Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #83 | 08 June 2018

Alexander House
94 Talbot Road
Manchester
M16 0SP

T. 03300 240 711
F. 03300 240 712

www.h-f.co.uk

Welcome to *Insight*

In this week's edition of Insight, we will be covering cases relating to:

- A public liability claim by a child
- Whether fear is amounts to personal injury
- A claimant discontinuing proceedings where fundamental dishonesty was alleged
- The test for ordering a split trial

And news of the sentencing of a claimant for contempt of court.

Malcolm Henke
Partner & Head of LACIG

Public Liability

In *CC (a minor) v Leeds City Council (2018) EWHC1312 (QB)* the claimant, aged ten years, was one of a small group of family and friends which went on an outing to the defendant's premises where the defendants had provided a number of amusements aimed at young visitors. One of these was Hangar 51.

The general idea was that children would be equipped with laser guns to fire at each other inside the hanger which comprised a large inflatable structure divided into nine pods.

The laser fights had to take place in relative darkness. Otherwise they would be no fun and there would be no point in them. Thus the interior, although not completely dark, was dim enough for it to take a minute or so before the children's eyes became fully acclimatised to the gloom.

Separating the neighbouring pods within the hanger were changes in level which gave rise to a risk of tripping. Shortly after the claimant had entered he fell over one of the tripping points and the gun smashed against his front teeth causing serious injury.

The claimant brought a claim against the defendant in negligence which succeeded at first instance before a County Court judge. The judge found that the defendant had been in breach of its duty to the claimant both by failing to warn him of the tripping points before he went into the hangar and by failing to ensure that the tripping points were made more readily visible by the application of fluorescent strips or the like.

The defendant appealed. The Grounds of Appeal comprised the following:

The trial judge had been wrong on the following grounds:

a. Set an unrealistic standard of care that failed properly to take account of the public liability dimension to the claim, the relatively low instance of injury, lack of serious past injury and the fact that the apparatus in which the claimant was injured was not in any way defective.

b. In considering what steps the defendant should have taken to meet the required standard of care he failed to apply *S1 Compensation Act 2006*.

c. On finding there to have been a breach of duty he:

i. Took into account evidence that was not in fact given as to the practicability of a particular preventative measure; and

ii. Failed to take into account significant evidence concerning the manufacturer's advice.

d. Failed to identify any pleaded breach of duty that was potentially causative of the claimant's injuries and apply the 'but for test'."

The claimant's unchallenged evidence was that he could not recall being told that there were tripping hazards in the hangar between the pods. The defendant had prepared a risk assessment relating to the use of the hangar. It was dated some four months before the accident. One of the foreseeable risks which it identified related to tripping accidents. The relevant control measure was "participants to be warned about ridge between pods and about the potential to trip over them".

'A failure to implement a control measure in a formal risk assessment would not inevitably connote a breach of duty in negligence but in most cases it was likely to go a very considerable way towards it'

Those members of staff responsible for supervising the activity deployed a script which, for example, warned the children not to run. However, it contained no information about the tripping points.

A failure to implement a control measure in a formal risk assessment would not inevitably connote a breach of duty in negligence but in most cases it was likely to go a very considerable way towards it.

The accident history relating to the hangar revealed that there had been a number of recorded accidents which had occurred since the beginning of the 2014 summer season and prior to the one which had befallen the claimant.

