2 TEMPLE GARDENS

INTERNATIONAL GROUP CLAIMS SEMINAR

9TH NOVEMBER 2018

MATERIALS

INTERNATIONAL GROUP CLAIMS

LITIGATION MANAGEMENT

Niazi Fetto

Introduction

This half-day seminar deals with claims which stand in a class of their own. But they are won in the same way as all litigation: careful identification, analysis and presentation of the arguments on the decisive issues, strategic thinking, good preparation, marshalling and deployment of the evidence, and tactical nous.

Jurisdiction and applicable law

The importance of getting these foundational matters right cannot be overestimated – they set the framework within which the entire litigation is to be assessed and conducted.

International group claims generally fall into one of three broad categories:

- Historic human rights abuses. Defendants are usually governments. Questions of applicable law may arise. Jurisdiction tends not to be an issue where the defendant is the UK government.
- Environmental torts. Defendants generally are, or include, companies. Issues both of jurisdiction and applicable law normally arise.
- Current human rights abuses. Defendants might be companies, governments or both (potentially acting jointly). These may give rise both to jurisdictional and applicable law issues, depending upon who the defendants are.

Group litigation or not?

In this jurisdiction, the court can make a Group Litigation Order under CPR Part 19 where claims give rise to common or related issues of fact or law. It is not mandatory for such claims to be managed under a GLO; advantages include the certainty provided by a group register of claims, all of which will ordinarily be bound by all judgments, a relatively detailed framework for the management of the litigation and its costs, and the efficiency of overall

conduct on either or both sides by lead solicitors. However, a GLO by its nature also shuts out claimants

coming too late to the group and cohort firms who miss out on appointment as lead solicitors. Group litigation is less susceptible to control, and generally more resource- and time-consuming, than lead claims run on ordinary lines with a cohort in the background.

Costs, efficiencies and funding

Parties must plan carefully to be able to see the litigation through, and indeed to demonstrate that capacity if the court is persuaded to require them to do so.[1] Each side must cut its cloth according to what it can realistically achieve. Early, thorough analysis of the issues in the case and the most promising routes to success is therefore of critical importance, with a view to selecting and directing the work of the legal team(s) and influencing case management. Costs budgeting has advantages for both sides but also adds substantially to the real-time cost of running the case. In group litigation the GLO will set a pattern for costs analysis and recovery (e.g. definition of individual and common costs) which merits the parties' careful attention from the outset.

Defendants anxious about recovery of their costs in the event of success will wish to consider seeking security for costs against claimants or funders[2] under CPR Part 25. Recovery of costs against third party funders is possible in principle, up to the level of their contribution.[3]

Picking the right fights – slogs and shortcuts

It is trite that bad points should not be taken. Judges managing big cases will be wary of cutting them down to size until they have a proper 'feel', which can take months, even years.[4]

[1] See, e.g., *XYZ v Various sub nom Re Pip Breast Implant Litigation* [2013] EWHC 3643 (QB), in which Thirlwall J ordered one of the defendants to provide information about whether it could fund its defence to trial and any appeal, so as to inform the court's management of the litigation. Cf *In The Matter of RBS Rights Issue Litigation*
[2017] EWHC 463 (Ch).

[2] See *In The Matter of RBS Rights Issue Litigation* [2017] EWHC 1217 (Ch).
[3] See *Excalibur Ventures LLC v Texas Keystone Inc & Ors* [2016] EWCA Civ 1144.
[4] Stewart J's various judgements in the Kenyan Emergency Group Litigation *(Kimathi v FCO)* over the period 2014 to date represent a crescendo of judicial confidence in dealing with group litigation burgeoning with issues of fact and law at both individual and generic levels.

Preliminary issues need to be carefully chosen and even more carefully timed – judicial insecurity leads to judicial caution.[5] If there genuinely are self-contained issues of law, or law mixed with a limited amount of fact, with good prospects of landing a major or decisive blow for one or other side, they are worth heavy investment.[6] The court might try to insist on dealing first with issues that it perceives in that way.

However, it may be the fact- and evidence-heavy issues which ultimately carry the day, e.g. whether the court should exercise its discretion under section 33 Limitation Act 1980. The parties will need to be ready to put intensive and carefully-focussed work into such issues. In a s.33 case the arguments on both prejudice and substance will require considerable documentation and witness work.[7] Documents may be archived in multiple locations; witnesses may be far-flung and/or frail/infirm, giving rise to difficulties in proofing and questions of vulnerability affecting their handling in court. Both sides will need to be conscious of the modern hesitancy about the reliability of witnesses' memories.[8]

International conventions

The events giving rise to claims in this category will frequently pre-date incorporation of the ECHR into UK law, or will be brought outside the one-year primary limitation period under the Human Rights Act 1998. The second of those is unlikely to pose major difficulties, but thorough, specialist analysis will be required to gauge the strength of any potential causes of action and arguments by reference to international conventions where the events pre-date incorporation, or (for example) the coming into force of relevant conventions so far as concerns the UK or the territory where the events occurred, or the recognition by the UK of a

[5] Compare the judgments of McCombe J (as he then was) on strike-out and limitation in *Mutua v FCO* [2011] EWHC 1913 (QB), and [2012] EWHC 2678 (QB) with Stewart J's first test case judgment in *KEGL* (*Kimathi v FCO* [2018] EWHC 2066 (QB)), arising out of the same general facts but in the opposite direction of travel.

[6] For example, the preliminary ruling on double actionability in the Cyprus litigation, recently overturned by the Court of Appeal in the defendant's favour (*Sophocleous & Ors v FCO & Anr* [2018] EWCA Civ 2167).

[7] In *KEGL*, the claimants biased their efforts and resources towards the generic issues in the case, rather than towards the test cases. However, the first test case ruling on s.33 Limitation Act 1980 (*Kimathi v FCO* [2018] EWHC 2066 (QB)) proved to be of vital importance. The court may never rule on the generic issues in the case.

[8] See the seminal judgment of Leggatt J in *Gestmin v Credit Suisse (UK) Ltd & Anr* [2013] EWHC 3560 (Comm), at §§15-22.

right of individual petition to the Strasbourg Court (in the case of the ECHR). Derogations may also be relevant.[9]

Managing relationships: lawyer/client and lawyer/lawyer

Multiple clients mean multiple retainers. Solicitors should seek as much flexibility as possible when agreeing retainers so as to minimise the need to take instructions. That of course applies not just to instructions in the event of winning and/or on settlement offers, but also to the possibility of losing; there should be an exit strategy from the start.

In a GLO situation, lead solicitors are likely to have complete control. That gives rise to efficiencies and dangers in equal measure – firms with common interests should consider agreeing protocols for co-operation and information sharing.

Wood and trees, and endearing your client to the court

As with all litigation, at its heart will lie the question: 'What is this case really about?' On one side it might be unremedied human rights abuse; on the other, protection from facing stale claims. In big, complex litigation, the court will be looking for the bedrock upon which to build its ultimate decision. It may need regular reminding of the merit and importance of the principles for which your clients are fighting and the reasons why they should succeed.

[9] In *KEGL*, which concerns events in Kenya between 1952 and 1960, the claimants sought to rely upon various international conventions, including the ECHR and Protocol 1 thereto. The ECHR was ratified by the UK on 8 March 1951, and came into force in respect of the UK on 3 September 1953. Protocol 1 was ratified on 3 November 1952, and came into force in respect of the UK on 18 May 1954. The ECHR (but not the Protocol) was extended to cover Kenya by declaration under the ECHR dated 23 October 1953. On 24 May 1954, the UK notified the Secretary General of the Council of Europe of its derogation from Article 5 in respect of Kenya. The UK did not recognise a right of individual petition, or the jurisdiction of the Strasbourg court, until 14 January 1966, by a declaration which on its face did not relate to any territory other than the UK. The HRA 1998 incorporated the ECHR into UK law with effect from 2 October 2000.

