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**Parallel tracks in mass litigation: public and private responses to the Buncefield explosion in England**

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## 15. Parallel public and private responses: the Buncefield explosion

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### OVERVIEW

The largest peacetime explosion in Europe occurred on 10 December 2005 at a major oil storage facility at Buncefield, north of London, when one of the tanks was mistakenly over-filled, causing a vapor cloud that exploded. The tank had two forms of control, both of which failed. Three principal legal consequences followed. Firstly, damage claims were made by the 3,379 individuals, seven local authorities and 754 businesses affected. Secondly, the government established a committee of inquiry to establish the causes of the incident, whether the public regulatory agencies had done their jobs, what lessons could be learned, and what changes should be made to the regulatory system and requirements on authorities and operators. Thirdly, the regulatory authorities' statutory investigations led to prosecutions, convictions and major fines for several operators and service companies. Although independent of each other, these three consequences proceeded largely in parallel and in practice interacted significantly with each other.

This chapter does three things. First, it examines how the damage claims were processed through the courts. It finds, surprisingly, that although the English courts have a mass claim procedure, the Group Litigation Order (GLO), judges declined to invoke that procedure as being unnecessary and instead processed different groups of domestic property and commercial damage cases by relying on the English courts' inherent case management powers. Those powers gave sufficient flexibility for judges and lawyers to make procedural management decisions, albeit within the framework of the Civil Procedure Rules, which importantly require parties and lawyers to seek to resolve issues by negotiated settlement. As a result, the vast majority of claims were agreed by parties bilaterally, and insurers and their lawyers played a major role in such resolutions. Further, managerial control was passed on to the most appropriate court at different stages, involving a series of four judges who each brought a high level of specialization to give authoritative management and determination, depending on the key issue to be resolved (first, general case management, then a matter of construction of a commercial contract, then property issues and finally costs). Matters were disposed of effectively within five years.

Merely looking at the compensation claims gives an inadequate picture of what occurred. It is sometimes claimed that enforcement of civil law provides a deterrent effect. In England, that claim is not widely accepted (Ison, 1967; Elliott & Street, 1968; Atiyah, 1970; DeWees, Duff & Trebilcock, 1996; Cane, 1997; Cane, 2013) and behavioural aspects are addressed by a large corpus of public regulatory law, enforced by public enforcement authorities. The second purpose of this chapter, therefore, is to give an overview of the regulatory and enforcement steps that were taken in response to the Buncefield explosion. Not only were such matters

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important in their own right (the authorities brought a series of prosecutions that resulted in convictions and the imposition of large fines on the companies involved), but the progress of the civil damages litigation referred to above and the public proceedings were closely interlinked, and affected each other, in both helpful and unhelpful ways.

The importance of this case provoked an official review of what lessons should be learned for the safety and risk management requirements imposed under regulatory law, and whether the public authorities had adequately supervised the companies and the site. This process led to a large number of changes to regulatory requirements, with little criticism of the authorities. Thirdly, therefore, this chapter briefly notes how the review process was carried out through a formal public procedure. The conclusion is that matters of behavior and compensation were addressed by separate public and private law mechanisms within the English legal system.

## <a>THE INCIDENT

### <b>The Explosion and Fire

A major oil storage facility exists at Buncefield, Hemel Hempstead, north of London, close to the M1 motorway. It contains storage tanks used by a number of oil companies, including Total, Chevron, BP and Shell. It received petrol, aviation fuel and diesel through three pipelines, for storage in overground storage tanks before being piped elsewhere, including to Heathrow and Gatwick airports.

The operator of the key tanks was Hertfordshire Oil Storage Limited (HOSL), a joint venture between Total UK Limited (60 percent ownership) and Chevron Limited (40 percent). HOSL was under the day-to-day management of Total UK Limited.

On the night of Saturday 10 December 2005, one of the tanks was being filled with petrol.<sup>1</sup> The tank had two forms of level control: a gauge that enabled the employees to monitor the filling operation, and an independent high-level switch (IHLS), which was meant to close down operations automatically if the tank was overfilled. The first gauge stuck and the IHLS was inoperable. The control room staff was therefore unaware that the tank was filling to a dangerous level. Three hundred tonnes (250,000 litres) of fuel overflowed from the tank, and a vapor cloud formed, which ignited, causing a massive explosion (measuring 2.4 on the Richter scale and heard 200 km away) and a fire that lasted five days. The authorities' report found that there were as many as fifteen root causes of the incident, notably:<sup>2</sup>

<quotation>The gauge had stuck intermittently after the tank had been serviced in August 2005. However, neither site management nor the contractors who maintained the systems responded effectively to its obvious unreliability. The IHLS needed a padlock to retain its check lever in a working position. However, the switch supplier

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<sup>1</sup> See the statement of facts in *Buncefield: Why did it happen? The underlying causes of the explosion and fire at the Buncefield oil storage depot, Hemel Hempstead, Hertfordshire on 11 December 2005*, (The Competent Authority, 2011).

<sup>2</sup> Ibid.

did not communicate this critical point to the installer and maintenance contractor or the site operator. Because of this lack of understanding, the padlock was not fitted.

