

# From threats to opportunities

## *An exciting future for civil lawyers.*

Written by Dr Peter Jepson (published in the 'A-Level Law Review' April 2010).

The Master of the Rolls, Lord Neuberger, recently presented a keynote address to Butterworths' Financial Institutions Litigation Conference (23<sup>rd</sup> October 2009) called '*A Judicial perspective on the conduct of claims in the current climate*'.

This speech highlighted the severe injustice felt by many as a consequence of the global financial crisis. He argued that in the United Kingdom, thanks to government intervention, we have not seen the collapse of banks, while other countries (including the USA) have. He pointed out that homeowners, people with savings in various banks, those who have saved for pensions, individual shareholders, institutional investors, small, medium and large businesses, employers, and employees, have all suffered. With perhaps no sector of society that has not been affected, or will not in some way be affected, by the credit crunch and its aftermath.

He cited as an example, a recent headline in the Financial Times of '*3,700 investors to pursue Lehman claim*'. He further cited how Burford Capital had announced that it had set up a £80m fund to underwrite the costs of legal proceedings to be brought by those who have lost money as a consequence of financial institutions' activities, misjudgements, fraud and the like.

### **Rise in litigation to be expected.**

In effect, Lord Neuberger's argument is that many civil cases take years (10-15 years is not uncommon) to reach court and the judiciary can expect a significant rise in litigant cases as a result of the credit crunch. He also argued that we could expect to see increased regulation of the financial institutions, with the resulting need for legislative drafting and possible legislative challenge. He pointed out that insolvency, bankruptcy and restructuring work will increase and how there is a need for change in the judicial system to accommodate the need for those involved in justice. In effect, he argued for a more efficient and speedy way of resolving disputes. Central to this, of course, must be Alternative Dispute Resolution (ADR).

### **Issues of jurisdiction.**

What was especially interesting about the keynote speech was his discussion over difficult questions of jurisdiction. The thrust of his argument is that capitalism works beyond national boundaries. Thus, claims involving multi-national companies have implication way beyond the jurisdiction of the court that is hearing the case. What is more, the litigation claims will increase in number, and there will be far more complex cases than ever before.

Lord Neuberger predicted that there would be a need for more Judges in the Chancery Division to deal with the expected rise in cases. He also suggested there will be a growing need for cross-border consultation and co-operation between judges, for issues associated with insolvency, litigation, treaties etc.

He quite logically argued that parties and courts would have to work together to ensure that cross-border claims can be dealt with properly and efficiently. He argued that technology is likely to play an important role, with dialogue between the courts by telephone and video-link. He accepted that there could be difficulties with judges discussing matters outside of the hearing of the parties, since such discussions could be subject to appeal, and he suggested, therefore, that transcripts of such discussions would need to be made available to the parties.

However, he went on much further than cross border-dialogue. Indeed, he argued that we would start to see joint hearings across borders via video-link. Thus, we could see the parties in one court making submissions simultaneously before US and UK courts.

### **Problems of multi-national courts.**

Certainly this proposition by Lord Neuberger has far reaching implications, but it is also fraught with difficulties. Let us imagine for one minute the problems of dealing with a case in such a multi-national court. Are the Court bound by the ratio decidendi of a case from the House of Lords/UK Supreme Court? Possibly, if you are the UK litigant you may be happy to accept this, but would you if you are the US respondent? Likewise, would a UK litigant (or respondent) consider himself bound by decisions consistent with the US Constitution and US Supreme Court? What is more, even if the parties do accept the outcome of the case, is it right that future cases may be bound by decisions that have been based upon cases from a foreign jurisdiction, or are consistent with a US Constitution that does not bind UK citizens?

### **An alternative multi-national approach.**

To my mind, there are major jurisdictional problems with multi-national courts and great care will need to be taken before we should go down such a road to justice.

Possibly, a better solution is to establish a multi-national tribunal system with judicial representatives from the interested countries sitting on the panel. These expert tribunals could then tackle the multi-national issues and reach a conclusion that could be enforceable within the countries involved. This, in many ways, is consistent with how Jewish companies' resolve issues through the Beth Din. In effect, allowing the Jewish community to reach decisions consistent with their own traditions and being implemented thereafter by the UK courts.

## **Future lawyers.**

Central to Lord Neuberger's argument is that it is *"apparent that the courts and lawyers both here and abroad will have to innovate. They will have to adapt to the changing times and the nature of litigation arising from financial events unprecedented in the breadth, complexity and magnitude"*.

**What this suggests is that those students at the start of learning law now can expect an exciting and challenging future.** There will be a growing need for more lawyers over the next decade or so. What is clear is that future lawyers will need to have a legal education that is much more multi-national than at present. Certainly, students that can combine a fluent speaking language(s), with law, will be highly sought after by company law firms.

In my view, legal education in the future will be far more interesting and challenging, with a multi-national understanding and approach inevitable. Thanks to the arguments of Lord Neuberger, law has suddenly become much more interesting.

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