MILLS & REEVE

Litigation Update
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Adding and substituting parties

GE Money Home Lending Ltd v H C Wilton & Sons Ltd – wrong company named as claimant lender

[2010] EWHC 1011 (Ch) http://www.bailii.org/ew/cases/EWHC/Ch/2010/1011.html

This valuation claim by a lender against a surveyor was struck out on the ground that the wrong company was named as claimant. The court refused to substitute the correct company as claimant outside the limitation period.

The valuation report was completed on 23 September 2003 and it was common ground that the limitation period expired on 22 September 2009. On 18 September 2009, four days before the expiry of the limitation period, the claim form was issued, wrongly naming GE Money Home Lending as the claimant. It identified the borrower accurately, gave the correct date for the valuation report and identified the amount of the advance, but it also mis-identified the property.

The claimant applied successfully to substitute GE Money Mortgages as the claimant. On appeal, the judge applied the test in *Adelson v Associated Newspapers* by answering the questions below.

Was there a mistake?

Yes – the claimant's solicitor thought that Money Home Lending was the lender. It was a genuine mistake and had she realised she would have issued the claim form in the name of Money Mortgages.

Was the mistake a mistake as to identity or to name?
It was a mistake as to name. The description of the claimant in the claim form adequately identified the party, despite the fact that the property was wrongly described.

Was the true identity of the person intending to sue and the person intended to be sued apparent to the latter although the wrong name had been used?
No. The defendant did not know the identity of the correct claimant until well after the limitation period had expired. This was not therefore an appropriate case in which to exercise the court's discretion to substitute a party under CPR 19.5

Comment: those acting for defendants need to be aware of the circumstances in which a mistake as to the name of a party can lead to the claim being struck out. The court takes a fairly robust attitude to claimants' solicitors' mistakes of this type, in much the same way as it approaches defective service of claim forms. What is known as the *Sardinia Sulcis* test permits the substitution only where it is possible to identify the correct party from the claim form by reference to a description eg landlord, employer, manufacturer of particular drug, lender etc.

Here there was a genuine mistake and it was found to be a mistake as to name rather than identity because it was clear from the claim form that the claimant was intended to be the company which had lent £216,000 to the borrower Miss Daniels on 26 September 2003. It's fair to say that getting the address wrong didn't help the claimant's case but the judge was prepared to overlook this potential source of confusion. The application failed, however, at the final stage. This was not a case where the defendant was aware of the mistake from an earlier date and there were no special factors to justify an exercise of discretion in the claimant's favour.

Adelson, now the leading case on CPR 19.5, also concerned the less common situation where the wrong claimant is named on the claim form. A mistaken but deliberate strategic decision to select a particular company as a claimant was held not to qualify as a mistake. The existing claimants were unable to add subsidiaries as claimants, since they could not establish that those responsible for the particulars of claim had been under a mistake as to the group structure or the roles played by the members of the group, and that, but for that mistake, the putative claimants would have been included.

More frequently the claimant has sued the wrong defendant. A recent example of an unsuccessful application to substitute a new party as defendant is *Lockheed Martin Group v Willis Group Ltd*. As in the present case, the claimant had issued the claim form at the end of the limitation period (a relevant factor to the exercise of discretion) and then opted to sue the wrong company in the Willis Group. The judge was prepared to assume that the claimant had made a mistake as to name rather than identity but he concluded that the mistake was misleading and refused the claimant's application.

Note: for guidance on the application of CPR 19.5 to derivative actions, see the Supreme Court's decision of 26 May in *Roberts v Gill & Co*. The claimant is a beneficiary under a will

and began the action against the defendant solicitors in that personal capacity. The court refused to allow him to bring a representative claim on behalf of the estate outside the limitation period.

