

Litigation Update
March 2010

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Allegations of fraud

Noble v Owen – new evidence affecting assessment of damages

[2010] EWCA Civ 224 <http://www.bailii.org/ew/cases/EWCA/Civ/2010/224.html>

Where evidence is produced after judgment has been given to suggest that the assessment of damages may have been affected by fraud, the Court of Appeal has the following options:

- 1 It can set the judgment aside and order a retrial – this is appropriate only where the fraud is admitted or the evidence is incontrovertible; or
- 2 It can leave the innocent party to start an action to set aside the judgment; or
- 3 It can refer the trial of the fraud issue to a High Court judge pursuant to CPR 52.10(2)(b).

In the present case, the third option was appropriate. The video evidence of the claimant obtained after the trial of his claim for damages arising out of a road accident, whilst showing his mobility to have improved, did not prove incontrovertibly that he had deceived the trial judge. The Court of Appeal concluded that whilst previously the second option would have been the appropriate course in such circumstances, this is a costly and unnecessarily circuitous exercise given the flexibility of case management under the CPR. Permitting the trial judge to try the fraud issue would protect both sides' interests – if the judge rejects the allegation of fraud, the original award of damages will stand and if he finds that fraud is proved, he will be able to reassess the damages as appropriate.

E-disclosure

Goodale v Ministry of Justice – draft questionnaire

[2010] EWHC B41 (QB) <http://www.bailii.org/ew/cases/EWHC/QB/2009/B41.html>

As reported in last month's update, despite the strong endorsement given to the draft e-disclosure practice direction and ESI (electronically stored information) questionnaire in the Jackson Report, the Civil Procedure Rules Committee (CPRC) has decided that they need to appoint a sub-committee to consider the issues further. These documents have been worked on for almost two years by Senior Master Whitaker's drafting group and there is general frustration at this delay given the urgent need for guidance on this topic.

Shortly after the CPRC's decision last month, this judgment of Senior Master Whitaker (given in November 2009) helpfully became available. It is of particular interest because annexed to it is a copy of the draft e-disclosure questionnaire which the defendant was required to complete. This means that we can now all see and use the questionnaire if we wish (even if we do not yet have guidance from the practice direction) and other judges can require parties to complete it even though it has not yet become part of the CPR.

This judgment also offers genuinely practical guidance about the approach parties and the judiciary should take to e-disclosure. With the exception of the *Digicel* and *Earles* cases, judicial guidance of this type has been rather thin on the ground. The claims are brought by several prisoners who were dependent on opiates and then subjected to a "one size fits all" detoxification regime when they were admitted to prison. This policy is alleged to have caused them unnecessary pain and suffering and in one instance a prisoner died. The Ministry refused to search for any electronic documents during the relevant period between 2000 and 2009 on the ground that it would be disproportionate to do so.

The judge held that the Ministry's blanket refusal could not be justified. It was appropriate to adopt a staged approach to e-disclosure, starting with the data available from four key witnesses held on live servers or local computers. Back-up tapes are notoriously more expensive to search and it might be that it would turn out not to be proportionate to interrogate the back-up tapes at all.

31 key words were suggested by the parties. The judge ordered them to run limited searches without reviewing the documents to see how many documents each of the 31 terms will turn up so as to establish whether all 31 are necessary. Only once this rather crude method is used to find out what documents might exist will it be appropriate to proceed

on to the reviewing stage since the volume of documents dictates the method and software used for review.

Indemnity costs

Webster v Ridgeway Foundation School – partial awards

[2010] EWHC 318 (QB) <http://www.bailii.org/ew/cases/EWHC/QB/2010/318.html>

Henry Webster was attacked at school in 2007. Four Asian fellow pupils and three adults were convicted of wounding him with intent. He, together with members of his family who alleged that they suffered post-traumatic stress disorder as a result of the attack, sued the governors of the school for allowing racial tensions at the school to develop which were alleged to have caused the attack.

The judge dismissed the claims. The defendants argued that the claimants should pay their costs on the indemnity basis. He held that the defendants were entitled to indemnity costs on one part of the claim only, the human rights claim, since it was hopeless. To have succeeded on this issue, the claimants would have had to show that at the relevant date the defendants knew or ought to have known that there was a real and immediate risk that Henry Webster would be exposed to treatment which could be described as inhuman or degrading, something which the judge found was well nigh impossible.

The judge refused to award indemnity costs in relation to the systemic negligence claims based on the school's allegedly inadequate approach to race relations and discipline. Although they failed, these claims were not hopeless. He rejected other arguments relied upon by the defendants to justify an award of indemnity costs, including the following:

- **Rejection of the defendants' offer**

The claimants' failure to accept an offer which held out no more than the possibility of some reduction in what the defendants would accept in relation to their costs was not relevant. It was, at most, a proposal that the claimants should simply throw in the towel.

