

Litigation Update November 2009

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Costs orders and Part 20 claims

Green v Sunset & Vine Productions Ltd and others – who pays for costs of successful defendants?

[2009] EWHC 1610 (QB)

Willie Green, a renowned historic cars racing driver, was driving a 1948 Maserati at the Goodwood Revival meeting in 2005 when he hit a camera at the side of the track and crashed. Mr Green was flung out onto the track where the car ran over his legs.

He brought proceedings against the company responsible for the positioning of the kerb cam, Sunset & Vine Productions Ltd (Sunset), and the British Automobile Racing Club Ltd (BARC). Sunset joined Goodwood Road Racing Co Ltd (Goodwood) as a Part 20 defendant (third party) and Mr Green then joined it as a third defendant. All the defendants argued that the contact between the Maserati and the kerb cam did not cause the accident which they claimed was caused by Mr Green’s driving. The terms of the contractual indemnity claimed by Goodwood from Sunset were at issue in the Part 20 proceedings.

The judge dismissed Mr Green’s claims against the defendants. He also dismissed the Part 20 claim by Sunset against Goodwood and the contribution claims between the defendants.

It was clear that Mr Green should pay the costs of the action against Sunset but he argued that he should not have to pay Sunset's costs against Goodwood or the costs of the contribution claims between the defendants. The judge made the following costs orders.

The contribution claims

The contribution claims raised issues inextricably connected with the issues in the main claim. They did not require any additional evidence or argument of any significance, except between Sunset and Goodwood on the contractual indemnity. They added little to the duration of the hearing and were essentially left to the judge to decide on whatever factual conclusions he reached. In those circumstances, he concluded that they should be dealt with as part of the costs of the main action to be borne by Mr Green.

Costs of the indemnity argument

This issue was irrelevant to the main action and was not factually intertwined with it unlike the other contribution issues. Both Sunset and Goodwood were wrong on various aspects of the argument and they were ordered to bear their own costs on this issue. It was fair that Mr Green should bear his own costs of the hearing while this argument was being dealt with since it would not have arisen had he not brought his unsuccessful action.

Costs of the Part 20 kerb cam argument

Mr Green argued that he should not have to pay for the costs of Sunset's unsuccessful allegation that Goodwood had approved the location of the kerb cam. Sunset and Goodwood argued that he should. Alternatively, Sunset argued that there should be no order to costs on this issue and Goodwood said that Sunset should bear the costs.

The judge held that it would not be fair to make Mr Green pay all the costs on this issue. Sunset raised it in its Part 20 proceedings against Goodwood and it was reasonable for Mr Green to join Goodwood as a defendant and to have adopted these factual assertions, about which he knew nothing, against Goodwood. He ordered Sunset to bear its costs of suing Goodwood, with those costs falling outside the costs Mr Green was to pay Sunset. Sunset and Mr Green were ordered to pay Goodwood's costs of the whole action in the proportions 20:80. This reflected the fact that the approval issue took about 20% of the hearing and it was not fair to order Sunset to pay the rest of Goodwood's costs.

BARC's costs

Mr Green was ordered to pay BARC's costs. Various arguments were raised by Mr Green to support a reduction of his liability but these were rejected. One of them concerned an alleged failure to comply with pre-action protocol by failing to respond to Mr Green's protocol letter. Mr Green relied upon *Tokyo v Pazarlami* as showing that it is not necessary for a party to do more than prove non-compliance to put the other party at risk of an adverse costs decision.

The judge accepted this but said that the question of whether the default has caused costs to be incurred will always be very relevant. In the present case, he held that if BARC had failed to comply with its obligations, the failure caused no increase in costs worth measuring.

This was not a case where it was proper for the court to make an adverse costs order even though the non-compliance created no adverse costs consequences.

Comment: the appropriate costs orders in cases where there are several defendants are notoriously difficult to predict. This case offers a clear illustration of the principles to be applied where the claim fails and there are Part 20 proceedings as well as contribution claims between the defendants.

In a related common scenario, the claimant joins a second defendant because of allegations made against the latter by the first defendant. If the claimant succeeds against one defendant but not another, the court has the choice of ordering the claimant to pay the costs of both defendants or of making a *Bullock* or *Sanderson* order, both of which are more favourable to the claimant.

In a ***Bullock* order** the claimant is ordered to pay the successful defendant's costs but with liberty to include those costs in the costs of the action recoverable by the claimant from the unsuccessful defendant.

In a ***Sanderson* order** the unsuccessful defendant is ordered to pay the costs of the successful defendant directly.

