DOLMANS INSURANCE BULLETIN

Welcome to the April 2019 edition of the Dolmans Insurance Bulletin

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REPORT ON

- The importance of taking care - *NM v Torfaen County Borough Council*

RECENT CASE UPDATE

- Abuse of process - security for costs - unless orders
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- Civil procedure - breach of statutory duty - admissions
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A DATE FOR YOUR DIARY

Dolmans' Defendant Litigation Team's ever popular
Key Note Seminar
will be held on
Tuesday, 18 June 2019
at the Vale of Glamorgan Resort

Should you require details and/or a registration form for this seminar, please contact kerenj@dolmans.co.uk

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,
Justin Harris, Partner, at **justinh@dolmans.co.uk**

DOLMANS REPORT ON

THE IMPORTANCE OF TAKING CARE

NM v Torfaen County Borough Council

This was a somewhat unusual employers' liability claim where we were instructed to act on behalf of the Local Authority, Torfaen County Borough Council, by its Claims Handlers and Insurers.

The Claimant was employed by the Local Authority as a Caretaker at one of its primary schools at the time of the alleged accident.

The Claimant alleged that he was injured in an accident that occurred at approximately 7:00am on 1 November 2014. He alleged that he was opening the school building in his role as the Caretaker. He opened the shutter door to the canteen/kitchen and lifted the countertop. The countertop did not catch in the wall mounted latch properly and fell back down, landing on his head and shoulder, causing him to sustain injury.

The happening of the accident was recorded in the Accident/Incident/Near Miss Reporting Form which was undated. The date of the alleged accident was unclear, but appeared to be 20 January 2015.

The Claimant adduced a medical report from his medical expert, Mr Singh, in which he said that he was told by the Claimant that the alleged accident had occurred on 1 November 2014. This was consistent with the date pleaded in the Particulars of Claim.

We were surprised by the difference between the two dates of the alleged accident.

We were informed that there were no witnesses to the alleged accident, which was not surprising given that the Claimant was opening up the school early in the morning.

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The Claimant alleged that his accident was caused by reason of the negligence of the Local Authority, its employees or agents. He made a number of allegations of negligence, which included alleged breaches of the Workplace (Health, Safety and Welfare) Regulations 1992, the Management of Health and Safety at Work Regulations 1999 and the Work at Height Regulations 2005.

The Claimant's alleged accident occurred after 1 October 2013 and was subject to the provisions of section 69 of the Enterprise and Regulatory Reform Act 2013, which meant that there could be no civil liability for breaches of the Regulations in question. This explains why the Claimant framed some of his allegations of negligence by reference to the Regulations.

The main allegations made by the Claimant were that the Local Authority failed to provide a suitable countertop; installed a defective latch on the countertop which was insecure and failed to prevent it falling down; failed to take suitable and sufficient steps to prevent the fall of the countertop if it did not properly catch in the latch; failed to heed the Claimant's warning that the latch was defective; and failing to heed an earlier accident involving an employee and the defective latch.

The claim was investigated by the Local Authority's Claims Handlers in the pre-litigation stage. Their Claims Inspector inspected the mechanism and found that the catch appeared to be in working order and strong enough to hold the countertop. He concluded that the Claimant may have lifted the door hatch on entry and not pushed it up high enough for the catch to engage, with the result that it fell back down on to him.

We investigated the matter and interviewed the relevant witnesses. The parties then proceeded to exchange of Witness Statements.

The Claimant disclosed a Witness Statement from himself only and did not disclose any Witness Statements from any supporting witnesses.

He said that he believed that the accident had occurred on 1 November 2014, but acknowledged that the Accident Report showed the date of the accident as being 20 January 2015.

He confirmed that he was employed as a part-time Caretaker and that he was contracted to work on Wednesday afternoons, Thursdays and Fridays.

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He described the sequence of events on the day of the alleged accident. He said that he had put the lights on and opened the door before lifting the countertop and placing it against the wall. The countertop fell upon his head and he sustained a slight scar in front of his right ear, tinnitus in his right ear and a pierced ear drum.

He believed that he carried on working and continued opening up the school.

