April 2007

Litigation & Dispute Resolution Legal Update

Welcome to Mayer, Brown, Rowe & Maw LLP's Litigation & Dispute Resolution Legal Update April 2007. In this publication you will find summaries of key cases, information about recent legislation, consultation papers and other relevant news. A full table of contents appears on the inside of the front cover.

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PRACTICE AND PROCEDURE

Costs

Detailed assessment

- ***Lahey v Pirelli Tyres Ltd, CA (Sir Anthony Clarke MR, Arden LJ, Dyson LJ) 14.2.07***

The question raised on this second appeal was whether a costs judge had the jurisdiction at the outset of a detailed assessment of costs to order that a paying party had to pay only a proportion of the costs that were ultimately assessed to be payable. It arose in the context of a detailed assessment following the claimant's acceptance of the defendant's Part 36 payment, which then entitled the claimant to his costs of the proceedings up to the date of serving notice of acceptance, on the standard basis if not agreed (see CPR rules 36.13(1) and (4)). Costs were not agreed and the claimant started proceedings for a detailed assessment. At the outset of the hearing the defendant asked the district judge to order that the claimant should be awarded only 25% of the assessed costs and, that the jurisdiction to do so existed under rules 44.3, 44.4, 44.5 and possibly 44.14[1]. The district judge disagreed and he carried out the detailed assessment, reducing the bill considerably. The ruling was upheld on appeal and the defendant appealed to the Court of Appeal ("**CA**").

The CA held that upon acceptance of a Part 36 payment, "a costs order [was] deemed to have been made on the standard basis"(44.12(1)(b)). That meant that the claimant was entitled to 100% of the assessed costs, i.e. the amount that the costs judge decided was payable at the conclusion of the detailed assessment. The district judge had no power to vary this order. Rule 3.1(7) gives the court the ability to vary an existing order but the power is only exercisable in relation to an order that the court has previously made and not to an order that is deemed to be made by operation of the rules[2]. There is a distinction between carrying out an assessment and deciding to reduce the bill and deciding in advance of the assessment to reduce the bill. "There is no doubt that at the end of a hearing, the judge may make an order of the kind that the defendant sought from the district judge in the present case. In such a case, the judge is not purporting to vary an order if he disallows the successful party a proportion of his costs. He is making the order." Further, it was unnecessary to give a costs judge that jurisdiction because if he considers that the claimant acted unreasonably in refusing an offer to settle prior to proceedings being issued, he is entitled to disallow all the costs post-issue on the footing that they were unreasonably incurred (rule 44.4(1)). He could also disallow costs relating to an issue if he deemed that it had been unreasonable to raise and pursue it.

Judgment on Lawtel

1 Rule 44.3 deals with the court's discretion and circumstances to be taken into account when exercising its discretion as to costs; 44.4 with the basis of assessment, 44.5 with factors to be taken into account in deciding the amount of costs and 44.14 with the court's powers in relation to misconduct. Dyson LJ said that the powers given to the court under 44.14 included powers similar to those available to a judge making a wasted costs order under s 51(6) Supreme Court Act 1981 ("In any proceedings mentioned in subsection (1), the court may disallow, or (as the case may be) order the legal or other representative concerned to meet, the whole of any wasted costs or such part of them as may be determined in accordance with rules of court"). This endorsed the view of Longmore J in *Loucas-Haji Ioannou v Ioannis Frangos* [2006] EWCA Civ 1663.

2 Per Park J in *Walker Residential Limited v Davis & Another* [2005] EWHC 3483 (Ch)

Issue based costs orders

- ***National Westminster Bank plc v Kotonou, CA (Chadwick LJ, Lloyd LJ, Stanley Burnton LJ) 26.2.07***[3]

The defendant appealed against a costs order made in proceedings brought by the claimant to enforce a personal guarantee given by the defendant in respect of the indebtedness of a company that was under his control. He raised a number of issues and though he failed on the first four he succeeded on the fifth. Although the normal rule was that the unsuccessful party would be ordered to pay the costs of the successful party (rule 44.3(2)), at the costs hearing the judge said that in the circumstances it would have been grossly unjust to have ordered the claimant to pay the defendant's costs (the defendant made allegations that were "extravagant and untrue" and was wrong to have made certain assertions; in addition the trial would have been considerably shorter had the defendant only made the allegation on which he had succeeded). He held that that justified a departure from the normal costs rules. Depriving the defendant of a proportion of his costs would not have met the justice of the case and the judge therefore decided to make an issue based order, ordering the claimant to pay 50% of the defendant's costs and the defendant to pay 50% of the claimant's costs. The defendant appealed.

