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The Government has now decided to defer Lord Justice Jackson's civil litigation reforms, including the reform of conditional fee arrangements, until April 2013. The effects of this are considered below.

Costs feature in several of the cases we review this month. Although it was substantially amended in April 2007, Part 36 continues to spawn satellite litigation, with yet further guidance being given on the question of what amounts to a Part 36 offer in the *Norman Lee Thewlis* case below.

The case of *Islington London Borough Council v Margaret Elliott & Peter Morris* (2012) deals with both costs issues and the need for there to be "imminent danger" of physical damage for an injunction to be granted.

For more information on this, or any of the other cases or issues featured below, please contact Marise Gellert on **020 7469 6249** or at msg@greenwoods-solicitors.com

WHAT AMOUNTS TO A PART 36 OFFER?

Recent cases have made it clear that it is crucial that the wording of a Part 36 offer letter is absolutely clear and compliant with CPR Part 36. The most recent case of *Norman Lee Thewlis v Groupama Insurance Co Limited* (2012) is another example of the problems that can arise where that is not done. The defendant applicant ("G") sought a declaration that proceedings brought by the respondent ("T") had been stayed pursuant to CPR Part 36.11 on the grounds that G had accepted T's offer made pursuant to Part 36.

Although the facts of the underlying dispute were largely irrelevant to this application, the background is that T, the owner of a property which was insured by G, made a claim in respect of subsidence damage. G disputed the claim as there were issues in relation to whether any damage was covered by the terms of the policy and the extent and costs of any remedial work. As a result, T brought proceedings.

In September 2008, before the issue of proceedings, T made an offer to settle the claim for £20,000, which was rejected. The letter stated that the offer was made pursuant to Part 36 and remained open for acceptance for 21 days after which it could only be accepted if costs were agreed or the court gave permission. It is that final phrase that was the point of contention in this case.

Proceedings were issued in May 2011 and in October 2011 G purported to accept the offer. T submitted that G could no longer accept the offer. T argued that it was

not a Part 36 offer letter as it failed to comply with Part 36.2(2)(b) in that it did not state that it was intended to have the consequences of Part 36 and the reference to acceptance after 21 days was inconsistent with Part 36.

G contended that it was plainly intended to be a Part 36 offer and that the author clearly had in mind the old Part 36 provisions, prior to the April 2007 amendments.

The Technology and Construction Court held that:

The failure of the letter to comply with Part 36.2 was fatal, applying the decision in the cases of *Carillion JM Limited v PHI Group Limited* (2011) and *Huntley v Simmonds* (2009). It was not clear that T intended the letter to have the consequences of the new Part 36 which came into force in April 2007, and the case of *C v D* (2011) was distinguished. The sentence in the letter that after 21 days the offer could only be accepted if costs were agreed or the court gave permission was inconsistent with Part 36. Furthermore, whilst the letter referred to some of the consequences of Part 36 it did not refer to them all. The letter did not comply with Part 36.2, which sets out very specific requirements for an offer to qualify as a Part 36 offer. Part 36.2 meant what it said and accordingly the offer was not a Part 36 offer.

On that basis the application was refused and G was ordered to pay T's costs of the application.

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Comment:

It is quite clear that although it was agreed that the Claimant's solicitor clearly intended the offer to be a Part 36 offer that was insufficient in light of the clear

requirements in CPR Part 36.2. Those making offers prior to the issue of proceedings and, therefore, possibly, prior to the involvement of solicitors, must ensure that those requirements are adhered to if they want the costs consequences of Part 36 to apply.

COSTS ON INJUNCTION APPLICATION AND IMMINENCE OF DAMAGE

In another subsidence claim, *Islington London Borough Council v (1) Margaret Elliott (2) Peter Morris* (2012), the Court of Appeal was required to consider the appropriate order for costs where the **potential nuisance** that an application for an injunction was intended to remedy (possible future damage caused by tree roots) had been remedied prior to the issue of the claim and the local authority's plea in its defence that it had issued a works order for the trees to be removed should have been a complete answer to the claim. Settlement attempts were unsuccessful but only because the parties were unable to resolve their differences about costs and the Judge at first instance had to try the action to decide what costs order to make.

The Court of Appeal also considered the question of how proximate and likely the occurrence of physical damage has to be before the Court will intervene.

The appellant local authority ("LBI") appealed against the decision of the Judge at first instance, ordering LBI to pay the costs of the respondents ("E") in a claim arising out of a potential nuisance and the grant of an injunction. LBI owned a property, which it let to tenants on short-term tenancies, containing a number of poorly kept Ash trees that encroached upon E's neighbouring property. It was the view of the expert witnesses in the case that Ash trees were unsuitable (due to their size and rate of growth) for planting in a small garden such as this. The Ash trees were, in fact, self sown but LBI still had sufficient control over them and could have removed or maintained them.

