

# contentious business update

## Managing the costs of disputed proceedings



In all commercial disputes, there is an unavoidable tension between the risk litigation poses and the client's desire for costs certainty. The dispute which has arisen will often be unforeseen and almost invariably unwanted. Finance directors need to make provision for legal costs in the accounts of their business. An individual litigant needs to structure his or her finances to meet those costs.

We know that our clients need to be sure about the costs of our services, and always aim to provide a costs estimate with our initial assessment of the case. We endeavour to keep clients informed of costs as a case develops.

For straightforward uncontested matters, we provide costs certainty by agreeing a fixed fee for the job. Where costs can be recovered from an opponent, those costs can be reduced or recovered in full.

Achieving such cost certainty in contested matters, is inevitably more difficult, because of the number of different variables involved. The majority of arbitrations and court proceedings continue to be charged at the traditional hourly rate. This does not provide clients with the certainty and transparency to assist them in effectively managing their financial exposure. It may even be the difference between whether to pursue or defend a claim in the first place.

Whilst alternative pricing structures may not always be the answer to improve certainty around costs, Hill Dickinson has devised Fee Simple, a range of pricing and service options to support our clients in confidently managing their costs. We work with our clients from the outset to determine their chance of success. Should they then choose to proceed, we assist in selecting the most cost-effective option that best suits their case and individual circumstances. This will help to minimise financial risks for the client, and enable them to focus on the case in hand.

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## Welcome

There have been many positive developments to celebrate since the last edition of our contentious business update. Following our merger with the former Halliwells' Liverpool office, we are pleased to welcome Colin Gibbons, Fiona Parry, Harvey Stringfellow, Dominic McGinn, and their support teams. Julian Diaz-Rainey has joined us in Manchester, whilst in our new Sheffield office, Giles Searby heads up the commercial litigation team.

In this edition, we consider the implications of the Wayne Rooney judgment against his former agents, a case which put the Hill Dickinson dispute resolution team in the national spotlight. We also look at the impact the Bribery Act will have on UK businesses. The economic climate continues to be difficult, and we also include a feature on Fee Simple, examining different ways in which we can assist clients to fund cases.

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We would welcome any comments readers may have on the articles in this newsletter, or any related topic, and would be happy to publish suitable commentary in a subsequent edition. Please contact the editors, whose details are on the back page.

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## The Fee Simple service includes:

### Conditional Fee Agreements (CFA)

For claimant work, no fee is charged unless the claim is successful. Third party outlays are to be funded throughout the case.

### Partial Conditional Fee Agreements

A lower hourly rate is invoiced monthly during the course of the matter. Where the case is successful, or settled in the client's favour, our costs, including the success fee, are recovered from the opponent. If unsuccessful, the client will pay no more than the discounted hourly rate fees already paid.

### After the event insurance (ATE)

We are one of the few firms with delegated authority from a leading insurer to enter into an ATE policy. ATE will indemnify the client in respect of their opponent's costs in the event their case is unsuccessful, and our arrangements will usually mean that no insurance premium will be payable. ATE cover may be available for hourly rate matters, as well as those dealt with by CFA or partial CFA.

### Fixed fees

A fixed fee is pre-agreed for each element of the litigation process, irrespective of eventual actual cost.

### Access to third party funding

Through our network of contacts we introduce our clients, in appropriate cases, to third party funders to fund their case in return for a share of the outcome, if successful.

Fee Simple gives our clients cost certainty, improved cashflow, flexible costing options to suit their needs, and reduces litigation risk.

Details are available from your usual Hill Dickinson contacts or [geraldine.ryan@hilldickinson.com](mailto:geraldine.ryan@hilldickinson.com)

# Naomi Campbell and the High Court judge

The title of this article is, I'm afraid, deliberately misleading. The link between High Court judge, Judge Jackson, and the supermodel, Naomi Campbell, concerns conditional fee agreements (CFAs) - not exactly the topic to launch a flurry of tabloid headlines.