As regards whether or not the judge had been entitled to make an issue based costs order, the CA held that the case "cried out for such an order". The issues which were fought and on which the defendant lost included issues that should never have been raised at all. It would have been surprising if a judge, hearing a trial of this nature, had not reached the conclusion that it was an appropriate case for an issue based order. It was, therefore, impossible to hold that his conclusion was flawed in principle. The judge had recognised that it would have been difficult to have accurately identified the separate costs occasioned by the separate issues and thus decided to make an issue based order but to translate the split into simple percentages of the overall costs, which obviated the need for a detailed assessment of the separate costs of each issue. That was the approach which was required by the rules.

The judge's apportionment of the costs had also been fair and just. He had applied his mind to the various factors which he was required to consider and made a split costs order on that basis. No error of principle or flaw in the reasoning could be detected in his judgment. It was, therefore, not for the CA to interfere and the appeal was dismissed[4].

Judgment on Lawtel

3 See the summary in the Litigation & Dispute Resolution Legal Update November 2006 of the decision in the lower court.

4 See also *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] EWHC B3 (Ch) which was a case where the claimant was penalised for advancing claims for alternative remedies for the same cause of action. Although the claimant was clearly the "winner" there were special factors which militated against awarding the claimant the whole of its costs. The point to remember from this case is that, where appropriate, claimants should "moderate the relief that they seek by reviewing the evidence and statements of case prior to trial and abandoning claims for remedies which appear to be unlikely to succeed or oppressive." Failure to do so will put them at risk for costs.

Costs capping orders

■ ***Willis v Nicolson, CA (Buxton LJ, Smith LJ, Wilson LJ) 13.3.07***

This appeal was about the costs incurred and to be incurred by the claimant and whether the court should order a cap on those costs. Buxton LJ observed that it was now settled law that the various weapons of the CPR gave the court ample powers to make a costs capping order at any stage of proceedings, both in individual cases and cases where a Group Litigation Order has been made[5]. "Such orders are essentially case management decisions, depending heavily on the judge's perception of the needs of his case and general statements about when and in what circumstances a costs capping order should be made can only be general statements." In the circumstances of this case, the CA held that there were no grounds on which to disturb the decision of Field J and the appeal failed.

Buxton LJ went on to make some general observations. He said that the very high cost of civil litigation was a matter of concern to the litigation system as a whole. Limiting the way in which the professionals intend to conduct their case is a delicate matter and the court will therefore be careful before imposing such a restriction (particularly in personal injury cases where the claimant has suffered catastrophic injuries). For reasons of fairness and practicality a cap cannot be imposed retrospectively and there has to be a careful selection of the right moment in the litigation process for the consideration of a costs cap. With various factors in mind, the CA drafted a comprehensive set of principles to be applied in personal injury cases (which were the most obvious candidates for costs capping) but which could have been applicable to other types of cases. The guidelines were not included in the judgment because further discussion with members of the court, the Master of the Rolls and the Deputy Head of Civil Justice, demonstrated that there remained serious doubts as to whether further guidance on costs capping, if it were to be given at all, should have emanated from the court as opposed to being formulated by the Civil Procedure Rules Committee. The CA recognised the imperative of that view and did not pursue the question any further. "It will be for the Rules Committee to decide whether, and if so with what degree of urgency, to take up the issues that we have identified..." **Judgment on www.bailii.org/ew/cases/EWCA/Civ/2007/199.html**

Costs following claimant's late acceptance of Part 36 payment

■ ***Matthews v Metal Improvements Co Inc, CA (Chadwick LJ, Lloyd LJ, Stanley Burnton J) 14.3.07***

This appeal raised a point of general application as to the normal incidence of costs where a claimant accepted a payment into court late as a result of new evidence or information indicating that the sum paid in adequately reflected the value of his claim.

