

Technical claims brief

Monthly update – August 2010



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News

Court of Appeal to rule on scope of pure economic loss

The Court of Appeal is due to rule later this month on whether losses suffered by the users or owners of a defective product or building should still be considered as pure economic loss (not recoverable in tort) rather than physical damage.

In the case of Linklater Business Services v Sir Robert McAlpine and Others, ten years after a major refurbishment of the claimant's offices metal pipe work which was supposed to have been sealed to protect it from water vapour was found to have corroded. Linklater brought proceedings against the main contractors Sir Robert McAlpine who then brought in their sub-contractors How Engineering who in turn brought in their sub-contractors Southern Insulation who had actually fitted the insulation.

Southern applied to have the claim against them struck out on the basis that Linklaters loss was purely economic and could not succeed. The application was heard in the Technology and Construction Court by Mr Justice Akenhead who refused it on the grounds that the case raised important points of law which could be decided either way and because he was not convinced that corrosion was "damage" for litigation purposes. The Court of Appeal will now rule on these issues.

Comment: Guidance from the Court of Appeal will hopefully bring clarity to a sometimes complex area of law but their decision may not be welcomed by defendants or their insurers if claimants are enabled to pursue claims for losses which were previously unrecoverable.



Limiting recoverable defence costs in criminal cases ruled unlawful

In 2009 the Lord Chancellor implemented new regulations limiting the amount of costs that a successful defendant in a criminal case could recover from central funds. Recoverable costs were limited to legal aid rates leading to significant shortfalls in the costs recovered.

The law society sought a judicial review of the new regulations which they argued breached the principle set out in the *Prosecution of Offenders Act 1985* section 16 (6) that a sum of money should be provided which was reasonably sufficient to compensate a successful defendant.

The Administrative Court has now ruled that the new regulations are unlawful. The regulations made a constitutionally important change by doing away with the idea that a defendant ought not to have to bear the (reasonable) costs of defending

himself from what might in some cases be wholly false accusations. It was most unlikely that it had been the intention of Parliament when the 1985 Act was passed to allow the Lord Chancellor to make such a change without Parliamentary scrutiny.

Comment: Pending the introduction of a new scheme (subjected to Parliamentary scrutiny) defendant's costs will presumably be assessed under the old 1986 regulations. The removal of the 2009 regulations should assist insurers who have funded successful criminal defences for policyholders and who are seeking to recover their outlay.



Ministry of Justice to investigate claims management companies' use of text and e-mail

Post Magazine has reported that the Ministry of Justice is understood to be investigating the growing use of unsolicited text messages and e-mails by claims management companies offering their services to recover damages for personal injuries. A Royal Bank of Scotland insurance division study is reported as finding that around 15% of claims arose after claimants were contacted in this way. Contacting personal mobile telephone accounts whose holders have not opted to use the services of an accident management company (or

at least made enquiries or purchased a product from them in the past) is regarded as a breach of regulation and is arguably in contravention of the *Compensation Act 2006*.

Comment: Lord Young is to lead an investigation into the UK's "compensation culture" and has promised to clamp down on the advertising of claims recovery services. The appropriateness of his selection has been questioned however due to his major shareholding in the credit hire company Accident Exchange, an illustration perhaps of how widespread the claims management industry has become and how difficult it may be to reduce its influence.

Costs

Costs penalties for lack of meaningful negotiation: Alrahi v Ellis – Runcorn County Court (2009)

The claimant suffered moderate whiplash type injuries after her car was struck in the rear by the defendant's car. The defendant's insurers conceded liability and made a pre-issue Part 36 offer. The claimant countered with two Part 36 offers but these were rejected and the case went to a hearing.

