



Liability of a parent company to employee of subsidiary

In *Chandler v Cape plc*¹ the Court of Appeal set out the circumstances in which the law may impose responsibility on a parent company for the health and safety of employees of its subsidiary. The claimant had been employed between 1959 and 1962 by a wholly owned subsidiary of Cape plc (“Cape”), which was in the business of manufacturing asbestos products. He discovered that he had contracted asbestosis in 2007, by which time the subsidiary no longer existed and, since there was no policy of insurance which would indemnify it against claims of this nature, there was no point in seeking to restore the subsidiary to the register of companies. The claimant issued proceedings against Cape on the basis that Cape and its subsidiary were both tortfeasors and were jointly and severally liable for his loss. The judge at first instance held that Cape owed a duty of care to the claimant on the basis of the common law concept of assumption of responsibility.

The Court of Appeal upheld the judgment, holding that on the facts Cape had owed a direct duty of care to its subsidiary’s employees and had breached the duty in that it had failed to advise on precautionary measures as it should have given the state of its knowledge about the nature and management of asbestos risks. It held that in appropriate circumstances the law could impose on a parent company responsibility for the health and safety of its subsidiary’s employees. Those circumstances, germane

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to the instant case, included (a) the businesses of the parent and subsidiary were in relevant respects the same; (b) the parent had, or ought to have had, superior knowledge of some relevant aspect of health and safety in the particular industry; (c) the subsidiary’s system of work was unsafe, as the parent company knew or ought to have known; (d) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on the parent using that superior knowledge for the protection of the subsidiary’s employees. For the purposes of this last criterion, it is not necessary to show that the parent was in the practice of intervening in the subsidiary’s health and safety policies; intervention in trading operations could suffice.² Arden LJ was keen

¹ [2012] EWCA Civ 525.

² Paragraph 80.



to stress that the corporate veil was not being pierced: “A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company.”³ A particular relationship with at least some of the features set out above would have to be established. The decision should cause claimants facing claims against defunct or uninsured employers to look further into the relationship between the employer and any parent company.

The application of these principles to foreign subsidiaries of English companies is likely to be particularly interesting. The foreign subsidiary may well be based in a country whose courts do not offer an attractive forum and the subsidiary may or may not have the means or insurance to meet a substantial judgment. A claim against the English parent company will fix the jurisdiction of the English court, potentially allowing the foreign subsidiary to be joined as a second defendant in appropriate cases.⁴ And the decision in *Chandler* will make it more difficult to strike out the claim against the English parent as being clearly bad in law, with the result that the merits of the whole claim are more likely to be tried in England.

Discount rates and multipliers

In *Helmot v Simon*,⁵ the Privy Council considered an appeal about the appropriate discount rate to be applied to a lump sum payment for future losses in a personal injury claim in Guernsey. Guernsey tort law usually follows English principles, save where statute has intervened in England. The Damages Act 1996 does not extend to Guernsey and there

is therefore no default discount rate prescribed by statute and nor is there a statutory power to award periodical payments. Future losses must be awarded on a once for all lump sum basis. The principle of *restitutio in integrum* (putting the plaintiff back in the position he would have been in but for the accident as nearly as money can) is applicable in Guernsey as much as in England. The most recent relevant common law application of that principle in England (before the Damages Act intervened) was in *Wells v Wells*⁶ where the House of Lords decided that multipliers for future loss should be calculated using a discount rate based on the assumption that a plaintiff will invest his damages in Index Linked Government Securities (“ILGS”), a very low risk investment vehicle generally producing an accordingly modest rate of return. As well as the low risk, ILGS are attractive as the assumed investment vehicle for personal injury damages because ILGS protect the investor against retail price inflation (“RPI”) by offering a rate of return over and above whatever RPI happens to be in any given year. This means that the court does not have to speculate about future inflation when selecting the discount rate.

