Insight 186

from Horwich Farrelly's Large & Complex Injury Group

WELCOME TO INSIGHT

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

- A reminder that service by electronic means is not good service unless explicitly agreed to
- The importance of serving a notice to prove
- The Court of Appeal's review of liability under the Occupiers Liability Act and the defence of *volenti non fit injuria*

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Service by email not good service

Ipsum Capital Ltd v Lyall & Ors [2020] EWHC 3508

The claimant brought proceedings under a guarantee. The court made an unless order that the four defendants, two married couples, file a defence by a certain date. That defence was served by email. The claimant entered judgment on the grounds that the defence had not been properly served. The defendants applied to set aside that judgment arguing that:

(i) The claimant was estopped from arguing that the defence could not be served by email;

(ii) If the claimant is not estopped, the defendants should be given relief from sanctions;

(iii) If the defendants are not given relief from sanctions the default judgment should be set aside pursuant to CPR 13.3.

The judge rejected the argument that there was any form of estoppel and then looked at (ii) and (iii) in reverse order, for reasons which become clear.

Estoppel:

The service of documents by email is governed by Practice Direction 6A, para.4.1. That reads under the heading 'Service by fax or other electronic means':

'Subject to the provisions of rule 6.23(5) and (6), where a document is to be served by fax or other electronic means –

(1) The party who is to be served or the solicitor acting for that party must previously have indicated in writing to the party serving –

(a) That the party to be served or the solicitor is willing to accept service by fax or other electronic means; and

(b) The… e-mail address… to which it must be sent…'

Then the Practice Direction provides in subparagraph (2) that the following are taken as sufficient written indications for the purposes of 4.1:

'…an e-mail address set out on the writing paper of the solicitor acting for the party to be served but only where it is stated that the e-mail address may be used for service…'

It was accepted in this case that the claimant solicitors had not stated that they would accept service by email. The defendants argued that as their solicitors had served the defendants' application for an extension of time to file their defence and relief from sanctions on the claimant's solicitors by email on 4 November 2019 and no objection was raised by them to that service, they were lulled into mistakenly believing that the claimant would accept service by email generally and therefore they served their defence and counterclaim on the claimant's solicitors by email on 7 February 2020.

Whilst accepting that evidence and noting that the claimant's behaviour in entering default judgment despite service of a defence and counterclaim by email was *'somewhat opportunistic even if in accordance with the rules'* he went on to say that *'the fact remains that by leaving service of the defence until the very last moment in this way and then failing to comply with the rules as to service, the defendants were the authors of their own misfortune.'*

The requirements of PD 6A, para.4.1 had not been met as the claimant had not previously indicated in writing to the defendants that it was willing to accept service by email. There was no unequivocal representation to the defendants, whether in writing or by conduct, that it was willing to accept service by email and that it had agreed to forego for all time its right to refuse to accept service by email in order for it to be estopped as alleged by the defendants.

Moving on, the judge confirmed that that defendants were required to apply for relief from sanctions in seeking to set aside the default judgment under CPR 3.3. However, he re-ordered the defendants' second and third arguments following *Regione Piemonte v Dexia [2014] EWCA Civ 1298*. In that case the Court of Appeal held that the correct approach to this issue was first for an application under CPR 13.3 for an applicant to show that he has real prospects of a successful defence or some other good reason to set the judgment aside.

If he does, then the court's discretion is to be exercised in the light of all the circumstances and the overriding objective. The court must have regard to all the factors it considers relevant of which promptness is both a mandatory and an important consideration. Since the overriding objective of the Rules is to enable the court to deal with cases justly and at proportionate cost, and since under CPR 1.1(2)(f) the latter includes enforcing compliance with rules, Practice Directions and orders, the considerations set out in CPR 3.9 are to be taken into account.

CPR 13.3 - Can the applicants show that they have real prospects of a successful defence or some other good reason to set the judgment aside:

The factual matrix was complicated and after a detailed review of the evidence available at that stage, the judge went on to make the following findings:

In relation to the defences of D1 and D3, the husbands; *'…. despite having some misgivings, the circumstances in which the guarantees came to be taken do call for some explanation.'* and *'I cannot say that the defence has no real prospect of success, in running a defence of fraudulent misrepresentation.'*

In relation to the defences of D2 and D4, the wives; *'I cannot say, certainly at this stage, that the wives' defences….do not disclose a real prospect of success'* and *'It seems to me that defence of the wives does have a real prospect of success at this stage on the evidence.'*

Therefore, he concluded that *'… there is a good reason why the husbands' defence, despite my misgivings, should also go forward at this stage because the court is going to be examining all of the circumstances surrounding the effecting of the guarantees in this case in any event and I think that there is just sufficient evidence before me to get them over the threshold of showing a real prospect of success or, as I say, alternatively, there is some other good reason why their defence should be allowed to proceed at this stage.'*

The judge then turned to the three-stage test in *Denton*:

Stage 1: Identify and assess the seriousness and significance of the failure to comply with any rule, Practice Direction or court order;

Stage 2: Consider why the default occurred;

Stage 3: Evaluate all the circumstances of the case to ensure that the court deals justly with the application, including rule 3.9(1)(a) and (b), namely the need for litigation to be conducted efficiently and at proportionate cost and to enforce compliance with the rules, Practice Directions and orders.

