

Insight 2019

from Horwich Farrelly's Large & Complex Injury Group



WELCOME TO INSIGHT

Welcome to this week's edition of Insight, in which we report on the recent Court of Appeal ruling in the case of *Buttar Construction Limited v Arshdeep*. The Court of Appeal considered the appropriate test to apply when considering an application for an interim payment in a claim involving multiple defendants.

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Buttar Construction Limited v Arshdeep

Background

In August 2020 the claimant was working as a labourer on a building site in Swindon when he suffered catastrophic injuries. The claim was brought against four defendants. The claimant was employed by the second defendant (YKS) who were independent brickwork contractors engaged by the fourth defendant (Buttar). The first and third defendants were the individuals who controlled YYS and Buttar.

The event

The claimant, a student, was working for YYS during the summer vacation. The accident occurred on either the second or third day of his employment. YYS had carried out a risk assessment for the work they were undertaking and produced a method statement dealing with how the work should proceed. The method statement required bricks to be stored on secured platforms. This did not happen. Instead bricks and blocks were stored on sheets of hardboard that were spread over joists above head height for those working below.

The claimant was handing up bricks and blocks to a fellow worker who was stacking them while standing on the joists. The joists and the walls supporting them collapsed crushing the claimant causing him to suffer injuries of maximum severity.

The proceedings

Proceedings were issued in February 2021. The claim was brought in negligence against each of the four defendants.

In brief, the claimant alleged YYS failed to provide a safe place of work or system of working. The claimant alleged that Buttar was negligent in causing the bricks and blocks to be stacked in an unsafe manner, causing the claimant to stand in an unsafe place and failing to assess the strength and stability of the joists and supporting walls.

Both YYS and Buttar denied liability and blamed each other for the accident.

The insurers of both YYS and Buttar had reserved their position regarding indemnity.





The interim payment application

The claimant issued an application against both YKS and Buttar seeking a substantial interim payment to fund rehabilitation.

The claimant's application relied upon CPR 25.7 (1) which states:

The court may only make an order for an interim payment where any of the following conditions are satisfied –

- (c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;
- (e) In a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied –
 - (i) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which); and
 - (ii) all the defendants are either –
 - (a) a defendant that is insured in respect of the claim:

- (b) a defendant whose liability will be met by an insurer under s151 of the Road Traffic Act 1988 or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or

- (c) a defendant that is a public body.

The claimant relied solely on CPR 25.7 (1) (e).

The decision of the High Court

The application was heard by HHJ Bird. The judge laid out the test for himself as follows:

“I must be satisfied that if the claim went to trial, the claimant would obtain a judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which). If I am satisfied that that is the case, then I need to be satisfied that the second and fourth defendants are insured in respect of the claim.”

The judge reminded himself of the relevant passages in *HMRC v GKN* and summarised that advice as:

“It is important to emphasise that I am to assess what would happen if there was a trial on the material before me. It is not enough for me to say I cannot find on the balance of probabilities that judgment would be entered but I think it likely that it would”

The judge said he was satisfied that he would find breaches of duty owed to the claimant as a result of which he had suffered injury:

“The claimant was working on a building site, an inherently dangerous place. The second and fourth defendants were the only bodies who were capable either of making the building site safe or of keeping the claimant safe. That is because the fourth defendant was in effect in charge of the site as principal contractor, and the second defendant because I would find that it was responsible for the claimant.”

The judge having satisfied himself that damages would be substantial turned to the insurance issues asking himself whether the defendants were insured for the purposes of CPR 25.7. He stated:

“it may be in due course that one or other of the insurers will repudiate, but until repudiation takes place (whether the repudiation has the effect of completely rendering the policy void ab initio or not) as of today the defendants are insured”.

The judge directed YKS and Buttar to each pay an interim payment of £150,000.

YKS did not appeal the decision of the judge. Buttar appealed the decision.

