



Welcome to the Spring 2010 edition of the College Chambers' newsletter. In this publication you can expect to find articles covering a wide range of legal issues all of which we are able to further advise upon should you wish. We hope you will find the content both topical and of interest.

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MESOTHELIOMA HIDDEN KILLER CONTINUES TO TROUBLE THE LAW

There is currently a series of radio advertisements aimed at tradesmen who may encounter asbestos dust - the "hidden killer" as it is rightly called. Asbestos dust was first identified as unhealthy for human beings well over a hundred years ago, but the years 1931 (when the Asbestos Industry Regulations were passed into law) and 1945 (when the Circular Letter from H.M. Inspector of Factories was published) are generally recognised as being the key dates when the law recognised the damage this material caused to workers' health.

The law has now moved on to deal with the even more insidious implications of the invariably fatal condition of mesothelioma. This is an aggressive form of cancer strongly associated with exposure to asbestos fibre but with a very long period of latency. The problem for claimants in these cases lies in proving which of several potential defendants is responsible for the condition. The proximate cause of the condition is the mutation of cells in the lung, but this can be caused by exposure to very low levels of fibre: Indeed it used to be thought that a single fibre could be enough.

Since many occupations give rise to a small increase in environmental exposure, it is difficult for an employee to prove that **this** period of employment and **this** employer caused the condition. A man who has worked in the docks, the railways and the building trade during his working life is going to find it nearly impossible to show which (if any) of his employers directly caused his condition.

For this reason, the House of Lords in the landmark decision of *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 created an exception to the general "but for" rule of legal causation, so that it was sufficient if the claimant could show that the tortious exposure had made a "material contribution" to the risk of developing the disease. In the very recent case of *Willmore v Knowsley MBC* [2009] EWCA 211 (19 November 2009) an attempt was made to cut this principle down, with the argument that it was necessary for the Claimant to show that the defendant had at least doubled the risk of her exposure to asbestos over and above that which is prevalent in the environment anyway. The attempt was resisted by the Court of Appeal, who held that since the trial judge had identified likely exposure from two specific sources in the Claimant's workplace, that was enough to establish that there had been a significant and material increase in the risk, in that there had been "more than minimal" exposure, because there is no "safe" dose of asbestos. The case nevertheless demonstrates that claimants will have to be wary of identifying likely causes of asbestos if they are to establish their claims, and defendants will want to be on the lookout to ensure that they have done so. A claimant who merely says that he "must have" been exposed to asbestos by a particular employer is not likely to succeed in the claim.

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INTERVENER'S COSTINGS

Ever since the decision in *Tebbutt v Haynes* [1981] 2 All ER 238, it has been recognised as convenient that a third person who asserts a beneficial interest in property subject to an application for ancillary relief should either be permitted as an intervener, or ordered as a further respondent.

The general rule, under the **Family Proceedings Rules**, that there be no order for costs in ancillary relief, does not apply to the issue of costs involving parties who intervened in order to establish a beneficial interest in the marital home, as such are only in connection with ancillary relief and not for the purposes of ancillary relief.

Further, where intervention is under the general auspices of the **Matrimonial Causes Act 1973**, the **Civil Procedure Rules** do not apply by virtue of the fact that the **Civil Procedure Rules** do not apply to “family” proceedings. Thus, the

general rule that the unsuccessful party will be ordered to pay the costs of the successful party, will not apply.

The recent case of *Baker v Rowe* (2009) EWCA Civ 1162 considered this area further and concluded that the judge making the costs order has a wide “clean sheet” discretion, but also stated that the court could not properly ignore the fact that one side had won and the other had lost; and will often properly count as the decisive factor in the exercise of the judge’s discretion.

So how does this help the practitioner in advising as to litigation risk? Well, the answer seems to be overtly hidden within the *Baker* case: To ensure an Intervener has the highest chance of being awarded costs upon success, then they should issue a separate application under **Trusts of Land and Appointment of Trustees Act 1996** which will be heard with the



ancillary relief case, at which point the **Civil Procedure Rules** will then apply...

Simply join interested parties in ancillary relief then face the risk of the absolute discretion of the Judge!

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EXAGGERATING CLIENT: BEWARE!