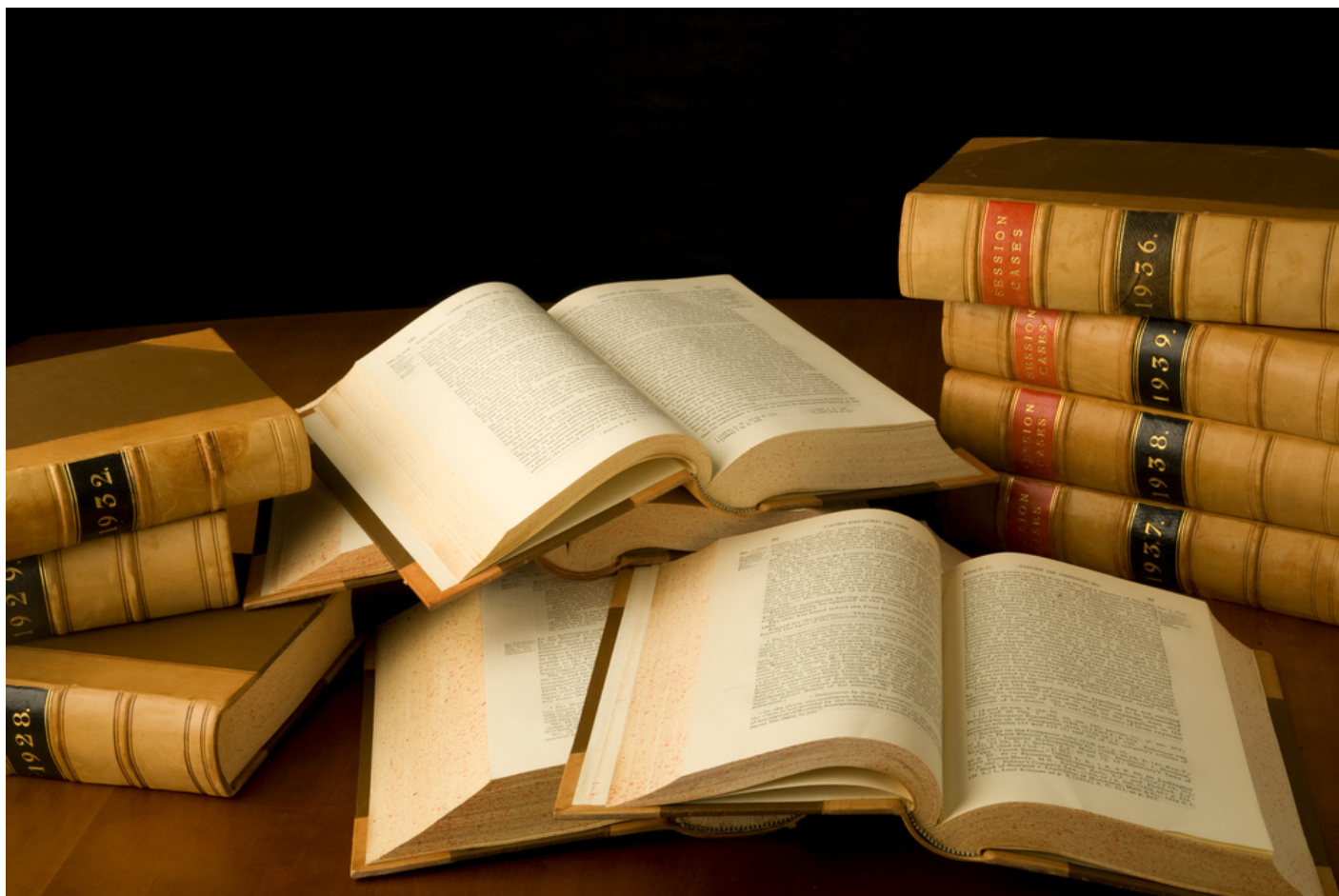
At trial the claimant was awarded £6,050 failing to beat the defendant's Part 36 offer of £6,750. The defendant argued that the claimant should not even be awarded predictive costs on the grounds that their two Part 36 offers of £7,880 and £7,500 were both unrealistic and did not amount to "negotiation" as required by the pre-action protocol. They had also failed to disclose any evidence in support of some items of special damages claimed.

The judge agreed and penalised the claimant's behaviour by awarding only two thirds of predictive costs (with disbursements in full) to them and 8 per cent interest on the defendant's costs.

Comment: This case is an encouraging example of the court applying sanctions against a claimant who would not enter into meaningful negotiations to settle their claim short of a hearing.

Our thanks go to Berryman's Lace Mawer who represented the defendant for giving us details of this case. Leech and Co acted for the claimant.