The principle in *Wells* applies to Guernsey. In the absence of a prescribed discount rate, expert evidence was heard on this issue from accountants, an actuary and an economist. The plaintiff’s evidence was to the effect that the rate of return on UK ILGS in Guernsey (after taking Guernsey inflation and tax into account) was just 0.5%. More radically, the plaintiff sought to establish that wage inflation generally runs at some 2% above price inflation. If such a differential were accepted as being likely to persist into the future, then the discount rate for future earnings related

³ Paragraph 69.

⁴ An English court has no power to refuse jurisdiction in a claim against an English domiciled defendant: *Owusu v Jackson* [2005] Q.B. 801.

⁵ [2012] UKPC 5.

⁶ [1999] 1 A.C. 345.



losses should be 2% lower than that for non-earnings related losses, i.e. should be the figure of minus 1.5%. As can be imagined, this produces strikingly high multipliers. The Royal Court (the court of first instance) did not accept the plaintiff's contentions and settled on an across the board discount rate of 1%. Given the severity of the plaintiff's head injury, this nonetheless produced a lump sum approaching £9.5m. The Court of Appeal (Sumption JA giving the only reasoned judgment), however, held that the plaintiff's evidence was cogent and that there was no proper basis for rejecting the conclusions to which it led. Discount rates of 0.5% and minus 1.5% were applied. The value of the award was increased by some £4.5m. The Privy Council unanimously upheld the Court of Appeal.

While not directly applicable in this jurisdiction, the case is of real interest for at least two reasons. The first is its relevance to the much delayed review of the statutory discount rate by the Lord Chancellor. The evidence accepted in *Helmot* would seem to demonstrate that in so far as the statutory discount rate is based upon the principles in *Wells v Wells* (as Lord Irvine said was the case when he set the rate in 2001) the current 2.5% is out by a long way. The Lord Chancellor reviewing the rate now would therefore presumably either have to reduce the discount rate very significantly or depart from the principle in *Wells* and risk a likely judicial review. Further, the evidence of the 2% differential between price inflation and wage inflation is as applicable to England as to Guernsey, and pressure will no doubt be brought to bear on the Lord Chancellor to accept that *restitutio in integrum* is only respected by a separate, lower discount rate for earnings related losses.

The second potential practical relevance of *Helmot* for English lawyers lies in section 1(2) of the Damages Act which permits the English court to take into account a rate of return different to that prescribed by the Lord Chancellor. The Court of Appeal shortly after the Lord Chancellor set his rate (in *Warriner v Warriner*)⁷ limited the circumstances in which the section 1(2) power could be exercised, requiring the identification of matters not considered by the Lord Chancellor or factors taking the case outside the range of cases envisaged by him when setting his rate. One can see that the courts would have wanted to give great weight to the rate set by the Lord Chancellor and to his reasons shortly after he had set the rate and propagated the reasons. But that was 11 years ago. Economic circumstances have changed significantly. The Lord Chancellor thought that returns on ILGS were "artificially low"⁸ when he set the rate. It has turned out, however, that they were not in a temporary trough at all but on a longer term path of decline. Could the courts feel that the exercise of the power under section 1(2) to apply a different rate of return is easier to justify when the Lord Chancellor's reasons are old and irrelevant to present conditions? Most claimants with large future loss claims of course mitigate the problem by taking much of the award in the form of periodical payments. But such awards are not available to all claimants and are not attractive to some. If the Lord Chancellor does not review his rate soon, a claimant might well be tempted to rely on *Helmot* to reopen the section 1(2) argument.

⁷ [2002] EWCA Civ 81, [2002] 1 W.L.R. 1703.

⁸ See Lord Chancellor's statement of 27 July 2001.