E notified LBI of their concern that the Ash trees might undermine the foundations of their property if allowed to grow unchecked but LBI took no action. E again told LBI about the problematic trees and about a water penetration problem emanating from LBI's neighbouring property. LBI responded, advising that root samples should be taken and that an inspection

would occur in early 2008. E provided samples and sent LBI an expert report stating that urgent action was necessary to prevent inevitable damage. Further correspondence ensued culminating in E's letter in June 2008 that unless remedial action was taken by July 2008, proceedings would be issued. In fact a works order was issued by LBI in December 2008 for the removal of the "offending" trees but this was not communicated to E.

E wrote to LBI on 3 March 2009 referring only to the water problem, but issued proceedings on 20 March 2009 in respect of the trees. LBI's defence made reference to the December 2008 works order. The trees were actually removed in June 2009.

At trial E's expert stated that the risk of imminent and significant property damage would occur in five years.

The Judge at first instance concluded that while there was no imminent harm in the sense of something happening within a three-to-five year period, there was a likelihood that the work would need to be done in some years to avoid the damage and that delay would only increase costs; it was unlikely that the work would have been carried out without an injunction; had the work not already been carried out E would have successfully obtained an injunction. The Judge at first instance therefore awarded E their full costs up until 3 March 2009, and half their costs from then until 20 March 2009, as LBI had acted unreasonably. LBI submitted that based on the finding that no damage would occur in less than three years, it could not be said that there was any imminent danger when the injunction was granted, thus making it premature.

The Court of Appeal held that:

(1) Whether or not the injunction was appropriate had to be considered in light of relevant matters known at

trial and not solely by reference to whether the tree roots would cause damage within a particular period. It was necessary to consider the relative cost of removing the trees, which the Judge at first instance had done, and the likelihood of the potential nuisance being controlled within three years before any actual damage occurred. As damage was unlikely to occur before three years, the Judge at first instance had to consider LBI's ability and willingness to prevent it. E had to show that an injunction was necessary to prevent the occurrence of the nuisance. LBI was entitled to rely upon its rights and obligations as an adjoining land owner to remedy the problem.

Therefore, in principle, only where the risk of danger was so imminent and the intransigence of a defendant so obvious should the court be prepared to grant an injunction for **a nuisance that did not yet exist**. The Judge at first instance's conclusion about the injunction, for which no reasons had been provided, was difficult to reconcile with his earlier finding that a works order had been issued. No challenge to the defence had been mounted which stated those works would be done, so there was no suggestion before the Judge at first instance that E did not believe that LBI would proceed to remove the trees, notwithstanding LBI's previous conduct. E had faced delays and misleading information but by December 2008 at the latest a decision had been taken to remove the trees.

Therefore, it was not open to the Judge at first instance to hold that the injunction was necessary.

(2) When the July 2008 deadline for issuing proceedings passed it was reasonable for E to assume that nothing had been done, but waiting until March 2009 before issuing proceedings could have been taken as an indication that proceedings were still not in contemplation. LBI's decision to remove the trees in that intervening period brought the prospect of a successful action for an injunction to an end. The

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March 2009 letter made no mention of the tree problem, dealing only with the water problem and LBI dealt with it on that basis. LBI only became aware that proceedings had been issued upon receipt of the claim form. Had E informed LBI of their intention to issue proceedings, they would have found out about the decision to remove the trees, thus negating the need to issue a claim. Such a letter could also have clarified the uncertainty surrounding the promised 2008 inspection and silence regarding the removal of the trees. However, some allowance had to be made for LBI's failure to respond to the June 2008 letter once it

had decided to remove the trees. Accordingly, the correct order was that no order for costs would be made for the period up to and including service of LBI's defence, thereafter LBI was entitled to its costs because once E was aware that the trees were to be removed, the failure of the injunction application was inevitable and it should not have been pursued.

Comment:

It is quite clear that the Court of Appeal regarded both parties to be at fault. E was at fault in failing to

communicate with LBI that it was about to issue proceedings in respect of the trees, in March 2009, by means of a letter before action shortly before the commencement of those proceedings, which the Court of Appeal took the view would have led to LBI advising E that the works order had already been issued for the removal of the trees. LBI was at fault in not voluntarily communicating that fact when the works order was issued in December 2008, as to do so would have prevented the need for the proceedings.

CLAIM TIME BARRED BY CONTRACTUAL LIMITATION CLAUSE

In the Court of Appeal case of *Inframatrix Investments Limited v Dean Construction Limited* (2012) the appellant principal ("ILL") appealed against a first instance decision that its claim for damages for breach of a construction contract by the respondent contractor ("DCL") was barred by a contractual limitation clause that provided that no action could be brought by the principal after the expiry of a one-year period from when the contractor last "performed services".

