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Bristol: 1 Redcliff Street, Bristol, BS1 6NP
Tel: 0117 9100 200

London: 18 Bedford Square, WC1B 3JA
Tel: 0207 323 4632

London: 77 Gracechurch Street, EC3V 0DL
Tel: 0207 220 7818

Manchester: 57 Spring Gardens,
Manchester, M2 2BY
Tel: 0161 228 3622

Milton Keynes: 2 Eskan Court, Campbell
Park, MK9 4AN
Tel: 01908 289200

Email:
crmsubscribe@greenwoods-solicitors.com

PERSONAL INJURY/EXAGGERATION/COSTS

The case of **Morton v Portal Ltd (2010) EWHC 1804 (QB)** sees the court examining the claimant's conduct to see whether or not an issues based costs order should be made against him and his costs reduced.

The claimant had been seriously injured whilst working as a subcontractor at a building site where the defendant was the main contractor. He had suffered a fracture of his T12 vertebra and complete damage to his spinal cord at that level. He was paralysed and would remain so for the rest of his life. Agreement was reached on liability and judgment was entered against the defendant for seventy-five per cent damages to be assessed and for the defendant to pay the claimant's costs of the issues of liability to be assessed, if not agreed, on the standard basis. Considerable work was done to prepare for hearing assess the damages payable by the defendant. Efforts were made towards settlement but for a long time were almost entirely unsuccessful. The assessment hearing was listed but the parties were eventually able to reach agreement on most issues, including past and future earnings. Issues relating to future care remained outstanding. The court was required to determine a number of matters including the appropriate order for costs to be made in respect of the claimant's claim for loss of past and future earnings; and whether a periodical payment order for future care should be made.

The defendant argued that the result of the process of settlement demonstrated that the amount of M's claim had been grossly exaggerated and that crucial factor enabled the court to depart from the default position that costs should follow the event.

In so far as it is relevant to this report **CPR 44.3** states:

(1) The court has discretion as to –
(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid.

(2) If the court decides to make an order about costs –
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order.

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including –
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

PERSONAL INJURY/EXAGGERATION/COSTS (cont'd)

(5) *The conduct of the parties includes –*

- (a) *conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;*
- (b) *whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;*
- (c) *the manner in which a party has pursued or defended his case or a particular allegation or issue; and*
- (d) *whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.*

On the first issue the judge found that **CPR 44.3(5)(d)** taken with **CPR 44.3(2)(b)** gave the court the power to disallow all of a claimant's costs of an issue if the conduct of the claim or the manner in which it was presented was unreasonable. The claimant accepted that the past and future loss of earnings claim was worth very much less than had originally been contended. However, that fact did not of itself show that there had been an exaggeration within **CPR 44.3(2)(b)**. That paragraph could not have been intended to be satisfied merely because a genuine claim was overestimated. There was a distinction between "exaggeration" and "concoction". Without needing to involve concoction, "exaggeration" for the purposes of **CPR 44.3(2)(b)** must nevertheless indicate conduct meriting criticism. The court had not heard oral evidence on matters which were said to support the claims of exaggeration. Considerable caution had to be exercised before reaching on a broad brush examination of documents alone, any conclusion adverse to the claimant. The relevant factors in the instant case did not all point towards exaggeration in the sense of conduct open to criticism. Whether the case was taken as a whole, or looking at the lost earnings claim alone, overall it seemed that the claimant was the winner. In the circumstances, the court was unable to make any findings as to his conduct such as would warrant a departure from the default position.

The costs in the instant case involved very substantial sums of money. In a case where the court had heard evidence and reached conclusions on relevant factual issues, it might be desirable that the court should apply its detailed knowledge of the case so as to make a special costs order in light of that knowledge. Where the court was asked to deal with the matter on a "broad brush" basis without the advantage of oral evidence and detailed submissions, it seemed that the size of the sums at stake made it all the more desirable that issues about appropriateness and proportionality were dealt with as part of detailed assessment by a costs judge.

The question of whether a periodical payment order should be made was a question for the court. Under **CPR r.41.7**, when considering whether to make a periodical payment award, the court must have regard to all the circumstances of the case and in particular the form of award which best met the needs of the claimant having regard to the factors set out in **CPR PD 41B**. Taking those factors into account, a periodical payment order was the appropriate order.

PERSONAL INJURY/HEALTH AND SAFETY

The case of **Bhatt v Fountain Motors Ltd (2010) EWCA Civ 863** involved the Court of Appeal considering the **Work at Height Regulations 2005**.

The claimant had been injured at work when he fell from a ladder, which was not footed, while attempting to retrieve vehicle parts stored in a loft. The judge found the defendant to be liable subject to a discount of one-third for contributory negligence.

