Legally Blonde

News & Case Law Update

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Compiled by Claire Mckie
claire.mckie@backhouses.co.uk

UK

BACKHOUSE JONES

News in brief

- The case of Gempride featured below reiterates that breaches of the indemnity principle will be penalised. Solicitors will be responsible for the errors of the cost draftsmen.

- The different divisions of the Court of Appeal find themselves somewhat divided on the subject of legal professional privilege and litigation privilege. Having restricted its applicability in the case of R (on the application of the Health and Safety Executive) v Paul Jukes (below), the court has now passed Judgment in the case of Director of the Serious Fraud Office v Eurasian Natural Resources Corp Limited, broadening situations in which litigation privilege applies. The definitive position is no longer a clear one. Consequently, the SFO will consider themselves to have a strong chance of securing an overturn on appeal.

- The Civil Liability Bill was recently debated in the House of Commons. The intention of this bill is to implement the proposed increase in the small claims limit for personal injury together with the whiplash reforms. It is anticipated that it will come into force in April 2020. By 2024 or 2025 a report must be produced by insurers to show what saving have been passed on by them. Labour have confirmed that they will oppose the bill. There is a call for evidence by 9 October 2018.

Mirajuddin Molodi v (1) Cambridge Vibration Maintenance Service, (2) Aviva Insurance Ltd (2018) EWHC 1288

The Claimant alleges a whiplash injury in an accident in February 2015. There was no dispute that it was the Defendant who was responsible for the crash. Causation was disputed by the Defendant who argued the accident was so minor that the damages being claimed for could not possibly have arisen in the circumstance of the accident. The Claimant did not seek any medical treatment until instructed to do so by his lawyer.

At first instance it was found plausible that injury was sustained and the Claimant was awarded £2,750 for pain and suffering and a further £400 for car repairs.

On Appeal, it was held that there was fundamental dishonesty on the part of the Claimant and that the trial judge had taken a 'far too benevolent approach' with regards to evidence from the Claimant that was 'simply untruthful'. The Claimant exaggerated the severity of the impact when claiming for repairs, as he was seeking £1,300 in respect of a £400 loss. As well as this, it was discovered that the Claimant had been involved in not one, as previously stated, but five road traffic collisions before this incident. Appeal allowed.

Philip James Clay v TUI UK Ltd (2018) EWHC Civ 1177

Whilst on holiday, the appellant, along with three other family members, became trapped on a balcony after the sliding door to the room became locked. Whilst climbing between another balcony, the appellant stood on an ornamental ledge which subsequently broke leaving him with a fractured skull after he fell onto the terrace below. It was found that the broken lock was in breach of local standards. However, the appellants action in standing on the ledge was deemed unexpected and foolhardy. The appellants actions were deemed as 'strikingly new and independent acts' considering there was no immediate danger or threat from being trapped on the balcony. The Judge held that the risk involving life was the action of standing on the ledge.

It was held that the voluntary and considered actions of the appellant were not reasonably foreseeable when his family was placed in a situation of inconvenience rather than danger. Therefore, the appeal for the dismissal of the original personal injury claims brought was dismissed.

Katherine Ann Irving v Morgan Sindall Plc (2018) EWHC 1147

The Claimant was involved in a collision which resulted in her car being written off and subsequent whiplash injuries. Liability for the accident was admitted by the other driver. A replacement car was hired by the appellant on credit. During this time, the Claimant was waiting on a cheque to buy another car from the insurer which took four months to process and meant hire charges reached £20,000.

The Claimant stated that she was assured that the hire charges would be covered by the third-party insurers. The Judge

originally held that for her to recover the charges it was necessary to establish that she would be obliged to pay them. This was not established therefore she could not recover the charges.

On appeal it was held that the Claimant had a contingent liability to the hire company. The Defendant was not relieved of liability if the Claimant's liability to pay charges to a third party was contingent on their recovery against the Defendant. Appeal allowed.

Roy Sumner v Michael Colborne and (1) Denbighshire County Council (2) Welsh Ministers (2018) EWHC Civ 1006

A cyclist was struck by the First Defendant's car at a road junction. The First Defendant denied liability and appealed a decision to strike out the claim against the Council as he claimed that vegetation present at the junction severely restricted his visibility so that the Second Defendant the highways authorities were responsible.