ANONYMOUS CLAIMANTS AND ANONYMOUS WITNESSES

Robert Cumming

1. Ordinarily, the identity of a witness in civil proceedings will be made public as a matter of course (see *Scott v Scott* [1913] AC 417); the principle of open justice being described as a "*beacon of the common law*" by Kay LJ in *Global Torch Ltd v Apex Global Management Ltd* [2013] 1 WLR 2993, para 13.

2. Nevertheless, the Court has powers pursuant to CPR39.2(4) to direct that the identity of a witness shall not be disclosed to protect their interests. Such (anonymity) orders involve a derogation from the principle of open justice, and must be strictly justified (*Yalland v Secretary of State for Exiting the European Union* [2017] EWHC 629 (Admin)).

3. There are two possible bases for an anonymity order:

   3.1 The first is where the order is necessary to discharge the State's positive obligations to protect life (Article 2 ECHR) or prevent torture or inhuman or degrading treatment or punishment (Article 3 ECHR). Such rights are absolute and are engaged when there is a "*real*[1] *and immediate*[2]" risk to the lives or the physical safety of the persons in question; if engaged, the Court must take reasonable steps to avoid a risk to life.

   3.2 The second is where the order is appropriate by reference to the common law obligations of fairness to witnesses (*In Re Officer L* [2007] 1 WLR

[1] "*Objectively verified*" (*In Re Officer L*)
[2] "*Present and continuing*" (*In Re Officer L*)

2135). In some respects, common law principles go further than Article 2/3. It need not necessarily be shown that there is a "*real and immediate*" risk to life and limb; other factors, such as the genuine subjective fears of a witness or an objective risk to property, may also be relevant (see *Kalma & Ors v African Minerals Limited* [2018] EWHC 120 (QB)). The requirement for such measures must, however, be balanced against countervailing factors (including fairness to the other parties and the interests of open justice). In considering an application for non-disclosure of the identity of a witness by reference to the common law, the Court will apply a two stage test: (1) The threshold test: the grant of anonymity must be necessary, based on a legitimate fear of danger; (2) If that threshold is met the Court will balance the witness' interest in anonymity with the interests of the parties in a fair trial, together with the public interest in open justice.

4. The burden in any application for anonymity lies with the party seeking non-disclosure.

Practical Considerations - ECHR

5. The threshold in respect of the ECHR test is high and one that is not readily satisfied. It requires cogent and clear evidence objectively verifying the risk to which the witness faces. For example, in *Libyan Investment Authority v Société Général*e [2015] EWHC 550 (QB), this entailed expert evidence from an FCO Official with experience in Libya.

6. Hypothetical risks are not sufficient. They must be objectively verifiable: *Adebolajo v Ministry of Justice* [2017] EWHC 3568 (QB)

Practical Considerations – Common Law

7. If subjective fears are to be relied upon, there must also be cogent evidence (witness evidence, medical evidence etc.).

8. There must be a direct link between the witness' legitimate fear of danger, and disclosure of that witness' identity; if the extent of the fear would not be materially increased by disclosure of the witness' identity then it cannot be said that anonymity is necessary.

9. Anonymity is unlikely to be necessary if the identity of the witness is already known to, or could easily be discovered by, those who threaten harm.

10. Witnesses with no interest in the proceedings have the strongest claim to be protected by the Court.

Confidentiality Club

11. The creation of a confidentiality club may help mitigate the potential unfairness to a party affected by any anonymity order (when the balancing exercise is carried out). In such a club, the identities of the witnesses would be disclosed to only a limited number of individuals who ought to be able to carry out their own investigations (*Libyan Investment Authority ibid*., *Kalma v African Minerals ibid*.). There ought to be nothing to stop the membership of the club altering over time.

Conclusion

12. Whether a departure from the principle of open justice is justified in any particular case is highly fact specific. Examples include:

12.1 *Kalma v African Minerals ibid*: Six non-claimant witnesses granted anonymity (on the basis of a confidentiality club being created) based on subjective fears of reprisal if identities were known.

12.2 *Adebolajo v Ministry of Justice ibid:* Five prison officers granted anonymity based on their fear of giving evidence in a notorious terrorist's civil claim.

12.3 *In Re Officer L ibid.:* No anonymity granted to members of the Royal Ulster Constabulary when giving evidence to the Robert Hamill Inquiry.

12.4 *Suez Fortune v Talbot Underwriting* [2018] EWHC 2929: No anonymity granted to a whistleblower on the basis that his identity was already known to those who were said to be threatening him.

ROBERT CUMMING[3]

[3] Junior Counsel in *Kalma & Ors v African Minerals* (judgment awaited). Recommended in Chambers UK 2019 as "*really thorough, intelligent and very sharp*" and "*very good on his feet. A strong advocate*".

Limitation in International Group Claims

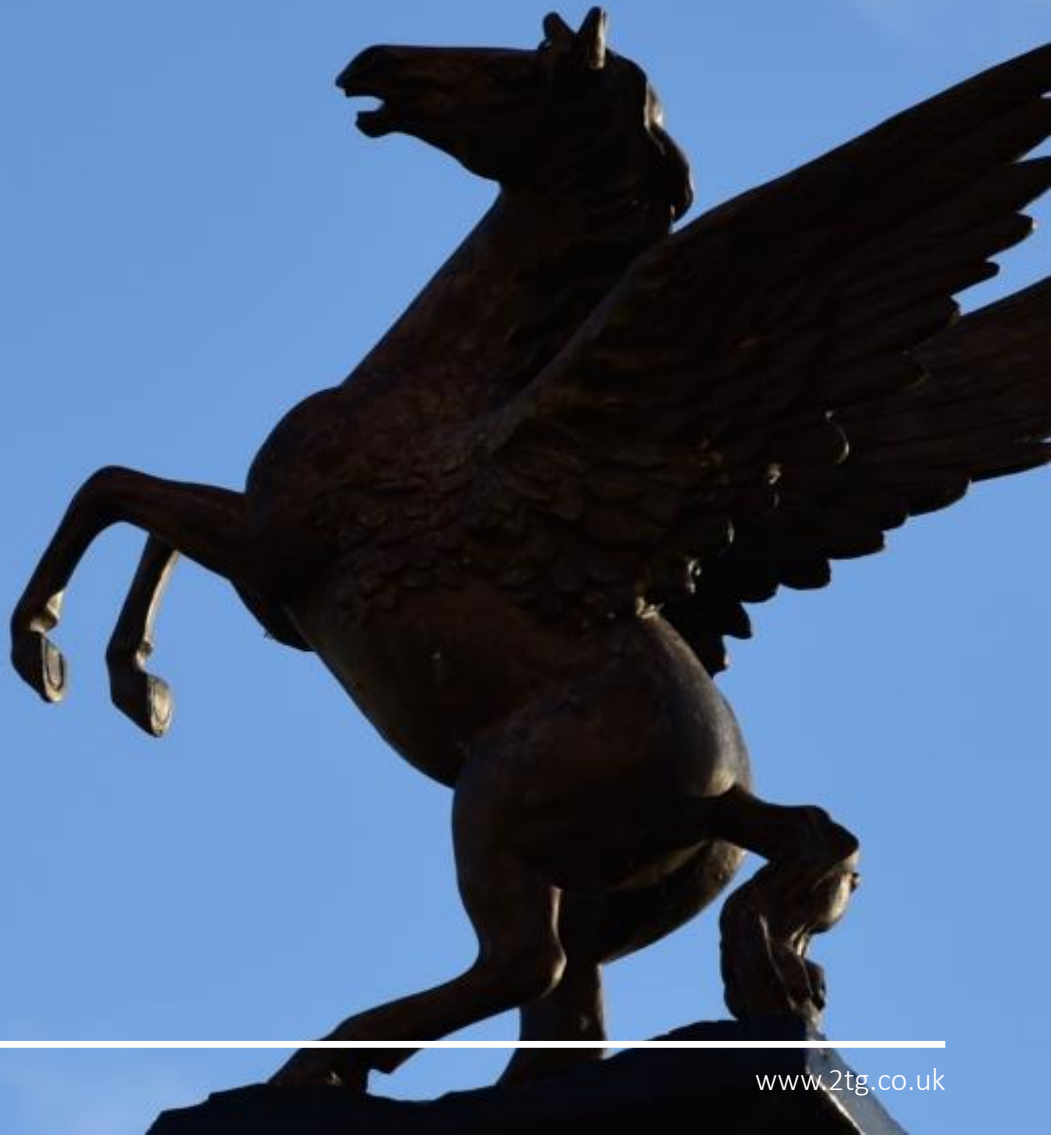
Ruth Kennedy

9 November 2018

Overview

- Applicable law
- Issues in English law
  - Date of knowledge
  - Section 33 – factors influencing the judge's discretion
  - Section 32 – concealment or fraud
- Foreign Limitation Periods Act 1984
  - Section 2(1) – public policy
  - Section 2(2) – undue hardship
- Rome II

