Insight 184

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

Welcome to this festive edition of Insight in which we report on cases relating to:

- The assessment of damages in a Fatal Accidents Act claim
- Solicitors leaving the service of proceedings until the last moment
- Setting aside a default costs certificate
- Amending a claim to reduce it by 87%
- The liability of a hotel for attacks on guests

Malcom Henké
Partner & Head of LACIG
malcolm.henke@h-f.co.uk

Damages/Fatal Accident

Young v Downey (2020) EWHC 3457 (QB)

This hearing related to the assessment of damages in a claim arising from the death of the claimant's father in a bomb attack in which the defendant had been found to have been an active participant. There were two principal claims by the claimant in this action: first, her own claim for personal injury comprising mainly psychiatric damage arising out of the death of her father; secondly, a claim under the Fatal Accidents Act for loss of dependency on the part of her and her mother, together with a small claim on behalf of the deceased's estate for the deceased's pain and suffering in the short period between the detonation of the bomb and his death pursuant to the Law Reform (Miscellaneous Provisions) Act 1934.

The claim by the claimant for personal injury in the form of psychiatric damage was brought by her as a secondary victim. The claimant was aged four and a half when her father was killed. It was the claimant's case that she satisfied all four of the criteria to succeed as a secondary victim:

(a) She was the young daughter of the victim and clearly had the close tie of love and affection to her father;

(b) She was close to the incident both in time and space having been situated close to the window in the nursery of the barracks when the soldiers left for the changing of the guard, hearing the blast and witnessing the return of soldiers other than her father with injuries sustained in the blast including one with nails embedded in his hand;

(c) This was a direct witnessing of the aftermath of the incident although the aftermath came to her as a small child looking out of the window rather than the claimant going to the aftermath of the incident as was envisaged in McLoughlin;

(d) On the basis of the claimant's expert's evidence, the claimant's illness was induced by the sudden shocking event which she underwent.

'…in the present case there was never, at the relevant time, any recognition by the claimant of her father as the primary victim'

Dismissing this part of the claim, the High Court Judge held that on the authorities, the injury had to be caused by 'shock' as a result of a sudden perception of the death of, or risk to or injury to the primary victim. Thus, the identification of the loved one as the primary victim was an essential element.

By contrast, in the present case there was never, at the relevant time, any recognition by the claimant of her father as the primary victim. The evidence suggested that it never occurred to this four-year-old's mind at all that her father might have been injured, or killed, or involved at all in what she had heard and seen. She did not say so and her remark to her mother later 'daddy should be coming now' indicated clearly that she had no appreciation that her father had been involved.

Had the judge found in favour of the claimant, damages for PSLA would have been assessed at £75,000, with an award of aggravated damages of £37,000. Future treatment costs amounted to £9,500 and the total damages awarded under this head would therefore have been £121,500.

A claim was also made for exemplary damages. The judge noted that the courts in England and Wales had not considered the issue of exemplary damages in the context of a claim resulting from a terrorist attack. Any such extension would be for either Parliament or the higher courts, and probably the Supreme Court.

The claimant sought an award for the deceased's pain and suffering prior to death, such an award being recoverable on behalf of the deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934. An award of £1,750 was made under this head, based on immediate unconsciousness/death within one week

At the time of the deceased's death, he was a soldier aged almost 20 who had joined the army at age 16¾ and had been promoted from Private to Lance Corporal. An assessment of the dependency claim involved consideration of the deceased's likely career but for his death, both within the army and after leaving the army. Based on an expert's report, the claimant accepted that the claim should be based on loss of a chance.

On the evidence, the judge found it appropriate to assess the dependency on the basis of a 100% certainty that the deceased would have remained in the army until 26 July 1989, having served nine years. It seemed that the tax-free Resettlement Grant on discharge would have been a powerful incentive to the deceased to remain in the army for an extra three years and the judge assessed the chance of the deceased completing 12 years' service as being 95%. There was a 75% chance of the deceased completing his full 22 years' service.

Next, it was necessary to consider what the deceased would have achieved by way of promotion in his lost career in the army. Again, based on the expert's report, the judge held that if the deceased had left the army after nine, or 12-years reckonable service aged 27 or 30 he would have done so in the rank of Corporal. If he had served beyond age 30 years than on the balance of probability he would have been promoted to sergeant after around 13 years' total service, i.e. around April 1992. If he had continued in service and assuming he was judged 'average' in his SNCO peer group then on the balance of probability he would have been promoted to Staff Sergeant after around 17 years total service, i.e. around April 1996.

Finally, there was an issue as to whether, upon retirement from the army, the deceased would have achieved median earnings or upper quartile earnings. Based on the evidence, the judge considered it likely to the point of certainty that the deceased would have achieved earnings in the median bracket, with a 50% chance of achieving upper quartile earnings.