In the case of *Widlake v BAA Limited* [2009] EWCA Civ 1256, the Court of Appeal considered an appeal arising out of a costs order in a personal injury claim brought by Miss. Widlake after falling down 12 or 13 steps of a staircase after losing her footing. Liability was not in dispute, and the Claimant contended that her PSLA award was justified at £11,000, and special damages of £23,906.40p. The Defendant, however, argued that the appropriate compensation for PSLA was £3,250, and special damages at £2,022.38p.

The Claimant was covertly filmed and seen acting normally as if she had no pain or disability and in evidence, the judge was neither impressed with the Claimant as a witness. He assessed the quantum of damages for PSLA at £3,500 and £2,022.38p was awarded for her loss of earnings (eventually conceded by the Claimant). Notwithstanding the award exceeded the Defendant’s Part 36 offer / payment into court of £4,500 (no counter proposals or attempt to negotiate made by the Claimant) the trial judge ordered the Claimant to pay the Defendant’s costs. The Claimant appealed.

With the provisions of CPR, Part 36 in mind, **CPR r44.3** sets out the circumstances to be taken into account when the court is exercising its discretion as to costs. The court must have regard to all the circumstances including conduct, success (even on part of the case), and

any payment into court or admissible offer to settle. Conduct includes conduct before and during the proceedings, whether it was reasonable to raise, pursue or contest a particular allegation or issue, the manner in which it was done and relevant for this case. Amongst the orders the courts can make are that a party pays only a proportion of the other’s costs, a stated amount of those costs, costs from or until a certain date or costs relating to particular steps or distinct parts of the proceedings: **CPR r44.3(6)**. In *Ul-Haq v Shah* (2009) EWCA Civ 542, Smith LJ was satisfied that there is no general rule of law that the dishonest exaggeration of a genuine claim would result in the dismissal of the whole claim. However, the exaggerating Claimant may find a sting in the tail when it comes to the question of costs. In *Painting v Oxford University* (2005) EWCA Civ 161, Kay LJ held: “...to contest and lose an issue of exaggeration without ever having made a counter-proposal is a matter of some significance in this kind of litigation but it must not be assumed beating a Part 36 payment is conclusive. It is a factor and will often be conclusive but one has to have regard to all the circumstances of the case.”

For Miss. Widlake, whilst she was successful in establishing a claim for damages and she had beaten the Defendant’s payment into court, bearing in mind the issue of conduct as provided under **CPR r44.3**, the spotlight was

certainly upon her. The trial judge found that there was gross exaggeration in her case. This was conduct which the Court could take into account in disapplying the general rule that costs follow the event. Given the judge’s finding of dishonesty, it was held appropriate that costs should be used as a punitive sanction against her. Ward LJ also had some words of warning: “...*There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the conduct is. The claimant’s dishonesty must be penalised. The claimant’s failure to negotiate a claim which was clearly capable of being settled must also be recognised.*”

When I balance those factors, and attempt to do justice to both parties and to be fair to them, I conclude that the right order in this case is that there be no order for costs.”

Every case will depend upon its own facts but it is clear from this case that exaggerated or partially dishonest claims will be visited in costs. They may well result in no order as to costs. Defendants should do more to protect themselves against such claims by making effective Part 36 offers. As a Claimant or a Defendant, negotiate and preferably, make appropriate Part 36 offers.

Carol Davies

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RECOVERY OF CONTRACTUAL COSTS IN RESIDENTIAL POSSESSION PROCEEDINGS

In light of the recent ruling in *Forcelux v Binnie* [2009] EWCA Civ 1077, it is worth looking at the mechanism for costs recovery in residential possession proceedings.

Under CPR Part 55 the amount of costs recoverable in undefended actions are ordinarily limited to fixed costs per r45.2A (commencement) and r45.4A (judgment). These fixed costs allow for very limited recovery and in cases with a single defendant amount to no more than £126.75 for issue of the claim and an order for possession.

Landlords can recover greater costs if the tenancy agreement contains an appropriate clause specifying that the tenants agree to indemnify the landlords in respect of all actions, claims and liabilities. These costs are payable pursuant to contract. 'Contractually agreed costs' represent an exception to the fixed cost regime and are dealt with under r48.3 allowing the Court to assess contractually agreed costs either summarily or through the detailed procedure and will be allowed if reasonably incurred and reasonable in amount.