He queried the date of the alleged accident. He pointed out that 20 January 2015 was a Tuesday and said that the accident could not have happened on that date because he did not work on a Tuesday. This was a valid point and called into question the date recorded in the Accident Report Form.

He maintained that it was not his responsibility to inspect the kitchen, including the countertop and latch. He said that he did not know the date of the last inspection of the kitchen equipment and could not say by whom and when the latch was installed.

He stated that he did not make any formal complaints about the latch prior to his alleged accident, which was contrary to the allegation contained in the Particulars of Claim.

Interestingly, he also confirmed that he had previously suffered a problem with his left ear after falling off a horse approximately 20 years ago. He also said that he had suffered a number of “bumps” in the past as he was previously a professional jockey. This was an unusual aspect of the claim which was very relevant in the context of the medical evidence.

We interviewed the Headteacher of the school and obtained a Witness Statement from her.

She confirmed that the Claimant had been employed as a part-time Caretaker at the school since October 2014. She was adamant that the alleged accident had occurred on 20 January 2015.

She said that, upon her arrival at school, she was informed by the receptionist that the Claimant had suffered an accident that morning. She could see a smudge of blood on his right cheek, but nothing else. She asked the Claimant if he needed to receive any medical attention, but he said that he did not.

She asked the Claimant what had happened. He said that it was “early in the morning and he was not quite awake”. He also said that he had not even put the lights on in the kitchen. We considered these comments to be both interesting and significant in the context of the case.

She said that she and the Claimant went to the kitchen to have a look at the mechanism. He raised the countertop and engaged the latch. The latch engaged correctly and the countertop remained securely in place. She was satisfied that the countertop and latch were safe for the kitchen staff to use and that no remedial action was required.

She also said that a few days after the accident, she asked the school clerks to ring the Property Services Department to let them know about the incident and to ask a member of staff to visit the school to have a look at the equipment. A member of staff visited the school and carried out an inspection shortly afterwards, when he confirmed that he was satisfied that the countertop and latch were working properly.

She was adamant that the Caretaker was responsible for inspecting and maintaining the whole of the school site, including the kitchen door. She also said that she was not aware of the Claimant ever warning or informing her that the latch was defective and was not aware of any previous accidents involving the countertop and latch as alleged by the Claimant.

She referred to the fact that the Claimant used to be a professional jockey and that he had told her that he had broken almost every bone in his body as a result of his profession.

We also interviewed the Building Surveyor who visited the school to inspect the equipment after the accident occurred. He recalled his visit to the school when he raised the hatch and locked it into the catch, which was positioned on the adjacent wall. The hatch stayed upright and he was satisfied that it was functioning properly and was safe.

He confirmed that a new door was installed and fitted at some point after the alleged accident. He also recalled discussing the matter with the Claimant before the new door was installed when the Claimant informed him that he had lowered the catch by a quarter of an inch after the alleged accident in order to ensure that it held the countertop properly.

We also served a Part 18 Request upon the Claimant which he answered. The contents of the Part 18 Replies were similar to the contents of his Witness Statement. However, there were some differences as follows:

- He confirmed that he had turned on the lighting. This was contrary to the evidence of the Headteacher.

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- He said that he had expressed verbal concerns about the countertop and latch, but was unable to specify the dates upon which they were made.

- He alleged that he drove home from work during the morning and returned later in the day. This was contrary to the evidence of the Headteacher, who said that he continued working until lunchtime, returned home for lunch and then returned to work in the afternoon.

- He was asked to specify the date of his first attendance upon his GP following the alleged accident and what he told the GP. He was unable to specify the precise date, but said that he indicated to his GP that he "had a bump at work and that he had a buzzing in his head …".

On the basis of the evidence of the various witnesses, and our investigations into the matter, it was clear that there were a number of inconsistencies and discrepancies in the Claimant's case.

We advised the Local Authority and its Claims Handlers that the Local Authority had reasonable prospects of being able to defeat the Claimant's claim on the issue of liability and that they would be justified in contesting the matter to Trial. They agreed and instructed us to proceed accordingly.

The issue of medical causation was also important in this case in view of the nature of the injuries sustained by the Claimant and his background as a former professional jockey.

The Claimant disclosed a medical report in support of his claim from Mr Vivian Singh, Consultant Otorhinolaryngologist.