The second part of the equation in the calculation of the dependency assumed that but for her father's death the claimant would have attended university and graduated in June 1999 and that she would have remained dependent on her father up to and including 31 August 1999 when she would have been 21.63 years old. Whilst the judge questioned the assumption that the claimant would have attended university, given the available evidence about her academic record, nevertheless, given that there was a younger sister, the date of 31 August 1999 was accepted as the date for the end of the dependency. This had implications for the Harris v Empress Motors calculation whereby, conventionally, 75% of income was used for the dependency where there was a spouse and dependent child whilst 66.67% was used for a spouse only.

The following template was used to calculate the dependency claim:

1. Scenario 1 (9 years' service: median civilian earnings);
2. Scenario 2 (12 years' service: median civilian earnings);
3. Scenario 3A (22 years' service: median civilian earnings);
4. Scenario 3B (22 years' service: upper quartile civilian earnings).

To these calculations, the percentage chances had to be applied.

(i) The base sum under scenario 1 was £470,235.

(ii) The additional sum under scenario 2 was £24,895 (£495,130-£470,235). Applying the percentage chance of achieving this additional sum (95%) the additional sum recoverable under scenario 2 was £23,650.

(iii) The additional sum under scenario 3A was £231,496 (£726,626-£495,130). Applying the percentage chance of achieving this additional sum (75%) the additional sum recoverable under scenario three was £173,622.

(iv) The additional sum under scenario 3B was £122,533 (£849,159-£726,626). Applying the percentage chance of achieving this additional sum (50% x 75% = 37.5%) the additional sum recoverable under scenario 3B was £45,950.

The total recovery for loss of dependency was accordingly £470,235 + £23,650 + £173,622 + £45,950 = £713,457.

An apportionment of this sum involved a consideration not only of an amount for the claimant when she was still a child but also compensation for the money that would have been spent on her during her adult life. The appropriate percentages were 25% to the claimant and 75% to her mother. Those percentages should apply to all money recovered from the defendant in this case. Accordingly, the sum payable to the claimant was £178,364 and the sum payable to her mother was £535,093.

The claimant was represented by McCue & Partners LLP.

The defendant was unrepresented and did not attend.

Comment

It is understood that the claimant will appeal the dismissal of her claims for psychiatric injury and exemplary damages.

Civil Procedure/Service of a Claim Form

Ideal Shopping Direct Ltd and others v Visa Europe and others (2020) EWHC 3399 (Ch)

The claimants had issued proceedings in 16 cases for breaches of competition law said to have been committed by the defendants. The claimants' solicitor sent copies of the issued claim forms to the defendants' solicitors for information, and not by way of service, and invited them to agree to an extension of time for service. The defendants' solicitors agreed, and when those extensions were due to expire, they agreed to further extensions. The last agreed extension of time ran until 17 July 2020.

Although it was apparent that the claimants' solicitor was carrying out work with a view to serving the proceedings in time, on 17 July she filed the claims electronically with the court and unsealed amended claim forms were sent electronically to the defendants' solicitors. The sealed amended claim forms were later served on the defendants' solicitors. It was the defendants' case that the sending of the unsealed amended claim forms did not constitute good service.

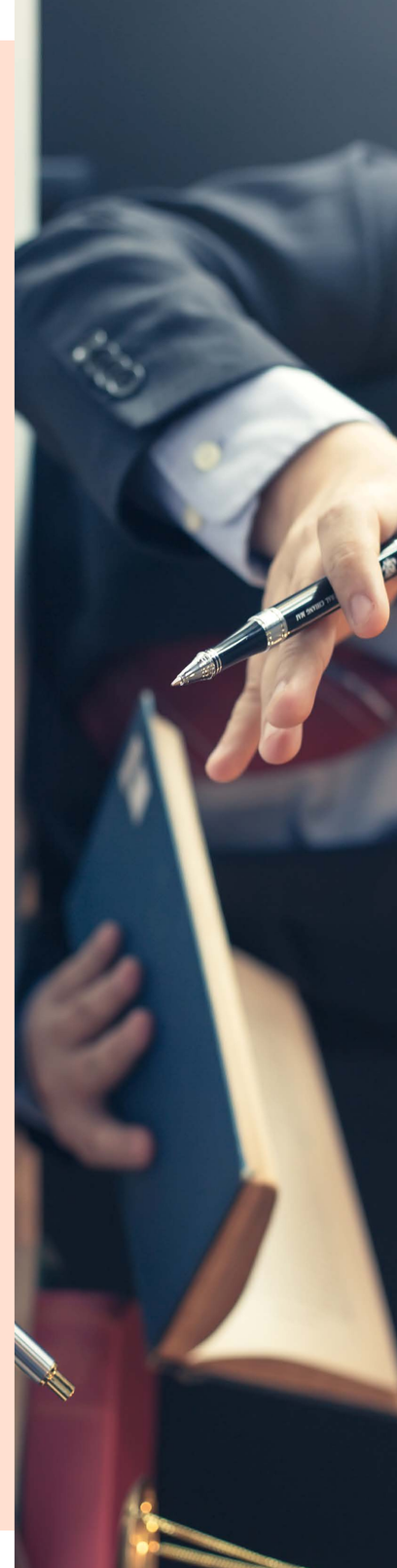
The defendants applied for orders that the claimants had not served the claim forms by 17 July and were out of time to do so, so that the court did not have jurisdiction in relation to those claims. The claimants applied for declarations that they had validly effected service of the amended claim forms on 17 July. Alternatively, they sought relief under CPR 3.10, 6.15 or 6.16.