Importance of limitation



Applicable law

- Frequently this can be the determinative issue in the case
- Work out the law governing the limitation period
- Assume nothing about foreign law limitation period
- Get instructions on any factual issues which might affect operation of limitation

English law issues

Date of knowledge

- Section 11 of Limitation Act 1980 - special time limit for personal injuries
- Generally, three years from:
    (a) Date on which the action accrued; or
    (b) Date of knowledge (if later) of the person injured
- If person injured dies before the expiration of the normal limitation period the cause of action for the estate is (whichever is later):
    (a) Date of death; or
    (b) Date of the personal representative's knowledge

Definition of date of knowledge (s. 14)

Knowledge of:

- Injury in question was significant (*A v Hoare* [2008] UKHL 6; [2008] 1 AC 844)
- Injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty
- The identity of the defendant
- The identity of the person whose act or omission gave rise to the action, where different to the defendant

Definition of date of knowledge (s. 14)

- "Knowledge"

  "in the context of section 14 does not mean know for certain: it means know with sufficient confidence reasonably to justify embarking upon steps preliminary to the institution of proceedings against those whose act or omission has caused the significant injury concerned, such as submitting a claim to the proposed defendant, taking legal and other advice and collecting evidence (Halford v Brookes [1991] 1 WLR 428 at page 443, approved in Dobbie v Medway Health Authority at page 1240B; and Nash at page 793C-D, paragraph 3)"

  Hickinbottom J in *Summers v The City and County of Cardiff* [2015] EWHC 3066 (QB)

Section 33

Guiding principles

Key case: *Carroll v Chief Constable of Greater Manchester Police* [2017] EWCA Civ 1992; [2018] 4 WLR 32, Sir Terence Etherton MR set out 13 general principles:

(1) Section 33 not confined to a "residual class of cases", it is unfettered and requires the judge to look at the matter broadly

(2) Crucially the "court shall have regard to all the circumstances of the case"

(3) Essence is the balance of prejudice on C or D

(4) Burden of proof on C is not necessary heavy – depends on facts

(5) Evidential burden of showing evidence less cogent because of delay on D

Guiding principles

(6) Prospects of fair trial are important

(7) Need to show passage of time has significantly diminished the opportunity to defend the claim on liability or amount

(8) Period after expiry carries particular weight

(9) Reason for delay may affect balancing exercise

(10) Delay caused by C's advisers may be excusable

(11) Knowledge or information suppressed by C weighs on exercise

(12) Proportionality is material to exercise of discretion

(13) Appeal courts should be slow to interfere with discretion

Kimathi v Foreign and Commonwealth Office

- TC34, [2018] EWHC 2066(QB)

"Reports that say that something hasn't happened are always interesting to me, because as we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know."

- Donald Rumsfeld

Kimathi v Foreign and Commonwealth Office

Points to take away

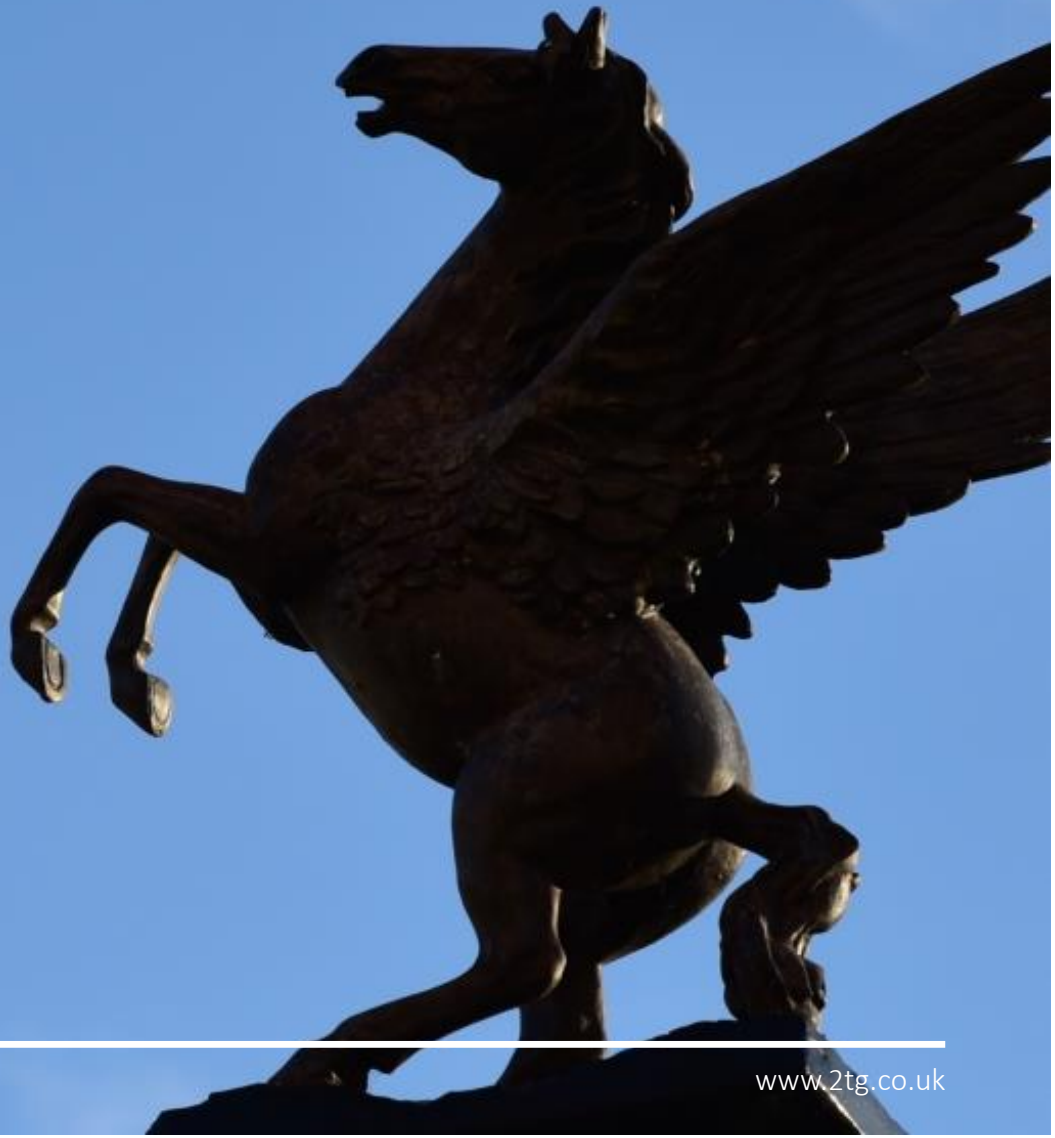
- Make sure you have evidence for any assertion [144]
- Be consistent in your approach across the litigation [206]
- Even when potential damages are small and expense to D is large proportionality might not be relevant [172]
- If D, you need to show that you have done what you can to establish known unknowns [203]

Compare: Kimathi and Mutua

- *Mutua v FCO* [2012] EWHC 2678 (QB) McCombe J (as he then was) ruled on s.33 as preliminary issue
  - In *Mutua* there was an admission of mistreatment for 3 claimants, this was important [161]
  - Not subject to a Group Litigation Order (CPR Part 19)
  - Only allegations of deliberately inflicted injuries

- In terms of strategy whether for C or D, think, what do I think we can show (a) at preliminary hearing stage; (b) is that enough; and (c) what will change between preliminary hearing stage and final hearing

Section 32



Section 32

- Fraud, concealment or mistake
- Limitation does not run until claimant discovered fraud, concealment or mistake or could have with reasonable diligence discovered it
- *Kimathi* [2018] EWHC 1169 (QB):
  - For claimants not enough to ask the judge to draw inferences – need concrete evidence
  - Stewart J asked rhetorically [71]:

    "How could the Test Claimants described by their lawyers as largely illiterate, unsophisticated people, often living simple rural lives a long way from Nairobi, be the victims of a deliberate concealment from them by the Defendant?"

