DOLMANS INSURANCE BULLETIN

Welcome to the July 2023 edition of the Dolmans Insurance Bulletin

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If there are any items you would like us to examine, or if you would like to include a comment on these pages, please e-mail the editor:

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DOLMANS
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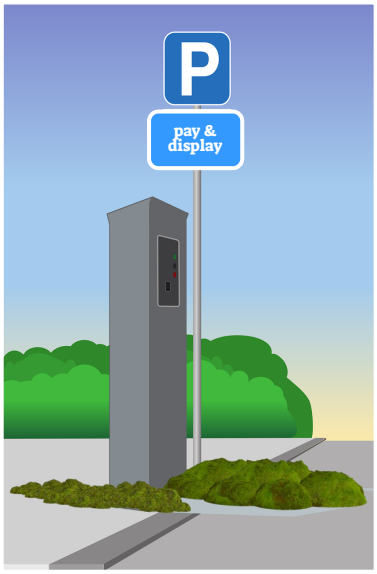
REPORT ON

Arguments as to Public Rights of Way, Retail Park Carpark Incident - Serious Injury Sustained but a Discontinuance of the Claim Secured

JB v Caerphilly County Borough Council

Facts and Claimant's Allegations



Dolmans successfully represented the Local Authority Defendant in a claim brought by JB who asserted that she had sustained personal injury when she slipped and fell on what she pleaded was a significant area of moss on a footway when returning to a pay and display car park occupied by the Local Authority.

Serious injuries were sustained, including a hip fracture; and this was a claim in which a Schedule of Loss totalling some £58,000 was served on behalf of the Claimant. The claim was subject to an Order for a preliminary issue trial (see below), but was otherwise allocated to the multi-track and subjected to costs and case management on that basis. There was no dispute that the Local Authority was the occupier of the location in question, and this had been admitted at the pre-litigation stage of the claim.

At that stage, the claim was advanced on the basis of it being a Highways Act case and no admissions were made as to the status of the area pursuant to the Highways Act.

In the pleaded case, the Claimant deployed a different argument and asserted that the Local Authority had been negligent and had, in fact, owed her a duty under Section 2 of the Occupiers Liability Act 1957 ("OLA"). This change of approach was likely a result of the case law which exists in regard to transient dangers on the highway and with reference to the alleged causative factor in the incident – the presence of moss.

Readers will be aware that Section 2 of the OLA provides:

2. Extent of occupier's ordinary duty

*(1) An occupier of premises owes the same duty, the "common duty of care", to all his **visitors**, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any **visitor** or visitors by agreement or otherwise.*

*(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the **visitor** will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.*

[***our emphasis***]

REPORT ON

Defence

The Defence pleaded that the footway in question, not being a highway, was constructed more than 20 years ago and had been freely used by the public (it was, in fact, the footway to a car park adjoining a retail park). The Defence further pleaded a presumption of a dedicated right of way and, as such, asserted the Claimant had used the path as of right and not as a visitor. As a result of this, the position and pleaded case of the Local Authority was that Section 2 of the Occupiers Liability Act 1957 was not engaged.

It was the position of the Local Authority that, if its Defence was proved, this would be an absolute defence to the claim and that the claim should, therefore, be struck out.

The Court Procedure

The Defendant sought a preliminary issue trial on the question of whether the location was a public right of way. The Claimant objected to the issue being determined by way of preliminary issue and argued the claim should proceed to full trial encompassing all issues – with all of the costs consequences such an approach would have engaged.

Costs Budgets were served on the basis that the Notice of Allocation proposed an allocation to the multi-track. The Claimant's Costs Budget for a preliminary issue trial amounted to £50,500 and on the basis that the claim proceeded to a full trial the Claimant's Costs Budget was £90,000. There would, therefore, be a significant cost saving to the Local Authority in securing a direction that the claim be dealt with by way of a preliminary issue trial.

At the Costs and Case Management Hearing the Court accepted the arguments advanced by the Local Authority and ordered that a preliminary issue trial be listed. Directions were then provided timetabling the claim to that preliminary issue trial.

Evidence Gathering and Amendment to the Defence

Further enquiry and the process of collation of evidence revealed that the Local Authority could establish only 18 years use of the footway and surrounding areas by the public. As such, the Local Authority would have been unable to prove the assertions in its originally pleaded Defence that the footway had been constructed in excess of 20 years ago. It could not, therefore, sustain its position that there was a dedicated right of way.

