SUBSTANTIVE AND CPR UPDATE

Recent Decisions: Liability and quantum

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Coventry v Lawrence (No 2)

[2014] UKSC 46, [2014] UKSC 13

- Fenland – 850 yards from speedway circuit
- Had gained planning permission
- C claimed noise nuisance – injunctive relief
- Succeeded at first instance + 60% of costs

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Coventry v Lawrence (No 2)

- High Court: [2011] EWHC 360 (QB) (won)
- Court of Appeal: [2012] EWCA Civ 26 (lost)
- Supreme court – restored first instance – leading case on nuisance
- But case then takes an unexpected turn…

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Coventry v Lawrence (No 2)

- C's base costs £398,000
- C's success fee £319,000
- C's ATE £350,000
- Total £1,067,000 – 60% = £640,000
- [C's house worth £300,000…]

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Coventry v Lawrence (No 2)

- Liability for £640,000 “very disturbing” … “highly regrettable” …
- Woolf reforms: aim included proportionality between costs and benefits of litigation – target missed…
- L argued that level of costs breached Art 6 HRA 1998

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Coventry v Lawrence (No 2)

- “open to the Court to consider breach Art 6”
- “the respondents may be right in their contention…”
- Possible that Court may declare CLSA 1990 as amended by Pt II AJA 1999 Act incompatible with Art 6
- But must adjourn to allow SoS Justice and AG to make representations.

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Coventry v Lawrence (No 2)

- Fall out?
- Some costs lawyers not advocating the non-payment of success fees and ATE pending resolution of C v L
- Possibility that payers of ATE and success fees will pursue the government for recovery

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Wagenaar v Weekend Travel Ltd

[2014] EWCA Civ 1105

- *C sues Travel company*
- *Travel company P20's ski instructor*
- *Both claims dismissed*
- *QUOCS issues arose…*
- *The first CA decision in this area*

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Wagenaar v Weekend Travel Ltd

(1) Were QUOCS provisions ultra vires?

- No
- Detailed consideration of SCA 1981

(2) Was is appropriate to make QUOCS provisions retrospective?

- Yes
- Secondary legislation

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Wagenaar v Weekend Travel Ltd

(3) Did D's junior counsel's (pre-commencement) CFA cause QUOCS not to apply?

- No
- CPR 44.13-17

(4) Does QUOCS apply between D and P20D?

- C could not have sued P20D direct…
- No

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Wagenaar v Weekend Travel Ltd

D would have been better off if both claims had succeeded…

Scenarios:

(1)You inherit a case where C executed a pre-commencement CFA elsewhere…

(2)You act for a claimant had have the choice of pursuing multiple defendants…

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Akhtar v Boland

[2014] EWCA Civ 872

C claims in bent metal claim

- Hire £5,280
- Recovery £300
- Storage £712
- Test £50
- Misc £50
- Total £6,392

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Akhtar v Boland

D: Admits:

- Hire £1860 (£3420)
- Recovery £150 (£120)
- Storage £486 (£226)
- Test £nil
- Misc £nil
- Total £2516 (£3866)

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Akhtar v Boland

…and submits “amount in dispute is less than £5,000”

DJ enters judgment on admissions and allocates claim to small claims track

CJ dismisses appeal but grant permission to appeal to CA. Orders C to pay D’s costs of appeal

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Akhtar v Boland

- Argument centred on nature of “admission”
- Was defence equivocal?

CA:

- Admissions were clear
- DJ right to enter judgment
- Allocation to SCT appropriate
- But post allocation to SCT D could not recover its costs of appeal

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Akhtar v Boland

Note:

- Admission must be clear not equivocal
- D cannot “go behind” effect of admission when arguing over balance:

- EG:
  - Enforceability arguments
  - Need for hire

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Akhtar v Boland

Note:

Open to D to:

(a) Reduce amount in dispute of non-PI cases to < £10,000

(b) (b) Reduce amount in dispute of PI cases to (for PI element) <£1000 and overall to < £10,000

But most content with portal?

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Matthew Porter-Bryant, Guildhall Chambers

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Billett v MoD [2014] EWHC 3060 (QBD)

Billett v Ministry of Defence [2014] EWHC 3060

29 y.o.

