C/M/S/ Cameron McKenna

Litigation annual review

2003

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In this issue...

Our annual review is written with the busy executive in mind. An awareness of recent legal developments and being able to anticipate future trends in your spheres of interest are key to the smooth conduct of your business. We bring together in one publication a series of short reports on significant developments in the field of litigation during 2002 across a range of specialist areas covered by our extensive litigation practice.

The reverberations from the economic downturn in the world economy in 2002 and recent events in the USA will continue to echo around the world for many years. The insurance claims arising out of the World Trade Centre terrorist attack and their immense significance to the world insurance market are discussed in **The insurance market post September 11th.**

The backlash from the media's embarrassment at being taken in by the corporate hype from the likes of Enron, WorldCom and Tyco is less accepting, harder hitting journalism with more in-depth investigations of corporations. A corporation is a distinct legal entity with a reputation and has the same rights to protect its good name as an individual. The company and its directors also have rights to privacy which the media seldom respect. A taste of the issues involved in protecting those rights is given in **Managing corporate reputation**. The scandals in the US have led to the government there rushing through legislation with long arm jurisdiction requiring directors to certify the accuracy of accounts of any company listed on one of the US exchanges. **Directors under the spotlight** reviews the onerous obligations of company directors and suggests strategies to reduce the risks.

As explained in **Litigating against a company in financial difficulties**, this is set to become even more complex when the Enterprise Act comes into force in 2003. For those unable to avoid this situation, the article includes suggestions as to how best to protect your interests.

Following the settlement of the Unilever Pension Fund claim against Mercury Asset Management, the widely predicted flood of similar claims has not materialised. Whether this is because of the difficulties in proving negligence by a fund manager or the tendency for such claims to settle is reviewed in **Suing fund managers**.

One of the most notable successes of the Woolf reforms is the wide acceptance of Alternative Dispute Resolution (ADR) in commercial disputes. For the third year running the number of claims being issued in the High Court has fallen dramatically but, disappointingly, cases are still taking over three years to get through the courts. **Successes and failures** looks at the trends revealed by the statistics of the courts, ADR providers and arbitration institutions while **Technology failing the court** questions whether the long-promised improvements from IT will ever materialise. The construction industry was supposed to be saved from the ravages of litigation through statutory adjudications but **Ambushes, deductions and cross-claims** reports on how the process is being undermined.

Some of the more successful aspects of the civil justice reforms are discussed in **Employment tribunal reform**. Although the law relating to the duty of confidence owed by employees is long established, areas of uncertainty have remained. The Court of Appeal decision in a dispute between Naomi Campbell and her former PA shed light on this and is discussed along with other developments in **Confidentiality – who do you trust?**

The ICC's latest statistics show a slow but steady growth in arbitrations commenced over the last four years and there is no doubt that in international disputes, arbitration is the preferred method of resolution whether through an institution or ad hoc. **Selecting your seat** for the arbitration will dictate what law governs the conduct of the arbitration, as opposed to the law that governs the contract itself, and this article touches on the issues to be considered.

Class Law is a law firm that has recently emerged seeking to attract work as experts in group actions. Difficulties with funding arrangements have dogged its efforts but it, and other law firms, are pressing to develop this area. **Class actions, product liability and product safety** looks at this and the direction the European Commission is taking on the Directive on General Product Safety of consumer products.

Health and safety of employees is always of concern to employers and in the last year stress in the work place has been most topical. **Reducing employees' stress claims** looks at the latest developments, including a landmark decision from the Court of Appeal. Three major decisions in multi-party personal injury actions were handed down during the course of last year. Each raised complex issues which are discussed in **Scientific evidence, causation and law.**

Celebrities, whether chefs, gardeners or sportspersons, have taken to registering their names as trade marks and, sometimes, even their image. In view of the money involved it is not surprising that they have been seeking to protect their earning capacity and **Star-struck ads?** discusses the careful path that has to be trodden when using an image without the authority of the personality concerned.

The Pensions Ombudsman has used his latest annual report to publish views on reliance on exoneration clauses and the need for trustees to give reasons for decisions. This is useful guidance for all pension fund trustees and can be reviewed in **Ombudsman flexes his muscles**.

New legislation and proposals for changes to the existing law, together with a flattening property market mean there is a great deal to keep abreast with in this field and **Property disputes – statutory intervention** highlights a few of the more important developments. **Does the HRA protect the environment?** rather surprisingly answers the question in the affirmative. In this article you can read how the right to respect for private and family life and home, introduced into English law for the first time by the Human Rights Act, is being used in legal challenges to polluting activities. The article includes suggestions for steps to take to reduce the risks.

Lastly, should you be unfortunate enough to become embroiled with a former employee, customer or consumer with nothing better to do than harass you through repetitive legal claims, you will benefit from reading **Restraining vexatious litigants**.

I hope you will find the articles informative and useful. If you would like further information on any of the topics, please contact the author or send me an e-mail.

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Insurance and reinsurance: the insurance market post September 11th

The immediate shock of the terrorist attack on the World Trade Centre (WTC) has subsided but the Bali bombing reminds us that the vicious targeting of Western interests for terrorist attacks is likely to continue.

The insurance claims arising out of the terrorist attack on the WTC are unprecedented and of immense significance to the world insurance market. It has recently been estimated by Federal Reserve experts that the attack that destroyed the WTC has cost New York US$33 - 36bn with some estimates rising much higher as the cost of the losses is re-assessed. The losses, estimated from October 2001 to June 2002, include US$7.8bn that the 2,795 people killed in the attack would have earned had they lived and US$21.6bn to clean up and replace the twin towers. New York lost an additional US$3.6bn to US$6.4bn in wages from job cuts and reduced hours in businesses such as the restaurant industry. Much of the loss will fall on the insurance and reinsurance industry under a variety of insurance coverages, such as property, aviation, business interruption, personal accident and third party liability policies.

There have already been a number of disputes arising out of the insurance coverages following the WTC loss. One of the largest disputes concerns the direct property insurance covering the WTC twin towers. The dispute has arisen largely because, at the time of the attack, the property insurers of the twin towers had not issued an agreed policy wording. The WTC had recently been leased by its owner, the New York Port Authority, to a group of real estate investors led by Larry Silverstein. On 11th September, the Silverstein Group was still finalising its insurance programme. Each of the 22 insurance companies had signed binding authorities ("binders") that obligated them to provide property insurance but wordings had not been agreed. This may seem surprising, but in the insurance market there is quite often a delay in finalising the formal policy wording, even though the insurers are on risk from the time that the insurance slip or binder is signed.

A central issue in the dispute turns on what is the applicable policy wording. The policy wording Mr Silverstein claims is applicable contains a narrow definition of loss so that each tower is a separate loss occurrence, thus entitling him to recover the policy limit (approximately US$3.5bn) in respect of the loss of each tower, making a total of US$7bn.

On the other hand, the insurers' position is that the applicable wording contains a broad loss occurrence definition, adding together losses arising out of one cause or a series of similar causes, i.e. the cause of the loss being the attack on the twin towers. The insurers argue that under this wording, the destruction of the twin towers was one loss so that Silverstein can recover only in the region of US$3.5bn. If the insurers' argument is successful, the practical effect will be that Silverstein is only insured for one of the twin towers.

There has recently been a United States Court decision in relation to three of the twenty-two property insurers. The Court ruled that the wording with the wide definition of "occurrence" applies to those insurers and that the destruction of the twin towers was one loss under that wording. Although this decision is significant, Silverstein has been allowed to pursue an expedited appeal. A trial will take place in 2003 on which wording is applicable to the other nineteen insurers, and whether

"In terms of risk management, the disputes that have arisen clearly illustrate the importance of understanding the extent of coverage purchased and of ensuring that it is reflected in the policy wording."

the destruction of the twin towers was one or more loss under those wordings.

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Steps taken by the British Government in light of WTC

The London insurance market has been familiar with terrorism losses for many years and although insurers' preference might be to exclude from cover all terrorist acts, the London market is able, with government backing, to cover the perils of terrorism. The government-backed pooling scheme is being developed in other countries and it is by no means the case that terrorist acts are uninsurable.

During 2002 the pooling arrangements in the UK were extended specifically to meet the increased and wider terrorist threat posed in light of the WTC attack.

The Reinsurance (Acts of Terrorism) Act 1993 established a government-backed unlimited liability reinsurance company, The Pool Reinsurance Company (Pool Re), specifically to ensure that insurers were able to fund losses from terrorist acts without questions over their own or their reinsurers' solvency. The Act followed the IRA's St Mary Axe bomb on 10th April 1992 that caused £800m of damage to the heart of London's commercial district. In November 1992 the Association of British Insurers announced that its members had been provided with model terrorism exclusion clauses, with the implication that, as a matter of policy, from 1st January 1993 insurers would exclude cover for terrorist acts. The government reacted by setting up Pool Re.

In 2002 the government reviewed the cover offered by Pool Re and extended it to offer commercial customers cover for insurance attacks causing property damage and consequent business interruption by all risks, rather than the previous restriction to damage caused by fire and explosion. This means that a terrorist attack involving nuclear, chemical or biological contamination, impact by aircraft, or flood damage will all be covered by the Pool Re scheme. The exclusion of damage caused by nuclear devices was due to be deleted by 1st January 2003. An exclusion in respect of computer hacking and virus damage will remain. Premium increases have been applied and the deductibles borne by each insurer in the scheme were adjusted to reflect the greater potential cost to insurers of a WTC-style incident.

These extensions to cover are crucial to ensure that the government's role as reinsurer of last resort remains effective to underpin the commercial insurance market in a climate where previously unthinkable insurance liabilities are considered a real prospect.

There is however still an area where Pool Re offers no comfort for commercial interests and their insurers. The legislation that underpins Pool Re restricts its scope to damage to property caused by terrorist activity, and consequential business interruption costs. This means that liability insurers do not benefit from Pool Re backing. Personal injury and employers' liability losses were a significant part of the losses resulting from WTC and Bali. These outstanding concerns on liability are being pursued in separate discussions between insurers' representatives and Government.

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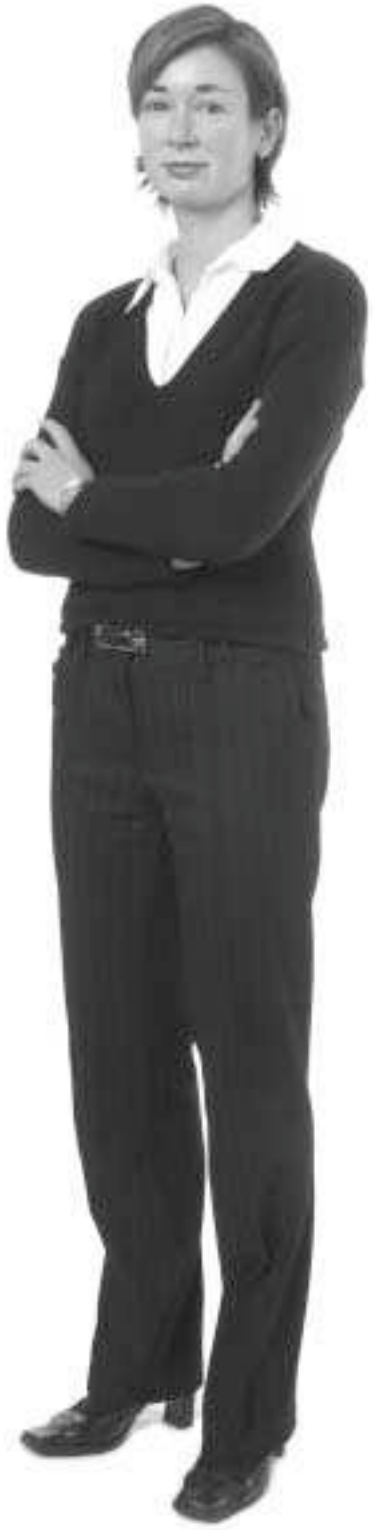
Media: managing corporate reputation



Last year the Enron and WorldCom scandals highlighted just how costly a damaged reputation can be. It is doubtful whether the media could have detected the wrongdoings of these companies but they were caught up in, and added to, the hype surrounding many businesses which have subsequently crashed spectacularly. Senior journalists have criticised the media's cosy relationships with analysts during the boom years as resulting in insufficient criticism of certain business practices. It is already clear that business journalism is going to be harder hitting, and less accepting, in the current economic climate. As a result, reputation management will continue to move up the corporate priority list.