However, detailed witness evidence and documents were secured to establish longevity of the footway as a right of way. Historical aerial images, plans and photographs were gathered to support evidence as to longevity, and historical building regulation control documents also proved relevant and helpful. Further, an amount of video evidence was taken of the location and its surrounds, supported by photographs of the general area, to highlight to the Court the location, showing the footway and location linking to other rights of way and to highways maintainable at the public expense.

REPORT ON

The claim was then reviewed. A view was taken that sufficient grounds existed to sustain and support an argument that the location was a public right of way, on the basis of common law implication. Following discussion with the Local Authority and Counsel, the Defence was amended to plead that the location was a public right of way by way of common law implication of a dedicated right of way, with the public having used the location openly and as of right as a public right of way for a period of in excess of 18 years.

The Successful Outcome

Following completion of extensive enquiries into the history of the area in question (see above), the Defendant's witness statements, historical documents, video footage and photographic evidence of the location and surrounding area were all served on the solicitors for the Claimant. At the same time the Amended Defence was also served.

The Claimant then proceeded to serve a Notice of Discontinuance, which can only have been based on the appreciation that the Local Authority's argument that the location was a public right of way was a powerful argument, and one likely to be accepted by the Court at the preliminary issue hearing.

As such, the preliminary issue hearing was not required and the claim came to an immediate end, with the resultant substantial saving of both legal costs and significant damages.

Comment

This case shows the importance of scrutinising the status of the location of an incident. Moreover, it also demonstrates the value of revisiting that status and ensuring that any initial assessment of the position is appropriately 'stress tested' against the developing evidential picture in the case, and, where necessary, the approach to the defence suitably adapted.

If it can be evidenced that a location is a public right of way, this could, in appropriate circumstances, afford Defendants an absolute defence, as was the assessment of the Claimant here. The case also highlights the importance of being dynamic to changes in the evidence. When the Local Authority was unable to establish 20 years user, immediate consideration was given to other available defences, which, ultimately, secured the desired outcome.

It is also a useful reminder of the importance of securing detailed witness evidence to support longevity of user and the use of historical documents to support the same.

Imaginative use of procedural tools is also a feature of this case – with the preliminary issue trial – initially opposed by the Claimant – being the means by which the claim was ultimately defeated because it focused on the relevant issues and prevented the needless haemorrhaging of costs into other aspects – such as quantum – which could have been a complex aspect in itself. Whilst success at trial is always satisfying, procuring a discontinuance brings with it the added satisfaction of the significant costs saving for a Local Authority client.

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CASE UPDATES

Claim Forms - Multiple Claimants - Group Litigation

Abbott & Others v Ministry of Defence
[2022] EWHC 1807 (QB)

This was an appeal against a decision that 3,450 Claimants (members or employees of the Armed Forces who sought damages from the MoD for Noise-Induced Hearing Loss (NIHL)) should each bring their claims against the MoD by individual Claim Forms rather than issuing them in a single "omnibus" Claim Form.

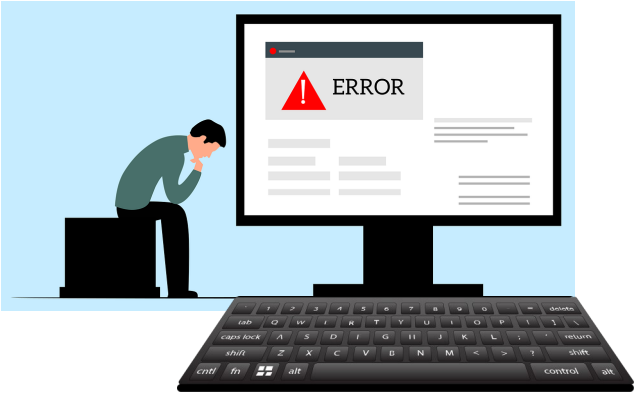
A single Claim Form was issued and a single Court fee was paid. The Claim Form had attached to it a Schedule of the names and addresses of 3,449 individual Claimants. The parties had identified a list of generic issues and they agreed that a number of lead cases should be tried. However, at a Case Management Conference, Master Davison took the view that it was impermissible for them to issue their claims by a single Claim Form because all of the claims could not be determined in a single trial and they could not be conveniently disposed of in the same proceedings within the meaning of CPR r.7.3. Further, he observed that if a Group Litigation Order ('GLO') had been made each Claimant would have had to issue their own individual Claim Form, and that having over 3,000 Claimants on a single Claim Form would put an impossible strain on the Court's digital case management system.