Foreign Limitation Periods Act 1984

FLPA 1984

- Establish applicable law to substantive action
- Key arguments available:
  - Conflict with public policy (claimants tried to argue this for Ugandan law in *L v Murphy* [2016] EWHC 3102)
  - Undue hardship (successful *obiter* in *Kazakhstan Kagazy Plc v Baglan Abdullayevich Zhunus* [2017] EWHC 3374 (Comm); [2017] 12 WLUK 678)
- For relevance of jurisdiction in which claim is brought see: *Iraqi Civilians v Ministry of Defence (No 2)* [2016] UKSC; [2016] 1 WLR 2001 and then limitation judgment of Leggatt J in *Alseran and others v MOD* [2017] EWHC 3289 (QB); [2018] 3 WLR 95 at [721] onwards

Illustrations of foreign limitation

- *Vilca v Xstrata Limited* [2018] EWHC 27:
  - Claims initially brought in English law in 2013, Ds raised limitation
  - Brought amendments to introduce claims in Peruvian law (in accordance with Rome II)
  - Stuart-Smith J held claims in Peruvian law were time-barred
  - Position on s. 35 Limitation Act 1980 for Rome II now clear

- *Sophocleous v FCO* (ongoing)
  - Decision on double actionability: [2018] EWCA Civ 2167
  - Dispute remains about limitation period in Cypriot law (though agreed no extension possible)

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DISCLOSURE IN HISTORICAL CLAIMS

Sam Stevens

1. Historical claims have unique challenges when it comes to disclosure. These arise from the absence of electronic resources, witnesses and, potentially, the documents themselves. The following are some tips to deal with a document review in historical cases.

The search

2. There is a duty to carry out a reasonable search for the purposes of disclosure. This will be dependent on the circumstances of the case. Different considerations will apply to public documents over which there is only an order requiring you to disclose the documents upon which you rely.

3. When searching for documents in archives, the Discovery search facility by The National Archives ("TNA") is a good starting point. However, other repositories will have their own (and likely more detailed) electronic catalogues for their own holdings. Equally, some collections will not be accessible online.

4. It is important to keep a good note of the search that is carried out, as well as the source data of any copies of documents taken (e.g. the public records office reference number). In civil proceedings, copies of documents can be admitted to prove statements within if authenticated in a manner approved by the Court: s8(1) Civil Evidence Act 1995. There are other specific statutory and common law rules regarding how to prove documents by copies (e.g. s9(2) Public Records Act 1958). There is no authority on how these statutory rules interplay with section 8(1) of the 1995 Act.

The first pass review and tagging

5. Tagging is a helpful way of categorizing documents. However, tags can be under and over inclusive. It is important to create a clear and consistent tagging

policy to avoid sifting out the relevant documents and keeping in the irrelevant ones. The tagging policy should:

5.1. Set out the issues in the case and the way the case is to be put;

5.2. Avoid overlapping tags;

5.3. Include documentary tags (e.g. missing page / earlier document); and

5.4. Include a narrative box for reviewers to include comments on a document.

6. Finally, active management and review of how the system is implemented is strongly advised.

PARENT COMPANIES : DUTIES OF CARE

Andrew Bershadski

An important issue, which often arises in both international and domestic group claims, is whether a parent company in a group of companies can be liable to employees or third parties in relation to the activities of its subsidiaries.

There may be cases where a parent should obviously be sued but, in other cases, the reasons why a parent company might be brought into proceedings include:

- Jurisdiction. A parent company may be domiciled in the United Kingdom. If sued as an anchor defendant, the claim may proceed in the courts of England and Wales against both it and any relevant subsidiary.

- Solvency / assets. The subsidiary may be insolvent, uninsured, or its assets may lie in a jurisdiction which will not enforce a judgment obtained in England and Wales.

- Media. The parent company may be more vulnerable than the subsidiary to the media aspects of the litigation, for example because it carries the more recognisable brand name, or because of its ownership structure.

Any claim against a parent company will need to overcome the hurdle of establishing a duty of care. This is a fast-evolving area of law with appeals to the Supreme Court outstanding.[1] As it stands, the guiding principles are as follows:

- Ordinary principles of duty of care in tort apply to the question of whether a parent owes a duty. The parent is in principle in no different a position from,

[1] The Supreme Court is due to hear an appeal in the case of *Lungowe v Vedanta* [2017] EWCA Civ 128 in January this year, and an appeal in the case of *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191 has been stayed pending the decision in *Vedanta*.

for example, an external consultant.[2] Accordingly, the tests of foreseeability, proximity, fairness, justice and reasonableness, and 'assumption of responsibility', are all relevant.[3]

- There are two basic ways that a parent can be demonstrated to owe a duty of care: first, where it **manages or controls** the relevant activity in place of, or jointly with, the subsidiary, and second where it **advises** the subsidiary about management of a relevant risk: *Unilever* [37], *Vedanta* [83].

- Factors of particular relevance are whether the parent and the subsidiary are in the same business, and whether the parent has either the same or a superior level of knowledge regarding the relevant risks, on which the subsidiary relies: *Chandler v Cape* [80], *Vedanta* [83].

- The existence of a corporate group structure in which each entity has its own management militates *against* a finding of a duty of care.[4] It is also not enough that the parent issues policies to its subsidiary, whether mandatory or not.[5] However, the existence of such policies may point towards a duty of care if the parent uses those policies to project 'real practical executive control' over the subsidiary (or in other words, if it 'enforces' those standards).[6] The fact that a parent company is kept closely informed about the activities of a subsidiary, or provides centralised assistance to it, is insufficient.[7]

- Generalised arguments based on the "fair, just and reasonable" test from *Caparo v Dickman*, e.g. that it is important that multi-national companies conduct themselves in accordance with international standards, are insufficient to found a duty of care: *Okpabi* [130].

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[2] *AAA v Unilever* [2018] EWCA Civ 1532, [36]
[3] Although Sales LJ has said that these tests 'tend to run together': *Vedanta*, [144].
[4] *Okpabi* at [196], [206] and *Unilever* [38]
[5] *Okpabi* at [89] (Simon LJ), [140] (Sales LJ), [195] (Vos LJ)
[6] *Okpabi* at [161] (Sales LJ), [205] (Vos LJ)
[7] *Okpabi* at [126] and [200].