Having failed to contain the petrol, there was reliance on a bund retaining wall around the tank (secondary containment) and a system of drains and catchment areas (tertiary containment) to ensure that liquids could not be released to the environment. Both forms of containment failed. Pollutants from fuel and firefighting liquids leaked from the bund, flowed off site and entered the groundwater. These containment systems were inadequately designed and maintained. </quotation>

### <b>The Damage Caused

Damage caused fell into various categories. Firstly, although no-one died in the blast, over 40 people were ‘physically injured’, two on the site suffering serious injuries. Secondly, all 600 businesses on the adjacent industrial estate, employing about 16,500 people, suffered ‘some property damage and/or business disruption’. The incident was reported to have cost firms more than £70 million.<sup>3</sup> The premises of 20 businesses employing 600 people were destroyed and the premises of another 60 businesses employing 3,800 people were heavily damaged and unusable.<sup>4</sup>

Thirdly, damage and disruption was also caused to ‘residential properties’ outside the perimeter of the depot. Dacorum Borough Council said 2,000 homes were evacuated during the fire and the M1 motorway was closed. A survey of 761 private householders in the area surrounding Buncefield suggested that 76 percent had experienced some damage. This mainly comprised broken glass, damaged roofs, window and door frames, and cracks in walls and ceilings. The majority of households were able to claim against their insurance for damage, but some claims are yet to be settled and repairs to some homes have still not been completed.<sup>5</sup> As time progressed, some households reported new and further damage. The contamination close to the site did not affect drinking water supplies but the long-term possibility of pollution remains.

The total sums claimed in compensation are shown in Table 15.1. The 2012 estimate of total quantifiable costs arising from the Buncefield incident came close to £1 billion, summarised in Table 15.2.<sup>6</sup>

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<sup>3</sup> Study by the East of England Development Agency, noted at *Buncefield explosion: One year on*.

<sup>4</sup> *Color Quest Limited and Others v Total Downstream UK plc and Others*, judgment of Mr Justice David Steel, [2009] EWHC 540 (Comm), 20 March 2009.

<sup>5</sup> One year on, two families remained in temporary local authority accommodation while an estimated three families were likely to be spending a second Christmas in a hotel. See *Final Report 2008*.

<sup>6</sup> *Buncefield Standards Task Group Final report 2008*.

&lt;caption&gt;Table 15.1&lt;em&gt;Estimated total value of claims

<i>Claimant type</i>	<i>No. of claims</i>	<i>Estimated £ million</i>
<i>Business</i>		
inside site perimeter	5	£103
outside site perimeter	749	£488
Subtotal business	754	£591
<i>Individuals</i>		
	3,379	£30
<i>Local authorities</i>		
	7	£4
Totals	4,140	£625

&lt;caption&gt;Table 15.2&lt;em&gt;Summary of the overall costs of the Buncefield incident by main category

<i>Sector</i>	<i>Cost (£ million)</i>
Site operators (compensation claims)	£625
Aviation	£245
Competent Authority and Government response	£15
Emergency response	£7
Environmental impact (drinking water)	£2
Total	£894

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## <a>GROUP LITIGATION IN ENGLAND AND WALES

The legal system in England and Wales is the originator of common law legal systems worldwide. Its traditional style is adversarial, with parties exchanging pleadings and evidence – all relevant evidential documents (discovery) and the reports of each side’s experts – followed by an adversarial trial before a judge (almost no civil cases have a jury). The traditional approach was radically reformed in 1999 by Lord Woolf, in response to concerns that costs were too high and disproportionate to sums in dispute.<sup>7</sup> The 1999 Civil Procedure Rules were based on the premise that since almost all cases are settled, the procedure and the courts should encourage settlement, rather than focusing on facilitating a trial. Thus, parties are required to observe pre-action protocols that are aimed at a voluntary exchange of relevant information and to make reasonable attempts to negotiate or mediate, to settle cases as swiftly and efficiently as possible. Some limitations were made in the extent of discovery, and the use of fewer expert witnesses, to reduce unnecessary costs, although these had less impact on large litigation cases. As ongoing problems continued to be experienced, especially in relation to the level of costs (Dwyer, 2009), further changes were made from around 2013

<sup>7</sup> Lord Woolf, *Access to Justice: Final Report* (HMSO, 1996).

pursuant to Lord Justice Jackson's review, including giving judges costs management powers (Legal Aid, Sentencing and Punishment of Offenders Act 2012; Jackson, 2009; Jackson, 2010).

Large or commercial civil cases are commenced in the High Court and are allocated to specialist Divisions. Cases might typically be initially managed by procedural judges called Masters, possibly acting closely with assigned judges. The Divisions relevant to this chapter are the Commercial Court and the Technology and Construction Court (TCC). Costs orders might be made by judges, but more detailed costs work and assessment of bills and awards is usually done by Costs Judges.