He found that:

- Baker J had already made an unless order against the defendants to file and serve the defence and counterclaim by a certain date, which they then failed to comply with.
- This was not a breach which was neither serious nor significant.
- The default occurred as a result of the defendants' misreading of CPR 6, but that misreading occurred as a result of the claimant's previous conduct in a ccepting service by email and the claimant latched onto that.
- The litigation had not been conducted efficiently and at proportionate cost and to enforce compliance with rules, Practice Directions and orders up to this stage and the defendants were responsible for that in large part.
- The contents of the defence and counterclaim were in fact brought to the attention of the claimant by email on the day on which the defence and counterclaim were ordered to be served and when the claimant entered its judgment in default it knew that the defendants had tried to bring the contents of that pleaded case to its attention

Taking all the factors into consideration, he set the judgment aside.

There is an important lesson here – service of a defence by email does not constitute good service unless the claimant's solicitors have stated that they will accept service by that means. The acceptance of earlier applications being served by email did not extinguish this requirement.

The importance of a notice to prove

Richards v Harvey [2021] EWHC 21 (Ch)

The claimant brought an action for damages alleging that he had entered into a contract with the defendant. The defendant denied there was a contract and the judge had to consider a series of emails that passed between the parties.

For the purposes of this publication, we only look at the judgment in relation to the claimant's emails but first, a reminder of CPR 32.19, which states:

(1) A party shall be deemed to admit the authenticity of a document disclosed to him under Part 31 (disclosure and inspection of documents) unless he serves notice that he wishes the document to be proved at trial.

(2) A notice to prove a document must be served;

(a) by the latest date for serving witness statements; or

(b) within 7 days of disclosure of the document, whichever is later.

In this case, the defendant served a notice to prove four documents, all apparently emails sent by Mr Richards. Three emails dated 12 June 2013; 13 March 2014 and 12 December 2014 were similar to emails disclosed by Mr Harvey, which he accepted he received or sent, but tracked comparisons showed numerous differences in the text.

The fourth, dated 5 February 2014 had no similar counterpart and Mr Harvey denied receiving that or any email from Mr Richards on 5 February 2014, which was the day after a crucial meeting.

Mr Richards accepted in evidence that the first three emails were documents he had forwarded to his solicitors, and that before doing so he had made alterations to the text of the original messages. He had not told his solicitors that he had made the alterations, and the added or altered text was not set out in such a way that would make the changes apparent.

All of the alterations strengthened Mr Richards' case or added support to his version of events. He had done so, he said, in order to 'translate' or 'explain' the words in the original emails. He had no good explanation why he had not told his solicitors this at the time he provided the documents to them. Without that information these documents gave a misleading impression, which would have been conveyed to the court if the defence had not spotted the discrepancies.

Mr Richards' counsel stated in opening that the claimant would not rely on any of those three emails but that he did seek to rely on the email dated 5 February 2014, in which Mr Richards says:

'It was good to see you yesterday morning at your house and to finally shake hands on the agreement reached between us. I fully understand why you don't want the agreement to be in writing… however as you put it a gentleman's agreement is binding on us both…I will advise [CGF] of our agreement reached…'

If genuine, this would have supported Mr Richards' evidence that he understood (and had expressly been told) that a binding agreement had been reached at the meeting.

The claimant had not been able to produce the original email, either in electronic or paper form and his evidence was that the electronic version had been deleted and he only had a paper copy that was in such poor condition that he retyped it in 2019, and gave the retyped version to his solicitors, which is what they disclosed. He had, he insisted in cross examination, copied it accurately.

The judge did not accept this account for various reasons having analysed the available evidence:

- The email did not sit well in the surrounding correspondence, which included an undisputed email sent by Mr Richards to Mr Harvey only two days earlier; the disputed email was not referred to in a later email and that email downgraded his understanding of the meeting from effectively a done deal to a 'proposal' that Mr Harvey was to discuss with his lawyers that he *'hope[d]' they would agree was the best way forward'*.
- There was no contact between Mr Richards and CGF (laweyers) after the meeting that could amount to him 'advising' the lawyers of an agreement he had reached with Mr Harvey. Although he sent them an email on 27 February in which he said *'as you know I have been discussing matters with John directly and I know he is in touch with your firm about that'*, that message was not consistent with Mr Richards Middle column on oage 7 neeeds having made any earlier contact with CGF about the meeting but did not amount to an assertion that an agreement has been reached.
- There was no apparent reason why the electronic version of the email should have been lost when others were not, nor why, if it was sent, it was not received.

