DOLMANS INSURANCE BULLETIN

Welcome to the March 2019 edition of the Dolmans Insurance Bulletin

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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

RELIEF FROM SANCTION REFUSED AND QOCS DIS-APPLIED IN A CLAIM THAT WAS STRUCK OUT BECAUSE OF THE CONDUCT OF THE CLAIMANT

Tony Owen v GS Yuasa Battery Manufacturing UK Limited

The Qualified One-Way Costs Shifting regime as set out in CPR Parts 44.13 to 44.17 ("*QOCS*"), which provides that Orders for costs made against a Claimant may not be enforced except in certain limited circumstances, has been in operation since 1 April 2013. Since that time, most of us have become familiar with the process by which QOCS can be dis-applied with the permission of the Court where the claim is found, on the balance of probabilities, to be fundamentally dishonest.

Indeed, Dolmans have been involved in a number of such cases, some of which have found their way into the pages of this publication on occasions.

Fundamental dishonesty, however, is not the sole ground for dis-applying QOCS and Orders for costs made against a Claimant may, in certain cases, be enforced without the permission of the Court as follows:

- To the extent that the costs do not exceed any Orders for damages and interest made in favour of the Claimant;
- Where the proceedings have been struck out because:
  - the Claimant has disclosed no reasonable grounds for bringing the proceedings;
  - the proceedings are an abuse of the Court's process; or
  - the conduct of the Claimant (or a person acting on his behalf and with his knowledge of such conduct) is likely to obstruct the just disposal of the proceedings.

Dolmans recently had the opportunity to put the last provision (conduct of the Claimant, etc) to the test when it was instructed by Mitsui Sumitomo Insurance Co (Europe) Limited ("MSIEU") on behalf of the Defendant in the matter of *Tony Owen v GS Yuasa Battery UK Limited*. Yuasa has been involved in the manufacture of industrial lead-acid batteries at its Ebbw Vale, South Wales, site since 1982.

DOLMANS REPORT ON

Background

The Claimant was represented by a trade union firm and the personal injury claim commenced in the EL Portal by a Claim Notification Form ("*CNF*") dated 21 June 2017 which alleged that during the course of his employment as a factory worker on 17 November 2014, the Claimant injured his back whilst removing a retaining bracket from a stack of lead battery components. The claim had the benefit of QOCS.

Dolmans were instructed at an early stage by MSIEU following receipt of the CNF. Having interviewed Yuasa's Plant Manager, HSE Manager and the Claimant's Team Leader, and after examining the workplace and the documents, Dolmans were soon satisfied that there was evidence of a suitable safe system of work. Moreover, there was concern that the accident might not have happened as alleged. On the day in question, we were told that the Claimant had told his Team Leader that he had hurt his back *"earlier in the shift"*, but he then refused all offers of first aid treatment and insisted on immediately leaving his workplace stating that he would seek treatment from a *"friend who was a physiotherapist"*.

The claim was allowed to exit the Portal and was subsequently repudiated. A Claim Form limited to £15,000.00 was issued on 13 November 2017 and deemed served on 12 March 2018. A Defence, denying liability, was filed and served on 30 April 2018. The claim was allocated to the Fast Track on 6 August 2018 and listed for a 1 day Trial on 7 February 2019.

Because of the concerns over the accident circumstances, Dolmans were keen from the outset to examine the Claimant's medical records to establish what he had told his doctor and physiotherapist. From the very start of Dolmans' involvement, requests were repeatedly made to the Claimant's Solicitors for copies of the records, but to no avail.

The Claimant obtained, and relied on, an expert medical report from a well-known orthopaedic surgeon, as well as an addendum report (following an MRI). Notwithstanding that he had not been provided with any other medical records, the Claimant's expert formed an opinion that the Claimant had sustained a *"resisted flexion injury to the lumbar sacral spine"*, had ongoing symptoms related to the accident and would suffer long term with mild discomfort in the lower back. The severity of the injury did not sit well with the mechanism of the accident. Part 35 questions to the Claimant's expert did not persuade him to change his opinion.