The Judge held that there was no prospect of establishing at trial that the vegetation was the cause of the accident. The duty of care was limited to obstructions on the highway itself. Appeal dismissed.

Williams v Secretary of State for Business, Energy and Industrial Strategy (2018) EWCA Civ 852

The Claimant brought a claim for noise induced hearing loss against two former employees. He later dropped the claim against one of the employers. The claim against the other employer was settled under CPR Part 36 before the commencement of proceedings. Dealing with the issue of costs, a Judge ruled that the claim should have been brought under the pre-action protocol for low value personal injury and so the Claimant was only entitled to the fixed costs and disbursements specified in that protocol.

However, a second Judge ruled that the first Judge was wrong and ordered a provisional assessment of costs pursuant to CPR part 47 although he did indicate that one result of that assessment may be that the Claimant was limited to those same fixed costs. On appeal, it was argued that the second Judge had erred and the Claimant was only entitled to recover fixed costs in accordance with the protocol.

The Claimant solicitors did not use the portal because at the time there were two potential Defendants. The protocol is only designed to apply where there is one Defendant. Where the protocol should have been used, and its non-use was unreasonable, then pursuant to CPR part 44 conduct provisions, the claimant would usually be able to recover fixed costs and disbursements.

Idris Farah v (1) Ahmed Abdullahi (2) Probus Insurance co Europe DAC (3) Unknown person driving the vehicle who collided with the claimant (4) EUI Ltd (5) Motor Insurers Bureau (2018) EWHC 738

The Claimant was injured by a car driven by an unidentified driver. The insurer of the negligent car obtained a declaration from the Court that it was entitled to avoid the policy due to material nondisclosure. Notwithstanding the same, the Claimant attempted to issue and serve proceedings upon solicitors of the unidentified driver. They refused to accept. The Claimant applied for an order that the insurer accept service of the proceedings on the unidentified driver's behalf but provided no explanation that a declaration to void the policy had been granted. It was the insurers position that since it had avoided the policy it was not liable under the Road traffic act 1988 section 151 to meet the claim.

Whilst the Claimant failed to mention in their application the order from the court voiding the policy due to material nondisclosure, it was innocent and the Claimant had obtained no particular advantage from it. The insurer could not avoid liability to an uninsured third-party pursuant to its obligations under article 75 of the Motor Insurers Bureau Article of Association. Therefore, service was effective.

Dryden and Ors v Johnson Matthey Plc (2018) UKSC 18

Three employees had been working in a catalytic convertor factory which had exposed them to platinum salts which had caused them to be sensitised to them. This was held to be an actionable personal injury. Personal injury includes a physical change which made the sufferer appreciably worse off in their health.

Faiz Siddiqui v University of Oxford Chancellor, Masters and Scholars (2018) EWHC 536

Damages were sought by the Claimant from the Defendant University on the basis that their breach caused him to obtain a lower mark which resulted in him not only failing to progress in his career, but also to suffer from psychological injury. The claim was dismissed and the parties agreed that the Defendant was entitled to a costs order, but disagreed about the orders enforceability in the context of QOCS rules which applied to personal injury claims under CPR pt44. It was deemed appropriate to order the Claimant to pay 25% of the Defendant's costs, subject to detailed assessment as it also included claims in contract and tort for financial loss. This reduction in costs was to ensure that the legitimate QOCS protection was not lost. Permission to appeal against the costs substantive decision was refused.

Broom and Anor v Archer and Ors (2018) QBD (TCC)

After being approved by the Court in April 2017, it was found that the budget calculated contained a mathematical error. It should have been nearly £100,000 more than previously estimated. The revised costs budget was approved by the court under PD 3E 7.6.

David William Carr v Panel Products (Kimpton) Ltd (2018) EWCA Civ 190

A claim for noise induced hearing loss made 32 years after exposure was statute barred. The Judge was entitled to decline to exercise his discretion under the Limitation Act 1980 S.33 to disapply the time limit.

Soraya Safavi & Ors v (1) Strandview Ltd (2) Garpoint Ltd [2018] EWCA Civ 539

It was held that where a party advances a case based partly on dishonesty where the dishonesty was only a minor part, and it was not persisted in at trial, there is no general rule for the deprivation of all costs other than those that were incurred falsely.