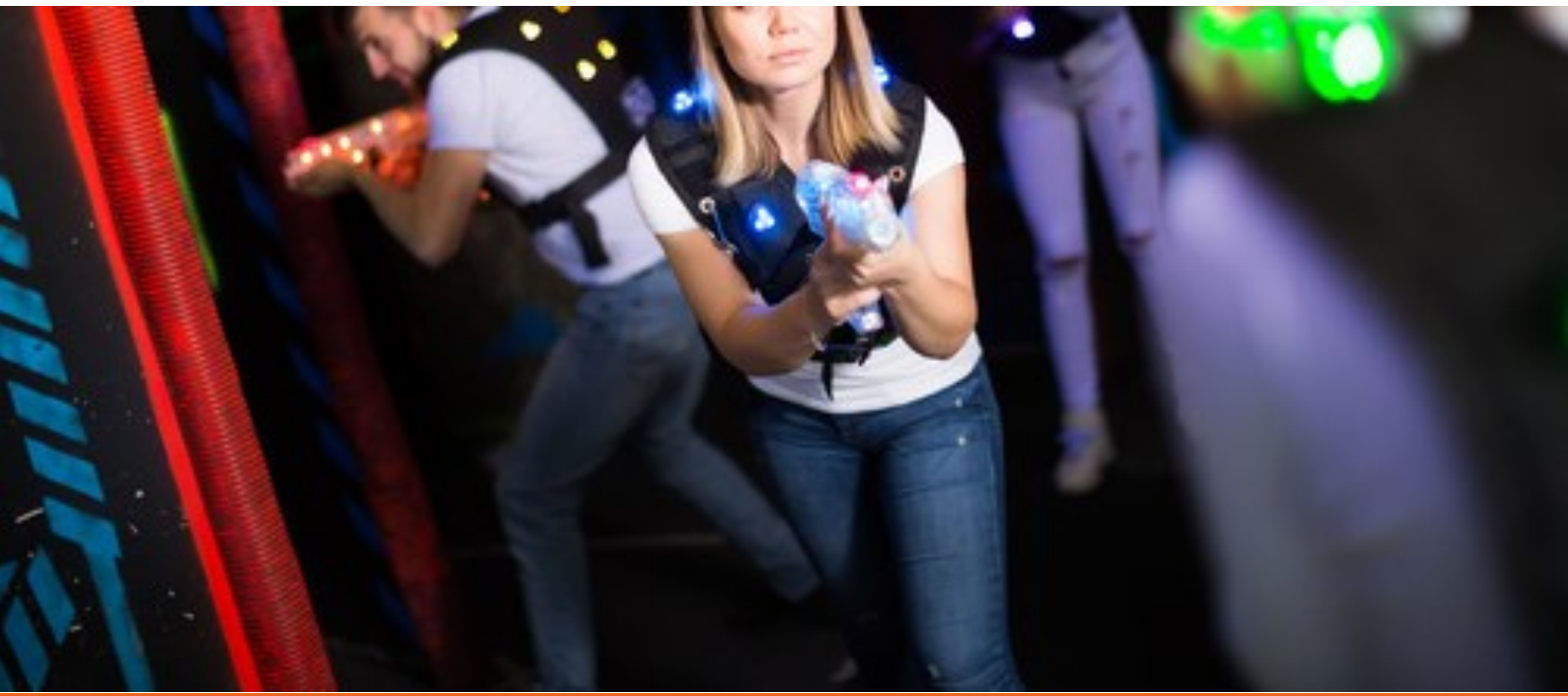
Ten days after the claimant's accident, another child was recorded to have tripped as a result of which his gun hit his lips causing a deep cut in respect of which he was referred to hospital.

Against this background, counsel for the defendant conceded in oral submissions that he could not sustain the contention that the judge's finding of a breach of duty in respect of a failure to warn was susceptible to appeal..

On the issue of causation, the defendant contended that the judge did not make a finding that the absence of a warning, as a freestanding breach, was causative of the accident.

During the course of his judgment, the judge held:

"Let me turn therefore to the question of causation because it is argued that whether the Council are in breach or not, it has not been established, the onus being upon the Claimant to establish it, that any breach of duty led to this injury. Mr Anderson's point here is that it was C's evidence that he saw the obstacle in any event, so warning him about it or even



drawing his attention by fluorescent strips or in some other way would have made no difference.

...I do not accept that." [Emphasis added]

The High Court judge hearing the appeal held that this passage was to be interpreted as connoting that the judge was looking at the failure to warn and the absence of other ways of drawing the claimant's attention to the tripping hazard disjunctively by his choice of "or" as the appropriate conjunction rather than "and". The judge's finding was that the failure to warn was a free standing cause of the accident in the "but for" sense.