- **Involvement of ATE insurers**

The defendants argued that it would not be unjust for the claimants' after the event (ATE) insurers to have to pay indemnity costs since they would have been entitled to a very high premium had the claim succeeded (the policy did not require the claimants to pay the premium if they lost). The judge said that the defendants were not alone in feeling aggrieved at the structure of ATE insurance, tacitly supporting Jackson LJ's recommendations on this topic, but that this did not justify an order of indemnity costs.

- **The claimants' motivation**

The defendants argued that the claimants had a collateral purpose in pursuing the proceedings, namely that of bringing the defendants to book. Mrs Webster accepted in evidence that this was true but the judge said there was nothing improper in pursuing litigation for this purpose. A desire to obtain compensation can often co-exist with a wish to demonstrate that the defendant has been at fault. It is only where an overzealous claimant engages in unreasonable conduct that indemnity costs are justified.

Comment: the Jackson Report recommends reversing the effect of *Lownds v Home Office* which at present governs the issue of proportionality under CPR 44.4 where costs are assessed on the standard basis. *Lownds* requires the costs judge first to see whether the total sum claimed is disproportionate (ignoring any success fee and ATE premium). If it is proportionate, each item must be reasonably incurred and reasonable. If it is disproportionate, each item must also be necessary. Jackson LJ proposes a new test which dispenses with the necessity requirement altogether. The costs judge should assess each item of costs for reasonableness and then consider whether the total which remains is proportionate. If it is not, the total should be reduced to a proportionate sum.

The effect of the Jackson recommendation will be to make assessment on the indemnity basis even more attractive to a successful litigant than it is already. It is also one of the reforms which we can expect to bear fruit fairly soon since it does not require legislation and there must be no shortage of suitable cases in which a more robust approach to proportionality would produce a considerable costs saving to a paying party, making an appeal worth the effort (see below under *In brief* for the latest news about implementation of the Jackson reforms).

The following principles govern the jurisdiction to award indemnity costs:

- there must be something about the case which takes it out of the normal;
- there is no need for conduct deserving of moral condemnation, although where there is, an order will obviously be appropriate (see, for example, *Shah v Ul-Haq* and other dishonestly exaggerated claims);
- an award of indemnity costs is not penal but compensatory and should be ordered where it is fair in the circumstances of the case.

The courts have been slow to award indemnity costs across the board but, as the present case shows, partial awards offer a flexible alternative. Examples include the costs orders made in *Colour Quest Ltd v Total Downstream UK plc* and *J P Morgan Chase Bank v Springwell Navigation Corp*. In *Colour Quest*, Total was held liable for the damage caused by the explosion and fire that occurred in December 2005 at the Buncefield oil storage depot in Hertfordshire. The claimants argued that they should be entitled to indemnity costs on the ground that Total unreasonably contested the issues of negligence and foreseeability. The judge awarded indemnity costs on the issue of negligence up until the date when liability on this issue was admitted. Total had denied fault for two years after the action was begun even though they knew the truth from their own internal investigation at the outset. He refused to award indemnity costs in relation to the issues of foreseeability, off-site negligence and vicarious liability. For such an order to be justified, the case would have had to be manifestly weak and perceived to be so at the time.

In *J P Morgan Chase Bank v Springwell Navigation Corp* Springwell claimed unsuccessfully against Chase in respect of advice given to them between 1987 to 1998 concerning the purchase of debt instruments linked to emerging markets in South East Asia and Russia. The judge rejected allegations that the bank had missold complex financial products to

Springwell. Chase incurred costs of £24 million defending the claim and was awarded 65% of them on the indemnity basis. Although Springwell could have focused its claim more narrowly instead of taking every point open to them and should not have pursued various allegations of dishonesty and deceit, many of which were dropped at or shortly before trial, it was not fair for Springwell to pay all of Chase's costs on an indemnity basis since Chase had also been guilty of widening the evidential scope of the trial.

Settlement agreements

Priory Caring Services Ltd v Capita Property Services Ltd - effect of release

[2010] EWCA Civ 226 <http://www.bailii.org/ew/cases/EWCA/Civ/2010/226.html>

In 2003 Priory gave an undertaking promising not to issue court proceedings against its surveyor Capita in connection with the latter's role in designing and supervising the repair of Priory's hotel following a fire in 1998. In return at Priory's request, Capita provided a witness statement to be used in an arbitration to support a claim against its insurers. Almost two years later, Priory discovered that the refurbished hotel had been disastrously affected by damp penetration which they attributed to the negligence of Capita's surveyor Vince Owen. In 2008 they brought proceedings against Capita.

The release of claims against Capita was stated to be "in relation to matters arising from Capita's appointment as surveyors to Priory Caring Services Ltd in relation to the Priory Hotel". Priory argued that the release was limited to claims of which the parties were aware at the time the undertaking was given and did not cover its claim concerning damp penetration. It appealed against a decision striking out the proceedings.

