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A PRACTITIONER'S PERSPECTIVE ON EMERGING LEGAL TRENDS

Litigation Landscape in the English Courts and the Aftermath of Recent Litigation Reforms

Whilst the statement that the world is getting smaller is something of a well used cliché, it is true to say that most large law firms now operate across many diverse borders, and either have offices in or deal with local firms across a number of jurisdictions. The increasing globalisation of law firms has a knock on effect on the severity of exposures, as firms may become embroiled in complex cross-jurisdictional litigation.

It is certainly our experience that there are an increasing number of claims relating to non-UK headquartered law firms, including those based in the US, being brought in the London courts.[1] For example, in 2014, a large US headquartered law firm defended in the London High Court, a Euro 12 million professional negligence claim brought by private equity house Bancroft arising out of Bancroft's purchase of a majority stake in a Slovakian ice-cream company in 2008. Bancroft sought to establish that lead transaction counsel in London, when acting in relation to foreign transactions, owed a duty to the client to coordinate with foreign lawyers to ensure that the transaction documents were fit for purpose. In particular, it was alleged that the firm failed to coordinate with foreign counsel to translate non-English documents, and thereafter explain to the client the consequent issues raised by those documents. The claim reportedly settled before trial.

Rather than attempt to provide an overview of the litigation regime in England, this article explores key recent developments and current litigation trends relevant to law firms offering our view on their impact and an insight into how they may be deployed successfully in defending liability claims.

Jackson reforms

A seismic review of litigation costs and procedure was undertaken by Lord Justice Jackson culminating in a package of reforms aimed at reducing the cost of litigation in April 2013. The reforms introduced the concept of "proportionate" costs, requiring parties to budget for their likely costs, and the court to take a more active role in managing compliance with court rules, limiting unnecessary disclosure and evidence, as well as taking an active role in controlling the costs being incurred.

In England, the default position is that the winning party is able to reclaim from the losing party their costs of the litigation. Until the reforms, this included lawyers' fee uplifts under a conditional fee agreement (CFA) and insurance premiums under an after the event insurance policy (ATE policy). Funding a claim by a combination of ATE insurance and a CFA, would often essentially mean that a claimant bore no, or very little, costs risk. The result was a large number of unmeritorious claims being brought. In the professional malpractice arena we saw some claimant lawyers utilising the threat of the potentially high sums the defendant would have to pay in claimant costs if the claim continued to attempt to force early settlement.

The reforms fundamentally altered the economics of this previously frequently used model. They dampened the number of claims being brought since now, even in the event of a win, the claimant has to bear the cost of the ATE insurance premium (usually around 20% of the claim value) as well as its lawyers' fee uplift[2]. This has resulted in increased demand for third party funding, whereby the funder funds the legal costs of the dispute in return for a portion of the damages (see more about the landscape for litigation funding below). The reforms also provided a new means of funding litigation in the form of damages based agreements (DBAs), where the lawyer takes a percentage of damages in the event of a win. Although a familiar concept in the US, DBAs were not previously permitted in the UK[3]. However, as a DBA requires a law firm to take on a great deal of risk for the potential slice of damages, take up to date has been very low. In light of this, the

2 This is with certain exceptions, most notably in this context insolvency proceedings.
3 With a narrow exception in relation to employment tribunal work.

Civil Justice Council published a report entitled "*The Damages-Based Agreements Reform Project: Drafting and Police Issues*" on 2 September 2015 proposing revisions to the current DBA Regulations and recommending that the arguments in favour of "hybrid" DBAs are considered.

Another key change was the requirement for each party's lawyer to produce, at an early stage of the case, a budget for the entire costs of the litigation, to be approved by the court. Most litigants must now comply with this requirement[4]. Parties will be held to these budgets, and it is very likely that litigation costs incurred by a party outside the court "budget", will be irrecoverable. The courts have shown themselves willing to cut substantial sums from the approved budgets in certain cases. Recently, the TCC considered a claimant's costs budget "grossly excessive" and cut it in half[5]. Additionally, from 1 October, a new practice direction 2015 will test a new format bill of costs for 6 months, which is aligned with parties' costs budgets.

