



DECISIONS, DECISIONS

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IN THIS ISSUE



"Anthropomorphism No More" - A brief guide to the *Corporate Manslaughter and Corporate Homicide Act 2007*

by Markus Esly

P. 1



Do you think you've had a bad day in the office?

by Melanie Willems

P. 5



Strengthening the Commercial Court

by James Barratt

P. 12

ALSO FEATURED

MEET THE TEAM P. 16

Odile Van Regemorter



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"ANTHROPOMORPHISM NO MORE"

A brief guide to the *Corporate Manslaughter and Corporate Homicide Act 2007*

by Markus Esly



Companies can, in principle, be held responsible in criminal law for causing the death of employees or of members of the public. Around 240 people are killed at work in the United Kingdom per year¹. The risk of fatal injuries to employees is, of course, greater in some industries: for example, a construction worker faces a risk of death 4.6 times greater than the national average. Large-scale engineering projects can pose considerable risks, though accidents in them are not always widely publicised. More than 15 construction workers died during the construction of the Channel Tunnel. Both fatal accidents of employees and disasters causing the death of members of the public can lead to the imposition of criminal liability on a company. After particularly serious accidents (most recently, a series of rail crashes), there tend to be strong calls for criminal prosecutions due to alleged corporate mismanagement. As we will see, these prosecutions have rarely led to convictions but the law has now changed.

The common law has long since recognised the offence of manslaughter where there is no intention to kill, and companies are not exempt from the criminal law. On 6 April 2008, the provisions of the new *Corporate Manslaughter and Corporate Homicide Act 2007* (the "Act") will come into force. The Act will operate in addition to existing health and safety at work legislation (which is not the focus of

¹ See the Health and Safety Commission's statistics for fatal injuries for 2006/2007 (from July to July).

this article). It reforms the basis on which a company can be found criminally liable for the death of a person to whom it owed a duty of care. The Act applies where the harm resulting in death occurred in the United Kingdom – it does it apply extraterritorially, nor does not apply retrospectively. Any company (whether English or foreign registered) can be made a defendant in a prosecution, provided that the company operates in the United Kingdom.

What does the Act mean for companies and their legal responsibility if fatal accidents occur? This article highlights the key features of the new legislation.

Corporate criminal liability for manslaughter – was it ever a real risk?

The reform of the criminal law leading to the Act originated with a Law Commission report published in 1996¹. Under the old law, the offence required a corporate defendant to have committed a gross breach of a duty of care owed to the victim.

At common law, criminal offences traditionally require both a “guilty act” (*actus reus*) and a “guilty state of mind” (*mens rea*) from the defendant. A company could therefore only be convicted if it could be shown that its “directing mind” was guilty of the offence. A sufficiently senior representative of the company, who by his actions (and thoughts) represented it, was needed. While this “identification” principle has been criticised, it has been consistently upheld by the courts². Until the recent reform of the law, it remained a constituent of the common law offence, in addition to a duty of care to the victim, a breach of which caused the death.

¹ “Legislating the Criminal Code: Involuntary Manslaughter” (Law Com 237).

² See for instance the Court of Appeal in the Southall rail disaster case (upholding the acquittal of the rail company at first instance), Rose LJ stated that: “... in any event, the identification principle is in our judgment just as relevant to the *actus reus* as to *mens rea*. In *Tesco v Natrass* at 173D Lord Reid said “The judge must direct the jury that if they find certain facts proved then, as a matter of law, they must find that the criminal act of the officer, servant or agent, including his state of mind, intention, knowledge or belief is the act of the Company.” In our judgment, unless an identified individual’s conduct, characterisable as gross criminal negligence, can be attributed to the company the company is not, in the present state of the common law, liable for manslaughter.” *Attorney-General’s Reference (No 2 of 1999)* [2000] 3 All ER 182

But past unsuccessful prosecutions for “old” corporate manslaughter have shown the real difficulties in proceeding on such an anthropomorphic basis against large corporations. The more complex the corporate entity and its management structure, the more difficult “identification” is. Lines of responsibility may be blurred, especially where health and safety is not centrally managed. Successful prosecutions for the “old” offence of corporate manslaughter have tended to involve small companies with simple management structures.

In none of the following cases where significant lives were lost, and where accusations of management failures or negligence were made, did prosecutions for corporate manslaughter succeed:

- “Herald of Free Enterprise” of March 1987 (187 dead)
- King’s Cross fire of November 1987 (31 dead)
- Piper Alpha oil platform disaster of July 1988 (167 dead)
- Clapham rail crash of December 1988 (35 dead)
- “Marchioness” accident of August 1989 (51 dead)
- Southall rail crash of September 1997 (7 dead)
- Paddington rail crash of October 1999 (31 dead)
- Hatfield rail crash of October 2000 (4 dead)
- Potters Bar rail crash of May 2000 (7 dead)

Instead, fines were imposed on the responsible companies³. Pecuniary penalties alone were, however, strongly condemned by the public. Calls were made for criminal liability to be imposed in the case of these (and other) serious disasters, where the old criminal law appeared to

³ For example, for the Hatfield (Balfour Beatty £7.5m, Railtrack £3.5m), Paddington (Thames Trains £2m) and the Southall train crashes (Great Western Trains £1.5m).

many (including the Crown Prosecution Service) to be powerless⁴.

The new offence – what has changed and who is caught?

What is the offence?

