

WINDS OF CHANGE

by Ashley Tucker

16th November 2005

1. It's never too late to ask... except when it is

In principle:

- * No witness is allowed to give evidence without a witness statement having been previously provided;
- * Witness statements are the subject of specific directions for their exchange.
- * Nevertheless what the witness statement contains may not be all that the witness wishes to say or ends up saying when the witness gives evidence.

What should happen then if the opposition cross examine on matters that have not been foreshadowed or adequately foreshadowed in their pleadings, disclosure or witness statements or in cross examination the opposition's witness originates something that was not foreshadowed?

Choudhury v Ahmed [2005] EWCA Civ 1102:

- * three Claimants in Choudhury, only one of them gave evidence;
- * C's were D's landlords of business premises and sued him for unpaid rent which he said he had paid;
- * C who gave evidence was cross examined on amongst other matters certain cheques which had been referred to in a schedule produced by D's accountant;

- * D had said the cheques had been paid in relation to certain third parties and were to be set off against the outstanding rent;
- * C's were saying (through the one Claimant who was giving evidence) that the cheques arose out of a need they had when they had temporarily been unable to process credit card payments at their own business premises and had prevailed on D to do so for them;
- * In the course of cross examination it was suggested to C giving evidence that certain of the cheques were paid directly to one C not giving evidence and they related to gambling transactions of his;
- * It was not until after D had given evidence that permission was sought by the C's to adduce the oral evidence of C to whom D alleged that payment had been made, although that C had been present in Court throughout;
- * C's Counsel informed the Judge that he would be limiting himself to just four questions;
- * The trial Judge refused to give permission, too late, too late! But otherwise appeared minded to have granted such an application had it been made earlier in the day.

The single Judge reviewing the paper application for permission was comfortably persuaded that permission ought to have been given.

The Court of Appeal *deduced* that the failure to call the second C was a deliberate decision of the C's despite the accountant's statement and the production at trial of six of the cheques.

The Court of Appeal *deduced* after what is called the “short adjournment” in the judgment of Clarke LJ that following the cross examination of the first C a deliberate decision had been taken not to call the second C.

The Court of Appeal concluded that the Judge knew how the case was being put to the C’s, had been present at the trial throughout and could properly conclude that the responses to four questions would not make any difference to the outcome.

The perceived tactical decisions of the C’s justified the refusal. To belt and brace matters, the trial turned on the credibility of the witnesses.

2. What happens when an impecunious Claimant is afforded access to justice by a third party funder?

You require some expert accountancy assistance in order to run a claim where you will sue a raft of shipping companies for infringing Articles 81 and 82 of the Treaty of Rome. Your client is skint but that doesn’t matter as you have advice from Counsel that your client has a very strong case. So you enter into a CFA and so does Counsel and so does professional funder who will finance the accountancy evidence side of things. Unfortunately just as your client is bereft of hard currency so he is bereft of hard facts and the litigation is what the Court of Appeal describes as a “disastrous piece of litigation”.

Fortunately you are immune from D’s and Part 20 D’s pursuing you for costs, as is Counsel, but the professional funder is not and pursued he is.

Arkin v (1)Borchard Lines Ltd (2) Camomile Lines Plc (3) Furness Withy (Shipping) Ltd (4) Zim Israel Navigation Co Ltd (5) Deutsche Nah-Ost Lniien GmbH & Co KG (6)

KNSM-Kroonbergh BV and (11th Part 20 Defendant) Managers & Processors of Claims

Ltd [2005] 1 WLR 3055:

- * MPC had funded their end of the litigation to the tune upwards of £1.3 million;

- * The various D's had shelled out something approaching £6 million, and now they would like their money back.

Colman J declined to make an order for costs against MPC...

Lord Phillips of Worth Matravers MR and Brooke and Dyson LJJ begged to differ...

MPC were to instruct, engage and pay for one or more expert forensic accountant from Ernst & Young; MPC would also provide various services ancillary to the accountancy exercise; they were to get 25% of damages recovered of up to £5 million and 23% thereafter + any costs relating to witnesses in relation to quantum that were recovered from the D's; only if the expert's report suggested damages would be inadequate to cover their costs could they withdraw; he didn't, so they couldn't.

“Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings... shall be in the discretion of the court... The court shall have full power to determine by whom and to what extent costs are to be paid.” (Section 51(1) and (3) Supreme Court Act 1981).