Mr Singh was of the opinion that the Claimant had probably sustained a right ear injury as a consequence of the alleged accident. This was supported by the immediate onset of the right ear symptoms after the alleged accident.

The Claimant said that he first sought the attention of his GP a few weeks after the alleged accident and was reassured by him. However, Mr Singh said that he could find no entry in his medical records to that effect.

The Claimant said that he saw a locum GP a few months after the alleged accident, when he was told that he had a perforated right eardrum. The locum apparently apologised for the fact that this had not been noticed at the time of the initial examination. Mr Singh quite rightly said that it was a matter for the Court to decide whether or not the contents of the medical records were correct.

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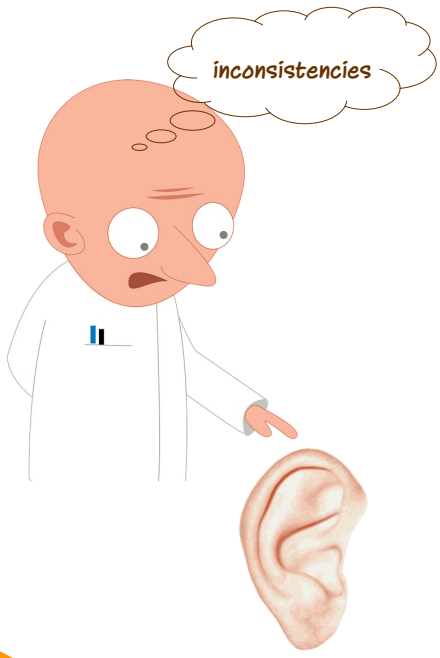
Mr Singh said that the Claimant had a history of an historical traumatic perforation of the left ear secondary to a fall from his horse when he was a jockey.

Mr Singh was of the opinion that the audiogram was indicative of a moderate to severe hearing loss that was predominantly sensorineural in origin. He said it was likely to have arisen as a consequence of the trauma to the middle and inner ears sustained in the alleged accident. Again, he emphasised that this was contingent upon the Court accepting the evidence of the Claimant.

Mr Singh was further of the opinion that the mild to severe left sided sloping high frequency sensorineural hearing loss was a pre-existing loss and was not connected to the alleged accident. He also said that the significant scarring of both eardrums was not related to the alleged accident.

Mr Singh was of the view that the Claimant's right sided tinnitus had arisen as a result of the alleged accident, provided the Court accepted the testimony of the Claimant.

Mr Singh's report was unusual in that he was very guarded in his conclusions, opinion and prognosis. He appeared to have doubts about the Claimant's evidence that he told the GP about his problems at the initial consultation, whereas the GP records made no mention of this.



We recommended to the Local Authority that it should obtain its own independent medical evidence. The Claimant claimed damages not exceeding £20,000, which meant that the matter was allocated to the Fast Track. Notwithstanding this, the Claimant's Solicitors confirmed that they had no objection to the Local Authority obtaining its own medical evidence and the District Judge granted such permission.

The Claimant was examined on behalf of the Local Authority by Mr Andrew Parker, Consultant ENT Surgeon, on 1 September 2018, and prepared a report shortly after this date.

Mr Parker referred to various inconsistencies in the Claimant's evidence.

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Mr Parker said that the Claimant had pre-existing-problems in his left ear, which dated from the time when he was employed as a professional jockey, and that he had significant disruption to his left middle ear, which was unrelated to the alleged accident.

Mr Parker was of the opinion that the Claimant's right sided tympanic membrane could not have been caused by the alleged accident and that he had not sustained a perforation of his right, or, indeed, his left tympanic membrane as a consequence of the alleged accident.

Mr Parker also referred to the pure tone audiogram that was carried out at the time of his examination. On the basis that the Claimant had not sustained a hearing loss in the left, and that the thresholds on the right were not dissimilar, he was of the opinion that the Claimant could not have sustained a hearing loss as a result of the alleged accident. He was of the opinion that the sensorineural hearing losses in the high frequencies were a combination of ageing and constitutional factors, ie - non-age/non-alleged index incident mechanisms.

Mr Parker also said that there was no complaint of tinnitus at his assessment.

