General liability update

October 2017

Case Law update

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Any comments or queries?

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Case Law update

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The previous 2.5% discount rate was set in 2001. Under the new proposals, future rate reviews will occur on a more regular and formalised basis. The intention is that regular reviews will safeguard the principle that claimants should receive 100% compensation whilst avoiding undesirable tactical behaviour by litigants. It is proposed that rate reviews will take place every three years, but with the precise timing remaining at the discretion of the Lord Chancellor.

The Government intends making the rate-setting process more transparent and guided by expertise rather than (as had been some peoples' perception) political considerations. The rate will still be set by the Lord Chancellor, however, following input from an expert panel comprising the Government Actuary, an independent actuary, investment manager, economist and individual with "experience in consumer investment affairs".

Historically, the Government considered claimants to be zero-risk, or very low-risk investors. In line with the view of the largest group of respondents to the Government's consultation, the discount rate will be based upon the assumption that claimants are merely low risk investors.

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Admissions – the interests of justice will prevail over all else

The decision whether or not to admit certain facts or even liability in response to a claim is always an important one.

Part 14 of the Civil Procedure Rules allows a party to withdraw an admission, subject to obtaining permission from the Court. Developments in case law this year show that the Practice Direction to Part 14 and previous case law will not alone determine the court's decision. The court will only permit admissions to be withdrawn if it is in the interests of justice to do so.

CPR *Practice Direction (PD) 14* provides that, in deciding whether to allow withdrawal, the court will have regard to all the circumstances, including whether new evidence has come to light, the parties' conduct, the prejudice that may be caused to either party if the application is allowed or refused and the stage of the proceedings. In *Woodland v Stopford* the Court of Appeal provided guidance on the court's power under *CPR 14*. In particular, at paragraph 26, Lord Justice Ward said that CPR 14 confers a wide discretion on the court to allow withdrawal; that the factors in the Practice Direction are not listed in order of importance; and that the weight to be given to the relevant factors will vary from case to case.

Should a fact be admitted?

A party might want to admit facts in order to limit the issues or to help advance a defence case. However, doing so carries some risk. If there are unexpected developments in the case that make the admission no longer desirable, the party which made the admission is more likely to be held to it than not.

In *Bayerische Landesbank Anstalt Des Offentlichen Rechts v Constantin Medien AG*, one of the civil claims arising from the alleged bribe paid by Bernie Ecclestone to Dr Gribowdky at Beyerische Landesbank in connection with the sale of its interest in Formula 1 in 2006, the High Court, rejecting an application for permission to withdraw an admission of a fact, considered the factors to be taken into account.

The judge said that the adequacy of the explanation as to why a fact had been admitted, the fullness of the explanation as to why it was necessary to withdraw the admission and the prejudice to the opponent's position are merely factors to be considered in each case. The decision one way or the other will be determined by the overriding interests of justice.

The judge also identified the difference between withdrawal of an alleged fact and withdrawal of an admission of an alleged fact, on the basis that a party that alleges a fact is concerned not only with whether the fact is true but also whether the fact can be proved; whereas a party admitting an alleged fact is concerned only with whether the fact is true and not whether it can be proved.

This means that a party who alleges a fact and then discovers that it cannot be proved may readily obtain the court's permission to withdraw the allegation at any time, usually on terms that the opponent's costs incurred in dealing with the withdrawn allegation are paid.

Each case will be determined on its individual merits. However, to stand any real chance, it is probably necessary to prove not only that the admitted fact is not true, but also that any prejudice to the opponent is outweighed by the interests of justice. In effect, that allowing the admission to stand will result in an injustice.

It therefore follows that facts should not be admitted unless it is certain they are true or inconsequential. The economics of litigation, particularly claims commenced in the EL/PL Portal, might lead to a decision to admit facts that the claimant is thought likely to prove. However, usually not all relevant evidence is available at both pre-action and pleadings stage. Where there is uncertainty, the better option is to make no admission and to require the claimant to prove the alleged facts.

By coincidence, on the same day that the court gave its judgment in Constantin Median, a Master in the Queen's Bench division in *Mack v Clarke* allowed a defendant to serve a revised defence withdrawing a partial admission on causation in an injury claim. The apparently crucial distinction from the Constantin Median decision was that the admission did not admit causation in its entirety. The Master decided that such a partial admission did not fall to be considered under CPR14 because although the wording of CPR14.1 referred to "the whole or any part of another party's case", the reference to "any part of another party's case" was a reference to a

distinct whole element such as breach of duty, causation (in its entirety) or a head of loss, and that CPR 14 was primarily directed towards the sort of admissions that entitled a Claimant to enter judgment. In this case the partial admission could not have led to any such entitlement and had anyway not been clear and unequivocal.

