RPC

General liability newsletter

August 2019

ADVISORY | DISPUTES | REGULATORY | TRANSACTIONS

“The new rate might well result in an increase in the amounts of damages awards, and therefore the cost of some insurance premiums.”

Introduction

Our newsletter this month has a procedural emphasis and comments on recent cases involving admissions, errors, fraudulent claims, late Defences, legal costs and a reminder that the success of a claim depends upon adequate evidence being presented to the trial judge.

A key development since our last bulletin, however, is the publication of the outcome of the discount rate review.

Discount rate review

The Lord Chancellor has announced that with effect from 5 August 2019, the personal injury discount rate will be amended from -0.75% to -0.25%.

The rate reflects the return that a claimant receiving a lump sum for future losses is predicted to receive when investing that sum. The lower the rate, the poorer the anticipated rate of return.

After being set at 2.5% for many years, in March 2017 the rate was reduced to -0.75%. Government consultations that followed led to the Civil Liability Act 2018, which prescribed a methodology for calculating the rate based on a presumed portfolio of investments based on low, but not very low, risk. The Act also set in train a further consultation process, and this has culminated in the latest rate set.

Prior to the announcement, there was widespread speculation that the rate would be set at somewhere between 0% and 1%. This was based in part on a MOJ statement in November 2017 to that effect.

However, after considering advice from the Government Actuary’s Department (the GAD), the Lord Chancellor has concluded that a negative rate is appropriate. The advice looked at what it considered to be the likely annual return on investment from a low risk portfolio, which was concluded to be 2% above Consumer Prices Index inflation. Then, a deduction of 0.75% was made to reflect the anticipated cost of investment advice and management, and tax. A further deduction of 1% was made to acknowledge the impact of inflation on certain aspects of future loss, in particular the cost of care. The GAD advised that the rate should be set at 0.25%, but indicated that a rate at that level would result in a 50/50 risk of claimants being under or over compensated.

The Lord Chancellor considered that setting the rate at that level ran too high a risk of under-compensating claimants. He suggested that a further adjustment to 0% or -0.5% would be needed to reduce this risk, and decided upon the mid-point figure, -0.25%.

Insurers have criticised the decision, highlighting in particular the assumption that claimants and their representatives will invest their damages in poor performing investments. For some time insurers have been pricing their products and reserving in response to the MOJ statement of November 2017. The new rate might well result in an increase in the amounts of damages awards, and therefore the cost of some insurance premiums.

Under the terms of the Civil Liability Act 2018, the rate will be reviewed again in five years time.

A Defence filed late may be relied upon provided the Court has not yet entered judgment

There was an important High Court decision on 18 July 2019 which, although likely to proceed to the Court of Appeal, sets out the current law in relation to the late filing of an Acknowledgement of Service or a Defence in relation to an application for default judgment.

In *Clements Smith v Berrymans Lace Mawer Service Company and another* (18 July 2019) the Defendant had filed a Defence after the Claimant had applied for judgment in default, but before the Court had entered judgment. The procedural situation was complicated by an application for an extension of time to serve a Defence before the application for judgment had been made.

Master McCloud decided that CPR 12.3 permitted the Court to enter judgment in default of a Defence being filed only in circumstances where no Defence had been filed at Court, regardless that the Defence had been filed after the time allowed to do so. In this case the Defence had been filed before the date the Court considered whether to enter judgement.

On the basis of this decision, the Court had not been entitled to enter judgment because a Defence had been filed. The Claimant has been given permission to appeal the decision to the Court of Appeal.

All claims started in EL/PL Portal treated as Fast Track and subject to fixed costs unless ordered otherwise

In claims commenced under the Protocol for low injury claims with a value of up to £25,000, the Civil Procedure Rules (CPR) prescribe formulas for fixed legal costs to which a successful Claimant is entitled upon settlement of the claim. CPR 45.29J states that the Court will consider a claim for legal costs higher than the prescribed fixed legal costs if there are exceptional circumstances that make an award of higher costs appropriate.

In *Mercel Hislop v Laura Perde* (23 July 2018) [2018] EWCA Civ 1726 the Court of Appeal decided that exceptional circumstances have to be truly exceptional rather than, for example, merely "not straightforward", and indicated that the Court would apply a high threshold to anyone arguing that the circumstances of the case were exceptional.

The Court has not yet given a definitive decision on what circumstances are exceptional enough to persuade the Court to allow more than fixed costs to be claimed, but a recent case has provided some clarification about what is not exceptional.