Naomi Campbell was in the news in January when the European Court of Human Rights (ECHR) handed down its judgment in [MGN Limited -v- United Kingdom](#).

The original case to which this related was a claim brought by Naomi Campbell following a front page article in the *Daily Mirror* which included photographs linked to her alleged addiction to drugs. She brought an action against MGN, *The Mirror's* publishers, for breach of confidence and misuse of private information. She succeeded at first instance, only for the Court of Appeal to unanimously overturn that decision. When the matter came before the House of Lords, they reinstated the judgment in her favour, awarding her a princely £3,500 in damages.

MGN made a second appeal to the House of Lords seeking a ruling that it should not be liable to pay the success fees of her legal team, 95% for solicitors and 100% for counsel, who were acting in the House of Lords appeal on a CFA basis. That appeal was also unsuccessful, and again, MGN were ordered to pay costs. The litigation costs were extensive; over £1 million including the first House of Lords appearance, with a further £250,000 for the second House of Lords appeal. MGN settled on a compromise figure for costs, but pursued its arguments further to the ECHR.

These arguments centred on the operation of the law in the English courts, restricting MGN's rights to freedom of expression under Article 10 of the European Convention on Human Rights. There were two strands to its

case. The first claim was that the award of damages against it represented a disproportionate interference with MGN's right of freedom of expression. This was rejected.

MGN further claimed that the costs awarded, including success fees, constituted a disproportionate interference with its right to freedom of expression. This second strand of their claim was successful. The court agreed that the claimed success fees of £365,077, more than 40% of the total appeal costs, were disproportionate to the legitimate aims of the CFA system.

In its judgment, the ECHR quoted with approval four flaws inherent in the recoverability of success fees in civil litigation, highlighted in the costs review conducted in 2010 by LJ Jackson. These were:

- the lack of focus of the regime and lack of any qualifying requirements for claimants who would be allowed to enter into a CFA;
- the fact that there was no incentive on the part of the claimant to control costs and judges assess costs only at the end of the case, when it is too late to control the legal spend;
- the fact that the costs burden on the opposing party was so excessive that often that party could be driven to settle early despite good prospects of a successful defence; and
- the regime provided the opportunity to 'cherry pick' winning cases to conduct on CFAs.

Following the ECHR findings, the government will now be obliged to bring in legislation to cure the unlawfulness of the existing CFA

regime, at least in relation to defamation and privacy cases. Almost certainly, the decision has given further impetus to the implementation of the Jackson Review recommendations for costs in litigation generally. This in turn will have wider implications for the funding of litigation (see the article in this edition on Fee Simple for more information).

In March, Ken Clarke confirmed the Government's intention to implement the majority of Lord Justice Jackson's proposals. It seems likely that before long, the ability of a party to recover a success fee from its defeated opponent will no longer apply.

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# The Bribery Act 2010 – are you ready?

The Bribery Act 2010 will sweep aside our antiquated anti-corruption legislation, creating a corporate offence of “failure of commercial organisations to prevent bribery”. The Act had been due to come into force in April 2011, after a previous delay last summer. The April start date has now also been put back. It had been suggested in some quarters that this signals, on the part of the coalition, a lack of appetite for legislation pushed through by the previous Labour Government. The Ministry of Justice, however, has now published new guidance on the Bribery Act to help businesses put into place practical and adequate anti-bribery procedures. The Act will now come into force on 1 July 2011.



The new Act will have far reaching implications, both geographically and in terms of the extent to which individuals and organisations can be held liable for bribery offences. The new regime creates four new bribery offences.

### Active Bribery – Section 1

This prohibits giving, offering or promising a bribe and applies to the public and private sector. A bribe is defined as a financial or other advantage in circumstances where:

- it is intended to induce someone to perform their function or activity improperly;
- it is intended to reward the recipient for improper performance; or
- it is known or believed that accepting the advantage would itself constitute improper performance.