'Until the claimants' solicitor was in possession of a claim form bearing a court seal, she did not have a claim form capable of being served'

The High Court Judge held that CPR 7.5 specified that the thing which was to be served within the time permitted for service was a 'claim form'. A document was only a claim form for the purposes of the rules if it bore an original court seal. The claimants' solicitor believed that if she had filed the amended claim form pursuant to the Electronic Working Pilot Scheme (PD51O), then she was in a position to serve it as a claim form even before it was sealed. However, a draft claim form without a court seal was not a claim form even if it was subsequently sealed and even if the sealing and issue was retrospective to the date of filing under PD51O. Until the claimants' solicitor was in possession of a claim form bearing a court seal, she did not have a claim form capable of being served. Accordingly, the documents served by the claimants on 17 July were not claim forms. Therefore, no claim form was served on the defendants within the time permitted by CPR 7.5, as extended by agreement to 17 July.

CPR 6.15 (1) allowed the court to permit service by a method which was not otherwise permitted by CPR 6. This rule only applied where there was 'good reason' for the court to exercise the power conferred by the rule. This involved consideration of three questions.

The first question was whether the claimant had taken reasonable steps to effect service in accordance with the rules. In this case, the



claimants did not take steps to effect service in accordance with the rules. The step which they took, sending an unsealed amended claim form to the defendants' solicitors was not in accordance with the rules. It would have been straightforward for the claimants to have served the original claim forms, or the amended claim forms, in accordance with the rules.

The second question was whether the defendants or their solicitors were aware of the contents of the claim form at the time when it expired. The defendants' solicitors were aware of the contents of the original claim forms as they had been sent to them for information. They were aware that the claim forms had been issued and they knew the nature of the claim being made. They knew the claim numbers.

As to the amended claim forms, they were aware of their contents from the unsealed copies which were emailed to them. There was an issue as to whether the defendants' solicitors would have known on 17 July 2020 that the claimants had filed the amended claim forms but on the evidence the judge held that in this case the defendants' solicitors were aware of 'the contents of the claim form' by the end of 17 July 2020.

The third question was: what if any prejudice would the defendants suffer by the retrospective validation of a non-compliant service of the claim form, bearing in mind what the defendants knew about its contents. The prejudice referred to was the prejudice which would flow from the court making an order under CPR 6.15. The comparison was between the position of the defendants if no order was made with their position if an order were made. This was a different question from asking: what prejudice did the defendants suffer by reason of the claimants, on 17 July 2020, emailing unsealed amended claim forms as compared with what should have happened, which was that the claimants ought to have served sealed claim forms?

In the absence of an order under CPR 6.15, the defendants had a limitation defence. The point applied in all of these cases. This meant that the defendants would be prejudiced by an order in favour of the claimants under CPR 6.15. The loss of a limitation defence was just the sort of prejudice which was relevant in this context.

In summary, the claimants did not take reasonable steps to effect service in accordance with the rules and the defendants would suffer prejudice if an order in the claimants' favour were made under CPR 6.15 but, conversely, the defendants' solicitors were aware of the contents of the claim form before the time for service expired. The judge now needed to stand back and ask: was there a good reason to treat the service of an unsealed claim form as good service? His conclusion was that there was not a good reason to do so.

The reason why the claimants were in this position was the mistake made by their solicitors. That was not a good reason for making an order under CPR 6.15.

In view of the conclusion as regards CPR 6.15, the instant case was not one where the court should find that there were exceptional circumstances which justified the making of an order under CPR 6.16.

The claimants had submitted that what happened was 'an error of procedure' within CPR 3.10 so that it did not invalidate the step taken in the proceedings, namely, the service of an unsealed claim form on the defendants. However, CPR 3.10 was to be regarded as a general provision which did not prevail over the specific rules as to the time for, and the manner of, service of a claim form. It did not enable the court to find that there had, after all, been valid service on the defendants or that it should make an order remedying the claimants' error as to service.

The claimants were represented by Scott + Scott UK LLP.

The 'Visa defendants' were represented by Linklaters LLP and Milbank LLP.

The 'Mastercard defendants' were represented by Jones Day.