Marret-Gregory & Anor v Metroline & Anor (2018) QBD

The First Defendant argued that their driver was forced to brake in consequence of the Second Defendants negligent driving. A passenger on the First Defendants bus suffered fatal injuries as a result. Evidence showed that the Second Defendant breached the highway code by failing to use mirrors and indicators, as well as entering a box junction without a clear exit and so negligence was established. The actions of the bus driver also amounted to negligence. Based on the speed of the bus when approaching the junction, and in the relative proximity of a bus stop, the likelihood of someone standing was high; and consequently, at risk in such a situation. The deceased was found not to be contributorily negligent. The bus driver was found to be 25% liable, and the Second Defendant 75%.

Raymond Allen James v (1) Karen James (2) Serena Underwood (3) Sandra James (Costs) [2018] EWHC 242 (Ch)

Prior to trial, the Defendants wrote to the Claimant, purporting to make a Part 36 offer stipulating the terms for which the claims and counterclaims would be settled, one of which stated that the Claimant was liable to pay them the entire cost of the claim and counterclaim up to the end of the relevant period or, if later, the date of service of notice of acceptance. The costs term of the offer was held to be inconsistent with part 36 regarding the acceptance period and therefore the offer could not be classed as one which fell in the scope of Part 36.

Accident Exchange Ltd & Anor v McLean & Ors (2018) QBD

The case regarding Autofocus and the car hire rates that they supplied is listed for a 14 week trial in October 2018. Combined costs are estimated to be £19 million. The Defendant solicitors sought security for their costs which was granted at 60% of their claim.

Anna Louise Tuson v Debbie Murphy [2018] EWCA Civ 1461

The Claimant started misleading the Defendant on or around 1 April 2014 and the Defendant became aware in December 2015. The Claimant accepted a Part 36 offer on 8 October 2015 which at that point was out of time by two months. The Judge at first instance ordered the

Defendant to pay the Claimants costs only up to the date at which she began misleading the Defendant and the Claimant was to pay the costs thereafter.

On appeal the judge found that the first instance judge failed to recognise that the Part 36 offer was made with the knowledge of the Claimant's non-disclosure. As such, the Defendant was instead ordered to pay the Claimant's costs up to the date of the 21-day expiration, with the Claimant to pay the Defendant's costs thereafter in line with the normal rules of Part 36.

Gempride Ltd v Bamrah and another [2018] EWCA Civ 1367

The Claimant was a solicitor whose own firm acted for her in her personal injury claim. The claim settled shortly after proceedings began. A cost draftsman prepared the bill of costs which was found to be misleading and contained an untrue provision regarding a funding agreement. At first instance the Claimant was disallowed her costs. The Claimant appealed and the appeal was allowed, finding that the Claimant's Solicitor was not responsible for the errors of the cost draftsmen. However at the Court of Appeal it was held that the Claimant's conduct had been unreasonable and improper and disallowed half her costs of the original action.

Alpha Insurance v Roche & Roche 2018 EWCH 1342

The Claimant discontinued a day before trial. PD 44 para 12.4 provides that "where the Claimant has served a Notice of Discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the Notice has not been set aside pursuant to rule 38.4". The Defendant insurance company requested that the Court hear the issue of fundamental dishonesty. At first instance the Judge found that it would be disproportionate to use the Courts resources to make a finding of fundamental dishonesty. On appeal, it was held that although this was a claim of modest value, it was of public interest to identify claims that were fraudulent.

Jeffrey Cartwright v Venduct Engineering Ltd (2018) EWCA Civ 1654

The Claimant issued a claim for noise induced hearing loss against six Defendants which was settled by Tomlin order. The Parties which were not at fault for the action sought their costs to be enforced from the damages that had been awarded to the Claimant by the at fault party. Under QOCS, a Defendant could enforce an order for costs out of damages payable to the Claimant by another Defendant. However, where it was settled by a Tomlin order the rule could not apply as it reflected an agreement between the parties.

