[6] Proposal for a Council Decision on the Approval, on Behalf of the European Union, of the Hague Convention of 30 June 20015 on Choice of Court Agreements, European Commission (30 January, 2014).

Obiter comment on Article 34

Re Zavarco plc[7] concerned a jurisdictional dispute. Proceedings were commenced in the English courts by the claimant when proceedings were already on foot (brought by the company Zavarco) in the Malaysian High Court. The company sought to have the English proceedings stayed on the ground of *lis alibi pendens* and/or *forum non conveniens.*

The Court ruled that it had jurisdiction over the English court proceedings under Article 24 of the Regulations (recast). However, the Judge also considered, obiter, whether the English court actions should be stayed under Article 34(1). The following judicial comment regarding the purpose of Article 34 is therefore of some interest: '[t]he clear purpose of Article 34 is to liberate the court from the constraint imposed by the Regulation in earlier versions, exemplified in *Owusu*, as regards stay in favour of the courts of non-Member States. It is therefore concerned only to lay down the conditions which must be cumulatively satisfied before such a stay can be ordered, not to dictate the circumstances in which once those conditions are satisfied the action should be stayed. That second stage is left to the discretion of the national court ('*the court may stay the proceedings*'). There may therefore – if perhaps rarely – be factors which the court can take into account which are not necessarily included in those to be considered, even as part of '*all the circumstances of the case before it*', in evaluating what '*the proper administration of justice*' requires.'

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[7][2015] EWHC 1898 (Ch).

Shareholder disputes – some key practical points

Shareholder disputes can damage shareholder value, never more so than in a private company where some or all of the shareholders are also directors. Where a shareholder considers that his interests are being unfairly prejudiced, he may apply to the court for relief, including the purchase of his shares by the other shareholders, in terms of the Companies Act 2006. Summarised below are 5 key issues that we have seen arise in the context of such disputes in the last 12 months.

1. Quasi-Partnership

If the features of a quasi-partnership[1] are present in the relationship between shareholders, it is easier to establish unfair prejudice. Acts or omissions that are inconsistent with the parties' relationship or the understandings between them may constitute unfairly prejudicial conduct even where permitted (or required) by the Articles of Association or other constitutional documents of the company.

At an early stage in any dispute, consideration should be given to the circumstances surrounding the incorporation of a private company, particularly one formed following a management buy-out and the extent to which either party might be able to argue that incorporation of the company engages arguments about quasi-partnership.

2. Corporate Group

Some corporate groups have a fairly disparate structure, with subsidiaries being under the control of only part of the board of the parent company. However, action or inaction on the part of the directors of a subsidiary can still found the basis for a claim that the affairs of the parent are being conducted in a manner which is unfairly prejudicial to the interests of a shareholder of the parent.

Difficulties can also arise when directors of the parent company are involved in a separate group of companies which is closely affiliated to, and trades with, the parent company and its subsidiaries. There is inherent potential for conflict where two groups with common directors trade with each other. Those directors should consider the extent to which their decisions and actions in relation to one group of companies could result in unfair prejudice to the shareholders of the other and how conflicts are formally recorded.

3. Audit Considerations

Directors must tread very carefully when there are issues arising in the context of an audit. Any interference with the progress of an audit or dispute with the auditors will likely be difficult to justify and, as a result of S994(1A) of the Companies Act 2006, the removal of the company's auditor will in most circumstances automatically be treated as unfair prejudice.

4. Misconduct

Even where unfair prejudice is made out, there are equitable constraints on the court's power to grant a remedy. The court will have to take into account any misconduct on the part of the complaining shareholder where it closely relates to his entitlement to relief. This could have a significant impact on the type of remedy the court is prepared to grant or could result in the court refusing to grant a remedy altogether.

[1]In the case of *Re Westbourne Galleries Ltd* [1973] AC 360, Lord Wilberforce described a quasi-partnership as typically involving one or more of the following elements: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence; (ii) an agreement or understanding that all or some of the shareholders are to participate in the conduct of the business; and (iii) restrictions on share transfers.

The court also has a responsibility to ensure that it is not unjustly enriching any party, including the complaining shareholder. In short, the shareholder should not be put in a better financial position than it would have been in had there been no unfair prejudice.

An example of how these two equitable principles might operate in practice is where a shareholder, who was also a director, claims that the manner of his dismissal on the grounds of gross misconduct was unfairly prejudicial. There may be provisions in the Articles of Association of the Company which allow his shares to be sold at par or reduced value when his employment is terminated in these circumstances. The shareholder/director should not be able to use proceedings under section 994 to escape or surmount the consequences of these provisions.

