

Accountancy Update

August 2009

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Casenotes

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Any comments or queries?

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Lord Justice Moses once spoke of such litigants and advised that *“what is needed is not only understanding but therapy. The courts grapple with the former, but they inevitably fail to provide the latter”*. Thus it will often fall to the other party and their legal representatives to bring order to an otherwise chaotic litigation experience.

Ask any seasoned litigator about their experiences with LIPs and there is a good chance that their response will include a rolling of the eyes, a protracted sigh, an amused smile or a torrent of war stories. Cases involving a LIP have the potential to be memorable for all the wrong reasons.

Of course, many LIPs are very intelligent and reasonable people, who have just chosen to conduct litigation themselves, rather than instruct lawyers to lead them through the process. This article is not concerned with the many reasonable LIPs, but rather the more vexatious breed of LIP.

LIPs are most common in the areas of law traditionally governed by legal aid; family, immigration and low-level civil disputes. Increasingly however, cases involving allegations of professional negligence are being brought by LIPs, a situation that is only likely to worsen in these recessionary times.

Watch your LIP

LIPs can pose a number of difficulties.

First, they are generally not familiar with the court process, which can lead to non-compliance with procedural rules. This can sometimes be used to the professional party's advantage, leading to successful applications for summary judgment, default judgment or strike-out. However, such applications are, in many cases, either not suitable on the facts or are likely to fail on account of the court's reluctance to preclude the LIP from obtaining justice on account of a technicality or without a full hearing.

Secondly, LIPs are often unable to objectively assess the merits of their case. Inevitably, they are often emotionally attached to the claim, and desire to 'have their day in court', and 'to see justice done'. This can hamper the prospects of an early settlement and increase costs.

Thirdly, if the claim is fought and successfully defended at trial, the LIP's financial situation may mean that it is difficult, if not impossible, to enforce any costs order (which may well be substantial) against them.

So what tactics can usefully be employed in the defence of a LIP claim?

Whilst it may be difficult to achieve an early resolution to a LIP-initiated claim in court, other weapons in a lawyer's armoury, in particular a well-timed Part 36 offer, could bring about a commercial



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settlement or, at the very least, put costs protection in place.

The technical implications of a Part 36 offer are complex. Arguments may arise at a later stage that the LIP did not appreciate the cost consequences (so should be spared the resulting order for costs on an indemnity basis), if the offer does not clearly explain the potential consequences of non-acceptance.

Whilst a solicitor acting for the professional party must be careful not to assume a duty of care to the LIP, they do have a duty to act towards them with frankness and good faith (*Thames Trains Limited v Adams*¹). Accordingly, setting out in clear terms the cost implications of a Part 36 offer would be both reasonable and appropriate behaviour.

ADR methods ... would enable the LIP to air his or her grievances

In many cases commercial negotiation, either by exchange of without prejudice correspondence or attendance at a without prejudice meeting or mediation, will not bear fruit in terms of settlement. If it appears that the LIP wants his or her day in court, then alternative dispute resolution methods such as Early Neutral Evaluation, Expert/QC Determination and Med-Arb could be considered. These methods (which all involve an independent third party assessing the merits of the dispute) would enable the LIP to air his or her grievances, either in writing or orally, to the third party and may provide an acceptable alternative to their day in court.

Of course, they are not guaranteed to bring success. Many LIPs can be reluctant to settle even in the face of a negative response from a third party evaluator, and any process that imposes a decision on the LIP could give rise to a challenge under the Human Rights Act.

Know your LIP

Perhaps the single most important step to undertake on being faced by a LIP claim is to research the LIP in question. It may be that he or she has multiple litigations underway. In which case, this background research could be acted upon further down the line by obtaining an extended civil restraint order against the LIP. Clearly such orders are only made in exceptional circumstances but if the LIP does prove to be very difficult (for instance by making multiple applications to the court which are wholly without merit), it is certainly possible for such an order to be obtained, as is clear from the recent case of *Supperstone v (1) Hurst (2) Hurst*².

This will not be an appropriate strategy in many cases. However, it is still worth researching the LIP's background, particularly with a view to evaluating, at an early stage, what the prospects are of successfully enforcing a costs order against them. The costs arising from pyrrhic victories, where a LIP's claim is successfully defended but the court either makes no costs order or the LIP is unable to meet any costs awarded against him or her, can be substantial.

There are very few circumstances in which a court will order a LIP to pay security for costs. Such orders are usually reserved for situations where the LIP resides out of the jurisdiction. Accordingly, unless they are of significant means, there could be very limited possibility of any costs recovery. Often the most valuable approach is to establish what a successful defence is going to cost and then

seek to dispose of the claim for a percentage of that 'worst case costs scenario', by balancing the litigation and costs risk. At the same time, it is also worth engaging in honest dialogue with the LIP about costs (whilst avoiding scaremongering tactics). It may be that advising them that they could face significant costs and the prospect of bankruptcy is sufficient to alter their approach to the claim, thus making settlement a more realistic possibility.