Another year comes to an end and yet we have here another example of solicitors leaving the service of proceedings until the last moment and falling foul of the clear but strict rules that apply in relation to service.

Setting aside a default costs certificate

Masten v London Britannia Hotels Ltd (2020) EWHC B31 (Costs)

This was an application to set aside a default costs certificate (DCC). One of the matters in issue was whether the Denton criteria for granting or refusing relief from sanction under CPR 3.9, applied on an application to set aside a DCC.

The claimant served a Notice of Commencement and a Bill of Costs on 3 January 2020, just over two months outside the period provided for by CPR 47.7. On 16 January the parties agreed a 21-day extension of time for service of points of dispute, to 14 February 2020.

The way in which things then went wrong for the defendant, as Paying Party, was explained in a witness statement from a costs draftsman. He detailed a series of problems that had arisen within his company, as well as personal problems he had encountered during the relevant period. These resulted in the discovery that points of dispute had been prepared only as a result of the DCC being issued. The DCC was filed with the court only on 16 June 2020.

After receiving the DCC and realising what had happened, the costs draftsman recommenced preparation of the Points of Dispute, making it necessary for him to reread four boxes of papers. Access to the papers was itself restricted due to his company's lockdown policy of allowing only one person to attend its offices per day.

On 15th July the costs draftsman drafted the present application and attempted to file it electronically, in accordance with the SCCO's Practice Note on Electronic Working. Having been unsuccessful in doing so he then prepared a hard copy of the application on 17 July 2020. It was posted to the SCCO on that date. The papers were subsequently rejected and returned, because of the requirement for electronic filing. Another electronic application was filed on 26 August 2020, this time successfully.

The defendant submitted that the test for relief from sanctions was not applicable, although it also submitted that the DCC should be set aside even if that test was applied. It was submitted that there was good reason to set aside the default judgment because the draft points of dispute accompanying the defendant's application showed that a substantial reduction could be achieved on the Bill in the detailed assessment.

As for whether the present application was made promptly, it was submitted that the court should consider only the period

from the date that the defendant learned of the DCC. Earlier inactivity was the same default which led to the DCC being issued.

The Master held that he should address first the proposition that this application must be dismissed because it was not framed as an application for relief from sanction. That was plainly wrong. CPR 47.12 and the accompanying Practice Direction set out the procedure for an application to set aside a DCC and the criteria to be applied upon such application. They had not been abolished and replaced with CPR 3.9. The application must be made under CPR 47.12 and the extent to which the criteria for relief from sanctions applied to it was open to argument. In any case one looked at the substance of the application, not the way in which it was worded.

An application to set aside a DCC, self-evidently, could not be made until a DCC had been issued. On the evidence the claimant did not apply for this DCC until 10 June. That aside, basic fairness required that the promptness of the application be measured by reference to the point at which the paying party knew, or should have known, that the certificate had been issued. In this case that would have been within one or two days after it was sent to the costs draftsman's company by DX on 18 June.

Turning to the criteria set out at Practice Direction 47 paragraph 11.2, the starting point was whether this application was made promptly, measuring that from the date upon which the defendant became aware that an application needed to be made. It would be inappropriate to overlook the attempts to file the application from 15 July 2020. The SCCO's CE-filing system was still relatively new and did not always function perfectly. The Master accepted that the application was made as promptly as the costs draftsman could reasonably manage.

'…(although this was not, strictly speaking, an application for relief from sanctions) the Denton criteria must have a bearing on this application'

In exercising any power conferred by the Civil Procedure Rules, including the power to set aside a DCC, CPR 1.2 required the court to give effect to the overriding objective at CPR 1.1, which required that cases be dealt with justly and at proportionate cost. That expressly included ensuring that cases were dealt with expeditiously and fairly, and enforcing compliance with rules, practice directions and orders. This was the primary reason why (although this was not, strictly speaking, an application for relief from sanctions) the Denton criteria must have a bearing on this application.

Also, CPR 47.9(3) did impose a sanction on a paying party that served points of dispute late, albeit in time to prevent the issue of a default costs certificate. That party might not be heard further in the detailed assessment proceedings unless the court gave permission.

It was accepted that the defendant's default was serious and significant and the defendant did not attempt to argue that there was good reason for it. The remaining question was whether it would be just, bearing in mind all the circumstances of the case, to set the DCC aside.

What troubled the Master about this particular case was that, between mid-February and mid-March 2020 when lockdown started, it was allowed to drift into default without any effective action being taken either to avoid default or to remedy it at the earliest possible time.

The costs draftsman was not without options in February and March 2020. After an extension granted by the claimant had expired and a further extension might have been unlikely, he could have applied to the court for an extension. In the event no such application was made, but action could still have been taken to remedy the default at the earliest possible time.

