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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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REPORT ON

Slips on Stairs in the Workplace - Some Useful Arguments

SP v Dorset Council

The Claimant's claim in the recent case of *SP v Dorset Council*, in which Dolmans represented the Defendant Local Authority, was dismissed following a 'half time submission' on behalf of the Defendant Local Authority after the Claimant was cross-examined at Trial. There had been some inconsistencies in the Claimant's pleaded case, although not enough to prove any fundamental dishonesty, and it was clear after the Claimant's evidence was adduced at Trial that there were sufficient grounds to make the submission.

Even though the Defendant Local Authority's evidence was not, therefore, heard by the Trial Judge, various arguments were raised on behalf of the Defendant Local Authority, which readers might find useful when dealing with similar cases.

Background/Claimant's Allegations

The Claimant, who was employed by the Defendant Local Authority, allegedly slipped and fell on stairs at one of the Defendant Local Authority's offices. As a result, the Claimant allegedly suffered personal injuries.

The Claimant alleged that the top step of the staircase was wet, apparently as a result of rainwater being carried into the premises from outside.

The Claimant pleaded that the Defendant Local Authority was negligent, in breach of Section 2 of the Occupiers' Liability Act 1957 and in breach of the Management of Health & Safety at Work Regulations 1999, together with the Workplace (Health, Safety and Welfare) Regulations 1992.

Enterprise and Regulatory Reform Act 2013

It was argued by the Claimant that he was entitled to pursue his claim in accordance with the Management of Health & Safety at Work Regulations 1999 and/or the Workplace (Health, Safety and Welfare) Regulations 1992.

Pursuant to the Enterprise and Regulatory Reform Act 2013, it was, however, pleaded in the Defence that the Claimant could not bring a claim for breach of the 1992 Regulations and/or 1999 Regulations. It was denied that any breach of the said Regulations was evidence of negligence itself and that any alleged breaches of the various Regulations was evidence of the common law duty of care and/or gave rise to an actionable claim in damages. It was argued that the legal and evidential burden is on the Claimant to prove negligence.

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Defendant's Arguments

Given that the said Regulations did not give rise to a private law cause of action, the Defendant Local Authority argued, therefore, that the Claimant's claim would need to be determined pursuant to the common law, the question being whether the Claimant had proved that the Defendant Local Authority failed to act as a reasonably prudent employer and not, therefore, taken reasonable steps to provide reasonable safety. The Defendant Local Authority emphasised that the duty was not to eradicate all risk, but to provide a place of work which is reasonably safe.

Reasonable Care

Witness evidence was served on behalf of the Defendant Local Authority which sought to show that the Defendant Local Authority had taken reasonable care in the circumstances.

The steps had a non-slip black trim on every step edge. They were easily visible with a non-slip abrasive. A handrail was also provided and matting at the entrance to the premises.

On entry to the premises, the Claimant would have had to cross the matting, then cross a foyer before reaching the staircase. He did so without encountering any other wet surfaces, which the Defendant Local Authority argued is illustrative of a reasonable system which took effective steps to lower the risk of walked in/stray rain droplets within the premises.

The Claimant was unable to accurately describe the extent of the alleged wetness/rainwater and it was argued on behalf of the Defendant Local Authority that it was not unreasonable to expect some rain droplets to find their way into the workplace during periods of inclement weather.

There was no evidence that anyone was aware of the alleged rainwater on the staircase and evidence of usage was provided by the Defendant Local Authority, with nobody else experiencing similar problems.

There was also a daily system where the staircase was cleaned, along with a reactive system to deal with any spillages. This was a modestly sized workplace and it was argued, therefore, that one would not expect a full-time cleaner in attendance to actively look for places to mop up rainwater/spillages.