The above principles have been applied in five key cases:

- In *Chandler v Cape* [2012] EWCA Civ 525, it was found that the parent owed a duty of care to an employee of the subsidiary who suffered asbestosis. Of particular relevance was that the parent had appointed a manager to manage the plant, and it was itself an operating company. Most relevant meetings were held at the parent's head office, the parent company directly appointed a medical adviser, and the parent had superior knowledge about the management of asbestos.[8]

- In *Thompson v Renwick* [2014] EWCA Civ 635, also an employers' liability asbestos case, no duty of care was established. The appointment by the parent company of a director was insufficient, and the parent was nothing but a holding company.[9]

- In *Lungowe v Vedanta* [2017] EWCA Civ 1528, it was held that it was arguable that a parent company owed a duty of care to Zambian residents who allegedly suffered injuries and environmental damage as a result of the activities of a copper mine. The particularly relevant factors were that Vedanta had made public statements emphasising its oversight over its subsidiaries, provided the subsidiary with relevant services pursuant to a management and shareholders' agreement, and provided the subsidiary with training and significant financial support.[10]

- *Okpabi v Royal Dutch Shell* [2018] EWCA Civ 191[11] was a claim concerning environmental damage caused by leaks of oil from pipelines in the Niger Delta. The Court of Appeal held that policies issued by the parent did not

[8] *Chandler v Cape,* [10], [78]
[9] *Thompson v Renwick,* [37]
[10] *Vedanta*, [84] and *Okpabi,* [197]
[11] in concurring judgments by Simon and Vos LJJ, Sales LJ dissenting

demonstrate *material control* over the subsidiary, but were 'high level guidance, based on the centralised accumulation of a wide range of expertise'. There was a distinction between the parent being concerned to ensure that there were proper controls in place, and exercising such control itself.[12] The facts were expressly contrasted with those which led the court to come to a different conclusion in *Vedanta*.[13]

- *AAA v Unilever* [2018] EWCA Civ 1532 arose out of acts of violence that occurred on a tea plantation in Kenya during presidential elections in 2007. The parent relied on a witness statement from the managing director of the subsidiary to the effect that the parent did not have superior expertise in the relevant areas. Whilst the parent required subsidiaries to have crisis management plans in place, the relevant policies were drafted by the subsidiary.[14] The Claimants did not pursue a case on the 'management' basis, and Simon LJ found that the evidence did not establish an arguable claim on the 'advice' basis.

Witness evidence from senior managerial personnel is likely to be crucial, and may cover areas including the corporate governance structure of the group, which individuals and corporate entities held the expertise in the areas relevant to the claim, the extent to which the subsidiary sought advice on operational and policy matters, and who drafted any relevant policies. Evidence of a change of working practices as a result of a parent company becoming involved (e.g. after it purchases the subsidiary) can be relevant to the issue of the degree of its control.[15]

Documentary evidence may also be important, and might include the following:

- Corporate governance documents and policies

[12] per Simon LJ, [125]
[13] See Vos LJ, [197]
[14] *Unilever*, [28]
[15] See e.g. *Vedanta*, [84]

- Group accounts, which may contain explanations of the relationships between the companies in the group
- Risk and crisis management policies
- Management and shareholders' agreements between the parent and the subsidiary
- Letters between subsidiary and parent regarding compliance with group policies
- Statements made by the parent or subsidiary for regulatory compliance purposes, or to the public generally

Andrew Bershadski

Private International Law Issues in International Group Claims

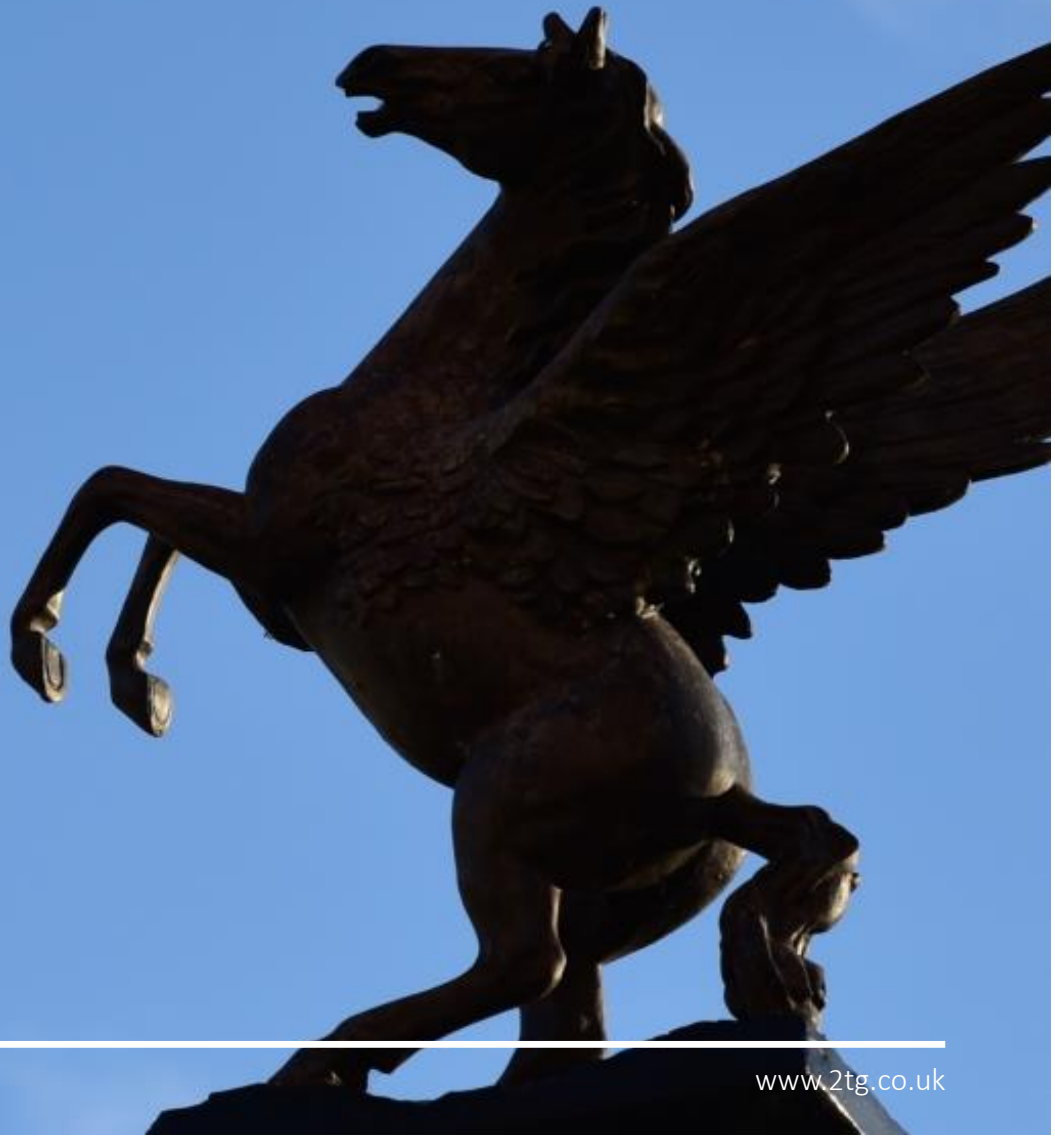
Charles Dougherty QC

9 November 2018

Overview – some key issues

- Jurisdiction/ enforceability
- Applicable law
  - The basic rules
  - Scope of applicable law and assessment of damages
  - Public policy
  - Contribution
- Practicalities
  - Top tips

Jurisdiction and enforceability



Jurisdiction - Common Law

- Traditional Common Law jurisdiction based on whether can serve the Defendant
  - Within jurisdiction serve as of right
  - Outside jurisdiction ground jurisdiction within CPR 6.36 and PD 6B para 3.1 under a **jurisdictional gateway** (eg contract is governed by English law or in tort if damage suffered in jurisdiction or results from acts in the jurisdiction)
- Controlling factor is discretion - appropriate forum (forum conveniens); *Spiliada Maritime Corp. v Cansulex Ltd* [1987] AC 460

Jurisdiction – Judgments Regulation

- Judgments Regulation (EU 1215/2012) applies to "civil and commercial matters" where **Defendant** domiciled in member state
- General rule is that a Defendant domiciled in a Member State should be sued in that State (Art 4)
- Other rules exceptions to general rule and construed restrictively
- **Mandatory** rather than discretionary regime – no forum conveniens doctrine – *Owusu v Jackson* [2005] ECR I-1383
- Post-Brexit position?