The relevant regulations state:

“Organisation and planning

4.(1) Every employer shall ensure that work at height is –

- (a) properly planned;*
- (b) appropriately supervised; and*
- (c) carried out in a manner which is so far as is reasonably practicable safe, and that its planning includes the selection of work equipment in accordance with regulation 7.*

PERSONAL INJURY/HEALTH AND SAFETY (cont'd)*Competence*

5. Every employer shall ensure that no person engages in any activity, including organisation, planning and supervision, in relation to work at height or work equipment for use in such work unless he is competent to do so or, if being trained, is being supervised by a competent person. Avoidance of risks from work at height

6.(1) In identifying the measures required by this regulation, every employer shall take account of a risk assessment under regulation 3 of the Management Regulations.

(2) Every employer shall ensure that work is not carried out at height where it is reasonably practicable to carry out the work safely otherwise than at height.

Selection of work equipment for work at height

7.(1) Every employer, in selecting work equipment for use in work at height, shall –

(b) take account of –

(i) the working conditions and the risks to the safety of persons at the place where the work equipment is to be used;

(ii) in the case of work equipment for access and egress, the distance to be negotiated;

(iii) the distance and consequences of a potential fall;

(iv) the duration and frequency of use;

(2) An employer shall select work equipment for work at height which –

(a) has characteristics including dimensions which –

(i) are appropriate to the nature of the work to be performed and the foreseeable loadings; and

(ii) allow passage without risk; and

(b) is in other respects the most suitable work equipment, having regard in particular to the purposes specified in regulation 6.”

The judge at first instance found a number of breaches of the regulations. In relation to regulations 4 and 5, he said that there was no evidence that the defendant’s managing director, although well-meaning, had had even the most cursory training in health and safety matters; and he was not satisfied that he was competent to engage in organisation and planning in relation to work at height. On that basis he found a clear breach of regulation 5.

However, such a breach was of causative significance only in so far as it resulted in breaches of regulations 4, 6 and 7.

The judge referred briefly to regulation 6(1) but regarded regulation 6(2) as the key provision. He proceeded on the basis that the expression “reasonably practicable” in that provision involved a burden on the defendant to show that it was disproportionate to the risk to require the goods to be stored elsewhere than in the loft. He found that it was reasonably practicable to carry out the work somewhere else (i.e. otherwise than at height) if it had to be carried out at all and that there was a clear breach of regulation 6(2).

The judge’s other important finding of breach concerned the selection of work equipment, which is covered by regulation 7. He said that if the loft was a serious storage area it would have been possible to install a fixed pull-down ladder. That might have involved altering the configuration of the access but it was unlikely that it would have cost more than a few hundred pounds. There was nothing to stop it being done, and no doubt the reason why it was not done was the expense compared with the profit to be gained from the stored material.

The defendant appealed on the basis that the claimant was wholly to blame for the accident and that there could therefore be no liability on the defendant. In climbing the ladder without waiting for it to be footed, the claimant ignored the instructions given to him and the system he had followed before. The claimant accepted in evidence that if the ladder had been footed the accident would probably not have occurred; and the judge found in terms that the claimant’s injury would have been avoided if the system had been followed properly. In the alternative, it was argued that the judge had been wrong to find that the defendant was in breach of the regulations.

PERSONAL INJURY/HEALTH AND SAFETY (cont'd)

The Court of Appeal took the view that it was necessary to start with the regulations rather than with the claimant's conduct, as the regulations existed to avoid or minimise the risk of working at height.

The appeal court therefore concentrated on the judge's findings that the regulations has been breached. It found that the "judge was also plainly correct" to find that those breaches of the regulations exposed the claimant to an unacceptable risk. The claimant could not be said to have been wholly to blame for the accident. The defendant's breaches of the regulations placed him in a situation of risk to which he would not have been exposed if they had been complied with. What happened is the very kind of event that the regulations are aimed at preventing.

The judge was perhaps generous to the claimant in finding only one-third contributory negligence, but there was no appeal against that finding.

PERSONAL INJURY/OFFER AND ACCEPTANCE

The case of **Rosario v Nadell Patisserie Ltd (2010 EWHC 1886 (QB))** is a reminder that alongside **Part 36 CPR** the usual principles of contract still apply.

After the claimant had obtained judgment in default in respect of his claim, the defendant made an offer to settle expressed to be pursuant to **CPR Part 36**. The offer was rejected and the claimant responded with a counter-offer. That was rejected by the defendant who reconfirmed that the original offer was still open for acceptance. After some further negotiations the claimant wrote a letter indicating that he wished to accept "your offer" and sent a draft consent order for approval which stated that the defendant was to pay the original settlement figure that it had offered plus all of the claimant's costs. The letter was marked "Without prejudice save as for costs" and stated that the claimant reserved the right to refer the correspondence to the court on the question of costs. The defendant responded by acknowledging that the claimant had accepted the "previous Part 36 offer" but did not query the form of the consent order. The defendant wrote asking the court to remove the quantum hearing from the list and sent cheques in payment to the claimant. However, the defendant argued that the claimant had accepted its original offer and therefore under Part 36 he was only entitled to his costs up until 21 days after the original offer expired and would be liable for the defendant's costs thereafter. The claimant countered that he had made an offer, or counter-offer, as set out in the draft consent order and that the reference to "your offer" was merely to the amount and not the whole terms of the original offer.