Risk Assessments

The Claimant alleged that there were no specific risk assessments and/or warning signs in place. It was argued, however, on behalf of the Defendant Local Authority that the Court had to be satisfied that these would have made a difference. The Court was reminded of the decision in *Uren v Corporate Leisure (UK) Limited and Ministry of Defence [2011] EWCA Civ. 66*, in which Smith LJ stated:

"*It is obvious that the failure to carry out a proper assessment can never be the direct cause of an injury. There will, however, be some cases in which it can be shown that, on the facts, the failure to carry out a risk assessment has been indirectly causative of the injury. Where that is shown, liability will follow. Such a failure can only give rise to liability if a suitable and sufficient assessment would probably have resulted in a precaution being taken which would probably have avoided the injury. A decision of that kind would necessitate hypothetical consideration of what would have happened if there had been a proper assessment".*

Comment

Although the above claim was dismissed at Trial following the Claimant's own evidence and cross-examination, it provides a useful summary of some of the arguments open to a Local Authority when defending similar matters, particularly relating to breach of Regulations/ Enterprise and Regulatory Reform Act 2013, the extent of the duty of care owed by Local Authorities and appropriate risk assessments.

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FOCUS ON

Bad Character Evidence in Regulatory Prosecutions

HSE v Evergreen Construction UK Limited [2023] EWCA Crim 237

Bad character evidence is an important concept in criminal cases and, therefore, has a potential importance in all such cases. It is not something which necessarily regularly arises in regulatory prosecutions, however, a recent case from the Court of Appeal Criminal Division refocuses attention on this concept in regulatory cases and, also, regarding activities which may later be presented as bad character evidence. It, therefore, provides an interesting lesson both in terms of the relevance of bad character evidence and in relation to dealing with certain situations which might give rise to problems in the context of a later prosecution.

Readers will recall that so-called bad character evidence is evidence of misconduct and/or evidence of a disposition to misconduct and/or evidence of a reputation for misconduct, usually tendered for the purpose of showing that the Defendant had a propensity to commit the kind of misconduct which was alleged of them.

Evergreen – Issues at First Instance

The Judgment in the Evergreen case arose out of a renewed Application on the part of the Defendant (Evergreen Construction) for leave to appeal against conviction, following an initial refusal of leave to appeal (on paper) by a single Judge. The matter came before Dingemans LJ, Lavender J and HHJ Menary KC, the Recorder of Liverpool (sitting as a Judge of the Court of Appeal Criminal Division). Evergreen was convicted on 6 July 2022 in Birmingham Crown Court for failing to discharge the duty to non-employees (pursuant to s. 3 of the HSWA 1974) and failing to discharge a duty relating to work at height (imposed by Regulation 4(1) of the Work at Height Regulations 2005). The Company was subsequently fined £150,000.

The Grounds of Appeal alleged that the Trial Judge had erred in admitting bad character evidence, in the form of HSE Notices of Contravention and Prohibition against Evergreen, which related to activities in January and March 2017 at two separate building sites in London – these dates were some 7 and 9 months before the fatality which gave rise to the material prosecution.

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The facts of the incident giving rise to prosecution were these – on 26 October 2017, at a construction site in Perry Bar, Birmingham, a group of men, employed as casual labour for the day, were unloading the contents of a container from the back of a lorry. In the course of this work, a pack of large panes of toughened glass within the container fell and struck one of the men, knocking him from the back of the lorry to the ground. The glass then fell on top of him, causing fatal crushing injuries to his chest. He died at the scene.

Evergreen, according to the Prosecution, was the principal contractor with overall responsibility for coordinating the construction work on site and ensuring that it was undertaken safely. Evergreen's Manager (a Mr Farooq) was present on site during the unloading operation. Evergreen contended that this characterisation of them as principal contractor was incorrect. They contended that Mr Farooq's presence during the operation in question was merely a coincidence. However, there was some evidence that Evergreen had acted as principal contractor before the incident in question. Moreover, its status as principal contractor was recorded in more than one document that pre-dated the incident.

Evergreen asserted that Mr Farooq (the company's General Manager) was the client's agent or representative on site and no more. He attended site to check and monitor progress, but no more than that. The principal contractor was said to be another contractor on site – Hilux – and Evergreen was just one of several subcontractors engaged by Hilux. Additionally, Evergreen denied that the unloading activity on 26 October 2017 was within the scope of any of its activities, relying again on the "coincidental" presence of Mr Farooq on site on that date. After the incident, it was accepted that Evergreen took over the role of principal contractor and was appointed into that role by Hilux.

As part of this main issue of what the status of Evergreen was at the time of the incident (it should be said that the Prosecution also had the burden to prove that there had been a failure to conduct safe operations in relation to the unloading of the glass panes and in relation to the work at height), the Prosecution sought to adduce bad character evidence of previous breaches of health and safety legislation, where Evergreen had been the principal or sole contractor on two (other) separate construction sites.