Getting a foreign company before the court

- Can foreign (non-EU/ EEA) registered company be brought before English Court in relation to international tort?
  - In tort, if:
    - Damage sustained within the jurisdiction. NB open question whether indirect/ consequential damage sufficient (*Brownlie v Four Seasons* [2017] UKSC 80); and/or
    - If substantial and efficacious acts committed in jurisdiction (regardless of whether acts elsewhere as well)
    - See CPR PD 6B para 9

Jurisdiction – necessary or proper

- If necessary & proper party (CPR PD 6B para 3):
  - Where there is jurisdiction against an anchor D (eg because registered in England), and can show a "*real issue which it is reasonable for court to try*" against anchor D and other D is necessary or proper party to that claim
  - Typically anchor D is English registered parent or other relevant group company
  - BUT if no real issue against anchor D, then cannot assert jurisdiction on this ground – eg *Okpabi v Shell* [2018] EWCA Civ 191; *AAA v Unilever* [2018] EWCA Civ 1532
- Potential arguments against jurisdiction on this ground:
  - Abuse of EU law for C to rely on English D anchor for (non EU) D
  - That "not reasonable to try" anchor claim in England (see "*VMZ The Red October*" [2015] EWCA Civ 379)
  - But see *Lungowe v Vedanta* [2017] EWCA Civ 1528

Forum conveniens

- Forum non conveniens argument:
  - Natural forum usually where incident/ accident occurred (where the fundamental focus of the claim is). BUT:
    - English anchor D cannot argue forum non conveniens – *Owusu*; *Vedanta*
    - A non EU D can so argue, but in practice, **where court has concluded that they are a necessary or proper party** this essentially decides question of forum conveniens in favour or England, given desire to to avoid 2 sets of proceedings– eg *Credit Agricole v Unicof; Vedanta*
  - **However,** this is an area ripe for further argument:
    - Risk of parallel proceedings can only be one factor (versus all the other such as focus of tort, litigation convenience, language, applicable law, enforceability);
    - What if going to be parallel/ related proceedings before local court in any event?

No alternative forum

- But even if England not otherwise the most suitable forum, it may nevertheless assume jurisdiction where the interests of justice so require, if the gateway requirements met. Eg where clear and cogent evidence that:
  - Real risk not obtain justice in local court (through for example extreme delay or corruption)
  - lack access to funding or suitable representation (*Vedanta*)
- Creative solutions
  - Making funding available; expertise; option of arbitral proceedings
  - Time to reconsider approach? Is *Lubbe v Cape* [2000] 1 W.L.R. 1545 too wide?

The other side… enforceability

- Outside Judgment Regulation countries, fact court assumes jurisdiction not mean that foreign country will recognise and enforce English judgment:
- Need local law advice, but (for example) typically common law countries only recognise judgment where:
  - D has presence in the jurisdiction
  - D has contractually agreed to the jurisdiction
  - D has voluntarily appeared and submitted to the jurisdiction
- Cs need to consider whether will ever be able to enforce in a jurisdiction where there are assets
- D (especially if part of multinational) needs to consider reputational factors

Applicable law

Tort: applicable law

- Rome II regulation (events giving rise to damage after 11/1/09)
  - Will survive Brexit, with only a few modest changes
- But older provisions remains relevant in some cases
  - Private International Law (Miscellaneous Provisions) Act 1995 (acts or omissions after 1 May 1996)
  - Common law rule of “Double Actionability” (pre-1 May 1996 acts and omissions)

Rome II - basic rules

- Law of country in which the (direct) damage occurs applies: Art 4(1)
  - Exception – if the parties have a **common habitual residence**, then the law of that place applies: Art 4(2)
  - Escape - Where tort **manifestly** more closely connected with another country: Art 4(3)
- Environmental damage (including injury and property damage sustained as a result of such damage)
  - Article 4(1) [place of direct damage] applies…
  - Unless person seeking compensation chooses to base his claim on law of country where "event giving rise to the damage" occurred

Rome II: scope of the law

- Rome II - Very wide scope for applicable law:
  - Art 15:
    - Basis and extent of liability; grounds of exemption and limitation or division of liability; contributory negligence
    - Vicarious liability, and questions of attribution (cf questions of corporate capacity/ status)
    - Limitation and quantum
  - BUT cf statutory schemes which are not tort/ obligation based – eg workers compensation schemes or accident schemes (eg NZ Accident scheme)
- BUT evidence and procedure (including standard of proof) for forum (Art 1(3))

Assessment of damages

- Pre-Rome II, tort damages always assessed in accordance with English, irrespective of applicable law – *Harding v Wealands* [2007] 2 AC 1
- Under Rome II, assessment is in accordance with the applicable law
  - Importantly, not just black letter law but also practice and conventions - *Wall v MDP Assurances* [2014] 1 WLR 4263
  - However, the law/ practice needs to be sufficiently clear to be applied
  - Evidence and procedure remains for the forum; dividing line not always clear (eg discount rates in relation to future loss)
- Even applying same law, results usually still very different from local court

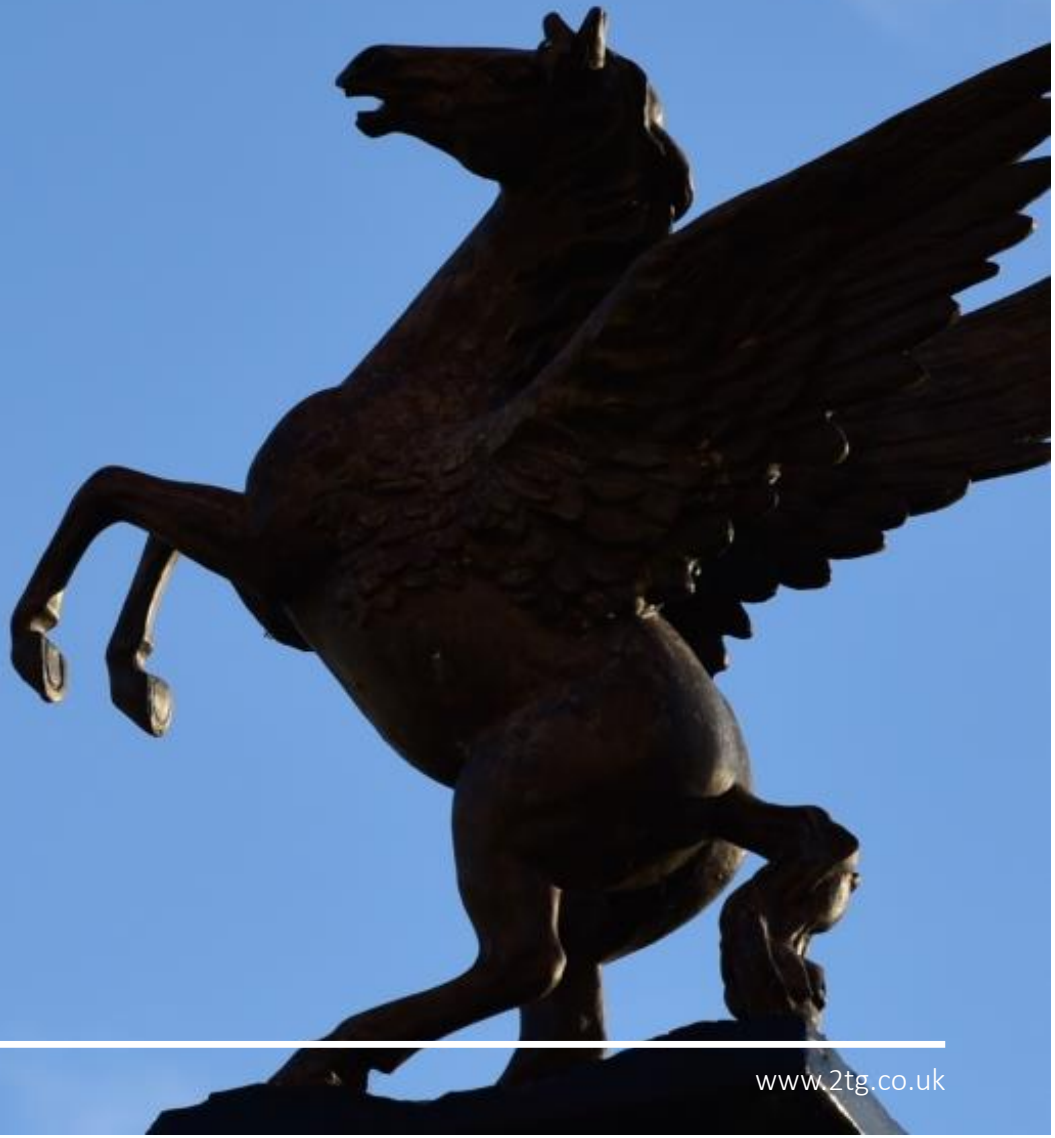
Role of public policy in applicable law

- The application of a "provision" (not the law generally) may be refused if **manifestly** contrary to the forum public policy (Art 26 of Rome II; cf Art 16 overriding mandatory provisions of the forum)
- **High hurdle** but, for example, manifestly unfair or discriminatory bars or caps can therefore be ignored
- BUT does not entitle the court to substitute its own law – eg if there is no right to compensation for a fatal accident