The claim arose out of a minor head injury in consequence of which the claimant developed a disabling psychiatric condition. He brought a claim for damages against his employer. About a year later he was diagnosed with lymphoma which had no causal connection with either his accident or psychiatric condition. The claim form was issued in March 2003 and the defence was served in June 2003. In November 2003 a specialist advised that the lymphoma was slow moving and the claimant had a 70% chance of 10 year survival. In July 2005, another lymph node was found and a biopsy was performed. In August 2005, pursuant to Part 36, the defendant, unaware of the newest medical development, made a payment into court. The claimant did not accept the offer within

5 *See King v Telegraph Group Ltd* [2005] 1 WLR 2282

the 21 day period for acceptance (rule 36.11) or request an extension. In January 2006 the results of the biopsy became available and they revealed that the claimant's life expectancy had been reduced to approximately seven years. As a result, he decided to accept the Part 36 payment, with the consent of the defendant, subject to costs. The judge ordered the defendant to pay all of the claimant's costs on the ground that in light of the facts that were known at the time, his reasons for rejecting the offer when it was made were proper and valid. The parties agreed that the court could only interfere with the costs order made by the judge if she had made an error of principle; the incidence of costs was not affected by the fact that the claimant was a patient[6]; and that "at the approval hearing the same principles fell to be applied by the Deputy District judge to the issue as to the incidence of costs incurred after the last date for acceptance of the Part 36 payment as would have applied if the claim had gone to trial and the claimant had then failed to do better than the Part 36 payment." The question was whether it was unjust to make the usual order, that the claimant pay the defendant's costs after the expiration of 21 days from the payment into court (rule 36.20(2)).

The CA said that the judge wrongly held that she had unfettered discretion. She concluded that because the claimant's advisors could not have known earlier that his life expectancy had been reduced, there was not any reason to exercise her discretion in favour of the defendant rather than the claimant. In fact, "...the question before her was rather whether there were grounds to exercise her discretion in favour of the claimant: it was only if she could properly conclude that it was unjust to order the claimant to pay the costs in question that she could depart from the usual order." The judge's approach was based on a misunderstanding of the function of a Part 36 payment or offer which was to place the claimant on risk as to costs if as a result of the contingencies of litigation he failed to beat the payment in. The judge had not identified any fact that rendered it unjust to make the usual order and therefore there was nothing to justify depriving the defendant of the protection against costs conferred by their Part 36 payment. The CA ordered the claimant to pay the defendant's costs after the expiration of the 21 days from the date of the payment into court, apart from the costs of the approval hearing.

Note that this case dealt with the rules prior to the new Part 36 which comes into force on 6 April 2007. The situation remains the same under the new rules. The new rule 36.10 provides that "(4) Where – (a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or (b) a Part 36 offer is accepted after expiry of the relevant period, if the parties do not agree the liability for costs, the court will make an order as to costs. (5) Where paragraph (4)(b) applies, unless the court orders otherwise – (a) the claimant will be entitled to his costs of the proceedings up to the date on which the relevant period expired; and (b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

Judgment on Lawtel

6 In principle, a defendant in proceedings brought on behalf of a patient is entitled to the same costs protection from his Part 36 offer or payment as a defendant against whom a claim is brought by a competent claimant.

Civil Proceedings Fees from 6 April 2007

■ HMCS has published a guide to the new Civil Proceedings Fees Order which combines both Supreme Court and county court fees. It can be accessed on **http://www.hmcourtsservice.gov.uk/publications/guidance/fees/civil_proceedings_fees_0106.htm.** The only increases that we are aware of are in the fees for company winding up petition deposits, bankruptcy creditors petitions and bankruptcy debtors petitions.

Service

Service by alternative method

■ ***Albon (trading as N A Carriage Co) v Naza Motor Trading SDN BHD & Another, ChD Lightman J 09.03.07***[7]

CPR rule 6.8(1) provides that "Where it appears to the court that there is a good reason to authorise service by a method not permitted by these Rules, the court may make an order permitting service by an alternative method." In this case the claimant gave notice of intention to apply for an order for permission, pursuant to rule 6.8, to serve documents on the defendant by delivering them to the office of his solicitors in Kuala Lumpur because the claimant had been unable to effect service. The application was supported by a witness statement and the master made the alternative service order that had been requested. Alternative service was effected in accordance with that order on 5 February 2006. On 10 February the period for service of the proceedings abroad expired. On 13 March 2006 the defendants made the instant application before Lightman J to set aside the alternative service order.

