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Law Diary
Edward Fennell



Silence rules supreme

Supreme Court justices appear to have adopted a self-imposed vow of silence — not to speak, tweet or otherwise comment between now and the start of the sensitive Brexit hearing next week. Lord Mance has pulled out of a lecture on European law he was due to give tonight, while Lord Neuberger and Lady Hale have gone quiet after coming under fire (for tweets by the former's wife and a speech by the latter). The court's spokesman is left to do any speaking. He says: "The justices regularly give public lectures explaining the work of the Supreme Court and wider legal system, although at the present time we are conscious that comments about European law might risk being overinterpreted."

Border crossing

Law firms are having one of their regular spasms of merger mania. One more credible coupling is between Addleshaw Goddard and the Scottish firm HBJ Gateley. John Joyce, the managing partner at Addleshaw Goddard, says that the firm had been ambitious for a presence north of the border and he is "delighted with the overwhelmingly enthusiastic response" from both firms. Malcolm McPherson, the senior partner at HBJ, is equally keen. A good sign for the state of the union, UK or EU? Hard to say.

D-I-V-O-R-C-E

We are in the middle of Good Divorce Week, as promoted by Resolution, the association of family lawyers. Wilsons, the smart Salisbury family law firm, has published tips "to help reduce animosity during the divorce, which could save unnecessary legal costs and prevent delays created by getting bogged down in vitriolic arguments". What caught my eye was that "unreasonable behaviour petitions should be kept benign". Jacqueline Fitzgerald, a Wilsons partner, advises: "If your description of your partner in the unreasonable behaviour petition hits a nerve with your spouse, they may object to it, adding more time to the process." Clearly least said...

'Kill all the lawyers'

As the 400th anniversary celebrations of Shakespeare's death conclude, the Bard lives on in the legal world. On Sunday prominent lawyers and actors staged the trial of Hamlet at Wyndham's Theatre in London's West End, raising £60,000 for the Shakespeare Schools Festival. Shakespeare was also the theme for Burges Salmon's annual party, with the Insane Root theatre company performing extracts. Ben Crispin's St Crispin's Day speech from *Henry V* brought tears to the eyes of some; yes, even lawyers.

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Funding lawsuits is 'only game in town'

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The king of litigation held court last night when Lord Gold — formerly David Gold, senior partner of rough-and-tough Herbert Smith — convened a reception at the Palace of Westminster. The City's dispute resolution specialists turned out in their droves.

It was a rather special occasion. Lord Gold chairs the recently launched Balance Legal Capital and it was an opportunity to show off his new entrant to the third-party litigation (TPL) scene.

There could be no better time to do so. Only last week the multimillion-pound Excalibur Ventures oil exploration case blew up in the face of speculative investors, illustrating the dangers for those who venture into this complex area. However, while scaring off amateurs, Excalibur underlined, as Christopher Bogart, chief executive of Burford Capital, commented, the "complete acceptance of litigation finance funding [by the appeal judges] as an integral part of today's justice system".

And, by implication, the case added to the lustre of the professional TPL funders — including members of the Association of Litigation Funders (ALF). "I would only ever consider referral to a member of the ALF, the independent body charged by the Ministry of Justice with the self-regulation of litigation funding in England and Wales," said Gordon Dawes, of Mourant Ozannes.

So the arrival of the highly experienced Lord Gold on the TPL scene is another clear endorsement of third-party funding as an important route to justice. Progress, however, has been slow. Ten years ago, when the ALF was founded, the prediction was that there would be 20 members by now. The number is half that: persuading investors to put money into litigation has not proved easy for start-ups.

For those with the right skills and persistence, however, the results have been good. Typically a funder will collect 25-50 per cent of the damages recovered. For example, Calunius, which is run by Leslie Perrin (also the chair of the ALF), manages £200 million of litigation assets and has serial investors. "The big challenge is to reach a critical mass," says Perrin. "It is not enough to be a good litigator to be a litigation funder. You need to be a good litigator [to pick the right cases to back] and you also need to be a banker."



