QBE European Operations

Technical claims brief

Monthly update | September 2014

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Costs

Supreme Court to hear argument on the recoverability of pre-LASPO success fees and ATE premiums - *Coventry v Lawrence*

The Supreme Court will hear an argument that the losing party's obligation to pay a success fee and ATE premium infringes their article 6 right to a fair hearing (European Convention on Human Rights, ECHR). If such an infringement were established, the legitimacy and incompatibility with The Courts and Legal Services Act 1990 would then have to be determined. This might lead to compensation claims against the government where success fees and ATE premiums have been paid pre-LASPO (1 April 2013). As such, the government has been given the opportunity to set out their position.

In *Coventry* the claim concerned a complaint of public nuisance against a nearby stadium owner, with damages valued at £74,000, but costs claimed in excess of £1 million. The base costs amounted to £400,000, so the remainder was the success fee and ATE premium. Unsurprisingly, the Supreme Court took a dim view of the level of costs claimed, describing them as "very disturbing", but had to conclude that there is no authority to support an argument that payment of these sums would infringe a party's rights under ECHR.

Although the recoverability of success fees and ATE premiums for the majority of claims was abolished from 1 April 2013 (following the Jackson reforms) it still applies to those entered into before that date. The appeal is to be re-listed for a further hearing after notice has been given to the Attorney-General and the Secretary of State for Justice. A number of other interested parties are likely to be invited to make submissions and it will be probably be months before the case goes back before the Supreme Court.

> *The prospect of hundreds of thousands of claims against the government seems an unlikely one, with the potential of billions of pounds at stake. With regard to recoverable success fees and ATE premiums in personal injury cases, various percentages were fixed by the Civil Procedure Rules for RTA and EL accident and disease claims. These were reached after negotiations between representatives of paying and receiving parties, so that previous agreement may be binding. The extremely high costs in Coventry may just be an unfortunate exceptional example of excessive success fees and ATE premiums, rather than compelling evidence of the incompatibility of the costs regime itself. Some commentators have drawn early comparisons to the recent Mitchell episode and one hopes the Supreme Court do not make the same mistakes.*

Liability

Second claim not an abuse of process. *John Patrick Dowdall v William Kenyon & Sons & Ors*

The claimant was employed by the first defendant as a labourer in 1963/64 and then the second defendant between 1965-69 and 1972/73. He worked at the Stanlow Oil Refinery and the Burmah Oil Refinery in Ellesmere Port. He was then employed by the third defendant as a rigger at the Shell Star in Ellesmere Port. The claimant alleged heavy exposure to asbestos dust and was diagnosed as suffering from asbestosis and pleural plaques in 1998.

The claimant had previously brought a claim against eight other employers, which was settled in 2003 and resulted in damages due to asbestosis and pleural plaques, as well as the risk of contracting mesothelioma. The second claim followed the unfortunate contraction of pleural mesothelioma and the defendants argued that they would have joined the 2003 settlement had they been sued at the time, thereby affording them the complete defence of compromise. The defendants also relied on a limitation defence, estoppel and an abuse of process.

The court were sympathetic to the claimant's position and decided that there might be many entirely legitimate reasons for bringing the first claim and only bringing a second claim at a later date. As such, it would be wrong to hold that the second claim was an abuse of the court process. The fact that the defendants had not been parties to the first claim was not decisive as a matter of law and there was no evidence that the claimant had manipulated the court process. He had not deliberately secured a lump sum for the risk of mesothelioma, omitting the defendants from those proceedings so that he could sue them later if the risk came to pass. The decision not to sue those defendants had been honestly made because in each case the claimant and his solicitors had been unable to discover an Insurer liable to meet the claim against them. That was a reasonable decision.

The court went on to confirm that when there are concurrent tortfeasors, a settlement against one would not extinguish the claim against another, unless there had been full satisfaction of the entire claim, which wasn't the case here. The first claim was for damages for asbestosis, depression and the risk of the development of three further different conditions also caused by asbestos exposure. The employers had not been concurrent tortfeasors in relation to the asbestosis and depression, but might have been in relation to the risks. The settlement resolved all those claims against the original defendants and in settling the claim as he had done, the claimant had plainly intended to extinguish his rights in relation to future mesothelioma against all the employers whom he had decided were worth suing. The claimant elected to accept a sum for the risk of mesothelioma and in return decided not to seek an order permitting him to return to court in the event that mesothelioma actually developed. The settlement deliberately excluded any sum which would follow from the development of the condition.

Finally, when considering the limitation point, the court acknowledged the competing factors were evenly balanced and there were significant arguments in both directions. The principal consideration had to be the fact that the claimant had a substantial claim for a very serious injury and that the medical evidence in respect of his condition was uncontroversial. Each tortfeasor who had exposed the claimant to asbestos dust and had thereby materially increased the risk of mesothelioma was liable for the injury, so the claimant had very good prospects of establishing that the defendants contributed to the causation of the risk of the condition, and were liable for it by reason of the principle in *Fairchild*. The application for relief under section 33 of the Limitation Act was allowed and the claim will proceed.

