

How many bites of the cherry do you need?

The *Seele Austria* case underlines the importance of claimants raising key points early on.

The *Seele Austria GmbH & KG v Tokio Marine Europe Insurance Ltd* case (which is still continuing) is a long-running and complex saga. But it has important implications for insurers keen to stop claimants mounting or resurrecting claims long after they should have first been made in court proceedings.

Case background

The case concerns coverage under a combined contract works (construction all risks) and third-party liability policy. In dispute is an indemnity claimed by a subcontractor regarding the cost of rectifying defective windows in an office development in Paternoster Square in the City of London.

The proceedings started in the Commercial Court in 2006. Following the hearing of liability issues, Mr Justice Field decided (see [2007] EWHC

1411 (Com)) for the insurer, ruling that there was no indemnity under the policy in the absence of any accidental damage to the works. His decision on this point was overturned by the Court of Appeal (see [2008] EWCA Civ 441) and the case was transferred to the Technology and Construction Court (TCC) to decide the level of damages (known to lawyers as “quantum”).



“We are where we are”

The phrase “we are where we are” – often accompanied by a sigh or a look of bemusement – has been used repeatedly by advocates and judges in both the Court of Appeal and the TCC.

So where exactly are we now? Following the Court of Appeal decision that a separate deductible applied to each window affected by workmanship defects – and almost three years after the proceedings were first issued – the subcontractor applied to amend its particulars of

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claim. The amendments related to a cause of damage to the windows – the subcontractor now argued the cause a generic design defect – and quantum.

Issue estoppel

The insurer opposed the design amendments, relying on issue estoppel (broadly speaking, the legal rule that the same issue should not be litigated more than once) and the *Henderson v Henderson* abuse of process principle. The design v workmanship issue had, the insurer argued, already been decided – or at least could and should have been raised – in previous stages of the litigation.

The insurer's view (which was not shared by the subcontractor) was that the effect of refusing the subcontractor permission to make the design amendments would be to apply one deductible per each defective window, thereby reducing the value of the claim by half.

The subcontractor said that the nature of defects had never been decided and that it would be wrong and unfair to prevent it from raising this new issue now.

After reviewing the general rules relating to amendments, Mr Justice Coulson in the TCC referred to the key principle of issue estoppel established by Lord Justice Diplock in *Thoday v Thoday* [1964]: you have to demonstrate that a particular issue has already been litigated, decided and was a necessary ingredient in the previously advanced cause of action. Mr Justice Coulson concluded that issue estoppel would apply to the determination of preliminary issues, or even interlocutory matters, decided earlier in the same action between the parties.

Following an extensive examination of the proceedings before the courts of both instances, Mr Justice Coulson decided that the issue of design v workmanship defects had already been decided in the insurer's favour by both courts. He further ruled that the parties could not subsequently, in the same proceedings, advance arguments or adduce further evidence aimed at showing that this particular issue had been wrongly decided.

He disregarded the subcontractor's argument of "special circumstances", saying that, if there was any confusion about whether the issue of design v workmanship had been fully considered, then resolving that confusion had been within the subcontractor's knowledge and control.

Henderson v Henderson abuse

However, in case the design amendments were not in fact barred by issue estoppel, Mr Justice Coulson then went on to consider whether such amendments would be an abuse of process. He referred to the decisions in *Henderson v Henderson* [1843] and *Johnson v Gore Wood & Co* [2002] as authorities for the proposition that a court will not permit the same parties to revisit the same subject matter which, due to

negligence, inadvertence or accident, were not but should have been decided in previous litigation. He decided that the issue of generic design defect could and should have been raised in the earlier liability proceedings.

On this basis, he concluded that it would be an abuse of process for the court to allow the design amendments to be made at this late stage. Notably, he reached this conclusion

despite the fact that the

previous litigation was actually an earlier stage of the same proceedings – a development characterised as unusual but, on the facts of this case, appropriate.

TCC judgment

Mr Justice Coulson therefore dismissed

the application

for the design

amendments on the basis

that the underlying issue:

- (1) had already been determined against the subcontractor and could not be reopened; and
- (2) could and should have been raised years ago.

To allow the amendments now, he said, would be unfair, contrary to the Civil Procedure Rules and an abuse of process.



Quantum

The subcontractor's second category of proposed amendments related to quantum. This was also opposed by the insurer. The subcontractor was, the insurer said, trying to introduce claims for consequential losses or composite claims which were not covered by the policy, or which were expressly excluded.

Mr Justice Coulson examined the insurer's argument that the new claim appeared to include many items that were originally described as straightforward remedial costs but which were also excluded from the policy and consequently not recoverable. The judge conceded that some of the costs included in the amended pleadings might be classified as consequential losses or otherwise be excluded. However, he decided that it would be inappropriate to turn an application to amend into a form of preliminary issue hearing and to decide points of law on an interlocutory basis.

He also said that the subcontractor had not provided adequate particulars of claim. So he ordered it:

- (1) to particularise its case regarding the dominant cause of the costs and/or the basis of costs apportionment claimed; and
- (2) prior to the quantum trial to produce the evidence upon which it relied.

