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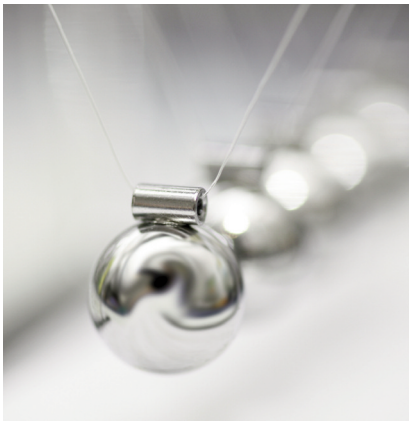

Weekly Update

A summary of recent developments in insurance, reinsurance and litigation law

29/11

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This Week's Caselaw

Thornhill & Ors v Nationwide Metal Recycling

Effect of failure to comply with the Practice Direction on Pre-Action Conduct

http://www.bailii.org/ew/cases/EWCA/Civ/2011/919.html

The claimants brought a nuisance action against the defendants over the level of noise emanating from the defendant's scrap metal yard. The judge at first instance found there had been an actionable nuisance (now ceased) and awarded damages to the claimants. He also awarded the claimants their costs of the action. The defendants have appealed against that ruling. They argued that because the claimants had expressly refused to engage with the Pre-Action Conduct Practice Direction (which came into force in April 2009), costs should have been awarded in their favour.

The Court of Appeal recognised that the Practice Direction applies to all parties to any prospective litigation and their solicitors and that the claimants had failed to comply with the Practice Direction in several ways, including a failure to engage in discussion and a failure to provide information about their expert's findings, when requested to do so. Furthermore, it was held that the fact that the claimants were seeking an injunction did not provide any excuse (para 4.3(3) of the PD deals with cases in which urgent relief is sought). By engaging at an earlier stage, each side would have had a clearer idea of the strength of each other's cases.

Nevertheless, the defendants were denied the relief which they sought. The claimants had been penalised in costs when they had been ordered to pay most of the defendant's costs of the application for the injunction. By that time, the shortcomings of the claimants' pre-action conduct had been put right.

Here is a link to the PD on Pre-Action Conduct: http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_pre-action_conduct.htm

Austin & Ors v Miller Argent

Group Litigation Orders and the need to demonstrate adequate funding

http://www.bailii.org/ew/cases/EWCA/Civ/2011/928.html

At first instance, the judge refused to make a Group Litigation Order ("GLO") in relation to a proposed group action. (A GLO is an order which permits a number of claims which give rise to common or related issues (of fact or law) to be managed collectively). The claimants appealed that decision. One of the reasons given by the judge was that it was not clear that the claimants had funding in place (either to cover their own costs or to meet any adverse costs order). It subsequently transpired that ATE insurance could not be obtained by the claimants. Nevertheless, they argued that the judge should not have been deflected from granting a GLO by funding considerations (and an alternative source of funding was suggested by the claimants).

That argument was rejected by the Court of Appeal. It was held that, at the date of the hearing, it was not clear that a sufficient number of claimants seriously intended to proceed with the action. Only two claimants had BTE insurance (with a limit of £50,000) and "far more than two claimants are necessary to constitute a viable group action".

COMMENT: PD 19B lists the information which must be provided in support of an application for a GLO. The provision of details relating to the funding of the claimants is not listed in the Practice Direction. However, it does require the provision of the "number of parties likely to be involved" and this Court of Appeal decision makes it clear that the question of funding will have a direct impact on that issue (and hence the likelihood of a GLO being made).

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Microsoft v Datel Design & Ors:

Costs of abortive application for pre-action disclosure

http://www.lawtel.com/UK/Document.ashx?AC0129502ChD.pdf

The (subsequent) claimant in an action had applied for pre-action disclosure of certain documents. That application had become unnecessary following developments in proceedings overseas. The respondent/defendant therefore sought his costs of that application. CPR r48.1 provides that the general rule is that an applicant for pre-action disclosure will ordinarily be ordered to pay the costs of an application, even if the application is successful. However, the court can make a different order, having regard to all the circumstances. In this case, the defendant argued that the normal rule should apply because the claimant's own actions had rendered the application otiose. Arnold J accepted that the starting point was that the defendants should recover their costs. However, he declined to make such an order.

He held that the fairest order in this case would be to reserve costs to the conclusion of a trial. Most significantly, in this case proceedings had, in the event already been commenced. The judge observed that if he were to order the claimant to pay the defendant's costs now and the claimant were to later win at trial, those costs would have to be paid back to the claimant. An order for costs in the case would therefore achieve the same result. However, Arnold J did stress that he had not heard full argument on this point.

Grimes v Hawkins & Anor:

Whether private pool owner owed duty of care to visitor - of possible interest to liability insurers

http://www.bailii.org/ew/cases/EWHC/QB/2011/2004.html

The claimant was seriously injured after diving into a swimming pool at the home of the defendant (where she was an invited guest). She claimed that he was in breach of his duty to her under the Occupiers Liability Act 1957 to take reasonable steps to ensure that she was reasonably safe in using the premises for the purposes for which she was invited or permitted by the defendant to be there. Thirlwall J rejected an argument that, although the defendant was permitted to use the pool, she was not permitted to dive.

The defendant relied on the House of Lords decision in *Tomlinson v Congleton BC* [2003] which related to the 1984 Occupiers Liability Act. In that case, Lord Hoffmann had placed particular weight on the importance of the exercise of free will and held that it will be rare to impose a duty on an occupier of land to prevent people from taking risks which are inherent in the activities which they freely choose to undertake on the land. The judge rejected an argument that that case was only authority for trespassing situations. Here, the defendant was not required to adopt a "paternalistic" approach to his visitors, who were all adults exercising their free will: "I do not accept that it is incumbent on a householder with a private swimming pool to prohibit adults from diving into an ordinary pool whose dimensions and contours can clearly be seen. It may well be different where there is some hidden or unexpected hazard but there was none here".

Nor had there been a breach of the duty of care at common law: "it would not be fair just or reasonable to impose upon the defendant a duty of care to the claimant which required him to put his pool out of bounds at night, or to prohibit adults from diving into the pool".

Further information

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