BRIEFING

PERSONAL INJURY

January 2021

CONTRIBUTORS

Christopher Pask

Thomas Yarrow

INTRODUCTION

LAURA JOHNSON
Head of the 1 Chancery Lane Personal Injury Group

This briefing considers two recent cases that will be of interest to injury practitioners. The first, *Head v Culver Heating Limited* is an interesting decision in which the Court of Appeal considers the difference between loss of earnings generated by work and loss of income from investments in the context of a lost years claim.

The second decision *Pallett v MGN Limited* arises out of the phone hacking scandal, which continues to be the gift that keeps on giving from a litigator's perspective. The court had to consider whether a defendant who had purported to accept the claimant's part 36 offer one day after its expiry on the basis that it could avoid the usual costs consequences of acceptance was able to do so.

DEBORAH HEAD (EXECUTRIX OF THE ESTATE OF MICHAEL HEAD DECEASED) V THE CULVER HEATING CO LIMITED [2021] EWCA CIV 34

THOMAS YARROW

For a case which was initially refused permission to appeal to the Court of Appeal both by the trial judge and by the Court itself on the papers, it is remarkable how elementary the decision of Lord Justice Bean reads in *Head v Culver Heating Co Ltd.* [2021] EWCA Civ 34, as he overturned the lower court's decision. Indeed the Lord Justice in applying rule 52.30 and the principle in Taylor v Lawrence to reopen the case to avoid injustice, notes that this case was a "rare exception" to the usual swathe of entirely unfounded applications under rule 52.30, indeed *"perhaps the most striking one I have seen during six years' service in this court"*.

Mr Head, who had died subsequently to the trial but before this appeal was heard, had brought a claim against the Defendant for damages following development of mesothelioma in December 2017. Judgment was entered at an early stage for damages to be assessed. The quantum hearing was held before HHJ Melissa Clarke in April 2019. Damages were awarded for PSLA and there was an indemnity agreed for medical treatment for the remainder of Mr Head's life. The principal issue at that hearing, and the only issue on appeal, concerned the damages to be awarded for the 'lost years' of income Mr Head (and then his estate) would have enjoyed *but* for the tort of the Defendant.

The core facts going to that quantum were as follows. Mr Head had founded a heating and ventilation services business in 1987 ("EMSL"), which was incorporated in 2004. At the time of Mr Head's diagnosis, he, his wife and his two sons were all directors of the company and worked for it. All of them took salaries and received dividends on the company's profits. EMSL, however, did not pay out *all* profits by way of dividends keeping a sizeable proportion of the profits in the company to improve its net asset value.

The Judge made as a finding of fact that Mr Head was the driving force behind the business, but accepted evidence from forensic accountants that the profitability of EMSL would not diminish following Mr Head ceasing to be actively involved. On her analysis, Mr Head's estate after his death would continue to have the benefit of dividends on the profits of the company.

Applying the case of *Adsett v West* [1983] Q.B. 826, the Judge distinguished between loss of earnings from Mr Head's capacity to work, which were recoverable damages, and loss of income derived from capital which would survive his death and would not be recoverable. The Judge considered that some £172,000 per annum of net dividends would continue to be earned by Mr Head's 90% shareholding in the business after his death (wherever he left them in his will). This figure should then be set against Mr Head's current surplus income which could be calculated from his net salary plus net extracted dividends attributable to his and Mrs Head's shareholding, plus his share of retained dividends in the company, minus his living expenses. These living expenses were assessed at 45% of Mr Head's net salary plus net extracted dividends, and of course would no longer be incurred after death. Mr Head's *surplus* income was therefore in the region of £158,000 per annum. Because £172,000 exceeded £158,0000, there was in fact a *negative* loss of income (a net benefit to the estate) in the lost years. Damages for this head of loss were therefore assessed at nil.

While expressing *"sympathy"* for the trial judge, the Court of Appeal rode roughshod over her assessment. Lord Justice Bean found that *"it seems to me to make no sense at all"* to have said that the salary and extracted dividends was the full extent of Mr Head's earnings from work and the rest of his income from EMSL was and would continue after death to be income from capital. The Judge had made a finding of fact that Mr Head was the driving force within the company and would have been for some time, but for his contraction of the disease. He was not an *"Honorary President"*, nor a passenger of the business. All the income which he and his wife received from the company (save for the small deduction in respect of Mrs Head's work) was the product of *"his hard work and flair"*, not a return on a passive investment. In this sense *Adsett* was distinguished. This confirmed the approach in a similar

case heard last year of *Rix v Paramount Shopfitting Co Ltd [2020] EWHC 2398 (QB)*, from which Lord Justice Bean borrowed the quoted phrase.

The Lord Justice allowed the appeal and remitted the case for quantum to be assessed by a Master based on the evidence that Mr Head would have continued to work until the age of 65 full time; then until the age of 70 on an 80% basis; then reduced to a 50% basis. From the age of 70 he would no longer have drawn a salary but would have continued to receive dividends. As he reduced his involvement, the responsibilities of his sons would increase, with Dale taking over as Managing Director. Mr Head's involvement would have reduced to say, 25% at age 75. Once he no longer worked full time, his dividend income from EMSL (assuming it remained constant) could properly be treated pro rata as income from investments rather than earnings from work. When he ceased work altogether, his income from any shares he retained would have become entirely income from investments. As his sons would have taken over an increasing share of responsibility for the fortunes of the company, they would have received a greater share of its profits (either in the form of salary or shares) and Mr Head's own share would reduce accordingly.