The judge also encouraged the subcontractor to review its claim regarding supervision costs. There were, he warned, potential costs consequences for the subcontractor if the claim, which apparently related to a period after remedial works on the windows had been completed, ultimately failed at trial.

The Civil Procedure Rules

Ten years on.

Ten years since the introduction of the Civil Procedure Rules – and 15 years since Lord Woolf’s first Access to Justice report – it is worth looking at whether the reforms have realised their ambitions.

Aims and principles

Lord Woolf’s review had three aims:

- to improve access to justice and reduce the costs of litigation;
- to reduce the complexity of the rules and modernise terminology; and
- to remove unnecessary distinctions between practice and procedure.

These aims were underpinned by eight basic principles that Lord Woolf considered had to be met by a civil justice system if it was to “ensure access to justice”. The system must:

- be just in the results that it delivers;
- be fair in the way it treats litigants;
- offer appropriate procedures at a reasonable cost;
- deal with cases with reasonable speed;
- be understandable to those who use it;
- be responsive to the needs of those who use it;
- provide as much certainty as the nature of the particular case allows; and
- be effective, adequately resourced and organised.

The outcome

After the two-day hearing, Mr Justice Coulson allowed the subcontractor’s application regarding quantum amendments but rejected its application in respect of the cause of damage.

Although it stems from a procedural application, the decision (see [2009] EWHC 255 (TCC)) reinforces the point that defendants can successfully rely on issue estoppel/*Henderson* abuse of process arguments when responding to applications to amend particulars of claim. They do not have to wait to plead such arguments in an amended defence.

It is also a good example of a proactive case-management decision, highlighting the importance of claimants setting out genuine heads of claim supported by evidence. Although complex issues, including those relating to the coverage of consequential loss, are likely to be decided at trial, Mr Justice Coulson unequivocally directed what information the subcontractor must provide in the pleadings.

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One result of the introduction of the CPR has been a drop in High Court litigation by around 80% and county court litigation by over 20%.

Main effect on claims

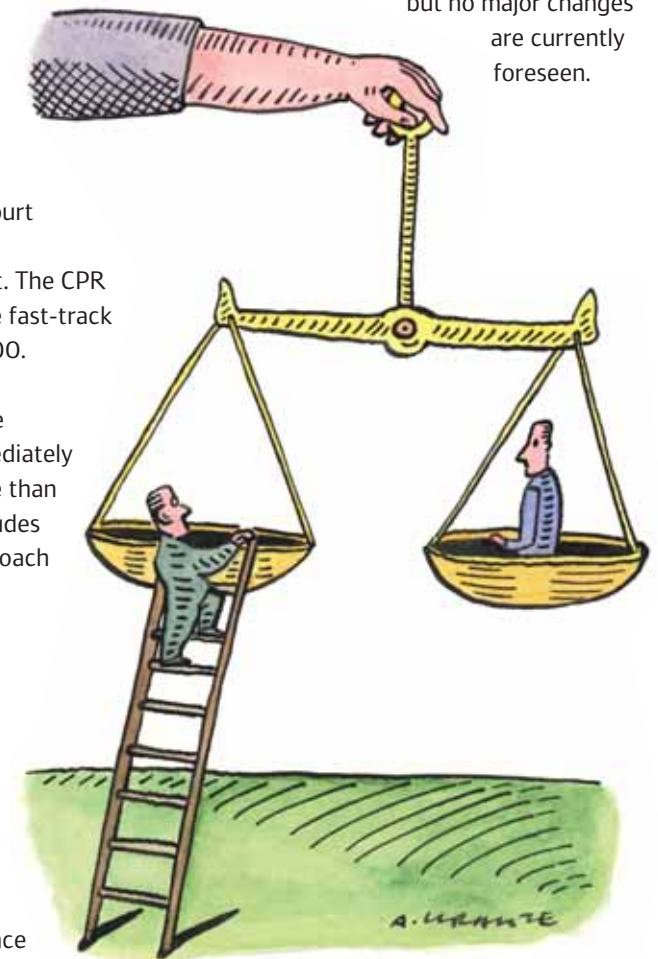
What have been the main effects of the Civil Procedure Rules on claims that are actually run?

The fast-track procedure has undoubtedly been a successful innovation. Under the old county court rules, the step up from small-claims arbitration to full trial was too great. The CPR committee has now agreed that the fast-track limit should be increased to £25,000.

Another successful innovation is the summary assessment of costs immediately after any hearing that lasts no more than a single day (which necessarily includes all fast-track cases). What this approach lacks in subtlety is more than compensated by the saving in time and yet more costs, as well as the immediacy of the result.

However, probably the most successful change effected by the CPR is in relation to expert evidence. Previously, we often had to deal with “the hired gun” expert who gave the same report in evidence in every case. The Civil Procedure

Rules require and emphasise that the expert’s duty is to the court. The use of a single joint expert will save many litigants many thousands of pounds. The CPR committee has now embarked on a review of Part 35 but no major changes are currently foreseen.



Part 3 of the Civil Procedure Rules sets out specific and detailed case management powers. It can reasonably be said that, under the CPR, the court has the power it needs to give effect to the overriding objective of enabling the court to deal with cases justly. However, there are some missing links. The first is a lack of will to exercise the available case management powers. Ten years on, the parties or their legal advisers fail to comply with court timetables on too many occasions, and still frequently conduct the litigation in an adversarial fashion, losing sight of the concept of proportionality.