Limitation

The headline on the procedural horizon recently is the Supreme Court decision in *AB v Ministry of Defence*.⁹ The Court grappled with the concept of ‘knowledge’ for the purposes of sections 11 and 14 of the Limitation Act 1980 and the correct approach to the exercise of the section 33 discretionary power to disapply the limitation period. Ten lead cases were brought in group actions for personal injuries allegedly arising from exposure to radiation during nuclear testing in the South Pacific region in the 1950s. The claims were issued between 2004 and 2008 but it was not until 2007, when they were given a pre-publication copy of a new scientific study, that the claimants obtained their first piece of objective evidence of a possible link between the exposure and the injuries they had suffered. Limitation was tried as a preliminary issue. The key question was whether the claimants had knowledge that the injury each had suffered was attributable to the defendant’s breach of duty within the meaning of section 14(1)(b) of the 1980 Act. At first instance Foskett J¹⁰ concluded that he was bound by authority to approach knowledge under section 14 on the basis that a firm belief could amount to knowledge and found that half the lead cases would be statute barred. However, he exercised his section 33 discretion in favour of those claimants. The defendant appealed and the Court of Appeal¹¹ upheld Foskett J’s finding on the correct approach to ‘knowledge’ but found that all but one of the ten lead cases were out of time and the section 33 power ought not to be exercised in the claimants’ favour. Those nine claimants appealed to the Supreme Court.

By a four to three majority, the claimants’ appeals were dismissed. The majority held that knowledge under section 11(4)(b) was acquired when a claimant first reasonably came to believe in the facts specified in section 14(1) (that the injury was significant, attributable in whole or in part to the alleged act or omission said to found liability and the identity of the defendant or of the person for whom he is liable and the facts supporting that liability). Such knowledge did not mean knowing for certain, but with sufficient confidence to justify embarking on the preliminaries to issuing a claim (such as submitting a claim, taking advice or collating evidence). Of section 14(1)(b) and the attribution of injury, these claimants had historically made declarations of their belief in the link (some had made war pension applications on that basis and brought proceedings in the ECHR). All had the requisite belief more than 3 years before commencing their claims. Lord Wilson made it clear that it was “*a legal impossibility for a claimant to lack knowledge of attributability for the purpose of section 14(1) at a time after the date of issue of his claim.*”¹² Further, whilst the 2007 report established a possible link between the exposure and the injuries, the claimants had no case on causation and their claims had no reasonable prospects of success. As such the Court of Appeal had been correct to exercise the section 33 discretion afresh and against the claimants.

The complexity of the judgments and the stark disagreement between majority and minority mean that the Supreme Court’s decision “*will not ... be an ideal source of guidance to lower courts which regularly have to deal with these difficult problems.*”¹³ Lord Walker stressed that lower courts must take

⁹ [2012] UKSC 9, [2012] 2 W.L.R. 643.

¹⁰ [2009] EWHC 1225 (QB).

¹¹ [2010] EWCA Civ 1317.

¹² Lord Wilson at paragraph 3.

¹³ Lord Walker at paragraph 68.



the words of the Act as their starting point. Short judicial summaries of the appropriate principles, which are found in a number of cases, should be treated with caution, but the speech of Lord Nicholls in *Haward v Fawcett*¹⁴ at paragraphs eight to fifteen is the most authoritative judicial opinion on section 14. In short, the mainstream of existing appellate authorities on knowledge is not disturbed. Unfortunately, however, neither are the difficulties much clarified. The opportunity to provide definitive guidance for use by practitioners and the judges of lower courts has not been taken.

No non-delegable duty to school pupil

In *Woodland v Essex County Council*¹⁵ the Court of Appeal considered whether it would be appropriate to extend the law of negligence to provide that an education authority owed a non-delegable duty of care to a child at a school for which it was responsible to ensure that reasonable care be taken to secure her safety when she attended a swimming lesson arranged by the school but provided by a third party. It was accepted by the claimant that a finding to that effect would require a development of the law of negligence. The Court of Appeal (Laws LJ dissenting) upheld the High Court's decision to strike out that part of the claimant's claim, holding that the court was bound by the decisions in *A (a minor) v Ministry of Defence*¹⁶ and *Farraj v King's Healthcare NHS Trust*,¹⁷ and that there was no good reason to move the law on from where it currently stood. If the law were to be developed along the lines sought, it would be a matter for the Supreme Court. The ruling

provides a useful summary and analysis of current learning on the circumstances under which a non-delegable duty of care might potentially be imposed upon schools and hospitals to see that care be taken for the safety of children and patients, notably of recent case law in Australia where the courts have gone further than the English courts in extending the scope of the duty.

