Personal Injury Newsletter

July 2016

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CHAMBERS OF
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Farrar's Building News

Nigel Spencer Ley, Editor

In this Newsletter Guy Watkins explains the provisions of the Third Parties (Rights against Insurers) Act 2010, which despite the date of its enactment only comes into force in August 2016. This important piece of legislation will make it much easier to bring claims against insurers, when the tortfeasor has become insolvent. Robert Golin explores the difficulties in suing landlords for injuries caused by defective premises. The Case Law Update was prepared by Rajiv Bhatt, who has recently joined Chambers as a 3rd six pupil.

Lastly, Farrar's Building's PI seminar will take place on Thursday 29th September 2016. To book a place please email: Sehrish@farrarsbuilding.co.uk

Legislation Update - The Third Parties (Rights against Insurers) Act 2010

By **Guy Watkins**

Introduction

The long-awaited Third Parties (Rights against Insurers) Act 2010 ('the 2010 Act') will come into force on 1st August 2016. The 2010 Act received Royal Assent as long ago as March 2010 but its commencement was delayed because, as originally drafted, it did not cover all relevant insolvency situations. The necessary amendments to the 2010 Act were made by the Third Parties (Rights against Insurers) Regulations 2016.

The policy behind the 2010 Act is to simplify and modernise the process for third party claimants with claims against insured parties who are insolvent. The existing regime under the Third Parties (Rights against Insurers) Act 1930 ('the 1930 Act') has long been recognised to be overly complex.

The purpose of this article will be to highlight the key changes introduced by the 2010 Act and to identify potential practical implications of the new regime for both personal injury claimants and defendant insurers.

The 1930 Act

The purpose of both the 1930 and the 2010 legislation is to protect insurance proceeds under a liability policy from the effects of the insured's insolvency by automatically transferring the insured's rights against its insurer under the policy to the third party. By providing for a statutory transfer of the insured's rights, the legislation enables a personal

injury claimant to bypass the insolvency process and to bring a direct action against the insurer.

The 1930 Act has, however, a number of significant defects which can make the process unnecessarily complex and expensive:

a) Before being able to bring a direct action against the insurer, the claimant must first establish the existence and amount of the insured's liability. This often means that two sets of proceedings have to be brought;

b) Where the defendant company has been dissolved, the claimant must first apply to restore the company to the register to bring a claim against it;

c) Any rights that the claimant obtains by virtue of the 1930 Act are subject to all of the defences which would have been available to the insurer against the insured, including any defence based on failure by the insured to comply with notification and co-operation provisions notwithstanding that any such non-performance is not within the control of the claimant;

d) There are only very limited rights for a claimant to obtain information about the insurance position.

The 2010 Act

The three key changes introduced by the 2010 Act are as follows.

First, it will no longer be necessary for a claimant to establish the insured's liability before being able to bring proceedings directly against the insurer. A claimant will instead be able to issue against the insurer (and optionally the insured) seeking declarations from the Court both as to the insured's liability to the claimant and the insurer's liability under the policy.

This means that only one set of proceedings will be required. It also means that the need for a claimant to restore a dissolved company to the register before being able to pursue the insurer will be removed.

Secondly, whilst the 2010 Act generally maintains the current position that the transfer of rights will not put the third party in any better position vis-à-vis the insurer than the insured would have been, the new legislation introduces exceptions to the operation of certain technical defences:

a) An insurer will no longer be able to rely on breach of a policy condition requiring the insured to provide information or assistance to the insurer where the insured has been unable to fulfil the condition because it has been dissolved;

b) Anything done by the claimant which, if done by the insured, would have amounted to or contributed to fulfilment of a policy condition, for example giving notification of a claim, is to be treated as if done by the insured. This means than the insurer will not be able to rely on a defence of non-performance of the policy condition by the insured; and

c) An insurer will not be able to rely on any "pay first" clause (a clause requiring the insured to pay the claim before the right to an indemnity arises) to defeat the third party's claim.