Some mass claims have appeared in the courts stretching back at least 40 years. They have not been particularly frequent and the incidence of cases is closely linked to the availability of funding for claimant lawyers, and whether the costs rules encourage or discourage expensive and sometimes speculative litigation. A series of mass product liability cases was brought during the 1980s and 1990s, in which, in the absence of a formal effective class action rule, the courts fell back on their inherent common law authority to manage cases. This pragmatic approach was a success and led to the development of a body of practice that was crystallised into the GLO procedure in the 1999 Woolf rules.<sup>8</sup> In outline, an application is made to the Lord Chief Justice for a GLO to be made on the basis that there exist multiple similar cases that it would be effective and efficient to manage together. Under a GLO, all cases within the courts system that fall within the defined parameters set out in the GLO are transferred to be managed by a single judge or team of judges. The judges have significant discretion over case management decisions and there are usually master sets of pleadings for the generic aspects of the cases, supplemented by individual pleadings or schedules for non-generic matters. Single or integrated teams of lawyers are appointed to represent the group. Complex cost-sharing arrangements are usually entered into between group claimants, which cover sharing generic costs and liability when people join or leave the group. The case management approach to litigation was pioneered in the early multi-party cases to a significant extent, and was effectively applied to all types of litigation under the Woolf rules, so the approach is now firmly enshrined in litigation practice.

## <a>THE CIVIL CLAIMS

### <b>The Parties and the Claims: Organising the Groups

The first problem facing both householder claimants and the oil company defendants was one of organising their representation. The company side was complicated by the existence of various joint ventures and trust arrangements. A series of special arrangements had to be negotiated in order to overcome conflicts and to simplify representation in the litigation.

Four oil companies who owned pipelines agreed on terms of reference, under which a litigation committee would instruct a single firm (Pinsent Masons LLP) to represent them, including a procedure for resolving conflicts from which Chevron and Total were excluded.

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<sup>8</sup> Hodges, 2001.

Despite the 60/40 ownership split of Total and Chevron in HOSL, there was no operating agreement between the companies. HOSL had few assets and played little active role in the litigation. The central legal issue was whether the operator was HOSL or Total. Chevron issued an application against Total under section 459 of the Companies Act over the way that HOSL had been run. That claim was settled fairly quickly and a committee was appointed to run the litigation jointly.

In view of the potential for conflict between Total and Chevron, the oil companies appointed a respected insurance executive to look after the position of HOSL and it was agreed that one firm would represent HOSL, in addition to Total. Total and Chevron had complex insurance arrangements for different layers of cover and the insurers maintained a degree of oversight through their lawyers. There was no public knowledge of HOSL or of who owned it, so the brand damage to Total and Chevron, and claimants' leverage on those companies or on HOSL, was limited.

The claimant group was diverse and involved over 100 groups (Boylan, Frances & Briery, 2009) and around 3,300 claims filed by individuals and companies, or their insurers. Claims differed widely in size: around 250 individual claims involved a total claim value of £20 million each, and 2,754 claims were for less than £10,000.

A number of local solicitors' firms were initially instructed to represent householders. One firm, Collins, made particularly effective use of the media and attempted to try to form a steering committee of firms. Since many of the solicitors were not convinced that there was sufficient evidence that anyone had done anything wrong, virtually all householders were subsequently represented by Collins.

Many claims were settled by parties' insurers, who then brought subrogated claims against the owners or operators of the tank in question, divertingly named the Buncefield Property Insurance Group (BUNPIG). A consensus was reached that it would make sense for a single firm (Kennedys) to represent the interests of all insurers, in the names of the 'neighbours' of the site.<sup>9</sup> Kennedys benefited from having the gravity and freedom of action in being sole lead claimant, and not being subject to detailed control by a committee of insurers, although regular written reports were sent to a steering committee of around 40 insurers and there was a monthly meeting involving six of them. Kennedys persuaded every insurer that they would act for and fund *all* liability claims, whether they were subrogated or not, and this avoided splintering of representation. One consequence of this was that a claimant who was uninsured would be less likely to make an individual claim since he would have to fund it, and this approach forestalled those who would otherwise have 'tried it on'.

### **<b>Strategic Decisions**

The oil companies made a policy decision at the start that they would respond proactively and invite claimants to come forward, rather than fight all the way. This policy had been adopted with success in the major Lloyd's litigation of a decade earlier (Wakinshaw, 2001). The oil companies were also influenced by wanting to be seen to respond by 'doing

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<sup>9</sup> The 'grown up manner' in which other leading insurance law firms stood back and did not seek involvement was notable: some were later retained to prove quantum and to handle inward claims by insureds.

the right thing' in the eyes of the Competent Authority (CA), since they had to deal with the twin fronts of regulatory investigation/enforcement and compensation claims.

The explosion occurred shortly before Christmas, so the impact on local people was significant. Loss adjusters Crawford were instructed to provide assistance to householders and to settle all direct claims as quickly as possible. Kennedys liaised closely with the loss adjusters at this stage.

The insurers decided fairly quickly that they would pursue recovery from Total of the subrogated claims paid out to insureds as claimants, rather than as defendants. Kennedys issued proceedings quickly, and effectively took control of running the litigation instead of Collins. They decided to sue Total only, and not Chevron, since it suited the insurer claimants that the two oil companies were to argue liability between themselves, which could produce useful discovery that might not otherwise have been available.

