Technical claims brief

Monthly update – November 2009

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News

Bribery Bill to be introduced in next Parliamentary Session

- A Bribery Bill is planned to be introduced in the next Parliamentary Session which commences on 18 November 2009
- The Bill is intended to consolidate and simplify current legislation (some of which dates back to 1889) covering two general offences of offering, promising or giving of an advantage and requesting, agreeing to receive or accepting an advantage
- It also creates a discrete offence of bribery of a foreign public official and an offence of negligent failure by commercial organisations to prevent bribery
- Organisations convicted of the negligent failure offence face an unlimited fine and the maximum penalty for individuals convicted of giving or receiving bribes increases from 7 to 10 years imprisonment
- Full details of the Bill can be viewed at www.justice.gov.uk/publications/draft-bibery-bill.htm

Comment: As well as reforming a previously complex and fragmented area of legislation and common law duty the Bill responds to international calls to address deficiencies in UK laws on the bribery of foreign officials and corporate liability for same. The Bill is not apparently intended to curtail corporate hospitality or other events aimed at marketing services or building relationships with existing business connections. An offence is only committed if the intention of the offering or giving/accepting of an "advantage" is to induce or reward improper conduct.

50th amendment to the Civil Procedure Rules (CPR)

- With effect from 1 October the 50th amendments to the Civil Procedure Rules have made significant changes to rules 35 and 44 and accompanying practice directions dealing with expert evidence and costs respectively
- If expert evidence is permitted in a small or fast track case, rule 35.4 is now worded to the effect that normally only one expert (i.e. single joint) on each particular issue is to be allowed
- Practice Direction 35, 9.1 states that (unless directed by the court) discussions between opposing experts are not compulsory and that the parties should give careful thought as to whether anything will be achieved by their meeting
- The overriding duty of an expert to the court is re-emphasized and there is a revised statement of truth which must be used unmodified
- Part 44 dealing with costs has been amended in respect of notices of funding emphasizing the parties' duty to provide details of funding arrangements as soon as possible before the start of proceedings
- The practice direction under 19.4 (3) requires that where there is an insurance policy in place covering costs the level of cover provided and whether the premiums are staged must be disclosed

Comment: The amendments to Part 35 appear to be aimed at trying to avoid some of the partisan and costly conflicts between expert witnesses that continue to be a feature of UK litigation. The amendments to Part 44 will hopefully bring greater transparency to costs funding arrangements.

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Wide-ranging review of Scottish legal system published

Lord Gill's working party published its report on the Scottish Legal System on 30 September 2009. The wide-ranging report appears to have been generally well received in the Scottish Parliament and offers the hope of both speeding up litigation and reducing costs.

Some key proposals are:

- The current level at which cases can be heard in the Court of Session (the Scottish High court) will increase from £5,000 to £150,000
- A national sheriff appeal court to be established to hear both civil and criminal appeals
- A new specialist personal injury sheriff court to be created (Edinburgh based but with national jurisdiction)
- The current tender system to be reformed and a system like the Part 36 offers used in England and Wales to be introduced
- The introduction of a new case management model with compulsory pre-action protocols
- The creation of a Civil Justice Council for Scotland to review court procedure generally and in particular to review costs

Comment: To what extent Lord Gill's proposals are adopted depends on the Scottish Parliament. If implemented the reforms should relieve the current pressure on the Court of Session and streamline Scottish litigation procedures leading to savings in both time and costs.

Costs

Contributory negligence, small claims track, applicable costs: Parveen v Farooq - Liverpool County Court (2009)

The claimant had agreed damages for personal injury with the defendant in the sum of £875 net of contributory negligence. The defendant agreed to pay costs in addition but only fixed costs as allowed under the small claims track. The claimant issued Part 8 proceedings in an effort to recover fixed recoverable costs as per Part 45 but was unsuccessful at first instance with the judge ruling that as the net damages were within the small claims track that costs regime should apply.