In summary, under the Act a company will be guilty of an offence if it causes a fatal accident through the way in which it manages its business or activities⁵. The company's failure in this regard must, however, amount to a grossly negligent breach of a duty of care to the victim. The focus is now no longer on the conduct and knowledge of a particular individual, and instead on processes or systems employed by the company as a whole – and in particular, how health and safety were managed or organised.

It is important to note that the Act itself does not impose new standards or introduce more stringent guidelines. Neither does it create a duty of care on the part of company where there was none prior to the Act. However, any breaches of existing health and safety requirements by the company, and the seriousness or extent of those breaches, will be an important factor⁶.

Who can be a victim?

The Act does not apply extra-territorially, but only to the United Kingdom. The victim must die as a result of harm that occurred within the United Kingdom⁷. So a foreign tourist injured in the United Kingdom who dies at home outside the United Kingdom is a victim within the meaning of the Act. However, an English tourist who is injured

abroad but dies at home within the United Kingdom is not, however (assuming it is clear-cut when the harm occurred and what the operative cause of death is!).

Which companies are caught?

The Act applies to all companies incorporated in the United Kingdom, and also all foreign corporations that operate in the United Kingdom (whether or not they are registered here – if you commit a criminal offence within the jurisdiction, you are subject to its criminal law). Limited liability partnerships are caught, as are public bodies incorporated by statute (such as local authorities, NHS bodies etc). Companies have distinct legal personalities, so a parent company will not be liable for the failings of a subsidiary if it is the latter who actually managed the relevant activities. Similarly, foreign companies operating through a distinct local subsidiary should not be prosecuted. The Act is not intended to allow the corporate veil to be pierced. Instead, the local operating vehicle would be the defendant. The Act also does not apply to individuals (who cannot be accessories to an offence committed by a company)⁸.

Senior management at fault

Before a company can be convicted, it must be shown that a substantial part of the failure occurred at a senior level – and senior management means officers of the company who make significant decisions about it as a whole, or about substantial parts of the business, or who actually manage the company (or a substantial part of it). The guide to the Act published by the Ministry of Justice confirms that senior management will include “*both centralised, headquarters functions as well as those in operational management roles.*”⁹

Membership of the senior management of a particular company will depend on the facts of the case. Directors and those holding positions similar to a directorship will be senior management unless something

⁴ See for example “*Director of Public Prosecutions calls for change in law after Euromin manager acquitted of manslaughter*” - CPS press notice 137/01, 29 November 2001.

⁵ It is suggested that the general test of causation in criminal law would apply. Was the company's act or failure to act an operative cause of the death? Or, alternatively, would the death have occurred “but for” the management failure? It may be that in some circumstances an intervening act breaks the chain linking the management failure to the death in question, making the latter too remote a consideration.

⁶ Section 8 of the Act requires juries to consider the extent and seriousness of failures to comply with health and safety obligations, and the degree of danger resulting from this. This relates to existing obligations only.

⁷ The harm resulting in the death must be sustained in the United Kingdom – Section 28(3) of the Act.

⁸ See Section 18 of the Act. Of course, individuals can already be prosecuted at common law for manslaughter.

⁹ *A Guide to the Corporate Manslaughter and Corporate Homicide Act 2007*, Ministry of Justice, October 2007.

unusual excludes them. Regional managers, or heads of different operational divisions, are also likely to be caught.

It is important to recall that under the Act, senior management will not be able to plead delegation in its defence. Inappropriate delegation, a “hands-off” attitude or (worst of all) turning a blind eye by senior management can easily constitute a management failure for the purpose of the Act.

A relevant duty of care must be owed

As noted above, the company must owe a duty of care to the victim, and the Act defines¹⁰ which duties of care are “relevant”. These duties are already owed under the existing law of negligence, so the Act itself does not widen the scope of a company’s legal responsibilities. The duty must be an existing one, and must (in addition) relate to the following:

- the company’s own employees or persons working for it or performing services for it;
- the company occupying premises;
- the company’s business in connection with the supply of goods or services (irrespective of whether this is for consideration or not);
- the company carrying out any construction or maintenance operations;
- the company keeping any plant, vehicle or other thing (the first “catch-all”);
- carrying on any other activity on a commercial basis (the second “catch-all”).

The Act does not do much to explain the circumstances in which a duty is owed to a particular victim – so the question might be, was the victim a reasonably foreseeable plaintiff? In practice, it would be safest to assume that all of a company’s employees, customers, visitors or members of the public who might come into contact with its activities would be owed a duty of care.

¹⁰ Section 2

Relevant factors for establishing gross negligence

The new offence is based on gross negligence. This means that the company’s conduct (always at a sufficiently senior level) must have seriously fallen short of what the law expects. The Ministry of Justice has emphasised this point, stating that:

“Corporate manslaughter/homicide will continue to be an extremely serious offence, reserved for the very worst cases of corporate mismanagement leading to death.”

A prosecution under the new legislation will therefore not only look at a particular level of management within the organisation, but would review health and safety across the board. Factors likely to be relevant include:

- As mentioned, any breaches of existing health and safety requirements, generally accepted codes of conduct or practice, but also guidance¹¹.
- The “corporate culture” – or general attitudes towards health and safety. For instance, were obvious breaches regularly overlooked, was there a lax attitude?
- What is the company’s approach to auditing and monitoring health and safety? Are risk assessments prepared, and if so, how are they reviewed and implemented?
- How health and safety systems or processes were actually operated “on the ground” – this may show whether “senior operational management roles” were effectively carried out.
- What training was made available to employees? Do they understand the equipment or processes they use? Is the equipment itself safe, and regularly maintained?