On a related note, there is also a question of whether, and if so to what extent, the complaining shareholders' misconduct (or indeed, the dysfunction of the Board of Directors) should be factored into the valuation of the company for the purposes of a section 994 application.

5. Those Entitled to Relief

Relief under section 996 of the Companies Act 2006 may only be sought by the shareholder who has made the application for relief to the court. Therefore, if a shareholder finds himself on the receiving end of such an application but feels that he too has suffered unfair prejudice, it is not enough to set this out in any 'Answers' lodged with the Court. He must take the additional step of making his own application under section 994 (known as a 'cross-petition').

In shareholder disputes where director misconduct is an issue, consideration should be given to the fact that, beyond disposal by the court, factual enquiries may raise issues about whether the company could or should sue its directors, an issue considered by the Supreme Court recently in *Jetivia v Bilta* [2015] UKSC 23.

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Dispute boards

Dispute boards in construction and engineering projects have been around for some time. They originated in the United States in the 1960's and 1970's and nowadays are common in many large international infrastructure projects, particularly those funded by the World Bank or the European Investment Bank. Those contracts based on FIDIC standard conditions (an internationally recognised standard form contract for the construction sector) will usually have some form of dispute board within the dispute resolution provisions.

The aim of a board is to deal with issues as they arise throughout a contract's life such that formal disputes are avoided.

What is a Dispute Board?

- It is three individuals, appointed by the parties, who are independent from the parties and the project.
- Parties agree as part of their dispute resolution procedure in their contract to establish a dispute board. It is a creature of contract.
- The board may be appointed at the beginning of the project – when there are no disputes – and will follow the project through to conclusion dealing with issues that arise between the parties, including disputes, along the way.
- Of the board, a member is appointed by each party and these two members will appoint a chair. The members will have technical knowledge and expertise in the sector. The chair is often a senior lawyer experienced in the field.
- Each member signs a dispute board agreement which sets out his or her duties; fees; and deals with procedure and conflicts.
- Boards are, in some contracts, only established when or if a dispute arises – these are known as *ad hoc* boards – as opposed to the standing ones identified above.

What does the Board do?

Its procedure is regulated by the contract that sets it up. In general terms it visits the site 2 to 3 times a year. It receives minutes of meetings so it is up to date with progress and any issues on site. At each site visit (which usually has a set agenda) the board hears whether there are issues on the project such as delay or defects which might, if not dealt with, lead to a formal dispute. A board can, with the agreement of both parties, make informal recommendations. In many of the standard form contracts, any dispute which arises **must** first go to the board for its determination or recommendation. If a party is not satisfied with that determination it will have a set number of days to issue a notice of dissatisfaction and go to arbitration.

There are two main types of dispute board – DAB's and DRB's. A Dispute Adjudication Board (DAB) issues determinations on any disputes referred to it. Such a determination will be interim binding and finally binding unless a party issues a notice of dissatisfaction within a set number of days and then proceeds to arbitration. A Dispute Review Board (DRB) is only empowered to issue a recommendation. Some countries prefer a recommendation – because it is thought desirable in certain fields and countries to keep implementation of any findings within the control of the parties. This varies from country to country.

The rules and procedure of dispute boards are set out in detail or by reference within the contract. As well as FIDIC having such rules, ICC and the Chartered Institute of Arbitrators publish rules which can be incorporated by parties by reference within the contract or by later agreement. These allow parties to choose whether to opt for a DAB or DRB.

The use of dispute boards is growing at around 15% per year. Additionally, the Dispute Resolution Board Foundation reported that from a pool of over 1200 projects since 1975, 60% of projects with a dispute board had no disputes and 98% of disputes referred to a dispute board resulted in no subsequent arbitration or litigation.

Whilst they have been employed in some UK projects including the Docklands Light Railway, the Channel Tunnel, the second Forth Bridge in Scotland, and a number of contracts for the delivery of the London Olympics, they are rarely used domestically – although that may be changing.

What does it cost and who pays?

Clearly the cost implications of a dispute board are a consideration when forming a view as to whether it is appropriate for a project. Dispute boards come with a cost given that they consist of a board of professionals which is in place for what is sometimes a significant period of time. The overall costs of the project, the desire (or necessity) to avoid disputes and the risk that disputes will occur are important factors when determining whether a dispute board is appropriate.