We disclosed a copy of Mr Parker's report to the Claimant's Solicitors. We instructed Mr Parker to contact Mr Singh to discuss the matter and prepare a Joint Statement at the same time. We were later informed by Mr Parker that he had tried to contact Mr Singh, but had encountered difficulty in contacting him.

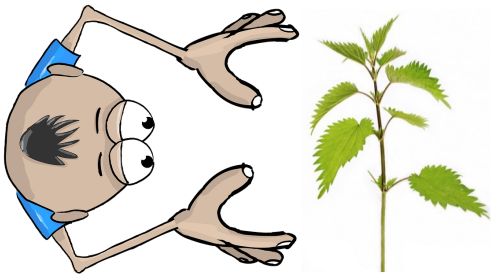
The parties dealt with the issue of Special Damages in accordance with the Court Order.

We were then approached by the Claimant's Solicitors who said that they had discussed the contents of Mr Parker's report with the Claimant and had advised him to discontinue the claim. They sought confirmation that the Local Authority would not seek to recover their costs from the Claimant if he were to discontinue the claim. The claim was a QOWCS claim and we could see no basis upon which the Local Authority could rely upon one of the exceptions to the QOWCS regime in this instance.

The Claimant then discontinued his claim on the basis of each party bearing its own costs. The case had not been listed for Trial when this occurred.

Conclusion

This is a further example which highlights the importance of taking a robust stance in an appropriate case. There were inconsistencies in the Claimant's evidence, although these were not significant. We advised the Local Authority and its Claims Handlers that it would be justified in contesting the matter to Trial on the issue of liability, whilst acknowledging that the issue was not clear cut. However, the issue of medical causation was important and we advised the Local Authority and its Claims Handlers that it would be justified in contesting the matter to Trial on that issue alone.



We were pleased that the Claimant's Solicitors took a realistic and pragmatic approach to the claim upon receiving and considering the Local Authority's evidence. They were clearly concerned about the medical evidence of Mr Parker and must have realised that the Claimant would have grave difficulty in establishing medical causation. It would appear that the Claimant and his Solicitors decided to "grasp the nettle" before Mr Singh and Mr Parker were due to discuss the matter and prepare a Joint Statement.

The Local Authority and its Claims Handlers were content to contest the matter to Trial and their stance was vindicated by the discontinuance of the claim.

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DOLMANS RECENT CASE UPDATE

Abuse of Process - Security for Costs - Unless Orders

Harbour Castle Ltd v David Wilson Homes Ltd
[2019] EWCA Civ 505

The Appellant, HC, appealed against a decision striking out its claim against the Respondent, DWH, as an abuse of process.

HC had previously issued proceedings in 2009 against DWH for damages for an alleged breach of covenant. An Unless Order was made requiring HC to provide £201,000 as security for DWH's costs. It was common ground that HC's sole shareholder had personally the resources to pay this sum. HC failed to comply with the Unless Order and its claim was struck out in 2012.

However, in 2016, HC issued a second set of proceedings against DWH. DWH applied to strike out that second action as an abuse of process on the basis that HC was essentially bringing the same cause of action as the previously struck out claim. The Judge considered that the breach of the Unless Order had been deliberate and that HC had made an informed choice not to comply with the Order. HC should have made proper use of the opportunity provided by the first action to resolve its dispute with DWH. Accordingly, the Judge struck out the second action as an abuse of process.

HC appealed, contending that the shareholder had not been prepared to provide the necessary funds to comply with the Unless Order in December 2012.

The Court of Appeal considered that whether a second action amounted to an abuse of process was not a matter for the Court's discretion, but required an evaluative assessment. Generally, in cases such as this, the relevant test was not whether a company's owner or a person closely associated with it could discharge the sum owed, but whether the company itself could.

In the instant case, the relevant question was whether HC's sole shareholder would have provided the requisite funds to satisfy the Unless Order if requested to do so by HC. The shareholder was the sole directing mind and had financed both HC and the litigation up to December 2012. The Judge was permitted to find that HC had not demonstrated that it had insufficient funds to provide security of costs and, therefore, was entitled to conclude that HC had not used the opportunity provided by the first action to resolve its dispute with DWH. HC had made a deliberate decision not to comply with the peremptory order for security. Accordingly, it was an abuse of process to issue new proceedings for the same cause of action when it had chosen to abandon the first. It would be manifestly unfair to the Respondent to subject it to a second action when the Appellant had chosen to abandon the first.

