QBE European Operations

Technical claims brief

Monthly update | August 2014

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Contents

Liability

QBE UK Casualty Claims enjoy success in the Court of Appeal. Denton v T H White Ltd [2014]

Our UK Casualty Technical Claims Team successfully appealed the original county court decision, and in doing so, has helped shape the civil litigation landscape with regard to compliance with court deadlines and relief from sanctions.

Even those with only a passing interest in claims are unlikely to have avoided the near-constant flow of reported cases following the controversial decision in Mitchell v News Group Newspapers Ltd [2013]. In Mitchell the Court of Appeal upheld a decision which prevented Mr Mitchell from recovering his 6-figure legal fees (even if his claim succeeds), as his solicitor had failed to send details of those fees in accordance with a court prescribed deadline. Where previously the failure would likely have been rectified by the court granting relief from sanctions, a stricter approach to compliance was endorsed following Lord Jackson's reforms (April 2013). Since Mitchell the courts have been inundated with satellite litigation and this culminated in the Court of Appeal hearing 3 appeals together and then providing further guidance to legal practitioners and the judiciary. The cases were Denton v TH White Ltd, Decadent Vapours Ltd v Bevan and Utilise TDS Ltd v Davies [2014].

The guidance sets-out a three-stage test for deciding whether the court should grant relief from sanctions:

1. Identify and assess the seriousness and significance of the failure to comply with a court deadline. This replaces the 'trivial' test introduced by Mitchell. The primary factor is whether the breach imperils a hearing/trial date. If the breach is neither serious nor significant, relief is likely to be granted. If it is serious or significant, 2 and 3 should be considered.
2. Question why the failure or default occurred and whether there was a good reason or explanation.
3. Evaluate all the circumstances of the case, to enable the court to provide justice for the parties. This is similar to the pre-Jackson test of whether prejudice would be suffered by granting relief.

In Denton v T H White Ltd the court gave the parties a deadline to exchange witness and expert evidence, which would allow the case to be ready for trial in January 2014. The claimant served some witness evidence by the prescribed date, but then with the trial imminent he served an additional 6 statements, without any reasonable justification. As they were served late, the claimant had to apply to the court for relief from sanctions (permission to rely upon the statements at trial). Permission was granted, which meant the trial had to be adjourned at the last minute. The decision contradicted the stricter approach to compliance, so we appealed.

Applying the three-stage test, the Court of Appeal was in no doubt that when a party fails to meet a deadline, but then does so at some later date, if that failure would cause a trial to be adjourned, permission to rely upon the additional evidence should not be granted. It is hoped that this approach to litigation should mean that cases are properly prepared for trial, on time, without delay, and without legal fees escalating due to protracted litigation. The appeal was successful and the importance of complying with court deadlines was underlined.

> *Since the introduction of Lord Justice Jackson's reforms, and the decision in Mitchell, the amount of satellite litigation has put a significant strain on a judiciary that was already struggling due to spending-cuts. That was not the intention of Lord Justice Jackson, and the Court of Appeal have taken the opportunity to try and put a stop to the courts being clogged-up with applications and appeals.*
> *The court's time and resources are precious and a party opposing an application for relief from sanctions will need to pay close attention to the new three-stage test.*

Local Authorities and Historic Abuse. BB & BJ v Leicestershire County Council [2014]

We reported the landmark decision of Woodland v Essex County Council in December 2013, when it was decided that the local authority owed a non-delegable duty of care for the provision of school curriculum swimming lessons by an independent contractor. It is unsurprising that a court has now been asked to consider another local authority service.

The claimants were fostered by Mr and Mrs L in the 1960s. They were removed after three years due to the foster carers' unusual reaction to perceived sexualised behaviour of BB and her brother. In early 1970 the claimants returned to Mr and Mrs L following a private arrangement with their mother. Mr and Mrs L applied to adopt the claimants and this was granted by the court in October 1970. Mrs L died in 2008 and a police investigation followed due to concerns over her death. The police interviewed the claimants, who disclosed sexual, physical and emotional abuse by Mr and Mrs L. Following the decision in Woodland the claim was changed from a professional negligence claim against the social workers, to alleging the local authority's breach of a non-delegable duty of care and/or vicarious liability for the actions of Mr and Mrs L.