O'Byrne v Aventis Pasteur MSD Ltd – consumer product liability claims

[2010] UKSC 23

The claimant began proceedings within the 10 year period provided for in the European Product Liability Directive (EEC) 85/374 as enacted by the Consumer Protection Act 1987against the supplier of an allegedly defective vaccine, presuming it to be the producer. In fact the producer was the parent company of the supplier. Following the first of two references to the European Court of Justice, the Court of Appeal allowed the claimant to substitute the parent company for the subsidiary outside the limitation period. The court held that the ECJ's decision left it to the national procedural law to determine when it is permissible for one person to be substituted for another where a mistake has been made. They concluded that the decision in *Horne-Roberts v SmithKline Beecham Plc*, which allowed the substitution of one person for another as a party after the expiry of the ten-year longstop under the, remained good law.

Following a second reference to the ECJ to clarify the position, the House of Lords has allowed Aventis Pasteur's appeal. It accepted the parent company's argument that the second ECJ ruling permitted substitution in such circumstances only where "the putting into circulation of the product by the supplier" had been determined by the parent company which had manufactured it. Since this was not the case here, the parent company producer could not be substituted as the defendant in place of its subsidiary supplier.

ATE insurance

Kris Motor Spares Ltd v Fox Williams – recovery of premium

[2010] EWHC 1008 (QB) http://www.bailii.org/ew/cases/EWHC/QB/2010/1008.html

The defendant solicitors acted for the claimant KMS in litigation against a stockbroker under a CFA. Shortly before the claim was settled on a drop hands basis, Fox Williams terminated the CFA and claimed its fees. KMS considered these to be excessive and in August 2007 it applied for an assessment of the bill.

A preliminary issue as to whether there were special circumstances within the meaning of s70 of the Solicitors Act 1974 was heard by Master Rogers. This involved considering whether Fox Williams had been entitled to terminate the CFA.

On 16 December 2008, the day the 4 day hearing began, Fox Williams served KMS's solicitors with a Notice of Funding relating to an ATE insurance policy taken out in respect of the trial of the preliminary issue. Master Rogers held that the CFA had been lawfully terminated and that there were no special circumstances. At detailed assessment, KMS were ordered to pay costs of almost £250,000 including an ATE premium of £95,550.

KMS appealed against the finding concerning the ATE premium. The judge held that the fact that Fox Williams had decided to take out insurance at a late stage was not a valid reason to refuse to allow it to recover the ATE premium. There is no principle that the

premium on a late incepting policy is an unreasonable cost and it was reasonable for Fox Williams to decide it wished to obtain insurance once they discovered that KMS had instructed a very senior QC.

Comment: the issue of timing has vexed the courts since the recovery of premiums and success fees became possible in 2000. The concern on the part of the paying party has generally been about what is known as "the prematurity point". In *Callery v Gray* the Court of Appeal held that success fees and premiums can be recovered from the defendant where the claim is settled before proceedings are begun. In *Re Claims Direct* Senior Costs Judge Hurst expressed the opinion that where the liability insurer has from the outset accepted liability for a minor injury claim, it will generally be disproportionate and unreasonable to take out an ATE policy. But if there is a live issue, for example concerning causation, it may be reasonable to take out insurance.

The present case looks at the opposite problem, that of the last minute arrangement. As the judge held, there is nothing in the CPR or the case law which leads to the conclusion that this is necessarily unreasonable – it all depends on the circumstances. Here there were good reasons for Fox Williams to decide not to continue to self-insure although leaving it so late in the day seems rash. They submitted a proposal to insurers on 12 December 2008, just 4 days before the hearing. The premium of £95,550 was high for cover of only £130,000, a rate of 73.5%. It was nearly 40% of the costs incurred by Fox Williams.

Fox Williams relied on an email from Temple Legal Protection Ltd in response to the argument that the retrospective nature of the cover meant that the premium was much greater than it would have been had cover been acquired at an earlier stage. The email said that, had the case been insured earlier, the premium would have been stepped. Since the highest step would have been just before the hearing, obtaining cover at that point didn't make any difference to the size of the premium. Since KMS did not adduce evidence that insurance could have been procured for a lower premium (this evidence is rarely available in practice), the judge was unable to find the level of premium unreasonable.