If a LIP is intent on litigation and unable to be drawn into a compromise (commercial or otherwise), then the likelihood is that the litigation could mean money down the drain. In those circumstances, one way of minimising costs is to take a more broad brush approach to the litigation. If appropriate, consideration could be given to seeking a split trial (in an effort to avoid the need for experts on causation and loss at the first stage), disclosure could be provided by category or only one main witness statement could be given (rather than several statements covering similar ground). It may also be useful to set down some ground rules regarding communications with the LIP. It may be that emails would be more productive (and cost effective) than lengthy telephone calls - the content of which could be disputed further down the line.

In summary, there is no easy approach to litigating against a LIP. However, a willingness to use more unusual ADR methods, carefully drafted Part 36 offers, the establishment of a dialogue with the LIP regarding costs and the implications of Part 36 offers and some initial research into the LIP's financial circumstances can all pay dividends further down the line and help to steer a smoother path through these undoubtedly challenging claims.

Footnotes:

- 1 (1) *Thames Trains Limited* (2) *Railtrack Plc (in administration) v Michael Adams* [2006] EWHC 3291 (QB)
- 2 *Antony Peter Supperstone v (1) Robert Alfred Hurst (2) Ann Stephanie Hurst* [2009] EWHC 1271 (Ch)

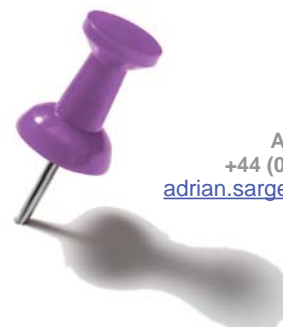
Casenotes

Exclusion clauses must contain 'clear' and 'strong' language to cover a deliberate repudiatory breach of contract

In *Internet Broadcasting Corporation Ltd (NETTV) and NETTV Hedge Funds Ltd v MAR LLC (MARHedge)*¹, the High Court held that an exclusion clause in a contract should not extend to cover a deliberate personal repudiatory breach. The court's decision acts as a useful reminder that exclusion clauses should be drafted clearly and carefully, particularly if they are intended to exclude liability for deliberate and personal repudiatory breaches of contract.

In May 2005, NETTV, a provider of interactive television platforms, and MARHedge, a provider of information and services to hedge funds, entered into a three-year joint venture agreement whereby NETTV agreed to set up and provide an internet channel on which it would broadcast content provided by MARHedge. The agreement contained an exclusion clause which held that neither party would be liable to the other for 'loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage'.

One year into the contract, MARHedge committed a repudiatory breach of contract. NETTV sued for loss of profits, claiming a wrongful repudiatory termination of the contract. MARHedge



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Casenotes continued

accepted that it had wrongfully terminated the contract but argued that the exclusion clause protected it from a loss of profits claim. Both parties agreed that the Unfair Contract Terms Act 1977 did not apply, as the contract was individually negotiated.

The court held that the repudiation of the contract was both 'deliberate' and 'personal', as it was committed by the 'controlling mind' of MARHedge, its President. The judge went on to state that there was a rebuttable presumption that an exclusion clause should not extend to cover deliberate personal repudiatory breaches of contract. To rebut this presumption, the exclusion clause would need to contain 'clear' and 'strong' language to the effect that it was intended to cover such repudiation. In this case, the clause did not expressly state that the parties would be protected from a claim for loss of profits in the case of deliberate personal wrongdoing. Further, such a reading would, in all likelihood, render the clause ineffective, as it would enable either party to deliberately and personally repudiate the contract at any time without any liability for loss of profit. This was in spite of the fact that loss of profit would be the main head of damage arising from a repudiation.

Blocking a non-party's access to a statement of case

*National Policing Improvement Agency v Total Downstream UK PLC*² and others is one of the few reported decisions on CPR 5.4C(4), which allows a non-party to obtain copies of documents on the court file without the court's permission. In this case, a party applied to restrict or block access by a non-party to a statement of case and the High Court ruled that a non-party would not be entitled to obtain a copy of the statement of case.

The application was made during the course of a claim arising from a major incident at the Buncefield Oil Storage Depot in 2005. In order to plead their cases properly, the parties wished to refer to certain confidential matters pertaining to the National Policing Improvements Agency (NPIA) in their statements of case. They would be unable to do so if copies of the statements of case were made available to non-parties, as this would put confidential information into the public domain. Accordingly, one of the parties made an application under CPR 5.4C(4)(a) to block or restrict access by non-parties to the statements of case.

