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This year's AGM was an entertaining and stimulating occasion. Sir Hugh Laddie took us through the pros and cons of the present litigation system. The main points of his insightful address are included in this issue. Wine and conversation flowed generously hosted by Lovells.

I was elected President of the Association in succession to Graham Huntley. Graham's energy and commitment have been the hallmark of his tenure and he will be an extremely hard act to follow. Anthony Maton and Seamus Smyth were elected Secretary and Treasurer respectively.

During the year we have been joined by three new members from practices of varying size and nature: Richard Langley of Bircham Dyson Bell, Mark Clark of Solnick & Co and Nick Gray of Slaughter & May. I have no doubt that they will make a significant contribution to the success of the Association.

The Committee will continue to work hard to represent the interests of our members (including often direct benefits for their clients). It has now been announced that there will be a new Commercial Court building. I am sure that this is in large part due to the strenuous efforts of Graham, and Tony Guise before him, raising the profile of the problem and ensuring that the Treasury is aware of the importance of the Commercial Court in attracting business to these shores.

Most recently the profession came under attack from the Governor of the Bank of England, suggesting that the failure of the BCCI case highlighted a "lawyers' monopoly". The Association, to use the words of the Financial Times, "sprang to the defence of the profession", pointing out that the Bank's lawyers had sought to have the case struck out on the basis that it had no reasonable

prospects of success and that it had been the House of Lords who had rejected this application and chosen to permit the case to proceed. In those circumstances both sides' lawyers then strenuously represented their clients' interests. The response of the Association was also extensively reported in the Law Society Gazette.

Going forward we intend to host a balloon debate on 19 October 2006. This will involve various high profile individuals promoting their particular preference: ADR, litigation, arbitration, expert determination or collaborative lawyering. This will be followed by lashings of food and drink.

I look forward to a stimulating and successful year.

Simon Davis

Sir Hugh Laddie's guest speech at the LSLA AGM Dinner

Sir Hugh Laddie was the guest speaker at the LSLA Dinner following the Annual General Meeting on 21 March. Sir Hugh was a leading Intellectual Property barrister in the UK before becoming a Judge of the High Court of Justice, Chancery Division, in 1995 and, more recently, Senior Judge of the Patents Court, London. Now a consultant with Willoughby & Partners, Sir Hugh is thought to be the first judge to resign voluntarily from the High Court for 35 years and then join a solicitors' firm. Those present at the dinner were fortunate to be able to hear his views on *A Judiciary for the 21st Century*, the broad nature of which we outline below.

Judicial Expertise

Sir Hugh is a firm believer that, just as the days of the generalist solicitor are at an end, so too should be the days of generalist judges, presiding over cases where all parties but they are expert in the matters at hand. Appointing specialist judges to technically demanding areas of the law would benefit litigants (who currently face something of a gamble with respect to the judge they are allocated) and the court system (in terms of the time and cost savings of having judges who were comfortable with the specialist issues at hand).

Courts of Appeal/Judicial Resource

Sir Hugh considered that the existing split system reduced the pool of judicial talent available at first instance. Sir Hugh would advocate a system whereby there was a pool of specialist judges who would ordinarily sit at first instance but might at other times sit on the Court of Appeal. He was also unconvinced of the need for a House of Lords, making the point that from time to time the Court of Appeal bench could be increased to five.

Woolf Reforms

Sir Hugh approved of some of the Woolf reforms, for example, the recent emphasis on alternative dispute resolution and the Part 36 regime. However, he said that there are certain areas where Lord Woolf might have taken a more radical approach with, for example, automatic disclosure being abolished, and submissions cut dramatically. He believed that cases currently taking weeks should in fact be taking days.

Professions Apart

Sir Hugh said that although he had greatly enjoyed his time as a barrister he believed that the requirement to choose a career as a barrister or as a solicitor, at so early a stage of a lawyer's development, was undesirable. Sir Hugh suggested that an alternate approach might be as in New Zealand for all lawyers to begin their careers as solicitors, to benefit from the training and support of that profession, and then, if a particular aptitude for advocacy is displayed, to specialise accordingly.

Simon Davis

The subject matter of the lecture was the effect of the decisions of the Court of Appeal in *Three Rivers DC & Ors v Governor and Company of the Bank of England (No. 5)* [2003] EWCA Civ 474 and of the Court of Appeal and House of Lords in *Three Rivers DC & Ors v Governor and Company of the Bank of England (No. 6)* [2004] EWCA Civ 218 and [2004] UKHL 48.

Legal professional privilege has traditionally been split into two sub-categories: legal advice privilege and litigation privilege. The rationale behind legal advice privilege, or lawyer-client privilege, is that there is a strong public interest in enabling individuals to obtain legal advice and in promoting candour between lawyer and client. It is an absolute right, but has come under increasing judicial scrutiny in recent times. *Three Rivers No. 5* and *Three Rivers No. 6* are but two incidents when this issue has come before the higher courts.

1. Background to the Three Rivers Judgments

These decisions arose from the BCCI litigation against the Bank of England (the “Bank”), following BCCI’s collapse in 1991. The Bingham Inquiry was set up on behalf of the Chancellor of the Exchequer and the Bank to investigate the collapse and, in particular, to review the Bank’s supervision of BCCI. Shortly after the Bingham Inquiry was established, the Governor of the Bank of England appointed three Bank officials to deal with all communications between the Bank and the Inquiry, known as the Bingham Inquiry Unit (“BIU”). During the Bingham Inquiry, the BIU sought legal advice from the Bank’s solicitors, Freshfields. This advice covered all aspects of the preparation and presentation of the Bank’s evidence and submissions to the Bingham Inquiry.

Following the conclusion of the Inquiry, proceedings were issued against the Bank and the claimants sought the widest possible disclosure. The Bank claimed legal advice privilege for numerous documents which came into existence between the time when the BCCI collapsed and the time when they made their final submissions to the Bingham Inquiry. The Bank did not claim litigation privilege over the documents as they were not prepared in contemplation of litigation (as per the House of Lords’ decision in *Re L (A Minor) (Police Investigation: Privilege)* [1997] AC 16).

2. *Three Rivers No. 5* – Decision of the Court of Appeal

On an application by the claimants for disclosure by the Bank for internal Bank-employee documents, the Court of Appeal reversed the first instance decision, ruling that the Bank was not entitled to legal advice privilege. The Court of Appeal gave three reasons for its decision.

2.1 Communications

The court held that legal advice privilege could not be claimed for documents other than those passing between the client and his legal advisers, for documents evidencing such communications and for documents that were intended to be such communications even if not in fact communicated.

2.2 Client

The court agreed with the claimants that on the evidence before the court, the BIU was the client rather than any single officer of the Bank (including the Governor).