The claimant's account was that the accident happened about 30 seconds after he had entered the hangar and that his eyes had not yet become fully acclimatised to the dark. He went on to say under cross examination that, just before the accident, he became aware of a difference in levels between the pods but in the dim light had perceived them to be higher than they actually were. The judge dealt with this evidence in his judgment thus:

"I accept C's evidence that he saw the obstacle, but he only just did so. His evidence was clear that because of the ambient condition he was not able to gauge the degree of the hazard about which he was dimly aware and the fall occurred because, by virtue on the ambient light conditions in which he found himself, he was not properly able to assess the degree of danger that this hazard presented. He was not, in other words, in a position to evaluate the risk of what he fleetingly saw in those dim conditions."

The defendant contended that the judge ought to have found that it had not been proved that a warning would have prevented the accident from happening. This was because the claimant had, from what he had already seen, become aware of the danger before the accident and so, by that stage, he was as fully informed as if a warning had been given.

The appellate judge found that a proper distinction was to be drawn between (i) a dimly perceived and, importantly, inaccurate awareness of some difference in levels in the fabric of the pods and (ii) actual knowledge, strengthened by a warning, that the difference in levels represented a tripping hazard if he were not careful.

In any event, the judge had the advantage over the appellate court of hearing the evidence of the claimant and forming a view of how he would be likely to respond to a warning in the terms advocated in the risk assessment and how this would have been likely to have impacted on his behaviour.

The parties agreed that if the appellate judge found that the trial judge had not made a definite finding on the issue of causation of the failure to warn then he should resolve the issue himself rather that remit the case for further first instance consideration. He held that even if he was wrong in his interpretation of the judge's comments on these issues he would, in any event, have reached the same conclusion as he did on the facts of this case.

The combination of the defendant's concession on the issue of breach of duty with respect to the failure to warn and the appellate judge's findings on the issue of causation rendered it unnecessary for him to deal with the judge's approach to the omission to provide fluorescent strips, or the like, to demarcate the tripping points.

The claimant was represented by Blacks Solicitors

Comment

One simple point illustrated by this case is the importance of analysing the risks identified in a risk assessment and taking steps to implement preventative measures.

Is fear personal injury?

In *Kimathi and others v The Foreign and Commonwealth Office (2018) EWHC 1305 (QB)* the claimants claimed damages against the defendant for alleged abuses arising during the course of the Kenyan Emergency during the 1950s. The court was asked to rule on two matters, namely:

(1) Whether the defendant was guilty of deliberate concealment so that *S26 Limitation Act 1939/S32(1)(b) Limitation Act 1980* operated so as to stop time running against the claimants. This matter was decided in favour of the defendant and the claims were therefore time barred unless the court exercised its discretion under *S33 of the 1980 Act*

(2) Whether fear, caused either by the tort of negligence or trespass, amounted to personal injury so that the court had the discretionary power to exclude the three year limitation period which arose *under S11 of the 1980 Act*.

The claims were based on negligence and trespass to the person. It was trite law that negligence was not actionable per se. Proof of damage was an essential element in the tort of negligence. Therefore, in the circumstances relevant to this judgment, if fear did not amount to personal injury, then the tort of negligence could not succeed in any event. However, trespass to the person was actionable per se; i.e. proof of damage was not essential to complete the action.

If the claims had been in time, then it would have been important to decide as a matter of substantive law whether fear amounted to personal injury. If it did then the claims would have been capable of succeeding in both negligence and trespass. If it did not then the claims would have potentially succeeded in trespass alone (assuming in both cases that all the other ingredients essential to liability were proven against the defendant).

This demonstrated that the definition of personal injury was a matter of substantive law and that *S38(1) Limitation Act 1980* did not restrict that definition. The subsection did not purport to be comprehensive, since it defined personal injuries as including "any disease and any impairment of a person's physical or mental condition."

