RPC

# General liability newsletter

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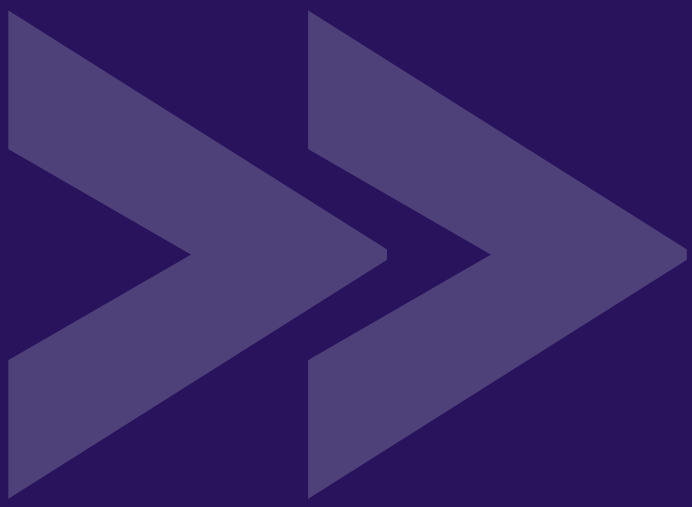

# Introduction

Welcome to the latest edition of our general liability newsletter, rounding up the key cases from January 2020. This month we look at recent cases involving; claims for court fees, late applications to vacate trial, part 36 settlements & litigation privilege.

# Claim for Court fee is unreasonable if remission of the Court fee possible

In Stoney v Allianz Insurance Plc (County Court at Liverpool) at a Detailed Assessment hearing on 7 November 2019 the District Judge decided that the Claimant could not recover the Court issue fee of £455 from the Defendant if he could have claimed remission of the fee from the Court.

Rule 44.3 of the Civil Procedure Rules says that the Court should not allow costs which have been unreasonably incurred or are unreasonable in amount.

The Defendant accepted that the Court fee was reasonable in its amount, but argued that the fee was unreasonably incurred because the Claimant's medical report stated that the Claimant was unemployed and therefore likely to have been receiving one or more of the qualifying benefits that entitled him to apply for fee remission, thus avoiding having to pay the court fee.

The Claimant's solicitors argued that its business model was to offer to fund all disbursements for their client, regardless of the outcome of the claim, provided the Claimant took out an After The Event insurance Policy which provided for reimbursement if the claim was unsuccessful; as such, their client could not justifiably claim fee remission when the fee was covered by insurance.

The judge decided that a costs assessment was not the place for such nuanced arguments, and that as the Court rules provide for fee remission which can be obtained by answering questions addressing income alone, and which did not enquire about potential availability of insurance cover or other means of funding the fee, the fee was unreasonably incurred and not allowed to be recovered from the paying party.

The judge expressed the view that if this was a matter of principle rather than interpretation of the rules, then that was a matter for the Rules Committee or Parliament to address.

Pending the decision of a higher Court, or rule change, this is an issue which both Claimants and Defendants should bear in mind and address early on in litigation rather than when the issue arises on assessment of costs.

# Late application to vacate a trial date risks refusal even if this automatically hands victory to an opponent

In *Mitchell v Precis 548 Limited* (High Court 15/11/2019), a fatal mesothelioma claim being pursued by the deceased's 84 year old widow, the Court gave Directions in March 2019 and at a listing hearing in April 2019 arranged for a trial on a day between 18 and 20 November 2019.

The First Defendant had no factual witnesses. It relied entirely upon expert evidence for its defence, which disputed that at the time of exposure to asbestos in the 1940s and 1950's the alleged exposure to asbestos was likely to have been known to cause injury.

The First Defendant's solicitors did not inform their expert of the trial window until July 2019. By that time the expert had booked a holiday and was not available to attend the trial. The Claimant's solicitors were informed about this, but no application to move the trial was made until two days before it was due to commence.

The judge hearing the application considered that the First Defendant's solicitors should have notified their expert of the trial window in April 2019 (ie promptly). Failing that, they should have made their application to the Court at least in July 2019 when they knew their expert was unavailable, and at the latest in September 2019 after experts' reports were exchanged and the extent of the dispute between the parties was evident.

The judge accepted that if the trial proceeded with the First Defendant being unable to call any evidence in its defence, the Defendant would in effect be deprived of any defence. However, he considered that this situation had been avoidable and created by the failure of the Defendant's solicitors to take action much earlier. The judge also considered that the Claimant, whose husband had died more than four years earlier, had a legitimate expectation the trial would proceed and that it would be highly prejudicial to her if the trial was delayed. The judge decided that it would not be fair and just to delay the trial and ordered the trial to proceed.

The judge reiterated the point often made by judges that the later the application to vacate a trial the less likely it was to be granted.

# Care required when making Part 36 offers – costs and interest pitfalls

Two recent cases have addressed continuing issues relating to what constitutes a valid Part 36 settlement offer and its costs consequences.