The appeal was successful and the Order of Master Davison, was set aside.

Held

Master Davison was wrong to think that, if there were a GLO, each Claimant would have to issue their own separate Claim Form; *Boake Allen Ltd v Revenue and Customs Commissioners [2007] UKHL 25, [2007] 1 W.L.R 1386, [2007] 5 WLUK* distinguished.

The Master was also wrong to have had regard to the practicalities of the Court's digital case management system. That could not determine the propriety of using such a form. In any event, there was no evidence that the system would be unable to cope or that a single Claim Form would cause greater difficulty than 3,450 separate Claim Forms.



The main basis of the Judgment, however, related to the meaning and effect of CPR r.7.3, together with r.19.1(1). It was found:

- The CPR imposed no absolute limit on the number of Claimants on a single Claim Form.
- The only qualification was the r.7.3 requirement that a single Claim Form should only be used to start multiple claims which could conveniently be disposed of in the same proceedings. The word "convenient" simply conveyed usefulness or helpfulness and the test did not require common disposal to be the only possible or reasonable way of determining the claims.
- The most important factor was the degree of commonality between the causes of action.
- "Disposed of in the same proceedings" did not mean "disposed of in a single trial". R. 7.3 did not require that it be possible, or practicable, for all of the claims on a single Claim Form to be finally determined at one trial sitting. The question was whether there was a commonality of significant issues of fact such that it would be useful, in the interests of justice, for any determination of those issues in proceedings brought by any one of the Claimants to be binding in the other claims.

The generic issues agreed by the parties showed that there were questions that were likely to be important across the claims cohort. The nature and likely importance of those issues to all the claims clearly indicated that it would be convenient for all of them to be disposed of in the same proceedings. An omnibus Claim Form in an appropriate group action was not, therefore, an abuse of process.

Costs Budgeting - Attendance at Rehabilitation Case Management Meetings

Hadley v Przybylo
[2023] EWHC 1392 (KB)

In relation to costs budgeting, the Court was required to determine whether the inclusion of solicitor attendance time in a budget for attending case management meetings with medical and other professionals in the course of management of the Claimant's rehabilitation needs and for meetings with financial and Court of Protection deputies as part of inputting into a Schedule of Loss are in principle costs which may be included in a budget and, if so, it was appropriate to include those costs in the Issues and Statements of Case phase of the budget.

CASE UPDATES

The Claimant argued that attendance by a fee earner at such case management meetings was reasonably necessary to progress the litigation because it assisted in maintaining the Schedule of Loss as the claim went along. The Defendant submitted that such attendance charges were not admissible in a budget as a matter of principle as they were not progressive of litigation and they did not fall within the guidance as to the categories of matter to be included in the Issues and Statements phase in any event.

The Judge made clear that the decision was not concerned with whether some legal charges relating to case management / rehabilitation can be properly claimable in some parts of budgets – e.g. time incurred liaising over a witness statement from the case manager or disclosure issues. This decision focussed only on the specific question of the expense of lawyers attending case management meetings on a regular, and in this case very extensive, basis.

The Judge concluded that having a fee earner attending rehabilitation case management meetings was not materially progressive of the case and, therefore, did not fall within the notion of 'costs'. Similarly, a fee earner attending on deputies to seek input into the ongoing drafting of the Schedule of Loss, when deputies do not properly play a part in such work, was not progressive. Such charges were, therefore, not claimable in the Costs Budget. It was for the Claimant to consider whether at trial they may be claimable as damages. Information about case management or incurred expenses could be achieved by the occasional letter to the case manager or deputy or from obtaining documents for disclosure or witness statements and there was nothing in this decision that precluded some phases in a budget, including engagement with case managers or deputies such as for disclosure or witness statements and occasional letters.

Costs Orders - Part 36 Offers - QOCS

Tabbitt v Clark
[2023] EWCA Civ 744

The Claimant sustained serious personal injury following a road traffic accident. On 18 December 2018, he issued a claim for damages. On 20 January 2022, the Defendant's insurers made a Part 36 Offer, but it was not accepted until 3 November 2022. As such, the Claimant was entitled to recover his costs up to and including 10 February 2022 and the Defendant was entitled to its costs thereafter.