Don't admit liability unless you really mean it.
Whilst admitted facts are likely to be difficult to be put back in issue, getting the court to agree to reverse an admission of liability is even harder.

In *Cavell v Transport for London* an admission of liability subject to causation was held to have been an admission of liability. In that case the claims handler provided no explanation as to why liability had been admitted and the judge decided it would not be in the interests of justice to allow the admission to be withdrawn when there was no evidence that the decision had not been properly made.

In *Clark v Braintree Clinical Services Ltd* the defendant's admission of liability subject to the claimant subsequently proving certain facts was held to be an admission of liability from which the court's permission was needed to withdraw. In deciding to refuse permission to withdraw the admission, the court considered the expert evidence to establish whether the defendant was seriously disputing liability; the lateness of the application to withdraw the admission; the prejudice to the claimant; and the effect of allowing the application on the court timetable. In all the circumstances, the court decided that it was not in the interests of the good administration of justice to allow the admission to be withdrawn.

Whist obtaining permission to withdraw an admission of liability is difficult, it is nevertheless possible if the court decides that the interests of justice justify it. In *Blake v Croasdale and another* the claimant suffered brain damage when a passenger in a car accident. The defendant's insurer initially thought it was dealing with a low value claim which was issued in the Claims Portal with a likely value of less than £25,000. In response to the Claim Notification Form, the insurer admitted primary liability whilst alleging contributory negligence and expressing the view that the claim was not suitable for the Portal. After seeing initial medical reports the insurer offered £100,000. When proceedings were eventually issued, the claimant's provisional schedule claimed between £3m and £5m, which might increase. The defence pleaded an *ex turpi* defence on the basis that the claimant's injury was caused by his own criminal act as he was engaged on a criminal enterprise as a drug dealer.

The court decided that the *ex turpi* defence being presented did not trump the admission. However, in considering the defendant's application to withdraw the admission, the judge considered all the circumstances of the case as set out in Practice Direction 14 and decided that it was in the interests of justice to allow the admission of liability to be withdrawn. The judge decided that the insurer had initially thought it was dealing with a low value claim and decided to admit liability rather than run the *ex turpi* defence on the basis of proportionality. He thought that was a sensible approach and did not want to discourage defendants from acting proportionately. He also thought that the defence had a realistic prospect of success, and allowed the admission to be withdrawn.

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Defendant's failure to disclose crucial documents pre-action penalised in costs when claim discontinues

Another example of how the interests of justice influence the decision of the Court is *Nicole Chapman v Tameside Hospital NHS Foundation Trust*.

The claimant alleged that she had slipped and fallen while visiting the defendant NHS Trust's A & E department. In response to the claimant's Letter of Claim, the NHS Litigation Authority denied liability and said it had no documents to disclose. However, after proceedings were served the defendant disclosed a number of documents, leading to the claimant agreeing to discontinue her claim. Under such circumstances, the claimant will usually be ordered to pay the defendant's costs, but the claimant argued that if the defendant had disclosed the relevant documents as required under the pre-action Protocol, she would probably not have issued proceedings and would not have incurred costs.

The Judge agreed with the claimant, stating that under the Pre-action Protocol the defendant was under a duty to set out its case and in particular was obliged to provide documents in its possession which were material to the issues and likely to be ordered to be disclosed by the court. The fact that the Defendant had said in response to the Letter of Claim that it had no documents was proved to be false by the subsequent document disclosure, and the judge was satisfied that if the documentation had been disclosed sooner, the claim would not have gone any further.

The judge thought that the defendant's conduct was precisely the type that CPR rule 44.2 was designed to address ("If the court decides to make an order about costs the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order") and that the fixed costs regime did not alter this. In assessing the appropriate sum to award the claimant, the judge reasoned that under the fixed costs regime the claimant would have incurred base costs of £950 (the fixed costs allowed if the claim had settled before proceedings were issued) prior to issuing proceedings and had incurred fixed costs of £3,790 at the time of the discontinuance. The appropriate sum to award the claimant was therefore the difference between these two figures, plus VAT and disbursements.

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