## Costs hazards

In *Siu Lai Ho v Seyi Adelekun* (19 November 2019) the Court of Appeal decided whether the Defendant's agreement to costs being assessed in his Part 36 settlement offer (which was accepted by the Claimant) modified and replaced the standard provisions for costs set out in Part 36 which would otherwise have provided in this particular case for fixed costs to be paid.

The facts leading to settlement were not straightforward. The claim had been commenced using the pre-action protocol for low value personal injury claims in road traffic accidents. Liability was not admitted. Following issue of proceedings, the claim was allocated to the Fast Track, to which the fixed costs prescribed in the Civil Procedure Rules would apply.

Because the claim appeared to have a value higher than £25,000, the Claimant's solicitors applied to have the claim reallocated to the Multi Track. Before the application was heard, the Defendant agreed to the reallocation but also made a Part 36 offer to settle at £30,000, which was accepted.

The offer letter stated that if the offer was accepted, the Defendant will pay the Claimant's legal costs "in accordance with Part 36 Rule 13 of the Civil Procedure Rules such costs to be subject to detailed assessment if not agreed".

Apparently at the request of the Court, the parties then agreed a consent order which included this costs provision. (A consent order is not usually necessary where a claim is settled through a Part 36 offer and acceptance).

The Claimant then sought assessed costs in the region of £42,000. The Defendant argued that fixed costs applied and that the Claimant's costs were limited to no more than £16,000.

At first instance the judge decided that fixed costs applied. On appeal, a High Court judge took the opposite view, deciding that fixed costs did not apply. The Court of Appeal reversed that decision, deciding that fixed costs applied for the following reasons.

- The reference in the offer letter to the entitlement to costs in CPR 36.13 (which provides for assessed costs) rather than the CPR 36.20 (which provides for fixed costs) was not relevant; CPR 36.13 provides for fixed costs to apply where a claim has left the low value pre-action protocol.
- N242A, the standard court form for making Part 36 offers, refers to CPR 36.13 and not to CPR 36.20. The person making the offer did not have to say whether or not fixed or assessed costs were being offered.
- The offer letter was expressed to be made under the Part 36 regime, and as such the provisions of Part 36 make it clear that the fixed costs regime will apply.
- The reference in the offer letter to detailed assessment should not be construed as an intention to displace the fixed costs regime. Fixed costs involve an assessment of some kind, particularly to disbursements.
- It was improbable that the Defendant intended to disapply the fixed costs regime in the offer letter, because doing so would be inherently unfavourable to the Defendant.

The Court of Appeal accordingly decided that fixed costs applied.

Possibly fortunately for the Defendant, the Claimant had not sought to argue that his email accepting the offer and submission of a draft consent order setting out the terms of settlement which included provision for assessed costs amounted to a counter-offer to settle in terms outside the Part 36 regime.

The Court of Appeal suggested that a Defendant making a Part 36 offer on the basis that fixed costs will apply would be well-advised to refer in the offer to CPR 36.20, and not CPR 36.13, and to omit any reference to the costs being assessed or any reference to costs on the standard basis.

Whilst that is sound advice for Part 36 offers made by letter, it would be better to use the standard court form N242A for making and accepting Part 36 offers and to avoid following up accepted offers with any consent order.

## Interest

It has been settled for some time that a Part 36 offer made in the course of proceedings must include interest, and that an offer expressed to be made exclusive of interest disqualified the offer from the rules that apply to Part 36.

Until recently, however, it has not been clear whether this applied to Part 36 offers made in Detailed Assessment proceedings, because of conflicting previous decisions.

In *Francis King v City of London Corporation* (18 December 2019) the Court of Appeal decided that any Part 36 offer, made at any time in proceedings, cannot contain a provision that excludes interest.

Following settlement of the claim, the Claimant's costs draftsman served a Bill of costs and offered to settle costs on a Part 36 basis at £50,000 excluding interest. Costs were assessed at £52,470 excluding interest. The Claimant referred to the settlement offer, pointed out that costs had been assessed at a higher sum, and claimed entitlement to the additional costs and interest provided for in Part 36. The Defendant denied the offer was valid.

The Court considered the apparent conflict between CPR 36.5(4) which states that Part 36 settlement offers will be treated as including interest, and Practice Direction 47.19 which states that a Part 36 offer should say whether it includes interest. It decided that the rule prevailed over the Practice Direction.

The origin of this conflict has its origins in what used to be CPR 47.19 which provided in Detailed Assessment proceedings for costs settlement offers to be made "without prejudice save as to costs of the detailed assessment proceedings." CPR 47.19 said that when such an offer is made it should specify whether it is intended to include, among other things, interest, and that unless specifically stated otherwise, the offer will be treated as including interest.

Whilst CPR 47.19 allowed a nuanced approach to costs settlement, its replacement by the current all-embracing Part 36 regime is not so subtle and a costs settlement offer made as a Part 36 offer is incapable of such modification.