The difficult question of contribution

- D's may want to consider contribution claims against J-V partners, consultants, engineers etc….
- Article 20 Rome II – law of contribution is the one applicable to debtor's obligation to creditor. BUT in terms only applies where debtor has already satisfied creditor's claim (ie paid)
- BUT does Civil Liability (Contribution) Act 1978 apply **in any event, irrespective of applicable law,** on the basis that it is of overriding mandatory effect (whether under Rome II or earlier law)? Cf *Arab Monetary Fund v Hashim (No.9*) and *Cox v Ergo* [2014] UKSC 22.
- Guidance soon?

Practicalities



Top tips

- Identify the jurisdiction/ applicable law issues from the outset
  - Private International Law issues should be integral to analysis from outset rather than an add-on
  - This is an area for legal creativity!
- Get your evidence in order
  - Keep it manageable!
  - Expert evidence as to foreign law
    - The right expert/s
    - The right questions

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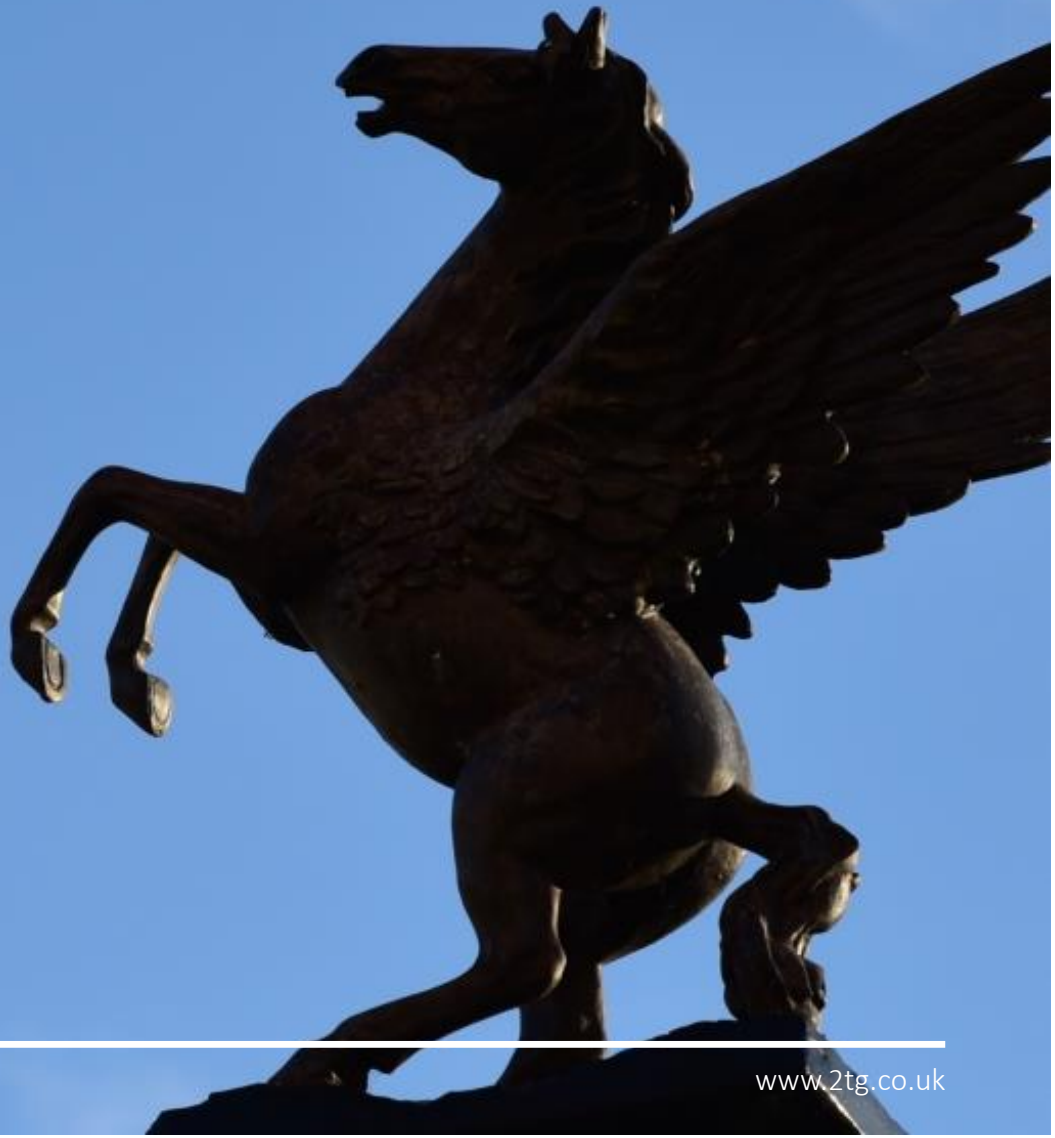
CORPORATE LIABILITY FOR HUMAN RIGHTS ABUSES BY POLICE AND SECURITY CONTRACTORS

NEIL MOODY QC

9th November 2018

CORPORATE LIABILITY FOR HUMAN RIGHTS ABUSES BY POLICE AND SECURITY CONTRACTORS



INTRODUCTION

- The need for corporate security in the Developing World;
- The risk of human rights abuses;
- Application of English common law;
- *Kalma v African Minerals Ltd* (2018)- judgment awaited;
  - Iron ore mine in Sierra Leone;
  - Road block and public disorder in 2010;
  - Strike and public disorder in 2012;
  - Police response;

RESPONSE TO RISK OF HUMAN RIGHTS ABUSES

- UN Global Compact (2000)
  - Businesses should support and respect the protection of internationally proclaimed human rights; and
  - Make sure they are not complicit in human rights abuses

RESPONSE TO RISK OF HUMAN RIGHTS ABUSES

- Voluntary Principles on Security and Human Rights (2000)
  - Governments, companies, NGOs all signatories;
  - Provides guidance on minimising the risk of human rights abuses;
    - Risk assessments should consider the available human rights records of public security forces, paramilitaries, local and national law enforcement, as well as the reputation of private security. Awareness of past abuses and allegations can help Companies to avoid recurrences as well as to promote accountability.
    - Although governments have the primary role of maintaining law and order, security and respect for human rights, Companies have an interest in ensuring that actions taken by governments, particularly the actions of public security providers, are consistent with the protection and promotion of human rights.