The judge concluded *'Mr Richards' evidence about the other three emails challenged shows that he is not above presenting altered documents to assist his case, which is plainly damaging to his credibility. It is his obligation to prove that the 5 February document is genuine, and I am not satisfied that he has done so. It was not, in the end, put to him that it is a complete forgery, so I limit my findings to saying that*

i) This document is not reliable evidence of the text of any email that Mr Richards may have composed on 5 February 2014, and

ii) I am satisfied that if Mr Richards did compose any email on that day, whether in this or any other form, Mr Harvey did not receive it.

I attribute no weight to this document on any material issue.'

It is vital that when a notice to admit is served or documents disclosed, the subject matter is closely examined and where necessary, a notice to prove is served. This is a valuable but sometimes overlooked weapon in the defendant's armoury. Although this was a claim for breach of contract, it is a reminder that it can and should be used more widely where there are suspicions about the authenticity of documents. Had this been a personal injury claim the defendant's advisors would not have held back on an allegation of fundamental dishonesty.

Occupier's Liability Act 1957/ Volenti non fit injuria

The White Lion Hotel (A Partnership) v James [2021] EWCA Civ 31

The respondent, the widow and personal representative of her deceased husband, claimed damages for personal injury against the appellant, a hotel partnership, after he fell from a second-floor sash window in 2015 at the age of 41. Having attended a wedding with a friend, he returned to his hotel room, opened the sash window and sat on the sill, either to smoke or to get some fresh air. The window was faulty, so he had to hold the lower sash open. He fell from the sill to his death, though it was not possible to determine the exact cause of his fall.

The windowsill was 46cms above floor level, the modern standard minimum height being 80cms. Following an investigation, the appellant pleaded guilty on an agreed basis to offences contrary to s.3 of the Health and Safety at Work Act 1974 (the 1974 Act), accepting that although at the time of the accident there were no relevant standards for the window height, there was a low risk of someone falling from the window which should have been addressed.

The claim succeeded at first instance pursuant to s.2 of the Occupiers' Liability Act 1957 (the 1957 Act), subject to a 60% reduction for the deceased's contributory negligence.

The partnership appealed, relying on *Tomlinson v Congleton BC [2003] UKHL 47, [2004] 1 A.C. 46, [2003] 7 WLUK 986, Edwards v Sutton LBC [2016] EWCA Civ 1005, [2017] P.I.Q.R. P2, [2016] 10 WLUK 215 and Geary v JD Wetherspoon Plc [2011] EWHC 1506 (QB), [2011] L.L.R. 485, [2011] 6 WLUK 256,* arguing that the trial judge erred in failing to apply the principle that someone who chose to run an obvious risk could not pursue an action on the basis that the defendant had either permitted him to run that risk or had not prevented him from doing so.

The deceased's widow did not appeal any of the findings of fact or the finding of contributory negligence.

The following issues were reviewed on appeal:

Duty of care under s.2 of the 1957 Act

The trial judge's conclusions as to the existence of the appellant's duty to the deceased, a lawful visitor; the foreseeable risk of serious injury due to the state of the premises; the absence of social value of the activity leading to the risk; and the minimal cost of preventative measures were unassailable and provided a sound factual basis for a determination that the appellant breached its s.2 duty.

Tomlinson, *Edwards* and *Geary* were not authority for a principle which displaced the normal analysis required by s.2. What a claimant knew and should reasonably have appreciated about any risk he was running was relevant to that analysis and, in cases such as *Edwards* and *Tomlinson*, might be decisive.

In other cases, such as the instant case, a conscious decision by a claimant to run an obvious risk might not outweigh other factors, which were:

- The lack of social utility of the particular state of the premises from which the risk arose - the ability to open the lower sash window;
- The low cost of remedial measures to eliminate the risk (£7 or £8 per window);
- The real but relatively low risk of an accident acknowledged by the guilty plea.

The risk was foreseeable and likely to materialise as part of the normal activities of the hotel's guests.

There were factual features that distinguished *Tomlinson*, *Edwards* and *Geary* from this case:

- The presence of a defect;
- The critical difference a risk assessment would have made;
- The foreseeable risk of injury;
- The negligible financial cost of the preventative measures which would not reduce the social value of the window; and
- The fact that the deceased was a guest at the hotel.