All claimants sued Total and HOSL, so indemnity issues between those two companies were of little consequence. Total brought in Chevron as a Part 20 (indemnity) defendant, and also made Part 20 claims against TAV (which manufactured the safety switch that failed) and Motherwell Control Systems (which installed and maintained the systems; it soon went into administration and played little further part).

### <b>Chronology of the Litigation

Lawyers for the leading claimant groups began to send letters claiming liability. Liability was initially denied because, for some weeks, the cause of the explosion was unknown. In previous large disasters, gossip usually circulated quickly about what the cause was, but here evidence from the investigation by the CA was crucial.

Collins applied for a GLO on 25 January 2006, with a statement of case that was a single page (unusually brief). All parties were summoned by the Senior Master of the Queen's Bench Division of the High Court, Master Turner, to a Case Management Conference (CMC) in March 2006. The GLO application was adjourned to the next CMC, but a general structure was established for the civil claims. It was ordered that all claims were to be issued in or transferred to the High Court. The judiciary thereafter controlled the progress of the proceedings – and pressured the parties to negotiate directly – through a series of CMCs.

The oil companies told Master Turner that they would deal with claims and report monthly to the Court on progress. The vast majority of the 3,300 claims were insured. As a first stage, it was necessary for the first party claims against insurers to be settled, before the subrogated claims by insurers against the oil companies could be dealt with. The oil companies established a Joint Claims Committee, which met every three weeks for four years, comprising representatives from Total, Chevron and their lawyers, which operated under the badge of HOSL. The members appointed one loss adjuster to act for HOSL in investigating the site and preparing loss reports.

In October 2006, HOSL and Total said they would pay all personal injury claims, as if liability was not in issue. This was in fact regarded by Collins as a problem for almost all householders, since they also had property claims that still had to be pursued. The defendants required receipts for all expenditure.



At the next CMC in October 2006, Master Turner decided against proceeding under a GLO and instead continued the 'overseen structured settlement' process. He divided claims into categories by size of claim and made various orders for service of further schedules of special damage and agreement on a panel of joint medical experts. Kennedys emerged as the leading firm driving the commercial claims, and an order was made that all parties should cooperate with that firm to develop General Particulars of Claim that would include standard specified items. Kennedys would maintain a Register of parties. Claims should be issued by 12 April 2007.

Master Turner ordered HOSL to mediate with the householders. Collins were ordered to file individual schedules of loss by the claimants by March 2007, and there was a mediation in March 2007, which was unsuccessful.

The parties reported at the CMC in June 2007. Master Turner adopted a firm interventionist approach over whether parties were seriously discussing settlement or not, and ordered all to write to him to confirm what progress had been made towards structured settlement of the claims.

Shell had decided to break away and had issued a claim in the Commercial Court, since its claim was primarily the consequential loss from being unable to supply fuel to its airline customers. That claim was essentially for economic loss, not claimable in negligence, and the Court of Appeal held that Shell was entitled to claim as beneficial owner. An appeal to the Supreme Court was settled before judgment.

It was clear that three main issues were emerging, which were primarily commercial:

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- (1) Whether the defendants (essentially HOSL) had liability to the claimants. A major element in this involved whether loss was foreseeable.
- (2) The dispute between Total and Chevron over whether liability should be 100 percent that of Total, or split between them 60:40. It turned on two factors: interpretation of the legal agreements between the companies and on the actions of the controller, and whether there was vicarious liability.
- (3) The claims by Total for a contribution or indemnity against TAV and Motherwell. </list>

In mid-2007, the remaining parties to the commercial litigation concluded that the Queen's Bench Division of the High Court was not the right venue and agreed to transfer cases to the Commercial Court, where Mr Justice David Steel took over the management of all cases.

At a CMC in July 2007, David Steel J kept up the pressure for update reports on those 'outside the fence' (householders and some businesses) involved in the structured settlement process, and also decided that there would be a trial of preliminary issues in the 'inside the fence' cases (commercial companies located within the site) to be identified at the next CMC. He gave directions for standard disclosure of documents, negotiations on electronic inspection, expert evidence and witness statements. Certain disclosure issues were pursued and decided by a separate judge. The documents produced clarified many facts, and shortly afterwards, five months before trial, Total admitted negligence by their employee.

HOSL took the position that damage outside the site (further than 451 metres from the tank) was unforeseeable. This created a division of claimants into those ‘inside the fence’ or outside. The ‘insiders’ included most commercial claimants but excluded almost all householders. The costs risk to the householders facing the prospect of fighting a 13-week trial, with cost exposure estimated at £30 million,<sup>10</sup> was a major concern for them and Collins.

At the CMC in April 2008, David Steel J, faced with ‘a cast of thousands’, rationalised who was to appear at the trial in October 2008 to ensure that it would be manageable and costs contained. The judge strongly encouraged parties to collaborate and save costs, and made clear that some named parties (including the National Police Information Authority, whose national computer had been damaged) would not otherwise be awarded their costs of participation in the forthcoming trial and its preparations.<sup>11</sup> Subsequently, various groups shared work between their lawyers.