RESPONSE TO RISK OF HUMAN RIGHTS ABUSES

- Voluntary Principles on Security and Human Rights (2000)
  - In cases where there is a need to supplement security provided by host governments, Companies may be required or expected to contribute to, or otherwise reimburse, the costs of protecting Company facilities and personnel borne by public security. While public security is expected to act in a manner consistent with local and national laws as well as with human rights standards and international humanitarian law, within this context abuses may nevertheless occur.
  - Companies should use their influence to promote the following principles with public security: (a) individuals credibly implicated in human rights abuses should not provide security services for Companies; (b) force should be used only when strictly necessary and to an extent proportional to the threat; and (c) the rights of individuals should not be violated while exercising the right to exercise freedom of association and peaceful assembly, the right to engage in collective bargaining, or other related rights of Company employees

POTENTIAL ROUTES TO LIABILITY

- Duty of care owed in respect of acts of third party;
- Vicarious liability;
- Common design/ accessory liability;
- *Smith v Littlewoods* [1987] 1 AC 241
  - no duty of care to prevent wrongdoing by third parties, except:
    - special relationship and control of third party;
    - Assumption of responsibility;
  - *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4

VICARIOUS LIABILITY

- *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56 *(Christian Brothers)*
  - "The law of vicarious liability is on the move."
  - "i) The first stage is to consider the relationship of D1 and D2 to see whether it is one that is capable of giving rise to vicarious liability.
  - ii) …What is critical at the second stage is the connection that links the relationship between D1 and D2 and the act or omission of D1…"

VICARIOUS LIABILITY

- *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56
- i) The employer is more likely to have the means to compensate the victim than the employee and can be expected to have insured against that liability;
- ii) The tort will have been committed as a result of activity being taken by the employee on behalf of the employer;
- iii) The employee's activity is likely to be part of the business activity of the employer;
- iv) The employer, by employing the employee to carry on the activity will have created the risk of the tort committed by the employee;
- v) The employee will, to a greater or lesser degree, have been under the control of the employer.

VICARIOUS LIABILITY

- Close relationship “akin to that between an employee and employer”
- *Cox v. Ministry of Justice* [2016] UKSC 10
- Dual vicarious liability
- *Viasystems v Thermal Transfer* [2005] EWCA
- *The [employee] “is so much part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence.”*

COMMON DESIGN/ ACCESSORY LIABILITY

- *Mutua v Foreign and Commonwealth Office* [2011] EWHC 1913
  - Alleged common design between British Army and Colonial authorities;
- *Fish and Fish v Sea Shepherd* [2015] UKSC;
- "D will be jointly liable with P if they combined to do or secure the doing of acts which constituted a tort. This requires proof of two elements. D must have **acted in a way which furthered the commission of the tort** by P; and D must have **done so in pursuance of a common design** to do or secure the doing of the acts which constituted the tort. I do not consider it necessary or desirable to gloss the principle further." (per Lord Toulson)

COMMON DESIGN/ ACCESSORY LIABILITY

- *Fish and Fish v Sea Shepherd* [2015] UKSC;
  - "The defendant will be liable as a joint tortfeasor if (i) he has assisted the commission of the tort by another person, (ii) pursuant to a common design with that person, (iii) to do an act which is, or turns out to be, tortious." (per Lord Sumption)
  - Sea Shepherd UK, Sea Shepherd Conservation Society (US);
  - Operation Blue Rage;
  - SSUK's contribution was £1,730 paid to SSCS;
  - Held: there was a common design, but the assistance was de minimis

COMMON DESIGN/ ACCESSORY LIABILITY

- Intent is required; negligence is not sufficient;
- *Credit Lyonnais v EGGD* [1998] 1 Lloyds' Rep 19 at 46 per Hobhouse LJ: *"Mere assistance, even knowing assistance, does not suffice to make the 'secondary' party jointly liable as a joint tortfeasor with the primary party. What he does must go further. He must have conspired with the primary party or procured or induced his commission of the tort... or he must have joined in the common design pursuant to which the tort was committed."*
- Attributing the relevant intention (common design) to a company:
- Generally needs to be shown at level of senior management;
- *Meridian Global v Securities Commission* [1995] 2 AC;

COMMON DESIGN/ ACCESSORY LIABILITY

- *Credit Lyonnais v Export Credits Guarantee Dept* [2000] 1 AC 486

> "For vicarious liability what is critical, as long as one of the joint tortfeasors is an employee, is that the combined conduct of both tortfeasors is sufficient to constitute a tort in the course of the employee's employment… …Before there can be vicarious liability, all the features of the wrong which are necessary to make the employee liable have to have occurred in the course of employment." (per Lord Woolf)

Comparing Group Actions in England and Wales with California

It could not be more different in California if the multiplicity of Claimants (still Plaintiffs there) requires what is known as class action determination. More often than not, because it is a class action being sought which is likely to have impacted upon persons outside the jurisdiction of the State of California, the venue is going to be the Federal (District) rather than State courts. The procedure is strictly governed by the Federal rules, which are a minefield to navigate.

To begin with, in order to obtain a class certification, it is not enough to merely show that a multiplicity of Claimants have a common cause against the same Defendant.

There is a strictly defined set of requirements that have to be satisfied and if any one of these fails, the class cannot be certified and one may be left with the unpalatable prospect of hundreds if not thousands of relatively small claims- almost all of which will be subject to the lengthy and cumbersome civil jury trial procedure involving hundreds of depositions, discovery exchanges, expert evidence for each case. In other words, for all practical purposes, if the Claimant fails to certify a class, the high chance is that the case ends there and then.

Another distinction is that part of the process for class certification is that the cause of action has to be shown to be viable at this stage. Obviously, even within the English system, there has be a cause of action that would not be subject to a strike out for failure to establish a summary case but within the Federal rules, the standard of proof is only just short of the proof for trial. Thus there has to be cogent evidence of liability, causation and quantum.

The specifics to be satisfied are found within the Federal rules;
In short compass these are:

a) that the class is so numerous that joinder of all potential Claimants would be impractical;
b) that there are questions of law or fact common to the class;
c) that the claims or defences of the representatives' parties are typical of the class whether it be Claimants or Defendants;
d) the representatives will fairly and adequately protect the interests of the class as a whole.

It is obvious that a) and b) above are reasonably straightforward and reflect the English approach to GLO's. Thereafter the similarities end. Frankly c) and d) are minefields and sub categories further exist which become more onerous as they unfold.

It takes only the smallest attack upon the credibility of the class representatives who are subject to rigorous investigation by demands for documents, depositions, statements for the attack to be made that 'typicality' is not made out. This investigative process leeches into the issue of fairness and adequacy and if any dents can be made to show, for example, that the representative claims have any flaws, this can be fatal to the class being certified. What might be forgiveable as an error or misstatement at a trial but, on the whole may be accurate, is unforgiving at class certification.

Further the court will look at whether the representatives can actually prove loss and expensive expert evidence to prove the underlying case as well as the losses arising therefrom all have to be obtained.

One problem for class actions in the US as a whole is that the Supreme Court has made rulings on the strictness of proof for this certification to be made because there is a general reluctance to allow such claims as a certain protection is offered to the likely Defendants who are, more often than not, big business entities. Sadly the movement in the US has been rather protectionist for the corporate hegemonies

who have used the political lobbying system to their advantage. The days of the benighted groups impacted by environmental disasters or tainted drugs or medical devices being able to successfully prosecute cases by way of class action are being curtailed. The bars to jump over for affected Claimants are not impossible but ever higher and with the present constitution of the US Supreme Court, it is likely that even success at local District Court level (from which ultimate appeal does go to the US Supreme Court) will be overturned.

Of course, if one does happily succeed at class certification stage, one has virtually proved one's case and the chances of a trial following are likely to be minimal which means that pressure is on the Defendants to resist the class certification.

In short, the claims are really decided at this stage and not at trial because by the time the trial is ready to roll, the proofs have all been established.

This has been, of necessity, a short overview which just scratches the surface of this procedure. Case law dealing with every issue to be proved as well as numerous sub-issues have been the subject of extensive review in the courts. Thousands of learned articles and many books exist to navigate the requirements for Federal class certification.

Having had experience in both jurisdictions, I can opine that the English system seems to operate more fairly because it is a greater examination of the justice of the underlying case at a trial rather than a minefield of procedural requirements which can very easily trip up the unwary trying to navigate what is, essentially, an interlocutory proceeding. It is a danger, which I do hope the English courts never fall into completely, that ultimately procedural requirements will trump justice.

I am mindful that, from time to time, our own courts have moved a little in that direction but thankfully have pulled back when a procedural deficit, unless utterly

egregious, appears to deprive one or more deserving parties of their chance to maintain or defend an action.

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