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Recent research from the US suggests that 43% of a company's reputation is attributable to the CEO. Increasingly, protecting the reputation of a company involves protecting the reputation of its CEO. As the architects of their company's strategies, the behaviour and performance of the CEO has an enormous influence on the corporation's reputation. However, building corporate reputation around one individual can have its costs. Not surprisingly, when news broke of the extent to which Dennis Kozlowski, CEO of Tyco, had been living it up at the company's expense, Tyco's share price plummeted. There are plenty of newspapers, tabloid and broad-

"Freedom of the press is essential in a democratic society, but publishing inaccurate, misleading or alarmist stories is not."

sheet, which will delight in titillating their readers, in the public interest of course, about the shortcomings of high-flying executives. By and large the media behave as if they have a free hand and can publish with impunity, relying on their right to freedom of expression, as enshrined in English law by virtue of the Human Rights Act 1998 (HRA). However, the courts do not always share the same view.

The media did score notable successes in fighting off the claims to privacy brought by Gary Flitcroft, Jamie Theakston and Naomi Campbell during the last year. All three tried to enforce their right to privacy, which was also introduced by the HRA. However, that right has to be balanced with the conflicting right to freedom of expression and, in these cases, freedom of expression prevailed. The English courts' approach has been to treat privacy as an expansion of the common law duty of confidence and, in these cases, they decided either that the particular information did not attract the required duty of confidence, or that the disclosure was in the public interest.

The fact that a company director has misbehaved may well be protected by a right to privacy, provided that there is the required duty of confidence and that the journalist is unable to find some acceptable explanation as to why disclosure is in the public interest.

The Times tried to rely on freedom of expression in *Reynolds v The Times* to defend a report which was clearly inaccurate and defamatory but which it claimed it had a duty to publish in the public interest. The case went to the House of Lords where Lord Nicholls commented: "The appellant newspaper commends reliance upon the ethics of professional journalism. The decision should be left to the editor of the newspaper. Unfortunately, in the United Kingdom, this would not generally be thought to provide a sufficient safeguard". He went on to set out ten principles to be taken into account in assessing whether a journalist has acted responsibly and can therefore truly assert that publication is in the public interest, even if it turns out to be wrong. In effect, Lord Nicholls was dictating to the media what amounted to good journalistic practice including, most importantly, seeking comment from the target of the criticism and taking proper steps to verify information.

It is disappointing that only two of Lord Nicholls' ten principles are included in the Press Complaints Commission Code of Practice and this looks unlikely to change. The press' strategy of avoiding statutory regulation by the establishment of the PCC, with its voluntary code, has been successful but has recently come under considerable attack. The PCC suffered a number of setbacks in 2002, not least the resignation of its Chairman, Lord Wakeham, due to his non-executive directorship of Enron. The PCC has also been the subject of criticism because of its lack of independence (complaints to the PCC are handled by a panel of editors) and its lack of teeth. The latter point was illustrated most recently when the Sunday World simply refused to co-operate with the PCC in the resolution of a complaint. The PCC could only uphold the complaint and admonish the publication saying it was "disappointed" by the stance taken. This all added weight to the arguments in favour of the statutory regulation of print media by Ofcom.

The Communications Act looks set to come into force later this year and to bring in sweeping changes for regulation of the media. The work of Oftel, the Broadcasting Standards Commission, the Radio Authority, the Radio Communications Agency and the Independent Television Commission will be taken over by Ofcom, to provide one unified regulator for the communications industry. Most importantly, it will have power to levy hefty fines for breach of its rules. However, print media and the PCC are not included within the remit of Ofcom. The government's Culture Secretary, Tessa Jowell, has declared there is no intention to bring the press under Ofcom, describing the press as "the grit in the oyster" which should remain free to be opinionated. Freedom of the press is essential in a democratic society, but publishing inaccurate, misleading or alarmist stories is not. It is a great pity that the press will be out of Ofcom's reach, as the power of the regulator to levy fines has great potential to stop many of the excesses and recalcitrant behaviour, such as that exhibited by the Sunday World. Complaints about radio, television and satellite will now come under the remit of Ofcom. The ability to fine for breach of Ofcom's rules gives it the teeth to police standards in broadcasting but it is too early to judge how effective it will be in practice.

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Corporate: directors under the spotlight

In the words of one Equitable Life director, commenting to the Higgs Review of Corporate Governance on the role of a company director, "who is going to do the job if they can get sued out of existence"? Is the situation really so bad as to warrant such a comment?

Common law duties

A director's duties at common law have existed, largely unchanged, for more than a hundred years. A director has a duty to act with reasonable skill and care in the performance of his duties. For many years this was regarded as a subjective standard, i.e. the court looked at the director's behaviour in light of his own particular skills and qualifications. More recently, this has developed into a combined subjective and objective test, i.e. what might reasonably be expected from a person carrying out the same functions as that particular director. Directors are not required, at common law, to take any particular part in the running of the company's business but, where they do involve themselves, they have to act in accordance with that duty. In the case of *Bishopsgate v Maxwell*, Ian Maxwell was not generally liable for his failure to attend to the affairs of one of the Maxwell Group companies but he was liable for losses caused where he involved himself by signing a document under which assets were unlawfully transferred out of the company.

"...there are fiduciary duties placed on the director, the most important of which is to act in good faith in the interests of the company as a whole."

In addition to the duty to act with skill and care, there are fiduciary duties placed on the director, the most important of which is to act in good faith in the interests of the company as a whole. Consistent with this principle, directors also have a duty to avoid conflicts of interest, not to make an unauthorised or undisclosed profit from their position as a director, to act in accordance with the company's constitution, and to treat shareholders fairly.

These duties are owed to the company itself and it is only the company which can sue a director for breach of duty. This is an important limiting factor in the ability of shareholders to launch class actions against directors. When the company cannot, or will not, bring an action because it is controlled by those who have wronged it, shareholders can pursue an action in the company's name and at the company's expense.

Another potential problem for the director is a shareholders' action under section 459 of the Companies Act 1985. The shareholders must establish that they have suffered unfair prejudice as a consequence of the conduct of a director, in which case the court may sanction an action in the name of the company against the director. Applications under section 459 are more common in relation to the affairs of small private companies where the directors are also the principal shareholders but imaginative lawyers can use the section to good effect.

Directors can also face claims from shareholders, where they have made statements or conducted some activity in their personal capacity. In a recent case, the House of Lords held that a director who had committed a fraud was personally liable and he could not "use the device of acting as a director to escape any liability to his victims".

"...900 directors were disqualified between March and September 2001, a 24% increase on the same period in the previous year."

Future reforms

It has long been recognised that the common law duties of directors are unclear and, to an extent, outmoded. A White Paper was published in 2002 under which it is proposed that directors' duties be codified in a statutory statement. There will be a list of general principles which, while similar to the old common law principles, are intended to remove much of their uncertainty. The duty to act in the company's interests as a whole will be modified so that directors must take into account all material factors, which will include the company's business relationships with its employees, customers and suppliers.

Changes in the regulatory climate

Regulatory developments are also creating an increasingly hostile climate for directors. This is happening as a result of a number of pressures. The DTI has become much more active in bringing disqualification proceedings against directors. More than 5,000 directors have been disqualified since 1997 and 900 directors were disqualified between March and September 2001, a 24% increase on the same period in the previous year. The Competition Act and the Data Protection Act place new duties on directors; the Enterprise Act, when it becomes law, will impose personal criminal liability on directors where they have been involved in anti-competitive practices in their role as directors. Health & Safety Executive prosecutions are also on the increase.

Then there is the US long-arm jurisdiction in the form of the Sarbanes-Oxley Act, which came into force in July 2002. The Act has been passed in a hurry as an attempt to clean up corporate America in the wake of the Enron and WorldCom scandals and the Act is likely to apply to those UK-based businesses which are listed on one of the US exchanges. Directors of such companies will be required to certify the accuracy of any company report containing financial statements; there will also be whistleblowing regulations on those advising such companies. Both the long arm and the whistleblowing aspects of the proposed legislation are causing understandable concern to directors of dual-listed companies.

Conclusion

Directors are justifiably concerned that they may be sued out of existence but they can attempt to reduce the litigation risks by:

- Asking questions and obtaining up-to-date and reliable information;
- Avoiding concentration of power in the hands of one or two directors;
- Implementing internal risk management strategies, such as internal audit risks analysis;
- Delegating effectively;
- Ensuring adequate training;
- Considering how each proposed action can be justified as being genuinely in the interests of the company.

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Insolvency: litigating against a company in financial difficulty

The world is becoming an ever-more dangerous place and learning to manage risk is part of the new reality. In the past year your organisation may well have been left high and dry when a party you have traded with has gone bust. What steps can you take to minimise your loss? How does the insolvency of a company affect your rights against it? And how are your rights going to change with the introduction of new laws in 2003?

Practical hints

What should you do if your opponent in litigation might, or has, become insolvent?

- First of all, check your facts: establish whether the company is formally insolvent and, if so, what type of insolvency procedure it is in. This can usually be done by carrying out a winding up/administration search at the Companies Court by telephone (020 7947 7328), or a company search.
- Even if the proceedings are not automatically stayed, consider carefully whether there are likely to be any recoveries for unsecured creditors. You can then decide whether you are throwing good money after bad.
- It is not necessary to have a judgment in order to be able to claim your share as an unsecured creditor. All creditors will ultimately get a chance to submit details of their claims (known as proving your claim) against the company and the liquidator or scheme nominee, as appropriate, will then decide whether to accept or reject the claim. If the claim is rejected, you will have a right to ask the Court to determine its validity.
- If an insolvent company starts or continues a claim or counterclaim against you, consider whether it would be appropriate to apply for security for your costs. It usually is.
- Where a company goes into liquidation, set-off will automatically apply between any claims that the company has against you and any claims you have against it. Consider how this might affect your position.
- If you believe that a company is in the process of dissipating its assets (or has already done so) in order to prevent creditors from recovering anything, there are a limited number of options. In certain circumstances it is possible to obtain freezing orders to preserve the status quo.
- If you are already a creditor, it may be possible to have a provisional liquidator appointed who will "hold the ring" until a liquidator can be appointed.
- The liquidator, or else an administrator, will investigate transactions the company entered into prior to the date of insolvency. He has wide-ranging powers to set aside those transactions, particularly where they are with "connected" parties. He will look at whether one creditor was treated preferentially to others, or whether the company disposed of assets for less than their true value.
- A liquidator will also consider whether the directors kept on trading the company after the point in time when they should have realised that there was no reasonable prospect that the company could avoid insolvent liquidation. In these circumstances directors can face personal liability – usually this is the only way of piercing the corporate veil.

"An important feature of that Act is the new company voluntary arrangement (CVA) moratorium for small companies."

- Outside the litigation context, it is still worth considering whether you, as a creditor, have proprietary rights over the company's assets. This could be over goods supplied to the company which are subject to retention of title provisions or monies (perhaps a deposit) that may be held on trust for you. If you have a proprietary interest over an asset (whether hard assets or cash) in the hands of the insolvent company, it remains yours as it does not form part of the estate of the company available for the other creditors.
- It is worthwhile establishing a relationship with the administrator, receiver or liquidator at an early stage, and setting out your claims in writing. He who shouts loudest often gets heard.

The future

The buzz-word in the world of insolvency is moratorium. Like lots of trends this has come across the Atlantic. It has been taken up eagerly by opinion formers here.

The idea is that companies should find it easier to achieve sanctuary from their creditors and gain time to sort out their affairs in their own way. Two developments in the law mean that 2003 will see power swing towards the company in trouble (which could be your debtor) and away from the creditor (which could mean you).

The Insolvency Act 2000 has crept in quietly, whilst attention has been lavished upon the more fundamental reforms which will arrive when the Enterprise Act comes into force in the middle of 2003. The Insolvency Act 2000 arrived on 1 January 2003. An important feature of that Act is the new company voluntary arrangement (CVA) moratorium for small companies. "Small companies" are defined as companies that meet two of the following three requirements:

- turnover not exceeding £2.8m;
- balance sheet total not exceeding £1.4m; or
- no more than 50 employees.

From 1 January 2003, management of small companies will be able to trigger an initial moratorium of 28 days to enable them to put a rescue plan to creditors. All creditors will be bound by this initial moratorium and it is important to note that floating charge holders (up to now holders of the Ace card when it comes to chasing up debts) will have no right of veto.

This development is important for two reasons. First, you might be the unlucky creditor of a "small company" and you might have to stop in your tracks just when you thought you could slam home some aggressive litigation. Second, this new measure is quite clearly the legislative equivalent of one of those tiny pots of paint we buy from the DIY shop: the Government is going to monitor carefully this small-scale stab at a moratorium and, if things proceed without a hitch, we will have to expect to see it applied on a much grander scale in the not too distant future.

