SIX PUMP COURT

Frankenstein's monster, group litigation and solicitor disputes (in 1000 words)

What is it about group litigation in England & Wales which leads right-thinking members of the judiciary to compare the actions of solicitors with Punch and Judy and the unloved creation of Dr Frankenstein?

This short article looks at some of the lessons which can be learnt from disputes between solicitors wanting to be active in key roles in group litigation, in particular from the recent TCC decision in *Lungowe v. Vedanta* (27 March 2020).

Such disputes have become more prevalent in recent years, alongside the development of litigation funding and competition from new entrants to this lucrative market.

At the end of the article there are some reminders about the courts' broad and flexible approach to the case management of group litigation. The judges have appropriated powers to themselves which are necessary for effective case management, including the management of solicitors.

Relevant cases

First, the case of *Harcus Sinclair plc v. Your Lawyers plc* (CA, 2019) stands on its own as a detailed factual account of some of the difficulties for the new solicitor on the block seeking to enter the market. It is worth a mention.

Your Lawyers Limited, Chesterfield, noticed what was going on in the US in respect of the VW diesel emissions scandal, and spotted an opportunity. The firm gathered together a very substantial client base before turning to a specialist for help and collaboration (Harcus Sinclair).

A 'non-compete' contract was drawn up. Harcus Sinclair collected its own clients. During the course of the subsequent litigation, the effectiveness of the non-compete clause needed speedily to be determined in a separate judicial sideshow. The Court of Appeal subsequently decided that the agreement as drafted was in restraint of trade and that the judge should not have granted an injunction to enforce the restriction previously obtained by Your Lawyers (permission to appeal has been obtained.)

There are some hard lessons here for the parvenu. If you are going to be active in group litigation, then you need to take care either in choosing your friends, or in tying them up.

Turning to those cases with disputes between rival aspirants keen to take charge of group litigation, four are notable: *Greenwood* (May, 2013), *Hudson* (2017), *Crossley* (2018) and *Lungowe* (27 March, 2020).

Greenwood (July 2013) is one of a number of judgments given in the course of the Royal Bank of Scotland Group litigation in which a GLO was made. Four separate sets of claimants (or potential claimants) were before the court, each set corralled by different

solicitors. The judge required one of those four firms to act as lead solicitor (if only for the purpose of managing the register), despite fears by another firm that the lead solicitor wanted to take control of the litigation.

This judgment (as with the other reported hearings in the same litigation) is in fact a model of judicial caution, the judge demonstrating a degree of practical deference towards the parties' solicitors in the hope that differences would be resolved by those concerned. To that extent, the judgment runs contrary to any general hypothesis that complex litigation will always be needlessly confrontational.

One practical lesson from *Greenwood* is that if you want to run group litigation, then you need to be the first to make a claim, even if the group and its issues are still somewhat ill-defined. There is little downside risk, since there is always the danger that the defendant will throw your plans into confusion by making the application itself.

The lesson for solicitors, that fortune favours the brave, is one which has been repeated in more recent judgments.

In *Hudson*, for instance, a firm sought to be admitted to join the rank of lead solicitors, a post already occupied by two other firms. The judge dismissed the application, it being "likely to produce a long-running forensic Punch and Judy show". Then in *Crossley*, Master Fontaine similarly refused to grant an application to a firm of solicitors seeking to be admitted to the wider collection of steering group solicitors. Deckchairs on the beach had already been secured.

Lungowe v. Vedanta will be familiar by reason of the jurisdiction application which went to the Supreme Court (reiterating the highest court's long-standing position that an anchor defendant can be sued in the UK in those cases in which access to justice would not be practicably available to the foreign claimants at home) ([2019] UKSC 20, 10 Apr 2019).

On 27 February 2020, Mr Justice Fraser had three claims before him in respect of Vedanta's mining activities in Zambia, two made by Leigh Day and one by Hausfeld. There were, and had been, various disputes between them.

Previously, as recorded by the judge, Leigh Day and Hausfeld had agreed to disagree as to who should progress the Zambians' claims, by flying out together to meet communities in Zambia. The Zambians were invited to select one of the two in order to pursue their litigation. After Leigh Day had been chosen, Hausfeld subsequently obtained instructions from a different community, but arising from the same events.

On the occasion of the hearing before Fraser J, the application for the GLO was made by the defendants themselves. Leigh Day and Hausfeld had again agreed to disagree prior to the hearing by drafting a very short order, the effect of which would have allowed Hausfeld to progress its litigation separately.

Fraser J was not much impressed by the claimants' attempt ultimately to have the issues litigated once for the benefit of the Leigh Day claimants, but then a second time for the Hausfeld claimants. The draft order had "similarities to Frankenstein's monster".

The judge identified the "real issue" as "the relationship between the two competing firms of solicitors' solicitors". The real aim of the rival claimants' submissions "was the commercial

advantage to each firm of solicitors of keeping all the interests of all of its claimants entirely separate from the other firm".

The judge agreed that the GLO should be made subject to detailed terms, to be finalised by the managing judge when appointed. He commented on the degree of cooperation as to future management which had arisen between Leigh Day and Hausfeld between the date of the hearing and the date of judgment.