The application to set aside the order was dismissed. Lightman J said that an alternative service order is an exceptional order and for there to be jurisdiction to make such an order, the court must be satisfied that there is a good reason to do so. Once satisfied that jurisdiction exists the court must decide whether it should exercise its discretion. At both stages the court must keep in mind the overriding objective of dealing with cases justly and in particular "...must have in mind the horrendous cost of litigation today, the hurdles thereby created in the way of obtaining justice on the part of those with limited means...and the need to ensure that cases proceed expeditiously. The question whether there is good reason is a matter to be determined by the judge at the date of the application on the particular facts of the case before him. It is not a precondition of the making of the order that service by a method permitted by the Rules is impracticable: it is only necessary that there is a good reason to make the order." In deciding what constitutes a good reason the court will keep in mind the overriding objective. Once the court has decided that there is a good reason it will then decide whether to exercise its discretion having regard to the facts, including the parties' conduct. On that basis, in this case, given the history of the defendant and its legal advisers taking all steps to frustrate proper service and the fact that the date of expiration for service was approaching, it was reasonable for the claimant to have been granted the alternative service order and the master was correct to have exercised his discretion to make the order; it was the order which the overriding objective practically dictated.

Judgment on Lawtel

7 See the summary in the Litigation & Dispute Resolution Legal Update February 2007 of an earlier application in this case to set aside an order permitting service outside the jurisdiction.

Evidence

Expert determination

Powers of the court to direct expert to state reasons

- ***Halifax Life Ltd v The Equitable Life Assurance Society, QBD (Comm) (Cresswell J) 13.3.07***

The question of what a decision-maker must do when he is required to give reasons for his decision has been considered in relation to judges, tribunals and arbitrators but, until this case, not in relation to an expert in an expert determination. That makes this case interesting. Here the claimant sought a declaration that an expert determination made by way of a written decision was not final and binding on the parties on the grounds that the umpire materially departed from the agreed terms of reference by failing to provide any adequate reasons for his decision and/or the decision contained a manifest error. Putting aside cases of fraud, collusion or partiality, the principal ground on which a party to an expert determination may succeed in a challenge to the determination is that the expert materially departed from his instructions, so that the determination is not a determination made in accordance with the terms of the contract[8]. In *Veba Oil Supply & Trading GmbH v Petrotrade Inc*[9] Simon Brown LJ held that any departure was material unless it could truly be characterised as trivial, or de minimis in the sense of being obvious and making no possible difference to either party. He also said that where a contract provides that the decision of the expert is binding save for "manifest error" the expression "manifest error" refers to "oversights and blunders so obvious and obviously capable of affecting the determination as to admit of no difference of opinion." As regards arbitration, s 52(4) Arbitration Act 1996 provides that an arbitration award must contain reasons unless either it is an agreed award or the parties have agreed to dispense with reasons. Sections 67 and 69 provide for appeals on points of law and other kinds of challenges in certain circumstances and s 70(4) gives the court power to order the tribunal to state the reasons for its award in sufficient detail to enable the court properly to consider the application or appeal to the court.

Cresswell J held that although there was no statutory power, he considered that the court had the power to direct the umpire to state reasons/further reasons for his decision by way of remedy in relation to the relevant contractual provisions and/or under the inherent jurisdiction. If he was wrong about the inherent jurisdiction then the court, on any view, had power to invite the umpire to state reasons/further reasons by way of its case management powers. In this case, although some reasons had been given, the umpire had failed to give adequate reasons for the conclusions that he had reached. The appropriate course was to adjourn the hearing, direct the umpire to state his further reasons in relation to the areas of concern and restore the hearing as soon as the reasons were available.

Judgment on Lawtel

8 *Per Dillon LJ in Jones v Sherwood Services Limited plc* [1992] 1 WLR 277

9 [2001] EWCA Civ 1832, [2002] 1 Lloyd's Rep 295

Appeals

Assignment of appeals to the Court of Appeal

- ***7E Communications Ltd v Vertex Antennentechnik GmBh, CA (Sir Anthony Clarke MR, Arden LJ, Dyson LJ) 26.2.07***

CPR rule 52.14 provides that "(1) Where the court from or to which an appeal is made or from which permission to appeal is sought ('the relevant court') considers that – (a) an appeal which is to be heard by a county court or the High Court would raise an important point of principle or practice; or (b) there is some other compelling reason for the Court of Appeal to hear it, the relevant court may order the appeal to be transferred to the Court of Appeal..."