As a result, there is now greatly increased pressure on litigants and their lawyers to produce accurate costs budgets and then to manage their costs properly within the stipulated budget (or apply to court for revisions of the budget where appropriate). For clients instructing lawyers, this can be seen as a positive development, arguably meaning that there is greater thought that goes into cost issues at the start of a case, and a greater transparency in relation to the ultimate costs of litigation. However, lawyers may now be pushing their client for further information and to take decisions on the case at an earlier stage leading to front loading of time and cost. Once the court has approved the budget, if a party wishes to spend more on the litigation then they may be able to do so, but the likelihood is that such costs will not be recoverable from the other side, even if the case is won. We manage this new costs risk with the assistance of our in-house specialist costs lawyers by involving them at an early stage in any claim and by continuing to work with them throughout the life of the claim.

Following the reforms, and subsequent case law[6], the litigation landscape is stricter in the English courts than it was before. Where parties act in a manner which is in flagrant disregard of the relevant court rules, results in court time being lost or causes prejudice to their opposing party, they are less likely to be "forgiven" and more likely to be penalised, usually by way of costs penalties. It will therefore be important for a law firm facing a claim to act so as to ensure that its lawyers are able to comply with relevant court deadlines and rules, for example, ensuring that documents are provided for disclosure, and that information and instructions are provided in plenty of time.

Jackson reforms – potential negligence claims?

Any law firms that themselves conduct litigation in the English courts will be aware of the recent litigation reforms. There is a risk that litigation lawyers who fail to deal properly with the effect of the reforms will face the fall-out from a malpractice claim. The potential flash points are:

The obligation to produce (and keep to) a costs budget. If the budget is inaccurate or not kept under proper review any costs outside it will become irrecoverable.

Risk of costs penalties for breaching court procedural rules, and the lower likelihood of a party's lawyer being able to correct a mistake, such as the late filing of a document, by applying to court. This results from the new, stricter approach to case management.

Advice on funding the claim. If acting for a claimant then it is more important than ever to understand the different options available for funding a claim and to advise appropriately.

Unfamiliar territory. There have been major changes over the last few years in a number of areas of the English civil court rules. Whilst reforms bed in there is always a risk that litigators will make mistakes in their application, or assume wrongly that they know what the relevant part of the rules says without appreciating the effect of the changes.

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4 Proceedings commenced on or after 22 April 2014 are subject to the budgeting requirement whenever claims are valued below £10 million.
5 *GSK Project Management Ltd (in liquidation) v QPR Holdings Ltd [2015] EWHC 2274.*
6 Mitchell v News Group Newspapers (2013), Denton & Ors v White & Ors; Decadent Vapours Ltd v Bevan & Ors; Utilise TDS Ltd v Cranstoun Davies & Ors (2014).

Claims environment for solicitors defending claims against them

Group litigation

Collective action is a relatively new development in the UK and there is little sign of a US style class action regime for commercial litigation actions against professional services firms in England. The nearest process is the Group Litigation Order ("GLO")[7] which permits multiple claims against a defendant to be grouped into a single action, provided the court is satisfied that the claims give rise to common or related issues of fact or law. A further move towards collective actions was addressed in the Consumer Rights Act 2015 which came into effect from 1 October 2015 and introduced a regime of "opt out" consumer collective actions for anti-competitive behaviour.

We have seen a recent trend of GLO actions in the financial services arena, and although we have not yet seen a GLO in the area of professional malpractice, this is becoming increasingly likely. This is particularly the case given that we have seen a number of claimant lawyers touting for potential GLO appropriate professional malpractice claims to take on (although by no means on the scale of the plaintiff bar in the US) and also in light of the potential backing by litigation funders and overseas capital. By way of example, we have recently seen it reported that Bentham Europe, a subsidiary of an Australian funder, and backer of the Tesco shareholders litigation, is eager to fund more GLOs in the UK.

Professional malpractice claims can be attractive to funders as they may be of significant value and offer a good potential return on investment, in the right claim. We have seen funders backing the claimants in some high profile professional negligence claims in the English courts such as in Stone & Rolls v Moore Stephens[8] (an auditor's negligence claim). We think it is likely that litigation funding of larger professional negligence claims will continue to increase. The only possible dampener might be funders' concerns about being ordered to pay a defendant's legal costs if a claim is unsuccessful.

Crowdfunding of litigation may become a possibility in the UK in the not too distant future, following the launch of "LexShares" in the US.