Mercel Hislop v Laura Perde: Kundan Kaur V Committee (for the time being) of Ramgarhia Board Leicester (2018)

This case concerns cost arguments in fixed cost cases where the Defendant has accepted a Claimants Part 36 offer late, before trial. The Claimant argued that

they should be awarded costs on an indemnity basis from the last date of acceptance. It was held fixed costs applied. Where a Claimant accepted the Defendant's offer late there was no question of standard or indemnity costs, so the Claimant should not be treated differently. In the case of exceptional delay there might be a case to escape the fixed costs regime.

PJSC Aeroflot – Russian Airlines v Leeds and another (Trustees of the estate of Berezovsky) and others (2018)

The Claimant discontinued shortly before trial without explanation. The Claimant had alleged fraud, conspiracy and dishonesty and then abandoned those allegations. The Defendant was therefore awarded indemnity costs.

Harrap v Brighton and Sussex University Hospitals NHS Trust (2018) EWCH 1063

The Claimant discontinued at trial after evidence from the Defendant. The evidence by the Defendant had not been included in their witness statement. Whilst such discontinuance would normally amount to the Claimant paying the Defendant's wasted costs, the Judge found in this case that there was a change of circumstance and that due to the unreasonable conduct of the Defendant, there was good reason to depart from the normal rule.

Bratek v Clark - Drain Limited (April 30th 2018)

On Appeal, the interpretation of a consent order in relation to cost the of personal injury claims subject to fixed recoverable costs was being considered by the Court. Liability was not admitted and the case was settled the day before trial.

The order provided that the Defendant pay the Claimant £10,000 in full and a final settlement with the Defendant to pay the Claimant's solicitors costs. It was argued by the Claimant that this took the matter outside the fixed costs regime and that the agreement should be constructed on the basis that the parties had agreed that the fixed costs regime wouldn't apply.

Neither party had addressed themselves to the issue of whether there were exceptional circumstances for escaping fixed costs as set out in CPR 45.29J. It was held that these provisions are

mandatory and that neither party can contract themselves out of the provisions. This meant that unless exceptional circumstances applied, then in a fixed recoverable costs case, the costs are indeed fixed.

Therefore, a consent order providing costs to be assessed on the standard basis if not agreed, makes no difference at all.

Razumas v Ministry of Justice February 2018

The Claimant, a former prisoner brought a medical negligence claim against the MoJ over medical care he received whilst in custody.

The Claimant lied about seeking treatment. Under the Criminal Justice and Court Act 2015 s57, this type of conduct can lead to a striking out of the claim unless the Court is satisfied that the Claimant would suffer substantial injustice if the claim was dismissed.

The Claimant was held to be fundamentally dishonest. The claim of seeking treatment were part of the potential success of the case, and so he had substantially affected the presentation of the case.

Accident Exchange Ltd v Nathan John George Broom & Ors (2017) EWCH 1096

The case was brought by Accident Exchange after its fraud investigation team uncovered evidence that the individuals named had committed perjury and falsified documentation used in court in a systematic fabrication of evidence. The falsified evidence was then used to reduce legitimate claims for damages for car hire charges brought by innocent victims of road traffic collisions.

It was held that there was overwhelming evidence of evidence fabrication in which the Defendants had knowingly participated. The application to commit the Defendants to prison was granted.

Autofocus went into administration in July 2010.

Rhys Allen Williamsv McMurrays Haulage (2) Morrisons 2018 EWCH 2079

An HGV driver was responsible for the injury to a supermarket employee who's arm was crushed whilst a delivery was being made at the supermarket. No breaches of duty were established against the supermarket for failing to provide safe systems of work.

Caine Steven John v Paul Kelly & Violet Ellis 2018 EWCH 2018

The Defendant car driver admitted liability for injuries suffered to an 8 year old boy who had been crossing the road close to a playground. The car driver however made a claim against the child's mother for contributory negligence for failure to supervise him. Neither the boy, nor the boy's mother were found to contributorily negligent. Holding the mother responsible would impose a far too high standard on an ordinary parent.

Advantage Insurance Company Limited v Lee Stooley (2) trinity Insurance Company Limited 2018 EWCH 2135

The Defendant held a motor insurance policy with the Claimant which stated that he could drive his own vehicle and others, with permission of the car owner, on a third-party basis. While driving his friend's car, with his permission, the First Defendant was involved in a serious accident. His insurers attempted to argue that "the vehicle" he was insured to drive was limited to the drivers own car. It was held when the driver used his friend's car with their permission, that car became the "vehicle" for the purpose of S145 of the Road traffic Act.