The Court of Appeal dismissed Priory's appeal. It found that Priory was a commercial concern which, with the assistance of its lawyers, made a deal with its eyes open, knowing of the possibility of negligence and worse on the part of Mr Owen. It was prepared to forgo claims it might be able to bring because of its keenness to buy Capita's assistance in the arbitration claim against its insurers.

Comment: Priory relied upon the decision in *BCCI v Ali* where the House of Lords held that a widely-worded release did not extend to the bank's employees' claims for "stigma damages" since this type of claim did not as a matter of law exist, and whose existence could not have been foreseen, at the date when they agreed the release. This decision could not help Priory in the context of a dispute arising out of a construction contract since claims arising out of latent defects have been held to be precisely the kind of claims which may be expected to be within the contemplation of parties when they agree a generally-worded release of claims (see *Mostcash Plc v Fluor Ltd*). The courts will not intervene in such a case unless there is evidence of sharp practice where the party to whom the release was given knew that the other party might have a claim and knew that the other party was ignorant of this.

In brief

Champerly and conditional fee agreements

Where CFAs used to fund simple housing disrepair cases provided that the solicitors would indemnify the client in respect of any adverse costs orders not covered by insurance, this did not amount to champerty or maintenance and the CFAs were accordingly enforceable. It was material to this conclusion that after the event (ATE) insurance was not available for these claims (or not at proportionate cost), the success fee was only 10% and the indemnity provided by the solicitors would be used rarely, in which case the defendant would be spared having to bear the additional costs of an ATE premium (*Morris v London Borough of Southwark* <http://www.bailii.org/ew/cases/EWHC/QB/2010/B1.html>).

Email acceptance of offer

There is no authority to say whether an email acceptance is effective when it arrives or at the time when the offeror could reasonably have been expected to read it. The question must be resolved by reference to the intentions of the parties, sound business practice and in some cases by where the risks should lie. In the present case, the email acceptance of a solicitor's undertaking sent at 1800 on Friday evening was effective upon its receipt soon afterwards. In the context of a corporate transaction, 1800 was not outside working hours and the email was available to be read then despite the fact that the recipient had gone home (*Thomas v BPE Solicitors* <http://www.bailii.org/ew/cases/EWHC/Ch/2010/306.html>).

Illegality defence

The Law Commission has published its final report into the issue of how far a claimant's illegal conduct should prevent it from enforcing its normal legal rights. A draft bill deals with the only reform requiring legislation which would give the courts a discretion to deny a beneficiary under a trust used to conceal his criminal purpose the right to enforce the trust. In other areas, the report concludes that the courts should be left to develop the law as they have done in recent cases such as *Gray v Thames Trains* and *Stone & Rolls Ltd v Moore Stephens* (<http://www.lawcom.gov.uk/docs/lc320.pdf>).

Implementation of the Jackson Report

The Judicial Executive Board has agreed to support the recommendations made by Jackson LJ and a Judicial Steering Group has been established to provide direction on issues such as case management and costs which do not require legislation. The members of the group are Lord Neuberger (Master of the Rolls), Maurice Kay LJ (Chairman of the Judicial Studies Board), Moore Bick LJ (Deputy Head of Civil Justice) and Jackson LJ.

Money laundering in litigation

The Law Society has published guidance for litigators following an increase in the instances of money laundering and fraud in litigation. This is thought to be due to the fact that some law firms take a more relaxed approach to client due diligence in this area since the provision of legal advice and the conduct of litigation are not covered by the Money Laundering Regulations 2007 (see *Bowman v Fels*). The guidance is available at <http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=426168>.

Statutory interest

A limitation of liability cap in a contract did not apply to limit statutory interest awarded by a court for breach of contract. However, monies paid by a party to a contract by way of interest on late payments would count towards any overall cap on that party's liability, as this formed part of the party's "total liability in contract" (*Markerstudy Insurance Company Limited v Endsleigh Insurance Services Limited* <http://www.bailii.org/ew/cases/EWHC/Comm/2010/281.html>).

"Subject to contract" rule

It is possible for an agreement that is "subject to contract" to become legally binding where the parties later agree to waive that condition. The waiver must be agreed unequivocally but there does not have to be an express statement by the parties to that effect. The agreement can be inferred from communications between the parties and conduct of one party known to the other. On the evidence in this case, the parties had agreed to be bound by the agreed terms without the necessity of a formal written contract (*RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* <http://www.bailii.org/uk/cases/UKSC/2010/14.html>).

Success fees in defamation cases

The government has decided to reduce the maximum success fee in defamation cases to 10% as an interim measure whilst it considers Jackson LJ's recommendation that success fees and ATE premiums should no longer be recoverable from unsuccessful parties. The Conditional Fee Agreements (Amendment) Order is expected to come into force in April 2010. The 10% limit will only apply to CFAs entered into after the date when the Order comes into force (<http://www.justice.gov.uk/news/newsrelease030310e.htm>).

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