The issue of limitation had to be determined, which the judge found in favour of the local authority and refused to disapply the limitation period, thus the claims could not proceed. However, the judge went on to say that whilst the local authority could not be vicariously liable to the claimants (as their relationship with the foster carers was not sufficiently akin to employment) there was a non-delegable duty of care.

In relation to a child whom it takes into care, the local authority has a duty to take reasonable care for the safety of that child. The local authority relied on the Australian High Court decision in New South Wales v Lepore [2003] and argued that deliberate abuse by a foster carer would not be a breach of a duty to take reasonable care. The judge did not agree and sought to apply the Woodland criteria:

1. The claimant is a patient, child or vulnerable person who is reliant on the protection of the defendant against the risk of injury
2. There is an antecedent relationship between the claimant and the defendant, independent of the negligent act or omission (i) which places the claimant in the custody, charge or care of the defendant, and (ii) there is a positive duty to protect the claimant from harm

3. The claimant has no control over how the defendant chooses to perform those obligations
4. The defendant has delegated to a third party a function which is an integral part of the positive duty which he has assumed towards the claimant
5. The third party has been negligent in the performance of the very function assumed by the defendant and delegated to the third party.

The local authority argued that whilst the first three criteria were met, the foster carers were not performing a function which was an integral part of the duty assumed by the local authority, namely, the provision of family life, as opposed to arranging its performance. The judge disagreed and decided that in placing a child with foster carers, the local authority passed responsibility for the child to them and that part of the bundle of duties assumed by the local authority is the duty to take reasonable care for the safety of the child and to protect them from harm. The final criterion was also met because, by abusing a child, a foster carer is in breach of that duty to protect which is the same duty assumed by the foster parent and passed to the foster carers.

The judge also considered whether it would be fair, just and reasonable to impose a non-delegable duty on the local authority. He looked at the difficulties that may be faced in the future with regard to obtaining insurance and the imposition of a duty on a local authority, where no such duty is imposed on a parent.

That had to be balanced against the potential inequality if redress was available for children placed in a local authority's children's home and abused by a local authority employee, but no such redress was available against a foster carer. Ultimately, the judge felt it more compelling that victims of abuse should have a claim against the local authority which had taken the positive step of taking control of the child to protect it.

> *Had the judge disapplied the limitation period an appeal on the non-delegable duty point seems inevitable. In Woodland the Supreme Court said that a local authority will not be liable for the negligence of an independent contractor where their duty is not to perform the relevant function, but merely to arrange for its performance. We can expect this argument to revisit the courts in the near future, with the present uncertainty giving some encouragement to claimant lawyers.*

Breach of Duty and the Highway Authority. Heath McCabe v Cheshire West & Chester Council and BAM Nuttall Ltd [2014]

Mr McCabe claimed damages for personal injuries following a fall down a flight of steps on a public footpath in Elton, Cheshire, at about 11pm on 22 October 2009. He was walking his dog and claimed that he fell because a streetlight (intended to illuminate the steps) was not working at the time and so he claimed against the council (who were the highway authority responsible for the footpath and its lighting) and Bam Nuttall Ltd, who were contracted to maintain the streetlights.

The court was asked to decide four issues:

a) Whether the accident occurred as the claimant had described

b) Whether either defendant owed the claimant a duty of care arising from the state of the lighting

c) Whether either defendant was negligent

d) If so, whether the claimant's conduct amounted to contributory negligence

After hearing the party's evidence, the judge decided the accident had happened as described and that it probably wouldn't have happened had the streetlight been illuminated. That being the case, the claim turned on whether any duty of care was owed to the claimant.

Having reviewed the case law and section 97 of the Highways Act 1980, the judge concluded that for liability to be established against the highway authority, they must have performed some positive act that created a danger. This can broadly occur in three ways:

a) if the authority introduces a danger to the highway and fails to neutralise it

b) if the authority was responsible for constructing the highway in a dangerous manner

c) if the authority misleads a motorist as to the state of the road so as to cause an accident

A highway authority will not be regarded as having performed a positive act where it undertakes work on the highway to remove a hazard but fails to do so completely. The authority does not positively create a danger simply because it took inadequate measures to repair a road, provided the measures it took did not create greater dangers than would have existed if the highway authority had done nothing.

The judge decided that the provision or maintenance of the steps did nothing to add to any danger, and the same could be said about the streetlight. There was a failure to maintain the lamp and therefore, this was a case of nonfeasance (a failure to act where action is required) as opposed to misfeasance (wilful inappropriate action or intentional incorrect action). An act of nonfeasance cannot result in liability where no duty of care exists.