In very broad terms the claimants claimed that they were detained in villages or detention camps. Further, that the threat of force compelled them to remain in the villages/ detention camps and also to carry out labour. There was no claim for false imprisonment on the pleadings. There was no evidence of psychiatric injury having been suffered by any of the claimants.

The starting point was the clear distinction traditionally drawn between fear or other distress short of a psychiatric injury on the one hand, and a personal injury on the other hand. The claimants argued that fear was not symptomless or hidden. They had felt fear and it was intended that they should do so in order to secure compliance with orders.

Fear also provoked physical change albeit transitory and there was an identifiable physiological effect: the release of adrenaline, an increase in blood pressure and an increase in heart rate. Once the threat ceased, physiological markers returned to normal, but the changes were felt by the person concerned. Fear was unpleasant and made the claimants appreciably worse off and compelled behaviour which would otherwise be different. It also resulted, or could result, in impairment of normal daily function and is not negligible.

'It had been clearly and authoritatively determined that fear alone did not amount to a personal injury'

Finding in favour of the defendant, the High Court judge held that none of these submissions changed the position clearly founded in the authorities that anything short of a recognised psychiatric condition could not amount to a personal injury. It had been clearly and authoritatively determined that fear alone did not amount to a personal injury. Claims based on fear were subject to a six-year time limit. The provisions of *Ss11, 14 and 33 of the Limitation Act 1980* had no application to them.

The claimant was represented by Tandem Law (Lead Solicitors)

The defendant was represented by the Government Legal Department

Comment

The judge here was alive to the implications of a ruling in favour of the claimants. It would have meant an extension of the traditional definition of "personal injuries" that would be extremely wide ranging and have numerous substantial consequences across the law of tort.

Discontinuing proceedings

In *Alpha Insurance A/S v Roche and another (2018) EWHC 1342 (QB)* the appellant/defendant insurer appealed against the decision of a County Court judge who had refused to direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined after the claimants had served a notice of discontinuance.

The claim arose out of an accident on 6th April 2016. The defendant's insured collided with a vehicle being driven by the first claimant. It was claimed that the second claimant was a passenger in the front seat.

Both claimants claimed damages for personal injury. In their defence, the insurers admitted that their insured's negligence had caused or contributed to the accident but alleged that the first claimant was the sole occupant of the vehicle and that the second claimant's claim was fraudulent. It was further alleged that the first claimant's claim was tainted by dishonesty.

The trial was fixed for 14 February 2018. On 13 February 2018 a Notice of Discontinuance was filed. At the defendant's request, the matter was left in the list so that they could seek a direction that the issue of fundamental dishonesty be determined.

The trial judge gave a brief judgment refusing that application. The grounds of appeal contended that the judge's decision was perverse and/or wrong in law.

The defendant argued that the judge failed to give any or any sufficient weight to the public interest in maintaining the integrity of the legal system and ensuring that dishonest claimants should be exposed as such and pay the costs of the litigation. It further contended that the judge put too much emphasis on the court resources required for determination of the issue and insufficient emphasis on the waste of resources by the claimant in serving the notice of discontinuance at the eleventh hour.

Then, it was said that the judge placed too much weight upon general difficulties faced by defendants challenging occupancy and insufficient weight on the substantive allegation and cogency of the evidence in this case. The defendant also complained that the judge placed too much weight upon a general acceptance that reasons for discontinuance were multi-faceted without any explanation being put before the court.

Finally, it said that the judge placed an unnecessary burden on the defendant to establish a "particular exceptional quality".

The claimants identified that the appeal concerned the exercise of a case management power. As such, this involved a generous ambit of discretion. That discretion was unfettered, save only that it must be exercised in accordance with the overriding objective under *CPR 1.1*. There was no presumption either way.

The judge must have regard to all the circumstances of the case before him. The claimants contended that the judge correctly exercised his discretion having regard to the facts of this case and the evidence in the bundle before him. They suggested that the judge clearly assessed the cogency of the evidence and made a merits-based assessment, reaching a decision he was entitled to reach in the exercise of his discretion.