The Commercial Court has long and extensive experience of handling big cases and has a reputation for demonstrating a degree of flexibility that is greater than in some other courts. However, concern over costs and delays had led to a series of recommendations over the adoption of further innovations in procedure, and the Buncefield case became the first and paradigm case to test new techniques.<sup>12</sup> The judge adopted an interventionist style of management and issued lengthy directions. In general, almost all lawyers involved considered that the new techniques worked well.

The first task was for the judge to determine which issues he had to decide. He again declined a GLO and progressed the cases as managed litigation. Instead of the parties sequentially exchanging pleadings, the legal teams had to fill out a large matrix document, which identified what the issues were, and on which each party filled in what their position was in relation to each issue, similar to a technique used in construction disputes (where it is known as a ‘Scott schedule’). This identified how the various claims should best be managed so as to support both settlements and court determination of key issues in the most efficient manner.

In the disclosure exercise, 1.7 million documents were processed in six months. The parties were also required to produce witness statements (setting out evidence and not arguments) that were headed with the individual issue to which the statement was speaking. A detailed timetable was set for preparations for trial of all unsettled claims and for the trial itself, which was set for 12 weeks starting in December. Pinsent Masons drew up a large spreadsheet that stated which witnesses the parties were going to call and cross-examine, and apportioned time for each issue, witness, expert and counsel, as estimated by each team. The parties were required to produce timetables for the trial. The judge then required them to reduce the requested timetable by 20 percent, and gave them 80 percent of what they had asked for: nobody complained about this. In fact, the evidence stages of the trial were finished early, which enabled an adjournment period to be used for counsel to prepare their final speeches, which, possibly as a result, also finished early.

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<sup>10</sup> Indemnity costs were awarded up to 23 May 2008 (when liability was admitted), on the basis that they had known from January 2006 what happened and that either HOSL or Total had been operationally negligent, so they just had to decide who had to pay.

<sup>11</sup> *In Re The Buncefield Litigation*, Order of Mr Justice David Steel, 7 April 2008, para 25.

<sup>12</sup> *Report and Recommendations of the Commercial Court Long Trials Working Party*, (Judiciary of England and Wales, 2007).

At the Pre-Trial Review and various other hearings in September 2008, some parties were forced to justify continuing to appear on their own. Summary judgment was given on the negligence issue.

Much of the trial was dominated by the fight between Total and its joint-venture partner Chevron over liability for the bill: or, in technical terms, to what extent Total was responsible for HOSL. TAV settled the third-party claim against it on the first day. On the third day, Total gave up the foreseeability argument. The other parties went away, except for some arguments towards the end of the trial over *Rylands v Fletcher* liability<sup>13</sup> and whether there was a claim in public nuisance. The judgment was delivered on 29 March 2009<sup>14</sup> and held that:

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(1) the operator was Total and not HOSL. Total failed to discharge the burden of establishing that HOSL was responsible for the negligence of the supervisor. The Court also found there was a further contributory fault consequent on the failure of Total's head office staff to promulgate an adequate system for preventing the overfilling of a tank. This reflected the absence of any written tank filling procedures for use in the control room, even following a 'near miss' in August 2003. In the result there was a lack of careful monitoring of filling operations and an improper reliance on alarms.

(2) Total was not entitled to recover a contractual indemnity from HOSL or Chevron in respect of all or any part of the claim. Total appealed the first instance decision in the third-party claim that Chevron should not contribute 40 percent, but lost, and the Supreme Court declined to hear the case.

(3) Shell could not recover for consequential loss in its own name. Shell appealed and won its point in the Court of Appeal. Total then appealed but the issue was settled before the Supreme Court hearing. </list>

After the trial, the claims that had not been settled went their separate ways for quantum to be dealt with. Determination of quantum in 140 individual large claims was transferred from the Commercial Court to the TCC, where they were all dealt with by Ramsey J. The claimants complained of four years of delay and asked the TCC for an immediate trial. Sensing that the claimants were not yet able to produce their evidence on quantum of their claims, the defendants accepted that request. Total asked for disclosure in every case, in order to be able to settle claims. The judge gave generic directions in every case, that there should be pleadings and (which was innovative) at the same time service of supporting documentation. The claims were divided into four batches (easy to complex) and a trial window for each was allocated, together with directions for timing of disclosure and the experts' reports. Generic CMCs were held every month.

Ramsey J managed the process under a tight timetable, which pressured the parties to settle cases. The parties opened every communication channel in order to reach agreements: adjuster-to-adjuster, lawyer-to-adjuster, lawyer-to-lawyer, independents. None of the 140 claims went to trial. The defendants concluded that some claims might have been overpaid, but there was a significant saving in resources and reserves.

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<sup>13</sup> This imposes strict liability for the escape of dangerous materials onto another's property.

<sup>14</sup> *Buncefield litigation* [2009] EWHC 540 (Comm).

## <b>Costs Issues

The company claimants did not share costs of representation, but did agree to divide up tasks so as to reduce overall costs. HOSL reached pragmatic agreements on costs with Kennedys, but not with Collins.