Despite the ostensible need to prove the unsafe nature of the unloading operation, a partial (but not complete) concession was made by the Defence at Trial that the operation, as described, was agreed to be unsafe by the experts in the case.

The bad character evidence sought to be admitted (and, ultimately, admitted, at Trial) was as follows:

(1) A Notice of Contravention and 2 Prohibition Notices relating to Zenith House, Leighton, London, which prevented further works at that site until remedial steps had been taken to address the risk of a fall from height.

(2) A Notice of Contravention in relation to 3 breaches of health and safety legislation, 2 of which concerned the risk of falls, and also a risk of work at height for construction work at 2-8 Warnock Gardens, Hainault, Essex.

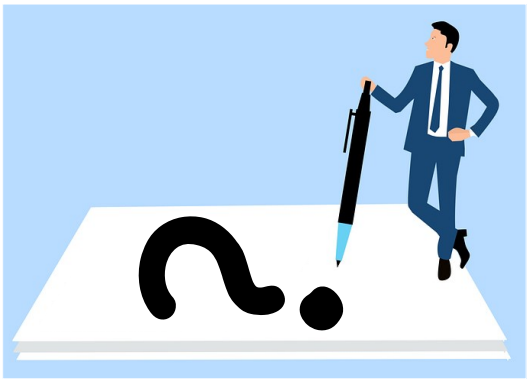
(3) Correspondence between the HSE and Mr Farooq – which was to the effect (according to the Appeal Law Report) that errors had occurred and would effectively be remedied.

(4) Photographs of the site(s) showing obvious health and safety breaches – such as a missing fence panel in front of a substantial hole in the ground, which, it was said on Appeal, plainly posed a risk to any third party who stepped through the fence.

Unsurprisingly, Hilux supported the Application to admit this evidence.

In order to admit this evidence, the Prosecution would need to satisfy the Trial Judge that it met the test within section 101(1)(d) of the Criminal Justice Act 2003 ("CJA 2003") – that is to say the evidence went to important matters in issue between the parties for the purposes of the CJA 2003.

In particular, the Prosecution argued that this material clearly showed that Evergreen, in the months preceding the incident, had acted as principal contractor and in that role had failed to guard against the risks of falls from a height. It had been reminded of those obligations, by the HSE, and it had not disputed its duties or responsibility to address them.



The Application to admit this evidence before the Jury was resisted by Evergreen on the basis that the evidence did not establish a propensity to act in a particular manner and was not relevant to the issues in the case because the only real issue in the case was whether Evergreen had been appointed in writing as principal contractor, moreover, this evidence would have the effect of distracting the Jury from that central issue and the evidence thereon – namely, who was the contractor with the duty to plan, manage and monitor the unloading pursuant to the HSWA and WAHR.

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The Trial Judge ruled that the evidence should be admitted, based on fairness (by reference to the overriding objective) and also on the basis that it was not unfairly prejudicial to the Defendant. Having decided to admit this evidence, the Judge summed up the relevance of the same to the Jury as follows:

"(These documents) are in evidence because you may take them into account in a particular way. The Prosecution would say they demonstrate a tendency (on the part of the Defendant) to break such rules, and hence they say it is more likely to be true that they broke the rules in this case. It is for you to decide whether that fact leads you to accept that proposition; you do not have to accept it at all. But I do need to give you these three warnings …"

The Trial Judge went on to warn the Jury that this evidence, firstly, reflected previous breaches of rules; they were not formal convictions. Secondly, the fact that someone had broken a rule in a particular way did not inexorably lead to the conclusion that they broke rules on that occasion. Thirdly, the Judge warned the Jury that Evergreen could not be convicted on that evidence alone, at best this was supporting or corroborative evidence of a significant case (if that case was made out) for Evergreen to answer otherwise on this point.

The Judge also said to the Jury:

"The other way in which that evidence may be relevant is in terms of (Evergreen's) role as principal contractors, because it is served on them as principal contractors and they appeared, effectively, it is said, to (concede) that by responding to them, but, again, that is a matter for you."