DOLMANS REPORT ON

Standard Disclosure took place on 3 September 2018, at which point the Claimant still did not disclose his medical records (save for radiology discs), and a request for specific disclosure of those records was made. Copies of the Claimant's GP records were eventually received by Dolmans on 4 October 2018. The GP records indicated that the Claimant had attended on his GP with backache on 25 November 2014, that he was receiving private physiotherapy and had been referred for further physiotherapy. A request for specific disclosure of the physiotherapy records was promptly made. On 26 October 2018, the Defendant applied for an Order for specific disclosure of the Claimant's physiotherapy records, which was listed for a hearing on Monday, 12 November 2018.

Shortly before the hearing of that Application, on Friday 9 November 2018, the Claimant's Solicitors wrote stating that *"Our client instructs that a friend of his referred him to a therapist who was a friend of the client's friend. Our client instructs that he cannot recall the name of the male therapist. He instructs that therapist was working as a physiotherapist for a rugby team, to which he cannot recall, and does not now know his whereabouts dated over 3 years ago. Our client instructs that there was no record of the treatment being administered. The treatment was provided by way of a good and friendly gesture by his friend … Given the above, we can confirm that we do not hold or are in control of the information requested"*.

On the basis of the Claimant's representation that no physiotherapy records existed, Deputy District Judge Williams dismissed the Defendant's Application for specific disclosure of the same (with costs in the case).

The Defendant remained dissatisfied with the positon set out in the email correspondence and, on 12 November 2018, served on the Claimant a CPR Part 18 Request for Further Information. By 21 December 2018, the Claimant's Solicitors wrote enclosing *"correspondence with regards to the therapist by way of continued disclosure"*. The enclosure was actually a document entitled *"Claimant's Reply to Defendant's Part 18 Request for Further Information"* and included a copy invoice dated 8 December 2018 in respect of 2 sessions of *"Bowen Technique Therapy"* provided on 21 and 24 November 2014 at a cost of £20.00 per treatment. Dolmans wrote to the Claimant's Solicitors pointing out that the Claimant had not answered the CPR Part 18 Request and asking for a response by 4 January 2019. No response was received and an Application for an Order was issued.

DOLMANS REPORT ON

On 22 January 2019, District Judge Keller ordered that *"Unless the Claimant by 4pm on 29 January 2019 serves on the Defendant his Further Information … then his claim shall be struck out".* The Claimant was represented at the hearing on 22 January 2019 by an employee of the Claimant's Solicitors. Counsel attended for the Defendant.

No Further Information pursuant to the Defendant's CPR Part 18 Request was received from the Claimant as ordered and the Claimant's claim was deemed struck out.

Late on 29 January 2019, the Claimant's Solicitors emailed a copy of their proposed Trial Bundle Index which included, at item 10, reference to *"Claimant Replies"*. After being pressed the next day to identify this document, the Claimant's Solicitors emailed a document *"Claimant (sic) Reply To Defendant's Part 18 Request For Further Information",* purportedly verified by a Statement of Truth and signed by the Claimant personally dated 8 December 2018. The Claimant's signature on the Statement of Truth appeared to be an exact match for the signature on the Statement of Truth annexed to the document serving the Bowen Technique invoice.

The Claimant's Solicitors telephoned Dolmans to explain that the Statement of Truth signed by the Claimant dated 8 December 2018 had been returned by him on or around that date, but that the he had failed to actually answer any of the requests for Further Information. Following the hearing, they had chased the Claimant for Responses, which had been provided by telephone on the morning of 30 January 2019, were typed up and the Statement of Truth, already signed by the Claimant and dated 8 December 2018, was attached.