> *The courts are routinely asked to decide arguments concerning a technical point of law and the application of the interests of justice. The losing side will invariably feel aggrieved at the outcome, which is why so many of these arguments end up in the Court of Appeal. Those suffering from an asbestos related injury, who have good prospects of a successful claim, can expect to receive the sympathy of the court and are more likely to defeat a defendant's reliance on a technical point of law.*

Procedure

Interim payment application and contributory negligence. *Melvyn Smith v Richard Bailey*

The claimant suffered a spinal cord injury, leading to paraplegia, following a road traffic accident on 15 April 2012. He successfully applied for an interim payment of £500,000, which the defendant disputed and subsequently appealed against on the basis that the issues of contributory negligence and accommodation costs had been approached incorrectly.

On the issue of contributory negligence the court confirmed the position that the burden of proof is on the defendant – it is trite law that a party raising an allegation of negligence has the burden of proving it. The defendant had put no supporting evidence before the court, but the police investigation report had been filed by the claimant. The report concluded that the defendant was at fault for the accident, which allowed the court to decide damages were likely to be awarded on a full liability basis.

On the issue of accommodation costs the court was right to conclude with a high degree of confidence that the trial judge would award a capital sum in respect of those costs (see Eeles v Cobham Hire Services Ltd [2010]). The claimant had suffered a very serious injury, he was a property owner for 33 years prior to the accident, he wished to provide security for his wife for the future and he had no security of tenure in his current property. Again, there was no evidence before the court that a trial judge might treat the claimant's accommodation needs as being reasonably met by rental, for which a periodical payments order would be appropriate.

Having decided that accommodation costs would be capitalised, there was no question of the interim payment fettering the trial judge's discretion in relation to other heads of loss and it was no more than a reasonable proportion of the capital sum (made up of general damages, past losses and accommodation costs). The appeal was dismissed.

> *The court was clearly unimpressed with the defendant's appeal and the lack of supporting evidence. The decision underlines the onerous burden placed on defendants to establish a reasonable prospect of successfully proving their case, before the exchange of witness and expert evidence. This undoubtedly puts defendants in a difficult tactical position as they will have to carefully consider the best way to adduce compelling evidence in support of their position.*

Fraud

6 year custodial sentence for insurance fraudster

Mr Justin Hindry has been jailed for 6 years following a four week trial at Norwich Crown Court. He was found guilty of charges relating to arson and fraud by false representation, following a fire at his Aylsham Bathroom and Kitchen Centre on 27 June 2012. Mr Hindry's business was completely destroyed by the fire, with the blaze causing substantial damage to his premises and stock, as well as to neighbouring properties.

The premise had been alarmed at the time of the fire and there were only a small number of key holders who knew the code to deactivate the alarm. According to the experts there appeared to be no fault with the alarm. Mr Hindry was seen by witnesses at the premise after the alarm was set and deactivated, and prior to it being reset once the fire had started. Mobile phone data also showed he was not in nearby Reepham as he claimed in police interview, but was still in Aylsham at the time of the fire.

Fraud investigators discovered Mr Hindry's income from the business did not support his outgoings and lifestyle. The business was struggling with a number of creditors pursuing payment and it was also discovered that Mr Hindry was an active gambler, losing approximately £50,000 at casinos in the last two years.

Detective Sergeant Darren Reade, from the Great Yarmouth CID, led the investigation into the offences and welcomed the sentence saying, "Justin Hindry thought to con emergency services, detectives and his insurance company by setting fire to his struggling business to make money out of the claim. He also deceived his own staff, many of whom had supported him throughout the investigation. His complete disregard for the law and the danger it placed others in, is shocking and his conviction will serve as a warning to others who are considering making money in this way."

The severity of the crimes support the custodial sentence and should act as a deterrent to those who see insurance fraud as a victimless crime. It is encouraging that the police shared the Insurers' view that such disregard for the law should not go unpunished. Unfortunately, Mr Hindry made the wrong decision when faced with a failing business and mounting debt, and will presumably regret that decision for the rest of his life.

Alteration of invoices does not constitute a "fraudulent device". *Beacon Insurance Company Ltd v Maharaj Bookstore Limited*

The fire, which occurred at the Insured's premises on 3 November 2005, destroyed over US$750,000 of stock. The Insured submitted invoices in relation to the items said to have been purchased and then destroyed, and had altered various invoices to reflect genuine purchases. For example, there were a number of connected companies from whom the Insured bought books and then altered the invoices to reflect this.

The Insurance policy included an express condition that it would be forfeited if "in any claim in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent devices are used by the Insured... to obtain any benefit under this Policy".

At first instance, Mr Justice Prakash Moosai decided that despite the Insured having altered various invoices, there was no dishonest intent on their part as the stock in question had been genuinely purchased. The Insurers did not accept the decision and appealed. The Court of Appeal referred to the leading case of *Agapitos v Agnew* [2003] which decided that "fraudulent device is used if the Insured believes that he has suffered the loss claimed but seeks to improve or embellish the facts surrounding the claim by some lie". The appeal was successful.