Who pays will be set out in the contract. It is usually met 50:50 initially with the client/employer footing the bill at the end of the project. Some of the boards are paid an annual retainer for the duration of the contract and a daily rate for visiting the site and dealing with disputes. Others simply charge for the time spent on the project. The overall cost of boards, including the costs of dealing with disputes, is often estimated to be no more than 1% of the contract value. Experience suggests it can be significantly less than this.

Parties may feel this is a small price to pay to try to avoid disputes.

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Multi-party claims in investment arbitrations: the state of play

Foreign investors increasingly rely on investment protections offered by bilateral or multilateral investment agreements concluded by States. When foreign investors suffer losses as a result of a host State's unlawful acts or omissions, these treaties typically entitle such foreign investors to invoke investor-State arbitration in an effort to recoup their losses under international law.

Around 3,000 bilateral investment treaties (BITs) are currently in place, with dozens added each year. There are also a number of regional or sectorial multilateral investment treaties, the most frequently invoked ones being the North American Free Trade Agreement (NAFTA) and the Energy Charter Treaty (ECT). Almost all of them offer arbitral remedies to foreign investors. More than half of the countries in the world have been involved in investor-State disputes submitted to arbitration through investment treaties and the number of investor-State disputes is on the rise. Whilst generally the wording of the BITs differ, including in relation to the State's offer to arbitrate, prior arbitral decisions can provide helpful guidance in respect of the investors' ability to bring multi-party claims. This article reviews arbitral practice in some of the most common scenarios in which multi-party claims arise in the context of investment arbitration.

State parties can be confronted with multi-party claims as the host State's standing offer to arbitrate set forth in an investment treaty is directed to an undefined number of potentially qualifying investors. Multi-party arbitration is a generally accepted arbitral practice. Arbitral practice[1] confirms that the institution of multi-party proceedings does not require any consent on the part of the host State beyond the general requirements of consent to arbitration. However, as explained below, investors considering bringing multi-party claims in investment arbitration should be aware that there are as yet unsettled issues as well as limitations when it comes to their ability to bring such claims in a single proceeding.

Foreign investors affected by the same measure often consider whether they can band together and bring multi-party claims in a single arbitration against a host State under the same or multiple BITs. The ability of investors to bring multi-party claims can be examined in a number of different investment scenarios discussed in this article. As the nationality of the investors involved may bring into play more than one BIT, a distinction can be made between situations where claims are brought under the same BIT or through multiple BITs.

Multi-party claims by investors of the same nationality under the same BIT

International investments can give rise to different scenarios in which multiple investors having the same nationality may consider bringing multi-party claims under the same BIT. Most BITs protect a broad range of investments encompassing all assets. The nature of certain investments such as sovereign bonds necessarily involves multiple investors, which may be equally affected by the same measure taken by the host State. Similarly, the same regulatory measure of a host State may adversely affect an entire sector or industry. For example, in recent years a number of European

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[1] *Ambiente Ufficio SPA and others v Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013, para. 141; *Guaracachi America Inc and Rurelec PLC v Bolivia* (PCA Case No. 2011-17), Award, 31 January 2014, para. 343 (see www.worldbank.org/icsid).

countries altered their regulatory framework concerning renewable energy by scaling back subsidies and other incentives. In response, industry players covered by BITs or the ECT initiated a large number of investment arbitrations, including in some cases multi-party claims.[2]

Shareholder investors in the same company

Individual shareholders sharing the same nationality and investing in the same company are typically entitled to bring multi-party claims against the same host State under the same BIT. There is no requirement for the shareholders to be affiliated. This scenario has not raised any particular difficulties in arbitral practice.[3]

Unrelated investors with related claims

Several arbitral decisions confirm the ability of unrelated claimants to bring a multi-party claim arising out of the same events or circumstances occurring within the host State. In *Funnekotter and others v Zimbabwe*,[4] 14 unaffiliated Dutch investors holding investments in different farms in Zimbabwe jointly brought a claim against Zimbabwe contending that its land acquisition programme was in breach of the Netherlands-Zimbabwe BIT.

As the Respondent did not raise any jurisdictional objections, the Tribunal actively examined and confirmed its jurisdiction. More recently, the majority in the *Abaclat and others v Argentine Republic*[5] and *Ambiente Ufficio SPA and others v Argentine Republic* tribunals[6] permitted 60,000 and 90 Italian bondholders respectively that were affected by Argentina's sovereign debt default to bring joint claims against Argentina in the same arbitration. In both cases the majority noted that variations in the contractual relationship between the claimants and the host State were irrelevant for the rights and obligations deriving from the investment, as such rights and obligations are based on the BIT.