The claimant appealed arguing that the judge had been wrong to fix the costs by reference to the small claims track and should have considered the gross value of damages. Dismissing the appeal the judge held that there was no requirement within the rules for the court to consider the impact of contributory negligence. The claim had been compromised at £875 and the small track was the normal track for a claim of that size. At the costs only stage the court knew the level of agreed damages and it was not required to assess the value of the claim.

Comment: This is the first appeal decision on what has proved to be a thorny costs issue. Judge Stewart QC is a highly respected costs judge who has never been overturned on a costs matter. Hopefully this decision will finally see an end to disputes on this issue.

Funders, third party costs orders: Thomson v Berkhamsted Collegiate School and Ian Thomson and Gracinda Thomson – High Court (2009)

The claimant sought damages against his former school alleging that they had negligently failed to protect him from bullying. As a result of the alleged bullying he claimed he had suffered psychological injury which in turn had gravely damaged his future employment prospects.

The claimant discontinued his action two weeks into a hearing leaving the defendants with costs in excess of £250,000. The

court ordered that the claimant pay the defendant's costs but as he was unemployed there was no prospect of recovery from him. The defendants then joined the claimant's parents to the action on the basis that they had funded the claim and had had a significant involvement in it.

The defendants applied to the court for an order for disclosure statements to be filed and served by the claimant's parents covering any correspondence between them and the claimant's legal team so that they could investigate the claimant's parents' involvement in the litigation.

The court reduced the period to be covered by the statements and ruled out privileged documents dealing with legal advice but otherwise granted the order. It was held that whilst third party costs orders were only appropriate in exceptional circumstances this case would have been unlikely to have proceeded had the claimant's parents not funded it and the defendants here had reasonable prospects of success. Disclosure of the correspondence requested would allow the defendants to assess the extent of the claimant's parents' control of the litigation.

Comment: The judgment in this case sets out the courts' approach to granting third party costs orders. A funder who is purely that with no personal interest in the litigation would not normally be at risk of incurring a costs order but where the funders are closely involved in the conduct of the litigation an order may be appropriate even where the funders are family members rather than a commercial organisation.

Correct fee earner not specified, no entitlement to costs: Booth v Oldham MBC – Watford County Court (2009)

In this case dealing with pre-action disclosure the judge held that no costs were recoverable by the claimant in respect of their application. The letter of claim had not complied with the pre-action protocol as it was unclear and failed to identify the accident locus.

In addition, although a substantial part of the work had been done by a grade "D" fee earner the statement of costs served suggested that all of the work (bar attendance at the hearing) had been done by a grade "A" fee earner. The judge took a very dim view of this and stated that the grade "A" fee earner should be personally notified of his disgust.

Comment: Senior fee earners are often credited with carrying out work on cases which defendants believe they are over qualified for. Cases such as the above will no doubt fuel defendants' suspicions about work being falsely accredited to senior fee earners.

Our thanks go to Berryman Lace Mawer for telling us about this unreported case.

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Credit hire

Non-compliance with Court directions, striking out: Hussain v Mohammed and Fortis – Liverpool County Court (2009)

The claimant sought a small amount of damages in respect of personal injury and damage to his vehicle and to recover much more substantial ongoing credit hire charges of £35,000 on behalf of the hirers Direct Accident Management Ltd. The first defendant's insurers had grave reservations as to the authenticity of the alleged accident circumstances and even as to the true identity of their policyholder.

The claimant supplied essential evidence, which should have been forthcoming some months previously, only a few days before trial. The defendants applied to have the claim struck out on the basis that the claimant had not properly complied with the court directions by disclosing this evidence so late in the day. This application was heard as a preliminary issue at the trial and the claim was struck out in its entirety with an order for the claimant to pay the second defendants' (i.e. the insurers) costs.

Comment: Delay in the disclosure of evidence is a common frustration for defendants seeking to investigate credit hire claims. In this case the court applied a strong sanction for the claimant's delay which will hopefully encourage future claimants in the area to comply with court directions more promptly.

Our thanks go to DWF Solicitors, who acted for the second defendants, for telling us about this case.