This case marks an important narrowing of the scope of *Adsett*, distinguishing clearly those cases where the deceased is a 'passive' shareholder in a company and whose income from the profits of those companies can be viewed as returns on capital, from cases where the deceased is the active driving force of the company and where the profits can properly be viewed as earnings.

PALLETT V MGN [2021] EWHC 76 (CH) – PART 36 PREVAILS

CHRISTOPHER PASK

Mr Justice Mann has recently added to the case law surrounding Part 36 and its operation. The judgment is a helpful reminder of the operation of the rules in the context of an attempt by a defendant to avoid the usual consequences of accepting a claimant's offer.

The claim arose from an action for infringement of privacy rights by mobile telephone voicemail interception which Ms Pallett brought against the Defendant. The Claimant made a Part 36 offer roughly three months before trial which specified that if accepted within 21 days the Defendant would be liable for her costs. The Defendant accepted the offer 22 days later, on the express basis that the court would be invited to deal with the extent to which it would have to pay costs.

It then sought to argue that in the absence of the automatic consequences of accepting the offer within the 'relevant period' (per CPR 36.13(1)), it was entitled to invite the court to consider its liability for the costs of the action pursuant to CPR 36.13(5) and, for reasons it argued, it should not have to pay the Claimant's costs.

Valid Acceptance?

The first issue was whether the Defendant was entitled to accept the offer in the manner in which it did, i.e. on the basis that it would invite the court to exercise a discretion over all the costs of the action.

The Defendant argued that it was entitled to invoke the provisions in CPR 36.13(4)(b) which say that when an offer is accepted outside the relevant period, the liability for costs must be determined by the court if the parties cannot agree them.

The Judge held that that position was correct if the rules were followed as they are set out. It is reminder that there is no room within the Part 36 regime for a contractual offer and acceptance analysis. Per CPR 36.1, it is a 'self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part'.

At paragraph 17 the Judge acknowledge the apparent oddity of the situation:

> *"…The claimant has made an offer which she has pitched as being acceptable provided that her costs are paid. In making an offer an offer or is likely to make it on the basis that the monetary offer proposed is acceptable provided that the costs are also paid. That is what the offer says, and that is the effect of an offer accepted within the 21 days. The offeror (if a claimant)*

might well expect that if the offer is not accepted it is open to the offeror to continue with the action and see if he/she can better the offer and still get costs. The one thing that an offeror would not expect is that the offeree can wait until the relevant period (usually 21 days in practice) has passed, accept the offer (and thus bind the offeror) and then seek to avoid the costs by asking the court to determine them. The offeror will usually not think that that is an appealing option to have forced on him or her; otherwise it would have been offered in the first place. Yet that seems to be the effect of CPR 36.13(4)… "

In holding that the Defendant was entitled under the rules to do what it did, the judge then turned to the arguments as to how the courts' discretion should be exercised.

Decision on Costs

The Defendant's arguments on costs centred on the pattern of offers which had been made throughout the life of the case and what it said was the Claimant's failure to engage with the settlement process, particularly the decision to wait for disclosure before making the offer which was ultimately accepted.

CPR 36.13(5)(b) requires that unless it considers it 'unjust', the court must order that the offeree (in this case the Defendant) do pay the offeror's (the Claimant's) costs for the period from the date of the expiry of the relevant period to the date of acceptance.

It was accepted by the Defendant that attempting to overcome the presumption in CPR 36.13(5), was a 'formidable obstacle' in seeking to demonstrate that the normal consequences of the acceptance of an offer should not apply.

Finding that the Defendant had failed to surmount that obstacle, the Judge held that the "the claimant had reasons, which cannot be dismissed as unreasonable, for not engaging in horse-trading over figures from the outset. In my view the claimant's attitude of declining to negotiate until she was better informed was an entirely reasonable one, bearing in mind the one-sided nature of the possession of information in all these cases and, in this one, the failure of the defendant to comply with the early disclosure regime". [71]

The normal consequences pursuant to Part 36 followed and the Claimant was entitled to have all of her costs of the proceedings.

Conclusion

Addressing the significance, or otherwise, of the judgment, the Judge finished with a word of caution at paragraph 77:

"This case has turned on its own facts, and to a large extent on the justification of the claimant in pressing on for disclosure before valuing her claim. It involves a determination in which the burden is on the defendant under Part 36. Because it turns on its own facts, it should not be taken as a green light for all claimants to decline to enter into negotiations before disclosure is complete. Such a posture would not be correct in every case. Each case must turn on its own facts. There may be other cases in which a non-engagement will be unreasonable. That will depend on the facts of those cases. Other cases may not involve the burdens of Part 36. The defendant will no doubt be concerned that every case will now go to disclosure. That would be regrettable, and should not be the case, and in any event the defendant can always seek to protect itself by making early offers which are more generous and less combative than they were in this case. Claimants should not seek to apply this case too generally."

1 Chancery Lane, London, WC2A 1LF

Tel: +44 (0)20 7092 2900
Email: clerks@1chancerylane.com

www.1chancerylane.com