2.3 Dominant Purpose

In consequence of the court’s conclusion that the Bank was not entitled to privilege as the

documents were not “communications”, the court said that it did not need to express a view on the question whether the internal documentation of the Bank, which came into existence after the setting up of the Bingham Inquiry, was prepared with the dominant purpose of obtaining advice. However, the Court of Appeal did go on to express its *obiter* opinion that the Bank’s dominant purpose of obtaining the information was not to obtain legal advice, but to gather raw material for the Inquiry. The Court of Appeal reaffirmed the position of lawyer-client communications in *Balabel v Air India* [1988] Ch 317.

3. *Three Rivers No. 6* – Decision of the Court of Appeal

In the light of the *obiter* decision of the Court of Appeal in *Three Rivers No. 5* that the dominant purpose for which the documents were prepared was for placing the facts before Bingham LJ, the claimants sought an order for disclosure of communications passing between the Bank and its solicitors during the course of the Bingham Inquiry. The Bank resisted the application. The judge at first instance declared that on the basis of the decision in *Three Rivers No. 5*, the only documents that the Bank was entitled to withhold from inspection were communications passing between the Bank and its legal advisers for the purposes of seeking or obtaining “legal advice” (advice concerning the Bank’s rights and obligations); and any document evidencing such communication. Given the *obiter* decision of the Court of Appeal, he ordered a further and better list to be prepared in accordance with the declaration.

The Bank appealed to the Court of Appeal, where the appeal was

dismissed. The Court of Appeal set down a new narrow test for “legal advice”, under which legal advice privilege was confined to advice as to the “law” i.e. legal rights and obligations or the carrying out of legal transactions, but not the giving of forensic assistance which could be performed by non-lawyers. As a result, advice as to how to present evidence of the role of the Bank to the Inquiry in the best possible light, was considered to be presentational advice and therefore not legally privileged. The court concluded that where litigation was not anticipated it was not easy to see why communications with a solicitor should be privileged and that although legal advice privilege attached to matters such as the conveyance of real property, it was not clear why it should.

4. *Three Rivers No. 6* – Decision of the House of Lords

The House of Lords overturned the decision of the Court of Appeal in *Three Rivers No. 6* but declined to deal with the consequences of *Three Rivers No. 5*. It was held that the essential ingredients of legal advice privilege are that: (1) confidentiality is necessary, but not sufficient; (2) privilege is absolute; (3) privilege is both a substantive and procedural right; and (4) (in fundamental disagreement with the Court of Appeal) there is no requirement that the legal advice must be connected with litigation. Central to the House of Lords’ decision was a reaffirmation of the candour principle between a client and his lawyer. As such, the advice could include advice as to what should prudently and sensibly be done in the relevant legal context (that is, not just in relation to the “law”). The House of Lords took the view that the Bank should be able to take legal advice on presentational matters in relation to minimising any criticisms levelled at it by the

Bingham Inquiry and that such communications should attract privilege.

5. The Effect of the Three Rivers Judgments

In the light of *Three Rivers No. 6*, privilege should not be distinguished by whether it is litigation privilege or legal advice privilege, as they both fall under the umbrella of legal professional privilege. The distinction should be drawn by whether the communication was made between a lawyer and his client or between a lawyer or his client and a third party. The definition of “legal advice” provided in lawyer-client communications has been extended to advice as to what should prudently and sensibly be done in a “relevant legal context”, which will include the presentation of a case to an Inquiry by someone whose conduct might be criticised by it.

As a result of the decision of the Court of Appeal in *Three Rivers No. 5*, the scope of privilege has been narrowed by the definition of “client”. In Mr Stadlen’s opinion, this is incompatible with the policy rationale for lawyer-client privilege as currently there is uncertainty as to the definition. This uncertainty will no doubt pose practical problems for solicitors and their client companies until the definition is reviewed.

LSLA Lecture – 1 June 2006

Litigation with Deep Pocket Defendants

– Laurence Rabinowitz QC

The subject matter of the lecture was advice to lawyers representing potential claimants against deep pocket defendants, with reference to the problems encountered by the claimants in the BCCI litigation and in the claim by Equitable Life (the “Society”) against Ernst & Young and former executive and non-executive directors.

Mr Rabinowitz stated that five valuable lessons had come to light for litigators as a result of these unsuccessful claims.

1. Who to sue

The first of these is that litigators must think carefully about who to sue. Mr Rabinowitz advised that when acting for a potential claimant with a claim against a deep pocket defendant, the first and most important point to realise is that as the potential defendant has deep pockets, it will have the financial resources to fight back. As such, lawyers for the claimant must think about its commitment to pursuing a claim, its resources to fund that claim, and the possibility (and indeed with a deep pocket defendant, the probability) that the claim may go all the way to trial.

The claimant should consider whether it is wise to join additional defendants to the claim other than the deep pocket organisation. Mr Rabinowitz noted that it was worth remembering that quite often suing two or more disparate parties may effectively make them opposition allies. Accordingly, in the Society’s case, the decision to sue the directors, in addition to Ernst & Young, led to the situation where the directors naturally refused to give evidence that would have assisted the Society to prove the causation element of its claim.

Moreover, avoiding suing more parties than necessary reduces the

burden of dealing with several legal teams and the paperwork, correspondence and pragmatic workload that inevitably result from the presence of an increased number of legal teams on the other side.

A further problem where there are numerous defendants to an action is that it is very difficult for the claimant to settle the claim. In order to settle, the claimant must agree separate settlements with each of the defendants.

2. Objectives of the claim

The second lesson was that it is important for litigators to carefully analyse the objectives of any claim. Mr Rabinowitz’s advice was that a claimant should never start a claim with the intention to settle, without being fully confident that it can prove all the allegations made. The reason for this is that if there is an intention that an argument will not go before the court, it can result in a claimant making wild and unprovable allegations, which place the claimant at a tactical disadvantage and affect its credibility. In the case of the Society, Langley J stated at trial “*I confess that in the overall context of these claims, I do feel we have moved from a hypothetical world to a different solar system*”. In Mr Rabinowitz’s own words, don’t create your own albatross!

Mr Rabinowitz also stated that in the context of commercial disputes, a claimant should sue for money and nothing else. The Society issued claims against the former directors of the Society, yet the amount claimed was such that even as a collective the directors could not have settled the claim or even meet the anticipated costs of the proceedings. Perhaps the new board of the Society wanted to appear tough, by making claims against the directors as well as the auditors. However, this was damaging not only to the claims

against the directors, but also to the claim against the deep pocket defendant.