¹¹ A jury may reasonably consider relevant health and safety guidance. This would capture statutory Approved Codes of Practice and other guidance published by the regulatory authorities tasked with enforcing health and safety laws. While guidance is of course not mandatory, it may very well be helpful to a jury when considering the question of gross negligence.

- Is there immediate and effective supervision where risks are such that this should be the case?

Penalties

An organisation convicted of the new offence can receive:

- A fine. There is no upper limit to this.
- A publicity order. This requires an organisation to publicise the fact of its conviction and certain details of the offence, in a way specified by the court. Publicity orders are not being brought into force on 6 April 2008, but will be commenced when supporting guidelines are available.

In addition, the court can set a remedial order, requiring the organisation to address the cause of the fatal injury. These are not currently available for organisations convicted of manslaughter/culpable homicide, although they can be imposed under health and safety legislation.

Conclusion

Corporate manslaughter has received a statutory overhaul, and compared to its weak, anthropomorphic predecessor now seems to have teeth. However, it is important to note that while there has been a shift away from individuals being responsible within a company to the adequacy of management across the board (but at a senior level), the Act does not introduce an expectation of higher standards of conduct from companies, and does not impose any wider duty of care than the law of negligence. The offence is still based on gross negligence, and will only be relevant where there has been a serious failing. The most severe penalty that can be imposed is an unlimited fine, but in addition the stigma of criminal responsibility will attach to the organisation (but not individuals, which are specifically excluded from the Act).

Do you think you've had a bad day in the office?

by **Melanie Willems**



Civil lawyers tend to be rather outgunned by criminal lawyers when it comes to telling war stories at parties. Mergers, insurance and restitution are no match for murder, incest and robbery. Add to this that the *really* interesting things one encounters in an arbitration practice may never come to public notice.

You do, however, come across the odd nugget and, in this article, I've sought to discuss a few cases which are in the public arena, and which are loosely connected both by their international nature, and by the human interest underlying the commercial disputes.

Dam nation

In 2003 an appeal reached England's highest court, the House of Lords, which arose out of the construction of a dam

(called the Katse dam) in the Kingdom of Lesotho. Lesotho is a tiny, landlocked country, surrounded on all sides by South Africa. The Lesotho Highlands Development Authority ('LHDA') – an organ of the State had employed a consortium of European companies to construct the dam, under a contract governed by the law of Lesotho. A final account dispute went to arbitration in London and the tribunal delivered an award.

Section 69 of the Arbitration Act 1996 sets out a process whereby an award may be appealed on the ground that it contains an error of law. Parties can agree to exclude this right of appeal, and the ICC Rules contain just such an exclusion.¹ Section 68 of the Act gives parties the right to challenge an award on the ground of 'serious irregularity'. This right cannot be excluded by agreement. One form of serious irregularity is:

¹ ICC Rules Article 28.6

“the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction...)”

The LHDA sought to challenge part of the award, claiming that the tribunal should have made the award in the local currency (Maloti) which the contract provided, rather than Euros (the Lesotho currency had dramatically fallen in value, and paying in foreign currency would therefore be ruinously expensive for the LHDA). The LHDA also claimed that the tribunal should have applied Lesotho law (which imposed restrictions on the way interest was charged and calculated) to the issue of interest. These were said to amount to an excess of power, rather than an error of law. The LHDA’s argument succeeded before the Commercial Court and the Court of Appeal. The House of Lords rejected it and upheld the award².

Underlying this dry story is a rather more interesting tale of corruption, intrigue, war and despotism. In February 2000, Corner House (an English non-profit group campaigning for democratic reform and against corruption) published a report on various dam construction projects around the developing world. These included the Lesotho Highlands Water Project, Africa’s largest engineering project, of which the Katse dam forms a part.

The project, which involves construction of five dams, began in 1986 and is due for completion in 2020. The scheme is aimed at diverting water from Lesotho’s Maluti highlands via a complex series of tunnels to South Africa’s Ash River and thence to the Vaal Dam, South of Johannesburg. When the project began South Africa was subject to the Apartheid regime, and so to international sanctions. The Corner House report suggests that, from its inception, the financing arrangements for the project amounted to a breach of the sanctions.

In September 1998 South African Troops invaded Lesotho, ostensibly to assist in restoring order in the face of public protests,

² Though, by this time, enforcement of the award had been delayed more than three years and the Lesotho currency had crept back up in value, so the LHDA may not have come out of it too badly.

but (per Corner House) mainly to try and protect South Africa’s investment.

Similarly, in 1996 workers on one of the other dams had organised a series of strikes to protest about differences in pay between native Lesotho and South African workers. Contractors sacked a large number of workers for their illegal strike, and called on Lesotho police to evict workers from the construction camp. Subsequently at least five workers were shot dead, and more than 30 injured.

According to a US-based NGO called The International River Initiative, rising water demands might have been better supplied by improvements to the existing infrastructure, and the project has actually pushed up South African Water prices. Corner House are also highly critical of the project’s environmental impact, and the displacement of local people which has resulted from the construction.