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Another important missing link between the court's powers and achieving the overriding objective concerns the rules relating to costs. These rules do not enable the court to compel litigation to be conducted at a reasonable and proportionate cost. The position has not been helped by the virtual abolition of legal aid, the introduction of conditional fee agreements and the decision to treat after-the-event premiums as if they were costs.

Not the complete package

It is not easy to draw absolute conclusions. Woolf justice does appear to be fairer. Lawyers generally like and are comfortable with Woolf.

It has reduced litigation and led to more cases settling early. Civil procedures have been improved in terms of quality, although there has been a price to pay in costs.

The Civil Procedure Rules delivered in 1999 did not constitute the complete Woolf package. A number of crucial proposals were left parked on one side, including fixed costs in fast-track cases, improvements in collective actions for consumers and effective IT support for case management functions. We are still waiting for these proposals to be converted into practical reality.

The lingering concern is that the Civil Procedure Rules have fallen short of the original (and well-intentioned) aims of the review set out at the beginning of this article. The Rules themselves have significantly improved the system that governed litigation before April 1998. That they have not done so to the desired extent is not the fault of the rule-makers, but due to the lack of priority given to civil justice by politicians and the Treasury.

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The price of petrol

The cost of property contamination.

The law recognises that petrochemicals in their various forms can harm land, water, the atmosphere and people. However, they are an unavoidable aspect of the modern UK economy, which is heavily dependent on motorised transport. It is not realistic to keep such substances away from the places in which people live and work: motorists need easy access to petrol stations.

Escaping substances

Recognising the risk of danger to human health and the pollution of natural and built environments, the law requires petrochemicals to be processed, transported and stored in a way that is secure and minimises the likelihood of escape.

Sadly, though, escapes are not uncommon. There can be spillages from road tankers or storage tanks and supply pipes can split, sometimes as a result of insufficient maintenance or inappropriate installation. Escapes can take the form of liquid, or gaseous or vaporous particulate matter.

These problems are not confined to petrol filling stations. Equally dangerous substances can and do escape from refineries, manufacturing and processing operations and domestic premises, notably kerosene-based heating systems.

Legal consequences

When these escapes remain within the property

of the party responsible for the storage of the substance, the legal consequence is likely to be confined to a requirement (by the Environment Agency and the relevant local authority) to remediate the affected soils and groundwater, and to prevent the further spread of contaminants.

However, significant additional problems arise where the escape extends beyond the premises of the responsible party. The regulatory authorities will require remediation of the contaminated soil, groundwater and watercourses. Local authorities can effect remediation and recover the expenditure from the polluter. Contamination of watercourses may well result in criminal penalties, and civil claims by the water companies that have to clean the watercourses.

The remediation of land and water and the subsequent monitoring of the affected sites can be time-consuming and extremely costly.

Petrochemical pollution

Many disputes arise where petrochemicals have escaped from storage facilities beneath petrol filling stations and percolated through the soil and groundwater to neighbouring residential properties. In these circumstances, there is likely to be liability under the law of nuisance and negligence. It is conceivable that the polluter could be liable under the famous 19th century *Rylands v Fletcher* rule, which imposes strict liability for escapes from land that has been

modified in what Lord Cairns described as a “non-natural” way. However, in the 21st century, it is debatable whether the use of land as a petrol filling station is “non natural”.

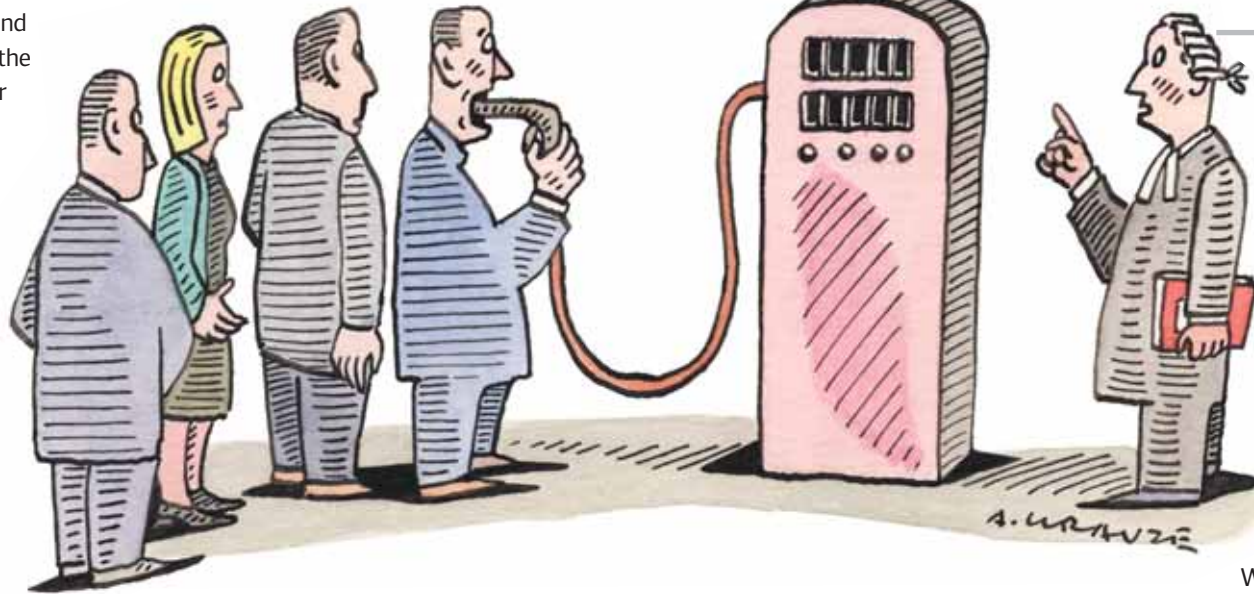
For what types of losses can affected householders (or their subrogating insurers) seek to recover damages?