All of Collins' 275 clients entered into privately-funded arrangements, mostly conditional fee agreements (CFAs), except that about eight of those clients were on legal aid from the start until they converted to CFAs.<sup>15</sup> Under a CFA, Collins bears the cash flow financial responsibility, but is entitled to recover a success fee on a successful outcome. The clients also entered into complicated cost-sharing agreements between themselves. Collins appears to have suffered a significant reduction in fees paid by the defendants: an initial bill submitted in 2009 claimed £14.9 million costs (including a success fee of £14,000), which was later reduced to £1.7 million (including a success fee of £180,000). The arguments on how much the defendants would pay lasted into 2012, and were finally settled confidentially.

## <a>THE REGULATORY INVESTIGATION AND ENFORCEMENT PROCEEDINGS

### <b>The Competent Authority

European Union Member States have harmonised legislation regulating the control systems for major industrial hazards.<sup>16</sup> This establishes extensive requirements on EU Member States and site operators. One of the requirements on every Member State is to have a Competent Authority (CA). Under the United Kingdom implementing legislation,<sup>17</sup> the CA for England & Wales<sup>18</sup> is the Environment Agency (EA) and the Health and Safety Executive (HSE) acting jointly. Operators of major hazard sites were subject to detailed requirements, including making safety reports and forwarding them to the CA. The authorities operated a procedure for inspecting and monitoring operators and sites, divided into a top tier of approximately 500 sites and a lower tier of approximately 5,000 sites.

### <b>The Public Oversight Response

The incident attracted extensive media coverage and hence political attention, in response to which an independent investigation board, the Buncefield Major Incident Investigation Board (MIIB),<sup>19</sup> was established to perform, in the public interest, a thorough, timely and cost-effective investigation and analysis of what had occurred and how the operational and legal systems had worked. The MIIB published a sequence of Reports, which included a large number of recommendations, and also formed a useful source of evidence

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<sup>15</sup> The legal aid contract arrangements were terminated in 2001, after which the Legal Services Commission put the case out to tender, which was won by another firm. However, the eight clients preferred to stay with Collins on a CFA.

<sup>16</sup> Directive 82/501/EEC, as amended.

<sup>17</sup> The Control of Major Accident Hazards Regulations 1999 (COMAH).

<sup>18</sup> Different arrangements apply in Scotland and Northern Ireland.

<sup>19</sup> The Board was chaired by Lord Newton of Braintree and comprised senior HSE and EA staff (none of whom had any previous involvement with Buncefield or COMAH) and a number of independents, especially academics. It had a public supervisory role, acting under the mantra 'We are there for the public'.

for the civil damages actions. The MIIB scrutiny and oversight process was regarded by the HSE and EA as having been ‘a great success’.

### <b>The Regulatory Response

The CA established a Panel to determine whether anyone had done anything wrong in the authorities’ management of the site before the incident. That scrutiny drew a number of conclusions and was considered and actioned by the authorities internally, but was not published until after completion of the criminal process.<sup>20</sup>

In addition, the CA was obliged to carry out its statutory functions as normal. An HSE Investigation Manager was appointed for the incident, who supervised an investigation team of up to 250 people at its peak, with a range of technical and legal expertise, as well as independent experts. Their task was to find out what went wrong and to institute criminal enforcement if there had been any criminal activity. The EA also responded to the environmental aspects of the incident at time. Hence, the HSE in general dealt with the retrospective aspects (cause) and the EA with the prospective aspects (consequences).

Various other agencies were also involved. For example, there was an issue over decisions on whether, or at what distance, vulnerable sites like hospitals and schools should be built in relation to sites that have major hazards. This was essentially a local matter that required a balanced decision from Local Authorities under the Land Use Planning legislation. At Buncefield, an industrial estate had been allowed to expand over 40 years and to end up as a direct neighbour to the oil depot.

The authorities’ primary concern was with systems. They were operating within and applying the pre-existing legal framework. Under the Control of Major Accident Hazards Regulations 1999 (COMAH), the EA were looking at whether ‘Operators’ had taken ‘all measures necessary’. A key legal provision was whether individuals had taken ‘reasonable care’. The officials regarded the legal provisions as broadly satisfactory, on the basis that the phrase ‘reasonable care’ is broad enough to cover all the required activities and issues.

The CA and its component authorities published a series of Reports throughout the investigation, to provide transparency and an opportunity for public dialogue.<sup>21</sup> The public dissemination of information was subject to the legal constraints that information or opinions that might be likely to prejudice any subsequent prosecutions should not be made public. Accordingly, some information was not published until after the conclusion of the prosecution appeal process.<sup>22</sup>

### <b>Prosecutions

The CA prosecuted five companies for various offences and on 16 July 2010 the Criminal Court imposed fines totalling £9.5 million:

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<sup>20</sup> *Buncefield: Why did it happen?*, supra note 1.

<sup>21</sup> Available at <http://www.hse.gov.uk/comah/buncefield/oneyear.htm>.

<sup>22</sup> Public access to documents can now be achieved under the Freedom of Information Act and a separate provision in the Environment Act, and could have been available earlier but was subject to the exemption of not prejudicing ongoing criminal prosecutions.