Volenti non fit injuria

The trial judge found that the deceased had chosen to sit on the windowsill and had accepted the risk that, if he leant too far, he might fall. He said that *'In choosing to act as he did, he was guilty of a blameworthy failure to take reasonable care for his own safety.'*

The appellant argued that that finding was enough to provide a volenti non fit injuria defence pursuant to s.2(5) of the 1957 Act. However, the appeal judge confirmed that the judge's findings represented knowledge of the general risk. There was no finding that the deceased knew and accepted that the risk had been created by the appellant's breach of duty and was deliberately absolving the appellant or waiving his right to sue them. The findings provided a basis for a determination of contributory negligence but did not meet the requirements of s.2(5) and there were no grounds to interfere with them.

'There is no absolute principle that a visitor of full age and capacity who chooses to run an obvious risk cannot found an action against an occupier on the basis that the latter has either permitted him so to do, or not prevented him from so doing.'

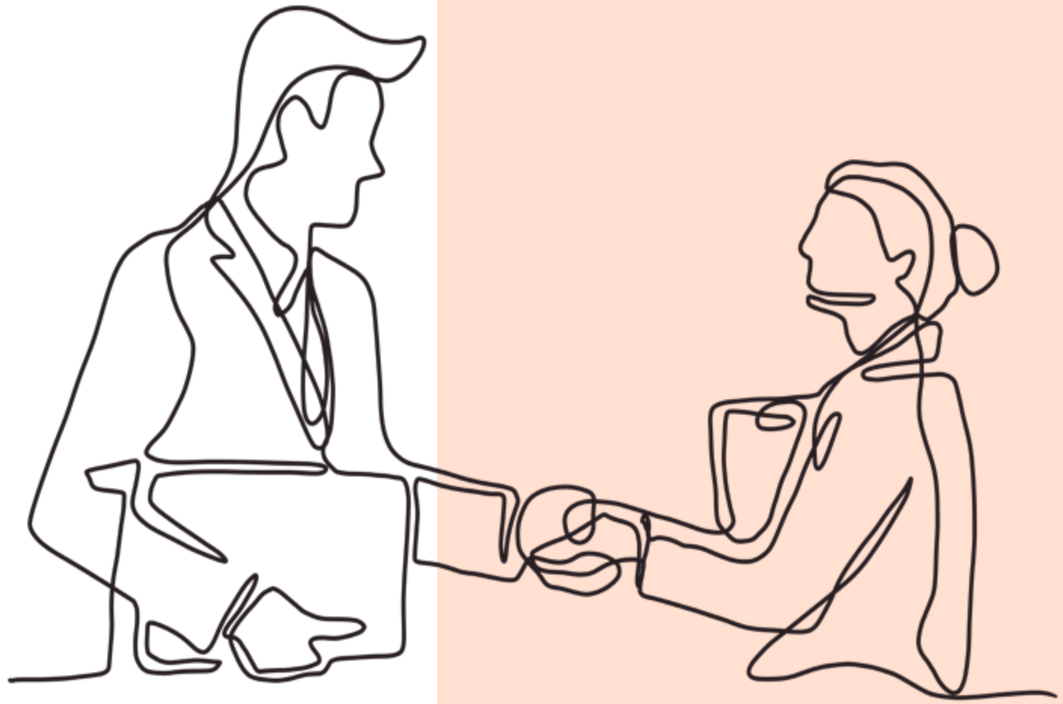
The criminal conviction

The trial judge erred in holding that an occupier who was in breach of his statutory duty under s.3(1) of the 1974 Act was ipso facto in breach of his duty to a visitor under the 1957 Act. The wording of s.47(1)(a) of the 1974 Act was clear: failure to comply with any duty imposed by s.3 did not confer a right of action in civil proceedings. Whilst there was a need for coherence and consistency as between the civil and criminal law which applied to the same set of facts, those facts had to be explored to determine how a criminal conviction related to civil liability.

The existence of a reasonably foreseeable material risk, which any reasonable person would appreciate and take steps to guard against, was a key constituent of the criminal offence and reflected the obligation under s.2 of the 1957 Act. In this case, the basis of the appellant's pleas should be taken into account - it accepted that it was reasonably foreseeable that an adult could fall from the window and that that risk should have been addressed. However, it did not follow axiomatically that in every case the chain of causation would be made out. Each assessment would be fact specific and it did not follow that civil liability automatically followed an unchallenged criminal conviction.

The Appeal was dismissed and the original judgment for the respondent subject to a reduction of 60% contributory negligence was upheld.

This judgment confirms that each case must be dealt with on the facts - the respondent's guilty plea under s.3(1) of the 1974 Act was on specific terms and did not automatically make them liable in the civil claim. It would have been perverse to make a finding that the deceased, a visitor, should possess greater knowledge than the occupier of the premises, making him wholly liable for his own accident pursuant to s.2 of the 1957 Act.



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