The QOCS regime applied to the proceedings. Under CPR r.44.14, the Defendant was not permitted to enforce (including by way of set-off) the Costs Order in his favour against the Claimant. However, changes to the QOCS rules were under active consideration by the Civil Procedure Rule Committee (CPRC) and it was anticipated that there would be an amendment to the rules permitting enforcement by a Defendant of a Costs Order against agreements to pay damages and costs. Wishing to guard against the possibility of a future rule change with potential retrospective effect, the Claimant sought a declaration giving effect to the acceptance of the Part 36 Offer based on the rules as they stood at the time of acceptance. The Judge declined to make such a declaration/Order.

The Claimant appealed. The issue for the Court to determine was whether the position under the current rules (at the time of the settlement) should be preserved even after any rule change. The original Judge had held that if there were to be a rule change that had retrospective effect, that rule change could not take effect in the way that was intended. That was maintained and the appeal was dismissed. It was held that the Judge was entitled to decline to make the Order sought.

By the time of the appeal hearing, the CPRC had amended the rules, as contained in the Civil Procedure (Amendment) Rules 2023. Rule 24 amended r.44.14 so as to permit a Defendant to enforce an Order for costs in their favour (including Orders for costs deemed to have been made) against Orders for damages, or agreements to pay or settle a claim for damages, as well as against Costs Orders. However, r.1(3) of the 2023 Rules provided that the amendments made by r.24 applied only to claims where proceedings were issued on or after 6 April 2023. Accordingly, the Claimant's claim was unaffected by the change in the rules in any event.

Unless Order - Payment of Court Fee - Service of Claim Form

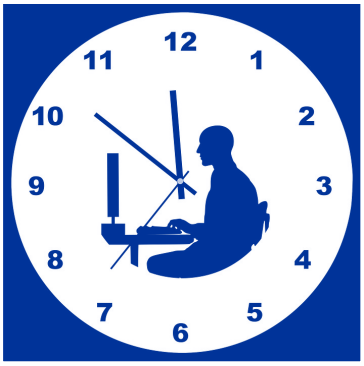
Clewer v Higgs & Sons (A Firm)
[2023] EWHC 1556 (Ch)

The Claimant, 'C', appealed against the strike out of his claim for failure to comply with an Unless Order which required him by 4.00pm on 1 November 2020 to serve a Claim Form and pay the balance of the Court Fee of £7,500. At first instance, the Deputy Master found that there had been no compliance with this Order and declared the claim struck out.

CASE UPDATES

On 29 October 2020, C had posted an application for help with fees form to the Court. C submitted on the appeal that the Court fee was paid in time, in the sense that it was discharged by the application for fee exemption prior to 1 November 2020. On 30 October 2020 at 5.00pm, C had emailed an unsealed Amended Claim Form to the Court and the Defendant's solicitors. On the appeal, C submitted that it had not been possible to serve a sealed Amended Claim Form by 01 November 2020 because one had not been supplied by the Court.

The Judge accepted C's contention that the Deputy Master's reasoning did not sufficiently address the question whether the proper meaning of the word 'pay' was wide enough to include the situation in which a successful application for fee exemption was made. The Judge concluded that it was. What the Order required in substance was that the position vis-a-vis payment of the Court fee be regularised. That could be done by making a successful application for fee exemption. On the facts of this case, the application for fee exemption was received by the Court before the 01 November 2020 deadline, but not approved until after it. The Judge concluded that 'payment' was effected by C lodging the completed form. C, therefore, succeeded on this ground of appeal.



However, the Deputy Master's conclusion that the Claim Form had not been served by 01 November 2020 was correct. As determined by the Court of Appeal in *Ideal Shopping Direct Ltd v Mastercard Inc [2022]*, C was required to serve a sealed Claim Form. The Amended Claim Form served by C on 30 October 2020 was unsealed. Whilst C did not have a sealed Amended Claim Form by 01 November 2020 that was because C had left everything too late. Accordingly, this ground of appeal was unsuccessful and the claim remained struck out.

For further information on any of the above cases, please contact:

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Judith Blades at **judithb@dolmans.co.uk**

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- Industrial disease for Defendants
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- Public liability claims update

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Melanie Standley at **melanies@dolmans.co.uk**