The reasonable costs of remediating and monitoring the affected site will be recoverable as damages. This will include the fees of both the specialised engineers required to devise and manage a remediation scheme and the contractors needed to carry out the necessary clearance works. Particular problems can arise if contamination spreads beneath a dwelling house, which may necessitate the removal of floors and internal walls to allow excavation of all contaminated soil. This will inevitably result in significant rebuilding works and, frequently, redecoration throughout the property.

Once contaminated materials have been excavated and cleared, the site must be monitored to ensure that it is free of contaminants or, at least, that the level of contamination has been reduced to a level at which the property is safely habitable. Sometimes this monitoring can continue for years and involve site attendances by engineers, together with the preparation (and subsequent analysis) of data from the monitoring exercise. The monitoring costs will be recoverable as damages.

The fact of a pollution incident – especially one

which has caused contamination of a claimant’s soil or groundwater – is likely to result in a claim that the affected property has been blighted and consequently diminished in value. Any such claim will need to demonstrate a causal connection between the pollution incident and the alleged reduction in value. The expert evidence of valuation surveyors will be key here. Blight claims can be significant but need to be considered critically. The mere fact that a property is located close to a filling station is likely to have an adverse impact on its



value anyway. Furthermore, a pollution incident may simply be a manifestation of a pre-existing risk, which was partly reflected in the price paid for the property by the claimant and the pre-incident value of the property.

Many other types of contamination-related losses can also be recovered in damages: for example, alternative accommodation expenses which can be long-term and significant;

accommodation for pets; storage for furniture, furnishing and contents; the replacement of contaminated belongings; new floor coverings; and extensive redecoration.

Types of suffering

People affected by petrochemical contamination incidents often have understandable concerns about the effects on their health and that of their children. Some of the chemicals present in petrol and diesel are carcinogenic. Claimants may complain about respiratory problems, either

has poisoned their land. Anxiety and distress about imagined problems is not actionable (as illustrated by the House of Lords’ recent decision in pleural plaques claims). Fear, however severe, is not a problem for which compensatory damages will be paid.

However, in the 21st century, it is debatable whether the use of land as a petrol filling station is “non natural”.

On the other hand, a claimant may have reason to believe – and evidence to show – that the state of a neighbouring filling station (or refinery, factory or heating oil tank) is such that it threatens to cause significant harm to the claimant (in the form of contamination or additional contamination) if it is not repaired, remedied, modified or dismantled. In those circumstances, the claimant may be able to obtain injunctive relief against the owner and/or operator of the dangerous equipment.

Where contamination has occurred, and the claimant can show that they have suffered inconvenience, distress or anxiety as a result of such proven contamination, a court is likely to award limited damages to reflect that type of suffering.

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Courts make waves for marine lawyers

Rule B and antisuit injunctions.

Two recent judgments are making waves for marine lawyers. It should be appreciated that in these cases either party to a dispute might start proceedings to gain an advantage by freezing the other party's assets in a pre-emptive strike. In both of our own examples mentioned below, the defendants in the actual claims were, for tactical reasons, claimants in what are known as "Rule B" proceedings.

STX Pan Ocean (UK) v Glory Wealth US Court of Appeals Second Circuit

On 19 March 2009, the United States Court of Appeals for the Second Circuit gave a judgment severely diminishing the ability of parties in marine cases to attach opponent's funds in New York.

The way it has worked for years has been that if, for example, a charterer has a claim against a shipowner (it might be that a ship has suffered engine failure during a charter, the cargo has been delivered late and the charterer has a claim for loss of profit) the charterer can attach funds in US dollars transferred to that owners' bank in New York.

The charterer and the shipowner might be in any jurisdiction worldwide and the charterparty may provide for arbitration in London under English law. The usual practice is for hire or freight due to owners to be paid in US dollars by electronic transfer. Over 95%

of international dollar payments must, however briefly, pass through one of 15 banks which form the Clearing House Interbank Payments System ["CHIPS"]. So, all the owner's income will be passing through one or more of these banks even if it is for just a few seconds.

The procedure is that the plaintiff applies ex parte to the court in New York for a Rule B Maritime Attachment Order.

Once the order is obtained, it is served on all the 15 relevant banks, daily by fax. Any served bank receiving funds apparently intended for the named defendant must contact the plaintiff's attorney named in the order, and may only release funds after obtaining approval.