The Claimant's Application for Relief

On 4 February 2019, the Claimant applied to reinstate his claim and/or for relief from sanction (this Application does not appear to have been filed/served until 5 February 2019 however). The Application was supported by a Witness Statement from the Claimant's Solicitor (who had appeared at the previous hearing) which stated, by way of explanation for the breach, that *"The default occurred as a result of an administrative error of the recording of the correct date for disclosure of the Request for Further Information. My self-note reflects that the Claimant do serve the Request for Further Information within 10 days from the date of the Order. This meant that I diarised service to take place on the 1st February 2019, which was an error on my part".*

The Trial date on 7 February 2019 had been kept open by the Court and the parties appeared before Deputy District Judge Weaver (an experienced former full time District Judge). Counsel represented both parties, with Defendant Counsel also being the same as who had previously appeared before District Judge Keller (see above).

Counsel for the Defendant submitted that the District Judge had stated a number of times at the (previous) hearing that the time for service of the Further Information was 7 days. He also submitted that the document that had eventually been served was not verified by a valid Statement of Truth and was a *"cut-and-pasted"* composite document. The Deputy District Judge noted that the Claimant's Solicitor's attendance note had not been put forward to corroborate the reason given for failure to comply with the Order.

The Decision

The Deputy District Judge noted that the Claimant's Application for relief from sanction had not been formally listed for a hearing and had been served on the Defendant just 1 clear day before. He nevertheless agreed to deal with the Application and he proceeded to consider the (now familiar to all) three-stage test set out in *Denton & Others v T H White Limited & Others [2014]*.

It had already been conceded that the breach was a serious one. The Deputy District Judge considered that the reason given for failing to comply with the Order of District Judge Keller was a poor one unsupported by an attendance note. In all of the circumstances of the case, there had still not been compliance with the Order and the Deputy District Judge refused to exercise his discretion in favour of the Claimant and the claim remained struck out.

Costs

Defence Counsel sought a declaration that the conduct of the Claimant (or that of his Solicitors with his knowledge) had been likely to obstruct the just disposal of the proceedings and that QOCS should be dis-applied. Counsel for the Claimant submitted that the usual QOCS protection should apply.

The Deputy District Judge noted that the Claimant's position before the Court on 12 November 2018 had been that there were no physiotherapy records to disclose and that treatment had been provided gratuitously by an unidentifiable physiotherapist, and that position had been maintained for some considerable time up to 21 December 2018 when it became clear that treatment had been paid for. It was the Claimant who was telling his Solicitor that there were no documents capable of being disclosed and which led the Court to dismiss the Defendant's Application for specific disclosure.

The Deputy District Judge was satisfied that the Claimant probably knew that the physiotherapy had not been provided gratuitously. There was no reason why he did not provide Further Information when requested to do so. Accordingly, he would dis-apply QOCS.

The Defendant's costs were summarily assessed on the fixed costs basis in the sum of £9,793.90 and have now been paid in full.

Discussion

The factor that appears to have influenced the Deputy District Judge in disapplying QOCS was that the Claimant's conduct had led Deputy District Judge Williams to dismiss an Application that, had he been appraised of the actual facts, was likely to have been allowed and this, ultimately, caused the Defendant to incur costs in prising the truth out of him.

This conduct, undoubtedly, fell short of the claim itself being fundamentally dishonest, but, interestingly and importantly, it did still permit the Court to disapply QOCS and, therefore, in addition to the claim being struck out (and, therefore, the Claimant being unsuccessful in his bid to recover damages from his employer), costs have also been recovered in consequence of the Claimant's conduct.

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DOLMANS RECENT CASE UPDATE

Civil Procedure - Road Traffic - Insurance - Service

Cameron v Liverpool Victoria Insurance Co Ltd
[2019] UKSC 6

A motorist who had been injured in a hit-and-run collision in which the car was identified, but the driver was not, issued proceedings against the registered keeper of the vehicle erroneously believing him to be the driver. When it became clear that he was not, the motorist added the Insurer as the Defendant. The Insurer denied liability; arguing that the policy did not cover the keeper and the driver had not been identified. The motorist applied for permission to amend her Claim Form and Particulars of Claim by removing the keeper as the First Defendant and substituting "*the person unknown driving the vehicle [registration number] who collided with the vehicle [registration number] on [date of accident]".*

The District Judge dismissed her Application and granted Summary Judgment in favour of the Insurer.