Allowing the appeal, a High Court judge held that, on the face of it, the judgment below did contain an error of law in relation to the test to be applied when exercising the discretion under *CPR 44PD 12.4(c)*. The judge concluded that:

"...there is nothing ... which suggests that there is any particular exceptional quality about this particular case that should cause me to give further directions and set aside further court time to allow this particular isolated issue of fundamental dishonesty to be ventilated."

The relevant sub-section did not require exceptionality. This might be contrasted with sub-section (b) which applied where proceedings had been settled rather than discontinued, where it is expressly provided that the court would not order that issues arising out of an allegation that the claim was fundamentally dishonest be determined "save in exceptional circumstances".

The distinction highlighted that "exceptional circumstances" were not required for directions to be given under sub-section (c). However, this appeared to be the basis upon which the judge exercised his discretion.

The correct approach was to regard the discretion under *CPR 44PD 12.4(c)* as an unfettered one, requiring the weighing of all relevant considerations in accordance with the overriding objective.

The appellate judge did not agree with the suggestion put forward by the defendant that the test for determining whether to grant a defendant's application under *CPR 44PD 12.4(c)* should be analogous to the test for an application for summary judgment under *CPR 24.2*. The suggestion that a claimant would have to show that there was no real prospect of the allegation of fundamentally dishonesty succeeding and/or show compelling reasons why the allegation should not be pursued just did not fit with the wording of the Practice Direction.

There was no presumption that the court should generally direct determination of the issues of fundamental dishonesty nor was there any presumption that the court should generally not make such a direction. In other words, giving such a direction should be seen to be neither routine nor exceptional.

The provision has been introduced expressly to allow issues of fundamental dishonesty to be determined after discontinuance. Inevitably, this involved the allocation of further court resources to a case in which the claim was no longer being pursued. It would not be uncommon for such cases to involve relatively modest costs. However, in considering proportionality, it did need to be recognised that there was a public interest in identifying false claims and in claimants who pursued such claims being required to meet the costs of the litigation.

Each case would depend on its own facts. This was an area in which judges sitting at first instance must be afforded a wide margin of appreciation. Provided that the judge had weighed the relevant considerations, an appeal court would not interfere merely because it might have arrived at the opposite conclusion. Appeals against discretionary decisions as to whether it was appropriate for issues relating to fundamental dishonesty to be determined were not to be encouraged.

However, in this instance, the judge had applied the wrong test.

'...it was the defendant's case that the second claimant was not in the vehicle when the accident happened. This was a serious allegation...'

The second claimant was 13 years old at the time of the accident. He would shortly be 16. The first claimant was his mother. The accident happened in a car park. It involved a minor collision. Both claimants claimed to have suffered modest whiplash injuries. Medical reports were served. Those medical reports were unremarkable. There did not appear to be anything unusual such as would arouse suspicion within the claimants' case. However, it was the defendant's case that the second claimant was not in the vehicle when the accident happened.

This was a serious allegation since it involved the suggestion that the first claimant had encouraged her young son to bring a false claim and had taken him for a medical examination to support the claim.

The defendant's case was supported by evidence from their insured driver and her husband. Both said that they did not see any passenger. They cited the husband's experience of health and safety matters. He claimed that the first claimant told him she did not have a passenger and that he looked into the car when only a few feet away with a clear view of the front passenger seat and that there was no one there.

The second claimant gave some detail as to why he was in the car and where he was going. He described the insured and her husband. The first claimant denied that either witness asked if anyone was in the car. She also denied that either of them approached or looked inside the car. She added that had they had a clear view into the car they would have seen the second claimant clearly "because he had big, curly hair at the time".