Size of claims

Although currently numbers of claims against lawyers are much reduced from their 2009 post financial crisis peak, we have seen something of a recent uptick. Perhaps more important than frequency is impact; our experience is that claim and settlement values in professional malpractice claims against law firms are getting larger, with multi-million pound claims becoming more common. One recent development that could lead to claims becoming even larger is that tax may become payable by a claimant in relation to certain large professional malpractice claims. Broadly speaking, the issue is that the UK tax authorities want to introduce tax on damages or settlement payments over £1 million where the claim has no underlying asset (such as negligent tax advice that leads to penalties being incurred by the claimant). Where this is a tax which would not have been incurred by the claimant but for the defendant's negligence, the claimant will seek to recover this from the defendant solicitor as part of the claim. The issue was consulted on towards the end of last year, and we have yet to see whether draft legislation will be put forward implementing the change. If the change goes ahead (and there is every indication that it will), there is the potential for the taxable element of the damages claimed to be "grossed up" by as much as 39%.

Smaller claims

It is our experience that international firms can and do face lower value claims. Here, as in the US, low value does not necessarily mean lacking in complexity, and smaller claims bring their own challenges for law firms; for example maintaining costs within a level that is proportionate to the size of the claim. The growing trend for lower value claims to be dealt with outside of the court process is one we expect to continue due to a number of developments.

Firstly, smaller claims might be dealt with by alternative methods of resolution in light of changes to the funding of litigation mentioned above, and the fact that the cost of commencing court proceedings has recently risen very dramatically[9]. We are seeing larger numbers of claimants making a complaint to an English regulator (such as the Solicitors Regulation Authority) rather than, or before, bringing a court claim. The Legal Services Ombudsman (which can only award maximum compensation of £50,000) is also an option for individuals or smaller entities. The difficulty for law firms in relation to the defence of complaints to the Ombudsman is that compensation tends to be awarded in a far wider range of circumstances without the need to prove liability in accordance with legal principles, with a corresponding increase in uncertainty over the outcome.

7 Of which only 80 have been granted since 2000.
8 [2009] UKHL 39.

9 The Government controversially increased the fee to issue proceedings for the recovery of money to 5% of the value of the claim (capped at £10,000) for all claims over £10,000 in March 2015, so that a £200,000 claim that cost £1,315 to issue, will now cost £10,000.

Secondly, several industry bodies are working on an adjudication scheme for smaller professional negligence claims against law firms (less than £100,000), as a reaction to the recent litigation reforms. A pilot is currently in operation utilising three lawyer malpractice claims but the relevant bodies are pushing for the wider adoption of this scheme (as of late October, only one pilot case had been adjudicated).

Resolving threatened or actual court proceedings before trial

In malpractice litigation in the English courts it is fairly rare for matters to make it all the way to trial, and a broad understanding of the rules relating to settlement, either pre-action or during the course of proceedings, is therefore key for firms facing the risk of UK based professional negligence claims.

In the English litigation system, there is a professional negligence pre-action protocol, which the parties are obliged to follow in a lawyers' malpractice claim, before court proceedings can be commenced. This requires early exchange of information so that the claim can be fully investigated and potentially resolved without the need for litigation. The courts have the power to impose sanctions on a party as a result of substantial non-compliance with a protocol. The downside of the protocol is that it does involve having to incur substantial costs at an early stage as it requires both sides to exchange a large amount of information about the claim. However, our experience of the protocol is that it works very well, providing an opportunity to put forward a defendant law firm's case to the claimant, which often either resolves the matter entirely or if not, gives an opportunity to explore settlement discussions where appropriate.

Mediation is another strategy that can be used to resolve a claim. Over the past twelve months, there have been a number of English Court decisions stressing that a party's refusal to participate in mediation should now be the exception, and that costs sanctions will be imposed for an offer to mediate that is unreasonably declined[10]. Refusing to mediate is now an increasingly high-risk strategy[11]. This trend is likely to continue in 2015. Although mediation can work very effectively in some professional malpractice claims (and we have recently seen high-value, multi-party claims be resolved by mediation), a framework in which mediation is effectively compulsory can present some issues. It can, in certain cases, be difficult to mediate professional malpractice cases at an early stage, as it may be, for example, necessary for disclosure to be given before the parties can sensibly consider liability or quantum. Contribution claims (where a lawyer defending a claim brings in a third party who, it is claimed, is jointly responsible for the damage to the claimant) also present a potential challenge. Mediation usually works best if all potential parties to the dispute are in a room. This can put a defendant lawyer in a tricky position if a claimant is pushing for an early mediation, but the lawyer is not yet in a position to determine whether either there is a valid claim against a third party or the appropriate tactics: deny liability and point the finger at the third party, or cooperate to defeat the claim together. In order to overcome such issues, we have had recent success in negotiating with the other parties to proceedings the most appropriate time for mediation to take place. Alternatively, it may be possible to have a series of mediations.