KMS also argued that it was unreasonable for Fox Williams to take out insurance at all since it was well able to pay the costs of litigation itself. This argument is usually associated with Naomi Campbell whose breach of confidence appeal to the House of Lords against MGN Ltd had been funded by a CFA. The House of Lords held that the fact that a claimant can afford to fund the claim themselves (as she had done earlier in the proceedings) does not preclude them from entering into a CFA and from recovering the success fee from the defendant if they win. This led to considerable concern about the effect CFAs are having upon the freedom of the press and subsequently to Jackson LJ's conclusion in his report that ATE premiums and success fees should cease to be recoverable from the losing party.

For the time being, however, defendants are able to do little to challenge the reasonableness of ATE premiums. The paradox that the cost of premiums is only confined by the amount decided as reasonable by judges who are not in a position to decide what is reasonable is not one the judges are happy with, hence their support of Jackson LJ's proposal. The chance of challenging the reasonableness of a success fee is considerably better for

defendant interests, particularly since the Court of Appeal's helpful guidance about how a success fee should be calculated in *C v W.*

Michael Phillips Architects Ltd v Riklin – security for costs

[2010] EWHC 834 (TCC) http://www.bailii.org/ew/cases/EWHC/TCC/2010/834.html

While it is possible in principle for a claimant to use an ATE insurance policy to provide security for the defendant's costs, in practice it is highly unlikely that the policy will provide adequate security for all of the defendant's costs. It will be rare for such a policy to provide the same level of security as a payment into court, bank bond or guarantee because insurance policies are voidable and subject to cancellation by the insurers and the promise to pay under the policy is made to the claimant not the defendant. There is no reason, however, why the amount fixed by a security for costs order cannot be reduced to take into account the existence of an ATE insurance policy.

Privilege update

MAC Hotels Ltd v Rider Levett Bucknall UK Ltd – waiver and knowledge under s14A

[2010] EWHC 767 (TCC)

The defendant (represented by Mills & Reeve) applied for disclosure of privileged documents potentially relevant to the question of when the claimant first acquired the requisite knowledge to enable it to bring a claim under s14A of the Limitation Act 1980. Although issues of waiver are unlikely to arise under s14A because of s14A(9), which provides that it is irrelevant that the claimant should know that the acts or omissions complained of amount in law to a cause of action in negligence, they will do so where the investigation of the underlying facts was itself protected by litigation privilege. In practice, a claimant may find it hard to argue that the limitation period should not begin to run from a period in which he was in receipt of legal advice unless he is prepared to waive privilege in that advice.

Comment: where a party deploys a privileged document, relying on its contents to support a point, they will have waived privilege in the document. Once there has been a partial waiver of privilege, whether privilege over other related documents has also been waived is assessed by reference to the transaction to which the initial waiver related. Whilst a party will not be allowed to make a partial waiver of privilege which is so selective as to create a misleading impression, in practice the court has been slow to hold that a party has waived privilege over related documents. This can be seen from the present case which reviews the law concerning waiver in the course of looking at the particular complexities caused by the limitation argument.

A review of previous cases illustrates the difficulties of persuading the court to uphold a waiver argument. In *R v Secretary of State for Transport, ex parte Factortame* the Secretary of State waived privilege in legal advice over a certain period. The argument that he should disclose all legal advice which went to the same issue failed. A similar approach was taken on the application for disclosure of further material following disclosure of counsel's opinion and associated instructions in *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones.* In *Dore v Leicestershire County Council* earlier this year the defendant local authority disclosed a report by a legal executive about the background to the dispute, counsel's opinion and a

summary of their solicitor's advice. They were held not to have waived privilege over correspondence and documents relating to the obtaining of legal advice.