The lesson from this case is that rival solicitors should not think that they can make arrangements to conceal the reality from the court. If there are true differences, then they need to be litigated. The better course, however, is one which has the corresponding benefit of reducing the risk of public disapprobation by a written judgment: a mutual process between solicitors of give and take, a process designed primarily to forward the resolution of their clients' disputes under a single GLO umbrella.

Summary points from *Lungowe v. Vedanta*

During his judgment Fraser J. made a number of varied remarks worth summarising, some of which have been said elsewhere and some of which are new (and arguably contrary to received wisdom about GLOs):

(1) The ethos of group litigation is not the commercial advantage of solicitors, which comes in as a definite second;
(2) Similar issues should be resolved in one set of proceedings;
(3) Specialist courts such as the TCC are inappropriate for group litigation, which should proceed in the mainstream QBD whatever the subject-matter;
(4) A court in group litigation can override a party's ordinary right to the solicitors of their choice – this may follow where the court appoints a lead solicitor and chosen counsel;
(5) The relationship between lead solicitor and other firms must be carefully delineated in writing; the court may use a reserve power to make regulations to be imposed by the court;
(6) Different groups of claimants are not entitled to different counsel;
(7) The lead solicitor is the contact point for the court and other parties in terms of service and communication;
(8) The court has a power in reserve to intervene to regulate the relationship between solicitors;
(9) A managing court has very broad powers of case management.

Conclusion

Why are these cases more contentious than they were as between claimant interests?

Judges find disagreements between claimant lawyers unhelpful. But this does not answer the underlying question why the types of disagreement outlined above appear to have become more common.

In the early days of group litigation, claims were made by reason of wrongs occurring at the workplace (typically personal injury claims such as deafness or limb-strains). Claimant lawyers had strong connections with workers affected by poor conditions and cooperation was the norm.

The recoverability of success fees under CFAs, and more importantly ATE premiums, made these better business propositions for the same lawyers, who became more confident about supporting successful cases. (It is often forgotten that the Woolf Report recognised the positive contribution to be made by claimant lawyers in promoting group litigation.)

When the Jackson reforms took away the considerable benefits of additional liabilities, litigation funders had started to fill the breach. Litigation funding operates in different ways, but it is common to use the funding to remunerate some of the lawyers (whatever the outcome: win or lose).

As a result of the changes brought about by the availability of litigation funding and by reason of the overall rewards, new entrants are keen to undertake group litigation and some old hands are content to keep them out. Moreover, funders do not see the need to benefit those parties whose lawyers they do not fund. In a variety of ways, much more is at stake than was previously the case. The old 'workplace' model requiring co-operation is no longer the most prevalent, or perhaps just the most noticeable, scenario.

There are bound to be contentious issues as lawyer-participants seek to ensure that they maximise the returns to be won from group litigation. The judges do appear to understand this, but there inevitably comes a stage in any litigation when a lack of co-operation is heavily stigmatised as a breach of the overriding objective and the lawyers' duty to further that objective. Judges will step in where there is an absence of cooperation.

Postscript:

Identifying common issues of fact and law

In *Lungowe v. Vedante* (noted above), it is fair to say that the Fraser J was not much impressed by the different versions of the common issues which were laid before him. Indeed, he took the trouble to draft the 17 GLO issues himself. Whilst for many less complicated cases the list of those issues would be a long one, Appendix 1 of his judgment (setting them out) is well worth examining by those who may be uncertain as to how such issues should be presented.

Case management

There have been a number of useful dicta making reference to case management in group litigation. Judges should not be slow to intervene.

As to the aims of the GLO itself, the judgment of Hildyard J in *Greenwood v. Goodwin* [2014] EWHC 227 (Ch) [27] is useful:

"As suggested by Sir Thomas Bingham MR in *Ward v Guinness Mahon Plc* [1996] 1 WLR 894 at 900G-H, the court has considerable latitude and the broad question is: what, in the particular situation, does fairness demand, having regard to the objectives of the procedure for a GLO, the nature of the claim, and the positions of the claimants?"

Finally, but importantly, the comments of Steyn LJ in *AB v John Wyeth & Brother Ltd (No.2)* (1992) 12 B.M.L.R. 50 are still apposite:

"The rules of court were devised to control the ordinary run of actions. Those rules are more often than not silent on the problems which beset the modern phenomenon of group actions

and other complex multi-party litigation. There are no rules of court or even practice directions to provide a procedural framework for such cases. Inevitably, High Court judges assigned to the control of such litigation must depart from transitional procedures and adopt interventionist case management techniques. If the judges charged with the control of such actions did not undertake this innovative role, the system of justice in respect of such cases would break down entirely. That result could not be tolerated."

Principle cases

Greenwood and others v Goodwin and others [2013] EWHC 2785 (Ch)

Hudson v Tata Steel UK Ltd [2017] EWHC 2647 (QB)

Crossley v Volkswagen Aktiengesellschaft & Ors [2018] EWHC 1178 (QB)

Harcus Sinclair LLP v Your Lawyers Ltd [2019] EWCA Civ 335, [2019] 4 W.L.R. 81

Vedanta Resources Plc v Lungowe [2019] UKSC 20, [2019] 2 W.L.R. 1051, [2019] 3 All E.R. 1013

Dominic Lungowe & Ors v. Vedanta Resources Plc [2020] EWHC 749 (TCC), 27 March 2020

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