## Absence of evidence of historic noise surveys does not entitle the Court to infer that a Claimant had been exposed to excessive noise at work

One of the mainstay allegations made in Noise Induced Hearing Loss claims is that an employer failed to carry out any or any adequate assessment of noise and had exposed the Claimant to excessive noise.

Where the alleged exposure to noise took place many years ago, even if the employer still exists it is commonly found that noise surveys have not been kept or factory buildings where the alleged exposure to noise took place have been demolished. If the employer ceased trading a long time ago, then no records at all will be available.

In *Brian MacKenzie v Alcoa Manufacturing (GB) Ltd* (29 November 2019) the Court of Appeal considered the correct approach to assess liability in this situation.

The Claimant had worked at the Defendant's factory between 1963 and 1976 apart from a few months in 1968. He alleged he was regularly exposed to average noise each day above 90 decibels, which was the relevant threshold for liability to be established at the time.

The Defendant was unable to provide any noise survey for the factory at which the Claimant worked, but still had a comparable factory where noise levels were said to be similar. An acoustic engineer was instructed by the parties on a joint basis and visited the other factory. Based upon this, the acoustic engineer's expert evidence was that the Claimant, who was a maintenance engineer, was unlikely to be regularly exposed to noise exceeding 90 decibels. He added that without seeing contemporaneous noise surveys / measurements from the premises at which the Claimant had actually worked between 1963 and 1976, it was not possible to demonstrate, on the balance of probability, that the Claimant's average daily noise exposure would have reached or exceeded 90dB(A) during his employment.

At trial, counsel for the Claimant argued that as the Defendant was unable to produce any noise surveys or explain their absence, the judge should draw adverse inferences in line with the Court of Appeal decision in *Keefe v Isle of Man Steam Packet Co Ltd* [2010] in which the Court decided that a judge was entitled to draw adverse inferences against an employer which had failed to carry out noise assessments and which accordingly made it more difficult for a Claimant to prove his case.

The trial judge rejected this approach, saying that in the years since the Claimant's employment, documents were likely to have been lost. He said it was not possible to make a finding that the Defendant had not carried out any noise surveys. The judge also said that the expert evidence was not just that the Claimant was unable to prove exposure to noise higher than 90 decibels; it included an opinion that it was unlikely the Claimant was regularly exposed to noise in the way he had alleged. The claim was dismissed.

The trial judge's decision was overturned on Appeal to a High Court judge, largely on the basis that as the acoustic engineer's evidence explained why it was not now possible to establish the noise to which the Claimant had been exposed, the absence of a noise survey was a significant factor that entitled the Court to draw adverse inferences against the Defendant. The Defendant appealed.

On this further appeal, the Court of Appeal considered when the common law duty to carry out a noise survey first arose, whether there was a failure to carry out a noise survey, and whether the trial judge was entitled to rely upon the acoustic engineer's evidence.

The Court of Appeal noted that it had not been disputed that the absence of noise surveys was explicable because of the passage of time, and that the trial judge had accepted that noise survey documents may have been lost rather than absent because no noise survey was carried. The Court of Appeal decided that the trial judge was entitled to conclude that it was not possible to make a finding that the Defendant was in breach of duty to carry out noise surveys, and that there was no basis for the first appeal judge to overturn this finding of fact.

The Court of Appeal considered that the original decision to dismiss the claim was not based upon the balance of probability because it was not possible to determine the exposure to noise; it was based upon acoustic engineering evidence that the Claimant was probably not exposed to excessive noise. Thus, the trial judge did not need to resort (and did not resort) to the application of adverse inferences but decided liability on the expert evidence which did not support the Claimant's case.

The Court of Appeal suggested that in future cases where it is relevant to determine whether a noise survey has been carried out in the past, it would be helpful if both parties addressed that issue either in pre- trial questions about the existence of documents, or in the evidence at trial.

## Litigation privilege to withhold a document from disclosure is not lost even though information contained in the document has been revealed

In *SL Claimants v Tesco Plc* (3 December 2019) the High Court ruled in an interim application that the Defendant was not required to disclose a document in civil proceedings, part of which had been read aloud to the Court in previous criminal proceedings in relation to a procedural matter being considered by the Court.

The Claimants did not dispute that the document was originally privileged but alleged that confidentiality in the document had been lost because it had been summarised, partly read out, and discussed extensively in legal argument at the hearing in criminal proceedings.

The Defendant distinguished between information contained in a document and the document itself, and argued that if there was any loss of confidentiality, this was confined to the information contained in the part of the document read in court (at most about one third of the document), and did not extend to loss of confidentiality in the document itself.

The judge decided that the document was not used in the criminal procedural hearing in such a way as to constitute waiver of privilege, and that only loss of confidentiality was in issue. He distinguished between the information in a document and the document itself and decided that confidentiality in the document was not lost. It therefore did not have to be disclosed.

The judge commented that if in the course of the trial the document were deployed or referred to, then the matter will have to be re-assessed.

This decision is useful guidance on the likely approach of the court in other cases where reference is made to part of a document to which privilege attaches. For example, correspondence with experts instructed for litigation purposes, and medical records.

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