In *Ferri v Gill* (17 April 2019 QBD) the High Court decided that exceptionality had to be assessed by comparing the case in question with other cases that had exited the Portal process. These could include other cases which had settled either before or after issue of proceedings and were not restricted to claims where the sum claimed did not exceed £25,000. For example, the Court of Appeal decided in *Qader v Esure Services Limited* (2016) that fixed costs could apply to a claim which settled at £42,000.

In *Ferri v Gill* the self-employed Claimant's loss of earnings claim was not straightforward. The Claimant needed shoulder surgery, and the Claimant changed solicitors during the course of his claim. Although the court did not have to decide whether these factors made the claim exceptional in this case, such factors commonly occur in many claims which have exited the Portal process but remain within the fixed costs regime. The question of whether all the circumstances of the case were enough to make the claim exceptional was referred down to the lower Court for determination, but with a direction that the test the Claimant had to meet was a high one.

The fundamental message here is that the Court will not readily disapply fixed costs and persuading the Court to do so will require persuasive evidence.

Discontinuing a dishonest claim does not avoid the risk of contempt proceedings

David Romaine (aged 69) brought a claim for Noise Induced Hearing Loss allegedly arising from exposure to noise whilst working for two employers between 1965 and 1985.

He told his medico-legal expert that he had not had any noisy hobbies. However, his medical records suggested that he had been a professional singer and a motorcyclist. In Part 18 Replies, he said he had never been a professional singer and that the medical record referring to this was an error. He said he did not perform with a live band and had played an acoustic guitar only occasionally since he was 19 years old. His witness statement repeated this evidence and said that he did not participate in or attend motorsport events.

An intelligence report revealed that the Mr Romaine had ridden motorcycles; had an interest in fast motorcycles, fast cars and guitars; rehearsed regularly and was the lead singer and guitarist in a live rock-and-roll band which performed at pubs, clubs and larger events. The report was supported by images from the band's website.

Upon being served with this evidence Mr Romaine served a Notice of Discontinuance.

Zurich Insurance, the Insurer of one of the Defendants, then issued and served an application for committal proceedings, contending that Mr Romaine was guilty of Contempt of Court pursuant to CPR 81.17(1)(a) (making a false statement in a document verified by a statement of truth) contrary to CPR 32.14.

Mr Romaine opposed the application.

At first instance the judge refused to allow the application to proceed, on the basis that Mr Romaine's statements of truth in his Part 18 replies and witness statement had not been signed by him (they had been signed electronically and he said that he had no knowledge of these documents); he had not been warned that bringing a claim based upon false statements could lead to committal proceedings; the evidence of contempt was not strong enough bearing in mind the need for great caution in such matters; and it was not in the public interest to bring committal proceedings where the claim had been discontinued at a relatively early stage. Zurich Insurance appealed this decision.

On 17 May 2019 the Court of Appeal in *Zurich Insurance Plc v David Romaine* overturned the original decision and allowed the committal application to proceed. The Appeal Court said that the alleged lack of warning was irrelevant; that the judge had failed to take account of the damage to the justice system by the use of early discontinuance by those who engaged in bringing false claims; and that the judge was wrong to conclude that the proposed committal proceedings would not be proportionate.

The Court of Appeal emphasised that the message needs to go out to those who might be tempted to bring or lend their names to fraudulent claims, that dishonest Claimants cannot avoid being liable to committal proceedings merely by discontinuing their original fraudulent claim.

Overriding objective does not require a party to notify an opponent of procedural errors

In *Woodward & another v Phoenix Healthcare Distribution Limited* the Claimant's solicitors attempted to serve the Claim Form on the Defendant's solicitors two days before expiry of the time allowed for serving a claim which had been issued just one day before the limitation period had expired, nearly four months earlier. The Defendant's solicitors realised that service was ineffective because they had not confirmed to the Claimant's solicitors that they were authorised to accept service. They advised their client accordingly, and were instructed not to alert the Claimant's solicitors about this procedural error until the day after the time allowed for service of the claim had expired.

Having been so notified, the Claimant's solicitors then took immediate action to serve the Claim Form personally the same day, so that the Claim Form was served the day after the time allowed for service. The Claimant's solicitors then applied for an order that the steps taken earlier had been good service; alternatively that service be dispensed with because of the earlier

steps; alternatively that the court should validate the purported later service by granting an appropriate extension of time.

At first instance the Master hearing the application decided that there had not been valid service; that the Defendant was not estopped from denying there had been service; and that the Defendant was not under a duty to notify the Claimant's solicitors that they and made a mistake. However, he retrospectively declared that the first purported service was valid. His reasoning was that a good reason for validating service was that the Defendant's solicitors were under a duty to help the Court to further the overriding objective (enabling the Court to deal with cases justly and at proportionate cost) and that the delay in notifying the Claimant's solicitors of their error amounted to deliberately playing a technical game.