The judge considered that the parties were justified in seeking to keep matters concerning the NPIA confidential. He therefore ordered that non-parties could not obtain copies of the statements of case in the proceedings. However, the judge acknowledged that circumstances could arise in the future (of which the court was not currently aware) whereby disclosure of the statements of case to a non-party would be justifiable. Accordingly, he ordered that any person wishing to apply for a further order to produce a statement of case in these proceedings should make an application to the court and serve that application on the parties.

Footnotes:

- ¹ [2009] EWHC 844 (Ch)
- ² [2009] EWHC 943 (TCC)

Stop Press

APB issues a Bulletin setting out Revised Example Auditor's Reports on Financial Statements

On 24 April the Auditing Practices Board published a Bulletin entitled "Auditor's Reports on Financial Statements in the United Kingdom". The Bulletin aims to provide illustrative examples of unmodified and modified audit reports on financial statements for UK companies. The example reports take into account the new requirements under the Companies Act 2006 and the requirements of ISA (UK and Ireland) 700 (Revised) which was issued in March 2009.

Civil litigation costs review

Lord Justice Jackson has published his preliminary report on civil litigation costs. The report aims to encourage debate about whether the current costs rules meet their intended functions, and whether reforms are required. The report runs to 64 chapters and 653 pages.

In short, the report reviews the funding of civil litigation – legal aid, insurance, third party funding and conditional fee agreements. It also looks at costs in different types of litigation and identifies ways of controlling the costs of litigation, possibly by improving the process of e-disclosure and either limiting witness statements to a prescribed length or substituting them for witness summaries (with a longer examination in chief at trial). Jackson LJ has also raised the possibility of a "no costs" regime or "one way costs shifting", in favour of the claimant only (ie the defendant would not be able to recover costs in the event the claim was successfully defended).

Jackson LJ has emphasised that he still has an open mind as to the final recommendations to be made in December 2009. He also warns that his final report "will generate protests from at least some directions and quite possibly from all directions".

As part of the debate, Jackson LJ took part in eight topical seminars in July. These seminars were designed to facilitate open and informed debate and were attended by those with relevant expertise or interest on all sides. RPC hosted the first of these debates on 20 July at which after-the-event insurance, success fees and conditional fee agreements were all debated.

Modernisation of insolvency rules

The draft Legislative Reform (Insolvency) (Miscellaneous Provisions) Order 2009 has now been published detailing the proposed changes to the Insolvency Act 1986. The aim of the changes is to reduce costs and the administrative burden on users of the legislation and subsequently benefit the creditors of insolvent companies and individuals through more flexible procedures and increased dividends.

The Government has also published a consultation paper, "Encouraging Company Rescue", which proposes various reforms to the current insolvency regime with a view to supporting companies that are struggling in the global economic downturn. The deadline for responses is 7 September 2009.

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New HMRC policy to publicise illegal tax avoidance schemes

On 24 April, HMRC published its first edition of "Spotlights" in which it highlighted tax schemes which it claims are ineffective. It says that its intention is to warn customers that it would challenge these schemes and seek the maximum possible payment of any underpaid tax, interest and penalties. Although "Spotlights" merely sets out HMRC's views, which may not be correct, taxpayers who have utilised any of the schemes referred to are likely to face enquiries.

This new policy could have the unfortunate consequence of encouraging demands for compensation from the users of any such schemes from their professional advisers who might have recommended the schemes.

POB publishes "Key Facts and Trends in the Accountancy Profession"

On 19 June the Professional Oversight Board published its seventh edition of "Key Facts and Trends in the Accountancy Profession". The main highlights were:

- In 2008 the six Chartered Bodies reported a total of 286,000 members and 169,000 students in the UK and the Republic of Ireland, growth by 3% and 0.8% respectively.
- The number of registered audit firms has been gradually declining. The number in 2008 (8,179) is 25.7% lower than the number in 2003 (11,006). The decline has been less steep in recent years - a fall of 4.6% was reported for 2008.
- Over the past five years, the Big Four have experienced a steady increase in the proportion of fee income from non-audit work for non-audit clients but a steady decrease from non-audit work to audit clients.
- Total fee income continued to grow in 2007-2008. The growth rate of non-Big Four firms was higher than that of the Big Four. There has been a small increase in the proportion of listed companies audited by non Big Four firms.

Implications for accountancy firms following the FSA's decision to fine HSBC for data protection breaches

The FSA's recent decision to fine HSBC for sending unencrypted personal data by post and for keeping personal paper files on site but not locked up could have consequences for FSA authorised accountants. As Jonathan Davies of RPC explained in his recent press release, the decision "*could mean that FSA authorised accountants could be fined for failures that do not relate to their FSA regulated business*".