Technical claims brief

Monthly update – October 2011

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News

Solicitors' referral fees to be banned

Justice Minister Jonathan Djanogly has announced that the government will ban referral fees paid by solicitors in England and Wales for new personal injury cases. The ban will probably be enacted by an amendment to the ***Legal Aid, Sentencing and Punishment of Offenders Bill*** (LASPO) which carries the main provisions of Lord Justice Jackson's reforms *(see July 2011 Brief)* and which is currently at the parliamentary committee stage.

A Private Members Bill introduced by Jack Straw, which would also ban referral fees, but only in motor cases, received its first reading in Parliament on 13 September. It is unlikely to progress, however, as being only a Private Members Bill it will probably not be given sufficient parliamentary time.

Comment: referral fees have received a good deal of recent media attention. They have been blamed for encouraging a "compensation culture" and for pushing up the number of claims and consequently the cost of insurance premiums (especially for motor insurance) in England and Wales.

Ironically, the announcement of the ban comes only a few months after the Legal Services Board decided that an outright ban was unnecessary because Lord Justice Jackson's reforms would mean that solicitors would be much less able to afford to pay substantial referral fees.

Advocate General holds that UK Road Traffic Act is in breach of EU Motor Directives

Where a policyholder allows an uninsured driver to use his or her vehicle and is injured as a passenger, insurers have in the past refused to pay them damages. This is on the grounds that insurers have a right of recovery under ***section 151 (8) of the Road Traffic Act*** against anyone who causes or permits an uninsured driver to use their vehicle and so could immediately claw back any damages paid making a claim from the injured policyholder pointless.

This approach was challenged in the Court of Appeal in the conjoined cases of ***Churchill Insurance Co Ltd v Wilkinson and Evans v Equity*** *(see June 2010 Brief)* on the basis that it conflicted with long-standing European Union policy that injured passengers should be compensated whether drivers were insured or not. The Court of Appeal referred the cases to the European Court of Justice (ECJ).

The Advocate General assisting the ECJ on this case has now handed down his opinion that the operation of Section 151 (8), in depriving an injured passenger of compensation, is contrary to European Law. The fact of their having permitted an uninsured driver to use their vehicle is not a valid exception.

The judgment of the ECJ is not expected for several months however and the ECJ is not obliged to follow the Advocate General's ruling. Whatever the ruling of the ECJ, the cases will be referred back to the Court of Appeal to conclude matters.

Comment: it is now looking likely that the use of section 151 (8) of the RTA to defend passenger claims will be removed either by a reinterpretation of the Act or by amendment of the section.

First prosecution under new Bribery Act

A clerical employee at Redbridge Magistrates' Court has become the first person to be charged under the ***Bribery Act 2010*** *(see May 2011 Brief)* after allegedly being filmed accepting £500 in cash to delete a traffic penalty from a legal database. Mr Munir Patel has also been charged with misconduct in public office and perverting the course of justice. He is due to appear at Southwark Crown Court on 14 October.

Comment: when the wording of the Bribery Act was first announced, there was some concern that corporate hospitality could breach the new law. Guidance issued by the Ministry of Justice in April 2011 has largely allayed these concerns and the use of the Act in this blatant case of alleged bribery is unlikely to be controversial.

QBE announces sponsorship of Road Safety Week

QBE has announced that it will be sponsoring road Safety Week 2011 which takes place between 21 to 27 November. This year's Road Safety Week, ***"2 Young 2 Die",*** is the 15th organised by road safety charity Brake and will focus on raising awareness of road safety issues amongst young drivers. Brake reports that there are five deaths and fifty-nine serious injuries on UK roads every day and that eighteen-year old drivers are three times more likely to be involved than those aged forty-eight or older.

Comment: QBE is proud to support this initiative to improve road safety.

UK Supreme Court to rule on striking out exaggerated claims

The UK Supreme Court has given a date for hearing the appeal in ***Summers v Fairclough Homes Ltd*** *(see April 2011 Brief)*. The hearing will take place in April 2012 and is scheduled to last four days.

The Supreme Court will consider the controversial issue of whether a damages claim in tort should be struck out in its entirety as a penalty for substantial exaggeration.

In ***Summers,*** the claimant's attempt to exaggerate his claim was thwarted by the defendant's insurers who obtained surveillance evidence showing him to be exaggerating. The defendant applied to have the case struck out in its entirety as the exaggerated claim was a substantial fraud and dishonest behaviour such as the claimant's should be stamped out as a matter of public policy. The judge at first instance disagreed and awarded the claimant £88,000 but also gave permission for an appeal to the Court of Appeal.

Lord Justice Ward for the Court of Appeal referred to the claimant as ***"...an out and out liar, who quiet fraudulently exaggerated his claim to a vast extent..."*** The Court of Appeal however considered itself bound by case law holding that the Civil Procedure Rules gave the court no power to strike out genuine claims even when associated with dishonesty.