The Defendant appealed this decision and the judge hearing the Appeal reversed the Master's decision, set aside the Claim Form and dismissed the action. The Claimants appealed to the Court of Appeal.

The Court of Appeal upheld the judge's decision and reiterated that the overriding objective did not oblige a party to notify an opponent of errors, and that not alerting such errors to an opponent was not game playing.

Applications to withdraw admissions

In previous bulletins we have explained the profound difficulty of persuading the Court to allow an admission of fact or liability to be withdrawn, whilst acknowledging that this is possible if the Court decides that the interests of justice justify it. Three recent cases demonstrate this approach and give greater clarity about the factors the Court is likely to take into account.

In *Wharfside Regeneration (Ipswich) v Laing O'Rourke and others* (10 October 2018) the Technology and Construction division of the High Court allowed the Defendant to withdraw an admission and serve an amended Defence.

Before the claim was issued the Claimant alleged that cladding on several blocks of flats was defective and needed to be replaced. The Defendant maintained that the alleged defects required repair only. Because the Defendant's estimate for the cost of repair was similar to the Claimant's estimate for replacement, the Defendant abandoned its argument for repair and served a Defence conceding that replacement was more suitable. The Claimant then served a revised schedule claiming that the replacement cost had risen from about £3m to £9m.

The Court allowed the Defendant to withdraw its admission and serve a revised Defence, on the basis that the issue of whether the cladding could be repaired in compliance with the Regulations and at the much lower cost alleged by the Defendant was a matter for the trial judge. The judge hearing the Defendant's application decided that there would be substantial prejudice to the Defendant (of about £6m) if it were not permitted to amend its Defence. Furthermore, because the parties had failed to reach agreement for settlement at mediation when they had not been far apart on quantum, allowing the amendment would not make settlement any less likely.

> Crucially in this case, the Court decided that the Defendant's admission had been entirely sensible, given that at the time of the admission there was not much difference between the cost of replacing or repairing the cladding. The admission had narrowed the issues, but the circumstances had been changed by the substantially increased claim for replacement.

In contrast, in *Royal Automobile Club Limited v Wright* (26 March 2019) the High Court refused to allow the RAC to withdraw its admission of liability made before proceedings had been issued.

The Claimant was an employee of the RAC and had sustained injury in June 2015 when she fell down stairs which did not have a bannister. The RAC contended that the claim had a value of less than £25,000 and the Claimant's solicitors maintained it had a higher value. In September 2016 the RAC admitted liability and made several interim payments. In August 2017 the Claimant served a schedule of loss claiming about £1m. The RAC asked the Claimant to agree to allow it to withdraw the admission. The Claimant refused and issued proceedings, relying upon the admission.

The RAC applied to the Court for permission to withdraw the admission, the substantially increased sum amounting to a change of circumstance justifying withdrawal. The Master hearing the application refused permission on the basis that the Claimant would succeed at trial. The RAC appealed the decision.

The Appeal judge upheld the Master's decision. Whilst the judge thought that the Master had not needed to conclude that the Claimant was bound to succeed in her claim, he had been obliged to consider the parties' prospects of success and had addressed all the matters prescribed in the Civil Procedure Rules. The judge thought that the RAC, having been provided with medical evidence before it had admitted liability, could not have reasonably thought that the claim had a modest value. The application to withdraw the admission so long after the admission meant that investigation into the accident circumstances was more difficult. This, together with the interim payments, prejudiced the Claimant. The judge thought this demonstrated a cavalier attitude to the administration of justice. Although the RAC would clearly be prejudiced if it was held to its admission, because of the claim's high value, the nature of the claim had anyway indicated that the claim would be substantial.

In *Newham London Borough Council v Arboleda-Quiceno* (31 July 2019) the High Court has allowed the Defendant Borough Council to withdraw its admission of liability, even though the Council should have been aware of the potentially high value of the claim.

The Claimant alleges that his knee was injured in 2015 as a result of a defect in the astroturf at the Defendant's recreation grounds. When the Claim was initially notified, the Claimant said the value of the claim would be more than £50,000. The Defendant's Insurer investigated the claim and entered into correspondence with the Claimant, in which liability was admitted. When proceedings were issued in 2018 the Claimant's schedule of loss claimed more than £3m.

The Defendant applied to withdraw the admission. It now denies liability on the basis that the accident did not happen as claimed, and that the claim is fundamentally dishonest. Both parties provided witness statements from people who had been at the recreation grounds on the day of the injury. The Defendant maintains that the Claimant's injury happened when he jumped and just landed awkwardly, and that he had also been on a different pitch to the one with the alleged defect.