The failure to replace the light bulb was not an active step and thus no duty of care was owed to the claimant and the claim was dismissed. Had a decision on contributory negligence been required, the claimant would have been 50% liable as he continued along the path when he could not see what he was walking on or what was the nature of the terrain.

This case neatly restates the law and sets out the limitations on a highway authority's liability to the public. The claimant may feel slightly aggrieved with the outcome, but the judge correctly drew the important distinction between a failure to exercise a power, as opposed to a breach of duty. We have recently seen a number of challenges to a local authority's highway duties, and with Government spending cuts ongoing, this decision should provide some comfort to authorities who have in place a reasonable system of inspection and repairs.

Fraud

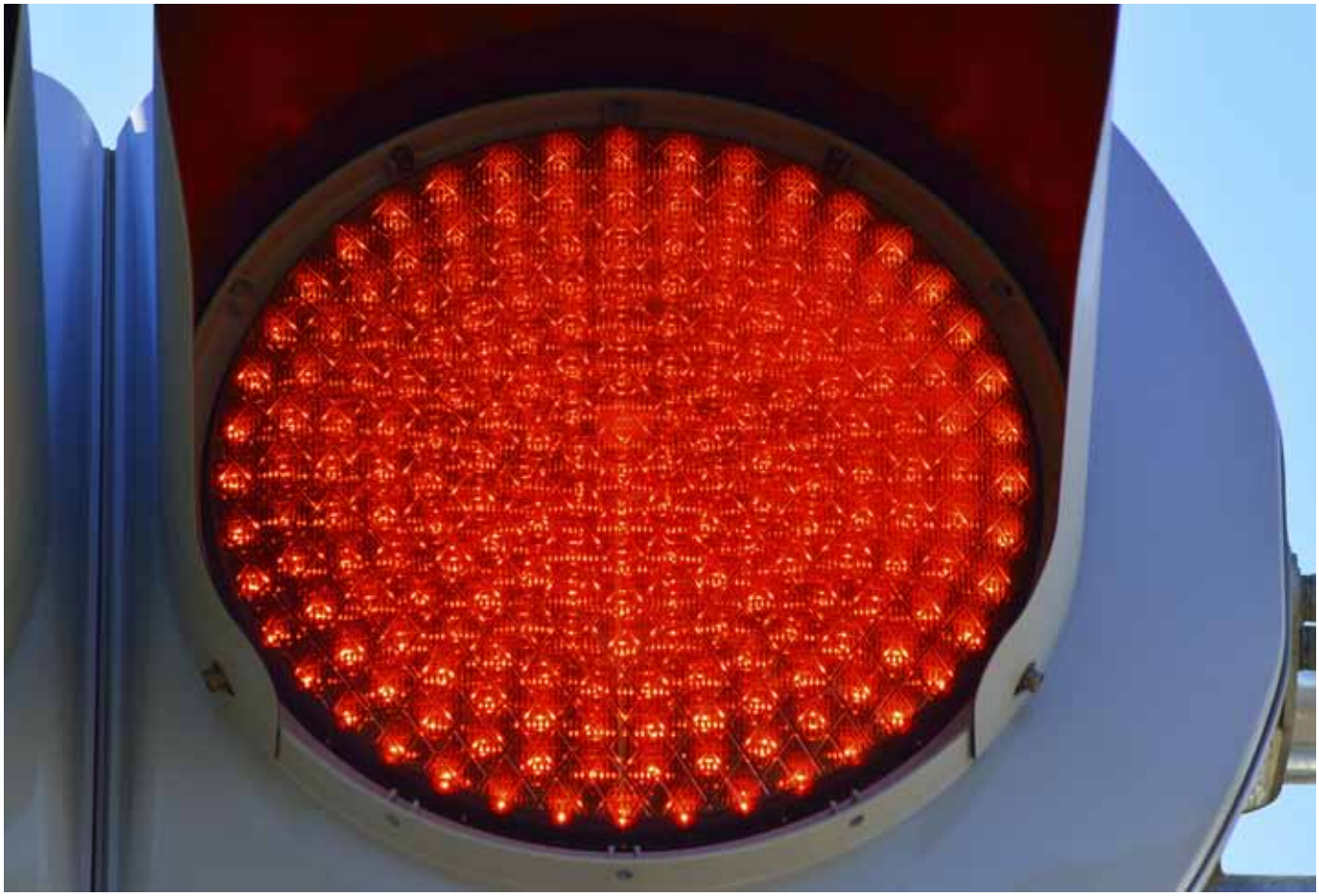
Liverpool Victoria Insurance Company Ltd v Mr Balraj Singh Thumber [2014]

This latest High Court decision underlines a judicial appetite to punish fraudsters and at the same time reiterating the position that those found guilty of fraud can expect a custodial sentence.