By far the most popular attachment has been that of funds transferred electronically. But it is also sometimes possible to attach bunkers (fuel oil in a ship), insurance proceeds, credits or even ships, depending on the judge involved and provided the asset is within the district of the Court. In some cases, it may even be possible to pierce the corporate veil and attach tangible assets of the defendant company's alter ego.

Recent examples of such attachments in our own experience include:



- a charterparty dispute between Far Eastern companies, arising out of an incident in Africa, with arbitration proceedings in London, involving four Rule B attachments; and,
- a collision in the eastern Mediterranean, between a Hong Kong owned ship operated from Vancouver and a vessel owned and operated in the eastern Mediterranean, resulting in one Rule B attachment order.

Many claims worldwide have been dealt with in New York using this procedure, thus encouraging commercial settlement.

The increasing popularity of Rule B attachments has meant that New York judges have been overwhelmed by applications a trend that has been reinforced by the current economic climate. There is growing judicial resistance to such applications, no doubt encouraged by the banks who are obliged to incur huge costs dealing with the sheer volume of such orders.

Although the theory is that a Rule B attachment is meant to be available only in support of an arbitration outside the district (typically, in London), many judges have allowed its scope to be expanded to cover, for example, the collision damage claim in an eastern European court mentioned above.

The basic requirements for a successful application include:

- a prima facie maritime claim;
- the defendant's property being within the district of the court hearing the application; and
- that the defendant is "not to be found" within the district of the court issuing the order.

All went well until the *Sealand Investment Corp, Eastwind Transport Ltd and Atlantic Wind Ltd v Ingosstrakh Insurance Co* decision in May 2008. In this case, Judge Buckwald in the southern district of New York wrote the following while declining to make the

plaintiffs' proposed order: "Because this Court concludes that, based upon authorisation to do business in New York and designation of a registered agent, the defendant can be found within the district, the Order of attachment will not issue."

The approach varies from judge to judge but, broadly speaking, prior to this decision, the normal position was that the defendant had to be conducting substantial business in New York in order to avoid Rule B on these grounds.

Possibly as a result of the *Ingosstrakh* decision, many shipowners have recently been registering to do business in New York as a means of circumventing Rule B. A cottage industry providing off the shelf companies has grown up.

In the Pan Ocean appeal circuit Judges Walker, Calabresi, and Wesley held that to be "found" within the jurisdiction required two things:

- "found" for jurisdiction; and
- "found" for service of process.

Mere designation of an agent to accept service is insufficient.

Registration under S1304 New York Business and Corporation law requires appointment of the Secretary of State as agent to accept service of process and that would satisfy the requirements so "*a company registered with the Department of State is 'found' for the purposes of Rule B ... for Admiralty or Maritime claims and Asset Forfeiture Actions*".

It follows that companies can circumvent Rule B simply by being registered with the Department of State.

Another way of circumventing Rule B is to arrange for a payment to be made in a currency other than US dollars, for examples Euros or Singapore dollars.

Allianz v West Tankers

On 10 February 2009, the European Court of Justice gave a decision that is thought by some to threaten the position of London arbitration as the leading forum in the world for settling marine claims.

The background facts were straightforward. A ship struck a jetty in Syracuse. Although the charterparty was subject to an English law and jurisdiction clause, the charterers' insurers started subrogation proceedings against the owners in Italy. The owner then applied to the English courts for an antisuit injunction against the Italian proceedings on the basis the dispute was subject to the jurisdiction clause in the charterparty.

The House of Lords asked the European Court of Justice to resolve the conflict between:

- (1) the decision in *Turner v Grovit* (ECJ) that European Council Regulation No 44/2001 prevents the court of one EU country from issuing an antisuit injunction against proceedings in another EU country; and
- (2) the fact that arbitrations are expressly excluded from the application of Regulation 44/2001.

The ECJ found that permitting a court in one country to make an antisuit injunction against arbitration in another "amounts to stripping [the member of state] court of the power to rule on its own jurisdiction under [the] regulation".

As a direct consequence, where an arbitration agreement provides for arbitration in London

under English law – as most charterparties do – it will not be possible to get an order in England stopping either party from starting or continuing court proceedings in another EU jurisdiction. A charitable commentator might say that it will make little difference because (among other things):

- an antisuit injunction in support of a London arbitration clause will be easily obtainable in any EU court;
- the sanction of damages for breach of contract including the costs of the abortive foreign court proceedings will be readily obtainable in any other EU jurisdiction and will be a sufficient deterrent to prevent unnecessary proceedings; and
- people choose London because it has an established procedure and practice for maritime arbitration so they will not seek to avoid London arbitration.

This writer's view is less charitable. While the decision does not sound the death knell for London maritime arbitration, it is likely to lead to a significant increase in attempts to circumvent or simply obfuscate the process which has been contractually agreed, thereby causing expense and delay. In some cases, local courts may refuse to recognise the jurisdiction clause. Consequently, a claimant could be faced from the outset with the knowledge that it must go through several levels of appeal to have the dispute decided by arbitration in London and under English law, as set out in the contract.

Conclusion

While it is clear how the New York Appeal Court came to its decision severely weakening Rule B and how the European Court of Justice

came to its decision in the *Allianz* case, the effect in each instance will probably not help those who are regularly involved in marine litigation or arbitration as part of their business.