- (1) Total UK Ltd pleaded guilty to three offences and was fined £3.6 million (£3million for safety; £600,000 for pollution) and ordered to pay costs of £2.6 million.
- (2) The supply company British Pipeline Agency Ltd pleaded guilty to three offences and was fined £300,000 and ordered to pay costs of £480,000.
- (3) Hertfordshire Oil Storage Ltd was found guilty of two offences and fined £1.45 million (£1million for safety; £450,000 for pollution) with costs of £1 million.
- (4) TAV Engineering Ltd, which designed the crucial safety switch that failed, was found guilty of one offence, fined £1,000 and ordered to pay £500 costs.
- (5) The installation and maintenance company Motherwell Control Systems 2003 Ltd was fined £1,000 and ordered to pay costs of £500 after being found guilty of one offence.<sup>23</sup> </list>

Thus, HOSL, TAV and Motherwell pleaded not guilty but were found guilty. HOSL subsequently withdrew its appeal, which was based on the issue of whether it was the operator. The final appeal was by TAV, the switch manufacturer, which the Court of Appeal dismissed in January 2011.

When passing sentence on the defendants at St Albans Crown Court on 16 July 2010, Mr Justice Calvert-Smith commented that cost cutting per se was not put forward as a major feature of the prosecution case, but the failings had more to do with slackness, inefficiency and a more-or-less complacent approach to matters of safety.<sup>24</sup> The authorities noted that operating culture was a key factor:

<quotation>Cumulatively, these pressures created a culture where keeping the process operating was the primary focus and process safety did not get the attention, resources or priority that it required. </quotation>

The Buncefield situation was highly unusual in that the civil compensation litigation made swift progress and was resolved before the regulatory cases. Decisions made in the civil cases hindered the administration of the regulatory enforcement process. Total conceded criminal responsibility on the basis that the operator had made a series of errors. However, HSE/EA did not accept this view and considered that there had been a fundamental systemic management failure, at the highest level. That was the basis on which the prosecution was put. The issue was who was the legal operator under the COMAH Regulations. In the civil case, David Steel J had found that the operator was Total, but the agencies thought differently. However, in view of the outcome of the civil case, procedural issues had to be dealt with in the criminal prosecution in the Crown Court over whether the judge's findings in the High Court should be binding on the Criminal Court. The position was resolved by the Court of Appeal, which decided that the civil findings were not binding, noted that the position was unclear as to who the operator was, and held that there were two legal criteria for deciding the position that should be applied by a jury in the criminal case. At the criminal trial, Total pleaded guilty but not as the operator, and HSOL were found by the jury to have been the operator.

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<sup>23</sup> Available at <http://www.theengineer.co.uk/channels/process-engineering/buncefield-trial-ends-with-modest-fines-for-safety-and-pollution-offences/1003662.article#ixzz0zgVwBv9v>.

<sup>24</sup> *Buncefield: Why did it happen?*, supra note 1.

## <b>Lessons Learnt For Future Behaviour

The MIIB and CA procedures together comprised both strategic and detailed reviews of the regulatory system and the roles and actions of the public authorities and the operators. The regulatory system was found to be a sound framework. Scrutiny of national arrangements is inherent in the European Union's legislative structure, both from the 'superior' dimension of the European Commission over the implementation and operation of EU legislation, and from a horizontal 'peer review' element amongst Member States. Such scrutiny is also constantly evolving.

The MIIB made 74 recommendations, all of which were officially accepted, public responses provided, and have been acted upon by HSE and EA. Lessons were learned about the supervision of operators and sites, and avoiding serious incidents such as this. Changes were implemented in the organization, resource, priorities and the way the authorities investigate major cases. The EA and HSE felt that they had worked well together but could do better. Information was provided to operators to improve their understanding of risks and performance. Guidance has been issued and gaps in previous guidance have been filled, such as on containment policy.

After all prosecutions and appeals had been concluded, the CA issued a final Report on the causes of and lessons from the incident in February 2011.<sup>25</sup> The CA concluded that the incident did not have any unknown or new cause. The basic issues revolved around inadequate management systems, their operation in practice, and culture. The Foreword stated that the following actions had been taken:

<quotation>Since the incident, the Competent Authority, industry and trade unions have worked together to drive forward high standards at fuel storage sites. This has resulted in agreement on improved standards of safety and environmental protection for all UK sites storing large volumes of gasoline and to systematically upgrade sites to meet these standards, with progress monitored by the Competent Authority as part of its regulatory programmes. This work has also established a set of process safety leadership principles for top-level engagement in all businesses involved with significant risks to people and the environment – see [www.hse.gov.uk/comah/buncefield/response.htm](http://www.hse.gov.uk/comah/buncefield/response.htm).