The default and the issue of a DCC seemed to have been accepted as a fait accompli and the application to set aside treated as a routine administrative matter, rather than being prioritised sufficiently to prevent its going astray, as it did. It was partly the result of subsequent unfortunate circumstances that the default extended as long as it did, but all of that was preventable, and not enough was done to prevent it.

By the time the costs draftsman contacted the claimant's representatives to invite them to agree to setting aside the DCC, over four months had passed. The claimant was not only being asked to relinquish the DCC but to accept an avoidable delay of over four months to a process that should have been completed in six. That avoidable delay, and the way in which it was allowed to come about, led to the conclusion that this application should be refused.

It was not an answer to say that the claimant would be compensated by receiving interest on the unpaid part of her costs. She should not be kept out of her money for any longer than was necessary and she was entitled to a hearing as soon as reasonably possible. A delay of over four months was not, in all the circumstances, acceptable given the prejudice to the claimant and the need for the expeditious administration of justice.

The claimant was represented by Pennington Manches Cooper LLP.

The defendant was represented by QM Legal Costs Solutions Ltd.

The result here was not surprising but the judgment confirms the extension of the Denton criteria to this type of application.

The costs of amending a claim

R G Carter Projects Limited v CUA Property Limited (2020) EWHC 3417 (TCC)

This judgment concerned the proper approach to costs where a party in effect discontinued a number of claims by a radical amendment to its Particulars of Claim. The claimant had sued the defendant for damages of £14,225,768 for alleged misrepresentations. In the alternative it claimed extensions of time pursuant to a building contract and declaratory relief as to the proper sum due on its final account. The claimant now sought permission to amend its case to abandon the misrepresentation claim, abandon one head of claim on which an extension of time was previously sought, and reduce its claim on the final account. The overall effect of the amendments was to reduce the value of the claim by almost 87% from over £14 million to £1,852,338.57.

There was no dispute as to the claimant's entitlement to amend, but the parties were unable to agree the appropriate costs order.

Practice Direction 17 to the Civil Procedure Rules 1998 states the general rule upon amendment:

'A party applying for an amendment will usually be responsible for the costs of and arising from the amendment.'

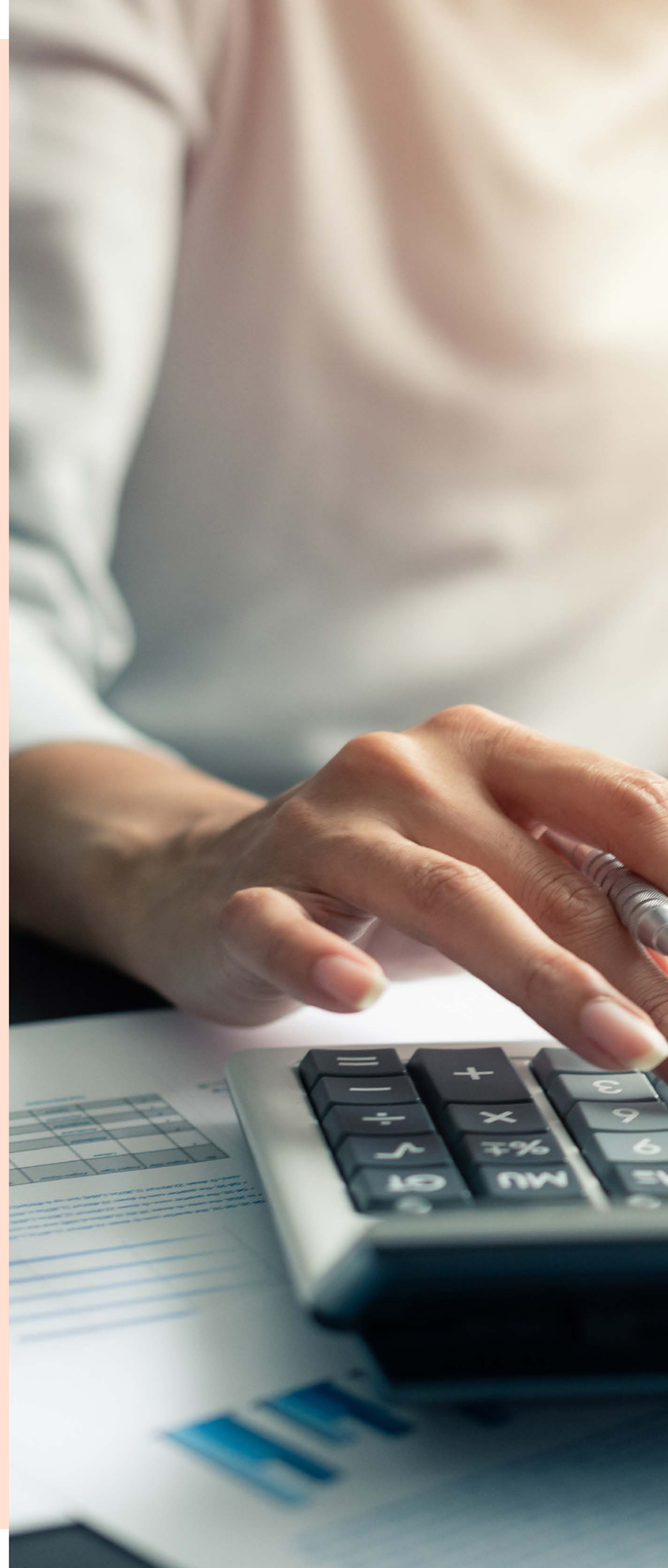
The High Court Judge held that the just order in this case was that the claimant should pay both the costs of and caused by the amendment; and the costs of the abandoned claims in misrepresentation and for an extension of time for the alleged change in the height of the roof.