The Court of Appeal reversed that decision. The Insurer appealed to the Supreme Court.

Under Section 151 of the Road Traffic Act 1988, an Insurer is only liable upon Judgment obtained and there is no direct right of action as between a Claimant and the Motor Insurer. In the present case, the motorist sought to trigger the Insurer's liability under Section 151 by seeking to obtain Judgment against an unknown person.

The Supreme Court held that to allow the claim to proceed would have offended the very basic principle that even an unnamed person has a right to be given notice of the proceedings (by service of the claim at the relevant address). The legitimacy of issuing or amending a Claim Form could be tested by asking whether it was conceptually, not just practically, possible to serve it. An identifiable, but anonymous, Defendant could be served. However, one did not identify an unknown person simply by referring to something they had done in the past.

A person could not be made subject to the Court's jurisdiction without having notice of the proceedings and substituted service by another method should only be permitted if it is "such as can reasonably be expected to bring the proceedings to the attention of the Defendant". No exception to that principle of natural justice could be justified in the context of compulsory insurance of motorists.

The Supreme Court acknowledged that service could be dispensed with under CPR r.6.16 where the Defendant was, in fact, aware of the proceedings, or had deliberately evaded service, however, a person could not be said to evade service unless they actually knew that proceedings had been, or were likely to be, brought against them.

Accordingly, the Appeal was allowed, the Court of Appeal's decision was set aside and the District Judge's Order was reinstated.

Defective Premises Act - Defects - Inspections

Elizabeth Rogerson v Bolsover District Council
[2019] EWCA Civ 226

A tenant (the "Tenant") appealed against a County Court decision which held that her Local Authority landlord (the "Landlord") had no duty under section 4 of the Defective Premises Act 1972 to inspect her property.

Whilst mowing the front garden of her tenanted property, the Tenant stepped backwards and into an inspection cover which gave way, as result of which her left leg and body fell through the cover into the void underneath. The underground chamber was used for the purpose of water sewage and was the property of Severn Trent Water.

Under the Tenancy Agreement, the Landlord was under an obligation to maintain the structure and exterior of the property. At Trial, the Tenant relied on expert evidence from a chartered civil engineer which stated that the cover was between 40 and 60 years old and was corroded, such that it could take the Tenant's weight when she stepped on it. The Landlord did not rely upon its own expert evidence, but only called one witness who confirmed that an inspection was undertaken in 2013, with a further 'stock' survey the following year. The District Judge found that it was for the Landlord to show that it had complied with its duty of care pursuant to sections 4(1) to (3), namely to take such care, as is reasonable in all the circumstances, to see that persons are reasonably safe from personal injury caused by a relevant defect. The Judge concluded that although the Landlord did not know of the condition of the cover, it ought to have known, by way of a pressure test, and there had been no evidence that a reasonable inspection of the premises had been carried out. The Tenant accordingly succeeded in her claim and was awarded damages.

The Landlord successfully appealed that decision on the basis that the Tenant had failed to establish a breach of s.4(1).

The Tenant then appealed to the Court of Appeal, which upheld the appeal and restored the decision at first instance, but on different grounds.

In respect of whether section 4 required a landlord to implement a system of inspection, the Court of Appeal found that there was no general duty to inspect under this provision. It was a question of fact in each case. One aspect was the Landlord's knowledge as to any likely or known risks or problems in the property. There had been two inspections here; one triggered by the start of a new tenancy and the other by a 10 year stock review. Those were the occasions when it was reasonable to implement inspections. However, there was insufficient evidence in the instant case to find that section 4 required the Landlord to institute a system of regular inspection of the property.

The main issue in the appeal, however, was whether reasonable care had been taken in carrying out the inspections and whether the Landlord had, or should have, discovered the defect.