Non-Freezing Cold Injury

Would have left Army anyway

Works as HGV Driver

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Billett v MoD

Ongoing problems:

Err...(£17,500 GDs)

- OK in cab;
- No extra heating;
- Fishing and clay pigeon shooting;
- *"Will have to avoid jobs that require him to work outside* [in the cold] *and therefore will be more limited in terms of his choices"*

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Billett v MoD

£21,442 p.a.

Cl: Disabled – Reduction Factors Tb A and B =10.41 £223,211

“Or if you are not with me...

3 year *Smith*

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Billett v MoD

Is he disabled?:

Recap:

What does ‘disabled’ mean?

* Para 35 Explanatory Notes Ogden 7

- illness or disability 1yr+;
- Equality Act 2010 – ‘substantially limits’ day to day activities; and
- Affects either kind **or** amount of paid work

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Billett v MoD

Andrew Edis QC:

Disabled BUT

"I find it **hard to conceive** of very many people who could be classified as 'disabled' who are **as fit and able** as is this Claimant."

"**Only just**"

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Billett v MoD

"I have concluded that I should use the multiplier/multiplicand method but that my multiplier will be **substantially reduced**...to reflect the minor nature of the disability."

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Recap – no 2

Conner v Bradman –

51 y.o. male

Knee Injury

From Saab to Taxi driver

No heavy bags/lifting

TKR – 10 years

Que then lose job or retrain?

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Not Disabled 0.82

Disabled 0.49

Awarded 0.655

OR ND +D divided by 2

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So...what did Edis do...?

"**hard to conceive** of very many people who could be classified as 'disabled"

"**Only just**"

"multiplier will be **substantially reduced**"

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A complex actuarial calculation

Not Disabled – 0.92

Disabled – 0.54

Awarded – 0.73

OR

ND + D divided by 2...

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That's great, but what does all this mean?

- Definition of Disability – A low threshold?

- Guidance Notes para 32:

  "...it may be appropriate to argue for higher or lower adjustments in particular cases...a framework for a range of possible figures...the minimum being the case where there is no realistic prospect of post-injury employment,"

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Dr Victoria Wass – Labour Economist

JPIL – 2008 2/154

2013 1/36 – “Ask the Expert”

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Questions and Answers

Q. Can we compare the proposed multiplier with other states and conditions?

A. Yes. It can be a useful check as to whether what the Defendant is proposing has a realistic feel.

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Q. *Will the judge simply look at the disabled/non-disabled spectrum and pick a figure?*

A. Almost certainly. But an argument raised is whether the disabled discount should stick, with factors like age/employment status/educational attainment 'altered' for comparison purposes.

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Q. So will a judge do that?

A. No.

...but Ogden 8 might suggest it.

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Q. So do you think a judge will simply pick the multiplier by using your clever little formula of (ND+D)/2?

A. I'm sure they will say otherwise, but by happy coincidence that seems to be what is happening in the vast majority of cases.

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Q. Do I need to instruct someone who is really good with statistics and what have you?

A. Yes. I have an A level in Mathematics (Pure and Statistics).

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Q. No, I mean an economist, statistician or actuary?

A. It is said that this is the only true way of arriving at a proper multiplier.

Good luck with your application for permission.

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Daniel Neill, Guildhall Chambers

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Denton, Decadent, Utilise (CA)

3-stage approach to r.3.9:

1. Seriousness or significance of relevant failure (but not considering other, unrelated failures: see stage 3); if neither serious nor significant then relief usually granted

2. Reason for failure (see examples at para. 41 of *Mitchell*)

3. All circumstances, particular weight given to 3.9(1) (a) and (b) (circumstances incl. promptness of application, other breaches of rules, PDS or orders, etc.)

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Denton, Decadent, Utilise (CA)

‘The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it.’

‘Where there is a good reason for a serious or significant breach, relief is likely to be granted.’

‘Where the breach is not serious or significant, relief is also likely to be granted.’