On 21 January 2011 Mr Thumber claimed to have been involved in a road traffic accident with a Mr Sivak, who was insured by Liverpool Victoria Insurance. Mr Thumber had issued proceedings by 25 April 2011 and was claiming ongoing car hire at £220 per day – his Audi was valued at £6774 and was a write-off. The insurers joined proceedings and alleged the claim was fraudulent. By the time the trial was due to be heard on 1 May 2013, the claim for car hire exceeded £130,000. At trial, Mr Thumber applied for an adjournment when Mr Sivak didn't show up and then discontinued his claim when the judge refused to adjourn the trial.

The insurers brought committal proceedings against Mr Thumber for contempt of court and whilst he tried to adjourn a number of hearings - suggesting he was suffering from depression and was not fit to attend court - the judge did not accept that excuse. Evidence presented showed the alleged collision was inconsistent with the vehicle damage, that the drivers were linked and that the insurance on Mr Sivak's vehicle was taken out 2 days before the alleged accident. The judge was satisfied there was 'powerful evidence of fraud' and the dishonest giving of evidence by Mr Thumber was plainly a contempt of court. He was sentenced to 12 months in prison.

> *The judge referred to 2 similar cases of insurance fraud, Liverpool Victoria Insurance Company v Samena Bashir [2012] and South Wales Fire Services v Smith [2011], to highlight the position that those who make fraud claims should expect to go to prison. The fight against fraud continues on all-fronts and only with a combined effort from all stakeholders can we expect to see the tide-turning on levels of fraud.*



Lawyers' guideline hourly rates to remain the same, for now.

The Civil Justice Council (CJC) Costs Committee has published its Final Report following its review of guideline hourly rates (GHRs) for 2014. The report was submitted to the Master of the Rolls (Lord Dyson) who has concluded that the evidence obtained is insufficient to support any changes to the GHRs. The complex issue needs more comprehensive data to be available before a decision can be taken. The GHRs have remained substantially unchanged since 1 January 2009.

This is the first review of GHRs by the CJC Costs Committee, which was previously undertaken by the Master of the Rolls himself. They experienced difficulties compiling the evidence-based-review and whilst a number of recommendations on GHRs were suggested, these were made with 'considerable reservations'. The difficulties included a very limited response to surveys, both in terms of numbers and from those engaged in a significant amount of multi-track litigation.

The Master of the Rolls will have urgent discussions with The Law Society and the Government to decide the best course of action and to ensure adequate evidence is obtained before a decision is made. He expressed 'considerable regret', but is clearly concerned at the reliability of the evidence obtained and has decided to err on the side of caution.

The CJC Costs Committee put forward the following recommendations which are to be implemented on 1 October 2014:

- Grade A fee earners will now include Fellows of CILEX with 8 years' post-qualification experience
- Costs Lawyers, who are suitably qualified and subject to regulation, will now be eligible for payment at Grades C or B; the grade will depend on the complexity of the work

Other potential changes which were not recommended by the CJC Costs Committee included:

- A new Grade A* star—this had been proposed for fee earners with over 20 years PQE who had a superior skill and expertise
- separate GHR bands specific to specialist fields of civil litigation—there had been a call for bands for specialist fee earners especially in the field in personal injury, clinical negligence and commercial litigation
- separate rates for detailed and summary assessment of costs.

> *It is noteworthy that the CJC Costs Committee took over the role of the review in January 2013 and since then civil litigation costs have undergone significant change following the introduction of the Ministry of Justice and Jackson reforms. The Committee did not take these into account, and whilst the Master of the Rolls supported that decision, he did acknowledge that the reforms have probably created considerable uncertainty. It seems that the Master of Rolls may have taken his lead from the Ministry of Justice and wants to 'let the dust settle' before implementing any further reform.*

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