The Enterprise Act, when it comes into force during the course of 2003, will take the pendulum a little further along the same course. Two aspects of the new regime will make it more difficult for you, as a creditor, to pursue a company which owes you money. First, reforms to the administration process will make it easier

for the company which owes you money to enter into administration and to cloak itself with the protection of that all-important moratorium, preventing you from taking hostile action to recover your debt. Second, the Enterprise Act will severely restrict the lender's right to play that Ace card: lenders will only be able to appoint an administrative receiver if:

- the floating charge from which they draw their rights was in place before the new statutory provision comes into effect; or
- the financing occurred in the context of a capital markets transaction or some other transaction as (fairly narrowly) defined in the statute.

So insolvency law will be dramatically reformed when the Enterprise Act becomes law, in the middle of 2003. The culture of insolvency is likely to change, with secured creditors' rights to control the insolvency process being curtailed. The overall effect is likely to be fewer administrative receiverships and more administrations which, in theory at least, should lead to the rescuing of more businesses. But if you are a creditor waiting to get to the head of the queue, 2003 might bring disappointment: there might be times when you have to settle for the warm feeling that will come from doing your bit for the rescue culture!

"The culture of insolvency is likely to change, with secured creditors' rights to control the insolvency process being curtailed."

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Financial services: suing fund managers

"It is necessary to show that, in all the circumstances including any agreed performance objectives, a competent fund manager would not have performed so badly."

The landmark professional negligence claim brought by the Unilever Superannuation Trustees against Mercury Asset Management Plc (MAM) was settled during trial in December 2001. The settlement involved a substantial payment by MAM to Unilever, reported to be in excess of £70m, and led to widespread speculation that a number of similar claims by other pension funds would immediately follow. Of these, the only claim reported to have resulted in a recovery was that by the Sainsbury's pension fund, which also resulted in an out of court settlement with MAM. So why is it that the flood of claims did not materialise and what does this herald for aggrieved parties who feel their funds or assets have been badly managed?

The Unilever Trustees had alleged that MAM had managed the assets of the fund negligently, causing the fund to underperform significantly. The fund was a segregated UK equity fund with an investment objective of outperforming a composite benchmark by 1% over rolling 3 year periods and a downside risk tolerance level of 3% below the benchmark over any 4 consecutive quarters. Between January 1997 and March 1998 exceptional gains were made on the FTSE All Share Index which had a weighting of 60% of the benchmark. The Unilever fund was not seeking recovery of losses but rather claiming compensation for the fact that its investments did not grow as much as the rest of the market.

The investment objectives quoted by fund managers do not amount to performance guarantees. They are merely targets which the fund managers seek to achieve. Accordingly, there is no question of a claim for breach of contract because the performance objective is not achieved. Any claim for mismanagement, leading to underperformance, must be based on an allegation of negligence, which requires proof that the fund manager failed to provide a level of service that the fund was entitled to expect and that that failing caused a loss.

Possibly the greatest difficulty with such claims is their novelty. As yet, there is no reported decision in which a fund manager has been found to have been negligent. In this respect, it is unfortunate that the Unilever case was settled before judgment as future claimants would benefit from some guidance on the courts' attitude to the legal principles applicable to such a claim.

It is clear that it is not sufficient simply to show either that the fund manager did not meet its performance objective or that other fund managers did better. It is necessary to show that, in all the circumstances including any agreed performance objectives, a competent fund manager would not have performed so badly.

In the absence of any authorities relating directly to fund management, it is necessary to look at case law in analogous situations, such as surveyors' valuations, for guidance. The fact that a valuation fell outside the "bracket" of reasonable valuations is a necessary condition of liability but it is not of itself sufficient. It is also necessary to show that the reasons why the valuation fell outside the bracket were caused by negligence. Further, the mere fact of a negligent mistake in the process of valuation will not necessarily mean that the overall valuation is itself negligent, if it falls within an acceptable bracket.

By analogy, to bring a successful claim against a fund manager, it would be necessary to prove both that the performance was exceptionally bad and that it was outside the "bracket" of reasonable performance. In addition, the claimant would have to show that the reasons for such bad performance were due to the negligence of the fund manager in the day-to-day management of the assets of the fund. This would involve examining in minute detail the manner in which its funds were invested and identifying a serious failing in the fund manager's investment strategy.

Lessons for other claimants

"This makes it almost impossible to obtain sufficient evidence to demonstrate the reasons for underperformance."

One of the greatest difficulties in establishing negligence by fund managers is the cost and expense of unravelling what has, and has not been done, and why. In the case of pooled funds the beneficiaries and/or trustees may have been provided with only relatively little information as to the underlying assets in which the fund was invested. This makes it almost impossible to obtain sufficient evidence to demonstrate the reasons for underperformance. The sums involved must be very substantial to justify the cost and, in most cases, the performance is bad rather than dreadful. It was alleged that MAM's performance was so poor, and the fund so large, as to justify the claim and MAM's investment strategy so ill thought out as to be clearly negligent. No doubt there are many funds and investors looking at their underperforming investments and wondering if they can bring a claim. The lack of reported decisions and law generally on the issue should not be a disincentive. It does not mean that suing these professionals is impossible but, rather, it reflects that these professionals would prefer to settle a claim before a judge decides in open court that their investment strategy has been negligent. There is no reason in principle why claims for negligent underperformance against fund managers should not succeed.

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Litigation: successes and failures

"It is clear that two of the primary objectives of the Woolf Reforms, to speed up litigation and thereby reduce its costs, have still not materialised."

Last year this publication reported that in 1999, after the introduction of the Woolf reforms, the number of High Court claims dropped by 37% to 72,161 and in 2000 only 26,876 claims were issued. The statistics for 2001 show the decline continued with only 21,613 claims issued. In light of this huge fall in the number of new claims it seems predictable that the courts' workload will have shrunk dramatically, so cases should be moving through the courts much faster. But the opposite is happening. So what are the statistics hiding?

The practice of issuing protective writs has virtually disappeared, as has the issue of speculative writs which were never pursued. In addition, issuing High Court proceedings for claims within the County Court jurisdiction has pretty much stopped as it is guaranteed to incur the wrath of the court. These account in part for the reduction in claims issued, as do the Pre-Action Protocols and the emphasis on Alternative Dispute Resolution (ADR). So why is it that the average time between issue and the start of trial is currently 3 years and 17 days, 11 days longer than in 1995 when the court had nearly three times the number of claims?

It is clear that two of the primary objectives of the Woolf Reforms, to speed up litigation and thereby reduce its cost, have still not materialised. Many practitioners have expressed the view that post-Woolf litigation takes longer and costs more because of the emphasis on pre-action procedures requiring cases to be thoroughly prepared before litigation can start. Old-style litigation, where much of the evidence was collected shortly before trial and only expert evidence was disclosed in advance, was cheaper. The front-loading required to comply with Woolf sets the tone for thorough preparation throughout the process and it is neither quicker nor cheaper. It should also be borne in mind that the statistics ignore the three to six months it typically takes to get through the pre-action procedures.

However, the number of cases actually going all the way to trial is falling as ADR is being more heavily promoted by the courts. This is reflected in the increase in numbers of decisions published last year involving mediation, for example.

- In *Cable & Wireless plc v IBM UK Ltd*, contrary to previous rulings, it was decided that if an ADR clause provided for the parties to mediate before issuing court proceedings, like an arbitration clause, it was enforceable. In a major boost for ADR the judge commented that such a clause could even be enforced by an injunction.
- In *Dunnett v Railtrack*, Railtrack was successful in its defence at first instance and on appeal. Surprisingly, the court refused to order the losing defendant to pay Railtrack's costs because of Railtrack's earlier refusal to agree to the claimant's suggestion of mediation.
- In *Société Internationale de Télécommunications Aeronautiques SC v Wyatt Co*, by contrast with Dunnett, on the particular facts the judge concluded the winning claimant should not be deprived of a portion of its costs for refusing to mediate.
- In re *Ciro Citterio Menswear plc* the Court of Appeal indicated that it was not going to hold a mediation agreement reached by litigants to be

binding. The mediation had resulted in an agreement but when asked to approve the subsequent Tomlin Order the court rescheduled the case for hearing despite the fact that an agreement had been made. The company contended it was not bound by the terms of settlement but following a further hearing the court upheld the settlement agreement made at the mediation.

- In *Hurst v Leeming* the losing claimant argued that no costs order should be made against him because the defendant had refused to mediate. The judge dismissed four of the defendant's excuses but he accepted the fifth, that there was no real prospect of a successful outcome to the mediation.

So what do the statistics relating to mediation reveal? Unfortunately, another confusing story. In May 2002 CEDR Solve reported commercial mediations were down 28%, mirroring reports from other providers. There is little doubt that the previous year's figures were distorted by the rush of mediations instituted following the introduction of the reforms. In addition, in large commercial disputes the market is maturing rapidly and the practice of appointing mediators direct, means that the ADR providers' statistics alone are not a reliable source of evidence as to whether ADR is growing or declining. Anecdotal reports suggests it continued to grow strongly last year and this is reflected in our own statistics.

The leading ADR providers are facing much stiffer competition as new providers appear. This has led to the formation of a trade association, the Civil Mediation Council, to lobby more effectively on behalf of the industry. The fact that the market is maturing can also be seen in the publication of a Green Paper by the European Commission consulting on whether harmonisation of laws relating to ADR would be a good idea. Judging from recent comments, the EU Commissioners seem intent on issuing a Directive despite the fact that the ADR movement is barely established in many EU jurisdictions, and being over-prescriptive at this early stage of its development could be harmful. Consultation across the CMS offices in Europe showed a strong preference for no regulation at this stage.

If there were to be any harmonisation, the area in most need for consideration is confidentiality and privilege in mediations. The approaches to these crucial issues are fundamentally different and are likely to cause problems when using mediation in cross-border disputes. The United States, where the ADR movement began over 10 years ago, has far more experience of these issues and had a not dissimilar problem caused by differences of approach adopted by its State legislators and judiciaries. The debate as to the need for harmonisation has only recently concluded with agreement to adopt a Uniform Mediation Act which seeks to achieve a consistent, national approach to the related core issues of confidentiality, privilege and admissibility. Preferably the EU will let ADR develop unfettered and any requirement for harmonisation will be limited to these core issues.

"If there were to be any harmonisation, the area in most need for consideration is confidentiality and privilege in mediations."

Anecdotes also suggest that the use of ADR in international disputes has grown but there is little hard evidence against which to test this. The ICC introduced its own ADR Rules in 2000 and in its latest annual report, for the first time, published ADR statistics showing it received 14 requests for "Amicable" Dispute Resolution or Conciliations during 2001.

As to International Arbitration, it is steadily growing as a direct consequence of globalisation. Central and Eastern Europe has attracted a great deal of investment over the past 10 years and the standard practice has been to provide in the contract that any dispute arising be arbitrated, rather than litigated through the local courts. It is therefore no surprise that the ICC's statistics show that, while the number of international arbitrations has been rising slowly for the last 4 years, in 2001 the number of disputes involving Central and Eastern Europe rose by 68%. Arbitration suffers from many of the problems of cost and delay associated with litigation, so it is only to be expected that ADR will be used increasingly in resolving international disputes.

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Litigation: technology failing the court

"The five year programme includes improved case management, provision of electronic services, and introduction of in-court technologies."

In his report "Access to Justice" Lord Woolf emphasised the importance of using computer-assisted technology to improve the efficiency of the administration of civil justice. He went as far as saying that "investment in the appropriate technology is fundamental to the future of the civil justice system and is also likely, in due course, itself to be a catalyst for radical change". And yet, despite these fine words and numerous reports, very few improvements have materialised.

Lord Woolf's report led to the introduction of the new Civil Procedure Rules in 1999 which anticipated, in many respects, the opportunities which technology was likely to provide for improvement in the way in which the courts work. For example, they provided for the first time a power to "hold a hearing and receive evidence by telephone or by using any other method of direct oral communication", to allow witnesses "to give evidence through a video link or by other means" and for service of documents by e-mail.

One of the most important innovations was the increased control of proceedings by judges by way of case management. The Rules impose a duty on the court to further the overriding objective (to deal with cases justly) by actively managing cases, and active case management was defined to include "making use of technology".

The Lord Chancellor's Department recognised that in order to maximise the benefits from the Rules, modernisation of the civil courts system was required, and in January 2001 the Court Service issued a consultation paper, Modernising the Civil Courts. The paper outlined how new ways of working with technology could improve the range and quality of services available to court users. In particular, the paper envisaged improved IT support for the judiciary, including electronic case filing and presentation of evidence, digital audio recording, video conferencing and improved electronic communication.