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Denton, Decadent, Utilise (CA)

Analysis

‘serious’ seems to require consideration of breach in and of itself

‘significant’ seems to require consideration of consequences of breach

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Caliendo and Barnaby Holdings (HC)

C claim in professional negligence against M

C entered into ATE policy and CFAs

C three-and-a-half months late in notifying M of funding arrangements (seven days prescribed by CPR)

C applied for relief

Court granted relief

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Caliendo and Barnaby Holdings (HC)

First assessment was seriousness or significance of breach, not consequences to M of granting of relief

Earlier notification would not have altered M's position as regards any potential settlement

Default was serious in the sense that it occurred in respect of a rule for which a sanction was imposed in the event of breach

But the default had not had a serious or significant adverse effect on the efficient conduct and progress of the litigation

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Caliendo and Barnaby Holdings (HC)

Analysis

Useful approach to question of ‘serious’: whether sanction imposed by CPR in event of breach

But court then wrapped up ‘serious’ and ‘significant’ (effect on M and on conduct of litigation) rather than considering ‘serious’ in terms of breach in and of itself and ‘significant’ in terms of consequences

Query whether flawed to find default serious in and of itself but to grant relief in absence of serious of significant adverse effect

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Altomart v Salford Estates (CA)

Landlord and tenant proceedings

Winding up petition presented by S against X

X paid sum due and applied for petition to be stayed or dismissed

Judge stayed petition

S appealed decision

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Altomart v Salford Estates (CA)

X filed respondent's notice over a month late and with request for extension of time under 3.1(2)(a)

Court granted application

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Altomart v Salford Estates (CA)

Most rules, PDS and orders did not provide specific sanction for breach so leaving it at court's discretion

3.9 did not apply to such cases (having regard to 3.8)

Courts had recognized existence of implied sanctions capable of engaging 3.9 (*Sayers v Clarke Walker*)

Application for extension of time to file respondent's notice involved implied sanction and so analogous to application under 3.9 and so to be decided by same principles

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Altomart v Salford Estates (CA)

Substantial delay in issuing respondent's notice, but appeal unlikely to be heard for some months and no undue prejudice caused

Delay was considerable but not likely to affect proceedings and so not a serious or significant breach

Therefore relief granted with costs consequences

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Altomart v Salford Estates (CA)

Analysis

Court wrapped up ‘serious’ and ‘significant’ (effect on S and on conduct of litigation) rather than considering ‘serious’ in terms of breach in and of itself and ‘significant’ in terms of consequences (as in *Caliendo*)

Query whether flawed to find default serious in and of itself but to grant relief due to absence of serious or significant adverse effect

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Hockley v North Lincolnshire (HC)

H commenced proceedings against N in March 2013 to preserve limitation position

Neither letter of claim nor Particulars served since investigations incomplete

Consent order July 2013 allowing service of Particulars by 17 January 2014

Particulars served 15 January 2014

Acknowledgment of Service filed 13 February 2014, i.e., 13 days late

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Hockley v North Lincolnshire (HC)

Default judgment requested and granted 14 February 2014

Default judgment subsequently set aside: judge held breach not trivial (failure to abide by deadline) and reason not good enough (oversight) but allowed N application due to fairness and justice and because protocol not followed

Appeal allowed: default judgment reinstated, granting of relief overturned

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Hockley v North Lincolnshire (HC)

Denton approach re. relief from sanctions also has profound importance in applications to set aside default judgments under the 'good reason' ground (13.3(1)(b))

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Hockley v North Lincolnshire (HC)

Judge placed undue emphasis on consequence of failure to engage protocol, esp. in light of consent order

N failure to file Acknowledgment of Service in time was serious and due to incompetence

Where defaulter sought to set aside judgment entered due to non-compliance with rule (e.g., failure to file Acknowledgment of Service) court should consider seriousness of default and why it occurred

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Hockley v North Lincolnshire (HC)

Analysis

Court considered ‘serious’ in terms of breach in and of itself and without regard to consequences

Arguably more logical / faithful decision in terms of approach to ‘serious’ and ‘significant’

But CA approach in Altomart might still allow escape from ‘serious’ breach where no significant adverse effect

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Hockley v North Lincolnshire (HC)

Where applying for relief from serious but not significant breach: go to *Altomart*

Where resisting application from serious but not significant breach: go to *Denton* and *Hockley* (but bear in mind latter is strictly decision re. default judgment)

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