As the Tenant's evidence on how the accident occurred was accepted, the evidential burden shifted to the Landlord to show the steps the Landlord had taken to ensure compliance with section 4. The Court of Appeal found that there was no sound evidential basis to conclude that each inspection had been carried out with reasonable care. The Landlord had not called first-hand evidence or expert evidence to refute the findings of the Tenant's expert regarding the nature and longstanding presence of the defect. There was a physical defect which would have been revealed by a pressure test. Accordingly, had an inspection been properly carried out, it would have revealed a defect within the cover. The Appeal Judge had, therefore, erred in finding that there was no duty on the Landlord to inspect to ensure that relevant defects did not develop as this did not reflect the wording of section 4(1), namely that the duty was owed if the Landlord *"ought in all the circumstances to have known of the relevant defect"*.

Accordingly, the Tenant's appeal succeeded and the original Order giving Judgment for the Tenant was restored.

Fixed Costs Regime - Disbursements - Medical Agency Fees

Dr Carol Beardmore v Lancashire County Council
[2019] CC Liverpool

The Appellant appealed against a decision that medical agency fees incurred in a low value personal injury public liability (PL) case were not recoverable as a disbursement under CPR r.45.29I.

The Appellant brought a highway tripping claim against the Respondent Local Authority which settled for £3,500. As part of her costs, the Appellant sought to recover the medical agency fees in obtaining her GP and hospital records. The Respondent refused to pay the agency element of these fees. At first instance, the Judge found that it would have been reasonable for the Appellant's Solicitors to have obtained the records themselves and that it had been unreasonable to instruct the agency to do so. She also found that CPR r.45.29I provided for the recovery of an agency fee in RTA cases, but that the rules did not provide for the recoverability of such fees as disbursements in PL and EL cases.

The Appellant sought to appeal the decision and argued that recoverability was not limited to RTA claims by the mere fact that CPR r.45.29I(2A)(c) made specific reference to such fees in RTA claims, with no reference to PL claims.

The Appeal Court agreed with the Appellant, and held that whilst CPR r.45.29I clearly allowed an agency fee as a disbursement for RTA claims, it did not follow from the inclusion of a specific reference to RTA claims that EL/PL claims were excluded from the recovery of such agency fees. If the rule drafters had intended to exclude EL/PL claims, there would have been clear provision made for that, such as the inclusion of words to the effect of "*only in respect of a claim started under the RTA protocol*". If, as a matter of policy, the rule makers believed that it was appropriate to exclude agency fee recovery, then a simple rule change could be introduced.

Appeal allowed.

Comment : Whilst this is a non-binding decision, it nevertheless provides some guidance to legal practitioners on the applicability of CPR r.45.29I.

Nuisance - Human Rights - Privacy

Fearn & Others v Board of Trustees of the Tate Gallery
[2019] EWHC 246 (Ch)

The Claimants, C, were owners of flats in a development adjacent to the Tate Modern art gallery in London. The living areas of the flats looked directly onto a viewing gallery which was open to visitors to the Tate Modern and provided a panoramic view of London. The flats had a distinctive appearance with winter gardens which had floor to ceiling windows. The winter gardens had been conceived by the developers as indoor balconies, but were used by C as part of their living accommodation. Tate Modern visitors using the viewing gallery had an uninterrupted view of the living areas of the flats. C alleged that they were subjected to close scrutiny by the many visitors, some of whom shouted and waved, took photographs and observed C through binoculars. C brought a claim in nuisance and under the Human Rights Act 1998 to protect their ECHR Art.8 right of privacy.

The claim under the 1998 Act failed, as the Judge held that neither the Tate Gallery nor the viewing gallery by itself were exercising functions of a public nature.