The Excalibur Ventures oil exploration case against two US oil companies illustrates the risks of third-party funding

Nonetheless, the driving force for TPL remains simple. Going to court for commercial cases is massively expensive, and for many businesses is now unaffordable. "English justice is increasingly pricing itself out of the market — look at the volume shifts in arbitration to places like Singapore and Dubai that used to be done in England," says Bogart. "I predict that in five years' time, every corporate CFO and general counsel will be exploring financial alternatives for costly litigation."

And as Simon Kamstra and David Engel, of Addleshaw Goddard, point out, international arbitration centres such as Hong Kong, Dubai and Singapore are moving towards TPL. "All these venues are in competition against the traditional venues — London, Paris, Stockholm, etc — for the world's arbitration disputes, so they wish to be seen as keen to support and embrace the new options," says Kamstra.

TPL funders are now approached by lawyers on behalf of potential litigants. "The litigation funding market has diversified from funding one-off 'big ticket' commercial litigation to providing funding solutions to a much wider spread of types and sizes of claims," says David Hall, of Burges Salmon. "As a result, litigation funding has become an

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important consideration for solicitors in the majority of cases." TPL is predicted to take off in Scotland too. "Litigation funding in Scotland has always been possible," says Robert Rothkopf, of Balance Legal Capital. "It's now being recommended by the Taylor Review [the Scottish equivalent of the Jackson Review]. We're talking to firms in Scotland, because there is a need for third-party funding there. It will be a matter of finding the right cases."

In some of those cases, TPL is virtually the only way to get lift-off. "For insolvency practitioners, for

example, whose estate is lacking the necessary funds to bring a claim, litigation funding is the 'only game in town'," says Marius Nasta, of Redress Solutions.

However, as he points out, only a small minority of the cases have the potential to be adopted. "We are looking for claims with clear and good merits, solvent defendants, attractive returns and a credible legal team to run them. If any of these ingredients are missing, we won't invest in it. There is no point in funding a case that is good, but hopelessly pleaded; or one which may result in a judgment in the claimant's favour that cannot be enforced."

For the lawyers, there can be dangers. Vernon Dennis, of Howard Kennedy, warns: "Lawyers in this arena need to acknowledge that, like it or not, they're working for two masters. Acting for the claimant with disregard to the commercial imperatives of the funder will result in ruination for all."

Times Law

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Lawyer of the week Zoë Fleetwood

Zoë Fleetwood, a partner at Dawson Cornwell, acted for the terminally ill 14-year-old girl, known as JS, who won a historic High Court ruling that her mother should be allowed to decide what happened to her body after death: the girl's wish was to be cryogenically preserved.

What were the main challenges? At 14, JS could not make a will and no legal remedy was immediately clear. A novel solution was a prospective order under section 116 of the Administration of Estates Act 1925. Time was also a major difficulty: thankfully



Mr Justice Peter Jackson managed the case impressively swiftly.

What's the best decision you've taken as a lawyer? The barrister Alev Giz and I persuaded a 19-year-old to give evidence about her childhood sexual abuse: that she was believed made a huge difference to her life.

Who has inspired you? My parents; my sister, Louise, who is also a lawyer; my artist husband, David; and Saika Alam, who trained me. I am privileged to work with an amazing team led by

Anne-Marie Hutchinson, QC (Hon).

What's the oddest thing that has happened to you? Being directed by the court to travel urgently to Brussels, only to find my passport had expired — not my finest hour as an international family lawyer.

What's the best advice you've received? Challenge authority: if you don't question everything then you have to put up with the status quo.

Which three qualities should a lawyer have? A family lawyer has to be a really good listener — and have incredible energy and staying power.

What law would you enact? A reversal of the many welfare and

housing cuts since 2010, which I believe have directly contributed to the relentless rise in the number of care cases, referred to as a "crisis" by Sir James Munby, president of the family division of the High Court.

How would you like to be remembered? As part of the Resolution campaigns for no-fault divorce and the review of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. And as a good mum, a loving wife, a caring friend and supportive colleague. People might say, "She worked really hard"; hopefully it might one day be: "She was great fun!"

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