In the instant case the claimant (an English company) issued proceedings against the defendant (a German company) at the Central London County Court, claiming damages for breach of contract. Following service of the proceedings on it in Germany, the defendant applied for a declaration (under CPR rule 11(1) (procedure for disputing the court's jurisdiction)) that the English courts had no jurisdiction. Judge Knight made an order pursuant to 11(1) that the English court lacked jurisdiction to try the claim and he set aside service of the claim form and particulars of claim. The judge refused permission to appeal but went on to direct "(but only insofar as this Court has jurisdiction to make this order) that any appeal against this order be made to the Court of Appeal". The judge made the direction of his own initiative. Instead of appealing to the CA, the claimant applied to the High Court for permission to appeal to that court, asking the High Court, if it did give permission to appeal, to direct that the appeal be transferred to the CA pursuant to rule 52.14.

Rafferty J granted the claimant permission to appeal but refused to direct that the appeal be referred to the CA because she was not persuaded that the CA was the appropriate forum. Jack J, the High Court judge, held that the High Court did not have jurisdiction to grant permission to appeal or hear the appeal and made a declaration accordingly. He then went on to determine the substantive appeal in the event that he was wrong on the question of appellate jurisdiction and he granted permission to appeal on the issue of appellate jurisdiction. He was of the opinion that 52.14 applied both to appeals for which permission had been obtained and to those for which it had not.

The CA held that having refused permission to appeal, Judge Knight had not had jurisdiction to say where an appeal was to be heard because until permission to appeal was obtained by the claimant, there was and could be no appeal. Since he had refused permission to appeal he had no power to make a direction under rule 52.14 that the appeal be transferred to the CA. Further, Jack J was incorrect to say that rule 52.14 applied both to appeals for which permission had been obtained and to those for which it had not. "The rule clearly distinguishes between an appeal and an application for permission to appeal. It is only 'the appeal' that may be transferred to the Court of Appeal. The heading of the rule correctly states that it is concerned with the assignment of appeals, not applications for permission to appeal[10]". An appeal from a decision of a circuit judge in a claim which had not been allocated to a track and which was not a final decision was to a single judge of the High Court. The present claim had not been allocated to a track, the decision under rule 11(1) was not a final decision and it was

10 This view accorded with that expressed by Lord Phillips MR in *In the Matter of Claims Direct Tests Cases* [2002] EWCA Civ 428.

inappropriate for the judge to have made an order giving a direction "only insofar as this court has jurisdiction to do so". Therefore, once Judge Knight refused permission to appeal the only court that could have given permission was the High Court. The appeal was allowed on the appellate jurisdiction issue.

Judgment on Lawtel

Hearing of appeals

- ***McFaddens Solicitors v Chandrasekaran, CA (Laws LJ, Scott Baker LJ, Wilson LJ) 26.2.07***

CPR rule 52.11(1) provides that "Every appeal will be limited to a review of the decision of the lower court unless-...(b) the court considers that in the circumstances of an individual appeal it would be in the best interests of justice to hold a re-hearing." The decision of whether to review or re-hear will depend on the facts of the particular case although the normal practice will be to review.

In this case, the defendant appealed against a decision allowing the claimant's appeal against an order refusing summary judgment in its claim for outstanding costs. The primary complaint was that the judge did not confine himself to a "review" of the master's decision but, without notice to the defendant conducted a "re-hearing" of the application for summary judgment. In particular, the judge had concluded that the defendant was slow to articulate the case which he then advanced by way of defence. The defendant submitted that in circumstances in which the master had made no reference to that point and the notice of appeal to the judge had made no complaint against the master's omission in that regard, it had not been open to the judge, without at least giving the defendant an opportunity to respond, to place considerable reliance on it. Further, after the dissemination of the judge's draft judgment, when the defendant had applied for leave to adduce a letter relevant to that issue, it was wrong for the judge to have refused it.