Part 36 Rules clarified: Gibbon v Manchester City Council; L.G. Blower Specialist Bricklayer Ltd v Reeves – Court of Appeal (2010)

In these joined appeals the Court of Appeal considered a number of issues around the interpretation of Part 36 of the Civil Procedure Rules (CPR) and issued useful guidance on the application of the rules.

In *Gibbon* the claimant had injured herself when she fell in the defendant's school playground. The defendant admitted liability and made a Part 36 offer. The claimant rejected the offer and made a counter offer

on a Part 36 basis of £2,500. The defendant did not initially accept the £2,500 offer but made an offer slightly improved on their original one. The claimant refused this offer and the defendant eventually decided to offer the claimant the £2,500 that she had sought, again on a Part 36 basis. The claimant by this time however had decided that she would not accept £2,500 and rejected the defendant's offer for this sum. The defendant tried to formally accept the claimant's £2,500 offer in writing whereupon the claimant's solicitor advised them that it had been withdrawn. The defendant cited CPR 36.9 (2) i.e. that a Part 36 offer may be accepted at any time unless a notice of withdrawal has been served and sent

a settlement cheque for £2,500 which the claimant returned prior to issuing proceedings.

At first instance the judge held that the defendant was entitled to accept the claimant's offer which had not been withdrawn and awarded their costs from the date of the offer. The claimant appealed arguing that the offer was no longer capable of acceptance under the common law principle that a rejected offer cannot subsequently be accepted.

The Court of Appeal held that Part 36.9(2) was clear and that the court should only resort to common law principles in situations where there was some ambiguity. The rules clearly stated the manner in which an offer should be withdrawn and this had not been done, there was no room in the rules for the concept of implied withdrawal. The acceptance of the offer was valid and the costs order appropriate.

"In a case where the offer has been beaten by a very small amount and there is clear evidence that the successful party has suffered serious adverse consequences as a result of pursuing the case to judgment those (non financial) factors may be sufficient to outweigh success in pure financial terms but in my view such cases are likely to be rare."

Lord Justice Moore-Bick

In *Blower* the claimant was a builder who sued his customers for the cost of home improvements which they had refused to pay for. The defendants made three Part 36 offers at different times but later withdrew all but the first. At trial the claimant beat the defendants' Part 36 offer although not by a large amount. The judge at first instance ordered the defendants to pay half the claimant's costs from the date that the later two Part 36 offers were withdrawn. The defendants appealed arguing in line with the Court of Appeal decision in *Carver v BAA* that although the settlement awarded was a larger one than their Part 36 offer it was not all things considered (stress, unrecoverable costs etc) materially more advantageous. The judge's costs order was therefore too generous to the claimant.

The Court of Appeal held that the award was materially more advantageous and upheld the trial's judge's order on costs as being within his reasonable discretion. Whilst accepting that *Carver* was binding the Court of Appeal endorsed Lord Jackson's criticisms of it in his review of civil litigation for bringing uncertainty into the operation of Part 36. They commented that cases where claimants beat Part 36 offers by a small amount but were ruled to be materially less advantageous should be rare.

Comment: In both these cases the Court of Appeal confirmed that common law principles do not apply to Part 36 offers and that more than one offer may be open for acceptance at any given time. Parties to litigation should be careful to formally withdraw offers if they do not wish to leave these open for acceptance. Litigants should also bear in mind that in judging the success of the parties the courts will focus on the size of the award relative to the Part 36 offers in the majority of cases.

Fraud

Amending a defence to allege fraud: Hussain and Another v Sarkar and Another – Court of Appeal (2010)

The two claimants alleged that they had been injured when the car in which they were passengers was struck in the rear by a van. The insurers of the van suspected that the accident was contrived but had insufficient evidence to plead fraud. They applied to the court for extra time to investigate but were refused.

A week before trial the insurers (the second defendants) having received additional information believed that they had enough circumstantial evidence to specifically plead fraud and applied to the court to amend the defence. The recorder again refused their application, found for the claimants at the hearing and awarded damages for injury.