3. Amount claimed in damages

The third lesson is to think carefully about how much one sues for. Where a claim is made for millions, or even billions of pounds, the claimant must be able to justify the amount, or no one will take the claim seriously. Whilst it seems natural to pursue the highest sum possible, often for negotiation purposes, an inflated claim will affect the credibility of the claimant. Moreover, even the most deep pocketed defendant is unlikely to be able to satisfy a claim that runs into billions, and so the only possibility for settlement is for the claimant to knock off numerous zeros from its claim. Where the amount claimed has been splashed across the press, such as in the Society's case, it is very difficult for the claimant to come down by such a large margin from the sum claimed, without looking as though it has failed in the process.

4. Behaviour at the outset of proceedings

The fourth lesson is to carefully monitor a client's behaviour at the outset of any claim. Mr Rabinowitz continued with the theme of the press, and suggested that a claimant should be careful about what it says at the outset of proceedings, both about its claim, and parties to that claim. Mr Rabinowitz noted that this can lead to angry and obstructive tactics by the defendants, with eventually a harmful effect on the claimant's credibility and a lack of motivation on the part of the defendant to consider settlement. So, the less that is said the better!

5. Practical consequences

The fifth lesson is to think carefully about the practical consequences of

suing a deep pocket defendant. By their very nature, deep pocket defendants will fight, and fight hard. In the long run, this can lead to a potential mismatch of resources. Certainly, as in the Equitable litigation, it is not wise to exacerbate this by extending the remit of a client's focus and claim to include other parties, unless this is strictly necessary. When facing a large number of legal teams as Equitable did, it is very easy at trial for these opponents to obfuscate your client's claim with minor and picky legal and procedural points which serve to hinder smooth progress with a claim your client may validly have.

Mr Rabinowitz summed up by stating that deep pocket litigation is an expensive business. He noted that in reality it is far from easy to give effect to these five lessons. In his opinion, the only way to make a successful claim against a deep pocket defendant is to make a substantial investment at the outset and give weight to these five lessons at that juncture, and also during the course of the litigation.

LSLA Lecture – 13 June 2006

Just Sue Me! – Julian Faux QC

The subject matter of the lecture was the decline and fall of the Film Finance Litigation. “Just Sue Me” was one of the films insured by HIH Casualty & General Insurance Ltd (“HIH”), which insured the risk of the film not making enough profit to cover the costs of production. Like many of such risks written, the film failed to reach the level of earnings necessary to pay off the investors in the film and an insurance claim was made. By the late 1990s, this form of insurance had become commercially unviable and the collective effect of claims such as these had caused an adverse effect on the insurance market, but not without some interesting legal and insurance issues arising.

Mr Faux divided his lecture into three parts – first he addressed the continuing duties of insurance brokers; secondly, waiver on the part of reinsurers for breach of warranty; and thirdly, remedies for misrepresentation and non-disclosure. He went on to discuss a range of case law in each area, but focused on the most recent decisions.

1. Continuing duties of insurance brokers

Mr Faux made the point that brokers have a duty to their clients that continues beyond placement of the risk, and cited *HIH Casualty & General Insurance Ltd v JLT Risk Solutions Ltd* [2006] EWHC 485. In that case it was held that brokers are under a continuing duty to alert the insurer to “any matters of at least potential concern on coverage issues”.

The facts of the case were that the insurer, HIH, had brought a negligence claim against its re-insurance broker, JLT Risk Solutions Ltd (“JLT”). A number of investors provided funding for the production of slates of films for which the investors were issued loan notes. The risk that the slates of films

may not generate enough revenue to repay the loan notes was underwritten by HIH and the reinsurance was placed by JLT with various other companies. Slip policies provided for slates of six, ten and five films respectively. However, fewer films were made during the period of cover than stipulated and the film slates were unsuccessful, generating significantly less revenue than was needed to repay the loan notes. A claim was made under all three slates of films and HIH paid out substantial sums, which it then sought to recover from the reinsurers. However, the larger reinsurance companies opposed the claims on the basis that there had been a breach of warranty as to the number of films to be produced.

HIH had initially brought an action seeking recovery against the reinsurers, but in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735, the Court of Appeal ruled that there were warranties regarding the number of films to be made in both the insurance and reinsurance contracts and that these warranties had been breached. As such, HIH should not in fact have paid the claims as they were made in breach of warranty. To try and recover some or all of the sums paid out, HIH issued a claim against the brokers, JLT, for breach of its duty in failing to inform HIH about the significance in the reduction in the number of films and the fact that it constituted a material breach. Although JLT had circulated a Risk Management Report to HIH which contained the information that there had been a reduction in the number of films made, JLT did not highlight this point directly to HIH. JLT argued that it owed no continuing duty to the insurer or reinsurers post-placement, and that in the absence of any instructions, it had acted merely as a “post-box” for the insurer and insured.

Langley J was not impressed by JLT's argument, and held that the brokers were under a duty to alert HIH to matters material to coverage. JLT was therefore in breach of duty in failing to properly alert HIH to the significance of the reduction in the number of films and it was not enough for JLT to hand over the Risk Management Report to HIH. However, judgment was given for the defendant broker, because although it had acted in breach of its duty of care, HIH failed to prove that the loss for which it claimed was caused by JLT's breach of duty.

Mr Flaux concluded that a broker's duty of care to an insurer post-placement, and the scope of the duty is dependant upon the circumstances of the case, and where a broker continues to deal with the insurer and/or reinsurers, the broker should alert its clients to matters affecting coverage.

2. Waiver on the part of reinsurers for breach of warranty

Mr Flaux stated in the case of a reinsurance contract, the reinsurer could only be said to have waived a breach of warranty where it had given a clear and unequivocal representation to the insurer that it would not insist on its right to treat the insurance or reinsurance cover as discharged. He commented that following the case of *HIH Casualty & General Insurance Ltd v Axa Corporate Solutions* [2002], the requirements for the establishment of waiver by estoppel in the context of reinsurance contracts are so strict it is nearly the case that there can only be a waiver where there has been a variation of the reinsurance contract.

The case itself involved the same facts as *HIH Casualty and General Insurance Ltd v JLT Risk Solutions Ltd* [2006], but here HIH were seeking to show that Axa, its reinsurance brokers, had waived the breach of the warranty relating to the

number of films made and so were obliged to reimburse HIH under the reinsurance contract.