The CA held that the nature of the judge's substantive task was to consider whether the master had been wrong to conclude that the claimant had failed to establish that the defendant had no real prospect of successfully defending the claim. Provided that he had done so in accordance with the CPR, the judge's obligation was to have adopted a procedure which was fair to both sides that enabled him to discharge that task. In exercising his power under 52.11(1) he had to give effect to the overriding objective of dealing with cases justly. Although some appeals from masters to judges could be the subject of satisfactory "review" by reference to little more than a transcript of the master's judgment, the grounds of appeal and argument on the law, in the instant case the judge could only have fulfilled his substantive task by reference to all the material which had been before the master; it had never been suggested to the judge that he could have properly determined the appeal by any narrower enquiry. All the bundles were placed before the judge by agreement on both sides and on the basis that he could consider everything in them, whether or not the subject of specific reference in the master's judgment or in the grounds of appeal. The nature of the review he had conducted was a "review" within the meaning of the rule. Accordingly, the appeal was dismissed[11].

Judgment on Lawtel

11 *EI Du Pont de Nemours & Co v ST Dupont* [2003] EWCA Civ 1368, [2006] 1 WLR 2793 applied.

ARBITRATION

Arbitration agreements

- ***Film Finance Inc v Royal Bank of Scotland, QBD (Comm) (Andrew Smith J) 14.2.07***

The claimants (FFI) sought a determination under s32 Arbitration Act 1996[12] that a dispute between them and the defendants (RBS) was governed by an arbitration agreement. The issue between the parties was the meaning and effect of provisions in a Completion Guaranty (related to the financing by RBS and a third party company of a film) whereby FFI guaranteed the completion and delivery of the film. In the event that it failed to fulfil its obligation, FFI agreed to pay RBS sums outstanding under a loan facility between RBS and the third party film company. The Completion Guaranty contained two mechanisms for resolving disputes. Clause 14 provided that "In the event of a dispute relating to delivery hereunder, the provisions for arbitration specified in Schedule III attached hereto shall apply. Any dispute other than a dispute relating to delivery shall be submitted to the jurisdiction to [sic] the courts of law of England." Schedule III set out the mechanism for FFI to notify distributors that completion and delivery had taken place and the procedure for commencing arbitration disputes between FFI and a distributor in the event of a dispute. It provided that "The Arbitrators must determine whether Delivery has been effected or has not been effected and shall promptly notify the parties in writing of the finding made, and the arbitrators' decision shall be final, binding and not open to any appeal process." The film was not completed on time and RBS sought to enforce the terms of the Guaranty. Arbitration proceedings were commenced and the arbitrator gave FFI permission to apply to the court for a determination as to whether the dispute fell within the scope of the arbitration agreement. FFI submitted that RBS' claim constituted a dispute that related to delivery and that clause 14 provided for the dispute to be arbitrated. RBS submitted that clause 14 had to be read in conjunction with Schedule III which was directed at disputes between FFI and a distributor, not FFI and RBS.

The Court held that that there was a tension between clause 14 and Schedule III but that the Completion Guaranty was to be interpreted so as to give effect to the parties' intentions. That required the provisions for arbitration in Schedule III to be modified so that they were to be read as referring to FFI and RBS. Further, the Judge rejected the argument that clause 14 should have been interpreted as referring to arbitration only disputes about delivery. He held that the arbitrator had jurisdiction to determine whether delivery had taken place, whether failure to deliver constituted a breach of contract and what damages were payable. This conclusion was supported by the judgment in *Fiona Trust & Holding Corporation v Privolov*[13] that any jurisdiction or arbitration clause in an international commercial contract should be liberally construed. It also serves as a reminder of the importance of drafting dispute resolution clauses very carefully.

Judgment on Lawtel

12 S 32 of the Act provides that "(1) The court may, on the application of a party to arbitral proceedings (upon notice to the other parties), determine any question of the substantive jurisdiction of the tribunal..."

13 [2007] EWCA Civ 20. See the summary in the Litigation & Dispute Resolution Legal Alert March 2007.

LIMITATION

Proper approach to s 14(2) Limitation Act 1980

- ***McCoubrey v Ministry of Defence, CA (Ward LJ, Neuberger LJ, Tugendhat J) 24.1.07***

This was an appeal against an order that a personal injury claim had been brought within time, notwithstanding that the proceedings had been issued more than 10 years after the injury had been suffered. The appeal mainly concerned the proper approach to the meaning and application of s 14(2) Limitation Act 1980, which provides that "(1)... references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts – (a) that the injury in question was significant...(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment."