The grounds of appeal

There were three grounds of appeal

1. The judge had failed to consider whether the conditions specified by CPR 25.7 (1) (c) were satisfied against YKS before considering the application under CPR 25.7.(1) (e).



2. The judge was wrong to conclude the claimant would obtain a substantial judgment against YKS or Buttar. He should have concluded the claimant would obtain a substantial judgment against YKS but not necessarily Buttar. The judge was also wrong to conclude that YKS and Buttar were insured in respect of the claim. He should have concluded that due to the fact the insurers of YKS and Buttar had reserved their rights neither defendant was insured in respect of the claim.

3. The judge was wrong to order an interim payment against Buttar because of the substantial chance the claimant’s claim against Buttar would fail and Buttar would not be able to recover the monies paid because the claimant is impecunious. Further the solicitors acting for YKS’s insurers had stated there was a very real prospect YKS would not be indemnified in respect of the claimant’s claim.

The Court of Appeal decision

Ground 1

There was no substance in ground 1. The claimant was entitled to bring the application under CPR 25.7 (1) (e). Whether it was wise to rely solely on CPR 25.7(1) (e) was a different issue. The judge was correct in finding CPR 25.7 (1) (c) applies when there is clarity as to the identity of the party against whom judgment will be entered. CPR 25.7 (1) (e) applies when there is no such clarity.

The appeal in respect of ground 1 was dismissed.

Ground 2

It was open to the judge to conclude that he was unable to determine whether the claimant would obtain judgment against YKS alone or YKS and Buttar. As such the requirement of sub-paragraph (e) (i) was satisfied.

The judge was correct to conclude that both defendants were insured in respect of the claim.

The appeal in respect of ground 2 was dismissed.

Ground 3

The possibility that YKS's insurers may not indemnify YKS in the event that it was held liable to the claimant was a material factor for the judge to take into account when exercising his discretion. The judge had considered it. The judge had described the evidence concerning the reservation of rights by YKS's insurers as "very thin". The judge was correct in applying that description.

It could not be said that the judge's balancing of factors that weighed in favour or against the exercising of his discretion was either wrong in principle, included immaterial features, or reached a conclusion that was outside the ambit available to him.

The appeal in respect of ground 3 was dismissed.

Commentary

The Court of Appeal decision confirms there are two separate categories of defendant against whom an order for an interim payment might be made.

Firstly, under CPR 25.7 (1) (c) where the court was satisfied the claimant would obtain judgment for a substantial amount against a defendant whether or not that defendant was the only defendant or one of a number of defendants to the claim.

Secondly under CPR 25.7 (1) (e) where the court was satisfied the claimant would obtain judgment for a substantial amount against at least one of a number of defendants.

In the present case the claimant brought the application under CPR 25.7 (1) (e) only. Whilst this had no material effect on the decision the judgment suggests a prudent claimant should bring the application also under sub-paragraph (c) in the alternative.

The definition of "insured" in sub-paragraph 7 (1) (e) (ii) (a) included claims where insurers had reserved their position in respect of indemnity. A defendant remains insured until the policy of insurance comes to an end.

The Court of Appeal stated it was not in a position to consider whether insurers were justified in making the decision to reserve their position regarding indemnity and commented that an interim payment application will seldom if ever be an appropriate forum for attempting to resolve the issues of fact and law that may arise on a purported avoidance or repudiation.

When assessing the prospect of a claimant obtaining judgment for a substantial sum of money the court could not conduct a mini-trial and the prospects had to be assessed on the information available at the time the interim application was heard.

In essence if a defendant wishes to oppose an application for an interim payment the court must be satisfied the claimant will not obtain judgment for a substantial sum against the defendant or that the policy of insurance covering the defendant's potential liability has been repudiated prior to the application for the interim payment taking place.

Finally, it should be remembered the court does have the power under CPR 25.8 to order the repayment of any interim payment made in the course of the proceedings.