This later reference was characterised in the Appeal Judgement to be a *"very cryptic reference to the correspondence which was before the Jury which appeared to concede (as the Judge put it) that the previous Prohibition Notices had been properly served and Evergreen had responded to them by indicating the steps to be taken by Evergreen to ensure that the future operations were safe."*

In summary, by responding to the previous Prohibition Notices, Evergreen had, without further embellishment, which was missing, conceded themselves to be the principal contractor for those works.

Issues on Appeal

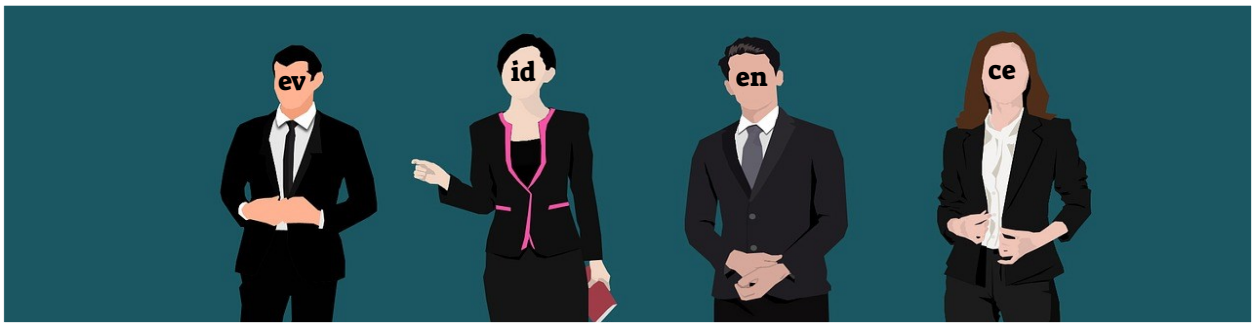
The first issue for the Court of Appeal was whether the evidence was, in fact, bad character evidence at all – i.e. did it reach the relevant evidential threshold to be characterised as such. This argument arose on the basis that the Notices and correspondence were, in fact, only evidence of an HSE Inspector's opinion (of previous events), not actual bad character evidence as such.

The Court of Appeal reminded itself that evidence of bad character is not limited to evidence of previous convictions; it includes evidence of "reprehensible behaviour" (by reference to sections 98 and 112 of the CJA 2003). The Court of Appeal accepted that where (as here) there was no formal conviction, care should be exercised in admitting such evidence. Here – whilst the Notices themselves did not amount to a conviction; the underlying evidence referenced in the Notices represented "reprehensible conduct".

Moreover, here, *"The material went beyond evidence about an inspector's opinion of Evergreen's word. It included Evergreen's acceptance of the Notice, their declared intention to put matters right … and in photographs showing the excavations which were unguarded. In these circumstances this was evidence of bad character."*

This left the Court of Appeal to consider admissibility by reference to the CJA 2003 (section 101(1)(d)) – which was based on the threshold test that the evidence showed *"the Defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence …"*

On that point, the Prosecution submitted, both at first instance, and in the Court of Appeal, that this evidence was properly admitted because it showed a propensity on the part of Evergreen to breach health and safety regulations when acting as the main contractor. The Court of Appeal laid emphasis on the fact that a single incident or piece of evidence can be sufficient for the establishment of a propensity and, here, there were two matters close in time to the material incident which showed that the Defendant/Appellant did not comply with safety critical duties.



Thus, the Court of Appeal was satisfied that this evidence was properly admitted and, therefore, the Appeal should fail (or rather not be permitted to proceed further) because:

(1) This was evidence of bad character.

(2) Moreover, it was evidence that the Defendant had, in the past, committed offences of the type with which it had been charged, while acting as main contractor.

(3) Thus, this evidence was capable of showing a propensity to breach health and safety laws when acting as main contractor.

The Court of Appeal were mildly critical of the summing up (see above) as to the question of the other way in which the evidence may be relevant (as to the position of Evergreen as principal contractors at other sites) stating:

"We cannot see, however, that the fact that Evergreen was the principal contractor in relation to other operations made it more likely that they were the principal contractor in relation to the operation with which we are concerned. However, we are quite sure that this additional part of the summing up … did not make this conviction unsafe. This is because the Judge had made it clear that before the Jury could convict Evergreen, they had to be sure that it had been appointed in writing as the main contractor. There was an abundance of material from which the Jury could be sure about that matter and on which they could reject Evergreen's defence which was that documents about Evergreen's appointment had been produced for the purposes of making a false position clear to third parties."