In relation to the claim in nuisance, the Judge held a deliberate act of overlooking could amount to an actionable nuisance, but that did not mean that all overlooking became a nuisance. Whether there was an invasion of privacy depended on whether, and to what extent, there was a legitimate expectation of privacy. The Judge held that that there was no nuisance on the facts of this case. The locality was in an inner city urban environment with a significant amount of tourist activity and an occupier in that environment could expect less privacy than a rural occupier. The operation of the viewing gallery was not an inherently objectionable activity in the neighbourhood and, whilst it allowed visitors to view the interior of the flats, that was not its purpose. In choosing to buy the flats, with their distinctive design of floor to ceiling windows, C had created or submitted themselves to an increased sensitivity to privacy and it would be wrong to allow that self-induced exposure to the outside world to create a liability in nuisance. By moving their living activities into the winter garden area, C had created their own additional sensitivity to the inward gaze. Further, the Judge considered that C could have taken some remedial measures such as solar blinds or net curtains. Accordingly, the claim was dismissed.

Permission to Amend - Costs Permitted to be Claimed as Damages

Playboy Club London Ltd v Banca Nazionale Del Lavoro Spa
[2019] EWHC 303 (Comm)

The Claimant, C, previously brought an unsuccessful negligence claim against the Defendant, D. In the August 2018 edition of the Dolmans Insurance Bulletin, we reported on the Supreme Court's decision in that case upholding the finding that D did not owe a duty of care to C in relation to a credit reference that D supplied to a company associated with C about a casino customer. C was ordered to pay D's costs of those proceedings. Before the hearing of that Appeal, C issued a claim for damages for the tort of deceit. D initially successfully applied to strike out that claim as an abuse of process on the basis that the deceit claim should have been brought at the same time as the negligence claim. As reported in the September 2018 edition of the Dolmans Insurance Bulletin, the Court of Appeal allowed C's Appeal, permitting the deceit claim to proceed.

This hearing related to an Application by C to amend its claim to include, as a claim for damages, the costs of the negligence proceedings. C submitted that although its negligence claim had ultimately failed, at all relevant times that claim had at least a reasonable prospect of success and C had acted reasonably in bringing the claim and pursuing the Appeal to the Supreme Court. The costs incurred in those proceedings were sums that were reasonably incurred by C in mitigating its loss and/or were loss and damage caused by D's deceit and that C was, thus, entitled to claim damages in a sum equivalent to the costs incurred.

D objected to the amendment, submitting that costs as damages on the facts of this case were irrecoverable as a matter of principle and to allow it would effectively reverse the costs award made in the previous proceedings. However, the Judge held that whilst the claim was novel and unprecedented, the prospects of C succeeding were more than fanciful and the point should be decided at Trial. Accordingly, permission to amend was granted.

Personal Injury - Breach of Duty - Education

Martyn Clarke v Hull City Council
[2019] EWHC 486

The Claimant ran a special teacher unit at a school for children for special educational needs. He had been involved in the restraint of a pupil and claimed that he had received repeated kicks to his knee from the pupil. He sought damages from the local authority, claiming that the deputy head teacher, who was present, should have intervened to stop the pupil from kicking him.

There was a dispute of fact as to whether the Claimant had been kicked, but, on the balance of probabilities, the Judge found that the Claimant had been repeatedly kicked, which established "the mechanism for the incident". He also found breach of duty was established on the basis that had the deputy head exercised reasonable care, he would have intervened.

On Appeal it was held that the Judge was entitled to find that the Claimant had been repeatedly kicked. The Judge had found the witnesses to be decent and upright persons doing their best, but had properly noted the deficiencies in the evidence. The critical evidence appeared to have been the contemporaneous reports from the Claimant to the effect that he had been repeatedly kicked.

Having found that the Claimant was repeatedly kicked, the Judge was entitled to find that the deputy head teacher should have seen the kicking, and probably had seen it, and should have stepped in and taken over the restraint of the pupil from the Claimant.

In light of the evidential findings made, it was inevitable that the Judge would find that the repeated kicking caused the Claimant's injury. That was sufficient to establish causation. The Judge was, therefore, right to make the implicit finding that causation was proved.

Appeal dismissed.

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

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- 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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