Ex turpi causa

In *Joyce v (1) O'Brien (2) Tradex Insurance Co. Ltd.*,¹⁸ Cooke J considered when a claim would be barred by the principle *ex turpi causa non oritur actio*. The facts as found were that Mr Joyce and Mr O'Brien were engaged in a joint criminal enterprise, namely stealing ladders. They put the ladders in the back of a van. Wanting to make a quick getaway, Mr Joyce stood on the rear footplate of the van with the door open holding on to the door and the ladder while Mr O'Brien drove off at speed. On a sharp corner, Mr Joyce fell from the van and suffered a serious head injury. Without the criminal activity, those facts would lead to a finding of liability with a healthy deduction for contributory negligence. But when illegality is involved, the court "*faces the dilemma that by denying relief on the ground of illegality to one party, it appears to confer an unjustified benefit illegally obtained on the other.*"¹⁹

Two principles arise. The first is one of moral turpitude: the law will not find it fair, just or reasonable to impose a duty on one criminal to take care of his co-conspirator when acting in a criminal enterprise. How can one measure an appropriate standard of care in such a situation? The second principle relates to causation: is it right that the criminal claimant should be compensated (often from

¹⁴ [2006] UKHL 9, [2006] 1 W.L.R. 682.

¹⁵ [2012] EWCA Civ 239.

¹⁶ [2004] EWCA Civ 641, [2005] Q.B. 183.

¹⁷ [2009] EWCA Civ 1203, [2010] 1 W.L.R. 2139.

¹⁸ [2012] EWHC 1324.

¹⁹ *Gray v Thames Trains* [2009] UKHL 33, [2009] 1 A.C. 1339 at paragraph 30.



public funds) for the consequences of his own criminal conduct? While the injury was in one sense caused by the driving of Mr O'Brien, Mr Joyce was standing on the footplate in order to secure the ladders he was in the process of stealing. The true cause of the injury, therefore, was the position he adopted while committing a crime. The proper question was identified by Lord Hoffman in *Gray*: "*Can one say that, although the damage would not have happened but for the tortious conduct of the defendant, it was caused by the criminal act of the claimant?... Or is it the position that although the damage would not have happened without the criminal act of the claimant, it was caused by the tortious act of the defendant?*"²⁰ Applying this causation test, the claim failed.

Assessing damages for mesothelioma

In *Ball v Secretary of State For Energy and Climate Change*,²¹ Swift J undertook an extensive review of the law applicable to the assessment of the award for pain, suffering and loss of amenity ("PSLA") in mesothelioma claims.

The claimant was exposed to asbestos dust in the course of his employment between approximately 1967 and 1985. Judgment on liability was entered in his favour and the matter came before Swift J for an assessment of damages. The remaining issue in dispute was the quantum of the PSLA award. The claimant was 92 years old when diagnosed with left pleural mesothelioma following symptoms of breathlessness which resulted in an emergency admission to hospital and invasive procedures. He remained in hospital for four weeks. Since his discharge, he had been looked after in a residential care home.

The medical evidence indicated that his life expectancy as of September 2011 was 3 months whereas (already exceeded by the time of trial), but for the mesothelioma, it would have been 2.9 years. His condition had stabilised over the six months leading to the preparation of the report and there was no indication that he had suffered a significant amount of pain or deterioration in his level of breathlessness. Over time, such deterioration would, according to the expert evidence, occur.