In 1999 the Lesotho government accused Masupha Sole, the LHDA’s former CEO of taking almost \$2 million in bribes from various companies which were awarded LHDA contracts. In 2002 he was convicted of bribery offences by the Lesotho courts. In 2003 the Lesotho courts imposed fines on two companies, Lahmeyer International and Acre Contracting.

Make tea, not war

In 2007 a Texas tea company sued its insurers in a Texas court after its insurers refused to pay out on a policy, claiming losses the company had suffered in Uzbekistan were not covered by the insurance.

Uzbekistan is a landlocked country in Central Asia, situated north of Afghanistan. It left the Soviet Union in 1991 and, according to its constitution, is a democracy. The current president, Islam Karimov, has held power ever since independence though, according to that same constitution, his term of office expired in January 2007.

The tea company claims to have been the victim of an extortion scheme orchestrated by Gulnora Karimova, the president’s daughter. Her business and property interests include retail, resorts, a cement

factory, nightclubs, a TV Station and a recording studio. She is a major shareholder in Uzbekistan's sole gold mine and has recently sold a 20% stake in a mobile phone company which was, itself a joint venture between foreign investors and the Uzbek state, and protected by heavy regulation of the telecoms market. She is reported to have benefited substantially from a new \$1.5bn Production Sharing Agreement between Uzbekistan and Russian state gas company, Gazprom. Add to this that Ms Karimova has recently attempted to launch a pop career (a copy of her music video can be found on youtube).

The tea company alleges that Ms Karimova had state security forces kidnap various members of its employees' and company directors' families. They were, in effect, held to ransom. State forces either seized or forced the tea company to surrender all assets in Uzbekistan. The tea company's dispute with its insurers arises from a resulting claim on the company's extortion-and-kidnapping insurance, and a question as to the scope of that cover.

The obvious answer?

It's natural to ask whether the tea company might have brought a claim against the Uzbek state in respect of its uninsured losses. Uzbekistan and the United States signed a Bilateral Investment Treaty ('BIT') in 1994. BITs are international agreements between states, whereby each agrees to treat investments by the other's nationals in a particular way, and not to deprive them of their investment without compensation. The States will also make open offers, consenting to have any claims against them under the treaties resolved by way of binding arbitration. Unfortunately the United States has never ratified the 1996 treaty and so it has no legal force.

A forum for patient parties

In the absence of a BIT, a second way in which recompense can be sought from state actors is by way of a claim before the International Court of Justice. The Statute of the ICJ provides that a state may make a "Declaration Recognizing as Compulsory the Jurisdiction of the Court". This confers

jurisdiction with respect to such things as questions of international law, facts which, if established, would constitute breach of international law and the reparation to be made for such breaches. Uzbekistan, though a member of the United Nations since 1992, has never made the requisite declaration.

In any event, only states can bring and defend claims before the International Court of Justice. If Uzbekistan had made the declaration, then the tea company, as a private party, would have had to persuade the United States to bring a claim against Uzbekistan on its citizen's behalf³.

An example of a country bringing such a claim for its citizens can be found in the case known as *Barcelona Traction*⁴. A Canadian company, Barcelona Traction, had issued bonds which were serviced by subsidiaries operating in Spain. In 1936 the servicing of these bonds was suspended by the Spanish Civil War. After the war, Barcelona Traction sought to resume paying the bonds using money from its Spanish subsidiaries. The Spanish exchange authorities refused to authorise these transfers. Unable to pay the interest due on the bonds, the company was declared bankrupt in 1948 and orders granted by the Spanish courts for seizure of its and its subsidiaries' assets.

Ten years later, in 1958, Belgium began a claim before the ICJ on behalf of Belgian nationals who had been shareholders in Barcelona Traction. Belgium sought reparation for damage to those people, said to have been caused by conduct of the Spanish state which was contrary to international law. The Spanish Government objected that the Belgian Government lacked capacity to submit any claim in respect of wrongs done to a Canadian company even if the shareholders were Belgian.

³ Incidentally, that might not have been too much of a problem. Since the September 11 attacks Uzbekistan had provided a key base for US operations in Afghanistan and the wider region, but there has been a souring of relations between the two countries, and in 2005 the US withdrew its assets.

⁴ *Barcelona Traction Light and Power Company Limited (Belgium v Spain)* (1970) ICJ Rep. 3

In 1970, 12 years after proceedings had commenced and *more than two decades* after the company had been declared bankrupt, the ICJ delivered a colossal judgment which, in short, accepted Spain's argument. International law had to recognise municipal law and so corporate personality and the distinction between a company and its shareholders. That being the case, an act infringing the company's rights did not give rise to responsibility to the shareholders, even though their interests were affected. Where an unlawful act was committed against a company representing foreign capital, international law authorised the company's State to seek redress. No rule of international law conferred such a right on the shareholder's State.

While not on a par with being kidnapped and held to ransom, this must, after a twenty year fight, have seemed like a pretty bad day for those on the Belgian side.

Alien torts - in Bolivia, no one can hear you scream

With no treaty claim and no scope for a claim before the ICJ a third possible route to redress might be by way of a claim before the US courts under the *Alien Tort Claims Act* (ATCA), which provides:

"The district courts shall have jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations".

The tea company's case is very similar to that of *Eastman Kodak v Susana Kavlin and Casa Kavlin*. The judgment in that case begins:

"Plaintiffs tell a gripping story filled with international corporate intrigue, corrupt South American judges presiding over kangaroo courts, rat-infested prisons where survival depends on bribery, and a Bolivian judge's tawdry affair resulting in an embarrassing love child. Defendants tell a less dramatic story about an ordinary commercial dispute between a distributor and a supplier that ended up in the wrong court."