In the case of Rule B, the best way to encourage a reluctant party to negotiate is to freeze its assets. The cause of the huge volume of Rule B applications is not that there is something wrong with Rule B. It is the huge volume of transactions, some US\$2 trillion per day, passing through "CHIPS". Any deterioration of this procedure will increase the number of long-running claims, and lead to many claimants going uncompensated for their losses.

Companies wishing to protect themselves against Rule B attachments should register under S1304 as soon as possible. It can be done on line.

In the case of antisuit injunctions, the best way for a reluctant defendant to avoid a claim is to force it to be brought in a remote court which is sympathetic to the defendant and has little or no experience of the matters involved.

This article is just a brief summary of the issues involved. It cannot address all the pitfalls. Particularly the case of Rule B, the law is changing almost daily. The important thing for anyone faced with these issues is to obtain early strategic legal advice from someone who can see the global picture; and, good local legal advice from someone in the countries in question before starting litigation or arbitration.

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Castles built on sand

The effects of the global financial crisis on Dubai provide some interesting lessons for the future.

Little more than a year ago, Dubai was being hailed as a city of fabulous wealth where remarkable projects were being commissioned on a weekly basis. So far as the construction and property industries were concerned, it was the centre of the world. However, as the global financial crisis has tightened its grip, some of that lustre has faded.

Large numbers of high profile projects have been shelved or cancelled, among them the Trump Tower and Palm Deira. Others have been scaled down or delayed. Newspaper stories of expatriates losing their jobs and fleeing Dubai, abandoning their cars at the airport, have proliferated. An interesting subtext is the news that the government of Dubai has for the first time appointed PR consultants – no doubt on the sensible basis that managing good news is easy; managing bad news less so.

Do we want to finish?

Local developers have been hit particularly hard. Much of their business centred around off-plan sales and the anticipation that these would continue. Properties were purchased and often resold prior to completion, with purchasers frequently making multiple “wholesale” acquisitions and disposals. Like other pyramid

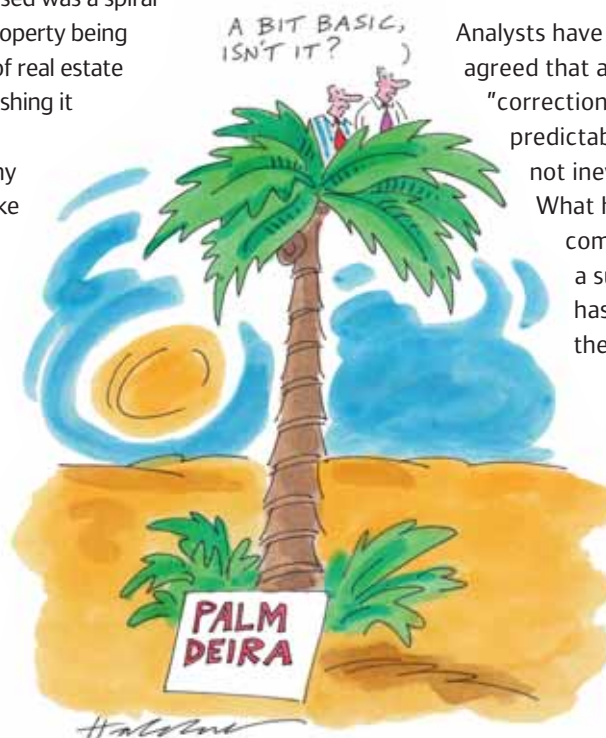
schemes this had the effect of driving up market prices. It also had the curious feature that, for some developers, completing the project became a secondary consideration. Dubai’s real estate laws place restrictions on using purchase monies to fund construction until the works have reached a certain stage. However, with each onward sale, the original developer becomes entitled to a small premium.

This was intended to protect purchasers from unscrupulous developers using their money to fund projects. What it actually caused was a spiral of forward selling and since the property being sold was regarded not as a piece of real estate but as a future option, actually finishing it became academic. This was compounded by the failure of many standard off-plan contracts to make any serious provision for compensation in the event of delayed completion. In the situation described above there was no need for such a provision.

Changing market conditions

Until the second quarter of 2008 there were suggestions that the UAE’s model would be “recession proof.” Unfortunately, the UAE is a small part of the global

economy and the disappearance of global credit inevitably affected demand in the UAE. At the moment prices started to fall, purchasers started to conclude that they were better off sacrificing their initial deposit rather than continuing with a transaction that might lead to their acquiring a property worth less than they had paid. Since many of those developers had no real borrowing facilities in place, the sudden disappearance of purchasers meant that liquidity disappeared overnight and, with it, the ability of developers to fund projects.



Analysts have largely agreed that a “correction” was predictable if not inevitable. What has come as a surprise has been the

suddenness and severity with which market conditions have changed and the fact that following the calamitous events of September 2008, the aftershocks have seen the market sink progressively further (a phenomenon described in the financial analysis website Market Oracle as “The dead cat bounce”).