Neuberger LJ set out the proper approach to adopt to s 14(2). He said that the test as it had been previously understood and applied had changed. The test is substantially objective. It is not the mixture of subjective and objective in the way in which the analysis of Geoffrey Lane LJ in *McCafferty v The Receiver of the Metropolitan Police*[14] was interpreted (as was indicated in a number of cases, culminating in *KR v Bryn Alyn Community (Holdings) Ltd*[15]). The question of whether an injury is "significant" within s 14(1)(a), as expanded in 14(2), must be decided by reference to the seriousness of the injury and not by reference to its effect, let alone its subjectively perceived effect, on the claimant's private life or career. That seems to follow from the way 14(2) is expressed. "...what section 14(2) is directed at is whether the claimant ought reasonably to have appreciated that his injury was serious. The effect of the injury on the claimant's private life or his career prospects does not impinge on the issue of whether the injury itself was 'sufficiently serious': it bears on the effect of the injury on the claimant's career...the word 'significant' is simply the verbal peg upon with section 14(2) is hung: what is 'significant' is to be determined by what would reasonably have been regarded as 'serious'...the section concentrates on the injury." The result is that s 14(2) has a comparatively limited application.

A further point involved identifying the assumption that one makes about the reasonable person for the purposes of this section. Is the assumption that he is a hypothetical reasonable person who has suffered the relevant injury or condition or does one also assume that he is in the same objective circumstances as the actual claimant[16]? The CA held that the person contemplated is in the same position, in objective terms, as the claimant. "Accordingly...the proper approach to the question raised by s 14(2) is to consider, on the hypothesis postulated by the section, the reaction to the injury (as opposed to its possible consequences) of a reasonable person in the objective circumstances of the actual claimant, while disregarding his actual personal attributes..." In this case the appeal was allowed on the basis that, as a matter of law, the requirements of s 14(2) were not satisfied and the judge should not have held that the claimant had brought the proceedings in time.

Judgment on Lawtel

14 [1977] 1 WLR 1073

15 [2003] QB 1441

16 Neuberger LJ said that this issue is unlikely to make any difference in the vast majority of cases given the essentially limited and objective nature of the enquiry that will be made.

CONTRACT

Breach of undertakings

- ***Independiente Ltd & Others v Music Trading Online (HK) Ltd, CA (Mummery LJ, Rix LJ, Lloyd LJ) 26.1.07***[17]

This case illustrates the care that needs to be taken when drafting settlement agreements. The CA upheld the first instance decision that undertakings that had been given to the court by the defendants were to be construed as having been given to the claimants (which meant that the claimants had a contractual right to claim damages for breach of the undertakings contained in annexes to a settlement agreement) but they approached the issue in a different way. Underhill J held that there was an implied term on the basis of the "officious bystander test". The CA preferred to consider the factual matrix of the case.

The defendant's criticism of Underhill J was that he had failed to apply a general presumption against the implication of terms into written contracts, especially those which were detailed, comprehensive and had been carefully drafted by lawyers. Further, in order to imply a term, the term had to be reasonable and equitable, necessary to give business efficacy to the contract, so obvious that it went without saying, capable of being clearly expressed, and did not contradict any term that was actually expressed in the contract. They submitted that the judge had only addressed the officious bystander test and had he addressed the other conditions he would not have made the implication.

The CA dismissed the appeal and said that the judge was not shown to have been wrong: on the true construction of the settlement agreement the defendant was contractually bound to the claimant not to do the acts which would have breached the undertakings which they had agreed in the settlement agreement to give to the court. "The settlement agreement has to be construed as a whole and in the context of all the surrounding circumstances –the factual matrix, as it is often called – and the critical point is that the appellants [defendants] gave the undertakings to the court in the agreement that settled the earlier proceedings." It made no commercial sense for a party to agree with another party to give an undertaking to the court and not at the same time to be agreeing with that party that they were not going to do what they promised the court not to do. Therefore, if there were breaches of the undertaking to the court they were also actionable as breaches of contract with the claimants.

Judgment on Lawtel

17 See the summary of the first instance decision in the Litigation & Dispute Resolution Legal Update January 2007.

CONFLICT OF LAWS

Applicability of Article 5(1)(b) where a contract specifies multiple places for delivery within one Member State

- ***Case C-386/05 Color Drack GmbH v Lexx International Vertriebs GmbH, Advocate General Opinion, 15.2.07***

Article 5(1) of Council Regulation (EC) No 44/2001 lays down rules on special jurisdiction in matters relating to a contract derogating from the principle that jurisdiction is based on the defendant's domicile. It provides that "A person domiciled in a Member State may, in another Member State, be sued: (1)(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question; (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered, - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided..." The German court submitted the following question for an opinion: "Is Article 5(1)(b)...to be interpreted as meaning that a seller of goods domiciled in one Member State who, as agreed, has delivered the goods to the purchaser, domiciled in another Member State, at various places within that other Member State can be sued by the purchaser regarding a claim under the contract relating to all the...deliveries – if need be at the plaintiff's choice – before the court of one of those places (of performance)? [i.e. the court of the place of any of the deliveries]."