HIH argued that Axa had been in regular receipt of the Risk Management Reports which detailed the reductions in the number of films made, and yet had not raised any objection with HIH until after service of its defences. HIH contended that Axa had therefore given a clear and unequivocal representation to HIH that it would not insist on its right to treat the reinsurance cover as discharged by (a) its continuing silence and inactivity in relation to the breach and (b) continuing to act as if it believed it was still on risk by calling for the risk management reports, amongst other things. However, the Court of Appeal held that continuing silence did not constitute an unequivocal representation, and this was especially the case in the context of a continuing contractual relationship where it was not possible to say when exactly the breaches of warranty occurred. Moreover, the actions of Axa suggesting that it believed itself still to be on risk, did not alone amount to an unequivocal representation.

3. Damages as a remedy for non-disclosure

Mr Flaux discussed the most recent House of Lords case on the topic, which is *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank and Others* [2003] UKHL 6. The case highlighted in the context of insurance contracts the importance of the role of the broker. Although the insured has little knowledge of the action of its broker, it is extremely difficult to exclude the insurer's ability to rescind the insurance contract on the basis of fraudulent misrepresentation or non-disclosure on the part of the broker.

In this case HIH underwrote financial contingency insurance on behalf of

the first defendants, Chase Manhattan Bank (“CMB”). The insurance contract between HIH and CMB included a “truth of statement” clause, which excluded liability for innocent or negligent misrepresentation, but did not exclude deliberate and dishonest or reckless non-disclosure by an agent amounting to fraudulent misrepresentation. The films were, of course, unprofitable, and CMB claimed for the shortfall between the revenue and the sum advanced.

HIH sought to repudiate liability under the insurance policies on the grounds of misrepresentation and non-disclosure, either fraudulent or negligent, on the part of the broker acting as CMB agent. CMB argued that under the “truth of statement” clause the insurers were not able to repudiate the contract or claim damages even if their allegation were true.

Under the Marine Insurance Act 1906, which expresses generally applicable insurance principles, a contract of insurance is a contract based on the utmost good faith, and if utmost good faith is not observed by either party, the contract might be avoided by the other party (Section 17). The court found that although the “truth of statement” clause relieved CMB of its disclosure obligation, it did not relieve the agent of its disclosure duty. It could not be supposed that HIH did not require any disclosure of information of material circumstances, only that HIH did not require this information to come from CMB. Moreover, the insurance policy did not prevent the broker from acting as CMB’s agent.

The court went on to consider the proper interpretation of the “truth of statement” clause. The court found that it was reasonable for CMB to exclude liability for negligent misrepresentation or non-disclosure

on the part of its agent and to exclude any right of HIH to avoid the policy on that ground. In a complex insurance transaction of this kind, there was a real risk that an agent may make a negligent misrepresentation, and the bank distanced from the transaction would have little knowledge of what was represented and little opportunity to correct it. However, the court found that the opposite was true in the case of fraudulent misrepresentation or non-disclosure. Fraud was a thing apart and unravelled all, and as such an intention to exclude liability for fraudulent misrepresentation or non-disclosure had to be expressed in clear and unmistakable terms on the face of the contract. The clause in the policy did not satisfy this test.

The court therefore found that in the case of fraudulent misrepresentation or non-disclosure, HIH was (a) entitled to avoid the insurance contract under the Marine Insurance Act 1906 and (b) entitled to damages for deceit under Section 2(1) of the Misrepresentation Act 1967.

Mr Flaux highlighted the following two elements of the decision made by the House of Lords in relation to contracts of insurance generally. Firstly, liability for fraud by a party to the contract of insurance cannot be excluded, as a matter of public policy. Secondly, a non-disclosure (even if fraudulent) does not give rise to damages, unless it is held to be a misrepresentation. The contract may only be avoided.

The subject matter of the lecture was the recent developments in the area of conflicts of interest for solicitors, and the extent to which professionals can and must take steps to prevent conflicts arising.

The Common Law Rules

Mr Bartle began by considering the current common law position on conflicts of interest. First, he looked at the issue of personal conflict: when a solicitor is acting for a client and a personal conflict arises, he will be in breach of his fiduciary duty if he continues to act. It is clear that negligence is not required for liability for breach of fiduciary duty, and that solicitors should not only refuse to act but should also advise the client to obtain independent advice. If a transaction does occur, the solicitor must prove that the transaction was fair and the client had the full knowledge of the solicitor's involvement (*Spector v Ageda* [1973]). This duty continues after the termination of the retainer, provided trust and confidence still exists (*Longstaff v Birtles* [2001]). The outcome in cases such as these depends on the facts of each case, but the usual remedy is that the transaction will be set aside.

Secondly, Mr Bartle looked at the issue of clients with competing interests: when a solicitor acts for two clients with competing interests he owes two competing fiduciary duties of loyalty. It is clear law that this is an automatic breach of fiduciary duty unless *both* clients give their informed consent (*Bristol & West BS v Mothew* [1998]). Further, the duty is owed by the firm as a whole, so the problem is not solved if a different individual is acting for each client. *Hilton v BBE* [2005] showed that a solicitor cannot properly act on both sides of such a transaction and will be under a duty to inform the client he cannot act for

him and that he should seek legal advice from other solicitors. It is not enough simply to refuse to act. Further, the House of Lords was emphatic that a solicitor is not exonerated from liability just because he was unable to carry out his duty to both clients: if a solicitor put himself in a position of having two irreconcilable duties it was his own fault.

Thirdly, Mr Bartle looked at potential versus actual conflict: the position is that a solicitor can act for two clients with potentially conflicting interests if they give their informed consent (*Clark Boyce v Monat* [1994]). However, the burden is more onerous with a vulnerable client: he must be told that he *should* take independent advice, not simply that he *could* do so (*Mahoney v Purnell* [1996]).

Fourthly, Mr Bartle considered *Bolkiah v KPMG* (1999) and the issue of possession of confidential information: the House of Lords held that a solicitor has a continuing duty to preserve the confidentiality of information imparted during the solicitor-client relationship. A professional is restrained from acting if the client proves that:

- (a) the professional possesses information confidential to the client, who has not consented to its disclosure; and
- (b) the information is or may be relevant to the new matter in which the interests of the professional's other clients is or may be adverse to the original client's interests.

The House of Lords made clear in this case that this does not place a heavy burden on the client as (a) is readily inferred and (b) is often obvious. The burden instead shifts to the professional to prove there is no risk of deliberate or inadvertent use or disclosure. The professional has an

unqualified duty to preserve confidentiality, and not to use it or allow use to be made of it other than for the client's benefit. The client need not prove that confidential information has already been abused. It is to be noted, however, that the Bolckiah principle applies only in the context of a fiduciary relationship, and not to every situation concerning receipt of confidential information.