A subsequently appointed Judicial Working Group, headed by Mr Justice Cresswell, concluded that there was "a pressing need for common computerised information systems to be introduced as soon as practically possible". The Group noted that without modern and appropriate IT support, judges were not able to carry out effective control of proceedings by case management, as they are required to under the Rules.

In May 2002 the Court Service published a progress report, Modernising the Civil and Family Courts, which describes the work completed and outlines plans for the future. The five year programme includes improved case management, provision of electronic services, and introduction of in-court technologies.

The plans are ambitious and, if implemented, would transform the way in which the courts interface with court users and manage proceedings. Mr Justice Cresswell's Working Group estimated that electronic presentation of evidence could shorten trials by 25%, and computer-assisted transcription could shorten them by 20%. Even at the most basic level, being able to communicate with the court electronically will result in costs savings. Clearly the introduction of new technologies would help realise some of the costs savings Lord Woolf envisaged the reform of the Rules would bring.

Money Claim On Line is the Court Services' first step to bring court users an internet-based service. The claim form and payment of court fees are completed on-line; the claim is automatically issued and served on the defendant; judgment by default is requested on-line, and a warrant of execution can be sent electronically to the bailiffs at the defendant's home court.

The Electronic Presentation of Evidence (EPE) is another project in the modernisation programme. It provides for simultaneous display of evidence to all parties in a trial, via monitors permanently installed in the courtroom, using courtroom presentation software. This ensures that all involved are looking at the same thing at the same time, and a pilot trial demonstrated potential savings of up to 20% in trial time.

The aims of the modernisation programme are increasingly reflected in decisions of judges who, for example, show a growing willingness to allow the parties to give evidence by video link. The scope of the Rules permitting evidence by video link was recently tested in the case of *Rowland and Anr v Bock and Anr* (in which CMS Cameron McKenna acted for the claimants). The second claimant, a Swedish businessman, was subject to a request for his extradition to the United States for alleged insider dealing. As he risked arrest and extradition if he entered the UK to give evidence he sought the court's permission to give his evidence by video link. At first instance the court declined, finding that receiving evidence through video link "was a second-class way of conducting a trial", and that it should only be ordered where there was a "pressing need for an order", for example, if the witness was too ill to attend in person. On appeal, the court determined that that was too restrictive and no defined limit should be placed upon the discretion to permit video link evidence as any other conclusion would conflict with the broad and flexible purpose of the Civil Procedure Rules.

The next few years will be an interesting time for litigants. Assuming the funds are forthcoming from the Treasury, and the IT works, the implementation of the promised new technology will fundamentally change the way the courts manage proceedings and how the court interacts with its users. Law firms are already poised to take advantage of the new landscape, having invested heavily in technological solutions, including electronic case management tools, scanning facilities, and internet based disclosure rooms. Unfortunately, the Lord Chancellor's Department's track record of securing working IT solutions is not good. If the system works as predicted, litigation in the civil courts should be quicker and cheaper, but it looks as though litigants may have some time to wait before they will see the promised benefits.

"Assuming the funds are forthcoming from the Treasury, and the IT works, the implementation of the promised new technology will fundamentally change the way the courts manage proceedings and how the court interacts with its users."

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Construction: ambushes, deductions and cross-claims

"If it does not constitute a dispute, the Adjudicator will have no jurisdiction and any decision will be unenforceable."

Decisions concerning the enforcement of Adjudicators' decisions under the Housing Grants, Construction and Regeneration Act 1996 have again been an important feature of construction law over the past year.

A couple of themes have been of particular interest:

- the issue of what constitutes a "dispute" which can be referred to adjudication and
- the extent to which deductions, set-offs and counterclaims can be raised by parties who are under an obligation to pay monies as a result of an Adjudicator's decision.

Disputes

The right given to parties to construction contracts under the 1996 Act is a right to refer "a dispute" under their contract to adjudication in accordance with the provisions of section 108.

Parties on the receiving end of an adjudication notice who feel they have been "ambushed", can challenge the process by questioning whether the matter referred to adjudication constitutes a "dispute". If it does not constitute a dispute, the Adjudicator will have no jurisdiction and any decision will be unenforceable. This strategy was highlighted a couple of years ago in *Fastrack Contractors Limited v Morrison Construction Limited*, which decided that a dispute must have crystallised before an adjudication could be started. This issue was taken further in 2002 in *Edmund Nuttall Limited v RG Carter Limited* which held that, for there to be a dispute, there must have been an opportunity for the protagonists to consider the whole package of arguments advanced and the facts relied on by each side and to formulate reasoned arguments. While a refinement of the arguments may not fundamentally alter the dispute, a party cannot abandon wholesale facts or arguments and contend that the dispute remains the same because the claim remains the same. If the dispute alters, an Adjudicator appointed in relation to the reformulated dispute acts without jurisdiction.

This decision has created huge scope for argument that any adjustment to a party's case constitutes a reformulation of the dispute. The torrent of pre-adjudication letters from parties seeking to avoid, or capitalise from, the impact of the decision, can only be expected to grow.

Deductions, set-offs and counterclaims

The question of the scope of available deductions from Adjudicators' decisions is also a recurring theme in recent caselaw. *David McLean Housing Contractors Limited v Swansea Housing Association Limited* found that an Adjudicator's decision concerns simply the parties' rights and obligations under the contract and does not create a debt in its own right. As a result, it is possible for a party on the receiving end of an Adjudicator's decision to serve a valid notice to withhold sums from amounts awarded by the Adjudicator. That decision was closely followed in *Solland International Limited v Darydan Holdings Limited*. In that case, the contract provided that the Adjudicator's decision was binding and that the parties must comply with it. On that basis, the Judge found that the sum awarded by the Adjudicator was payable under the contract and the paying party

could not claim an abatement, or cross-claim, to reduce/extinguish the amount awarded by the Adjudicator.

This issue was most recently considered in *Bovis Lend Lease Limited v Triangle Development Limited*. In that case, it was held that the decision of the Adjudicator gave rise to a contractual obligation to comply with the decision and that obligation would usually preclude the paying party from withholding, deducting, setting-off or cross-claiming. However, where the contract gave the paying party an entitlement to deduct from, or cross-claim against, the Adjudicator's decision as a result of the same, or another, adjudication decision, the first decision would not be enforced. In this case, there was a contractual term stating that, on determination of the contract, no further sums payable under the contract became due. As a result the paying party was entitled to resist payment.

These cases all make it clear that the parties' rights of deduction and set-off are governed by the terms of the contract. Therefore parties likely to be on the receiving end of Adjudicators' awards will be looking to include a contractual term that permits set-offs and cross-claims from Adjudicators' decisions. At the time of writing, the full text of the Bovis Lend Lease decision is not yet available and it will require close analysis to determine the most effective wording for the clause.

"These cases all make it clear that the parties' rights of deduction and set-off are governed by the terms of the contract."

Conclusion

These issues will no doubt continue to trouble the courts in the months to come.

Consultants who think they are getting off lightly under the adjudication regime should take heed of the decision in *Gillies Ramsay Diamond v PJW Enterprises Limited* in which an Adjudicator found that a firm of surveyors had been negligent and made an award of damages against it. On review, the court found that the Adjudicator had cited insufficient grounds to justify the finding of negligence but nevertheless, the mistakes by the Adjudicator did not go to jurisdiction and the decision was therefore enforceable. Will this decision lead to more adjudications against consultants? Almost certainly, yes. Consultants and their insurers should be ready to remind Adjudicators that evidence of an independent expert from the same profession must be available to determine whether the defendant fell below the standard of reasonable skill and care for that particular profession.

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Employment: tribunal reform

"...there will be a requirement of early disclosure of information sufficient to enable the parties to assess the strengths of the case."

The complaint has often been made that Employment Tribunals (formerly known as Industrial Tribunals) have been hijacked by lawyers and become a rival court system, bound in the same way by legal precedent and procedural rules. There is much truth in this complaint as legal precedents and arguments are deployed in a typical tribunal hearing, no less than in high court litigation.

The major reforms of civil litigation introduced in April 1999 initially had no application to Employment Tribunals. That was rectified in July 2001 when new rules were published incorporating certain key Woolf concepts, such as the overriding objective of achieving justice, intended to streamline procedures. Another important change was the introduction of an ACAS arbitration scheme as an alternative to a full scale unfair dismissal hearing, if both parties agreed to submit to arbitration. This was designed to afford a less legalistic and formal alternative, the availability of which represented a recognition of some of the failings of the existing system. But neither the new rules, nor the arbitration alternative, seem to have made a huge difference in practice.

Against this background, the DTI set up an employment tribunal system task force in October 2001 which was asked to make recommendations on how the system could be made more efficient and cost effective, in particular for individual applicants and small businesses. It was set an overall objective of ensuring that the employment tribunal system reflected 'the needs of its users in the changing environment in which it operates'. The task force reported at the end of July 2002 with 61 recommendations, ranging from changes in internal procedures, improvement in guidance material and user consultation to substantial investment in staffing and technology resources. In other words the system is to be more 'user friendly' and efficient. A subtext is that it ought to be possible to find one's way through a tribunal claim without recourse to expensive lawyers.

The recommendations of the task force have been accepted in principle by the Government and widely supported by unions, employers, the judiciary and indeed ACAS. It can therefore be expected that they will be implemented. But what do they amount to and what differences will they make in practice?

One key aim is to facilitate earlier resolution of disputes. This is, of course, consistent with the approach of both the Government and the judiciary to litigation generally. To that end, there will be a requirement of early disclosure of information sufficient to enable the parties to assess the strengths of the case. We can expect there will be a specific encouragement to consider reaching settlement built into the procedure, with another plug for mediation. This is a welcome move as mediation is being used successfully to resolve many employment disputes.

These changes also go hand in hand with the new unfair dismissal rules, introduced by the Employment Act 2002, which will come in on 6th April 2003. They are designed to promote proper use of disciplinary and grievance procedures in the workplace, in the hope that that will

reduce possible litigation, and they introduce a penalty, in the form of higher or reduced compensation, where the employer or the employee fails first to use those procedures.

Many of the recommendations are designed to reduce inefficiencies in the present system. One frustration for many years has been different practices in different regions, and this will all change. There is a lot about computerisation, minimum standards of facilities and accommodation at tribunals and so forth.

"One frustration for many years has been different practices in different regions, and this will all change."

The number of tribunal claims has risen inexorably, more than doubling during the 1990's. The real test of these reforms will be whether there is a significant decrease in the number of contested hearings from the present rate of over 30,000 per annum.

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Employment: confidentiality - who do you trust?

"...to be best-protected an employer needs an established, well-defined policy on the treatment of confidential information..."

The law on the duty of confidentiality owed by employees in favour of their employers has long been clear in principle, but its detail has been the subject of some judicial controversy and areas of uncertainty remain. One of those areas has now been considered in 2002 by the High Court and the Court of Appeal in *Campbell v Frisbee* while another case, *Jockey Club v Buffham*, demonstrates the old maxim that there is no confidentiality in an iniquity. The latter principle is also now buttressed by the protections that "whistleblowers" enjoy as a result of the Public Interest Disclosure Act 1998.

The long established general principle is that employees must not disclose to third parties, or use for their own or third parties' benefit, any confidential information they acquire in the course of their employment while that information remains confidential. Despite the courts' best efforts, the line drawn between protected confidential information and unprotected information is still difficult to define in practice. At least in relation to an employee's skill and knowledge, the 1997 High Court decision in *Ocular Sciences v Aspect Vision Care* allows an employee to use that acquired skill and knowledge, no matter where it was acquired and even if it was secret at the time it was acquired.

This principle helps define confidential information as identifiable objective knowledge of the employer which excludes the employee's own skill, experience and know-how. In drawing that distinction the court will look at all the circumstances of the employment and particularly the nature of the job performed by the employee, the nature of the information itself, whether the employee was told it was confidential and whether the information can be split from non-confidential information. A well-drafted confidentiality clause is obviously helpful but, in reality, to be best-protected an employer needs an established, well-defined policy on the treatment of confidential information, and the policy itself needs to ensure that there is appropriate discrimination between protectable and non-protectable information, lest the whole policy be tainted.

One simmering dispute has been whether, like restrictive covenants, confidential obligations are discharged if an employee is wrongfully dismissed. The point has now been considered by the courts, albeit in a case involving a self-employed person rather than an employee. In the case of *Campbell v Frisbee*, the PA of Naomi Campbell leaked salacious confidential information about her former boss to a newspaper, which the newspaper then published. Ms Campbell sued her former PA, relying upon a written confidentiality undertaking. The PA alleged that she had been assaulted by Ms Campbell as a result of which she quit and claimed to have been constructively dismissed. The PA argued that she was no longer bound by her confidentiality undertaking. The High Court held that this argument must fail; there could be no conceivable justification for granting, as a windfall to a wrongly dismissed employee, a present of the employer's secrets.