'Advantage' includes non-cash benefits, such as gifts and corporate hospitality. With active bribery, there must be knowledge on the part of the offeror that the advantage will result in improper performance of a function or activity. 'Improper performance' is defined as breach of an expectation of good faith or impartiality.

### Passive Bribery – Section 2

This prohibits a person from requesting, agreeing to receive, or accepting a financial or other advantage, where:

- it is intended that as a consequence a relevant function or activity will be performed improperly by the recipient or another;
- the acceptance of the advantage of itself constitutes improper performance;
- the advantage is a reward for improper performance; or
- the recipient improperly performs

a relevant function or activity in anticipation or as a consequence of the advantage.

As with active bribery, the offence applies equally to the public and private sector. However, unlike active bribery, it is not necessary for the offeree to believe that their performance of the function or activity is improper. Therefore, there is no need for the prosecuting authorities to establish proof of intention.

### Bribery of Foreign Public Officials – Section 6

The Bribery of Foreign Public Officials (FPO) offence is committed where someone offers, promises, or confers an advantage to an FPO (or another at an FPO's behest), and:

- it is intended to influence the FPO in his capacity; and
- it is intended to obtain or retain business or otherwise gain a business advantage; and
- the local written law neither permits nor requires the FPO to be so influenced.

To some extent, there is an overlap with active bribery; however, the FPO offence does not require the same level of impropriety. It could be argued that all forms of corporate hospitality envisage influencing the recipient, or gaining a business advantage. Therefore Section 6 will potentially impact on anyone seeking to carry out business abroad.

### Corporate Failure to Prevent Bribery – Section 7

One of the main features of the 2010 Act is that it will be easier for the authorities to prosecute corporate bodies. As of April 2011, where any person "performing services" on behalf of a company (or partnership) bribes

another, the organisation will be strictly liable. Previously, for a company to be liable, it would be necessary to demonstrate that the person giving the bribe had sufficient seniority for their conduct to be viewed as an act of the company. Now, it will be sufficient to demonstrate that the person was employed by the organisation. It remains to be seen how far the definition of "performing services on behalf of" will extend. It is difficult to predict whether companies will assume liability for the acts of others where the relationship is less straightforward than that of employer and employee - such as connected companies and commercial agents and service providers.

### Adequate Procedures – Section 9

The Section 7 offence is one of strict liability. However, there will be one defence available to companies where "adequate procedures" have been put in place to safeguard against service providers committing acts of bribery. The Ministry of Justice has issued draft guidance, which it is expected will be finalised soon. In summary, the draft guidance sets out six principles that it is recommended corporate entities follow to minimise exposure under Section 7:

1. Risk assessment – this may involve a comprehensive review of the extent to which a company is exposed to the risk of bribery.
2. Top-level commitment – companies need to be seen at the highest level of management to endorse anti-corruption measures. This could be emphasised by a statement on the company website or in promotional materials.
3. Due diligence – organisations should assess the risk posed by third parties,

such as subsidiaries (particularly if abroad), customers, agents, and officials in other jurisdictions.

4. Clear policies and procedures – anti-bribery policies should be readily accessible to all employees and clear guidance provided.

5. Effective implementation – internal roles should be clearly defined at all levels in order to promote collective responsibility. This should be enhanced by proper training and a clear policy on reporting potential breaches.

6. Monitoring and review – the obligation to avoid bribery is a continuing one subject to regular review.

The burden of proof that “adequate procedures” have been put in place rests with the organisation being investigated. The above is just a summary, and the draft guidelines are accessible at [www.justice.gov.uk](http://www.justice.gov.uk), along with useful illustrations on how organisations can implement the six principles in practice.

### What is the impact of the Bribery Act abroad?

The new Act extends beyond the scope of acts and omissions in the UK. Even where an offence has taken place outside the jurisdiction, the Serious Fraud Office can prosecute if it has been committed by an individual ordinarily resident in the UK, a British citizen, a body incorporated in the UK, or an overseas company or partnership which carries on part of its business in the UK.