The defendant's evidence certainly raised a triable issue. This was a case that would simply have turned on the trial judge's assessment of each side's evidence once he had heard all the witnesses. There was scope for cross-examination of the defendant's witnesses. The choice for the judge would be between finding that the defendant's witnesses were mistaken or finding that the first claimant

had deliberately set out to assist her son to make a false claim even after telling the insured's husband that she had no passengers and had taken him for a medical examination for that purpose. The defendant's case was not to be viewed as being particularly strong, but it was nevertheless based upon evidence that was capable of being accepted.

Two factors that weighed heavily in the balance were the very late stage at which the claim was discontinued and the complete absence of an explanation from the claimants. The claim was discontinued the day before trial. The defendant would therefore have incurred the costs of defending right through to preparation for trial. The defence was filed in January 2017, so the claimants had known what was being alleged for over a year.

They had maintained their claim until the last moment. In addition to the expense and inconvenience caused to the defendant, court resources had been allocated for trial. The defendant's witnesses were prepared to attend trial and did in fact attend court on 14 February 2018.

Coupled with the lateness of discontinuance was the fact that no explanation was provided to the defendant or the court. There might be many reasons why a claimant would discontinue. However, where liability was not disputed save for the allegation of fundamental dishonesty and where the matter was close to trial, some explanation could reasonably be expected.

The second claimant was still a minor. He might be caused distress if unfounded allegations that he was lying were put to him. This was something to be put in the balance, but it was not sufficient to outweigh the factors pointing towards allowing the defendant to litigate the fundamental dishonesty issue.

The defendant had incurred costs in defending this claim to trial and had done so because it believed that a false claim had been made. The defendant sought to enforce recovery of its costs by disapplying the QOCS regime. On balance, it was reasonable for the defendant to be given the opportunity to put forward its evidence and to test the claimants' evidence on the issue of fundamental dishonesty.

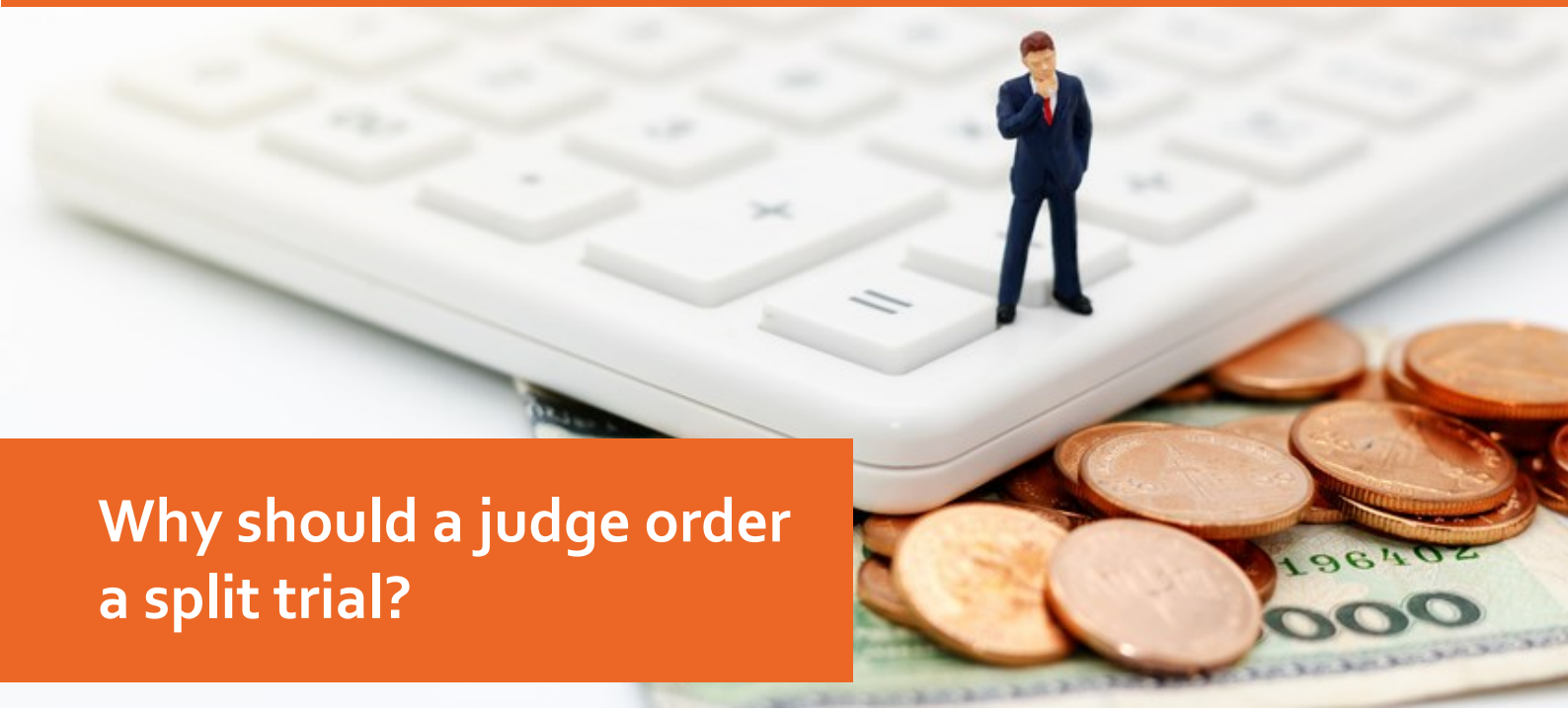
The issues relating to fundamental dishonesty should be determined at a further hearing.