There had been some debate about whether the rules on contractually agreed costs applied to residential possession proceedings that would otherwise be subject to fixed costs. This issue was resolved by the Court of Appeal in *Church Commissioners for England v Ibrahim* [1997] 03 EG 136 where Roch LJ said:-

"The successful litigant's contractual rights to recover the costs of any proceedings to enforce his primary contractual rights is a highly relevant factor when it comes to making a costs order. He is not, in my view to be deprived of his contractual rights to costs where he has claimed them unless there is good reason to do so... The fact that this was a straightforward possession action was not such a reason".

Ibrahim established that recovery of contractually agreed costs should be the rule rather than the exception. The Court of Appeal further said that the landlord is entitled to costs on an indemnity basis if this is what was agreed with the tenant.

Forcelux, a defended possession claim not subject to fixed costs provisions determined that landlords who unsuccessfully pursued appeals against failed possession orders were not indemnified for full costs regardless of any contractually agreed position. This was partly due to the indemnity clause not being pleaded until after final judgment and, partly due to *Forcelux's* conduct in pursuing possession after *Binnie* had demonstrated an ability to pay arrears.

The principles established in *Ibrahim* in indemnifying contractual costs is still good law but to be of benefit a purposeful approach at every stage of tenant engagement is required. This involves:-

- (a) Including an express provision within the tenancy agreement providing for indemnity costs;
- (b) Referring to the right to costs pursuant to contract in any letters warning the tenant about breaches of the agreement, although not essential this shows that the landlord is giving fair notice of the tenant's legal obligations from an early stage;
- (c) Double-checking the reasonableness (and costs consequences) of continuing litigation as the case unfolds;
- (d) Specifically pleading costs pursuant to contract in the Particulars of Claim and the prayer at the end;
- (e) Taking a copy of *Ibrahim* to Court and asking for contractually agreed costs.

Jason Nickless & Jason Hughes, Pupil

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UNPAID WORK FOR BREACH OF A CONTACT ORDER

Until 8 December 2008, the only sanctions which could be imposed upon a recalcitrant resident parent for breach of a contact order were (a) a fine or imprisonment (suspended or immediate) for contempt of court, or (b) transfer of residence to the other parent. These are blunt tools which practitioners have found the courts reluctant to use.

On that date, the new sections 11I to 11N of the Children Act 1989, inserted by the Children and Adoption Act 2006, s1 came into force. This article concerns itself with the court's new power to order a party in breach to carry out unpaid work. Anecdotal evidence suggests that few unpaid work orders have so far been made. There are a few points for practitioners to note:-

- (a) The provisions do not apply to shared residence orders – from an enforcement point of view one may therefore be better off with a contact order instead.
- (b) If the new enforcement regime is to apply, the order must be expressed in the mandatory form of s8(1) (e.g. 'A shall make the child x available for contact with B'). If this feels heavy-handed, there is probably nothing in principle to stop one from setting out the order in non-enforceable declaratory terms (e.g. 'there shall be contact between x and B'). The more common alternative is to set out an agreed regime within the recital and the 'no order' principle otherwise applies.
- (c) There can be no enforcement without a warning notice (which should be attached by the court automatically under s11I, but do check) and the person said to be in breach has been given a copy of or otherwise notified of the consequences of breach: s11K. Consider personal service if in doubt.
- (d) The court may only make an enforcement order if satisfied that there has been a failure to comply with the contact order and may not make an enforcement order if the resident parent can show a reasonable excuse: s11J. This may require a fact-finding hearing.
- (e) The court needs to consider whether an enforcement order is a proportionate remedy: s11L.
- (f) The court must (i) ensure that there is local provision for unpaid work in the relevant geographical area: s11L(2); and (ii) have information about the person in breach and the likely effect of an enforcement order upon him: s11L(3)-(4). The court may request CAFCASS to provide it with this information and CAFCASS has a duty to respond: s11L(5)&(6).
- (g) The number of hours of unpaid work must be between 40 and 200 and should be completed within 12 months (Schedule A1) subject to later revocation or amendment.
- (h) The welfare of the child must be taken into account: s11L(7).