Changes to the Solicitors' Practice Rules:

On 26 April 2006 the Law Society brought new rules into force which regulate conflicts of interest and the duties of confidentiality and disclosure. They form part of the Solicitors Practice Rules 1990 as Rule 16D (conflicts of interest) and Rule 16E (duty of confidentiality and disclosure). Chapters 15 and 16 of the Guide to the Professional Conduct of Solicitors which formerly dealt with these issues have been repealed. In the past, breach of these rules would not be directly enforceable in the courts, but they will now be dealt with as statutory rules.

Commercial law practices were finding the previous rules increasingly unworkable in today's legal market, because they did not make any allowance for the fact that a client might wish to waive either of the solicitor's duties of confidentiality or disclosure. The use of information barriers has now been recognised by the rules and not just by the common law: this relaxation is the most significant aspect of the changes.

The new rules reflect changes in clients' needs, the law and the way in which firms practice today. For the first time, a definition of conflict has been provided: conflict of interest arises either if:

- (a) the solicitor or firm owes separate duties to act in the best interests of two or more different clients in relation to the same or related matters and those duties conflict or there is a significant risk that they may conflict with the result that acting in the best interest of one client will result in prejudice to the other client; or
- (b) there is a conflict between the solicitor's interest and that of the client.

There are two exceptions to the conflict rule, to be used with caution:

- (a) when the clients have a common interest exception; and
- (b) when the clients are competing for the same asset.

In order to come within exception (a), there must be a clear common purpose and a strong consensus on how it is to be achieved. Further, if there is a conflict, it must be substantially less important to all the clients than their common purpose. Although accepted business practice will be a factor in determining whether an appropriate common purpose exists, this will not be decisive and ultimately the solicitor must be mindful of overriding reasonableness.

Exception (b) applies where clients are competing for the same asset which, if attained by one, will make it unavailable to the other, for example, where there is more than one creditor on an insolvency, or the clients are competing tenderers submitting tenders to perform a contract.

The rules also make it clear that the duty of confidentiality is paramount if there is a conflict between a solicitor's duty to disclose information to one client and the duty of confidentiality to another

client. A typical scenario arises where a solicitor owes a duty of confidentiality to the first client (A), but the confidential information is material to the new client (B). The solicitor is obliged to disclose material information of which he has personal knowledge. However, “material” is not defined: it would be wise to follow the assumption that the information must be relevant to the specific retainer, and information of general or inconsequential interest to the client is not material.

The rules provides that firms may use information barriers in limited circumstances where, but for the use of the barrier, the firm could not act. For example, the firm may act where the first client (A) gives informed consent, provided the firm is satisfied that:

- (a) both clients understand the relevant issues;
- (b) the new client (B) gives informed consent; and
- (c) it is reasonable to act in all the circumstances.

A firm may also act for B even if A does not give consent, provided that:

- (a) B knows the firm holds or might hold material information which cannot be disclosed;
- (b) safeguards are put in place to protect A’s confidential information which comply with the standards required by law; and
- (c) it is reasonable to act in all the circumstances.

Conclusion

Mr Bartle concluded that it is too soon to comment on how the new rules have been received and too short a time to know their effect, but one thing is clear: the old rules were unsatisfactory and needed to be

adapted to the modern world. It will be interesting to see the extent to which the rules work in practice and, when they do not, whether clients will rely on the rules or the common law or both when seeking a remedy in the courts. It is likely, for example, that the new rule that a solicitor is only obliged to disclose information personally known to him rather than information known to the firm, will give rise to a raft of litigation.

LSLA Lecture – 4 July 2006

Costs - The present legal position

– Jeremy Morgan QC

The subject matter of the lecture was an overview of the main Costs cases decided over the last year which were likely to be of interest to an audience of commercial litigators.

1. Conditional Fee Agreements

Cambell v MGN (N.2) [2005]
1 WLR 3394

In this case, it was argued that CFAs were designed as a means of securing access to justice for people of low or moderate means at the same time as Legal Aid was largely abolished, and that rich people did not need them. Accordingly in a case where the Article 10 right to freedom of expression was at stake, it was argued that it was a disproportionate interference with that right if those who exercised it were subject to a penalty then they got things wrong (i.e. a success fee on top of the usual costs). The House of Lords rejected this argument, holding that means testing did not come into the statutory scheme and that no breach of Article 10 resulted. Mr Morgan noted that as a result of this judgment, the fees payable by a losing party have the scope to treble if there is both a success fee and an insurance policy premium payable on top of the successful party's usual fees.

2. Costs consequences of refusing to negotiate

Daniels v Metropolitan Police Commissioner [2005]
EWCA Civ 1312

In *Halsey v Milton Keynes NHS Trust [2004]* 4 All ER 920, the court set out guidelines for when a successful party may be deprived of the costs of which it would otherwise be awarded if it fails to agree to mediate. The principal considered was whether the refusal to mediate was unreasonable. In *Daniels*, it was held that the same principles as *Halsey* apply to a refusal to negotiate. On the facts of this case,

it was held that the defendant had acted reasonably.

Sahota v Sohi [2006]
EWHC 344 (Ch)

A discount of 50% of the successful party's refusal to negotiate was imposed. However, in this case costs of some £0.5million had been run up on a partnership dispute which was never worth more than £50,000. The unsuccessful party had made a series of offers which, although they did not offer costs (or if they did the offers way short of the actual costs), had been flatly rejected by the successful party without any attempt being made to negotiate back.

3. Part 36 and other offers

Trustees of Stokes Pension Fund v Western Power [2005] 3 All ER 775

A pre-proceedings Part 36 offer was made by the defendant which, as it turned out, ought to have been accepted. When proceedings were issued, the offer was not followed up as it ought to have been under CPR 36.10(3), by a payment into court. The defendant relied on the offer in connection with the argument over costs. The Court of Appeal ruled that the court had a discretion to take into account non-compliant offers under CPR 36.1(2) and CPR 44.3(4)(c), setting out a number of conditions, which if satisfied, should usually be treated as having the same effect as a payment in.

4. Indemnity costs

Zissis v Lukomski [2006]
EWCA Civ 341

In this case, the district judge awarded costs on the indemnity basis, stating that “if parties litigate only as to costs then it seems to me that they must bear a greater risk that if unsuccessful they will be paying costs on the indemnity basis”. However, the Court of Appeal reversed this

decision, holding that there was no reason why parties litigating over costs alone should be at any greater risk of an award of indemnity costs than those litigating over other matters.

exceptional order which will usually only be available against a litigant without assets in England and against whom enforcement is likely to be difficult.

5. Interest on costs before final judgment

Nova Productions v Mazooma Games [2006] EWHC 189 (Ch)

Since 1838 an order for costs has always carried interest at Judgment Act rates, interest running from the date of the order for costs. The CPR made two change to this regime. The first, under CPR 40.8, was to enable the court to vary the date from which Judgment Act interest ran. The second, under CPR 44.3(6)(g) was to confer on the court awarding costs a discretion to award “interest on costs from or until a certain date, including a date before judgment”. In *Nova*, interest was awarded at 1% over base from the date of payment of the costs in question. Both rate and period corresponded with what had generally been allowed in earlier cases.

