SIX PUMP COURT

Mr Punch, Judy and 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 monster of Dr Frankenstein?

This short article looks at some of the lessons which can be learnt from disputes between solicitors wanting to progress group litigation. Disagreements between claimant lawyers have not been edifying, and a number of lessons can be learnt from the relevant judgments, in particular the recent TCC decision in *Lungowe v. Vedanta* (27 March 2020).

Such disputes have become more prevalent in recent years, together with the development of litigation funding and competition for types of work which are new to group litigation. At the end of the article there are some reminders about the courts' broad approach to the case management of group litigation.

Relevant cases

The case of *Harcus Sinclair plc v. Your Lawyers plc* (CA, 2019) stands on its own as a detailed factual account of the new solicitor on the block seeking to enter the market, and it is worth a mention. There are some hard lessons here for the parvenu.

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. (on 3 December 2019 the Supreme Court granted permission to appeal.)

Turning to those cases where there have been disputes between rival aspirants keen to take charge of group litigation (as they have seen it), four cases are notable: *Greenwood* (May, 2013), *Hudson* (2017), *Crossley* (2018) and *Lungowe* (27 March, 2020).

Greenwood is a judgment made 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 of which was corralled by different solicitors. The judge required one of those four firms to act as lead solicitor, despite fears by another firm that the lead solicitor wanted to take control of the litigation. The judge also allowed the four groups of

claims to continue within the umbrella of the GLO. A result was the continuation of various disputes about the central provisions of the GLO, which no doubt added to the cost of the litigation.

In *Hudson* 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".

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.

Lungowe v. Vedanta will be familiar by reason of the jurisdiction application which went to the Supreme Court (which reiterated the highest court's long-standing position that an anchor defendant can be sued in the UK in cases in which access to justice would not be practically available to the foreign claimants abroad) ([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, as has become increasingly common, the application for the GLO was one which had been 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 (i) the agreement of the President and (ii) detailed terms to be finalised by the managing judge when appointed. Between the date of the hearing and the date of judgment Fraser J had noted the existence of a degree of cooperation between Leigh Day and Hausfeld as to future management.

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 a strong 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 been starting 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 see them stay 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 ion 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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