The defendant argued that costs should be payable on the indemnity basis. The proper approach to applications for indemnity costs was not in dispute:

(a) Indemnity costs are appropriate only where the conduct of a paying party is unreasonable 'to a high degree.' Unreasonable in this context does not mean merely wrong or misguided in hindsight.

(b) The court must therefore decide whether there is something in the conduct of the action, or the circumstances of the case in general, which takes it out of the norm in a way which justifies an order for indemnity costs.

(c) The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, provided that the claim was at least arguable. But the pursuit of a hopeless claim (or a claim which the party pursuing it should have realised was hopeless) may well lead to such an order.



(d) If a claimant casts its claim disproportionately wide, and requires the defendant to meet such a claim, there was no injustice in denying the claimant the benefit of an assessment on a proportionate basis given that, in such circumstances, the claimant had forfeited its rights to the benefit of the doubt on reasonableness.

To that analysis, there were to be added five further observations:

(i) The discretion to award indemnity costs is a wide one and must be exercised taking into account all the circumstances and considering the matters complained of in the context of the overall litigation.

(ii) Dishonesty or moral blame does not have to be established to justify indemnity costs.

(iii) The conduct of experts can justify an order for indemnity costs in respect of costs generated by them.

(iv) A failure to comply with Pre-Action Protocol requirements could result in indemnity costs being awarded.

(v) A refusal to mediate or engage in mediation or some other alternative dispute resolution procedure could justify an award of indemnity costs.

Costs ordered either on amendment under Part 17 or partial discontinuance under Part 38 were ordinarily payable on the standard basis. Indeed, 44.9(1)(c) provided that where a right to costs arose under CPR 38.6, such order was deemed to be made on the standard basis. However, there was a growing practice of awarding indemnity costs where a claimant discontinued a claim pleaded in fraud.

Since it was professional misconduct to plead a claim in fraud without a proper evidential foundation, it was axiomatic that some explanation was owed upon the withdrawal of such an allegation. No doubt there would be cases where the allegation was properly made on the material then available to the claimant and the only responsible course to take following disclosure of some important contradictory evidence would be to withdraw the allegation, but unless such position was properly explained the claimant could usually expect to be ordered to pay indemnity costs.

The claimant here was careful, however, to stop short of pleading fraud in its misrepresentation claim. It was not therefore a case where defeat at trial would necessarily have led to an order for indemnity costs.

'The court should…be wary of departing too readily from the usual rule that costs on discontinuance should be payable on the standard basis'

Where a claimant persisted in a speculative, weak, opportunistic or thin claim to trial, he could expect to be met by an order for indemnity costs when it failed. The court should, however, be wary of departing too readily from the usual rule that costs on discontinuance should be payable on the standard basis. It would be wrong in principle and a perverse disincentive to claimants undertaking a proper review of their claims to order costs on the indemnity basis simply because, rather than pursuing a bad case to trial, a claimant took a proper decision to discontinue. There might be cases where the very issue of a speculative, weak, opportunistic or thin claim was abusive because the claimant never intended to pursue the matter to trial.

Such cases aside, the court should, save where fraud was alleged, ordinarily start from the position that costs should be on the standard basis.

The fact that the claimant realised for itself that its misrepresentation claim was doomed to failure at such an early stage in this litigation might well indicate that the claim was always so thin or speculative that it should never have been made. Indeed, given that the misrepresentation claim had been abandoned before either the exchange of witness evidence or disclosure, this was not a case in which the claim was discontinued by reason of something unexpected emerging during the course of the litigation that had forced a re-evaluation of the claim.

Nevertheless, the claim was not pleaded in fraud and on the material before him, the judge was not able to conclude that it was nothing more than an abusive attempt to extort money in settlement for a known bad claim. Indeed, if the matter had been so obviously clear, the defendant would no doubt have applied for summary judgment or applied to strike-out the claim.