In upholding its jurisdiction, the *Abaclat* tribunal applied the following homogeneity test in relation to the investment and the related treaty rights and obligations: '*whether Claimants have homogeneous rights of compensation for a homogeneous damage caused to them by potential homogeneous breaches by [the host State] of homogeneous obligations provided for in the BIT.*'[7] The majority found that the bondholders' treaty claims were sufficiently homogenous on the basis that: (i) the rights deriving from the investments and the corresponding protection obligations of the host State were the same with regard to all claimants to the extent that they derived from the same BIT and the same treaty provisions; (ii) the events leading to the alleged BIT violations were the same in respect of all claimants; and (iii) the invoked legislation and measures undertaken by the host State affected the claimants in the same way. Similarly, the majority in *Ambiente* found that a necessary link existed among the 90 claimants as (i) they complained about the same illegality; (ii) their claims were based on the same treaty provisions; (iii) they sought identical relief; and (iv) the factual background on the basis of which they sought to establish their treaty claims was virtually the same for all the claimants.

Unrelated investors with unrelated claims

A recent unpublished decision of an UNCITRAL tribunal confirmed that multi-party claims cannot be brought by multiple claimants when there is no link either between the claims or between the claimants. In *Erhas Dis Ticaret et al v Turkmenistan*,[8] 22 Turkish investors in 31 different projects in Turkmenistan jointly referred their unrelated claims to an UNCITRAL tribunal. The tribunal declined to hear the case, noting that the host State's open-ended consent to arbitration in the same BIT does not mean that entirely unrelated claims made by unrelated claimants over a variety of investments can be jointly adjudicated in the same arbitration.

Multi-party claims under multiple BITs or multilateral investment agreements

Multilateral investment agreements, such as the ECT, seem to be better equipped, through their multilateral nature, to accommodate multi-party claims by investors having different nationalities. In 2011 a consortium of 14 strategic photovoltaic investors, known as the PV Investors, brought a collective action against Spain under the ECT.[9] The tribunal in that case is still considering Spain's objections on jurisdiction and admissibility. As the investors hold investments in different photovoltaic projects, it remains to be seen whether the tribunal will uphold jurisdiction and if so whether it will be guided by the existing decisions with respect to BITs. Indeed, as discussed below, several arbitral decisions confirm the circumstances in which multi-party claims can be brought by investors of different nationalities under different BITs.

[2]For example, *Stadtwerke München GmbH, RWE Innogy GmbH, and others v. Kingdom of Spain* (ICSID Case No. ARB/15/1); see also http://globalarbitrationreview.com/news/article/34094/spain-faces-20th-renewable-energy-claim-icsid/

[3]See *Goetz v Burundi* (ICSID Case No. ARB/95/3), involving a BIT claim of six individual Belgian shareholders in a Burundian company, and *Urbaser et al. v Argentina* (ICSID Case No. ARB/07/26) involving a BIT claim of two Spanish shareholders in an Argentine company.

[4]*Funnekotter v Zimbabwe* (ICSID Case No. ARB/05/6).

[5]*Abaclat and others v Argentine Republic* (ICSID Case No. ARB/07/5), Decision on Jurisdiction and Admissibility, 4 August 2011.

[6]*Ambiente Ufficio SPA and others v Argentine Republic* (ICSID Case No. ARB/08/9), Decision on Jurisdiction and Admissibility, 8 February 2013.

[7]*Abaclat* Decision, para. 541.

[8]*Erhas Dis Ticaret et al v Turkmenistan*, UNCITRAL, Award, 8 June 2015, reported in the Global Arbitration Review on 24 June 2015 at http://globalarbitrationreview.com/news/article/33916/turkmenistan-sees-off-group-claim/.

[9]*The PV Investors v. Spain*, UNCITRAL, pending.