Swift J noted that she had been referred to the Judicial Studies Board ("JSB") Guidelines which, whilst not binding, are extremely influential in particular with conditions such as mesothelioma. The eighth edition of the JSB Guidelines identified the bracket for awards for mesothelioma as being £47,850 - £74,300. By the tenth edition, the bottom end of the bracket had been lowered to £35,000 whereas the upper bracket had been retained but with an increase to reflect inflation. Swift J further noted that there are a limited number of reported decisions as such claims frequently settle but summarised those reported awards which had been made in the currency of the eighth, ninth and tenth editions of the Guidelines.

Swift J expressed concern at the emphasis which successive editions of the Guidelines have placed on the primacy of duration of symptoms when determining the appropriate award of damages for PSLA in a mesothelioma case. There are a large number of factors other than duration of symptoms that will (or should) affect the level of award made. The Judge concurred with the view expressed by Senior Master Whitaker in *Smith v Bolton Copper Ltd*²² that one such factor was the extent and effect of invasive investigations. She further held that the level

²⁰ At paragraph 54.

²¹ [2012] EWHC 145 (QB).

²² QBD, 10 July 2007 (transcript available on Lawtel).



of symptoms must be a key factor and in particular, the extent to which those symptoms, and in particular pain, can be controlled. The level of the award will also be affected by matters such as the domestic circumstances and previous state of health and level of activity of the claimant/deceased. An older claimant may experience less restriction than a younger one. Whilst these factors were not exhaustive they were intended to illustrate that the assessment of damages in mesothelioma cases is more complex than the commentary to the JSB Guidelines would suggest. Swift J concluded that it was difficult to understand the basis for the lower bracket figure of £35,000 and expressed concern at the significant reduction in the bottom of the bracket.

On the facts of the case before her, the claimant could be regarded as a “typical case” of mesothelioma save in one respect, namely his advanced age. This meant that he had not had the distress of knowing that many years of his life had been denied to him and he had not had to give up work or hobbies. However, he had had to give up his independence and leave his home. Swift J concluded that an appropriate award would be below the inflation adjusted lower level of previous editions of the JSB Guidelines but above the level in the latest edition, namely £50,000.

A trio of employers' liability cases

*Ghaith v Indesit Co UK Ltd*²³ is the first of three recent employers' liability cases to stress the burden on the employer and the strictness of some statutory duties compared to negligence. *Ghaith* concerned an employee who suffered an injury to his back while lifting a package during stock taking. The package was not shown to be a heavy

one, but the claimant had been stocktaking for a considerable time when the injury happened. At first instance the judge dismissed the claim, holding that the claimant had been trained and knew how to lift and that there was nothing further the employer could have done. The Court of Appeal disagreed, finding that the risk assessments on which the defendants relied were not directed towards the specific risks associated with stock taking, in particular handling over an extended period. Having failed to assess the risks adequately, the defendants were not in a position to discharge the burden resting on them to show that they had taken all reasonably practicable steps to reduce the risk of injury to the lowest level reasonably practicable. On proof of causation, the Court of Appeal said: “*This is not a separate hurdle for the employee, granted that the onus is on the employer to prove that he took appropriate steps to reduce the risk to the lowest level practicable. If the employer does not do that, he will usually be liable without more ado.*”²⁴

The second recent case underlining the difficulties faced by employers is *Blair v Chief Constable of Sussex*.²⁵ This Court of Appeal case concerned leg injuries suffered by the claimant policeman during a motorbike training course. On appeal, the claimant argued that his defendant employer should have provided him with motocross boots which offered greater protection than the boots with which he had been provided in order to comply with its duties under the Personal Protective Equipment at Work Regulations 1992 and that the failure to do so caused his injuries. In the lower court the issued boots were held to be “*suitable and appropriate in the circumstances*”. The judge

²³ [2012] EWCA Civ 642.

²⁴ At paragraph 23.