The court held that viewed objectively, in the context of the correspondence, the claimant's letter could not reasonably be understood as an acceptance of the whole terms of the defendant's original offer. The word "offer" could be used to refer to the whole of what was technically referred to as an offer for the purposes of the law of contract or for Part 36 but it could also be used to refer to a part or item constituting one of a number of parts or items of an offer which was capable of acceptance under Part 36 or the law of contract. The designation of the letter as "Without prejudice save as for costs", and the reservation of the right to refer to it in court on the question of costs, could not be ignored as unnecessary or inappropriate and otiose words. There was a complete absence of words or conduct to suggest that the claimant was acting under Part 36. Accordingly, the claimant's letter was a counter-offer.

The terms of the defendant's response, together with the letter to the court and the sending of cheques, were all words and conduct that would convey to a reasonable person having all the background knowledge available to the claimant that the defendant considered the matter to have been finally disposed of in accordance with the terms of the claimant's letter.

There had been no query about the costs terms in the consent order until later. The use of the words "previous Part 36 offer" were consistent with a reference to agreement to the figure, as opposed to agreement to the whole of the terms of the Part 36 offer. Accordingly, there had been a settlement in the terms of the draft consent order.

LORD JUSTICE JACKSON'S REPORT ON COSTS IN CIVIL LITIGATION

With the "Jackson Report" coming relatively close to the change of government and with a coalition government in place, many have spent the last few months wondering what, if anything would happen next. The concern was that although there was judicial support for many of the recommendations made little real progress could be achieved without primary legislation and that looked unlikely.

From a defendant perspective, therefore, the recent written Ministerial Statement has come as a pleasant surprise.

It recognises that while CFAs have played a role in giving access to justice the high costs under the existing arrangements have now become a serious concern, particularly in clinical negligence cases against the NHSLA and in defamation proceedings. The statement also touches on how success fees and ATE insurance premiums, which are recoverable, add further to the costs. In his report Jackson LJ proposes abolishing the recoverability of both success fees and ATE insurance premiums. This is one set of reforms that would require primary legislation. To allow for CFA's to continue but with claimant's meeting the success fee he also recommends an increase of ten percent in the level of general damages for personal injury, defamation and other tort claims; and a regime of qualified one way costs shifting in specified proceedings, including personal injury and defamation.

The Government therefore proposes to carry out a consultation in the autumn. It will look into these issues but will also seek views on other related recommendations on funding arrangements such as whether lawyers should be permitted to enter into Damages-Based Agreements (DBAs) or enter into arrangements involving "contingency fees" in litigation. DBAs are also a type of "no win no fee" agreements which allow a lawyer to take a percentage of the claimant's damages for taking on the claim. DBAs are commonly used in Employment Tribunals but are not permitted in litigation before the courts.

The statement confirms that work is also progressing on a number of other areas covered by the Jackson Report but these will not form part of the Government's consultation in the autumn. The Government is considering the recommendations on Fixed Recoverable Costs in the Fast Track, and on referral fees. The Legal Services Board is looking at the issue of referral fees, and their conclusions will be fed into the Government's considerations. In addition Lord Young of Graffham's "Review of Health and Safety Law and the Compensation Culture" will be taken into account.

In a separate project, the Civil Justice Council will consult over the summer on a Voluntary Code of Conduct for third party funders, as recommended in the Jackson Report. Third Party Funding is an arrangement whereby a party, not directly involved in the proceedings, agrees to fund the case in return for a share of the damages awarded.

The statement also identifies a number of other costs related projects and proposed pilot schemes that will be taking place.

For further information on any of the issues dealt with in this issue (other than where a contact name has been provided) please contact Geoff Owen (01908 298216) – gro@greenwoods-solicitors.com

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Greenwoods Alert

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Please note that events are held in Central London and occasionally Milton Keynes or Manchester

Drafting Fraud Defences & Part 18 Questions

Date	Time	Location	Speaker(s)
19th August 2010	16.30 - 17.30	57 Spring Gardens	Matthew Smith
		Manchester M2 2BY	Sovereign Chambers

Tort of Deceit Claims

Date	Time	Location	Speaker(s)
2nd September 2010	17.00 - 18.00	18 Bedford Square	Marcus Grant
		London WC1B 3JA	1 TG

Current Controversies on Quantum

Date	Time	Location	Speaker(s)
16th September 2010	16.30 - 17.30	18 Bedford Square	Nicholas Heathcote-Williams QC
		London WC1B 3JA	12 KBW

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