The following factors indicate that it may be appropriate to make a *Bullock* or *Sanderson* order:

- the causes of action relied on against the defendants are connected with each other and arise from similar facts;
- the claimant's conduct in joining and pursuing a claim against the successful defendant was reasonable;
- the fact that cases are in the alternative, so that the claimant was bound to succeed on one and could not have succeeded on both, is material but not essential;
- one defendant sought to put the blame on another defendant.

In *Irvine v Metropolitan Police Commissioner* the Court of Appeal stressed that even if one defendant has blamed the other, the claimant has to take responsibility for the decision to join another defendant. The claimant must have evidence sufficient to sustain such a claim and cannot merely rely on the first defendant's attempt to shift responsibility to a third party. In that case, it had not been reasonable for the claimant to join the third defendant and it would have been unfair to make either a *Bullock* or *Sanderson* order.

Conflicts of laws and awards of interest

Maier v Groupama Grand Est – law governing right to interest

[2009] EWCA Civ 1191 <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1191.html>

In 2005 Mr and Mrs Maier were injured when a van collided with their car in France. The driver of the van, who was killed in the accident, was insured by Groupama Grand Est. Mr and Mrs Maier were entitled under French law to bring a direct action against Groupama

which is domiciled in France. They began personal injury proceedings in England, their domicile, relying on the European authority of *FBTO Schadeverzekeringen NV v Odenbreit* which permits someone domiciled in a Member State to bring proceedings in the courts of their Member State if the insurer is also domiciled in a Member State. Liability was not disputed but various issues arose on the assessment of damages.

The following issues were decided. Firstly, are damages to be assessed by reference to English or French law? The judge held English law. And secondly, should the question of the award of pre-judgment interest be determined in accordance with English or French law? The judge held that both laws were potentially relevant depending on the facts.

Groupama appealed unsuccessfully to the Court of Appeal. The court's analysis is set out below.

Assessment of damages

Had the Mahers been claiming against the driver of the van, the assessment of damages would have been characterised as a matter of tort and it is generally accepted that would be carried out in accordance with English law as the *lex fori*. Groupama argued, however, that since the claim was brought directly against the insurer whose liability sounds in contract, the assessment should be governed by French law as the proper law of the contract.

The Court of Appeal held that the issue fell to be decided primarily in the context of a claim against driver of the van responsible for the action which was a claim in tort. The damages should therefore be assessed in accordance with English law.

Interest

The issue which arose here is whether an award of interest under section 35A of the Senior Courts Act 1981 is to be classified as a substantive right or a remedy. Questions of substantive rights are governed by the *lex causae*, here French law as the law of the tort. Remedies are regarded as procedural and are governed by the *lex fori*, here English law.

In *Midland International Trade Services Ltd v Al Sudairy* (1990) Hobhouse J held that section 35A should not be characterised as creating a substantive right for the following reasons:

- in English law (at that date) there was no right to recover interest by way of damages for the late payment of money and section 35A was enacted as an alternative to a substantive right;
- the court's power to award interest under section 35A arises only in connection with legal proceedings; and
- the power to award interest is discretionary and not of such a character as to create a legal right.

Groupama argued that this decision has been superseded by *Sempra Metals Ltd v Inland Revenue Commissioners* in which the House of Lords recognised a right at common law to recover interest as damages for late payment where the loss is properly proved and is not too remote. It also relied upon *Dicey, Morris and Collins, The Conflict of Laws* which says

that the existence of the right to claim interest is a substantive right whereas the rate at which interest is paid is procedural.

The Court of Appeal held that the *Sempra* decision does not alter the position as regards section 35A and approved the approach taken in the *Midland International* case. The court agreed with the judge below that both English and French law were relevant to the award of interest. The right to recover interest as a head of damage was a matter of French law as the law of the tort but, whether a substantive right exists or not, the court still has available the remedy under section 35A. In exercising that discretion, however, the court may well consider any relevant provisions of French law relating to the recovery of interest.

“Subject to contract” settlement

***Jirehouse Capital v Beller and Owen* – effect of phrase “subject to contract”**

[2009] EWHC 2538 (Ch) <http://www.bailii.org/ew/cases/EWHC/Ch/2009/2538.html>

In June 2009 the parties to these proceedings, in which various allegations of fraud were made against the defendants, were in settlement negotiations. The trial was listed in a 5 day window beginning on 29 June with an estimate of 13 days. Terms were agreed late on 29 June and the court was told that the case had settled. Both sides stood their counsel down and the claimants’ counsel Mr Kremen accepted instructions to act in another case within the trial window.