On 21 May 2013, the European Commission adopted a directive 2013/11/EU on consumer alternative dispute resolution and a regulation 524/2013 on consumer online dispute resolution. The directive was implemented into national law on 9 July 2015. Its objective is to achieve a high level of consumer protection by ensuring that disputes can be submitted to ADR entities who will offer impartial ADR procedures. The online platform is due to be launched and operational by 9 January 2016.

Disclosing documents in litigation

Following the litigation reforms the rules on disclosure changed significantly. Once again, the thrust of the reforms was to require the parties to deal with disclosure of documents earlier, and on a more cost effective basis. Parties must now file a disclosure report[12] and must have discussed and sought to agree between them a proposal for disclosure at an early stage.

Prior to the reforms, the usual order for disclosure of documents in English litigation was "standard disclosure". This meant that a party must disclose all the documents on which the party relies, or which adversely affect its own or another party's case (or support another party's case) or which the party is obliged to provide by court rules.

The recent litigation reforms introduced instead a menu of disclosure options, including by way of example: no disclosure at all, disclosure on an issue by issue basis, or an order that a party disclose documents on which it relies and the ability to request specific disclosure from the other parties. The Court can order any of these, and also has the power to make "any other order in relation to disclosure that the court considers appropriate".

10 PGF II SA v OMFS Company 1 Ltd [2013], Phillip Garritt-Critchley & Others v Andrew Ronnan & Solarpower PV Ltd [2014], Northop Gruman Mission Systems Europe Ltd v BAE Systems (AL Diriyah) Ltd [2014] and Laporte v The Commissioner of Police for the Metropolis (2015).

11 Although, in a recent case, *Murray and another v Bernard [2015]* EWHC 2395, the High Court held there was no reason to deprive the claimants of their costs (even though they initially refused to mediate) in light of their later agreement to mediate (and the defendant's subsequent refusal to do so).

12 Briefly describing which relevant documents exist, where they are located, how electronic documents are stored and must contain an estimate of the costs that may be involved in giving disclosure.

There was some concern about the effect that the new disclosure options might have on cases, and the tactics that might be used by parties in relation to the options. For example, the risk that parties might seek "key to the warehouse" disclosure allowing it to provide all of its documents (except privileged documents) to the other side to review and hence provide effectively a data dump requiring the receiving party to spend extensive time and money ploughing through for relevant information. However, to date our experience is that many litigants are still receiving standard disclosure orders. So at the moment this change seems to be taking time to bed in, and the issues of concern have not yet arisen.

As firms who have faced litigation in the US or elsewhere will no doubt be all too familiar, one of the most significant issues, and greatest costs, when dealing with large negligence claims against lawyers is the wealth of electronic documents which are now created in relation to a case file. The issues of dealing with disclosure become more complex in cross-border litigation where different offices may employ for example, different filing policies.

Parties are specifically directed, by the relevant court rules when considering electronic disclosure, to use technology to ensure that document management activities are undertaken effectively and efficiently. The use of, for example, key word searching of the documents is common in English litigation, as is utilising teams of paralegals to review the disclosure documents. One technique which is less common in England than in the US but seems likely to increase in the future is the use of predictive coding. This is the use of a software program that is essentially trained by lawyers working on the case to recognise relevant documents. There has been some reluctance in England to use such programs, perhaps due to concerns over accuracy, but some researchers have suggested that predictive coding can be more accurate than human review of large amounts of documentation.

Conclusion

International law firms with an office in or a connection to England and Wales, inevitably face an exposure to malpractice claims against them in the courts of this jurisdiction. The recent Jackson litigation reforms have been of key significance to English litigation. One of the main thrusts of the reforms has been to attempt to improve the costs of litigation, to control spiralling amounts by means of budgeting, limiting disclosure, taking a stricter approach to court fees and so forth. We are also seeing developments such as mediation creeping closer to becoming compulsory, and smaller claims being pushed out of the court system into adjudication or to the Ombudsman. Most worryingly for larger firms who might be the subject of multi-million pound claims is the emergence of the group action. With the appetite of the litigation funders to provide the means to back such claims, it seems that a group action malpractice claim against a law firm is getting closer to reality.

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