The Court of Appeal also laid emphasis on the fact that Evergreen had made no explicit admission that, if it was the main contractor, its conduct, in that role and around the unloading operation, would have been such to be properly considered unsafe.

Comments

There are several layers to the importance of this Judgment.

Firstly, in the context of service of Notices of Contravention and/or Improvement/Prohibition Notices – clients who may find themselves to be Defendants in later criminal prosecutions by health and safety regulators will need to explicitly consider their approach to such documents and, it is recommended, seek explicit legal advice. Where, for instance, Notices have been improperly served – i.e. on an entity which is not correctly identified as a principal contractor – this will need to be carefully considered and, undoubtedly, the response will need to reflect this, but, depending on the circumstances overall, an appeal of such a Notice may need to be considered – lest there be a later assumption or, in effect, concession by conduct, of the role of principal contractor. Even if a formal appeal of the Notice is not warranted, the response will need to be carefully drawn to ensure that concessions are not made as to the status of the client – otherwise mistaken adoption of responsibilities in response to a Notice may be used against the client in a future (unrelated) prosecution arising from an unrelated incident. Naturally, there is a tendency to focus on a Notice of Contravention in relation to the incident(s) of facts that it addresses; Evergreen reminds us that documents of this nature can have a wider context.

Secondly, this case illustrates how bad character evidence can arise and, moreover, dispels any misconception that it is only formal convictions which are material in this context. Clearly, the status of the views of a HSE Inspector is different from other types of opinion, but, here we see that the Courts will accept the views expressed by an Inspector (admittedly, in a formal Notice) as being evidence of the matters to which they relate – in a later prosecution. This underlines, once again, the need to carefully evaluate such Notices and ensure that the response to the same affords them sufficient weight with regard to the future risk of regulatory action. In short, concessions made in regard to such Notices must be carefully weighed and only made when it is appropriate to do so.

Thirdly, and at the risk of stating the obvious, if a potential Defendant is involved in and/or in charge of a number of sites – reprehensible conduct at one site, subject to questions of relevance and chronology (see below) can be said to be explicitly relevant, in bad character terms, in regard to an incident at another site. This has a particular relevance to larger corporate entities and public sector organisations who, by definition, oversee significant numbers of sites. Presumably, albeit this was not addressed in the Evergreen case, a significant delay in time between the conduct which was criticised in a previous Notice and the conduct forming the basis of a prosecution may be sufficient to render the previous Notice of insufficient relevance or weight to permit its admittance as bad character. However, no hard or fast guidance can be derived from Evergreen as to the time delay which would be appropriate in that situation.

Fourthly, this case is an able demonstration of how an organisation's regulatory history is likely to be material – not just in terms of sentencing, which is a concept which clients are familiar with – but also regarding how a regulatory prosecution is conducted before a Jury. Bad character, in that sense, has a wider resonance than simply regarding sentencing consequences.

Fifthly, tactical concessions will need to be considered in cases where bad character evidence could be deployed – for instance – in the Evergreen case – there is reason to suspect that if the Defence had made an explicit concession regarding the inadequacy of its system of work, if it was found (as a fact) to be the principal contractor; the bad character evidence may well not have been admitted on grounds of the prejudicial nature of that evidence outweighing its value to the issues which remained to be resolved by the Jury. Clearly, this would necessitate an evaluation of the strength of the defence on the main point – here that the documentation mis-recorded the status of the client – but the option is there to be considered.

Sixthly, and finally, this case is yet another demonstration of how critically important it is to ensure that the status of relevant parties in relation to a construction project are accurately recorded in documents such as construction phase plans. Inaccuracies which are later identified are likely to cause difficulty if they have not been remedied at the time they first arose. We continue to see problems arising because of too relaxed an approach being taken to the identification of parties in the initial set up phase. This mis-identification then carries through to the work itself and can cause serious difficulty when an incident subsequently arises.

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CASE UPDATES

Civil Proceedings Order - Retrospective Permission - Nullity

Williamson v Bishop of London
[2023] EWCA Civ 379

The Court of Appeal was required to consider whether proceedings started without first obtaining leave of the High Court, in breach of the prohibition in a Civil Proceedings Order, were a nullity or could be stayed unless and until the leave required was granted.