²⁵ [2012] EWCA Civ 633.



dismissed the claimant's arguments that motocross boots could and should have been provided by holding that those boots were appropriate for competitive riding at speed on extreme terrain and that normal mobility would be hindered by wearing boots of that kind. The Court of Appeal held that the judge had not asked himself the crucial "effectiveness" question posed by regulation 4(3). There was no doubt that the standard issue boots supplied to Mr Blair were not effective to ensure "the prevention of significant injury". The Court of Appeal said: "It is first necessary to identify the risk of injury, and then to ask if the equipment in fact provided was, so far as practicable, effective to prevent or adequately control that risk. It is only if the equipment was effective or it was not practicable to make it effective that there is any need to consider whether the equipment is appropriate within Regulation 4(3)(a) or take account of ergonomic requirements or the claimant's state of health within Regulation 4(3)(b)."²⁶ Perhaps most interesting was Longmore LJ's comments on how much stricter the 1992 Regulations are than common law negligence: "I emphasize that this is not to say that the Chief Constable was in any way negligent at common law. Likelihood or foresight of injury does not come into the matter... The 1992 Regulations do not address matters of that kind. This is a sea-change from the old concepts of common law negligence. Whether that is a good or bad thing is not for this court to say, since the 1992 Regulations are now the law of the land."²⁷

The final case is *Costa v Imperial London Hotels Ltd*²⁸ which was a manual handling claim. In 2007 a chambermaid in a hotel

injured her neck and shoulder whilst moving a bed to clean under it. At the beginning of her employment with the defendant in 2004, the claimant had attended a training course including a manual handling demonstration of how to "lift" in the conventional manner (straight back, from the knees etc). At first instance the judge held that the Manual Handling Operations Regulations 1992 reg. 4(1)(b)(ii) applied and that, although the claimant had received adequate initial training, she had not received continuing or refresher training which was a breach of the defendant's duty to reduce the risks faced by the claimant to the lowest level reasonably practicable, and that the accident had been caused by the lack of that refresher training. The defendant appealed only against the finding that it should have given refresher training and that the lack of such training caused the accident. The Court the Appeal found that the failure to give refresher training was a breach of regulation 4(1)(b)(ii) as providing such training was "undeniably reasonably practicable". The judge's choice of the words "should" and "necessary" did not import a test of strict liability as the defendant contended. However, the appeal succeeded on causation. The Court of Appeal held that the judge at first instance had adopted the wrong test of causation when he found that "that refresher training on a regular basis would have prevented or at least reduced the risk of the Claimant pulling the bed from the wall in the way that she demonstrated at trial."²⁹ As Hughes LJ said: "It is not enough that any breach of the regulation would have reduced the risk of injury; the claimant has to demonstrate that the breach was a cause of the injury; in other words that it would have

²⁶ At paragraph 6.

²⁷ At paragraph 14.

²⁸ [2012] EWCA Civ 672.

²⁹ Cited at paragraph 15 of the Court of Appeal.



prevented the injury.”³⁰ Accordingly as the claimant led no evidence that conventional manual handling refresher training would have prevented the injury she sustained, her claim had to fail.

Costs Update

The primary legislation necessary to implement the Jackson reforms, Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill 2012, has now made its way through Parliament. It is expected to be in force from April 2013. It is envisaged that the Jackson reforms which require implementation via rules of court, rather than through statute, will be brought into force at the same time. Many of them have already been considered by the Civil Procedure Rules Committee and approved pending the implementation date. Many others have been, and are, subject to ongoing pilot studies to test their efficacy, to bring to light practical problems, and to provide the opportunity for improvements before full implementation.³¹ For the present, success fees and ATE premiums remain recoverable inter partes; and they will continue to be so under CFAs entered into, and ATE policies taken out, until the date the legislation is implemented.