6. Conditions for contesting detailed assessment

Days Healthcare UK Ltd v Pibsiang Machinery Manufacturing & others [2006] EWHC 1444 (QB)

Langley J held that the court had an inherent jurisdiction to attach conditions to the right of a party paying to contest a detailed assessment. In this case, the defendants were debarred from defending the detailed assessment hearing unless they paid the £2 million on account of costs plus interest. However, the facts of this case were extreme and two caveats should be expressed. Firstly such an order will never be made if the effect would be to stifle the litigant’s access to the court. Secondly, it was an

LSLA'S response to Consultation Paper Part 36 of the civil procedure rules: offers to settle and payments into court

The London Solicitors' Litigation Association (LSLA) is over 50 years old and represents the interests of a wide range of litigators in London handling a broad range of civil and commercial litigation. Through its 950 solicitor members and strong links with a wide number of professional bodies, it represents nearly all civil litigation practices in London. The LSLA operates through a committee of some 15 members which includes members of the Civil Justice Council, Civil Procedure Rule Committee, Law Society Civil Litigation Committee and local Law Societies. The LSLA has a long track record of responding to consultation papers and has drawn on a wide range of views in response to this paper.

Overview

The fundamental purpose of Part 36 is to promote settlement of disputes and in that respect, we consider that it has been one of the successes of the CPR. Any changes to its provisions should therefore be approached with considerable caution. We recognise however that a number of Court of Appeal decisions have highlighted points which ought to be reviewed and we therefore welcome this consultation paper.

We will deal with the specific questions below but in canvassing the opinions of the LSLA's members, a strong preference emerged for all defendants to be permitted to make offers rather than payments into court. It does seem perverse for the rules to be changed so that, in terms, those who can afford to pay in do not have to do so, whereas those who cannot demonstrate financial security have to pay in.

If the Rule Committee considers that Part 36 should move towards a system of offers rather than payments in, whether on a blanket basis as we

propose or on a more restrictive basis as the consultation paper proposes, then we consider that the approach to withdrawal of offers should also change. Inevitably in our view a greater freedom to make offers implies a greater freedom to withdraw. We suspect that the presence of money in court actually encourages parties to take more than the prescribed 21 days to consider their position.

In the interests of promoting settlement, we consider that Part 36 should now move to a system in which offers are deemed to lapse automatically at the end of the prescribed period for acceptance, unless stated otherwise. We believe that this would help "concentrate the minds" of both parties. Offerors would have the opportunity to consider whether offers should be left on the table and offerees will have to make prompt decisions as to whether to take the offer.

Such a system would only work if the offer, once withdrawn, still retained consequences in costs. We therefore agree with the Court of Appeal in *Western Power* that withdrawn offers should continue to have effect under Part 36 and amendments will be required to Part 36.5 to address this.

Turning to the individual questions in the consultation paper, we comment as follows:

- 1. Do you agree that defendants who can be assumed to be "good for the money" should not be required to make actual payments in support of offers as provided in recent case law?**

The strong preference of the LSLA is to move to a system where all offers in prescribed form should have the protection of Part 36, whether or not they are backed by a payment of money into court. If this approach is

not favoured, then it must follow that that LSLA supports a more liberal approach to the making of offers as opposed to payments into court and we would therefore agree that defendants who can be assumed to be “good for the money” should no longer have to make a payment.

The proposal risks the contradictory position that those who can afford to pay in will not have to and those who cannot afford to pay in will be obliged to, in order to seek costs protection. There is a real danger that this would lead to “inequality of arms”, with the rules arguably favouring those defendants who have substantial funds or backing.

It is fair to say that a number of our members have reservations about this move. There is a long list of insurers, local authorities and other major corporations who have fallen, sometimes very quickly, into insolvency. One of our members cited the example of Polly Peck, who were given a clean financial bill of health but had then collapsed within a matter of weeks. It was suggested that offerors or their solicitors could file a statement detailing why the offeror is good for the money, but this too fails on the Polly Peck example.

There is also the view that the presence of the money in court beyond the 21 day period for acceptance helps to drive the settlement process and therefore meets the main objective of Part 36, which is to promote settlement. There are however others who consider that the availability of the money in court arguably undermines the effectiveness of the 21 day period for acceptance of Part 36 offers/payments.

A possible compromise could be a provision that money offered must be paid within a short limited period, say 14 days after acceptance of the

Part 36 offer, otherwise the offer is of no effect at all.

2. If so, do you agree that so far as possible those categories of defendant should be defined in the rules to increase certainty for defendants making, and claimants accepting, offers unsupported by payments?

Our primary position, as explained above, is that there should in fact be no differentiation between any categories of Defendants for the purposes of Part 36 and that we should move to a system of offers only. However if this approach is not accepted, we agree that the rules need to make the position absolutely certain. The need for change in this respect arises from the decision in *Western Power*, where the Court of Appeal concluded that the position was not yet certain (but ought to be).

3. If so, do you agree that the categories defined in the draft rule are appropriate? What other categories would you include or exclude and why?

We do not agree that the categories in the draft rule are appropriate. The draft rule is much more restrictive than the judgment of the Court of Appeal in *Western Power*. If the Committee does proceed with some form of distinction between categories of defendant, the description should be wider.

It is worth comparing the position under Part 36 with the changed position under Part 25 for interim remedies (where any stated restriction as to the status of the defendant has been removed).

We accept that a wider definition may be difficult to draft. That is one of the reasons that the LSLA favours the blanket removal of the requirement to make payment to support the offer. By making an offer

in the prescribed terms, the Defendant could be assumed to be certifying that it is in a position to meet that offer.

The procedure of certification proposed is too cumbersome. There should be a simple statement by the party/representative making the offer.

4. Should the court be allowed to (a) extend and/or (b) abridge the time for accepting a Part 36 offer? If so, what factors or criteria would be relevant?

Whilst LSLA members believe that the courts' powers to extend or abridge time apply equally to Part 36 as to other time limits within the CPR, we agree that the court should be allowed to extend or abridge time and that this should be made clear in the rules for the avoidance of doubt. However we do believe that there are certain principles that should apply:

- The 21 day limit should normally be a minimum. Thus if a party (presumably the offeror) wishes to abridge time, they will need to show good reasons and to make the application promptly.
- As indicated under question 5, we consider that the parties should retain the freedom to extend time as they wish. However, as the purpose of the provisions is to promote settlement, we consider that the Court should be slow to extend time where the parties will not agree this. (Some members consider that the court should not have the power at all to extend time if the offeror objects, otherwise the court is imposing a bargain on an unwilling offeror)
- Any application to extend time must be made within the 21 day time limit. It should not be possible for the receiving party to extend time outside the 21 days as this will undermine the effectiveness of Part 36.