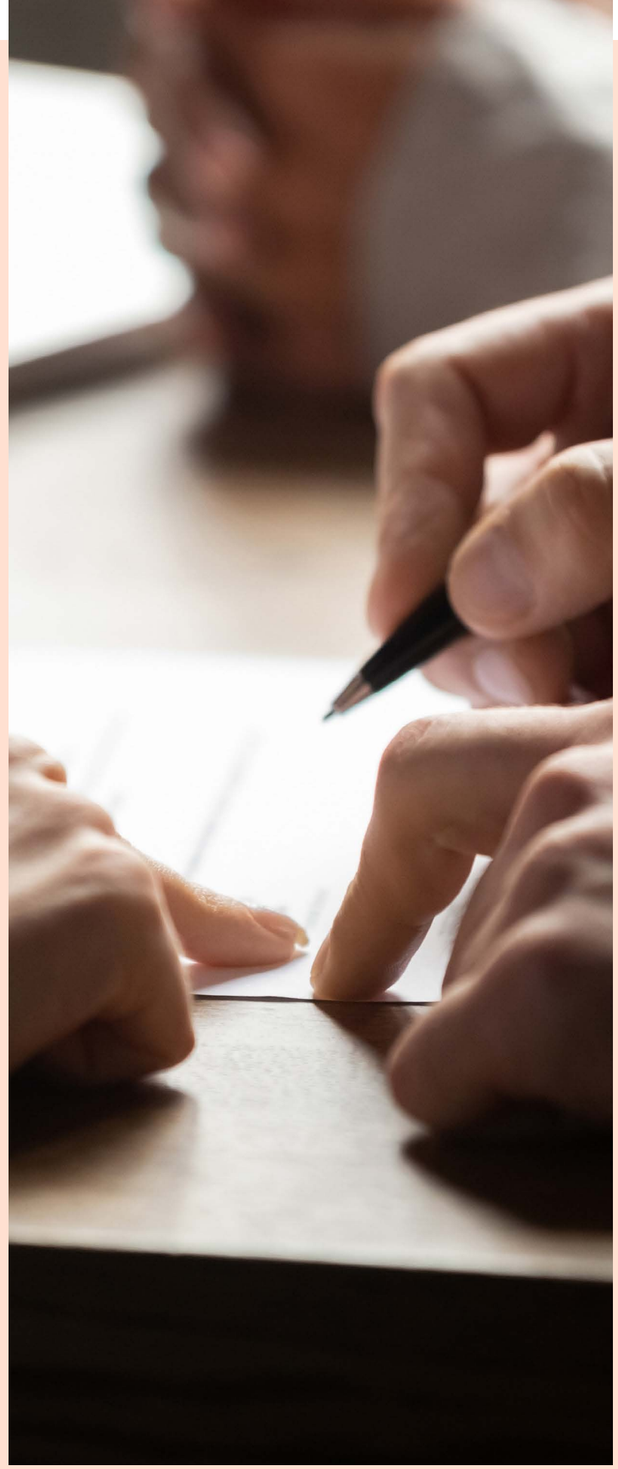
For all these reasons, the proper order was that the claimant should pay costs on the standard basis.

As to the amount to be paid by the claimant, the judge held that there was insufficient material to allow the court to contemplate summarily assessing that liability. The matter would have to be determined by a costs judge by detailed assessment at the conclusion of the case. This would be by reference to the two issues identified above, as the judge did not feel able to follow the preferred course of making a percentage order in this case rather than an issue-based order.

The claimant was represented by Kennedys Law LLP.

The defendant was represented by Costigan King.

This case is helpful in confirming that absent an abandoned pleading in fraud, or some other clear form of misconduct, a party discontinuing its claim, even to a significant extent, will normally be required to pay the costs of and caused by the its actions only on the standard basis.



Public liability/Hotel

Al-Najar (Protected Party) and others v The Cumberland Hotel (London) Limited (2020) EWCA Civ 1716.

In Insight 124, we reported the first instance decision in this case, when the High Court Judge dismissed the claimants' claims for damages.

The case raised issues about whether a hotel proprietor owed a duty to guests to take reasonable care to protect against injury caused by the criminal actions of third parties, and if so whether the duty was breached in this case.

The claimants and other family members were staying at the defendant's hotel. CCTV cameras showed that at 01.13 hours on Sunday 6 April 2014 Philip Spence walked into the hotel. He was wearing a jacket and trousers and it was common ground that in his appearance there was nothing to distinguish him from any other guest or visitor to the hotel. He walked across the lobby and passed within eight metres of the lobby security officer, going directly to the lift lobby. He took a lift to the 5th floor where he was shown on CCTV to be exiting the lift lobby on that floor at 01.14 hours. He then made his way to the 7th floor and it was apparent that he probably used the fire escape stairs because he was not shown on any other CCTV from the lift lobby. On the 7th floor he saw that the front door to room 7008 had been left open, with the deadlock used to prevent it locking. The door to room 7008 had originally been left open because one of the family members staying in the room had left it on the latch so that a hair dryer could be returned without waking the others.