The Appellant, W, was made the subject of a Civil Proceedings Order ('CPO') pursuant to s.42 (1A) of the Senior Courts Act 1981 in 1997. The CPO prohibited W from instituting any civil proceedings in any Court or Tribunal unless he obtained the leave of the High Court, having satisfied the High Court that the proceedings were not an abuse of process. In April 2019, W commenced proceedings in the Employment Tribunal without first obtaining leave.

W's claim alleged unlawful age discrimination in relation to the termination of his tenure as Priest-in-Charge of a parish when he reached the age of 70 on 18.11.18. There was no suggestion that, subject to the effect of the CPO, the claim itself was vexatious or an abuse of process.

In May 2019, the Respondents, B, filed a Defence pleading, inter alia, that the claim was a nullity in the absence of leave of the High Court. A preliminary issue hearing was listed for January 2020 to consider jurisdiction.

In the meantime, in September 2019, W applied for leave of the High Court either to continue the proceedings issued or for permission to issue fresh proceedings. The Application was dealt with on paper and an Order made permitting W to pursue the proceedings issued in April 2019. In the alternative, permission was given to issue proceedings.

By the time of the hearing before the Court of Appeal, it was common ground that the first part of the above Order was to take effect only if it was determined at the preliminary issue hearing that the proceedings were not a nullity.

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At the preliminary issue hearing on 08.01.20, the Employment Tribunal held that W's claim could not progress because it was a nullity having been brought in breach of the CPO. W appealed to the Employment Appeal Tribunal.

In the meantime, on 23.01.20, W also issued a fresh claim to the Employment Tribunal, but the Tribunal dismissed the claim because it was out of time and there was no good explanation for the delay. W did not appeal this decision.

W's appeal to the Employment Appeal Tribunal was unsuccessful. W appealed to the Court of Appeal submitting that the concept of a claim being a nullity offended the overriding objective. The 1981 Act did not identify the consequences of a claim brought in breach of a CPO. The breach should be treated as a procedural bar that could be cured.

B submitted the claim was a nullity and the High Court could not grant retrospective permission to bring such a claim. This was consistent with the object and purpose of a CPO, which is to avoid the unnecessary use of court time and resources on unjustified litigation and to protect prospective defendants from the expense which that involves.

It was agreed that the issue for determination by the Court was: what is the meaning and effect of s.42 and, in particular, in a case to which it applies, where proceedings are brought without leave, does it operate as a jurisdictional or merely a procedural bar?

The Court concluded that the express terms of s.42 SCA 1981, read in context and in light of the object and purpose of the section, impose a jurisdictional (and not merely a procedural) barrier on a litigant subject to a CPO wishing to institute proceedings. Parliament intended to make leave under s.42 a jurisdictional bar to the institution of effective proceedings where a CPO has been made. The Tribunals had, therefore, been correct to conclude that the proceedings were a nullity.

Appeal dismissed.

CASE UPDATES

Civil Procedure - Statements of Case - Amendments - Strike Out

Free Leisure Ltd (t/a Cirque Le Soir) v Peidl and Company Limited & Another [2023] EWHC 792

The Claimant brought an action against the Defendants relating to damage caused by fire in a nightclub in 2015. Proceedings were issued just within the limitation period and served in December 2021. The documents served consisted of a Claim Form which was blank in relation to the allegations of facts and stated only that it was "*a claim arising out of breach of contract*", and a detailed Letter of Claim alleging negligence and breach of contract, with details of the heads of loss claimed. The Particulars of Claim were served in May 2022 (after an agreement to extend time was made).

The Second Defendant submitted that the Claim Form disclosed no reasonable grounds for bringing the claim against the Defendants and that it should be struck out for failing to comply with CPR 16.2(1). It was also the Defendants' case that the issuing of the bare Claim Form, purely in an attempt to stop the limitation period running, amounted to an abuse of process. Further, any attempt to amend the Claim Form out of time should fail as it could not arise out of the same facts when none had been specified in the Claim Form.

The Claimant admitted that the Claim Form was defective as it contained no facts at all. However, the Claimant argued that the situation could be remedied.

Held

Under CPR r16.2(1), a Claim Form had to contain a concise statement of the nature of the claim and specify the remedy sought. A certain minimum of information had to be included.