That decision would be welcome news for employers , but for the fact that the Court of Appeal allowed the PA's appeal. Although the Court of Appeal accepted that the issue was not clearly established,

they did not think it likely that she would establish any material error by the judge but they could not say she had no reasonable prospect of success on the issue, and so must (albeit reluctantly) allow the appeal.

Anyway, the later case of *Jockey Club v Buffham* shows an employer may be unable to restrain publication of wrongly disclosed confidential information where the public interest in receiving that information outweighs the employer's right to maintain confidence.

The Club was seeking to prevent publication by the BBC, in October 2002, of confidential documents which Buffham had wrongly taken before his employment terminated. The retention was contrary to both a termination of employment agreement and a Consent Order settling earlier litigation between the Club and Buffham over disclosure of confidential information to journalists.

The Club established that the information had the necessary quality of confidence about it; it had been received by Buffham in confidence and the BBC had had notice of its confidential nature. However, the Judge had to balance the public interest in upholding the confidentiality against the public interest in accessing information of legitimate public concern. The documents were said to evidence mis-deeds in the horse racing world for which the Jockey Club was the regulator and the BBC argued, in view of the size of the betting public and the racing and gambling industry, the public interest weighed more heavily on disclosure. The Judge agreed and allowed the BBC to use the documents for the purposes of the Panorama programme.

There is yet a further difficulty of which at least senior executives need to be aware. That is that their personal secrets are not equated with the confidential information of the company. So confidentiality clauses in contracts of employment which are drafted to protect the employers' confidential information will not necessarily protect the private secrets of a senior executive. Although these are likely to be protected under the general law of confidence, and perhaps under the right of privacy under the new Human Rights Act, senior executives who entrust PAs with responsibility for personal, as well as business, affairs would be well advised to insist on a confidentiality undertaking in favour of them personally.

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Arbitration: selecting your seat

"...there are significant differences in the way arbitrations may be conducted in accordance with the national laws in each country."

In its Statistical Report, published in Spring 2002, the ICC found that the number of parties involved in arbitration from Central and Eastern Europe increased by 68% in 2001. France, Germany, England and Switzerland all featured prominently in the survey, coming second to fifth respectively in terms of the number of parties involved in ICC arbitrations. According to the report, France was the most popular venue, probably because the ICC is based in Paris, while Switzerland had the greatest number of arbitrators, perhaps reflecting their tradition of neutrality.

With the increasing prominence of international arbitration in the resolution of trade disputes, a party with an understanding of the mechanics of arbitration in different jurisdictions may well be at a considerable advantage. France, Germany, England and Switzerland are all established centres for arbitration with well-deserved reputations, but parties to prospective arbitrations in those jurisdictions should be aware that there are significant differences in the way arbitrations may be conducted in accordance with the national laws in each country.

In 1985 the UNCITRAL Model Law of Arbitration was published and was based in broad terms, around three internationally recognised principles of arbitration law, namely:

- Limitation of court assistance and supervision
- Freedom of the parties to determine the rules of procedure
- Recognition and enforceability of awards

The UNCITRAL Model Law enshrines those principles by providing that the parties are free to agree the procedures applicable to arbitration, but providing rules that apply in the absence of agreement between the parties. This mechanism allows parties to adopt wholesale rules for the conduct of arbitration, by reference to institutional rules or to select specific arrangements in ad hoc arbitrations by reference to the relevant arbitration clause or agreement.

Subsequently many jurisdictions reformed their arbitration laws incorporating those principles.

In Germany, new legislation was introduced on 1 January 1998 reforming German Arbitration Law, largely adopting the structure and wording of the UNCITRAL Model Law. In England, the Arbitration Act 1996, which came into force on 31 January 1997, codified the existing piecemeal legislation and brought English law more into line with the internationally recognised principles. In Switzerland too, international arbitration law was codified, with effect from 1 January 1998. Both the English and Swiss legislation borrowed from the UNCITRAL Model Law. In France the legislation pre-dates the 1985 UNCITRAL Model Law but, even so, provides a relatively modern and flexible framework for arbitration.

"...experience shows that, despite plenty of lip service being paid to openness and co-operation, there is no guarantee of any real co-operation between the parties once a dispute has arisen."

Despite the common source of much of the law, significant differences remain and before signing an arbitration clause or agreement, great care should be taken to consider those differences to identify which country would be a better venue (or seat) to suit the parties' needs in the event of a dispute. This is particularly important if the arbitration clause or agreement results in an ad hoc arbitration (as is often still the case), rather than by reference to any particular institutional set of rules. For example, absent specific agreement between the parties, if a single arbitrator is to hear disputes but the parties want to preserve a right to appeal on a point of law, the most appropriate venue (or seat) of the arbitration would be England. The same arbitration in Germany would be heard by three arbitrators with very limited rights of appeal.

Arbitration is a consensual process: parties refer their dispute to arbitration by agreement. Accordingly, much of the procedure for arbitration is still within the control of the parties as they can agree between themselves how the arbitration should be conducted. However, experience shows that, despite plenty of lip service being paid to openness and co-operation, there is no guarantee of any real co-operation between the parties once a dispute has arisen.

Opportunity for disagreement and much uncertainty can be removed at the time of negotiating the arbitration clause, while goodwill abounds, by making provision in the clause for the key aspects of procedure or by carefully choosing the institutional arbitration rules which are most likely to suit the parties. These issues are not always high on the parties' agenda when making a commercial deal. Therefore, the party with its own jurisdictional preferences (or hierarchy) for the determination of international disputes by arbitration may avoid later concern over the conduct of arbitration proceedings, or worse, costly battles over the venue (or seat), by the selection of the appropriate arbitration clause suitable to the circumstances. That clause should normally identify an institutional set of rules to apply, the language in which the arbitration is to be heard, the number of arbitrators and, of course, the venue (or seat) of the arbitration.

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Product Liability: class actions, product liability and product safety

Multi-party actions

The past year has seen multi-party actions (MPAs) expand from the products arena into the financial and consumer sectors, with actions such as those involving Lloyds' names, Equitable Life and Claims Direct. Environmental MPAs may not be far behind. Two of the juggernaut product liability cases have been ended by the courts, oral contraceptives and organophosphates in sheep dip, both of which are discussed in a later article in this publication, "Scientific evidence, causation and law".

Defendants may take some comfort from the confirmation that if claimants are to receive the benefit of being part of a group litigation, they will also incur the burdens of the outcome of that litigation. The organophosphate Court of Appeal judgment affirmed the principle in *AB & Others v John Wyeth* that the court could consider the "overall viability" of the claims and carry out a broad cost benefit analysis. This was also extended to bar the progress of new cases without the benefit of radically new and compelling evidence. This provides defendants with some protection against weak group litigation claims which have not been expeditiously progressed and which have incurred disproportionate costs, a situation with groups of claims which can cause defendants particular prejudice.

Problems over funding remain the principal difficulty for claimants' lawyers in getting group litigation off the ground. State funding for the impecunious litigant is still, in theory, available from the Legal Services Commission (replacing legal aid since 1999), and special budgets are available irrespective of whether claimants are impecunious for MPAs or cases which are in the wider public interest. However, the budgets remain small and are not as readily available as legal aid was. Three old-style product liability MPAs continued to be funded by legal aid: unlike the oral contraceptives and organophosphates claims, the MMR/MR vaccines case continues for the present.

It remains difficult for lawyers to fund large cases or MPAs themselves on a conditional fee basis. Even though the House of Lords in *Callery v Gray* has permitted a 20% uplift in fairly straightforward cases, the Court of Appeal in *Halloran v Maloney* has only allowed a 5% uplift for cases which settled before issue of proceedings.

In November 2002 the EU states reached political agreement on a draft Directive which would require all member states to have mechanisms that achieve proper access to justice in both civil and commercial cross-border matters, either by state-funded legal aid or some other mechanism. This opens up the possible introduction of contingency fees, and hence the spectre of uncontrolled, expensive, speculative US-style litigation.

Product recall and liability

Nevertheless, the implications of the revised Directive 2001/95/EC on general product safety of consumer products, which is to come into force by January 2004, mean that producers and distributors must anticipate an increase in product quality and liability claims. They must certainly ensure that they have robust post-marketing systems to collect and assess information on product safety, so as to be able to fulfil the requirement to report to the authorities if they have placed dangerous products on the market, whether or not the products have caused injury. That information will be published by the authorities and

acted on by consumer lawyers.

Companies will also need to have robust recall systems in place, as the authorities will expect recall to occur more often, and to have sound risk assessment mechanisms. The sequence of decisions by the Court of Appeal in the Britvic/Bacardi Breezer benzene contamination litigation shows the importance of scrutinising the wording of contractual indemnities for coverage and reasonableness. There is also a need to check the coverage of product and recall insurance, particularly given the decision that products supplied as ingredients cease to exist once manufactured into the final product and it is the final product which is defective.

Producers are having to come to terms with the particularly strict interpretation of "defect" under the Consumer Protection Act in the 2001 decision in the Hepatitis C case. The decision has not gone uncriticised in academic circles. A similar adverse blow was the House of Lords' decision on causation in *Fairchild*, where they recognised an exception to the normal "but for" rule in *McGhee* and permitted a claimant to jump the evidentiary gap on causation-in-fact in certain circumstances of multiple exposure, based on a "material contribution" approach. Subsequent academic work has opened up possible arguments to mitigate the severity of this approach, based on arguments of apportionment.

"...the moral is that suppliers may need to make the identification to a prospective claimant very quickly and voluntarily, without waiting to receive a request to do so."

A judgment of the Austrian Supreme Court highlights ambiguities in the provisions of the Product Liability Directive that deal with the secondary liability of suppliers where the producer cannot be identified. The secondary liability is only supposed to arise if the supplier fails within a reasonable time to identify either the person who supplied him, or the producer of the product. The uncertainty arises over when the reasonable time starts to run from and until the European Court clarifies matters, the moral is that suppliers may need to make the identification to a prospective claimant very quickly and voluntarily, without waiting to receive a request to do so.

It remains unclear whether the European Commission will propose any change in the Product Liability Directive. A study on the working of the Directive has been progressing in 2002 and another study is starting on the "development risks" defence. The Danish EU Presidency recently proposed a change in the Directive, on liability of suppliers, which raises the chances of other amendments being put forward. Some companies are seriously considering how best to ensure that they are able to make a balanced voice properly heard in debate about prospective reforms such as on liability, funding, class actions rules, punitive or other damages.

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Health and safety: reducing employees' stress claims

Stress, its causes, repercussions and meaning, has dominated the workplace health and safety stage in 2002. It has been the subject of the European Health & Safety week, a new HSE campaign, a Stress Awareness day and, most significantly, the Court of Appeal landmark decision in *Sutherland v Hatton* which set out guidelines clarifying when employees can bring claims and how employers can protect themselves. The Court listed practical propositions for considering stress claims based on 16 principles:

General principles

- The ordinary principles of employers' liability apply to claims for psychiatric illness or physical injury: a claimant must show that, on the balance of probabilities, a failure to take the care which could reasonably be expected in the circumstances, caused the injury or loss claimed.
- No occupation should be regarded as intrinsically dangerous to mental health.

The "threshold question"

- "Whether this kind of harm to this particular employee was reasonably foreseeable."
- Factors likely to be relevant in answering the threshold question include:
  - the nature and extent of the work done;
  - signs from the employee of impending harm to health.

Foreseeability

- Foreseeability depends upon what the employer knows, or ought reasonably to know, about the individual employee.
- The employer is generally entitled to take what it is told by an employee at face value, unless there are good reasons to think to the contrary.
- To trigger a duty to take steps, the indications of impending harm arising from stress must be plain enough for any reasonable employer to realise that action is required.

What is reasonable?

- The size and scope of the employer's operation, its resources and the demands it faces are relevant; as are the interests of other employees and the need to treat them fairly.
- The employer is only in breach of duty if it has failed to take steps which are reasonable in the circumstances, bearing in mind the magnitude of the risk of harm occurring, the gravity of the harm which may occur, the costs and practicability of preventing it, and the justifications for running the risk.
- An employer can only reasonably be expected to take steps which are likely to do some good.

Guidelines for employers

- An employer who offers a confidential advice service, with referral to appropriate counselling or treatment, is unlikely to be found in breach of duty.
- If the only reasonable and effective step would have been to dismiss or demote the employee, the employer will not have been in breach of duty in allowing a willing employee to continue in the original job. However, if there is no alternative solution, it has to be for the employee to decide whether to carry on in the same employment.