Fraud

"Crash for Cash" driver jailed: R v Mohammed Patel- Manchester Crown Court (2009)

A fraudster who charged £500 a time to crash vehicles by slamming on his brakes whilst driving in front of unsuspecting third party motorists was sentenced to four and half years imprisonment at Manchester Crown Court. Mohammed Patel was reported to have caused 93 crashes in a three year period allowing the various owners of the cars he was driving to make fraudulent claims estimated as being worth roughly £1.6m.

The fraud came to light when Patel was spotted by workers at an office overlooking one of his favourite locations for causing crashes being repeatedly involved in low speed collisions whilst driving a variety of cars.

Comment: One of the claims featured in the prosecution involved a QBE insured Network Rail vehicle and a Toyota Yaris driven by Patel. A video clip of this incident was recently featured in a BBC news item about the case.

Indemnity

Ambiguous insurance policy questions, *Contra Proferentem:* R & R Developments v Axa Insurance PLC – High Court (2009)

The claimants sought summary judgment against their insurer in respect of the insurer's decision to void their Commercial Combined and Contract Works policy. They were unsuccessful at first instance and appealed to the High Court.

The insurers argued that the claimants had been guilty of misrepresentation in failing to declare that a director of their company was also a director of a company in administrative receivership and had been a director of a number of companies which had gone into liquidation. The claimants argued that the question in the proposal form related only to the insolvency of individuals and did not extent to any business that their directors might have been involved with.

Finding for the claimants the court held that if the question referring to insolvency was ambiguous then the principle of contra proferentem applied (i.e. where a clause of a contract was ambiguous and had not been inserted by agreement it should be interpreted against the interests of the party who put it in). In this case, however,

the question about insolvency was not ambiguous, it clearly applied to individuals and not to corporate insolvencies. The policyholders had answered it correctly. In line with the Court of Appeal's comments in Doheny v New India Assurance, the insurers having asked specifically about individual insolvencies had made it plain that they were not interested in corporate ones.

Comment: This case is a reminder that insurers must be careful to ask the right questions on proposal forms. If questions are ambiguous these may be interpreted against their interests as per the principle of contra proferentem. If the wrong questions are asked altogether, attempts to void policy cover based on what the question was intended to cover and which was not subsequently disclosed are unlikely to succeed.

Procedure

Judge wrong to reject evidence without reasons: Taleb v Trina Coaches: Court of Appeal (2009)

The claimant alleged that she had fallen from her bike due to the defendant's coach driving too close to her and making contact with her bike's handlebars. The defendants denied this saying that their driver had given the claimant's bike sufficient room when he passed her and that she fell for some other reason.

There were no independent witnesses to the accident and the only evidence before the court was that of the claimant, the coach driver, hearsay evidence from the claimant's daughter (based on what her mother had told her) and CCTV footage. The judge at first instance rejected the driver's evidence as inconsistent and inaccurate and also rejected the claimant's evidence because

according to her daughter she had incorrectly said that she was cycling in a bus lane. He went on to give judgment in favour of the defendant based purely on the CCTV footage. The claimant appealed arguing that the judge had given insufficient reason for disregarding her evidence.

The Court of Appeal agreed and ordered a re-trial. The inaccuracies reported in the claimant's evidence by her daughter on a hearsay basis were insufficient reason to disregard her entire evidence. If the judge had other reasons to disregard her evidence he had not stated them. He should have evaluated her evidence as a whole. The CCTV evidence did not show where the coach was in relation to the bike when it passed it and could not be used in isolation to determine liability.

Comment: It is unusual for the Court of Appeal to interfere with the findings of fact of a lower court. In this case the Court of Appeal was able to view the CCTV evidence which was the sole basis of the judge's findings and was able to rule that it was an insufficient basis on which to make a judgment. This was not a case where the Court of Appeal had been unable to evaluate any of the evidence used by the judge.

Completed 26 October 2009 – Copies of case judgments and source material for the above items can be obtained from John Tutton (contact no: 01245 272756, e-mail: john.tutton@uk.qbe.com).

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