The Competent Authority has also improved its approach to regulating onshore major hazards in the light of ten years of operating the COMAH regime including incidents such as Buncefield. More information on the Competent Authority's remodeling programme is at [www.hse.gov.uk/comah/remodelling/index.htm](http://www.hse.gov.uk/comah/remodelling/index.htm). </quotation>

## <a>CONCLUSIONS

A series of conclusions are suggested by this case study:

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- (1) The regulatory and compensation aspects of the Buncefield incident were dealt with separately by different actors and through different – public and private – systems

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<sup>25</sup> Ibid.

and courts. It is normal practice in the United Kingdom, as in many other European states, that public scrutiny of the behaviour of the companies leading to administrative action and enforcement, is dealt with by public agencies. Here, the HSE and EA investigated the events, instituted criminal prosecutions, and issued a series of public investigation reports and changes to the guidance and administrative requirements regulating control of similar sites. The civil courts dealt with the liability and compensation aspects alone, in accordance with British practice that court decisions in damages claims have little impact on defendants' future behaviour.

(2) This case illustrates how two features can succeed in processing complex compensation cases: flexible but clear managerial control by experienced judges, and a culture in which experienced lawyers aim at agreeing whatever issues can be agreed. The time taken to dispose of the cases, effectively six years with many claims being settled earlier, was remarkably short.

(3) The mechanism by which the judiciary managed the litigation procedures was based on acting on the basis of the courts' inherent jurisdiction to manage cases: no new or extra rules were required and, indeed, the GLO or any other pre-existing procedure was not invoked. All the actions remained separate and not formally joined or within any formal coordinated structure. It is arguable that the progress of the cases would have been largely similar to what occurred if a GLO had been invoked, save that final arguments over costs might have been curtailed. A GLO may be appropriate where there is a homogeneous group of individual claimants and a single defendant. But where there are disparate groupings of claimants and defendants, rationalisation and ingenuity are needed. The judges demonstrated flexibility on various formalities, such as the normal rules on pleadings and discovery. Instead, the parties were told to produce lists of the issues that arose.

(4) There were so many parties on both sides, and therefore so many lawyers, that the cases would have been unmanageable without significant rationalisation and managerial control over representation. Rationalising the many parties into smaller coordinated groups was achieved at various stages either spontaneously by the parties themselves, or as a result of pressure from the court. The lawyers had to respond to a series of complex situations through sophisticated matrix management, described by Nick Young of Davies Arnold Cooper as 'like eight-dimensional chess'.

(5) Judicial control at every stage was vested in a single judge or master, 'passing the ball'. At the start, all claims were managed by being listed before the Senior Master. After the main issues had crystallised, the case was transferred to the Commercial Court, and managed by a single judge, with a separate judge dealing with documentary privilege issues. After the central liability issues were resolved, the remaining 140 claims were transferred to the TCC, again managed by a single judge. Finally, costs issues were handed over to a single costs judge. This single managerial control afforded consistency and continuity. All four judges involved were experienced in handling multi-party cases.

(6) The lawyers were able to make swift progress towards settlement of many issues directly between the parties, strongly encouraged by the judiciary, for two reasons:



(a) Almost all of the key lawyers were highly experienced. The management of major litigation requires considerable resource, in terms of personnel, IT systems, experience, imagination and strategic judgment. Only the leading commercial law firms possess all of these requirements. The local firms are notably effective in enlisting media support.

(b) The Civil Procedure Rules have required settlement and case management since their fundamental reform in 1999. The defendant oil companies made a clear policy decision at the start to adopt an orderly approach towards settlement, rather than an old-fashioned litigation approach, although the householder group might not have thought this. Negotiated settlements occurred between the commercial claimants and the defendants, assisted by pressure from the insurance sector and judges, from an early stage throughout the six years. Some settlements took longer than they might have done, partly as a result of a lower level of trust between the lawyers for the householders and the central defendants, and partly because the insurance claimants felt that the defendants took every point and then abandoned it at the last minute, thereby considerably increasing costs. Overall, there were interesting divergences of view over the opponents' tactics and approaches.

In contrast, the influence of insurers in reaching sensible, cost-effective solutions was significant. Insurers were ultimately behind the central defendants, many of the commercial claimants, and the property (but not personal injury) claims of householders.

(7) The judges identified the principal issues that they needed to decide, which impeded the parties reaching settlements. Those issues involved significant commercial consequences, of issues of apportionment of risk that could have been determined by contract in advance but were not, namely whether HOSL or Total was the operator, and how liability was shared between HOSL, Total and Chevron. Hence it was not surprising that judicial determination was needed. </list>

A final tantalising observation may be made about how things might be different if a similar situation were to occur. Since 6 April 2010<sup>26</sup>, the EA has had power to impose civil sanctions, which may include a Restoration Notice requiring specified steps within a stated period to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed.<sup>27</sup> The EA may also accept Enforcement Undertakings, which will enable a person, who a regulator reasonably suspects of having committed an offence, to give an undertaking to a regulator to take one or more corrective actions set out in the undertaking.<sup>28</sup> A person may give a Third Party Undertaking to compensate persons affected by an offence, and the regulator if it accepts the undertaking must take it into account in determining the variable monetary penalty. Such powers are now regularly used, thereby avoiding the necessity for separate civil liability litigation.

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<sup>26</sup> The Environmental Civil Sanctions (England) Order 2010/1157 and The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Order 2010/1159.

<sup>27</sup> Schedule 2 of the Order.

<sup>28</sup> Schedule 4 of the Order.

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