Level of proof required for causation

- It is necessary to identify the steps which the employer both could and should have taken before finding it in breach of its duty of care.
- The claimant must show that the breach of duty has caused or materially contributed to the harm suffered. It is not enough to show that occupational stress per se has caused the harm.

Apportionment

- Where the harm suffered has more than one cause, the employer should only pay for that proportion attributable to its wrongdoing, unless the harm is truly indivisible.
- The assessment of damages will take account of any pre-existing disorder, or vulnerability, and the chance that the claimant would have succumbed to a stress-related disorder in any event.

These principles provide the stepping stones to assess whether or not an employer has knowledge or deemed knowledge, of the foreseeability of harm to a particular employee, such that its failure to take reasonable steps constitutes a breach of duty of care.

The decision does not shut the door on stress claims but will limit the number of claims that can be successfully pursued. The threshold is whether or not psychiatric injury is reasonably foreseeable in respect of a particular employee.

The subsequent case of *Pratley v Surrey County Council* is illustrative of the new guidelines in practice. The claimant had been absent from work due to stress but asked her doctor to record the reason for absence as "neuralgia". The threshold question was whether that kind of harm was reasonably foreseeable in relation to that particular employee. The court held that the employer, although aware that the workload was burdensome, had had nothing to alert it, or any reasonable employer, to a risk to the claimant's health.

Action points for employers

The decision in Sutherland certainly makes it more difficult for employees to succeed in stress claims, not least because the guidelines have identified a range of actions which responsible employers will be taking which will reduce the circumstances giving rise to these claims. Those responsible for health and safety have been busy taking leads from the decision to introduce new procedures to demonstrate they have behaved as a responsible employer. These include:

- Pre-employment health check: in this way vulnerable potential employees may be excluded from stressful roles.
- Health and Safety policy to cover stress – a clear statement in relation to how stress is dealt with in a company's health and safety policy shows that the company is complying with the health and safety regulations to provide a safe working environment for employees and assists staff in following a set procedure. It would also stand as a defence where an employee fails to disclose that they are suffering from stress because of ignorance of a company's procedures.
- Bullying & Harassment Code including clear complaints-handling procedure.
- Risk Assessments - to include stress (Health & Safety Executive guidance can be found at: www.hse.gov.uk/pubns/indg281.pdf).
- Working time monitoring to include recording employees with action taken if they breach the benchmark in the Working Time Regulations 1998.
- Health monitoring - both through a confidential advice line and/or regular company medicals.

No employer has an absolute duty to prevent all stress which can be as a result of interests outside work. However, once an employee has raised the issue of stress an employer is under a duty to properly investigate and protect the employee as far as is reasonably practicable.

The lesson of *Sutherland v Hatton* is that employers with proper grievance procedures and who are able to illustrate a receptive and flexible response to complaints can protect themselves from unmeritorious claims.

"The decision does not shut the door on stress claims but will limit the number of claims that can be successfully pursued. The threshold is whether or not psychiatric injury is reasonably foreseeable in respect of a particular employee."

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Product liability: scientific evidence, causation and law

"Increasingly the court has to assess scientific data to determine questions of generic causation according to legal criteria."

Three major decisions were made this year concerning the treatment of evidence of causation. This issue has tended to predominate in product liability and toxic tort litigation in the UK, and the decisions show quite contrasting approaches.

The oral contraceptive pill litigation

The pill litigation arose from health scares after reports of epidemiological evidence postulating a link between use of the pill and blood clots forming in the venous system (venous thromboembolism, or VTE). The issues in the case of *XYZ and Others v Schering, Organon and Wyeth* concerned the relative safety of newer 'third generation' pills compared with 'second generation' pills. The UK Committee on the Safety of Medicines had written to healthcare professionals stating that the studies indicated "around a twofold increase in risk" of VTE associated with third generation pills compared with second. As well as profoundly affecting the prescription of the products, and the unplanned pregnancy rate, this action led to intensive scientific debate as to whether or not the difference in risk was real or apparent.

The claims were brought under the Consumer Protection Act 1987, and the claimants had to prove that they had injuries caused by a defect in the products. The court's approach was to begin by considering whether, based on a substantial volume of epidemiological expert evidence, there was sufficient evidence of causation because, if there was not, the claims must fail. The issue before the court was a narrow one: was the 'true' relative risk between third and second generation pills greater than two? A relative risk of two or more would represent a doubling of risk of VTE, indicating that more than 50% of women who suffered such a condition would not have done so if they had been prescribed the second generation instead of the third.

In the event, the court favoured a technique known as the Cox Regression Analysis, which indicated no difference in relative risk between the products. The judge commented that even if this analysis were not relied upon, the finding would have been one of a true relative risk of 1.7. On either basis it was not possible for the claimants to prove causation so the trial proceeded no further.

The judge also stated:

"Epidemiology has been in the van of developing medical knowledge... pending fuller biological understanding, epidemiology should be able to light the way to an understanding of factors or exposure which may cause such conditions to occur".

The words apply to any case where generic causation ("Can X cause Y?") is in issue and imply a rejection of the simplistic, legalistic approach, *post hoc ergo propter hoc* (after it, so because of it) which has formed the basis of so much legally aided pharmaceutical litigation.

Increasingly the court has to assess scientific data to determine questions of generic causation according to legal criteria. This decision shows how the court has resolved the tensions between the different traditions of reasoning in science and law.

Organophosphate group litigation

Litigation stretching back to the early nineties was finally ended in a Court of Appeal decision in *Shell and Others v Robert Young and Others*. The defendant manufacturers had applied for the cases to be struck out because the claimants had failed to support their pleadings with medical evidence satisfactorily attributing the alleged injuries (a variety of neurological and psychological conditions) to exposure to organophosphate chemicals. This was in spite of numerous extensions of time the court had allowed for the production of the evidence, including a large and very costly pilot study consisting of a barrage of medical tests to which claimants had subjected themselves. The defendants also argued that to allow the action to continue was an abuse of process.

In July 2001 Morland J rejected most of the applications as he could not rule out the possibility that if the case proceeded to trial some expert evidence of causation might be obtainable. (The Court of Appeal described this approach as "somewhat overindulgent towards the claimants"). However, the judge did accede to the abuse of process application and struck out all the claims as, taking an overview, the claims individually and as a group were unviable.

This overview took into account the absence of appropriate expert evidence to establish causation, the speculative nature of the claims themselves, the amount of delay and the public money expended. Morland J held that the claimants neuropsychological evidence was of "very limited value" in establishing causation and expert evidence of neurologists and psychiatrists supporting a causative link between symptoms and exposure to organophosphates was missing.

In the Court of Appeal the claimants argued that the courts should not consider the strength of scientific evidence on causation without a trial and, further, that the claimants intended to adopt a new approach to causation – "the exclusionary approach". This was based on the inability to ascribe any other cause to the claimants' injuries, which it was claimed could be associated temporally with exposure to the chemicals.

In a ruling of considerable importance for group actions, the Court of Appeal concluded that the principles adopted in the pre-CPR cases of *AB and Others v John Wyeth* applied in this case: the judge had been entitled to take a broad view of the evidence based on the unsatisfactory history of the claimants' case and the very substantial costs of proceeding further. In addition, it was likely that if further cases came along after this group action terminated they would need "radically new and compelling evidence of causation" if they were not to be struck out as well.

Asbestos litigation

The House of Lords in *Fairchild v Glenhaven Funeral Services Limited* took an unconventional approach to proof of causation in order to reach what it considered was the only just outcome for claimants suffering from mesothelioma.

Before the case reached the House of Lords, it had been successfully argued in the Court of Appeal that it was impossible for claimants, because of the limitations of medical evidence and the multiple exposures they had had to asbestos during their working lives, to prove that but for a particular employer's failure to protect them from exposure during a particular period of employment, the disease would not have occurred. The particular obstacle the claimants faced in this case was that the risk of contracting mesothelioma increases with multiple exposures to a causative agent, but the actual disease is potentially caused by one single incident of exposure.

This has been described as an "indivisible" injury, as opposed to a "divisible" injury where cumulative exposures cause the injury over time – e.g. industrial deafness. In the event of "divisible" injuries, cumulative exposures increase the severity of the injury over time and multiple defendants may each be held to have "materially contributed" to the injury and so be liable. However, in the case of the "indivisible" disease of mesothelioma, where there were multiple incidents of exposure to asbestos with each defendant

being found in breach of duty, there is no scientific way of proving which "guilty fibre" was causative of the injury.

This left the House of Lords with the dilemma of whether to adhere rigidly to the strict legal requirement for proof of causation. They decided not to on the basis of "justice" for the claimants. The 'unbridgeable evidential gap' caused by the application of the traditional "but for" legal test of causation was surmounted by questioning the purpose of the test itself and actively construing the lack of evidence against the defendants who were perceived to be morally 'in the wrong'. The judgment is restrictive, based on the particular facts of the case, but it openly anticipated further developments and extensions to the law of negligence in the future.

The juxtaposition between the strict Court of Appeal ruling in the organophosphate litigation and the flexible approach taken by the House of Lords to causation in *Fairchild* may be explained by the respective attitudes of the court to the position of the defendants in each of these matters. However, all three cases illustrate novel scientific evidential issues are beginning to face the courts and uncertainty is re-emerging as to whether strict proof of causation will be required.

"...all three cases illustrate novel scientific evidential issues are beginning to face the courts and uncertainty is re-emerging as to whether strict proof of causation will be required."

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Media: star-struck ads?

There has been much recent publicity about the use of famous people in advertising, acknowledging that paying celebrities to endorse products can reap huge benefits. In particular, both Sainsbury's and Walkers Crisps have attributed a substantial portion of their profits to the impact of endorsements by Jamie Oliver and Gary Lineker. Put simply, famous people help to sell products. Even the most uninspiring of subjects can be made interesting with the addition of a personality. But – can you use celebrities in advertisements without their permission?

Under English law, there is no right of personality. We also have extremely limited rights of privacy. In theory, the lack of an English right of personality should make it easier for advertisers to use the images of celebrities without their permission. However, using personalities raises a number of issues which must be carefully considered in any advertising campaign.

First, the regulatory codes include provisions regarding the use of individuals. The Advertising Standards Authority Codes urge advertisers to obtain written permission in advance if they portray or refer to individuals, although the use of "entertainers, politicians, sportsmen" and others with a high public profile will be permitted, so long as the celebrity is not portrayed in an offensive or adverse way and no endorsement is implied or claimed.

The ITC Broadcast Codes are not as generous. No distinction is made for the well known and prior permission is required before referring to any "individual living person". This provision is more easily enforced as a result of the need for prior clearance for all broadcast advertisements. This was recently demonstrated when advertisers sought to use the image of George Bush in a humourous advertisement which showed the US President receiving a video as a gift and then trying to use it by putting it in a toaster, where it burns to a crisp. Another advertisement for the same product showed David Beckham making out his Christmas list and asking his wife how to spell "DVD". These were considered too offensive and the advertisements were not permitted.

Copyright is obviously a key issue to be considered when using any photograph, but personalities are also increasingly seeking to use trademarks in order to protect the use of their image. Celebrities may register anything from a name or slogan, to a caricature or other likeness. Personalities from different fields have registered their names as trademarks, including Alan Shearer, Eric Cantona, Jamie Oliver, Delia Smith, Charlie Dimmock and Alan Titchmarsh. However, images have also been trademarked, including Eric Cantona and Linda McCartney. Damon Hill has registered the image of his eyes peering out from within his Formula One helmet.

Defamation has always been an issue for advertisers to consider when using the image of a personality, ever since the famous case of *Tolley v Fry* in 1931, where a caricature of a well-known golfer showed a packet of Fry's chocolate protruding from his pocket. Mr Tolley complained that the use of this caricature would lead people to conclude that he had been paid for the advertisement and would thus compromise his amateur status. The problem may still arise if, for example, an image of a vegetarian were to be used for an advertisement relating to meat products or a personality who is teetotal in an advertisement relating to alcohol.

"It is clear from this case that famous personalities will now be able to prevent the unauthorised use of their names or images for endorsement using the law of passing off..."

The most significant development over the past year was in relation to passing off. Although it had never before been successfully relied upon in relation to advertising claims, Eddie Irvine used it successfully in his claim against Talk Sport. Talk Sport had used a photograph of Eddie Irvine dressed in his racing suit standing in front of his Formula One car holding a portable radio with the Talk Sport logo displayed on it. Although the marketing company had legally obtained the right to use the photo, it had doctored the image by replacing a mobile phone with the image of the portable radio. The court took judicial notice of the fact that it is common for famous personalities to exploit their names and images by endorsing products and services. Whilst, on the face of it, this may not seem surprising, from a judiciary not previously renowned for its ability to keep its collective finger on the public pulse, this was actually a real development. Laddie J accepted that an action for passing off could be based on false product endorsement.