Commissioner of Police of the Metropolis v Andrea Brown & Equality and Human Rights Commission. 2018 EWCH 2046

The Claimant Police Officer sought to rely upon QOCS. The Claimant failed to beat a Part 36 offer. The Defendant police force was ordered to pay 70% of the Claimant's costs up to the date of the offer and she should pay the costs thereafter. However, the order could only be enforced to the extent of the damages awarded because of QOCS. The Defendants appealed and argued that as there were other claims, in addition to personal injury, an exemption applied.

The exception under R44.16 (2) meant that if it was a mixed cased, it was for the Court at the end to decide whether it was just to permit enforcement of a cost order. The appeal was allowed, and it was held the Judge had discretion.

R (on the application of the Health and Safety Executive) v Paul Jukes [2018] EWCA Crim 176

All of the Defendants were charged with failing to discharge their duty to take reasonable care of the health and safety of employees, contrary to Section 7 of the Health and Safety at Work Act 1974.These charges came about after one of the employees at Gaskells NW Limited was crushed to death by a baling machine he had entered to clear a blockage.

It was Mr Jukes' case that, as the Transport and Operations Manager, the monitoring of health and safety was not one of his responsibilities. The response from the Prosecution was to enter into evidence a statement that Mr Jukes had made to the company's solicitors, dated 9 February 2011, where the Defendant stated that his duties did spill over into some health and safety work.

On appeal, it was Mr Jukes' case that the document relied upon by the Prosecution was subject to privilege, as it was made to solicitors during an internal investigation. His argument was that there was contemplation of litigation at the time and, consequently, litigation privilege applied. The appeal was dismissed.

The reasoning underlying the Judge's decision rested on two limbs; firstly, it was the Judge's opinion that, whilst there may have been some litigation considered, it was not enough to attract privilege as there were no adversarial proceedings instigated. Secondly, the Judge concluded that the solicitors to

whom the statement was provided, were not Mr Jukes' solicitors, they were the company's solicitors. As such, the privilege would be that of the company and not of Mr Jukes.

In giving his judgment, the judge restricted tightly the concept of privilege to the below conditions:

> *"A document will only attract litigation privilege, whether in the context of civil or criminal litigation, if three conditions are satisfied: (1) litigation is in progress or reasonably in contemplation; (2) the relevant communication or document is made or created with the sole or dominant purpose of conducting that litigation; and (3) the litigation is adversarial, not investigatory or inquisitorial…"*

Director of the Serious Fraud Office v Eurasian Natural Resources Corp Limited [2018] EWCA Civ 2006

The judgment of *Jukes* has been overturned by the Court of Appeal, in a decision given on 5 September 2018.

The Serious Fraud Office ("SFO") was involved in a criminal investigation into allegations of fraud, bribery and corruption involving the Defendant, ENRC. As part of this investigation, the SFO issued a notice under Section 2(3) of the Criminal Justice Act 1987 to compel the production of various documents generated during the company's own investigations.

At first instance, the case was heard in the High Court (Queen's Bench Division), where it was pleaded by ENRC that the documents requested were covered by privilege. This would mean that the SFO could not demand the production of such documentation.

Unlike the High Court, the Court of Appeal decided that criminal prosecution was in the reasonable contemplation of the ENRC, on the facts of the case. They reiterated that not every SFO manifestation of concern will give rise to contemplation of adversarial litigation, but that in this particular case it had. Thus, litigation privilege was in play.

They also ruled that documents prepared by solicitors, even if done with the intention of showing the documents to another party, did not deprive those documents of privilege. Even if litigation was not the dominant purpose at the time of creation, it became clear that this swiftly became the case, and thus privilege applied.

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BACK

BACKHOUSE JONES

marketing@backhouses.co.uk
backhousejones.co.uk

The North
Backhouse Jones

The Printworks
Hey Road
Clitheroe, Lancashire
BB7 9WD

The South
Backhouse Jones

22 Greencoat Place
London
SW1P 1PR