- * The general rule is: the unsuccessful party pays the costs of the successful party;

- * The court will deviate from this course where (in broad terms) a successful party through unreasonable conduct has caused unnecessary costs to be incurred;

- * If a non-party is wholly or partly responsible for litigation taking place, justice may demand that he indemnify the successful party for the costs that have been incurred.

Hamilton v Al Fayed (No 2) [2002] 3 AER 641 (CA) two principles: it is desirable that the funded party have access to justice; it is desirable that the successful party should recover its costs.

- * Given the latter principle, it was deemed unjust that a funder should escape all liability for the costs of a successful opposing party;
- * Given the former principle, it would be impractical if a funder should be potentially liable for the entirety of the other side's costs in the event of failure.

Court of Appeal's conclusion: a professional funder financing part of a C's costs should be potentially liable for the costs of the opposition to the extent of the funding provided. In principle this could apply to a funder of all or a large part of C's costs rather than just a discrete part.

The above does not apply to a champertous arrangement; engage in that practice and you will still be apt to find yourself on the receiving end of the usual costs order.

Don't forget: you may not be simply retaining the funder but advising the funder as to risk

3. When is a failure to pay into Court as good as paying into Court?

CPR Part r.36.1(2) *Nothing in this Part prevents a party making an offer to settle in whatever way he chooses, but if that offer is not made in accordance with this Part, it will only have the consequences specified in this Part if the court so orders*

CPR Part r.44.3(4)(c) *In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including... any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36)*

How is the court to exercise its' discretion?

Trustees of Stokes Pension Fund v Western Power Distribution (South West) plc [2005]

3 AER 775 (CA):

If the following are satisfied:

- * The offer must be expressed in clear terms so that there is no doubt as to what is being offered;
- * It should state whether it relates to the whole of the claim or to part of it or to an issue that arises in it, and if so which part or issue;
- * Whether it takes into account any counterclaim;
- * If it is not expressed to be inclusive of interest, giving interest details equivalent to Part r.36.22;

- * The offer should be open for acceptance for at least 21 days and otherwise accord with the substance of a Calderbank offer;
- * The offer should be genuine and not be a sham or non-serious in some way;
- * **The Defendant should clearly have been good for the money at the time the offer was made**

Then an offer that is not followed by a payment in will usually be treated as having the same effect as a payment into court.

If none of the conditions are satisfied, then it is likely that a court will conclude that the Defendant is afforded no protection.

If some of the conditions are satisfied then the offer should be given less weight than a payment into court.

4. May I recover Pre-Action Protocol costs of issues C did not pursue following issue?

You receive a typical scattergun pre-action protocol letter alleging all kinds of mayhem on the part of your client. At considerable time and expense to your client you respond to these allegations and find when the claim is served that several of them are not being pursued. Your client is considerably out of pocket, can he recover those costs?

McGlenn v Waltham Contractors Ltd [2005] 3 AER 1126:

Barring unreasonable conduct it is the view of Judge Coulson QC of the QBD TCC that:

- * costs incurred by D pre-action in successfully persuading C to abandon a claim were not costs “incidental” to proceedings where in those proceedings the claim or claims did not feature at all;

- * Claims made at the time of the P-AP but deliberately excluded from proceedings bore no relation to the subject of the litigation;

- * More generally it would be against the purpose of the P-AP if routinely parties were able to recover costs of claims that were not pursued.

It is not easy to see though how unreasonable conduct in raising an issue or some other exceptional circumstance could become “incidental” to subsequent proceedings if the issue concerned was not pursued and bore no relation to the issues that were pursued following issue

5. ...just when you thought it was safe to pursue consumer credit as a practice...

The Consumer Credit Bill is from 8th November 2005 back in the House of Lords. 75 pages long and every one a winner... and no it does not repeal the Consumer Credit Act 1974, but amends it... and Lord Sainsbury of Turville states that the Bill is human rights compatible!

6. In case you missed the news...

The Conditional Fee Agreements (Revocation) Regulations 2005 SI 2005/2305

The Conditional Fee Agreements Regulations 2000 SI 2000/692, The Collective Conditional Fee agreements Regulations 2000 SI 2000/2988, The Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 SI 2003/1240 and the Conditional Fee Agreements (Miscellaneous Amendments) (No 2) Regulations 2003 SI 2003/3344 are revoked from 1st November 2005!

Naturally they continue to have effect in relation to CFAs and CCFAs entered into prior to that date, but...

From 1st November 2005, parties may enter into CFAs and CCFAs based on the primary legislation.

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