Interestingly, at the end of his judgment, Laddie J indicated that if he had not decided that the law of passing off had developed sufficiently to cover false endorsements, it would have been necessary to consider the possible impact of the right to privacy in the Human Rights Act. Its impact will have to wait for another decision.

The Eddie Irvine case is a significant decision and one that has been long awaited in the current trend of using celebrities and their "branding" for endorsing products. It is clear from this case that famous personalities will now be able to prevent the unauthorised use of their names or images for endorsement using the law of passing off, providing they can show the necessary reputation and, most importantly, a misrepresentation leading to confusion. Loss, or damage, should be relatively easy to show, although quantum may be an issue. The damages awarded to Eddie Irvine were not high and, at the time of writing, are the subject of an appeal. Can the courts be relied upon to judge an appropriate figure? It will, of course, be important to take into account the fact that celebrities can, and will, choose carefully with which products they are happy to be associated. This may be something the court needs to consider more carefully.

Shortly after the judgment was published, Ian Botham publicly threatened action against Guinness for using his image in its "Believe" advertisements. The advertisement in question showed, in the background, a series of well-known, and widely available, images of Ian Botham from the golden days of 1981, when England were able to beat the Australians at cricket, featuring a quote from Fred Trueman to the effect that "he [Botham] couldn't bowl a hoop downhill". It must be seriously questionable whether a court would have found this to be an implied endorsement amounting to a misrepresentation as it was readily distinguishable from the advertisement using a doctored image of Eddie Irvine.

The rise in the cult of celebrity means that it is likely we will see an increase in claims where there is an unauthorised use of a person's image. However, with only one decided first-instance decision on the topic, there remain uncertainties as to the extent to which an advertiser can use a person's image without their consent.

The difficulty for advertisers is in putting the law into the practical context. Even if it seems clear, legally, that there is no endorsement, there remains the risk for the advertiser. Celebrities will usually have the means and often the ego and inclination, to make a claim and to fight points of principle. The legal costs and management time involved in defending could be prohibitive and should make advertisers think twice before using a celebrity's image unauthorised.

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Pensions: ombudsman flexes his muscles

The Ombudsman has helpfully used the publication of his annual report to make known his views on two important issues and trustees would be well advised to bear these in mind. Meanwhile the High Court has in a recent ruling made it less likely that the Ombudsman will appear on appeals. As a consequence there are likely to be more appeals and his absence will increase the prospects of the appeal succeeding.

Reasons for decisions

The Ombudsman believes that Parliament would not have introduced the office of Ombudsman if the sole purpose was to provide comparable remedies to those of the courts. Instead, the Ombudsman appears to perceive his role as providing remedies in a situation when one party, although acting lawfully, has acted unfairly or unreasonably.

"...the Ombudsman appears to perceive his role as providing remedies in a situation when one party, although acting lawfully, has acted unfairly or unreasonably."

An example he provided of the distinction between his jurisdiction and that of the courts, is where trustees fail to give reasons for their decisions. Courts will uphold the longstanding principle of trust law that there is no general duty for trustees to provide justification for a decision. The Ombudsman, however, warns in his annual report that he will:

> *"start from a presumption that it is maladministration for the trustees not to provide reasons for a decision which may adversely affect the person who seeks such reasons. There may well be justification in the particular case for the trustees not to provide reasons – for example in order to preserve rights to privacy of other people – but a straight, blanket "no" is not likely to be seen as an acceptable response. The law may not require the provision of a reasoned decision but acceptable standards of administration do."*

The Ombudsman applied this approach in a determination concerning the TKM Group Pension Scheme case where he concluded that it was " good administrative practice" for trustees to provide reasons for their decisions to those with a legitimate interest in the matter being decided. He then directed the trustees to reconsider the member's application for early retirement pension and to provide the member with reasons for the decisions taken. This may give an indication of how the Ombudsman will deal with future cases.

On this basis, trustees ought to be prepared with reasons for the exercise of any discretionary powers. Ideally, reasons should be recorded in the formal trustee minutes, accompanied by papers supporting the decision and notes to record that the correct procedures were followed, or in some other document retained by the trustees. The absence of such a document may make it difficult for the trustees to defend themselves if their decisions are challenged.

Trustees and exoneration clauses

Most trust deed and rules contain provisions exonerating trustees from personal liability for losses caused by their acts or omissions except where they have acted fraudulently or in wilful default of their duties.

"...the appeal process has historically proved vital to determining the scope of the Ombudsman's powers and jurisdiction."

In his annual report the Ombudsman queries whether it is appropriate for the trustees of a pension scheme to be exonerated for their actions to the detriment of individual members. However, when one considers that nearly all trustees of pension schemes are not professional trustees and are not getting paid, the removal of exoneration clauses may make it less likely for individuals to agree to be trustees.

As a solution to the possibility of personal liability, the Ombudsman suggests that the remit of the Pensions Compensation Board be extended or, alternatively, that pension schemes be required to carry indemnity insurance, both of which would involve additional costs to schemes.

Appeals and costs

All determinations of the Pensions Ombudsman can be appealed to the High Court. Indeed the appeal process has historically proved vital to determining the scope of the Ombudsman's powers and jurisdiction. Section 151(4) of the Pension Schemes Act 1993 permits appeals from a determination of the Pensions Ombudsman only on points of law.

In recent years, a recurring question that has arisen is whether the Ombudsman should be party to appeals (the Ombudsman holds powers comparable to that of a High Court judge and High Court judges are not permitted to be a party to an appeal from one of their decisions). Following a number of cases, it is now accepted that the Ombudsman can be a party to an appeal. It was believed that his presence would better facilitate the court proceedings as the individual complainant would not be best able to defend the Ombudsman's conclusions on points of law.

In the past, the courts have ordered the Pensions Ombudsman to pay the costs of an appeal to the extent that his appearance at the hearing led to costs being increased. This limited the Ombudsman's exposure to costs and led to him appearing regularly at appeals. This in turn meant that the individual complainants did not need to be a party to the appeal and expose themselves to costs in the event of an unsuccessful appeal.

In the High Court decision in *Moores (Wallisdown) Limited v Pensions Ombudsman* Ferris J ordered the Ombudsman to pay the entire costs of the party who had successfully appealed the Ombudsman's determination. Relying on a recent Court of Appeal case *R v Inner London North Coroner, ex parte Touche* relating to an appeal from a coroner, the judge overturned the previous position whereby the Ombudsman was only liable for costs to the extent that the Ombudsman's attendance increased the length of the appeal hearing.

Following this, the Ombudsman stated in his 2001/2002 annual report that he would only participate in an appeal if it raised an issue which he considered to be a threat to the effectiveness of his office.

Due to cost implications this is likely to lead to claimants being unrepresented at most appeals. In turn, this will mean that the Chancery Division judges have to take a more active role to consider and protect the interests of the unrepresented claimant.

It is likely that the scope of the Ombudsman's jurisdiction will continue to come under scrutiny from the courts. In addition the Ombudsman has laid down some markers of his own as to what in his view amounts to good practice when trustees exercise discretions and how trustees should be allowed to protect themselves.

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Property: disputes - statutory intervention

A number of developments have had an impact in this area over the past year – with the coming into force of new legislation, proposals for changes to existing law and an increasing awareness (and use) of provisions contained in recent statutes. This article highlights just a few of the more important developments and concludes with a brief overview of the market going into 2003.

The Commonhold and Leasehold Reform Act 2002

This Act has now been passed but a number of its provisions are subject to a phased implementation. For residential premises, the right to enfranchise or obtain a lease extension is significantly more widely available than was previously the case. The provisions dealing with right to manage and the new arrangements for dealing with service charges will be effective this year and, on the basis of current information, it is anticipated that the provisions will increase the administrative burden of building management and create greater bureaucracy. It should be noted that the right to manage will apply not only to those buildings with sole residential use but also to buildings containing a mix of residential and commercial use.

"The Commercial Lease Code has sought to redress the balance and encourages landlords to adopt a more open approach with proposed tenants when negotiating new leases."

The Landlord and Tenant Act 1954 Part II

In relation to commercial premises, a number of changes have been proposed to the Landlord & Tenant Act 1954, Part II, most of which are welcome. Such changes should reduce the time and costs incurred to contract out of the security of tenure provisions and for dealing with the lease renewal process. The changes to this Act should become effective during 2003.

The Commercial Lease Code

During 2002 we also saw a greater interest in the Commercial Lease Code, particularly by investment landlords with large property portfolios. There has been a perception of the commercial property market that landlords have, apparently, sought to abuse a "monopolistic" position, evidenced by the lease terms offered by them for commercial premises. Particular issues have been upwards-only rent reviews, (relatively) long lease lengths and seeking to avoid agreeing break clauses. The Commercial Lease Code has sought to redress the balance and encourages landlords to adopt a more open approach with proposed tenants when negotiating new leases. In particular, offering, say, alternative lease packages (with different rentals) and which may include leases with upwards and downwards rent reviews, shorter term lengths and incorporating mutual break clauses, etc.

Tenants should be offered an alternative to the standard institutional-type lease terms whereby, for a lease with inherently more friendly tenant lease terms the tenant would pay more rent, whereas for inherently more friendly landlord lease terms the tenant would pay a lower rent. The important point being to offer tenants a variety of lease terms and rental packages.

Although the Code is voluntary, and was first published in April 2000, landlords may regret ignoring the code. The Government's

"During 2002 we have certainly seen courts gaining confidence and actively managing more cases."

position is that unless there is clear evidence that the market is adopting the Code, we should anticipate legislation being enacted which would compel landlords to offer alternative lease structures to tenants. Although statutory intervention in a free commercial market is unwelcome, the impetus for change is unlikely to recede and it is anticipated that any such legislation would be somewhat harsher than the suggestions made in the Code and would compel landlords to adopt this new approach with their tenants.

The Disability Discrimination Act

An increasing number of instructions have resulted from clients who are concerned to understand their responsibilities (and liabilities) under this Act together with consideration of the extent to which, in the landlord and tenant arena, such obligations can be passed to a tenant. For multi-let commercial premises, this has required careful consideration of service charge provisions in relation to works necessary to common parts, in particular, entrances, etc. We have also seen in relation to older buildings, competing issues such as, on the one hand, the owner having obligations under the Act to make alterations to the building but, on the other hand, planning laws restricting (or prohibiting) any alterations in order to preserve, inter alia, the historical significance of such buildings.

The Civil Procedure Rules (the CPR)

The CPR gave to courts the power and encouragement to manage cases actively. During 2002 we have certainly seen courts gaining confidence and actively managing more cases. This is evidenced by courts, of their own volition (rather than on application by the parties), making directions for the future conduct of the case with tight timescales for compliance being imposed. Further, the timescale between commencement of proceedings and a trial date is now generally significantly shorter. If parties wish to obtain a stay of the court procedures, the courts will entertain this but will need to be persuaded that there is a benefit in suspending the process: repeated applications for a stay of the proceedings will not be tolerated. Rather interestingly, experience has shown that courts outside London tend to have a greater resistance to permitting such stays although the reasons for this are unclear.

More generally, the CPR urges parties only to commence proceedings as a matter of last resort. This has certainly encouraged parties to consider alternative forms of dispute resolution, including the use of a jointly appointed independent expert. For example, if the issue between the parties is rental valuation, it has become increasingly common for the parties to exchange lists of valuers who would be acceptable to them to act as independent expert and the respective parties' own surveyor will then make representations to that expert. Similarly, if the construction of a document is in dispute, the exchange of lists of suitable Leading Counsel and a joint appointment of one to act as an independent expert is increasingly common. This process will be less costly and more time efficient than having to deal with court proceedings. Further, since the parties have jointly chosen and appointed the independent expert, there tends to be a greater confidence in the decision made by that

expert: this is important since the ability to appeal an independent expert's decision is extremely limited!