Kodak had terminated an agreement with its Bolivian distributor, a company called Casa Kavlin. Kodak appointed a new distributor, Mr Carballo, a Uruguayan national. Kodak's case was as follows: Casa Kavlin retained a certain Mr Zegarra, an attorney notorious for bringing criminal proceedings in purely civil matters. Mr Zegarra filed criminal charges against Mr Carballo and arranged to have the case assigned to a certain Judge Najerra. Mr Zegarra happened to be godfather to an illegitimate child Judge Najerra had had by Mr Zegarra's sister.

Mr Carballo was arrested on the Judge's orders and imprisoned, without bail, on a charge of (of all things).... sabotage! The judgment states:

"According to Carballo, a waking nightmare followed. The San Pedro prison in downtown La Paz, the "infamous Panoptico" according to one of plaintiff's experts, is apparently a place barely fit for the rats it houses. For eight days, Carballo was forced to stay there, sharing a filthy cell with murderers, drug dealers, and AIDS patients. Left without food, a blanket, or protection from the inmates, he was forced to bribe his way to survival. Prisoners ran the prison, and murdered each other in Carballo's presence on one occasion. Dangerous drug dealers discussed their deals in his presence, potentially making him someone who "knew too much." Finally, Carballo was able to buy the right to live in a jail cell for \$ 5,000, but even then he had to sleep on the floor. Although the authorities eventually released him, Carballo claims that the experience left him deeply traumatized and unable to resume life as before."

Who would have thought running a photography franchise carried such risks? Kodak and Carballo brought a claim in federal court in Florida. Carballo claimed that the US courts had jurisdiction over his claim (as a foreign national) under ATCA and that Kavlin had conspired with a

Bolivian judge to detain him in life threatening conditions (allegedly a breach of his rights as a matter of the law of nations). The defendants sought to have the claim dismissed. The judge held there was a case to answer, saying:

“...the Court finds that the law of nations does prohibit the state to use its coercive power to detain an individual in inhumane conditions for a substantial period of time solely for the purpose of extorting from him a favourable economic settlement. The court also finds that the Alien Tort Claims Act makes responsible anyone who conspires with state actors to achieve such an unlawful arbitrary detention”

There would, therefore, seem to be some scope for people who are mistreated by state entities as part of such extortion schemes and who are not themselves US citizens to bring claims under the ATCA. Such claims are not against the foreign state (which will usually enjoy immunity in foreign courts) but, rather, against parties like Kavlin (and, potentially, in the Uzbek example, Karimovo) who conspire with the state. The utility of such claims depends on whether such defendants have assets in the US or in some other jurisdiction where a US judgment might be enforced

From the point of view of a commercial lawyer, perhaps the more interesting aspect of the case concerns Kodak's own claims. Kodak brought a claim before the Florida court, alleging that it had a claim against Kavlin in Bolivian law, and that this was justifiable before the Florida Court. The Florida court had jurisdiction against a Kavlin director, because she was served with proceedings when visiting Florida. There was an issue whether the company, Casa Kavlin, had a sufficient connection with Florida to fall subject to its jurisdiction and, if so, whether it was nonetheless, forum non conveniens even if it had jurisdiction. Unfortunately these issues were left over for trial, and there is no judgment in the case.

Trouble and strife

Coming back to the tea company case, Ms Karimova and her husband settled in New Jersey, US and had two children. In 2001 the couple separated. A Washington Post article from 2004, which features an interview with Ms Karimova, describes her eloping to Uzbekistan with the children having left her husband a note mentioning that “the War of the Roses” was on cable and suggesting he watch it (the film is a black comedy about hate-driven spouses whose divorce turns into an orgy of revenge).

Mr Maqsadi brought and won a custody claim before the New Jersey courts. Having left the US for Uzbekistan, Ms Karimova was found in contempt and an international arrest warrant issued.

Subsequently Mr Maqsadi's family in Uzbekistan were rounded up and imprisoned or deported to Afghanistan, with his parents being subjected to strip searches at the airport. Assets owned by companies in which Mr Maqsadi had an interest were seized, criminal charges were brought in Uzbekistan, and a warrant issued for Mr Maqsadi's arrest.

One of Mr Maqsadi's companies has brought arbitration proceedings in Austria under a joint venture agreement against its partners, which include Uzbekistan itself. The same company has brought proceedings in the US against a group comprising one German and three US companies, arguing that they had acquired a stake in the Uzbek assets, knowing that they had been expropriated. In late 2007 a US court found that it did not have jurisdiction over the German company. The claim against the others continues.

Big money in Mississippi

A final case is that of *The Loewen Group Inc. and Raymond Loewen v United States*. Although this is a well known and well publicised dispute, the facts are so extraordinary as to be worth repeating.

The Loewen Group Inc. was a Canadian company and Raymond Loewen was its principal shareholder. Loewen was in the funeral home and funeral insurance

business, and looked to expand from Canada into the United States. To this end, its US subsidiary, Loewen Group International Inc. set about acquiring funeral businesses in the US.