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Agency

Boundary Disputes

Building Disputes

Clinical Negligence

Commercial Law

Company Law

Consumer Credit

Contractual Disputes

Costs

Criminal Law

Detailed Assessments

Employment Law

Environmental Law

Family Law

Housing Law

Immigration & Asylum

Inheritance & Probate

Insolvency

Intellectual Property

Landlord and Tenant

Land Law & Real Property

Licensing

Mental Health Law

Mediation

Partnership

Personal Injury & Death

Planning Law

Professional Negligence

Sale and Supply of Goods

Social Security Disputes

Trust

CARRY ON ASSESSING...

"A serious case that raised serious issues" was the comment of Family Law Magazine in its December 2009 issue [2009 FL1129], discussing the judgment of the Court of Appeal in *Re L* [2009] EWCA Civ 1008. The case is of great importance to all family lawyers because it deals with some fundamental principles which should inform any court's approach to care proceedings. The facts were that a six-month old baby had suffered severe injuries which were in the words of Wall LJ, "paradigmatic of abuse." There were a number of people potentially in the frame as perpetrators including both parents and some of the grandparents. In addition, there were criminal proceedings as yet unresolved in which the father was alleged to have been the perpetrator and the mother was charged with cruelty and neglect on the basis that she knew what the father was doing and failed to report him to the authorities. The circuit judge held a fact finding hearing at which she concluded that she could not rule out either parent as abuser (both denying culpability) and that there had been a "global family failure to protect the child" by all the parents and grandparents and, in consequence, he would have to be adopted outside the family. In the meantime, a local authority parenting assessment on the mother reported that she was committed to any work necessary to regain her child. This assessment had been undertaken largely prior to the fact finding judgment, but the judgment was not discussed with the mother before the report was filed. The mother naturally applied for a risk assessment on herself to be carried out by a well known and reputable organisation: Summarily refused by the circuit judge on the ground that the terms of the fact finding

finding judgment were so clear as not to permit any further delay. She directed the local authority to file a care plan and its placement application and set the case down for a final hearing to take place the week before the criminal case was due to begin. The Court of Appeal had no difficulty in reversing that order and directing a risk assessment. Further, the Court ruled that the requirement for judicial continuity was over-ridden by the appearance of unfairness to the mother and directed that a different judge should take the final hearing. It also vacated the fixture and directed that the final hearing should follow the criminal trial and not precede it.

The reader is invited to read the commentary in Family Law Magazine, which includes a full discussion of the case. However, the judgment itself is of huge importance because it sets out once again the frame work against which care cases are decided. It seems now that in most, if not all, cases an assessment is needed after the fact find so that parents can be shown and if necessary confronted with the findings in that judgment. In addition, where there are interlinked care and criminal proceedings, thought should be given in every case to how the two should proceed, and whether a fact find is necessary at all where, as here, the medical evidence was not disputed.

As Counsel for the mother throughout, I was conscious that important principles were at stake and was glad that the Court of Appeal took the opportunity to give general guidance on the law and the practice. In the meantime the message seems to be "carry on assessing...!"

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WE WELCOME YOUR COMMENTS...

- Would you like us to give a lecture on a particular subject at your firm?
- Do you have any friends or colleagues you think should receive our newsletter?
- Are our records of your details correct?

NEWS FROM THE CLERKS' ROOM



(Wayne Effeny - Senior Clerk)

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College Chambers launches new website! After a complete make-over, Chambers are proud to introduce its all new and updated website, which can be found at its usual address: www.college-chambers.co.uk.

Further, due to our expanding workload we are pleased to welcome Sarah-Jane Etheridge

to Chambers, of which some of you may have dealt with by now. Sarah will be joining the team of clerks assisting in both the clerking and the marketing of Chambers.

On a more serious note, College Chambers understands the pressures that solicitors are facing with family fee changes and continue to be fully committed to representing both legal aid and private clients.

If you have any queries on any aspect of work undertaken by us, or in relation to the new fee changes, please feel free to contact the clerks on either (023)80 230338 or clerks@college-chambers.co.uk