The Property Market

Looking at the market, especially during the second half of 2002, reveals evidence of increasing rental voids both for commercial and residential property. Rental levels achieved on new lettings are declining. Consequences for legal work include:

- Fewer new developments are being contemplated, except for buildings in areas where there is indisputable tenant demand. Developments already commenced are being completed or, if the project is at an early stage (where the lawyers are currently dealing with rights to light issues and recovering vacant possession), there have been a number of examples where a developer has then sought to negotiate with the current occupiers new leases (excluded from the security of tenure provisions of the 1954 Act) for, say, five years but with a right to break operable on six months notice with such notice not being given before, say, Autumn 2003 (and with the tenant's right to statutory compensation being preserved until either the break option is exercised or the lease actually expires). By dealing with the site in this way, the developer will have kept open his options for a future development, not wasted the costs already incurred, continues to receive income from the site and has in place a suitable lease structure to enable a future development to take place fairly swiftly.
- The risk of rental voids has encouraged landlords of properties which are not prime to adopt a more flexible attitude on tenant default. The downside of having an empty property with the obvious security implications and liability for local authority rates is normally outweighed by suggesting "easier" terms for the rental (and service charges) than the landlord may be strictly entitled to under the lease. Each case will, of course, turn on its own facts and requires a proper examination of the tenant's true ability to meet its lease liabilities but some temporary flexibility by a landlord can often reap dividends.

It is anticipated that the property market in 2003 will probably be somewhat flatter than for 2002, with both landlords and tenants considering carefully their property requirements and their liabilities under current lease commitments. The prospect of fewer speculative commercial developments, more rental voids and, no doubt, an increased frequency of tenant default will inevitably create tensions. At the same time, however, this can provide opportunities for both landlords and tenants to achieve more satisfactory relationships provided there is effective communication between them and a mutual respect for their respective goals.

"The risk of rental voids has encouraged landlords of properties which are not prime to adopt a more flexible attitude on tenant default."

C/M/S/ Cameron McKenna

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Environment: does the HRA protect the environment?

The lack of any express reference to the environment in the European Convention on Human Rights (ECHR) has not prevented its use in an environmental context, as imaginative lawyers have found ways to interpret its provisions so as to be a useful tool for environmental challenges.

When the Human Rights Act 1998 (HRA) came into force in 2000, incorporating the ECHR into English law, Article 8 was identified by most commentators as the first port of call for those seeking to stop, or hinder, potentially polluting developments or operations. Two years later on, Article 8 has not proved to be quite the thorn in the side of the business community that some predicted. Nevertheless, Article 8 has produced some significant developments.

Article 8 and the environment

Article 8 protects the "right to respect for … private and family life [and] home …". The link between this right and the environment is not obvious. It is the focus on "home" which is the key. In several cases over the last few decades, the European Court of Human Rights has found that pollution of varying sorts, which seriously affects the quality of life in a person's home, can interfere with Article 8 rights. The most important breakthrough came with the case of *Lopez Ostra v Spain*, where the court held that Article 8 was breached when a particularly foul smelling tannery waste treatment plant was built 12 metres from the complainant's apartment block. The case established that "severe environmental pollution may interfere with Article 8 rights" even where serious detrimental health effects are not proven.

The operations of many UK businesses have potential to affect adversely the quality of people's lives in their homes. However, the first case to use the HRA to try to challenge such operations indicates that the UK courts are setting a high threshold in determining whether pollution interferes with Article 8 rights. *R v Hampshire CC ex parte Vetterlein* was a challenge by local residents to planning permission for a Southampton incinerator. They claimed that the resulting NO_2 emissions, when combined with the already high ambient NO_2 levels in the Southampton area, would breach their Article 8 rights. The High Court was far from convinced and in rejecting the claim stated that "general environmental concerns do not engage Article 8".

Justification

Further, establishing an "interference" with Article 8 does not guarantee that a challenge to a polluting development, or activity, will be successful. Article 8 is a "qualified right". This means that the "interference" will be permissible if it is "justified" on one of a number of specified grounds, including "the interests of the economic well-being of the country". As most challenges are to developments, or operations, either undertaken by, or used by, the business sector, establishing some kind of benefit to the economy is not normally problematic. However, two recent cases involving Article 8 indicate that the courts are taking a more robust approach to justification. Anyone seeking to justify an interference with Article 8 rights will need to do much more than prove the mere existence of economic benefits.

In *Marcic v Thames Water Utilities* the Court of Appeal confirmed the High Court decision that the flooding of a man's home by foul water from an overloaded sewer was not only an interference with his Article 8 rights, but also was not justified. Thames Water argued strongly that its prioritisation scheme for capital works was sufficient to "justify" the interference because it balanced the competing interests of other customers, the costs involved and company resources. The Court of Appeal, seemingly influenced by the poor treatment Mr Marcic received and the total hopelessness of his position under existing statutory mechanisms, did not agree that a fair balance had been struck and awarded him damages. In view of the potentially huge resource implications this may have for water companies, Thames Water is appealing to the House of Lords. It will certainly have an uphill struggle to persuade their lordships to overturn the well-reasoned Court of Appeal judgment.

Hatton v UK was a challenge by residents of West London to the UK Government's policy of allowing night flights at Heathrow Airport. They argued that the noise and consequent sleep deprivation breached their Article 8 rights. Having failed to gain a remedy in the UK courts they took their case to the European Court of Human Rights. It was no great surprise that the court found the noise to be an interference with the complainants' Article 8 rights. What was unexpected was the court's decision on justification. It scrutinised the arguments and evidence put forward by the UK as to why the disturbance caused by the flights was justified. The court found there was insufficient evidence to assess properly the extent to which night flights contribute to the economy as a whole and only limited research had been carried out into the nature of sleep disturbance thereby caused. It held that the UK had failed to justify the interference and the night flights were therefore in breach of Article 8. The UK Government has now challenged the ruling. A Grand Chamber of the European Court of Human Rights reconsidered the case in November 2002. Judgment is awaited. There is a real possibility that the Grand Chamber will decide the original judgment overstepped the mark and will hold that the UK's policy on night flights was in fact within its margin of appreciation. Whatever the outcome of the appeal, some lessons can be learned from the comments on justification in the original judgment.

Implications for business

These cases show an increased willingness on the part of the courts to be drawn into the thorny issue of justification and, in particular, to analyse critically the evidence put forward as to economic benefits. Anyone defending an Article 8 challenge, or involved in a project that may be subject to an Article 8 challenge, should consider the need to take into account the following points:

- Developments or operations that seriously impact on the quality of life of people in their homes may be subject to challenge under Article 8.
- The fact that such a development or operation is not specifically prohibited by statute or common law, or even is authorised by a licence or permission granted under statute, does not preclude an Article 8 challenge.
- If a challenger has an arguable case that the "interference" falls within Article 8, it will be necessary to put forward arguments and evidence as to why the interference is justified.
- More than mere lip service must be paid to justification – the courts will be looking for serious evidence.
- The courts will consider whether the degree of "interference" is proportionate to the economic benefits gained – another reason for the need to adduce evidence as to the level, and not merely the existence, of economic benefits.
- The European Court has suggested evidence should be put forward showing consideration of alternative options; the least onerous as regards human rights should be chosen. These alternative options will include the payment of compensation to individuals impacted or the taking of mitigating measures to lessen their suffering.

It would be wrong to assume that the ECHR means that an individual's right for respect for their quality of life within their homes is sacrosanct. However, the courts are reluctant to see such individuals suffer a degradation of their rights with no compensation or mitigating measures taken to help them. The requirement for "justification" under Article 8 gives the courts an express mandate to strike a balance between the competing interests of the individual and the community. In doing so the courts are not willing to see individuals suffer unfairly (without compensation) for the benefit of the rest of the community.

"Anyone seeking to justify an interference with Article 8 rights will need to do much more than prove the mere existence of economic benefits."

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Litigation: restraining vexatious litigants

"...a vexatious proceeding is one which has little or no basis in law and its effect, whatever its intention, is to subject the defendant to inconvenience."

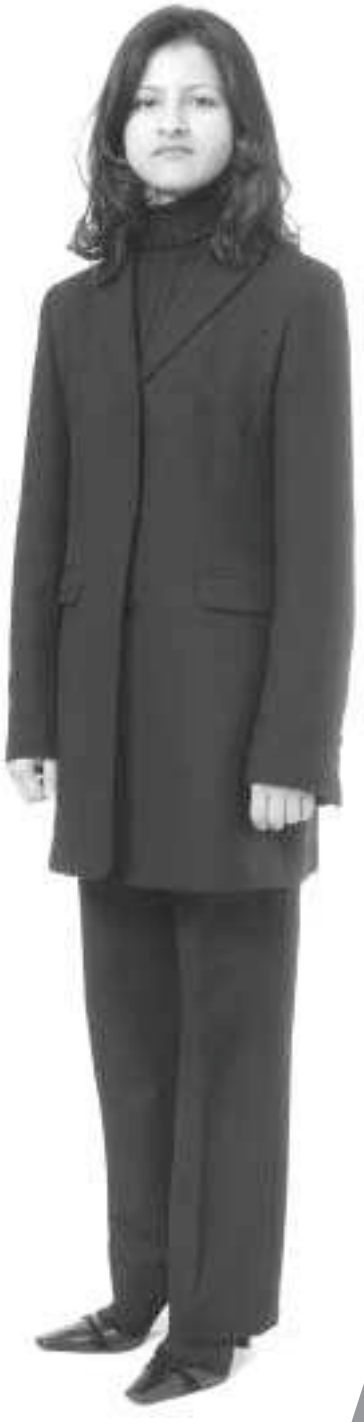
Vexatious litigants can be described as individuals who litigate in a manner which often leads to unnecessary harm and expense for the unfortunate opponents, and causes disruption to the justice system.

In *Attorney General v Barker* Bingham LJ described the characteristics of vexatious individuals:

> *"The hallmark usually is that the plaintiff sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, after it has been ruled upon thereby imposing on defendants the burden of resisting claim after claim; that the plaintiff relies on potentially the same cause of action ... against successive parties who if they were to be sued at all should have been joined in the same action; that the claimant automatically challenges every adverse decision on appeal; and that the claimant refuses to take any notice of or give any effect to orders of the court"*

Bingham LJ went on to state that a vexatious proceeding is one which has little or no basis in law and its effect, whatever its intention, is to subject the defendant to inconvenience.

Can anything be done to control vexatious litigants?



Restraining orders

Following the case of *Grepe v Loam* it is possible to obtain an order preventing a litigant from making an application without the leave of the court, failing which that application will be dismissed without being heard. These orders are one of the most effective methods of preventing litigants from pursuing their cases oppressively. It is not necessary to establish that the litigant is

vexatious; it is sufficient that there is a possibility that the litigant might abuse the processes of the court (*Jolly v Jay & Jay*). In *Ebert v Birch* it was held that these orders should extend not only to the existing proceedings but should also apply to restrain specified anticipated proceedings by individuals.

Section 42 orders

In addition to the principles in *Grepe*, Section 42 Supreme Court Act 1981 provides for a procedure whereby the Attorney General may intervene to restrict an individual's right to litigation. Such an application should only be made where there are grounds that justify limiting the individual's access to the court. An assessment of the merits will take into account all the circumstances; the general nature of the litigation, the litigant's conduct and character, the hardship caused to those on the receiving end and the likelihood of the conduct continuing in the absence of an order being made.

Human rights implications?

It is necessary to strike a balance between, on one hand, the rights of individuals to unrestricted access to justice and, on the other hand, the rights of individuals not to be subjected to vexatious proceedings, together with the need to allocate scarce court resources fairly. In *Golder v UK* it was held that the control of vexatious litigants was in the hands of the court, and an acceptable form of judicial proceedings. The detailed procedures of Section 42 have been held to conform to Article 6 of the European Convention on Human Rights (*Tolstoy Miloslavsky v UK* and the Golder case).

"It is necessary to strike a balance between, on one hand, the rights of individuals to unrestricted access to justice and, on the other hand, the rights of individuals not to be subjected to vexatious proceedings..."

What more can be done?

In dealing with a vexatious litigant it is vital to appreciate the complete history of the case. Any tribunal or other individual who becomes involved should be wary of making any comments or observations without recognising how the vexatious litigant may interpret or manipulate them.

Matters involving litigants in person should be case managed by a nominated Judge. This would provide the benefit of immediate access to a Judge who should be empowered to decide all interlocutory issues, thereby limiting or eradicating the necessity for appeal.

In circumstances where a litigant has a history of regularly issuing proceedings without cause, an application could be made by an interested party to the court for a screening order so that all applications filed after a point in a specific action are automatically reviewed ex parte.

A party who is the subject of a Section 42 order should be subject to closer scrutiny by the courts if leave is granted to proceed with any application or new proceedings. For example, the court may have a discretion to grant only conditional leave to ensure there is no repetition of the litigant's past behaviour in any new proceedings.

Conclusion

Despite the overriding objective of the Civil Procedure Rules and changes in the administration of justice, focusing on the need to minimise delay and reduce costs, vexatious litigants are still able to manipulate court processes in the obsessive pursuit of their own litigation. The number of applications made under Section 42 and the number of vexatious litigants has increased dramatically over the last ten years. The rights of both parties must be balanced.