- As the primary purpose of Part 36 is to promote settlement and to enable one party to put the other at risk as to costs and other consequences, the court will need to be satisfied that there are good reasons for the extension. Subject to this point and to the other factors identified above, we do not believe that the court's discretion should be fettered by identifying factors or criteria which should apply.
- 5. If the court has the power to extend then should the offeror also have the right to make the offer beyond 21 days in the first instance?**

The LSLA agrees that the parties should retain the freedom to extend time as they wish, both within the offer itself and once the offer has been made. The existing rules already provide for both these options. We anticipate that unless the power to extend time is restricted to situations in which there is good reason to request an extension, there will be a rash of applications for extension of time. Accordingly it is important that the power to grant extensions is limited to those cases in which good reason is shown.

6. Do you agree that the requirement to obtain the court's permission to accept a Part 36 offer out of time should no longer apply? If you disagree, please explain what purpose permission serves?

This is a difficult area and needs to be seen in the context of any decision on when and in what circumstances a party can withdraw an offer made. Some of our members believe that the ability of parties to accept offers out of time risks undermining the effectiveness of Part 36, as it makes less likely that the receiving party will take real notice of the 21 day period.

It will also depend on the effect of an offer once withdrawn. The position of the Court of Appeal in *Western Power* on this was quite clear: that the court should always take into account the fact that an offer to resolve the case had been made and rejected. We deal with this point further under question 8 below.

We believe on balance that the right approach is for Part 36 offers to be treated as limited in time and then to lapse for contractual and other purposes, save for the continuing effect in costs. On that basis it would not normally be possible for the receiving party to accept an offer out of time.

If the Rule Committee disagrees with this position, then the LSLA's secondary position would be that the formal permission requirement should remain. We consider that the consultation paper may not clearly have understood the costs position, as there seems to be some confusion between the *entitlement* to costs as opposed to the assessment of the actual figures for the costs themselves. Unless the parties can agree terms, the entitlement to costs will have to be determined by order of the court and could be dealt with under the permission requirement. The parties will not be able to enforce their respective entitlement to costs without an appropriate Order.

7. Should parties refusing an offer be required to give reasons?

We did not detect any real enthusiasm amongst our membership for requiring the refusal of an offer to be accompanied by reasons. It is quite clear that if such a proposal were introduced, the responses used would rapidly become formulaic and therefore meaningless.

8. Should withdrawal of offers be permitted:

- a. during the period for acceptance with the court's permission and thereafter by serving a notice of intent to withdraw; or
- b. at any time by serving a notice to withdraw; or
- c. at any time only with the court's permission; or
- d. only after the end of the period for acceptance, and with the court's permission; or
- e. only after the end of the period for acceptance, without requiring the court's permission?

As stated above, the LSLA's preferred option is for offers to be truly limited in time and to lapse at the end of the period for acceptance. This is a difficult subject, but any system which permits greater freedom to make offers rather than payments into court must also imply greater freedom to withdraw.

If the Rule Committee does not accept our primary position then our preference would be for Option a, under which notice to withdraw could be served at any time but only after the period prescribed for acceptance.

In reaching our decision on this option, we have had particular regard to the primary intention of Part 36, namely to promote settlement of disputes. The limited period for acceptance is in our view a protection for both offerors and offerees. The offeror knows that he will only be exposed to limited costs beyond the date of the offer and at the same time the offeree knows that he has a short period of grace in which to take stock. We believe that the latter is particularly important and that

therefore the right to withdraw within the period for acceptance should be restricted.

We would recommend that in order to avoid confusion, there should be a prescribed format for the withdrawal of Part 36 offers, in the same way that there is a prescribed format for the giving of offers. This would avoid any question of dispute over whether an offer has or has not been withdrawn.

The consultation paper does not address the effect of withdrawal of an offer. Part 36.5(8) currently indicates that an offer once withdrawn loses its costs consequences. However the Court of Appeal in *Western Power* ruled that the offer was relevant to behaviour at the time and can therefore still sound in costs. We agree with the Court of Appeal's reasoning in this respect and therefore agree that an offer once withdrawn should still have an effect in costs. Part 36.5 will therefore require amendment.

9. Should defendants normally be entitled to (a) indemnity costs and (b) enhanced interest where a claimant fails to beat the defendant's offer at trial?

There were a range of views within the LSLA's membership on this point. Some of our members considered that there should be no provisions within the CPR at all which could be regarded as imposing a penalty on one party at the expense of the other, as opposed to being purely compensatory. However we recognise the need for some artificiality in the incentive for Claimants to make offers and we therefore support the current provisions entitling Claimants to indemnity costs and enhanced interest.

Defendants already have incentives to make offers and it is not clear that further incentive is needed. However

on balance we would favour the defendant being entitled to indemnity costs and enhanced interest on those costs. It is not of course possible to provide for the defendant to receive enhanced interest on damages, as there is no equivalent entitlement to damages. Some imbalance between the parties will therefore inevitably remain, but we consider that the change would at least reduce the imbalance.

10. Should Part 36 offers and notices be served or simply given?

We would point out that the question posed is not necessarily the question addressed in paragraph 53 of the consultation paper. The first question is whether there should be a single rule applicable to all notices under Part 36. We agree with the consultation paper that there should be a single rule in this respect. If such questions were left to the law of contract, then there would be scope for confusion and satellite litigation.

Whilst we have reservations about any system that artificially assumes that a document has been served, particularly where both parties have addresses for service on the court record, we agree that a requirement for service should be the relevant trigger, so as to avoid arguments about whether the relevant notice has been received.

We understand that the provisions as to service are to be reviewed generally and we would welcome this, as it appears that the application of the rules for deemed service is becoming increasingly artificial.

11. Do you agree that the requirement to file a notice of a Part 36 payment with the court should be removed?

We agree that there is no benefit in filing the notice of payment with the relevant court. Indeed there is a real

danger, by retaining the requirement, that payment details may accidentally come to the attention of the Trial Judge. The parties are perfectly able to draw any such payment to the Judge's attention and to the appropriate point at the end of the trial and there is unlikely to be any dispute about the fact of payment in.

12. Do you have any views on these proposals or do you have any other amendments to Part 36 that you feel are necessary? If so, please specify.

