LITIGATION

Nina Goswami, senior reporter

The litigation increase expected to come out of the global economic climate may take some time to take hold, but litigators are already in their busiest period for almost a decade.

Looking back to the recession of the 1990s, litigators said it took around two years before economy-related cases hit the courts. They expect that this will be the same this time round; however, the number of disputes is likely to be a lot higher.

These Litigation and ADR Special Reports examine many of the cases that have been keeping the courts busy this year, including the Court of Appeal's ruling in *BSkyB v Virgin* that the client's right to choose its legal team is paramount.

Other cases that are showcased include *Springwell*, *UBS v Vestra* and *Yeoman's Row*.

Elsewhere we also consider how the economic turmoil has inevitably impacted on the number of cross-border disputes.

Choice roles

BSkyB's recent court battle with Virgin Media has provided fresh support for the principle that a client's right to choose their lawyer is paramount, says Rachel Couter

The Court of Appeal has judicially determined that a client's right to choose their lawyer is paramount and should not be displaced unless absolutely essential.

It is a fundamental obligation of litigants (and their lawyers), whether by rule 31.22 of the civil procedure rules (CPR) or an implied undertaking, that they may only use documents disclosed by their opponents for the purposes of those proceedings unless an exception applies.

Can that obligation, like a conflict, ever prevent a client from instructing a lawyer, for example, because there may be a risk of an inadvertent breach, or that material produced in one proceedings might assist in or inform the advice the lawyer gives in another? To put it another way: where does a lawyer's experience end and a breach begin?

The author has been on the receiving end of arguments that a lawyer cannot act in such circumstances and that a client must put in place a 'Chinese wall'. It is comforting, therefore, that the Court of Appeal in *BSkyB v Virgin Media* (2007) has brought some clarity to the issue.

The case arose out of a long-running battle concerning allegations of anticompetitive behaviour. There were proceedings both in the High Court and before the Competition Appeal Tribunal, as well as an investigation by Ofcom. Many of the documents disclosed in the court proceedings were of such commercial sensitivity that the parties agreed exceptional measures to protect their confidentiality, over and above CPR 31.22. In particular, they agreed that the sensitive documents would only be disclosed to identified opposing external lawyers, who gave express undertakings not to disclose them to anyone else, including their clients.

BSkyB, however, contended that the agreement did not go far enough. It wanted Virgin's lawyers in the court proceedings to be prevented from acting in the other proceedings (BSkyB had instructed separate lawyers) because, having seen the sensitive documents, they would inevitably be influenced by the knowledge that they acquired (if only subconsciously), either in the manner in which they represented Virgin or in the advice that they gave to Virgin.

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Many of the documents disclosed in *BSkyB v Virgin Media* were of such commercial sensitivity that the parties agreed exceptional measures to protect their confidentiality

The Court of Appeal disagreed. Its starting position was that litigants should be free to choose their lawyers. A conflict of interest was different. As the Federal Court of Canada in *Merck & Co v Interpharm* (1992) had observed: "The implied undertaking would be most impractical if it resulted in an ability to remove from a case any solicitor who was bound by [one]. The implied undertaking is not of sufficient public interest when balanced against the right of a party to choose his own solicitors and the public interest in the efficient administration of justice to require the court to disqualify any solicitor who might wrongly deploy information subject to the undertaking. If a solicitor fails to observe the undertaking the remedy is to cite him for contempt, not to remove him."

The Court of Appeal concluded: "In a rare case, the fact that documents have been disclosed to solicitors acting for a party in one set of proceedings might conceivably preclude those solicitors from acting for a different party in another set of proceedings. We find it hard to conceive of circumstances where disclosure in one set of proceedings would preclude lawyers from acting in other proceedings between the same parties."

In *BSkyB v Virgin*, the parties to the three proceedings were the same (or were at least accepted to be so for the purposes of the court's decision). The Court of Appeal clearly took some comfort from the fact that, had special arrangements to restrict disclosure to external lawyers not been in place, disclosure of the documents would have been made to the parties themselves, who would then necessarily have carried that knowledge with them when participating in the other proceedings. In those latter circumstances, the Court of Appeal considered that no question would have, or could have, been raised about preventing Virgin from using its preferred lawyers.

But what if the parties to the second claim (who wish to instruct the same lawyer) are not identical to the first, but, perhaps, a different member of the relevant party's group or, indeed, a completely unrelated third party? Lawyers must clearly keep their clients' affairs confidential, but they must also disclose to their clients all information material to their clients' instructions.

The author submits that, absent a conflict, and provided both clients give informed consent to the same lawyer acting *and* informed consent, the lawyer is under no duty to disclose to the first client any material information of which they become aware in the course of the second claim. Vice-versa, there should be no reason in principle why the same lawyer cannot act in both proceedings. As the Court of Appeal rightly noted, a client's right to choose their lawyers is of paramount importance. ■

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