The O'Keefe family owned and operated funeral homes and funeral insurance businesses in the Gulf coast region of Mississippi, including a company called Gulf National Life Insurance. Loewen bought certain of O'Keefe's competitors and, in addition, a business called 'The Wright and Ferguson Funeral Home'. The Wright and Ferguson home was party to a contract with Gulf National Life Insurance which gave Gulf an exclusive right to sell its funeral insurance through the Home. In breach of that contract, Loewen began selling its own insurance through the Home.

O'Keefe brought proceedings for breach of that contract. Loewen and O'Keefe reached a settlement agreement. There ensued a dispute about the meaning of that agreement. O'Keefe proceeded to bring fresh claims, alleging breach of the settlement agreement, fraud and violation of Mississippi antitrust law by Loewen. In its complaint, O'Keefe claimed \$5m US.

The case was heard before a Mississippi jury. Much of the evidence presented in the case was of no relevance whatsoever to the issue between the parties but was, rather, intended to invoke hostility against Loewen. Throughout the evidence O'Keefe's lawyers sought to portray O'Keefe, who had served in the Pacific, as a local war hero fighting against a ruthless, Japanese-financed, foreign competitor⁵, likening his struggle against Loewen to wartime exploits against the Japanese. The judge permitted O'Keefe to lead character evidence, to present pictures of the O'Keefe family and photographs from Mr O'Keefe's military service. A former US Secretary of State for Agriculture was called by O'Keefe as a 'character witness' and proceeded to give the jury an account of his experience struggling to protect American producers from unscrupulous Canadians like Loewen.

O'Keefe's lawyers also sought to portray Loewen as racists and exploiters of the Mississippi black community. Both sides ended up having to produce evidence as to the extent to which they served black and white customers, of no relevance to any of the issues between them, and in closing O'Keefe's lawyers suggested that Loewen would not admit black people to Loewen funeral homes for burial. A few excerpts from the closing give a flavour of their case:

"Your service on this case is higher than any honour that a citizen of this country can have, short of going to war and dying for your country"

"[Loewen] didn't know that this man didn't come home just as an ace who fought for his country – he's a fighter ... He'll stand up for America and he has"

[O'Keefe] doesn't have the money that they [Loewen] have nor the power, but he has heart and character, and he refused to let them shoot him down"

"You know your job as jurors gives you a lot of power ... the power to bring major corporations to their knees ..."

"Ray [Loewen] comes down here, he's got his yacht up there, he can go to cocktail parties and all that, but do you know how he's financing that? By 80 and 90 year old people who go to get a funeral, who go to pay their life savings, goes into this here, and it doesn't mean anything to him. Now they've got to be stopped ... Do it. Stop them so in years to come ... you can say 'Yes, I was there' and talk proud about it."

"1 billion dollars, ladies and gentlemen of the jury. You've got to put your foot down, and you may never get this chance again. And you're not just helping the people of Mississippi but you're helping poor people, grieving families, everywhere. I urge you to put your foot down. Don't let them get away

⁵ In his evidence, O'Keefe revealed that he thought HSBC, which he called the "Shanghai Bank", was Japanese.

with it. Thank you, and may God bless you all."

The Jury ultimately awarded O'Keefe \$500 million dollars⁶, including \$75 million as compensation for the 'emotional distress' suffered by the O'Keefe family, and \$400 million in punitive damages. It included heads of loss which O'Keefe had not even asked for in its closing (in respect of the antitrust, oppression and fraud claims) and was extensively duplicative – awarding sums, for example, both for breach of the original Wright and Ferguson contract and for breach of the settlement agreement whereby the parties had compromised O'Keefe's claim for that breach.

Loewen sought to appeal. Mississippi law, however, required appellants to provide a bond for 125% of the judgment as a condition of staying execution of the judgment being appealed, though allowed this amount to be reduced, or dispensed with, "for good cause". The trial court and the Mississippi Supreme Court refused to reduce the appeal bond at all. Loewen had to post a \$625 million bond within seven days in order to pursue its appeal without facing immediate execution of the judgment. With execution against its Mississippi assets due to start the next day, Loewen entered a settlement with O'Keefe, and agreed to pay \$175 million.

The North American Free Trade Agreement is an investment treaty between Canada, the United States and Mexico. It requires that each state treat investments by one another's nationals in accordance with international law, fairly, equitably and no less favourably than it treats its own nationals' investments. It provides for compensation to be paid when a state expropriates investments, and gives the foreign investor the right to bring arbitral proceedings against the state.

Loewen brought a claim against the United States, alleging that the verdict and the refusal to relax the bonding requirement were violations of the treaty. The case was considered by a tribunal of arbitrators.

The tribunal delivered a lengthy award, finding that:

"By any standard of measurement the trial ... was a disgrace. By any standard of review, the tactics of O'Keefe's lawyers were impermissible. By any standard of evaluation, the trial judge failed to afford Loewen the process that was due"

"...the trial and the verdict were improper and cannot be squared with minimum standards of fair international law and fair and equitable treatment..."

Since a court is an organ of State, its decision can be imputed to the State and the judge's actions could give rise to a claim against the United States. The law requires, however, that a decision of a lower court be challenged through judicial process to the court of last resort, before the State can be held responsible for a breach of international law. The State is afforded an opportunity of redressing, through its own legal system, the breach occasioned by the lower court's decision.