The insurers successfully appealed to the Court of Appeal who set aside the judgments and ordered a retrial. The insurers had information that the driver of the van worked for a company with which the three occupants of the car were all connected. The accident had also occurred in a place where it was unusual for the claimants and defendants to be. Together with the inconsistent financial information supplied by the claimants and their concealment of their relationship with the van driver the circumstantial facts amounted to a reasonable cause for believing that the accident was staged. The recorder had been wrong in his assessment that the defendant's application was essentially no more than a "fishing expedition". The fundamental objective of the Civil Procedure Rules was to do justice and the recorder should have concluded that there was a substantial risk that the insurers would suffer injustice if their application to plead



fraud was not permitted. They should not be penalised for the lateness of the application because they had not had sufficient evidence to make it earlier and had explained their position to the court.

Comment: Evidence of fraud often only emerges close to trial and although each case must be decided on its facts, this judgment should be helpful to insurers. The Court of Appeal has confirmed that a defendant should be allowed to make a late application to amend provided that it is in the interests of justice and they can give a satisfactory explanation for the delay.

Liability

Highway Authority liable for creating pedestrian hazard: *Yetkin v London Borough of Newham* – Court of Appeal (2010)

The claimant was run over by a car whilst attempting to cross the second half of a six lane dual carriageway from the central reservation. She was using a traffic light controlled pedestrian crossing and her primary allegation was that the lights were green in her favour and red against the motorist's car. Her alternative submission was that the local authority had created a hazard by planting shrubs on the central reservation which had grown to a considerable height and blocked her view to the left.

At first instance the judge rejected the claimant's allegations against the motorist finding that he had been proceeding properly through a green light. The judge went on to find that the shrubs did indeed interfere with the claimant's view of the road and had significantly contributed to the accident but having considered the House of Lords ruling in *Gorringe v Calderdale MBC* he ruled that there were additional requirements on a claimant bringing a common law claim against a highway authority and the authority did not therefore owe the claimant a duty of care. The judge said that had the local authority been liable he would have found 75% contributory negligence on the part of the claimant.

The claimant appealed arguing that the judge had taken passages from *Gorringe* out of context and had misunderstood them. She also argued that the finding of 75% contributory negligence should be reduced to 50%.



"...I entirely accept that the judge took these passages from Gorringe out of context and consequently misunderstood them. He thought that they imposed additional requirements on a claimant bringing a conventional common law claim against a highway authority for creating a hazard on the highway. There are no such additional requirements."

Lady Justice Smith

The Court of Appeal agreed that the judge had misunderstood *Gorringe* which was not concerned with local authority acts so much as omissions. There was nothing said in *Gorringe* which undermined the well-established position that a person who affected the safety of the highway would generally owe a duty of care to road users. Lord Brown's comments in *Gorringe* about highway authorities "enticing" a motorist into an accident were merely an example of colourful language; there was no requirement for a created danger to amount to enticement. The local authority did owe the claimant a duty of care. The 75% contributory negligence finding was appropriate as a pedestrian who chose to cross a three lane highway without waiting for the lights to change in her favour accepted a high degree of responsibility to ensure that it was safe to do so.

Comment: Local authorities who plant shrubs near crossings should be careful that they do not obstruct pedestrians' views of the highway as on the basis of this judgment they are likely to be found partially liable if this contributes to a subsequent accident.

Quantum

Periodical payments, allowance for State Funding: MS (A Protected Party) v X and Y – High Court (2010)

The claimant in this case suffered catastrophic injuries in a road traffic accident and was a protected party no longer having mental capacity to manage the litigation.

He was awarded a lump sum of £350,343 (including general damages of £200,000) plus Periodical Payments of £92,720 per annum indexed to the 75th percentile of the Annual Survey of Hours and Earnings index number 6115. The claimant's care and accommodation were at the time of the hearing being entirely met by the state. The Consent Order approved by Master Fontaine recognised this and stated that the claimant would not receive any money by way of Periodical Payments unless and until he was required to pay for any part of his care and /or accommodation himself.

Comment: Following the Court of Appeal ruling in Peters v East Midlands S.H.A. (see April 2009 brief) that claimants were not obliged to apply to the state to fund care and accommodation needs, defendants found it increasingly difficult to obtain any discount on lump sum settlements in respect of state funding. Insurers have however enjoyed more success with settlements involving periodical payments where claimants have proved more willing if not to offset state funding in advance then to at least agree to refund the amount of any state payments received to insurers. If state funding for the claimant continues the insurers in this case will achieve a huge saving.



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