Position of in-house lawyers under EC law

Where a competition investigation (known as a dawn raid) is carried out by a UK competition authority, such as the Office of Fair Trading (OFT), the company is able to refuse to hand over documents containing relevant legal advice from its in-house lawyers since this advice is protected by legal professional privilege under English law. By contrast, where the investigation is carried out by the European Commission, communications with in-house lawyers must be handed over since only advice from external lawyers attracts privilege under EC law.

Akzo Nobel Chemicals Ltd are challenging the current position under EC law following a raid of their offices by the European Commission in 2003. Given that only a handful of the 27 member states treat in-house and external lawyers equally as regards privilege, it is not surprising that the Advocate General for the European Court of Justice has given an opinion upholding the present position. The final ruling, expected later this year, is likely to follow the AG's opinion (*Case C550/07P - Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v European Commission*).

Legal advice privilege

At the moment legal advice privilege applies only to legal advice given by a lawyer and not to legal advice given by a non-lawyer such as an accountant. The Law Society wishes to uphold this state of affairs and has been given permission to intervene in the appeal in *R (Prudential plc) v Special Commissioner of Income Tax.* The Law Society is concerned by the suggestion in Charles J's judgment that the potential unfairness caused by the different approach taken to legal advice given by lawyers and accountants could be remedied by restricting the scope of legal advice privilege where advice is given by lawyers.

The House of Lords in *Three Rivers* (*No 6*) reaffirmed a broad test for legal advice privilege which was confined to advice given by lawyers instructed in that capacity. It is doubtful whether the Court of Appeal could reach a different conclusion, although it might be theoretically possible for it to tinker with the present rule, for example by creating an exception for tax planning advice. It seems equally unlikely, given existing authority, that the Court of Appeal will feel able to bestow the protection of privilege upon clients receiving legal advice from accountants. If any dramatic change is to be made to the present position, the case will have to be pursued to the Supreme Court.

In brief

Commencing proceedings

A solicitor is not authorised to commence proceedings on behalf of his client without specific authorisation. If he does so, he is personally liable to the opposite party for their costs of the proceedings. The claimant's claim that Manches should have issued and served proceedings on its behalf was dismissed (*Fonexco Group Ltd v Manches* http://www.bailii.org/ew/cases/EWHC/QB/2010/493.html).

Contesting jurisdiction

CPR 11 does not apply to an application for a stay of proceedings under s9 of the Arbitration Act 1996. The defendant's failure to make an application for a stay under CPR 11 within 14 days after filing an acknowledgment of service did not mean that they should be treated as having accepted that the court had jurisdiction to try the claim. The decision in *Hoddinott v Persimmon Homes (Wessex) Ltd* does not apply to this type of jurisdictional challenge (*Bilta (UK) Ltd v Nazir* http://www.bailii.org/ew/cases/EWHC/Ch/2010/1086.html).

Late payment of commercial debts

Interest on late payments of 0.5% over base rate is not a substantial remedy under the Late Payment of Commercial Debts (Interest) Act 1998. Statutory interest at 8% over base rate is payable where the contractually agreed rate is not a substantial remedy.

Pre-action disclosure

In a useful review of the relevant test for ordering pre-action disclosure under CPR 31.16(3), the judge noted that in most cases it can be argued that pre-action disclosure may be useful for achieving a settlement or saving costs. To justify an order, however, the circumstances must be outside "the usual run". The application was dismissed (*Pineway Ltd v London Mining Company Ltd* http://www.bailii.org/ew/cases/EWHC/Comm/2010/1143.html).

Tomlin orders

The court does not have power to vary terms in schedules to Tomlin orders unless the order expressly provides for this or one of the grounds for interference with a contract exists, such as misrepresentation or mistake (*Community Care North East v Durham County Council* http://www.bailii.org/ew/cases/EWHC/QB/2010/959.html).

Miranda Whiteley
Professional Support Lawyer
for Mills & Reeve LLP
+44(0)1223 222459
miranda.whiteley@mills-reeve.com

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