The Insured then appealed to the Privy Council and it was concluded that whilst certain invoices had been altered to explain the facts as the Insured understood them, and to assist the Insurers in processing his claim, the reasons for doing so were free from any dishonest intent and so were not fraudulent. Accordingly, the decision at first instance was upheld and the Insurers were required to pay the Insured's claim.

> *The Privy Council decision might appear to be a departure from the recent trend of judicial intolerance of fraudulent claims, but can be distinguished on the basis that there was no intention to exaggerate the claim. Despite acknowledging that various invoices were intentionally altered, the Privy Council confirmed that alteration alone is not sufficient grounds to repudiate the policy and dishonest "intent" is a key requirement.*

In the news

Discount Rate – Government review ongoing

The government review has been an ongoing process for a number of years and looks set to continue well into 2015. The discount rate is used to help calculate damages for lump sum future losses and was set by the Lord Chancellor at 2.5% in 2001. Even a 0.5% reduction would lead to significant increase in damages across large loss claims and would impact the government and Insurers alike.

The Ministry of Justice has now decided to appoint a panel of 3 experts to work together and prepare a report which gives expert investment advice to use within the review. The areas of expertise are (i) the financial management of investments (ii) an actuary who can deal with issues regarding the rate (iii) an academic who knows the workings of the financial services market, including aspects relevant to the economic cycle.

The Ministry of Justice say the positions should be filled before the end of September, with the submission of a final report approximately 6 months later. That will likely coincide with next year's general election and means a decision on the level of the discount rate will likely be taken by the next government.

> *The decision to commission a report follows the release of a Ministry of Justice research paper last year (see our October Brief). That paper received widespread criticism given its limited quantitative and qualitative findings - interviews were limited to 9 claimants and it seems that the government has realised the necessity for thorough and detailed expert evidence. It could well be another 12 months before the new government are able to properly review, consider and comment on the report, but it might just be the 'last piece of the jigsaw'.*

Horizon Scanning - Experts confirm formaldehyde cancer risks

Chemical industry claims that formaldehyde does not cause cancer have been dismissed by US government experts. A National Academies of Science (NAS) assessment of the cancer risks from formaldehyde - a common industrial chemical found in furniture, building materials and other household products- concluded it poses a threat to humans for three types of cancer: nasopharyngeal cancer; sinonasal cancer; and myeloid leukaemia.

According to Jennifer Sass of the US Natural Resources Defense Fund (NRDC), the finding will be a blow to industry lobbying, which appears to have backfired. The NAS review "was politically motivated, the result of a campaign by the chemical industry and its allies in Congress to protect formaldehyde and styrene, another common chemical linked to cancer." According to Sass, when subject to close scrutiny the chemical industry's case "added up to little more than a baseless defence of their toxic products. The chemical industry needs to start producing safer products, and stop attacking independent science and defending cancer-causing chemicals." In 2009, formaldehyde's top Group 1 human cancer risk rating from the International Agency for Research on Cancer (IARC) was broadened to include leukaemia in the list of cancers with an established link to the chemical.

The American Chemistry Council (ACC) has said that it is 'perplexed' by the new assessment of cancer risks and suggests they clash with previous assessments based on the same data. The ACC president and CEO Cal Dooley said, "it is important to note that formaldehyde can continue to be safely used... Much more information, including exposure, is needed to understand risk."

> *A key area of agreement is that more information is needed and further studies are likely in the coming years, but the use of formaldehyde continues. The conclusion that formaldehyde poses a threat to humans for 3 types of cancer will be a concern on all levels.*

Reform – Food Information Regulations 2014

On 22 November 2011 the European Parliament published regulation on Food Information to Consumers (FIC) and in July 2014 the UK statutory instrument produced the Food Information Regulations 2014 (FIR). The regulations come into force on 13 December 2014, save for an obligation to provide nutritional information on pre-packaged foods, which will apply from 13 December 2016.

The regulations will apply to any food business operator supplying food to the public and mass caterers. Private individuals preparing and providing food for an event are not covered unless they are preparing the food in the course of their business. In general, non pre-packed foods are exempt from labelling requirements, but information about allergens must be located on the main ingredient list. The mandatory nutritional information on pre-packaged foods must state the energy value, amount of fat, saturates, carbohydrate, sugar, protein and salt.

It will also be a requirement to state the country of origin or place of provenance for unprocessed fresh, chilled and frozen meat of swine, sheep, goat and poultry. It will be a mandatory requirement to say on the label in which country an animal was reared and slaughtered.

Incorrectly labelled food could lead to an allergic reaction and the suggestion of liability against the food business operator. Such a scenario may also necessitate a product withdrawal or recall, along with the associated costs and reputational damage. Once the regulations are in force, incorrectly labelled food and drink could lead to further action being taken against a business that is guilty of an offence. This is a significant piece of legislation for the food and drink industry and manufacturers will need to be aware of the impact on their business and take all necessary steps to protect themselves and their customers.

Completed 25 September 2014 – written by QBE EO Claims. Copy judgments and/or source material for the above available from Tim Hayward (contact no: 0113 290 6790, e-mail: tim.hayward@uk.qbe.com).

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5194/TechnicalClaimsBrief/September2014

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