Notwithstanding its impact globally, the new legislation makes little provision for the fact that other countries invariably have differing approaches to corruption and its prevention. Even where it might be local custom to offer

gifts and incentives, such conduct will only be taken into account where expressly permitted by written law of the country concerned. In reality, this almost certainly will not be the case and therefore the UK legislation will prevail. Likewise, little provision has been made for “facilitation” payments, i.e. small but routine payments to public officials to ensure procedures are carried out efficiently. As things have been left, this will remain a matter for the discretion of those prosecuting.

### Implementation and enforcement

Enforcement of the legislation is the responsibility of the Serious Fraud Office. In addition to criminal sanctions which include oppressive investigatory powers, unlimited fines and the potential for up to 10 years imprisonment, the SFO also have the option of bringing civil proceedings to recover the proceeds of crime. This is a double-edged sword in that the penalties are less severe, but, the civil standard of proof is the less stringent “balance of probabilities” test, as opposed to the criminal test of “beyond reasonable doubt”. Add to this the grave impact on an organisation’s reputation and potential debarment from government contracts and it is easy to see why it is so essential for management to ensure compliance with the requirements of the act.

It remains to be seen just how much impact the Bribery Act will have on how the UK does business, but it does mean that we will all have to think twice before throwing that elaborate, no expenses spared, client party. Perhaps we are safer bombarding you with legal updates instead!

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## [Proactive Sport Management Limited -v- Wayne Rooney, Stoneygate 48 Limited, Coleen Rooney, Speed 9849 Limited \[2010\] EWHC1807](#)

**The Manchester trial of Proactive’s claim against Wayne and Coleen Rooney and their company attracted national publicity. Hill Dickinson’s Geraldine Ryan co-ordinated the legal team representing Wayne and Coleen and their companies.**

The outcome of the trial vindicated the Rooneys’ stance in opposing the claim. Proactive sought to recover approximately £8.3 million. Ultimately, Coleen’s company was ordered to pay £90,000, representing less than half the £215,000 claimed, and significantly less than the £100,000 offered prior to trial. Proactive’s award against Wayne was £5,000 for accountancy services rendered, as well as a quantum meruit award, a fair commercial assessment for the services actually provided to him. Given the payments that Proactive had previously received (£1.9 million) it is believed the figure here is likely to be significantly less than the £330,000 claimed. The trial judge refused Proactive permission to appeal. At an oral hearing in February, the Court of Appeal granted Proactive permission to appeal, at a three day hearing in July 2011.

The trial lasted for 13 days. Judgement ran to 821 paragraphs over 139 pages – a complex, multi-faceted case. We will concentrate mainly on the most important aspects of the judgment; relating to the restraint of trade and penalty clause arguments, which have far-reaching implications throughout the sport, music and media arenas.



The history of the matter goes back to 2003, when Wayne entered into an image rights agreement covering his off-field business activities with Proactive. Proactive were to provide services to Wayne, receiving a 20% commission for those services. The agreement included a termination clause, providing that Wayne could leave on payment of certain sums. Wayne and Coleen developed a close working relationship with Paul Stretford at Proactive. In October 2008, the relationship between Proactive and Paul Stretford broke down. Wayne and Coleen wanted Paul to continue to represent them.

Proactive issued proceedings. Against Coleen, they claimed commission on her earnings up to when she left Proactive, and commission on future earnings arising out of contracts procured by Proactive. Against Wayne and his company, they claimed commission on Wayne's earnings up to when he left Proactive, commission on earnings up to when he terminated his agreement with Proactive, and commissions on future earnings arising out of contracts procured by Proactive - including renewals, said by Proactive to be worth £3 million. They also claimed damages against Wayne for breach of contract on termination,

estimated by Proactive in the region of £4 million. The Rooneys' defence team argued that the clause allowing Wayne to terminate the agreement was a penalty clause, and unenforceable as such because of the unreasonable sums he would be obliged to pay.