The Advocate General concluded that "Where there are several places of delivery, Article 5(1)(b)...is applicable if, as agreed between the parties, the goods have been delivered in different places in a single Member State. If the action relates to all the deliveries, it is for the law of the Member State in which the goods have been delivered to determine whether the plaintiff may sue the defendant in the court of the place of delivery of his choice or only in the court of one of those places. If the law of that State does not lay down rules on special jurisdiction, the plaintiff may sue the defendant in the court of the place of delivery of his choice." The Opinion itself summarises the legislative and political background of this Article. **Judgment on Lawtel**

Brussels Regulation and Service Regulation will extend to Denmark from 1 July 2007

■ To date, both the Brussels Regulation (The Jurisdiction and Recognition and Enforcement of Judgements in Civil and Commercial Matters (No 44/2001)) and the Service Regulation (Service of Judicial and Extrajudicial Documents in Civil and Commercial Matters (No 1348/2000) have applied to all Member States except Denmark. The aim of these Regulations is to provide uniformity and certainty on jurisdiction, enforcement and service and their non-application to Denmark has meant that all other Member States have had to apply the old rules of the Brussels Convention in resolving issues between themselves and Denmark. Denmark has now announced that it has ratified two parallel agreements to make both Regulations applicable to Denmark under international law (rather than by direct application). These parallel agreements contain provisions to ensure uniform interpretation by the Court of Justice and Denmark's acceptance of any future amendments to the Regulations. The parallel agreements will enter into force on 1 July 2007. For further information see **http://ec.europa.eu/civiljustice/news/archive/agreement_danemark_en.htm#en.**

CONSULTATIONS

Future structure of the Legal Practice Course

■ The Solicitors Regulation Authority (SRA) seeks views on proposed changes to the Legal Practice Course (LPC) including managing the disengagement of electives from the compulsory LPC; granting exemptions from part or parts of the LPC; the more permissive approach to be taken to the framework within which LPCs will be considered for approval and the complementary monitoring process; and information to potential students about choices in selecting LPC courses. The SRA is keen to develop a system for qualification as a solicitor that is both flexible and rigorous and is in line with their regulatory role. The consultation closes on 21 May 2007. To download the consultation paper go to **http://www.sra.org.uk/consultations/161.article**.

NEWS

Legal Services Bill delayed

■ It has been reported in the legal press (Legal Week 15.3.07) that the Legal Services Bill is now unlikely to come into force before 2010 or 2011. The Bill had been expected to come into force during 2008-09 and it was said that it would make the UK by far the most liberal legal services market in the world. The delay means that the Bill is unlikely to be in force before the next general election which raises the possibility that a Conservative government could amend controversial elements of the Bill, for instance provisions to do with allowing non-legal businesses to provide legal services. News of the delay has been disruptive for firms that have already begun preparing for its de-regulation agenda. At the same time, the Bill has been subject to lobbying from the Law Society and Bar Council, both of which are pressing for additional safeguards to avoid political interference with the incoming watchdog, the Legal Services Board.

Judicial appointments 2005-2006

■ The DCA has published the eighth report on judicial appointments covering the six month period from October 2005 to end of March 2006. The report is divided into a narrative section which includes information on appointments to the high court, magistrates' appointments and the work on improving judicial diversity; a section detailing the senior appointment made and overall magistrates' appointment figures; and two sections of statistical data for the period. The report can be accessed on **http://www.dca.gov.uk/judicial/ja-arep2006/index.htm**.

Conduct guidelines

■ The Solicitors Regulation Authority has announced that after receiving final ministerial approval, the new Solicitors Code of Conduct will come into effect from 1 July 2007. It will replace the old Guide to the Professional Code of Conduct for Solicitors. Lawyers are being encouraged to access the latest version of the code online. The Guide is made up of 25 rules for practising solicitors and law firm managers.

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