The Claimant's Claim Form did not include any facts.

The Letter of Claim could not be used to construe the Claim Form because it did not in any sense interpret or construe it; *Evans v Cig Mon Cymru Ltd [2008] EWCA Civ 390*, considered. Moreover, the Letter of Claim had been created after the limitation period had expired.

The Particulars of Claim had also not been served at the same time as the Claim Form, but after the limitation period had expired, and they also could not be used to construe the Claim Form. Further, the Particulars of Claim pleaded new causes of action.

There was, therefore, no jurisdiction to amend the Claim Form; the limitation period had expired and any proposed amendments raised new causes of action which were not on substantially the same facts as those contained in the Claim Form. Accordingly, the claim could not continue and the Application to strike out was successful.

CASE UPDATES

Pre-Action Costs - Abandoned Allegations - Discontinuance

Stubbins Marketing Limited & Others v Rayner Essex LLP & Another [2023] EWHC 515 (Ch)

In proceedings against the First Defendant accountants ('D'), arising out of a commercial transaction, the Claimants ('C') were ordered to pay D's costs, on the indemnity basis, of allegations made in a Letter of Claim which were included in an issued Claim Form but deleted before service of the Claim Form.

C sent a 14 page Letter of Claim to D in June 2021 under the Pre-Action Protocol for Professional Negligence. The Letter of Claim set out, inter alia, allegations of dishonesty, dishonest assistance in breach of fiduciary duty and unlawful means conspiracy. D instructed solicitors, who served a substantive response to the Letter of Claim in January 2022 which robustly denied the allegations of dishonesty and improper conduct.

C issued a Claim Form in March 2022 indicating an intention to claim in deceit, breach of contract, negligence, breach of fiduciary duty, dishonest assistance in breach of fiduciary duty and unlawful means conspiracy. The Claim Form was amended before service by crossing out the claims in deceit, dishonest assistance in breach of fiduciary duty and unlawful means conspiracy. The Amended Claim Form and draft Particulars of Claim were sent to D, for information only, in April 2022, with the covering letter highlighting that it was no longer proposed to allege deceit, dishonest assistance in breach of fiduciary duty or unlawful means conspiracy, which disposed of many of the objections raised by D in pre-action correspondence. D responded describing this as a profound transformation of C's case and that C should pay the costs incurred in D having to deal with the allegations now abandoned in the Amended Claim Form, which costs they estimated at £273,000.

Proceedings were formally served and a Defence filed and served. In December 2022, D issued an Application for an Order that C pay D's costs of responding to the Letter on Claim on the indemnity basis.

D submitted that the amendment of the Claim Form to delete the claims was a discontinuance pursuant to CPR 38 and the general rule was that D should have its costs of the discontinued claims. C argued that pre-action costs are not recoverable in principle. Amendment of an unserved Claim Form, of which D was unaware, could not constitute discontinuance. In the alternative, if the Court had jurisdiction to order C to pay costs in relation to the Letter of Claim the question of whether to use that jurisdiction and assessment of any costs should be dealt with at the conclusion of the proceedings.

The Judge confirmed that once a claim has been issued the proceedings have commenced and a party to those proceedings immediately becomes potentially liable to pay costs of another party to those proceedings, whether or not the proceedings are actually served. The Judge was satisfied that even if the amendment of the unserved Claim Form was not strictly speaking a formal discontinuance within CPR 38, it should be treated as if it was and discretion should be exercised pursuant to s.51 of the Senior Court Act 1981 to produce the same consequences as if there had been a formal Notice of Discontinuance.

Pursuant to CPR 38, the burden is on a Claimant to show good reason for departing from the presumption that a Defendant should recover its costs following a discontinuance, and this usually requires showing a change of circumstances to which the Claimant has not contributed and usually brought about by some form of unreasonable conduct on the part of the Defendant. The Judge noted that there was no explanation in C's Witness Statement opposing the Application about what had been relied upon when the initial allegations (that had since been abandoned) were made in the Letter of Claim, what was done after receipt of the response to the Letter of Claim, why C thought there was sufficient basis for including the allegations in the Claim Form when it was issued in March 2022 or why there was a subsequent change of mind in April 2022.