Some of our members have a concern regarding the provisions of Part 36.22. Recent cases have shown that there is scope for satellite litigation about the applicable rate of interest and that where the court has to rule on interest before being told of the Part 36 offer/payment, the "counting back" to see whether an offer has been beaten may become complex. Some members felt it was therefore necessary for offers to detail precisely the composition of the offer, whilst others felt that a statement as to whether or not the offer included interest would suffice. We raise this point for consideration, although it is fair to say that other members believe that the current provisions are sufficiently clear and flexible enough to permit an offeror to break down the offer into its component parts if he so chooses.

London Solicitors
Litigation Association

April 2006

Flying the LSLA flag in New York

In early April 2006 the American Bar Association Section of International Law held its Spring Meeting in New York. The conference which lasted (excluding administrative sessions before and afterwards) for three days on 5th, 6th and 7th April was divided into seven “tracks” of which Dispute Resolution/Litigation was one. (The others were Corporate Counsel, Customs/Trade, Law Practice, Public Law, Regulatory, and Transaction.)

The Law Society of England and Wales kindly sponsored (and arranged) a session in the Dispute Resolution/Litigation “track” called “Quicker Justice: A Transatlantic Toolbox” on the morning of 6th April. Three LSLA members spoke: Christopher Grierson of Lovells on Courtroom IT – What does the future hold?, Gavin Foggo of Fox Williams on Electronic Disclosure in the UK and Seamus Smyth of Carter Lemon Camerons on Costs Recovery and CFAs in the Commercial Field. The session was chaired by Judge Graham Jones and the other speakers were Gary Milner-Moore of Herbert Smith and Peter Rees of Debevoise & Plimpton in London.

Not only was reference made to the activities of the LSLA in England but the supply of recent copies of *Resolve* taken with us all disappeared! Generally it is thought that the session went well and generated substantial interest.

The ABA proposes to hold its autumn session in 2007 in London and it is the intention of the LSLA to collaborate with the Law Society once again, to contribute to the conference and to promote at the same time both the LSLA itself and London as a leading market place for litigation, arbitration and the resolution on international disputes. Watch this space!

Seamus Smyth

New Commercial Court

As many members will know, the proposed site of the new Commercial Court is something of an open secret. We will not proliferate the comment on that save to say that one of several potentially suitable sites has been earmarked and detailed plans have been drawn up. The consultation exercise with various Judges, practitioners and other users has informed the project group on the more detailed requirements for the new building. These are being worked up now. It seems as though the previous obstacles, regarding the need to find commercial partners to support part of the letting, have been overcome. We expect a further announcement in the autumn.

Graham Huntley

Details of New Committee

The LSLA has welcomed four new members on to the Committee this year: **Mark Clark** a partner with Solnick & Co and head of the firm's Commercial Dispute Resolution Group; **Nick Gray**, Partner at Slaughter & May; **Richard Langley**, a partner at Bircham Dyson Bell and Head of their Business Litigation Team; **Georgina Squire**, Partner and the Head of Litigation at Bircham & Co since 1989, retiring Chairman of the Law Society Civil Litigation Committee.

Georgina Squire (Rosling King)
Fraser Whitehead
(Russell Jones & Walker)

The current members of the LSLA Committee are:

Simon Davis (Clifford Chance),
President

Seamus Smyth (Carter Lemon
Camerons), Hon. Treasurer

Anthony Maton (McGrigors),
Hon. Secretary

Anna Pertoldi (Herbert Smith),
Membership Secretary

Graham Huntley (Lovells),
Immediate Past President

Emma Box (Gordon Dadds)

John Bramhall
(Davies Arnold Cooper)

Nicholas Burkill (Dorsey & Whitney)

Mark Clark (Solnick & Co)

Gavin Foggo (Fox Williams)

Richard Fox (Kingsley Napley)

Nick Gray (Slaughter & May)

David Greene (Edwin Coe)

Jeremy Grose (Dechert)

Tony Guise (Guise)

Colin Joseph (Kendall Freeman)

Francesca Kaye (Russell-Cooke)

Joanna Kennedy (Collyer Bristow)

Richard Langley
(Bircham Dyson Bell)

Andrew Parker
(Beachcroft Wansbroughs)

I, together with about 100 others, attended the Civil Justice Council's Costs Forum which took place from a cold 28 February to an even colder 2 March 2006 in a little known part of Buckinghamshire. To this day I am still unsure of where I was, somewhere at the end of the Met line is all I can remember. The first major issue to be resolved was whether this event was a Little Tent, Big Tent or a Forum. Such issues matter in CJC-land. For the regulars amongst us who had attended the different gatherings the answer was clear – we were a Forum and, this vital issue settled, we were able to progress to equally important matters, such as costs.

There was much debate about the different issues in costs today but two, in particular, will be of interest to readers of *Resolve* keen for insights into the Council's thinking about the shape of the management of litigation in the future.

1. Costs estimates/budgets as tools in the court's case management arsenal

The long running debate about whether the courts should set a budget for cases as apart of their case management powers and, if so, what that budget setting process entailed was given a very full airing. The Forum then broke into eight syndicate groups to discuss the issue in greater detail.

A straw poll of the groups led to the conclusion that what we were talking about was a case management tool called "estimates" and that budgets were something different and, more to the point, unnecessary. Jeremy Morgan, QC drew a distinction between an estimate (which he argued was a single figure) and a budget (a detailed breakdown). In any event the consensus of opinion was that the Forum did not consider budgets helpful in the between parties context.

After a very lengthy debate the Master of the Rolls concluded it

was unnecessary for the court to prescribe a budget as an aid to determining case management. The court already had the tool of estimates under the CPR and this, he concluded, should be adequate to provide the court with sufficient information to effectively case manage cases.

The topic of gatherings was revisited in this context when someone suggested that a Little Tent on budgeting may be useful, remember you read it here first. Budgeting may not be dead after all, see below too.

2. Funding of cases by professional funders

The funding of cases by commercial, professional funders established for that purpose moved another step forward during the Forum when the meeting acknowledged that in the light of the Court of Appeal decision in *Arkin v Borchard* [2005] EWCA Civ 655 the way was now clear for professional funding companies to develop the market in a structured and coherent fashion.

Arkin, it will be remembered, holds, amongst other things, that professional funders are a legitimate source of funding for litigation. The English and Welsh market is under-developed at present with a limited number of providers. I expect this will change before long.

Having said all of that ... during an interview with the *Law Society's Gazette* (21.04.06) the Master of the Rolls commented that he was remaining "open-minded" about costs problems. Many interpret his words as offering the prospect of radical solutions to current dilemmas in costs. In the light of this the only certainty in the costs field is yet further proposals for change emanating from the CJC in the near future.

Tony N Guise

Resolve

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