Investors from the same corporate group

Many BITs allow investors to make claims for directly or indirectly held investments. Investors at various levels of the corporate chain may be party to, or may be protected by, different investment instruments, each of which may contain a right to bring an investment arbitration claim. In *Noble Energy v Ecuador*,[10] the US shareholder and its local subsidiary brought claims under a BIT and two investment agreements which contained an arbitration clause providing for recourse to the World Bank's International Centre for Settlement of Investment Disputes (ICSID). Ecuador argued that it had not consented to consolidate claims brought under three different instruments in one proceeding. The Tribunal upheld its jurisdiction on the basis that there was '*an obvious interdependence between the different disputes…. They stem from the same facts, the same overall economic transaction, and the same measures. Moreover, the measures complained of and the relief sought under the different instruments offer significant similarities*.'[11] Although *Noble Energy* did not involve two different BITs, its test of sufficient connection between the claims was applied recently in *Guaracachi v Bolivia*.[12] Rurelec, a UK company, indirectly owned Guaracachi, a US company, and together the two companies owned a majority stake in Empresa Electrica Guaracachi SA, which they maintained had been nationalised by Bolivia. Bolivia argued that it had not consented to the joint hearing of the claims brought under two different BITs in a single proceeding. The Tribunal found that in the absence of an express restriction in the UK-Bolivia and US-Bolivia BITs the claimants were not prevented from bringing their claims in a single proceeding. In upholding its jurisdiction, the Tribunal noted that there was an '*obvious link between both Claimants and the identity of the facts alleged*'.[13]

Shareholder investors in the same company

The same investment operation was at issue in the cases of *Sempra v Argentina*[14] and *Camuzzi v Argentina*.[15] Sempra, a US company, owned 43 per cent, and Camuzzi, a Luxembourg company, owned 57 per cent of two local gas distribution companies. Whilst the claimants commenced separate arbitrations under the BITs between the US and Argentina and the Belgo-Luxembourg Economic Unit and Argentina, respectively, the same Tribunal was appointed and the case was effectively consolidated for all hearings. Unless otherwise provided in an applicable BIT, nothing prevents multiple shareholders holding investments in the same company from bringing joint claims against a host State under different BITs. As with multi-party arbitrations brought under the same BIT, there is no requirement that the shareholder investors be affiliated.

Unrelated investors with related claims

Arbitral practice confirms that unrelated investors having different nationalities can jointly bring claims related to the same investment. In *Oko Pankki Oyj et al. v Estonia*,[16] a German bank and two Finnish banks, all of them lenders under a loan agreement, brought joint claims under different BITs. Whilst the investors were unrelated, the case concerned one and the same investment operation.

Unrelated investors with unrelated claims

In May 2013, 10 foreign investors of different nationalities filed a joint request for arbitration against the Czech Republic in relation to their unrelated investments in the photovoltaic sector, which were allegedly affected by the same measures. The claimants relied on different BITs as well as the ECT. The Czech Republic objected to the attempted consolidation of the claims and appointed different arbitrators, indicating that it would only agree to the consolidation if the claimants were affiliates or if they had allegedly invested in the same operation. Eventually, six different tribunals were formed and the cases proceeded separately. This example highlights the difficulties that industry players face when they attempt to rely on different BITs in bringing joint claims without the host State's consent. As mentioned above, it remains to be seen how similar jurisdictional objections will fare when the multi-party claims are brought in a single arbitration under one multilateral instrument, such as the ECT.

Conclusion

Generally speaking, foreign investors are entitled to bring multi-party claims in a single arbitration, whether under the same or different BITs, provided there is a link between or among the investors and/or their claims. Absent the host State's consent to consolidation, unrelated investors affected by the same State measure are likely to face jurisdictional obstacles in bringing joint claims in a single arbitration under different BITs,

[10] *Noble Energy Inc. & Machala Power Cia. Ltd. V Republic of Ecuador* (ICSID Case No. ARB/05/12), Decision on Jurisdiction, 5 March 2008.
[11] *Idem*, para. 192.
[12] *Guaracachi America Inc and Rurelec PLC v Bolivia* (PCA Case No. 2011-17), Award, 31 January 2014.
[13] *Idem*, para. 340.
[14] *Sempra Energy International v Argentine Republic* (ICSID Case No. ARB/02/16), Decision on Objections to Jurisdiction, 11 May 2005.
[15] *Camuzzi International S.A. v Argentine Republic* (ICSID Case No. ARB/03/2), Decision on Objections to Jurisdiction, 11 May 2005.
[16] *Oko Pankki Oyj et al. v Estonia* (ICSID Case No. ARB/04/6), Award, 14 November 2007.

especially in situations involving portfolio investment. In such cases, the investors may still consider commencing separate arbitrations under each of the relevant BITs. If the arbitrations are likely to raise similar facts and/or legal issues, the investors may find it useful to establish some level of coordination between or among them. It remains to be seen whether the existence of a multilateral treaty, such as the ECT, will allow joint industry action by eligible investors having different nationalities. Each case can involve numerous options and permutations and it is highly recommended, therefore, that legal advice by experienced counsel is obtained before incurring substantial legal costs in advancing joint claims in a single arbitration.