Appeal dismissed.

DOLMANS RECENT CASE UPDATE

Civil Procedure - Abuse of Process - Due Diligence - Fraud

Takhar v Gracefield Developments Ltd & Others
[2019] UKSC 13

The Supreme Court was required to determine whether an action to set aside an earlier Judgment on the basis of fraud should be allowed to proceed.

A dispute had arisen about the terms on which the Appellant had transferred properties to the First Respondent. The Second and Third Respondents relied on a joint venture agreement, apparently signed by the Appellant. The Appellant, however, denied signing this agreement. The Appellant brought proceedings alleging that the transfers had been procured by undue influence and sought permission to obtain a report from a handwriting expert, but permission was denied. The Appellant's claim was dismissed.

The Appellant then obtained evidence from a handwriting expert, who concluded that her signature had been transposed onto the joint venture agreement from another document. The Appellant issued proceedings to have the Judgment set aside on the grounds of fraud.

It was claimed that the proceedings were an abuse of process as the matter had already been determined and any fraud which was being alleged could have been discovered at the time of the original proceedings. In response the Appellant argued that "fraud unravels all", such that the rules against 're-litigation' should not apply and/or it would be wrong to impose a "due diligence condition" in the case of fraud.

At first instance, the Judge concluded that the proceedings were not an abuse of process and allowed the claim to proceed. On appeal to the Court of Appeal, it was held that the Appellant had to establish that the evidence of fraud was not available at the time of the first Trial and could not have been discovered with reasonable due diligence.

The Supreme Court, however, held that where it can be shown that Judgment has been obtained by fraud, and where no allegation of fraud has been raised at the Trial which led to that Judgment, then a requirement of reasonable diligence should not be imposed on the party seeking to set aside the Judgment.

The Supreme Court held that the law did not expect people to arrange their affairs on the basis that others might commit fraud. The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of their opponent seemed antithetical to any notion of justice. The policy arguments for permitting a litigant to apply to have a Judgment set aside where it could be shown that it had been obtained by fraud were "overwhelming".

It was acknowledged that where fraud had been raised at the original Trial and new evidence about it was advanced to set aside the Judgment, or where a deliberate decision was taken not to investigate the possibility of fraud, the Court dealing with the Application to set aside should have discretion as to whether to entertain the Application.

The Appellant's action was allowed to proceed to Trial.

Civil Procedure - Breach of Statutory Duty - Admissions

Royal Automobile Club Ltd v Wright
QBD [2019] 3 WLUK 443

The Claimant's claim arose out of an accident at work in June 2015 when she fell down a flight of stairs. In her subsequent letter of claim, the Claimant asserted that the accident had been caused by the lack of handrails on the staircase which was negligent and in breach of statutory duty. The Claimant provided details of her injuries and indicated that she would be seeking medical evidence from a number of medical experts. The Claimant indicated that her claim would clearly exceed £25,000.

In September 2016, liability for the Claimant's accident was admitted.

The Claimant then obtained medical evidence in support of her claim. In August 2017, the Claimant served a detailed Schedule of Loss which totalled around £1 million. The Defendant then sought to withdraw its admission of liability, on the basis of the increased quantum of the claim and that the same amounted to a "change in circumstances".

At first instance, the Master rejected that contention, as well as other factors advanced by the Defendant, including its prospects of success in light of new expert evidence. The Defendant asserted that the absence of a handrail on the stairs was not causative of the accident. However, the Master found that the accident was of the kind which a handrail was intended to prevent and that a Trial Judge would resolve the issue in the same way. The Master, having gone through the factors he was obliged to consider under the rules, concluded that there was no proper basis on which to permit the Defendant to withdraw its pre-action admission.

DOLMANS RECENT CASE UPDATE

On Appeal, the Appellant contended that the Master had failed to consider the issue of causation separately to breach of duty and that the Respondent's case could only be properly tested at Trial once the factual and expert evidence had been considered.