Mr Spence went into room 7008 and started to steal money, jewellery and other items from rooms 7008 and 7007. He started putting the items into a suitcase which was in the room. One of the claimants woke up and Mr Spence attacked her by hitting her on the head with a hammer which he had in his jacket pocket. Another claimant woke up and came to the rescue, but she was also hit on the head with the hammer. At some time when he was in the rooms Mr Spence also attacked another claimant. All who were attacked suffered very serious injuries.

After the attack Mr Spence left the hammer on one of the fire escape staircases. He took the lift down to the lobby. He then left the hotel with the suitcase to return to an accomplice, who had supplied the hammer used by Mr Spence in the attacks. The accomplice used the credit cards stolen by Mr Spence to obtain £5,000 in cash.

Both men were subsequently convicted for the offences and imprisoned.

Three claimants claimed as direct victims of the attack, and other members of the family as secondary parties who suffered psychiatric injuries.

The trial involved a lengthy review of very many facets of the security arrangements at the hotel and the judge had to consider what was, in effect, a full-frontal attack by the

claimants upon the adequacy of the entirety of those arrangements as a whole. In general, the judge found the hotel's overall security systems to be adequate. He did not find there was any breach of duty arising from the failure to challenge Spence when he entered the hotel or in the hotel not having in place key card access to the lifts.

In their appeal, the claimants argued that the judge should have found that:

(a) the requisite standard of care in respect of controlling access to the guest lifts by the lobby officer involved the lobby officer at the least meeting and greeting every guest after 11pm where possible, alternatively where reasonably practicable;

(b) it was (eminently) possible/reasonably practicable for the lobby officer to have greeted Mr Spence, (particularly given how quiet the lobby was at the relevant time);

c) The lobby officer's failure to greet Mr Spence involved a breach of duty, whether operational negligence by the lobby officer or systemic negligence by the defendant for failing properly to train, supervise and/or monitor him;

(d) had the defendant not so acted in breach of duty to the claimants, the lobby officer would have greeted Mr Spence;

(e) as found by the judge, in such a situation Mr Spence would have then left the hotel i.e. the assaults would have been avoided.

There followed, in the grounds of appeal, a list of features of the judgment, in which it was said that the judge erred in reaching his conclusion on the breach of duty point. The first two of these were that the judge wrongly:

(a) erred in law in setting the standard as requiring only that the lobby officer walk around the lobby and look at guests;

(b) erred in law by asking only whether the duty on the defendant was to provide another lobby officer or to require the lobby officer to host and greet every guest entering the hotel after 11pm and not also whether the duty on the defendant required that the lobby officer host and greet every guest where possible, alternatively where reasonably practicable.

The Court of Appeal held that those two points could not properly be classed as errors of law at all, the findings criticised were merely assessments, on the facts of the case, of whether the admitted legal duty had been broken, which was a different thing.

The judge had addressed each of the thirty heads of criticism of the defendant's security arrangements separately, but all the heads of appeal now concentrated entirely on the single aspect of the judge's assessment of the role of the lobby officer at the hotel and his performance of that role on the night in question.

The appellate court noted that the duties listed for the lobby officer could not keep a single security officer in a fixed place in the lobby for the particular purpose of greeting or challenging those entering the hotel at all times. He had to attend other areas, including the bar, brasserie and outside smoking area. At the material time, the defendant only engaged one lobby officer at any one time. The judge rejected criticism of the failure to engage more than one such officer at any one time and the claimants did not appeal against that finding. Given the focussed manner in which the principal ground of appeal

was advanced, the crucial question now was whether the defendant was in breach of duty when the lobby officer failed to accost this one individual on the particular occasion in question.

'...that the judge was entitled to assess the breach of duty alleged in respect of the lobby officer's conduct on the night by the nature of the case being made against the defendant...'

Dismissing the appeal, the Court of Appeal held that the judge was entitled to assess the breach of duty alleged in respect of the lobby officer's conduct on the night by the nature of the case being made against the defendant on this individual point, and by the extent of the challenge made to the lobby officer himself when he gave evidence. The judge did that and he reached a conclusion, on this one aspect of the many breaches of duty alleged, in light of those factors.

There was no specific challenge at all as to whether it was possible or reasonably practicable for the lobby officer, from where he was at the crucial moment, to have directed a specific challenge to Spence as he entered the hotel. The nature of the duty alleged had now become shaded from the absolute duty that was being assessed at the trial. That shaded duty was not the one that the judge was called upon to assess. His final conclusion that (on the basis of the primary facts found by him) there was not a breach of the duty alleged, could not be faulted.

The claimants were represented by Hodge Jones & Allen Solicitors Ltd.

The defendant was represented by DWF Law LLP.

If nothing else, this judgment is a reminder of how difficult it is to appeal a judge's findings of fact, particularly where s/he has dealt with each allegation in considerable detail.

Horwich Farrelly

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