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Recent trends in mediation

Mediation has been on the increase for years. Used at any time from a dispute emerging to formal proceedings (and even after), mediation has fast become a staple for anyone involved in dispute resolution. The reasons are obvious – the potential for saving time, money, hassle and the salvaging of commercial relationships makes mediation very attractive. Few would disagree that the increased use of mediation is a long term trend which is set to continue. The idea of working through a dispute without at least considering mediation is steadily becoming the exception for lawyers in house, in private practice and perhaps also, for parties themselves.

What other trends have we been seeing?

At CMS we have been involved with a broad range of mediations recently, dealing with everything from relatively low sums to nine figures. The construction and insurance sectors have remained heavy users, but there has also been strong activity in financial services and employment. We've also seen mediation used in numerous other sectors including banking, education, energy, hotels, media, property and shipping. Others in the field report similar signs of a full range of commercial disputes heading to mediation, although some have noted a drop off in financial and professional negligence mediations as the effects of the 2008 crash fade. No doubt some of this activity stems from the fear of cost sanctions kicking in for an 'unreasonable refusal to mediate' in English court actions, where refusing to mediate in itself remains a high risk strategy. But international mediations held in the UK also appear to be growing, in London in particular.

Use of Med-Arb and Arb-Med

The use of variations of the so-called Med-Arb process (where parties attempt to mediate and proceed to arbitration on issues which are not resolved) or Arb-Med (where an arbitration proceeds to mediation but may revert to arbitration if mediation is not successful) appears to be on the rise, but these are still relatively unknown and far from common in the UK. These processes raise important logistical and legal questions and potential issues of confidentiality, without prejudice privilege and bias need to be carefully dealt with if entering into them.

Workplace mediation

The employment sector was an early adopter of mediation. Since April 2014 it has been compulsory (bar in limited cases) for claimants wishing to issue an employment tribunal claim to attempt an ACAS early conciliation; a process similar to mediation. Eighteen months in, there are mixed views on the success of the scheme, but there is no doubt they are part of a momentum to embed mediation procedure and practice into how disputes are routinely dealt with in the UK.

CMS's Workplace Mediation Service (which specialises in providing mediation in employment disputes) reflects this trend. See **http://www.cms-cmck.com/Workplace-Mediation-Guide-011014** for further details.

Other developments

This is all against the backdrop of summer 2015 having been the deadline for EU Member States to implement the Alternative Dispute Resolution (ADR) Directive and parts of the Online Dispute Resolution (ODR) Regulations for consumer disputes; to standardise the level of consumer protection and ADR procedures throughout the EU; and to encourage consumers and sellers to engage in ADR as much as possible.

Plus, this year's Civil Mediation Conference saw the keynote address by the President of the Supreme Court Lord Neuberger, who noted that '*Mediation is particularly attractive at the present time when litigation is becoming ever more expensive and time-consuming,* *when the law is getting increasingly complex…and when court fees are being increased markedly*'. However he did not shy away from naming the disadvantages of mediation, whilst also noting that '*There is a fine balance to be struck between not mediating too early…and not mediating too late (when the amount of costs already incurred may make it much more difficult to settle)*'. More controversially he touched on the benefits of compulsory mediation in some cases, whilst not going so far as to say that it ought to happen. Most will agree however, with his concluding remark that '*mediation work is a vital adjunct to litigation*'.

The message remains clear; mediation is here to stay. That won't come as a surprise to anyone involved in disputes, but the steady integration of mediation into the UK's systems of civil dispute resolution makes it a very interesting area to keep an eye on.

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What is the professional's duty to warn?

In the case of *Goldswain & Hale v Beltec Ltd & AIMS Plumbing and Building Services Ltd* 2015 EWHC 556, the judge introduced the decision with the comment '*This is a sad case*'. That was a fair analysis of what was to follow.

The facts related to Goldswain and Hale ('G&H') who acquired a leasehold in a ground floor flat in London in 2011. G&H decided to convert the cellar into living quarters and retained engineers Beltec Ltd ('Beltec') to design the essential structural works and AIMS Plumbing and Building Services Ltd ('AIMS') as contractor.