The Court of Appeal refused permission to appeal but the Supreme Court agreed to hear an appeal after a direct application. Judgment is unlikely to be given until at least several months after the hearing.

Comment: unlike Ireland, no UK jurisdiction currently allows the strike out of genuine claims on grounds of exaggeration. Defendants have the option of applying to have dishonest claimants committed for contempt of court but this is expensive to pursue and many insurers believe that the risk of losing all damages would make a useful additional deterrent to claimants tempted to fraudulently exaggerate their claims.

Health and Safety Executive consultation on intervention cost recovery closes

The Health and Safety Executive's (HSE) three-month long consultation on recovering the cost of health and safety interventions will close on 14 October 2011.

The new system will extend the current cost recovery arrangement from hazardous industries such as nuclear power and offshore oil and gas installations to all UK industries where a material breach of health and safety law (i.e. one requiring a formal written intervention) has occurred.

Under the new system, the HSE will have a duty to recover the cost of their interventions estimated at £330 per hour plus the cost of any specialist support. The consultation is on how the scheme will operate in practice rather than whether it should or should not be introduced.

The system could be in force by as early as April of 2012.

Full details are available at:

http://www.hse.gov.uk/consult/condocs/cd235.htm

Comment: the HSE justify the proposals on the basis that those who break health and safety law should pay their fair share of the cost of putting it right. The HSE, like most government agencies, are facing significant cuts to their budget and the extension of their cost recovery powers will no doubt alleviate this to some extent.

Liability

Permit compliant landfill site operator not liable in nuisance: Barr and Ors v Biffa Waste Services Ltd – High Court (2011)

The claimants brought claims in nuisance against the defendants over foul smells coming from a landfill site that they operated.

The defendants argued that they had a complete defence of statutory authority. If that was not accepted then they argued that the use of the land was reasonable because they had complied with the terms of their environmental permit and no negligence was alleged and/or the odour was not sufficient to constitute a nuisance.

The judge held that the defence of statutory authority did not apply because the defendants had no statutory obligations themselves. They were not operating under a legislative scheme and were free to follow their commercial interests provided that they abided by the terms of their permit.

The defence of reasonable user was valid however. The carrying out of activities in accordance with the defendants' environmental permit meant compliance with all relevant legal obligations giving a complete defence to claims in nuisance. Claims in nuisance at common law could not succeed without acts of omission or negligence on the defendants' part.

The judge also recognised that it was essential to set a threshold for odour nuisance cases both to determine what a reasonable user might be and to avoid relying solely on subjective interpretation.

The appropriate threshold was one odour complaint day a week (had the defendants been liable).

"...in all the circumstances, the permitted use of Westmill 2 as a landfill site meant that the carrying out of permitted activities of waste disposal, performed in accordance with the detailed terms of the permit and without negligence, amounted to reasonable user of land. In those circumstances whilst claims in nuisance that involved allegations of negligence against Biffa would have been open to the claimants, claims in nuisance alone were not."

The Honourable Mr Justice Coulson

Comment: the court has provided helpful clarification on when common law nuisance claims against companies operating under regulatory schemes and permits can succeed. Nuisance claims will not succeed where there has been no negligence or breach of permit conditions.

Procedure

Fresh pursuit of discontinued claim is abuse of process unless new issues: Westbrook Dolphin Square Ltd v Friends Provident – High Court (2011)

The claimant served a notice of claim under the ***Leasehold Reform, Housing and Urban Development Act 1993*** to obtain the purchase of the freehold of a group of buildings on behalf of the leaseholders. The action was discontinued just before trial on the basis that property values had fallen and the action was no longer commercially viable on the terms of the original notice.

The claimant informed the defendant that they would take further steps under the Act to acquire the property on more favourable terms. The defendant replied that under the Civil Procedure Rules (CPR) any further action could only be taken with the permission of the court.

The claimant served a second notice with a lower proposed purchase price. The defendant applied to have the action struck out on the basis that it was an abuse of process. The court should be guided by the principle that no defendant should be vexed by the same cause of action twice and that there should be as a matter of public policy, finality in litigation. The claimant argued that the possibility of successive claims was an inherent feature of the statutory scheme and that the difference in valuations was a legitimate reason to bring one.

The court accepted the defendant's arguments on the principle that no one should be vexed twice in respect of the same cause and on the finality of litigation

as a matter of public policy. The statutory scheme permitted successive notices but not without some material change in the facts of the case. The second action amounted to a breach of process as it arose from substantially the same facts as the original one. The claimant should not have discontinued and started a new action but should have let the court determine whether the leaseholders had a right to purchase the freehold. If successful, the claimant could then have addressed the issue of the proposed purchase price thus saving court time and resources by not re-litigating the same case.

Comment: this case serves as a reminder that permission to bring a second claim against the same defendant after an initial claim has been discontinued, will be permitted only in exceptional circumstances such as where important new evidence has emerged or there has been a retrospective change in the law.

Completed 26 September 2011 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).

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