It was held that the Master had not engaged in a Trial of the proceedings, but in a piece of case management. He was obliged to consider, and had considered, all the circumstances of the case by reference to the matters set out in CPR PD para 7.2. It was clear that the Claimant's claim, involving expert evidence from a number of medical specialists, was anything but straightforward, and it had been unreasonable for the Defendant to expect that a modest amount of damages would be claimed. That had never been suggested by the Claimant.

The Claimant would suffer prejudice if the admission were withdrawn. The accident had happened over 4 years earlier and the admission had been made 1 year later. The prejudice to the Defendant was self-evident, however, the Application to withdraw the admission of liability such a long time after the admission had been made, after interim payments had been made and when an investigation into the accident would be more difficult, demonstrated a 'cavalier attitude' to the administration of justice.

It was doubtful whether the Master had needed to conclude that the Claimant was bound to succeed, however, he had to consider the parties' prospects of success and those were not such as to inevitably lead to a conclusion that leave to withdraw the admission should be given.

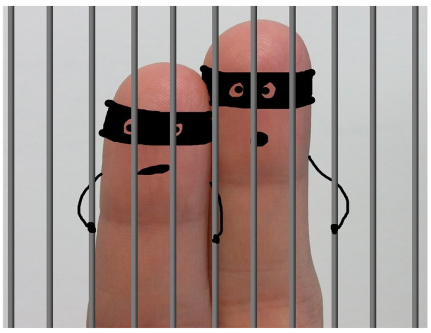
It was not appropriate to permit the admissions withdrawal and the appeal was, therefore, dismissed.

Contempt of Court - Expert Witness - Sentencing

Liverpool Victoria Co Ltd v Zafar
[2019] EWCA Civ 392

The Respondent, Z, was a GP who provided medico-legal expert reports. Z was instructed by a solicitor, K, to prepare a medical report on a Mr X for the purposes of a personal injury claim following a road traffic accident. Z examined Mr X 11 weeks after the accident and prepared a report based on what Mr X told him, stating that Mr X had suffered symptoms due to whiplash which had resolved within 1 week of the accident and he had fully recovered from his injuries. K emailed Z stating that Mr X was continuing to suffer severe to moderate neck and upper back pain and questioned whether this was likely to improve over the next 6 or 8 months, and asked Z to amend his report in respect thereof. Z produced an amended report stating that Mr X had continuing moderate symptoms which would fully resolve between 6 to 8 months from the date of the accident. The original report only came to light because it was mistakenly included in the Trial Bundle.

DOLMANS RECENT CASE UPDATE



At a Hearing in October 2018, the Judge found that 10 grounds of contempt of court had been proved against Z and ordered that Z be committed to prison for a period of 6 months, suspended for a period of 2 years (K was sentenced to 15 months in prison). The Appellant Insurance Company appealed against that sentence on the ground that it was unduly lenient.

The Court of Appeal agreed, in principle, that the sentence was unduly lenient. The Court gave guidance as to the appropriate sentence to pass on expert witnesses whose reporting practices place them in contempt of court. The Court stated that the deliberate or reckless making of a false statement in a document would usually be so inherently serious that only committal to prison would suffice. That was so whether the contemnor was a Claimant pursuing a spurious or exaggerated claim or an expert expressing an opinion without an honest belief in its truth. Culpability would be assessed on a case by case basis. In principle, a reckless act was less culpable than a deliberate act, but, where expert witnesses were concerned, there was not much between the two as experts knew the extent to which the Courts relied on their truthfulness. The 2 year maximum sentence for contempt of court had to cater for a large range of conduct. Sentence length would be determined on the individual facts, but a period well in excess of 12 months had previously been taken as a starting point. The Court gave guidance on the sort of factors which should be taken into account in mitigation, but noted that the fact that experts might have brought ruin upon themselves was no good reason not to impose a significant committal term. The Court further indicated that custodial terms should be served immediately. Powerful factors justifying suspension would be needed additional to those already considered as mitigation.

In relation to Z, the Court considered that given the number of aggravating factors, the custodial sentence should have been significantly longer than 6 months and should have been served immediately. However, the Court declined to impose a more severe sentence in this instance on the basis that it would be unfair to impose on Z the adverse consequences of the Court's guidance which had not been available at the time of sentence.