The defendants argued that the settlement was made on a “subject to contract” basis with the effect that it did not become binding until it was incorporated in a document. They also argued that the settlement did not encompass a related action (the QBD action). The defendants’ solicitor used this argument to attempt to get a further £35,000, later reduced to £25,000, from the claimants.

The problem arose because the email exchanges between the parties’ solicitors (and one email from Mr Kremen) on 29 June were headed “*without prejudice and subject to contract*”. There was a final telephone discussion between Mr Kremen and the defendants’ solicitor that evening when an agreement was reached.

On 30 June the defendants’ solicitor sent an email, again headed “*without prejudice and subject to contract*” which read:

“Draft settlements are attached for your final consideration. All terms have been agreed ...”

“Subject to contract”

Where a “subject to contract” qualification is introduced into negotiations, it can only cease to apply if the parties expressly, or by necessary implication, agree. There had been no express lifting of the expression in this case but the judge found that it was to be necessarily implied that the restriction was lifted when the agreement was concluded on the telephone on the evening of 29 June. Mr Kremen did not have the “subject to contract” umbrella in mind during the negotiations and the defendants’ solicitor was equally anxious to conclude a deal. The behaviour of all involved in taking the case out of the list indicated that they believed this had been achieved.

The judge went further, saying that where parties shortly before a trial instruct their lawyers to settle it can only be on the basis that it is a necessary implication of any settlement agreement that any previous “subject to contract” umbrella has been lifted. There is no point in negotiating immediately before a trial begins if the parties have to go away and draw up documents which then have to be considered. Such a course makes it possible for one of the parties subsequently to try and resile from the agreement to take an advantage. This is what occurred here.

The judge also held that the QBD action was also settled on the evening of 29 June subject to a signed consent order being produced the next day or within a reasonable time thereafter. The claimants had the order by 2 July and that was within time.

Comment: the “subject to contract” rule developed in land law for property transactions but has become a recognised concept in wider commercial transactions. Only in exceptional cases will the courts be prepared to find that the parties actually intended to be bound even when the words “subject to contract” are used. One example of this is *ProForce Recruit Ltd v The Rugby Group Ltd* (2005) where, after the allegedly “subject to contract” agreement was signed, the parties performed their obligations set out in the agreement.

In the present case, the judge found that the use of “subject to contract” in the defendants’ solicitor’s email of 30 June could not unilaterally reinstate the “subject to contract” umbrella to remove the binding nature of the agreement reached on the telephone the evening before. He also found that the solicitors using the phrase did not seriously intend to do so. Instead it was the simple repetition of a phrase which had appeared in the earlier emails without any thought as to what it was intended to cover.

The judge referred to the old observation that solicitors’ typewriters (or the modern equivalent) have two extra keys marked “subject to contract” and “without prejudice”. Solicitors need to ensure that they really intend to use these stock phrases – if they use them on autopilot, disputes and wasted costs can result.

In brief

Exaggerated claims

Where the claimant had dishonestly exaggerated her personal injury claim and failed to make a claimant’s Part 36 offer but had beaten the defendant’s payment into court, the judge should not have ordered the claimant to pay the defendant’s costs. The defendant could have protected its position by making an increased offer. There should be no order for costs in such circumstances. There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the claimant’s conduct is (*Widlake v BAA Ltd* <http://www.bailii.org/ew/cases/EWCA/Civ/2009/1256.html>).

Unsigned funding agreement

The courts will be slow to find that a commercial agreement, intended to have contractual effect and performed in good faith, was not a binding contract. Intention to create legal relations in a contractual context is to be assessed objectively. The fact that a funding

agreement contained a space for the defendant's signature but it had not signed did not mean that the agreement was not to be binding unless signed (*Maple Leaf Marco Volatility Master Fund v Rouvroy*).

Review of civil litigation costs

Jackson LJ's final report will be published on 14 January 2010. He published a preliminary report, as part of his review of civil litigation costs and procedure, earlier this year with consultation over the summer. The 653 page preliminary report can be found at http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

Interception of confidential information

The Court of Appeal allowed Marco Pierre White's appeal in part concerning his claim against his wife's solicitors for encouraging the interception of his correspondence. The misuse of confidential or private information had been correctly dismissed by the judge but the claims for trespass to goods and conversion could not be (*White v Withers LLP* <http://www.bailii.org/ew/cases/EWHC/QB/2008/2821.html>).

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