In July 2008, ILL engaged DCL to perform specialist roofing and cladding works at a new factory. A total of 7 contractors were engaged for the project, each of whom was on site for a different specified time. The works were carried out in sequence, so there was only one contractor on site at a time.

Clause 17.4 of the contract provided that no action or proceedings in respect of the agreement could be brought against DCL after "(a) the expiry of 1 year from the date of Practical Completion of the Services or; (b) where such date does not occur, the expiry of 1 year from the date the Contractor last performed Services in relation to the Project".

DCL carried out the relevant works in November and December 2008. Snagging items were completed in February 2009. In July and October 2009 ILL's solicitors sent letters making allegations of poor workmanship by DCL. In February 2010, DCL's solicitors stated that DCL was willing to visit the site with ILL to identify any required remedial work and that it was willing to attend to such work. The site

meeting took place in March 2010, after which DCL offered to return to the site to carry out further investigative work and remedial work if necessary.

That offer was not accepted and ILL did not allow DCL to return to the site. ILL issued proceedings in December 2010 seeking damages for breach of contract. DCL applied for summary judgment on the basis that the claim was time barred by virtue of the limitation clause in the contract. ILL submitted that there had not been practical completion of the services. DCL disputed that, but contended that if there had not been practical completion, then clause 17.4(b) of the contract applied and the claim was still time barred as it was over a year since services were last performed.

The Judge at first instance accepted DCL's contention.

The next issue was whether DCL had provided services, as defined in the agreement, less than one year before the issue of the proceedings. DCL contended that it had last performed services in February 2009, when it completed the snagging items, so that the issue of proceedings in December 2010 was more than 10 months out of time. ILL submitted that the meeting and inspection in March 2010 were performances of services. The Judge at first instance found that the meeting and the subsequent offer had to be seen in the context in which they occurred, and he concluded that they were part of the without prejudice negotiations which were being conducted in accordance with the pre-action protocol in an attempt to avoid litigation, and not the performance of services

under the contract. He therefore held that ILL's claim was barred by virtue of clause 17.4(b) of the contract and granted summary judgment to DCL, dismissing ILL's claim.

On appeal the parties essentially repeated the submissions they had made to the Judge at first instance. In addition, ILL sought to rely on the principle of construction set out in *Alghussein Establishment v Eton College* [1988] which held that contractual provisions would, so far as possible, not be construed to give a party the benefit of its own wrong.

The Court of Appeal held:

(1) In *Alghussein*, the claimants had contended that by their own breach of contract they had become entitled to a lease. The House of Lords, applying the canon of construction that a party should not be given the benefit of its own wrong, had rejected their claim.

By contrast, the present case was in relation to a limitation clause, applicable only to ILL as the contractor, so *Alghussein* was distinguished. Clause 17.4 of the contract was intended to provide an easily ascertainable limitation period for a claim against DCL.

The question whether ILL was entitled to bring proceedings should be easily answerable when it arose, and should not depend on an investigation of the merits of the claim. If there had been practical completion of the services, ILL had one year from its date to bring proceedings. If not, it had one year from the date when DCL last provided services as defined.

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ILL contended that there had not been practical completion so if that was correct, then clause 17.4 (b) applied.

(2) The next issue was to consider when DCL had last performed services. The Judge at first instance had been right to consider the context in which the meeting and the inspection took place and DCL's report was prepared. DCL had contended that it had completed its work under the agreement in February 2009. What took place in March 2010 were without prejudice discussions and steps to seek to avoid

litigation, following service of a letter before claim. It was not possible to see how a without prejudice meeting and inspection, and a without prejudice report prepared by DCL for the purpose of negotiations for a possible settlement, could be contractual services. It was not disputed that those were without prejudice communications, and the fact that so long had elapsed since DCL had left the site added support to the Judge at first instance's conclusion. It followed that the Judge at first instance had been correct; DCL had last performed services under the agreement in February 2009 and the

proceedings were barred by the operation of clause 17.4 of the contract.

On that basis the appeal was dismissed.

Comment:

This case serves as a reminder that it is always important to check that a contract does not include any specific limitation periods that may be shorter than the normal contractual limitation period, particularly one as short as this.

CHALLENGING THE EVIDENCE OF A JOINT EXPERT

The question of what challenge could be mounted to the findings of a single joint expert was considered in *P French & Co Limited v Walton Street Trading Co Limited* (2012)

The (defendant) applicant interior designer and supplier of soft furnishings ("W") applied to adduce further expert evidence following its agreement to jointly instruct an expert with the (claimant) respondent ("P").