Works commenced in September 2012. In early November G&H discovered cracks in their property. These were reported as '*nothing serious*'. Throughout November however cracks began to appear in the flat above G&H's property. AIMS visited the property on 20 November and reported that the building was sound and the cracks superficial. Notwithstanding this, on the morning of 24 November, cracks in G&H's bedroom significantly opened up. They again contacted AIMS who then fitted a brace. That afternoon the tenants in the above property knocked on G&H's door to say there was serious cracking upstairs. G&H went up to view the flat and stated they could now hear the building '*tearing apart*'. The property was evacuated immediately. The building then catastrophically collapsed.

G&H (unsurprisingly) initiated proceedings against Beltec and AIMS. It appears AIMS were insolvent as they made no appearance in the court action. The basis of the claim against Beltec was a failure to exercise reasonable skill and care. Beltec denied this, arguing the collapse was a failure on the part of AIMS to properly construct the works.

The court held that there was nothing in the permanent works design documentation produced by Beltec that would have prevented AIMS from doing its work in a reasonably safe manner. The question then became, did Beltec owe G&H a duty to warn of the contractor's failures?

The judge set out a five point test:

1. The scope of the duty to warn and the circumstances in which it may arise should be determined in the context of the contract;
2. The duty to warn is no more than an aspect of the duty of a professional to act with the skill and care of a reasonably competent person in that profession;
3. Whether, when and to what extent the duty will arise will depend on all the circumstances;
4. The duty to warn will often arise when there is an obvious and significant danger either to life and limb or to property. It can arise however when a careful professional ought to have known of such danger, having regard to all the facts and circumstances;
5. Any duty to warn may not be engaged if all there is is a possibility that the contractor in question may in future not do the works properly.

As Beltec had no supervisory duties there was no obligation on them to visit the property once the works had started. As such, the case against them was dismissed.

Of comfort to professionals will be the court's re-iteration of the reasonable skill and care duty, however, caution should be exercised. Professionals should always consider what services they are being engaged to provide and ensure they use reasonable skill and care in the execution of those services.

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The rise & fall of employment tribunals

Our employment tribunals, known until 1998 as industrial tribunals, celebrate their 50th anniversary this year. Their existence, and the range of employee rights that they enforce, have had a profound impact on the workplace for now over two generations. Until 2013, there had been a sense of remorseless advance in the position of the employee with an ever increasing range of rights enforceable by easy recourse to a tribunal, popularly, but wrongly, often blamed on the European Union.

Landmark dates were 1971 (unfair dismissal), 1975 (equal pay), 1993/94 (uncapped compensation for sexual or racial discrimination), 1999 (a fourfold increase in the compensatory award for unfair dismissal to £50,000), and 2004 mandatory pre-dismissal procedures (subsequently repealed in 2009).

A general perception is that the employment tribunals are employee friendly. An employer enjoying parallel claims in an employment tribunal and the high court or county court will typically be advised to pursue the tribunal claim first hoping for favourable findings of fact, which would then tie the hand of the court. (We still have the unsatisfactory situation that limits on tribunal jurisdiction mean that many dismissals give rise to claims that have to be pursued in two different forums).

One aspect of the employment tribunal regime has been the sheer ease of commencing a claim. A simple form could be completed in 30 minutes, sent to the appropriate tribunal, and the litigation is on foot. By contrast, even experienced practitioners can find issuing process in the high court a challenge, given the increasing amount of fees payable. The tribunal has seemed an easy hit for employees, all too easy in the eyes of employers.

This all changed on 29 July 2013 with the introduction of fees payable by claimants. The amount is £160 to £230 to lodge a claim and a further £230 to £950 for a hearing with additional charges for applications during the course of the litigation. If the claimant succeeds he can expect the employer to refund the fees, although that is not guaranteed. If he loses they will be money down the drain.

Unison brought a judicial review challenge to the introduction of fees. The union argued that they breached the EU principle of effectiveness because they made it virtually impossible or excessively difficult for an individual to exercise his rights conferred by EU law. Another argument was that the public sector equality duty and the EU principle of equivalence were breached, and for good measure, the scheme was indirectly discriminatory as it impacted disproportionately on women on average incomes who were not entitled to fee remissions. The high court found against Unison in February 2014. Following an appeal to the court of appeal a renewed application for judicial review was made based on the full first year's statistics. Judgment was given on 17 December dismissing the application. This came as no surprise.