Battles over Part 36 offers continue. The latest case is *PHI Group Limited v Robert West Consulting Limited*.³² It is not a personal injury case but raises issues likely to arise in personal injury litigation. The Court of Appeal had to consider the application of Part 36 in relation to contribution proceedings between two parties liable to the claimant, Carillion JM

Ltd, for the same damage. Carillion was the main contractor engaged to carry out the design and construction of a train servicing depot to the west of the Wembley Football Stadium between 2004 and 2006. The appellant, PHI, was the specialist design and build contractor for what was called the “soil nailing work”. The respondent, RWC, was the consulting engineer and lead consultant for the overall works. At the end of the trial of Carillion’s claim against RWC (Carillion having settled with PHI before trial) and the trial of contribution claims each way as between RWC and PHI, Akenhead J ordered PHI to pay 30% of the costs of RWC’s contribution proceedings against it and he made no order as to the costs of PHI’s contribution proceedings. By the appeal PHI sought an order that RWC should pay PHI’s costs of both sets of contribution proceedings and that RWC should bear its own costs of both those proceedings. PHI contended that a solicitor’s letter in February 2010 was a Part 36 offer, and, if it were not, that the February 2010 offer was anyway a better offer than RWC had achieved, and so most or all of the prescribed Part 36 costs consequences should flow under the CPR 44.3 discretion. The relevant letter of 5 February 2010 was headed Part 36 offer and “without prejudice save as to costs.” It said that the offer was intended to have the consequences of Part 36 of the Civil Procedure Rules. It offered a 70/30 liability split to RWC. It asked for a response within 7 days. On appeal the Court of Appeal held that the February 2010 letter, although called a Part 36 offer and intended to be so, did not specify a period of not less than 21 days, or any period, in compliance with paragraph 36.2(2)(c). This was fatal to its status as a Part 36 offer. Although any ambiguity in an offer purporting to be a Part

³⁰ At paragraph 17.

³¹ See lecture by Lord Neuberger MR to the Law Society on 29 May 2012: [Proportionate costs: fifteenth lecture in the implementation programme.](#)

³² [2012] EWCA Civ 588.



36 offer should be construed as far as possible so that the offer was Part 36 compliant, *C v D*³³ applied, some explicit identification of a period of 21 days or more was required under CPR 36.2(2)(c). The safe course was to use or refer to the wording of the rule, and merely referring to a 21-day period without following the wording would arguably not be enough. Under its alternative 44.3 discretion, the Court did not see how it could award the additional interest due under a claimant's Part 36 offer, unless the offer was a Part 36 offer properly so-called. Even a minor formal or technical defect would be fatal to that entitlement. Since the February offer was not a Part 36 offer, contractual principles applied as to withdrawal (see *Gibbon v Manchester City Council*)³⁴ but although the two offers were inconsistent, so that RWC could not accept them both, it did not follow that because the latter was put forward the former was necessarily withdrawn. Although it was not a case within Part 36, the appropriate order under CPR 44.3 was still that RWC should pay to PHI the latter's costs of the contribution proceedings, and should bear all of its own costs.

PHI underscores the importance of getting the Part 36 offer wording right in order for the offeror to be sure to obtain its protection, despite *C v D*. Paragraphs 31 and 32 of the judgment of Lloyd LJ set out helpful guidance. It is also worth remembering that any offer other than a Part 36 offer is subject to ordinary contractual principles, and can be withdrawn with no particular formality. The best course is to follow the wording of Part 36.2 itself. Beware taking old Part 36 letters out of the drawer or off the computer, and not checking whether they conform to the current

wording – see *Thewlis v Groupama Insurance Co Ltd*,³⁵ where the offer referred to late acceptance being possible only if costs were agreed or the court gave permission, a phrase which is a relic from a former version of CPR 36, and where this was one reason for the offer being held not to have Part 36 status. This case is widely thought to have been wrongly decided, and was compromised before an appeal, but nonetheless serves as a further warning.

*Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)*³⁶ bears careful reading as much for its general exposition of the exercise of the CPR 3.1(7) discretion to vary an order as for its decision in respect of that discretion with costs consequences. The claimant brought a personal injury action which began on the small claims track and was then re-allocated to the Fast Track. He won the claim. Not until detailed assessment commenced did the claimant realise that the costs before re-allocation were still only small claims costs because of the operation of CPR 44.11, which meant a potential loss of costs of some £20,000. Some 11 months after the order for re-allocation the claimant sought to vary it, so that costs before re-allocation would also be treated as Fast Track costs. The district judge agreed to vary the order. The defendant's appeal against that variation was successful, and the Court of Appeal dismissed the claimant's appeal. It would normally take something out of the ordinary to lead to variation or revocation of an order, especially in the absence of a change of circumstances in an interlocutory situation, but there might be room within CPR 3.1(7) for a prompt recourse back to a court to deal with a matter which ought to have been dealt with but had been overlooked by the parties and court in

³³ [2011] EWCA Civ 646, [2012] 1 All E.R. 302.

³⁴ [2010] EWCA Civ 726, [2010] 1 W.L.R. 2081.

³⁵ [2012] EWHC 3 (TCC).

³⁶ [2012] EWCA Civ 518.



genuine error. Here the gross delay in making the application was unexplained and fatal, and nearly every factor militated against the 3.1(7) discretion being exercised in the claimant's favour.

In *Corby Dockerill v S Tullett*³⁷ the Court of Appeal looked at costs in low-value infant settlement approvals. The question was whether costs were to be assessed under the fixed costs regime in CPR 45 Part II or under CPR 44.5; and if under CPR 44.5, how the assessment should be carried out, given that in both the cases before the Court, damages were less than £1,000, there were never any real issues on liability or quantum and these would have been small claims but for the fact that court approval was needed. Costs fell to be assessed under CPR 44.5 because the small claims track would have been the normal track (see CPR 45.7(2)(d)) and so the predictive costs regime did not apply; but the costs judge was entitled to take into account the size and complexity of the claim under CPR 44.5, and the paying party could challenge not only the amount and reasonableness of any particular item but also whether it was reasonable to instruct solicitors at all to act in the approval proceedings. Arden LJ accepted that practical consequence of the ruling might be to discourage solicitors from taking on CPR 21.10(2) proceedings involving small claims because they are unlikely in many such cases to be able to recover their costs. In the case of *Tubridy v Sarwar*, heard at the same time, the question was whether counsel's fees for attending the approval hearing under CPR 21.10(2) were recoverable as a disbursement necessarily incurred under CPR 45.10(2)(c). Where damages were £2,100 and so costs did fall to be assessed under CPR 45 Part II,

it was held that for the fees of counsel attending an approval hearing to be recoverable, there had to be some complexity in the case which justified her being instructed to appear, and in the present case the convenience of having counsel at the hearing had to be borne by the solicitors as part of their fixed recoverable costs under CPR 45.9 (counsel's advice was needed and the fee was recoverable).

Most practitioners are probably already aware of *Simcoe v Jacuzzi UK Group plc*³⁸ in which the Court of Appeal held that interest on costs incurred under a CFA runs, not from the date when those costs are agreed or assessed, but from the date when the order for costs is made. The fact that costs are incurred under a CFA, and probably will not be paid to the solicitor until they are assessed and paid over by the adversary in litigation, does not justify a departure from the general rule.

In the solicitor/own client arena, see *Cawdery Kaye Fireman and Taylor v Minkin*:³⁹ the solicitors were entitled to suspend work if they were not paid according to their letter of retainer, and an estimate had been exceeded for good reason; they had not wrongfully terminated the retainer but suspended work and it was the client who had terminated the relationship; that being so, they were entitled to payment, rather than their entire bills being disallowed for termination without good reason.

³⁷ [2012] EWCA Civ 184.

³⁸ [2012] EWCA Civ 137.

³⁹ [2012] EWCA Civ 546.

CONTRIBUTORS



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