The claimants were represented by Mark Reynolds Solicitors

The defendant was represented by Crawford Company Legal Services Limited

Comment

While the issue of fundamental dishonesty has yet to be determined in this case, it serves as an example of what defendants must do if a Notice of Discontinuance is served but, on the face of it, the claimant will have QOCS protection. If fundamental dishonesty is suspected the defendant must take steps to keep the claim alive and have that issue determined, with a view to overturning QOCS.



Why should a judge order a split trial?

Howard and others v Chelsea Yacht and Boat Company Limited and another (2018) EWHC 1118 (Ch) related to the case management of a commercial dispute but of general interest is the Master's consideration of an application for a split trial.

'It was clear from the authorities that he should take a cautious approach to deciding whether to order a trial of a preliminary issue'

The Master noted that the Court of Appeal had warned on several occasions of the risks of delay and increased costs resulting from trials of preliminary issues, particularly in complex cases. It was clear from the authorities that he should take a cautious approach to deciding whether to order a trial of a preliminary issue. These included:

i) Only issues which were decisive or potentially decisive should be identified;

ii) The questions should usually be questions of law;

iii) They should be decided on the basis of a schedule of agreed or assumed facts;

iv) They should be triable without significant delay making full allowance for the implications of a possible appeal.

In addition, there was also the guidance of *Briggs J in Lexi Holdings Plc (2009)*:

"questions of case management, questions of cost, delay and the use of the parties' and the court's resources must come first and foremost in the consideration whether any particular issue should be dealt with as a preliminary issue."

In this case the factors which the Master identified as militating against the trial of a preliminary issue weighed more strongly than those favouring it: particularly, the risks of delay (when the entire claim could be tried in early 2019) and of a significant increase in costs resulting from splitting the trial. For those reasons, he was not willing to order a preliminary trial of the Issue.

Comment

There is nothing in this judgment that is likely to impact on requests for liability to be tried as a preliminary issue in higher value personal injury cases. Disposing of the issue of liability meets the test in (i) above and also has the potential to save considerably in costs if a finding in favour of the defendant avoids the need for quantum to be addressed in any detail.

Contempt of Court

In Insight 80 we reported the case of *Calderdale and Huddersfield NHS Foundation Trust v Atwal* in which the claimant was found guilty of contempt of court for fraudulently exaggerating his claim for personal injury.

Sentencing has now taken place and the claimant has received a three-month custodial sentence, expressly intended to act as a warning to others. A substantial order for costs was also made, although the judge expressed doubt that the claimant would ever pay any of the costs awarded against him.