The High Court Master hearing the application considered the evidence in the documents and written witness statements submitted by both parties and refused permission, largely on the basis that the character and value of the claim had not fundamentally changed since the pre-action letter; that the Claimant would be prejudiced by the admission being withdrawn; and that allowing the claim to be defended was contrary to the interest of the administration of justice.

The Master thought that although the Defendant's defence of fundamental dishonesty has a realistic prospect of success, the evidence supporting it is weak and inconsistent.

The Defendant Appealed the Master's decision to a High Court judge, who has allowed the Appeal and permitted the Defendant to defend the claim. Whilst the judge agreed that the character and value of the claim has not fundamentally changed, he said that once the Master decided that the defence of fundamental dishonesty had a realistic prospect of success, the Master should not then have engaged in a mini trial by assessing the strength of the evidence by looking at the documentary evidence alone without being able to hear from witnesses.

Having found a realistic prospect of success for the defence, the Master should not have considered this any further. Whilst this was one of three factors the Master considered had equal weight, the judge thought that the Master would have reached the same conclusion without the error, and that this error obviated the decision.

The judge considered that there was no specific evidence from the Claimant that he would be prejudiced as a result of withdrawing the admission; he had a witness statement already from someone he was playing with, and had said that his wife and others had been present. There was no indication that they could not give evidence regarding which pitch had been used.

> Regarding the good administration of justice, the judge considered it would be an affront if the Claimant was compensated in circumstances where there was doubt over the reliability of his account of the accident circumstances. The need for admissions to be adhered to did not stand in the way of withdrawal in this case.

Evidence of alleged defect in the road must be supported by reliable evidence

In *Miranda Walsh v The Council of the Borough of Kirklees* (5 March 2019), the High Court upheld the decision of the County Court dismissing the Claimant's claim against a highway authority. The Claimant alleged that she had fallen when the wheel of her bicycle fell into a hole on a roundabout. Both the trial judge and the Appeal judge decided that the photographic evidence submitted by the Claimant was not reliable enough to allow the Court to determine whether the alleged defect in the road presented a real source of danger.

The trial judge had held that the photographs taken on behalf of the Claimant were virtually meaningless when assessing the level danger involved. The Defendant disputed the accuracy of the measurements of the hole shown in the Claimant's photographs and produced evidence that the width of the hole was less than the width of the tyre of the Claimant's bicycle. The Defendant also produced evidence that its inspections of the defect in the road were reported as being not dangerous or in need of repair.

This case demonstrates that a Claimant must prove the alleged dimensions of a road defect through reliable evidence of its length, width and depth. The reliability of the measurements shown in the Claimant's photographs in this case were successfully challenged by the Defendant, such that the Claimant was unable to prove that the road defect amounted to a source of danger to road users.

Contact

If you would like any assistance please contact any of those listed below or your usual RPC contact.

Nick McMahon
Head of Health and Safety
+44 20 3060 6896
nick.mcmahon@rpc.co.uk

Gavin Reese
Partner
+44 20 3060 6895
gavin.reese@rpc.co.uk

Robert John
Senior Associate
+44 20 3060 6944
robert.john@rpc.co.uk

Jonathan Drake
Senior Associate
+44 20 3060 6718
jonathan.drake@rpc.co.uk

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol.

"... the client-centred modern City legal services business."

At RPC we put our clients and our people at the heart of what we do:

- **Best Legal Adviser status every year since 2009**
- **Best Legal Employer status every year since 2009**
- **Shortlisted for Law Firm of the Year for two consecutive years**
- **Top 30 Most Innovative Law Firms in Europe**

We have won a number of industry awards, including:

- **Overall Best Legal Adviser – Legal Week Best Legal Adviser 2016-17**
- **Law Firm of the Year – The British Legal Awards 2015**
- **Competition and Regulatory Team of the Year – The British Legal Awards 2015**
- **Law Firm of the Year – The Lawyer Awards 2014**
- **Law Firm of the Year – Halsbury Legal Awards 2014**
- **Commercial Team of the Year – The British Legal Awards 2014**
- **Competition Team of the Year – Legal Business Awards 2014**

Areas of expertise

- **Advertising & Marketing**
- **Alternative Dispute Resolution**
- **Commercial Contracts**
- **Commercial Litigation**
- **Competition**
- **Corporate Crime & Investigations**
- **Corporate**
- **Data & Technology**
- **Employment & Pensions**
- **Financial Markets Litigation**
- **Health, Safety & Environmental**
- **Insurance & Reinsurance**
- **Intellectual Property**
- **International Arbitration**
- **Private Equity & Finance**
- **Product Liability & Regulation**
- **Real Estate**
- **Regulatory**
- **Restructuring & Insolvency**
- **Tax**
- **Trusts, Wealth & Private Client**

19275