In retrospect, Loewen might (for example) have filed for Chapter 11 bankruptcy protection to forestall enforcement of the judgment, pursued the appeal to the Mississippi Supreme Court without the bond or sought a stay of execution in the US Supreme Court. Instead Loewen had settled the claim. It might have been that the other remedies were not really available to Loewen as a matter of practicality, and that settlement was an inevitable consequence of the impugned decision. There was, however, no evidence as to the reasoning behind Loewen's decision to settle rather than pursue some other course. Accordingly, there was no violation of international law by the US, and so no breach of NAFTA.

Loewen failed for a second reason too. After the hearing on the merits before the tribunal, the Loewen Group Inc. (the Canadian parent company) had filed a petition for relief under Chapter 11 of the US bankruptcy code, and the US and Canadian

⁶ An amount which would, incidentally, have been more than half the Kingdom of Lesotho's GDP for the same year.

courts approved a restructuring, whereby the company ceased to exist, and its operations were reorganised as a US corporation.

A rule of international law requires “continuity of nationality”. This requires that there must be continuous national identity on the part of a claimant from the date of the events giving rise to the claim through to the date of resolution.

The tribunal refers to this as a “*hoary*” rule of public international law and admits that it “*might well puzzle a private lawyer*” as to how a party’s vested interest can simply evaporate in this way. Nonetheless, the tribunal held that, the claimant having become a US party, the claim had ceased to satisfy NAFTA’s jurisdictional requirements⁷.

The Mississippi trial and judgment had taken place in 1995 and the arbitration proceedings had begun in 1998. Hence, even though the tribunal had found unfairness and criticised the Mississippi proceedings in the strongest terms, Loewen emerged from a long and costly action without a remedy. 26 June 2003, the date the award was handed down, was, undoubtedly, a pretty bad day in the Loewen office.

STRENGTHENING THE COMMERCIAL COURT

by James Barratt



Background – collapse of the “Mega Trials”

In the aftermath of the collapse of the BCCI and Equitable Life litigation, the Commercial Court was subjected to unprecedented criticism. Both cases brought public attention to bear on the court’s procedures. The BCCI case collapsed after the Claimants abandoned their 13 year litigation on the 256th day of trial (excluding the 63 days taken up by interim hearings). The defendant’s costs alone were estimated to be approximately £80 million. Tomlinson J who heard the trial made the following observation in his judgment on costs following the discontinuance of the claim:

“I became so concerned about the case that I decided both to consult and to warn the Lord Chief Justice about it. I told the Lord Chief Justice, then Lord Woolf, that the case was a farce ... I warned the

Lord Chief Justice that I feared that the case had the capacity to damage the reputation of our legal system ... The Lord Chief Justice and I discussed whether there were any measures which might be taken either by me or by both of us together in order to persuade the liquidators of the folly of their enterprise. I take full responsibility for the conclusion, which was essentially mine anyway, that there was nothing which could usefully be done...”¹

The Governor of the Bank of England added to the weight of criticism at that year’s Lord Mayor’s Banquet: “A system that is powerless to prevent a case so hopelessly misconceived continuing for thirteen years requires examination.”² Other commentators have referred to the case as a “colossal wreck”.³

⁷ To try and get around this, the Loewen Group, assigned its right to the NAFTA claim to a newly created, Canadian company called “Nafcanco” – a not so subtle reference to NAFTA and Canada. This did not work.

¹ *Three Rivers District Council and others v Bank of England* [2006] EWHC 816 (Comm), at para. 23.

² 21 June 2006, available at: <http://www.bankofengland.co.uk/publications/speeches/2006/speech278.pdf>

³ See in particular, Zuckerman, A., “A Colossal Wreck - The BCCI – Three Rivers Litigation” C.J.Q. 2006, 25(JUL), 287-311.

Long Trials Working Party

In the wake of such public attention, the Commercial Court Long Trials Working Party under the chairmanship of Atkins J was set up. The Working Party was given an extensive remit to “*consider all aspects concerning the management of heavy and complex cases in the Commercial Court.*” It was made up of members of the judiciary, barristers, solicitors and other users of the Commercial Court. It met eight times in 2007 and published its 81 page report on 6 December 2007⁴.

The Working Party’s proposals and recommendations were adopted by the Commercial Court User’s Committee and are currently being put into practice for a trial period between 1 February 2008 and November 2008.⁵ Litigants should therefore be aware of the key changes, aims and objectives as these may very well apply to their case.

The Key Recommendations

The overarching point to emphasise at the outset is that despite the widespread criticism of the failed “mega trials”, the report does not recommend any truly fundamental changes to the procedures of the Commercial Court. The way in which litigation is conducted procedurally before the Court will remain largely the same.

The report does usher in a number of proposed reforms to how cases are conducted with the aim of ensuring that case management and litigation generally is conducted more efficiently. It makes a number of key recommendations covering the whole of the litigation process (including pre-action), and we have included a summary of these (all of which ought to form part of the current pilot scheme in the Commercial Court) with this newsletter. Very broadly, three main themes emerge:

- Getting rid of “bad” claims without trial.
- Getting the parties to really focus on the issues and streamline the case.
- Costs – using costs orders as a case management tool and dealing with the assessment of costs at the end of the litigation.