Growth in disputes

The cancellation of projects has resulted in claims by contractors seeking recompense in respect of lost profits and, more significantly, the value of works already carried out. It has also led to large numbers of disaffected consultants faced with large unpaid fee claims. In some instances, these have been met by belated attempts to allege non-performance by the contractor or consultant; in others by the slightly more ingenuous promise to deal with the matter at some unspecified but hopefully imminent future date. A further feature has been the widespread suggestion of financial discrepancies in applications for payment – some innocent, others less so – again leading to delays in payments and requests to repay sums already paid. Suggestions of failures of corporate governance in almost every tier of the economy are also becoming commonplace.

Unsurprisingly, these market conditions have seen a growth in claims. These are busy times for loss adjusters. Interestingly, in respect of projects that are going ahead, there are indications that

the parties are taking a more adversarial approach, as margins grow tighter. It is also being hinted that tendering is actually going to become a competitive process rather than a series of comfortable negotiations.

A maturing market

Prior to mid 2008, Dubai's economy had been growing at double digit rates. That is not going to be the case in the year ahead. There has been widespread disquiet as to whether pre-2008 conditions will ever be experienced again. However, another perhaps wiser view is to ask whether in fact this is a sign of a maturing market, which is subject to market forces, in which competition is rewarded and where efficiency is a necessity. This is a market in which failure to perform leads to claims – whether contractual or insurance-driven; and where failure to pay sums that are owing leads to proceedings to recover the outstanding amounts. A necessary corollary to this view is to ask whether the projects which have been cancelled were ever any more than future interests.

In other words, this is a marketplace which will be instantly recognisable to any Western construction or insurance professional – particularly those who have lived through the last few decades of economic turbulence.

A change in attitudes

There is a final link in this chain. The scenario described above makes it inevitable that disputes will become more widespread. Whereas previously there was anecdotal evidence to suggest that proceedings would never be brought against a government-owned entity, there is now hard evidence to suggest that such claims are being threatened and, in some cases, pursued. The number of references to the Dubai International Arbitration Centre and the new DIFC/LCIA arbitration centre are growing. Unquestionably, the preference of many in the region is still to sort matters out privately and amicably within the *Majlis*. However, there is clearly a growing appreciation that more formal methods of solving problems may be coming into their own.

To paraphrase the ancient curse – we live in interesting times.

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Innovation

Opening a can of worms.

The can

This article begins a journey, one that begins to look at the concept of innovation in the field of providing legal services. The field that I explore is that in which the liability lawyer is camped. The article poses some questions for debate. I offer no single answer but hope, reader that you will be patient and understand why that is the case.

My inspiration for this discussion is three-fold. Firstly I have a sense of growing unease at the way in which lawyers and their clients discuss innovation. Secondly, the content of a lecture I attended, given by Richard Susskind the well-known legal “future-thinker”, and finally, a developing belief that lawyers need to radically change and that the best law firms will lead that change.

I hope that by the end of this article I will have been able to spark some interest in just what innovation within our professional world can realistically mean, the probable speed of development and to look beyond the next five years in a way that most lawyers seem frightened to do.

“Innovation and Innovative Legal Services” will be the topic of Kennedys’ Liability Division’s Annual Event this year at The Magic Circle on 24 September – and so I hope that those of you who find this article interesting will also be encouraged to attend that event and take part in the discussions at that time.

Other than that, I promise no hard sell – just (I hope) a brief and reasoned discussion of innovation and the legal world that we may all inhabit from 2015.

The worms

There are two principal and obvious risks of setting out my thoughts and suggestions.

First, competitors may decide to adopt my arguments for themselves and strive to advance their own case. For that reason I hope the reader will understand that I put into this article my own original thought – but not by any means all of it.

Second, clients and potential clients may decide that the future should be advanced more rapidly and that the status quo should indeed be undone as quickly as possible. That, to my mind, is to be encouraged. I don’t doubt that the best lawyers in the best firms will always survive – as long as they place their clients’ interests first and can provide a service that clients want.

Before moving on, I should say here that I come to explore the fact that there are some who instruct lawyers who do not seem to know what it is that they want. It surely can’t just be the same product but delivered more cheaply? That is product development and not innovation. Such product development of course is to be welcomed and indeed expected. However, what is it that each client really wants from the legal process?

Some Susskind thoughts

Every year Kennedys, like many large law firms, holds a partners’ retreat. In 2008 our guest speaker was Richard Susskind, who gave a fascinating talk. He outlined some areas covered in his latest book, “The End of Lawyers?” – particularly emphasising that the question mark in the title was key.

In his book Susskind explores how the future of legal services and professional advice may look as a result of developments in the areas of Information Technology and the delivery of Knowledge Management. His book is aimed fairly widely across a commercial legal world. He suggests that change will be necessary and gives some thought to how that may happen.

To be able to truly work together in partnership, insurers, their customers and claims handlers will need to have a better understanding of what it is that their lawyers can do for them over the next 10 years, and then work towards that goal.

I make no secret of the fact that I was inspired and excited but equally depressed by what he had to say.

The problem for any liability lawyer to wrestle with (assuming of course that Susskind's warnings are not just ignored), is how to translate his portents into the wheels and cogs of a legal service for insurers and their customers that fits with the 21st century – and above all, one that creates a “product” that is actually wanted by those buying the legal services.