P had brought a claim against W for an amount due for works carried out by P. W's defence was that it had withheld the sum by way of set-off for losses it had suffered as a result of P's negligence and that of its sub-contractor. The parties instructed a joint expert who

provided a report stating that W had suffered no loss of profits as a result.

W submitted that the expert's report was perverse and it therefore wished to instruct a new expert in order to achieve fairness at the trial. P submitted that the process of instructing a new expert would involve unnecessary delay of the trial and would be costly.

The Court held: There was clearly a significant question which W was entitled to explore on the issue of its loss of profit. Limited sums were at stake but the costs of the litigation were rising. The Court was satisfied that the issue could be satisfactorily explored by cross-examination of the expert. The Trial Judge could resolve whether there was a substantial loss of

profit which had not been provided for in the expert's report. Given the lateness of the application so close to the trial, which was listed in two weeks, and the low sum claimed, it was not proportionate for W to instruct a further expert.

Comment:

There would be nothing to stop W instructing another expert 'behind the scenes' to advise it on the findings of the single joint expert and assist in developing questions for cross-examination, of course, but the likelihood is that unless at Trial the Court found that the single joint expert was incorrect and his/her evidence was "perverse", as suggested by W, W would have to bear those costs in any event.

PROPOSALS FOR REFORM OF CIVIL LITIGATION FUNDING AND COSTS IN ENGLAND AND WALES

The Ministry of Justice has confirmed that civil litigation reform will now be put back to April 2013. This means that the incorporation of the changes proposed in the Jackson recommendations on 'no win, no fee' arrangements, which were expected to be implemented this October will also be delayed until April 2013.

The deferral of the implementation of the changes has

met with a mixed response and many hope that the delay will allow the government time to properly consider the changes necessary rather than proceed with a possible 'piecemeal' implementation that effectively 'cherry picks' elements of the Jackson recommendations.

The Ministry of Justice has made it clear that it is committed to reforming the 'no win, no fee' system.

Indeed, a Ministry of Justice spokesman has made it clear that as the reforms require changes to legal rules and regulations, the delay will allow the Government sufficient time to "get the details right".

Only time will tell whether that actually proves to be the case.

BUILDING REGULATIONS (REVIEW) BILL - UPDATE

As this is a Private Member's Bill the sponsoring MP has now nominated 27 April 2012 for the second reading. However, as the House of Commons is not expected to sit on this day it is unlikely to be debated on this date. The sponsoring MP may choose another day for the second reading.

We will keep you advised of progress in that regard.

THE CONSUMER INSURANCE (DISCLOSURE AND REPRESENTATIONS) BILL - UPDATE

The Bill was considered in a Second Reading Committee on 31 January 2012. This is an unusual procedure, as it was a debate not a Committee sitting. The Bill then had its second reading on 6 February 2012. The House of Commons voted for the Bill to be sent to a Public Bill Committee that will scrutinise the Bill line by line. The first sitting of the Committee will be on a date to be announced.

A useful Research/Briefing Paper was provided to Members of Parliament, which summarises the background and key provisions of the Bill. That can be found at: <http://www.parliament.uk/briefing-papers/RP12-6>

We will keep you informed of the progress of the Bill.

THE THIRD PARTIES (RIGHTS AGAINST INSURERS) ACT 2010 – UPDATE

There is still no indication of a likely commencement date.

We will keep you advised of progress in that regard.

DATE FOR YOUR DIARY

15 March 2012

Major Bodily Injury Group Spring Seminar - The Wellcome Collection, Euston, London, commencing at 14.30.

For further information or if you or any of your colleagues are interested in attending this seminar please contact nicci@greenwoods-solicitors.com

Seminars

Greenwoods holds a series of training events for both our lawyers and interested clients. Below are those events being held in the next few months.

If you would like to attend any of the following seminars please email crm@greenwoods-solicitors.com, indicating which you are interested in attending.

E-DISCLOSURE

Date	Time	Location	Speaker(s)
21 February 2012	16.00-17.00	3600, Parkway Fareham PO15 7AN	Simon Thomas Greenwoods

FATAL ACCIDENT CLAIMS

Date	Time	Location	Speaker(s)
22 February 2012	16.00-17.00	18 Bedford Square London WC1B 3JA	Geoff Owen Greenwoods

PI UPDATE FOR Q1: THE KEY CASES AND PROCEDURAL DEVELOPMENTS

Date	Time	Location	Speaker(s)
14 March 2012	16.00-17.00	18 Bedford Square London WC1B 3JA	Geoff Owen Greenwoods

Other Greenwoods publications

Greenwoods produces a number of regular publications on various topics, namely:

PERSONAL INJURY ALERT (Weekly)

MOTOR CRIME FOCUS (Quarterly)

FRAUD REVIEW (Bi-monthly)

H & S REVIEW (Quarterly)

MARINE INSURANCE REVIEW (Quarterly)

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