The Working Party expressly concluded that the Civil Procedure Rules contained sufficient powers to enable its proposals to be implemented – it does however envisage that the Commercial Court judges will make greater use of their case management powers, including in situations where proactive judicial intervention that might hitherto have come as a surprise. Furthermore, the Working Party strongly rejected radical proposals for change, including charging a daily court rate for use of the Court which had been considered by the Ministry of Justice.⁶

Looking at the three main themes in turn:

Getting rid of “bad” claims

We would be surprised if many of our readers have experienced a Commercial Court judge politely asking the Defendants at a case management conference if they had “thought about” applying to have the claim against them struck out. Any such comment from the bench would immediately set off alarms bells, but such an enquiry by the judge is one of the matters specifically referred to by the Working Party. The report encourages the use of the court’s powers to dispose of issues at an early stage, although the test for applications for summary judgment or striking out under the CPR remains unaltered.

Interestingly, the report talks about costs “not following the event” in appropriate cases where, say, a strike-out application has been made but was unsuccessful. Ordinarily, the party whose case survived the attack would expect to recover the costs of the application from the losing party. Not so in some cases, says the Working Party. Where an application was merited (it had some prospects of success), but eventually

⁴ Report and Recommendations of the Commercial Court Long Trials Working Party, 6 December 2007, available at http://www.judiciary.gov.uk/docs/rep_comm_wrkg_party_long_trials.pdf

⁵ See the statement by the judge in charge of the Commercial Court, Andrew Smith J on 28 January 2008, available at http://www.judiciary.gov.uk/docs/long_trials_statement.pdf.

⁶ Report, paras. 122-123.

failed, the costs might become costs in the case to be allocated at the end of the claim when the ultimate winner is known.

Judges are generally encouraged to express a view on the merits at early procedural hearings (though those views are unlikely to be final), so that litigants can expect greater “feedback” from the judge on the claim. Early neutral evaluation, a service offered by the Commercial Court, is also highlighted in the report. All this should give litigants a better idea of their prospects of success, and the Working Party hopes that it will weed out bad claims.

In addition to recommending increasing use of measures aimed at early disposition and perhaps more subtly, the Working Party has sought to prevent cases taking on a life of their own with clients losing track of what it is that is being argued on their behalf (as might happen in a particularly complex matter where the lawyers have been given free reign). Statements of truth are now to be “refreshed” shortly before trial, the question thereby put to the clients being: Are you still sure this case is true and well-founded (and, implicitly perhaps, do you really want to go ahead to trial)?

Focus on the real issues

The Working Party has criticised the length and prolixity of Statements of Case as currently seen in the Commercial Court. It has recommended that without permission of the court, no party may file a Statement of Case longer than 25 pages. That is significantly shorter than the pleadings in any number of complex claims. The report states that each party should set out the relevant facts that are sufficient to inform the other side of the case they have to meet. In our experience, rebutting a claim premised on a few factual matters (and leaving a host of other matters going unmentioned) can require a fairly detailed explanation – and the imposition of an artificial limit may therefore become an issue in certain situations. Provided that the court’s permission is given when it really is required, shorter pleadings are no bad thing.

Witness evidence has also been criticised, for being expressed in excessively legal language and arguing the case (so not being in the witness’ own words – unless they were particularly argumentative!).

The report also introduces a new court-approved document aimed at narrowing the issues. The “List of Issues” must be prepared by the Claimants following close of pleadings. The list will be approved by the judge at the first CMC, following what the Working Party envisages to be a proactive review of the issues that really need to be decided to dispose of the claim. The list should, where necessary, also identify the matters to be addressed by expert evidence. Witness and expert evidence, as well as disclosure are to be closely tailored to the List of Issues. Witness statements should address the court-approved issues under separate headings, and be limited to relevant facts. While disclosure on the standard basis continues to be the norm, but the Working Party suggests that in appropriate cases, disclosure requests would need to be framed by reference to the List of Issues.

Costs

The costs of taking a case to trial in the Commercial Court can be considerable – though it must be borne in mind that the amounts at stake frequently exceed legal fees by a multiple. The general rule is that the winning party is entitled to recover a reasonable amount in respect of costs from the opponent. However, converting that entitlement in principle into hard cash can be a time-consuming, costly and frustrating process. A detailed assessment of a bill of costs worth GBP several hundreds of thousands might require lengthy hearings before a costs judge. The Working Party has realised this and suggests that there should be a summary assessment by the judge in all cases where costs are less than £250,000.

Summary assessment of costs was previously limited to one-day hearings only, where costs would ordinarily only be a fraction of the new limit. The Working Party’s expansion of the summary assessment jurisdiction to include much

longer hearings is to be commended, provided that judges are willing to be sufficiently robust to make it work in practice.

In our experience, summary assessments tend to work in favour of the party seeking

to recover costs, unless the amount claimed is patently unreasonable. There seems nothing objectionable in giving the winner a better chance to recover a good proportion of the outlay there and then.

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MEET THE TEAM

Each quarter we will introduce one of the members of Howrey LLP's International Dispute Resolution Group.



ODILE VAN REGEMORTER
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Odile is part of Howrey's arbitration team in Paris, which is led by Jean de Hauteclocque. As part of the Paris team, Odile works on both international and domestic arbitration matters in the impressive surroundings of the "hôtel particulier" at 21 rue St Guillaume that became Howrey's new Paris base last year.

Prior to joining Howrey, Odile studied commercial law and in particular private international law at the University of Paris II, Panthéon Assas. She has maintained a keen interest in both areas. Complex commercial disputes, frequently with an international angle, are the focus of Odile's practice.

Odile is fluent in English and also speaks some German. When not working on international business disputes, Odile enjoys playing the piano. Her favourite piece is Moonlight Sonata (both very nice to listen to and very easy to play).

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