The Judge noted that allegations of dishonesty and fraud should not be made lightly. For such allegations to be made a satisfactory threshold of prima facie evidence must be available to the party making the allegation.

It was not appropriate to adjourn the Application to the conclusion of the proceedings as the Trial Judge could not properly deal with an issue about whether it was reasonable to allege dishonesty where dishonesty was no longer an issue.

In considering whether costs should be payable on the standard basis or the indemnity basis, the Judge considered that C's conduct was 'outside the norm' as they had provided no explanation to justify the way in which they had approached the claim and had subjected D to having to answer allegations that were, at best, speculative. C must have been aware that D would incur substantial costs responding to the Letter of Claim, that there was a likelihood on losing a claim for dishonesty and fraud that indemnity costs could be awarded and if they had not commenced proceedings including allegations of dishonesty and fraud any costs against them could not have included D's costs of responding to such allegations. The Judge exercised his discretion to award costs on the indemnity basis.

However, assessment of the costs was a separate matter as some of the costs carried out by D to investigate the facts would have been carried out even if the Letter of Claim had been confined to allegations of professional negligence. The Judge considered that assessment should be dealt with at the conclusion of the proceedings.

Accordingly, the Judge ordered that C pay D's costs relating to the part of the proceedings which was discontinued by C when it amended its Claim Form in April 2022 to delete various causes of action to be assessed on the indemnity basis.

Small Claims Track - Strike Out - Absence

Owen v Black Horse Limited
[2023] EWCA Civ 325

The Claimant had brought a consumer credit claim against the Defendant, which was allocated to the Small Claims Track. The Notice of Allocation stated that, in accordance with CPR r.27.9(1), the parties had to give the Court at least 7 days notice if they did not intend to attend the hearing and that the case might be heard in their absence. At the hearing of the matter, the Claimant was represented by his solicitor, having given notice by e-mail that he would attend through his legal representative but not attend personally. The District Judge held that the Claimant had not attended the Trial for the purpose of CPR 27.9(2) and struck out the claim because the Claimant was not there to be cross-examined, which was important because of discrepancies between his evidence and the documents. That striking out was upheld on appeal to a Circuit Judge.

The Claimant appealed to the Court of Appeal.

Held

The Appeal was successful, with the Court of Appeal interpreting the rules for non-attendance on the Small Claims Track in a manner consistent with CPR r39.3 in finding that an absent Claimant nevertheless "appeared" at his Trial, though this legal representative. There was no jurisdiction to strike out the claim for non-attendance in those circumstances.

CASE UPDATES

The Small Claims Track was intended to be a proportionate procedure to decide most straightforward claims without the formalities of a traditional Trial.

Rule 27.9 (headed "non-attendance of the parties at a final hearing") provides that, on the Small Claims Track, if a party does not attend a final hearing, but provides written notice in compliance with rule 27.9(1)(a) and (b), the Court will take into account the party's Statement of Case and other documents in deciding the claim. If the Claimant does not attend the hearing and give the notice referred to, the Court may strike out the claim.

Rule 27.11 states that a party who was neither present nor represented at the hearing of their claim and who has not given notice under rule 27.9(1) may apply to have Judgment set aside and their claim re-heard.

The Defendant argued that the difference in language between CPR r.27.9 and r.27.11 was deliberate and had to be given effect. However, if that was right, the circumstances in which a party's case could be struck out for non-attendance did not match those in which such a party could apply for their case to be reinstated. There was no sensible practical reason for such a mismatch; it was incoherent.

Moreover, rule 39.3, which applied to hearings which are not conducted within the Small Claims Track, provides that if a Claimant does not attend Trial, the Court may strike out his claim and any Defence to Counterclaim. It was decided in *Rouse v Freeman Times, January 8, 2002, [2002] 11 WLUK 876*, as regards r.39.3, that a party "attended" a Trial if they were represented, and that approach was confirmed in *Falmouth House Ltd v Abou-Hamdan [2017] EWHC 779 (Ch)*. Those views were correct as regards CPR r 39.3.

There was no good reason for similar CPR provisions (i.e. rules 27.9 and 39.3) with apparently similar functions to be interpreted differently, even though they applied in the different contexts of their respective tracks. The essential point was that a litigation party was entitled to represent themselves or to be represented by a legal representative. Part 27 did not expressly impinge on that right.

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

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