The unreasonable nature of the clause fed into Wayne's restraint of trade argument - the main plank of his defence - namely that the agreement should be unenforceable because of the imbalance in the parties' bargaining power when it was entered into, Wayne's age then, and since the eight year term provided for was unheard of in the image rights industry.

Judge Hegarty QC found Wayne's agreement to be unenforceable as an unreasonable restraint of trade, stressed the importance of parties with lesser bargaining power receiving independent legal advice, cited the length and terms of the agreement, and held the termination clause to be a penalty and unenforceable as such.

In reaching his conclusions, the judge was influenced by Wayne's age, - he was only seventeen when the agreement was made - and the fact that:

"Wayne Rooney and his family had no commercial experience and were utterly unsophisticated in financial and contractual matters" adding there was a "very substantial imbalance in bargaining position".

This imbalance between the parties was aggravated by the lack of independent legal advice to Wayne and his family. The agreement offered no effective right to terminate, save by incurring potentially massive financial penalties and a potential to pay 20% commission on contracts already negotiated, but continuing after termination with the absence of any taper provision reducing that percentage post -termination.

Finally, there was the eight year term of the contract to consider - long in any circumstances, but doubly so given the limited career length of a professional footballer. By referring to other contracts and calling Gordon Taylor of the PFA as Wayne's expert witness, we were able to satisfy the judge that an eight year term was wholly unusual at a time when the norm for on-field contracts was two years.

The judge agreed that the agreement imposed:

"very substantial restraints upon Mr Rooney's freedom to exploit his earning ability over a very long period of time on terms which were not commonplace in the market and which were not the outcome of commercial negotiations between equals".

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## Hill Dickinson win landmark decision in 'David and Goliath' battle for M-Tech Data Limited.

It was a successful day when the Court of Appeal handed down a judgment in favour of Manchester company, M-Tech Data Limited, in their legal battle with IT giant Oracle Inc, of America.

Oracle (formerly Sun Microsystems) is a well-known manufacturer of Sun computer hardware and M-Tech is a UK company that is an independent trader in the computer hardware market. M-Tech purchased second-hand Sun hardware from a US dealer, which Oracle alleged amounted to infringement of its registered trade marks. Under EC trade mark law, it is an infringement to import goods bearing a trade mark which were first marketed outside the EEA, into the EEA, even if the goods are genuine.

M-Tech's defence to the claim is that Oracle should not be allowed to enforce its rights in an abusive way. M-Tech believe Oracle's actions are aimed at stopping the legitimate trade in Oracle products which they say is contrary to European law. M-tech also alleged that Oracle operate their business in an anti-competitive way, which is a further breach of European law. The first judge to hear the case decided that the defences put forward by M-Tech could not succeed and awarded summary judgement against the company.

However, in a landmark ruling the Court of Appeal reversed this original decision and has said that not only do M-Tech's defences have merit but they raise issues which may need to be referred to The European Court of Justice for determination.

M-Tech's solicitor Harvey Stringfellow, partner at Hill Dickinson LLP, commented:

"This is a massive victory for my client, which is a relatively small company, against Oracle, which is a \$123 billion corporation. The Court of Appeal has acknowledged in their judgement that the issues we have raised in this case involve questions of economic policy likely to affect the European Union as a whole. This decision is of importance to trade mark owners and parallel importers across the whole of the European Union."

Lady Justice Arden in her lead judgment in the Court of Appeal commented that the issues in this case "involve questions of economic policy likely to affect the European Union as a whole". The Court noted that the market in 2007 was approximately €260 billion, of which €160 billion was traded by independent resellers. As such, the grey market is huge and resellers ensure that there is healthy competition in second-hand computer hardware.

Oracle have appealed the decision and the case will be determined before the Supreme Court later this year.

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## About Hill Dickinson

The Hill Dickinson Group offers a comprehensive range of legal services from offices in Liverpool, Manchester, London, Chester, Sheffield, Piraeus and Singapore. Collectively the firms have over 190 partners and a complement of more than 1,300 staff.

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