Susskind points out that lawyers have no inherent right to profit from the law. He draws parallels with the ancient Guilds of London, who centuries ago held huge power and wealth and,

at the time, no doubt seemed eternal. The Guild of Wheelwrights (the builders of wheels) was one such organisation.

We still need wheels and indeed need more of them than we ever have done, but, as Susskind points out, technology and a changing world have done for the wheelwright.

There is no longer any routine need for one man to provide a bespoke handmade wheel and therefore no future in being a wheelwright. But there is still a need for wheels to be built and a thriving industry in the engineering, manufacturing, production and delivery of low cost, high volume wheels for all manner of diverse needs.

I am sure readers will appreciate that there is no longer any need for your lawyers, generally, to provide you with a truly hand built legal product.

We are as a profession, I would suggest, some distance along the road already ridden by the wheelwrights.

Innovation

Very often insurers and their procurement teams will ask lawyers to be “innovative” or to highlight their “innovations”.

I have become increasingly uneasy about such terms. I fear that both insurers and lawyers are missing a golden opportunity by continuing to misunderstand the term “innovation”.

If we take innovation to mean the creation of something entirely new – we can see the problem.

Creating a slicker, faster, cheaper or more transparent way of selling the same legal product is not, I suggest, truly innovative.

Reducing shelf life, claims experience and being more open may all be welcomed (and indeed expected) by a client – but is that all that the client really wants? Such an approach I believe is simply an enhancement of an existing product. It is not the creation of something new.

Once litigation has commenced, can lawyers be truly innovative if they, their clients and the other parties' lawyers are all bound by the same framework of procedure, court rules and timetable? I believe passionately that they can be.



Some thoughts to take forward

The description of lawyers and their clients “working in partnership” has become a clichéd phrase in the last five years, not as a result of the expression being meaningless but rather because it is misused. It is absolutely the ideal and should be the goal – but how many such arrangements truly exist in the liability field?

To be able to truly work together in partnership, insurers, their customers and claims handlers will need to have a better understanding of what it is that their lawyers can do for them over the next 10 years, and then work towards that goal. Lawyers will need to stop telling clients what it is that they can deliver and start asking what it is that their clients want. Lawyers will need to fully engage with their clients’ businesses and work alongside them in order to develop particularly focused legal products.

By “particularly focused” I don’t mean enhancements of more of the same, for example, by just being “in-house” or by virtue of a slicker delegated authority scheme. I mean a truly integrated legal solution. Such an approach needn’t be geographically proximate. It is far more important that the ideals, values and attitudes of the partnering organisations are harmonised. Businesses that share common core values and objectives will be far more likely to succeed together. Innovation will flow much more freely from such harmony.

I can imagine that at this point that readers will want me to place some flesh on the bones of this hypothetical discussion. I attempt to do so below, but these comments are only the slightest exploration into the more obvious areas for discussion.

Information Technology and Knowledge Management

Are new on-line products of interest? If so, to what end? Who will fund their development? What should they contain – just guidance, knowledge management, legal content or far more?

Risk and reward

Charging by the hour is, in my view, going to become anachronistic within the next five years. However, my experience is that potential clients are slow to respond to suggestions of annual retainers, delegated authority products or of structuring

reward for lawyers based upon quantifiable risk management results and Key Performance Indicators. Why should the insurance world not follow lawyers’ other commercial clients and seek certainty and eschew the hourly rate?

Product Development

These are exciting times. The Legal Services Act will allow non-lawyers to invest in legal businesses. However, why would they want to? Would now be a perfect opportunity for a forward thinking organisation to partner with a forward thinking law firm and create a truly innovative 21st century product? The two together could generate true innovation. No other organisations will be better placed to understand their market. It would be a bold step. Could that product then be sold to others in the market place?

Can the legal profession truly innovate if clients do not know what they want? Are our clients truly receptive to innovation, and how can that take place within a litigation structure that exists as it does today?

Can leopards change their spots?

You may assume here that I am going to explore whether lawyers are ready for the tectonic changes that will be necessary in the next 5–10 years. It’s true that, for example, asking lawyers to give up billing by the hour will be embraced about as enthusiastically as the Woolf reforms were by some and the Fast Track costs regime by others. The more progressive and more innovative lawyers will however embrace such changes and see them as opportunities to work more closely with clients and provide a proper service; not just a service of last resort.

However, the leopards that I refer to are those providers giving their work to the lawyers. Insurers and their customers I hope will understand that innovation comes about as a result of an exchange of ideas, an understanding primarily of what it is truly wanted – and not by starting with the question, “what is it that our lawyers can do for us?”

The Holy Grail I suggest is to eliminate all claims in the first place. That will probably never be a realistic goal for anyone other than

the smallest customer or more specialist insurer. A more realistic goal would be to deal efficiently with the claims that do arise, and perhaps even the litigation that arises from it; but to do so with significantly reduced legal input and legal cost.

To achieve such a solution, an insurer would need to work with its lawyers to find new ways of dealing with litigation, reducing legal spend and reducing the numbers of instructions to the very lawyers helping to design the new approach.

To find a lawyer brave enough to work with an insurer in order to

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square that circle would be a wonderful thing.

Is it possible?

I hope to see you at The Magic Circle in September.

Richard West

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