The impact of the fees has been dramatic. Latest reported statistics show that the number of tribunal claims has declined by over 70%. But that is not the end of the matter. On 6 May 2014 compulsory ACAS early conciliation was introduced. No employee can now bring a claim for a tribunal without first attempting to settle the claim through the auspices of ACAS. We are in the early days of this new regime, but we are already seeing a further impact on the number of claims.

The fees have been set high and have had the effect of choking off legitimate claims. No doubt at the same time they have discouraged speculative claims of no real merit brought in the assumption that the employer will get out its cheque book rather than incur the call on management time and expenditure of legal fees involved in defending the claim. A common concern of employers is that defending a claim may involve an element of washing dirty linen in public. Labour announced a while back that it would review the entire new system. The Conservative Government has now agreed to look at this again following concern about the impact from different quarters. Meanwhile, the Scottish Government has announced its intention to abolish fees for employment tribunals 'when it is clear how the transfer of powers and responsibilities [from Westminster] will work.'

Another change has been to the composition of employment tribunals. For 50 years they have routinely comprised a legally qualified judge sitting with two wing members, one from an employee list, the other an employer. They operate by majority. Now the wing members have largely disappeared. This may have the effect of reducing the perceived status and general standing of these tribunals.

My early impression is that the impact of these changes goes beyond the severe curtailment of employment tribunal claims and is having a subtle impact in the workplace, where finally the advance of employee rights appears to have been reversed. The employee rights culture has taken a knock. Incidentally, what is happening to all those full time and part time employment judges?

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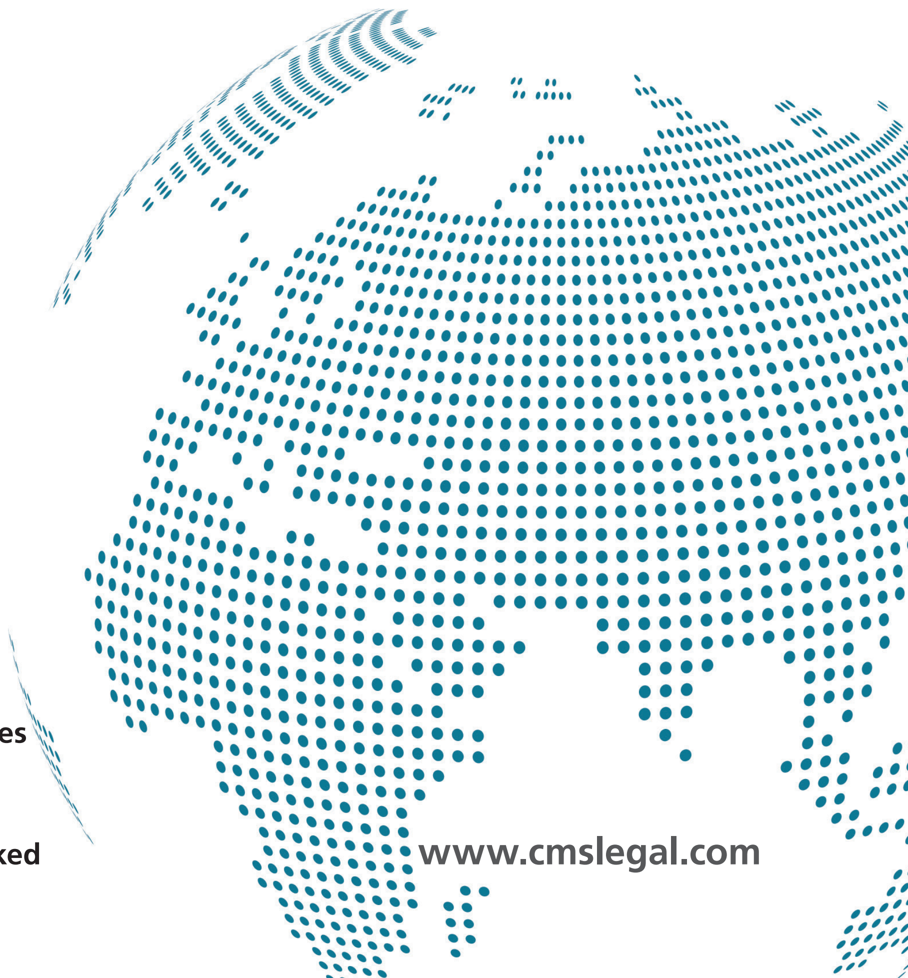

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