Costs - Medical Records Fees - VAT

British Airways plc v John Prosser
[2019] EWCA Civ 547

The Court of Appeal has ruled that a solicitor did not have to investigate whether VAT had been properly charged by a medical reporting organisation (MRO) on the whole of its invoice for obtaining medical reports, since the reports had been obtained at a reasonable and proportionate cost.

DOLMANS RECENT CASE UPDATE

The Respondent, JP, was injured at work in 2014 and brought a claim against his employer, British Airways, BA. His solicitors instructed an MRO to obtain the medical reports and records.

Following settlement of the claim, the parties proceeded to deal with costs. Fixed costs were not in issue. However, a dispute arose in relation to invoices rendered by the MRO. Part of the amount charged in those invoices was for administration fees and the remainder was attributable to the sums charged by doctors and hospitals who had provided the records. BA argued that the MRO should only have charged VAT on the administration fee element of each invoice because doctors and hospitals were not VAT registered or their supplies were exempt.

JP issued costs only proceedings. The District Judge found that it would have been entirely unreasonable and disproportionate to expect Claimant's solicitors to start questioning the VAT status of the invoice that was provided to them and that the MRO was not simply "*a direct agent or post box … for the solicitor/client*", but "*provides services whereby it obtains records and reports and passes those back on to the solicitor*".

BA appealed the decision.

The Court of Appeal agreed with the District Judge and found the Court was entitled to take the view that the sums claimed in the invoices were "*reasonably and proportionately incurred*" and "*reasonable and proportionate in amount*" so as to satisfy the requirements of CPR 44.3.

Further, where the MRO was just acting as a post box for the solicitor, it should charge VAT only on its own fee, but where an MRO played a more active role, such as by vetting possible experts, having some input into how a particular report is prepared and checking the quality of a draft, the commercial reality would likely to be that the cost of the report/records was part of the broader supply of legal services and incurred in the course of making its own supply of services.

Therefore, in this case, VAT would be payable on everything that the MRO invoiced, not just its own fee.

Appeal dismissed.

DOLMANS RECENT CASE UPDATE

Limitation - Accrual of Cause of Action

Matthew & Others v Sedman & Others
[2019] EWCA Civ 475

Under a Court sanctioned scheme of arrangements, any claims were required to be submitted by 2 June 2011. The Defendants, D, former trustees, failed to submit claims by the deadline. The Claimants, C, the existing trustees and beneficiaries of the trust, issued a negligence claim against D in respect of their failure to make a claim before the deadline. C's claim was issued on Monday, 5 June 2017. D argued that the claim was time barred as the 6 year limitation period expired on Friday, 2 June 2017. C submitted that the cause of action did not accrue until after midnight on 3 June 2011 and there was longstanding authority that the day on which an action accrued was not counted for limitation purposes. On that basis, the limitation period did not expire until 3 June 2017 (which was a Saturday) and the claim issued on Monday, 5 June 2017 was, therefore, in time.

The Court of Appeal held that there was a clear distinction between cases where a cause of action accrued at the stroke of midnight because it was based on a failure to do something by the end of a specified day and cases where the cause of action accrued part way through the day. In the latter cases, it was well established that for limitation purposes the date on which the cause of action accrued was ignored. However, in midnight deadline cases, such as this case, the cause of action arose at the commencement of the day, ie at midnight, not after midnight. Accordingly, C's cause of action had accrued by the first moment of 3 June 2011 and that day was not excluded when calculating the expiry of the limitation period. Limitation had expired on Friday, 2 June 2017 and C's claim was out of time.

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

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- Display Screen Regulations – duties on employers
- Employers' liability update
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- Flooding and drainage – duties and powers of landowners and Local Authorities for drainage under the Land Drainage Act 1991. Common law rights and duties of landowners in respect of drainage
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- Highways training
- Housing disrepair claims
- Industrial disease for Defendants
- The Jackson Reforms (to include : costs budgeting; disclosure of funding arrangements; disclosure of medical records; non party costs orders; part 36/Calderbank offers; qualified one way costs shifting (QWOCS); strikeout/fundamental dishonesty/fraud; 10% increase in General Damages)
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- Public liability claims update

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