Thirdly, the 2010 Act gives to claimants greater rights to obtain information about the insurance position before issuing a claim. The class of people from whom a claimant can seek to obtain such information has been widened and the 2010 Act introduces a time limit of 28 days in which any written request for information must be answered. If within 28 days the insurer fails to provide the information requested, or to explain why it is not able to provide it, the claimant can apply for a court order requiring the information.

Transitional cases

Despite its repeal by the 2010 Act, the 1930 Act will continue to apply in circumstances where the insured has both become insolvent and incurred the liability to a third party before 1st August 2016. Where the insured has become insolvent before commencement of the 2010 Act but the right of action arises after commencement, the 2010 Act will apply.

Practical implications

The 2010 Act will make it simpler, quicker and less costly for a claimant to bring a direct action against an insurer where a defendant has become insolvent, by removing the need for multiple proceedings and for a dissolved company to be restored to the register first.

The 2010 Act is likely to bring costs and benefits to insurers. On the one hand, there is the potentially valuable prospect of an insurer having greater control over the defence to the underlying personal injury claim as it will now be a party to the single set of proceedings in which the insured's liability to the claimant and the insurer's own liability will be resolved. The reduction in legal costs from the simplified process will also be to the advantage of insurers where they are the paying party.

On the other hand, there is likely to be an increase in requests from claimants for insurers to provide information about the insurance position, and additional resources will be required to ensure that such requests are dealt with in the relatively tight 28-day timeframe prescribed by the 2010 Act.

The difficulties faced when pursuing a landlord for injuries caused on a demised premises. Is liability a step too far?

By Robert Golin

This article examines the options open to a claimant injured as a result of an accident that occurs on demised premises. Dodgy bannisters and steps seem to be the most likely causes of injury. Unfortunately, a claimant's options are limited. The recent authorities reinforce the position that claimants should expect (pun alert) to rail against landlords in vain in most cases.

Occupiers' Liability Act 1957 ("OLA 1957")

Often the first step will be to consider whether the OLA 1957 applies in the circumstances. The relevant provision is, of course, Section 2(2): an occupier of premises owes a duty to take such care as is reasonable in all the circumstances of the case to see that a visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

For a person to be an occupier of premises, he must have a sufficient degree of control over the premises (**Wheat v Lacon & Co. Ltd** [1966] A.C. 552). The problem when pursuing a landlord will be establishing that he/she is an occupier of the premises. The following points should (hopefully) be useful as a rough guide:

- If the injured party is the tenant it will be essential to examine the tenancy agreement carefully in order to pinpoint the location of the accident. Did the accident happen on part of the demised premises or in an area of common use?

- If the location of the accident is not part of the demised premises, the claimant may well be able to establish sufficient control on the part of the landlord (or another party as the case may be) for the OLA 1957 to apply;
- If the location of the accident is part of the demised premises, the general rule is that the tenant is the occupier and therefore the OLA 1957 is of no assistance;
- Even if the accident occurred on the demised premises, the claimant may wish to establish some degree of control on the part of the landlord. It is tempting to argue that the landlord retains control of the premises on the basis that the contractual documents give the landlord a right of entry and/or an obligation to repair.
- Unfortunately, that sort argument will ordinarily be fraught with difficulty. The House of Lords in **Cavalier v Pope** [1906] A.C. 428 considered that there must be something that *"implies the power and the right to admit people to the premises and to exclude people from them. But this power and this right belong to the tenant, not to the landlord, and the latter's contract to repair cannot transfer them to him. The existence of such an agreement may entitle a landlord to demand from his tenant admission to the premises for the servants and workmen required to carry out his contract, but nothing in the shape of control"* (at pages 433-434).

Defective Premises Act 1972 ("DPA 1972")

If the landlord is not an occupier of the relevant location, the claimant should consider the provisions of the DPA 1972 in the alternative.

Under Section 4(1) of the DPA 1972, a landlord who is contractually obliged to maintain or repair premises owes a duty to all persons who are likely to be affected by defects to take such care as is reasonable in all the circumstances to ensure that they are reasonably safe from personal injury. But this provision only bites when the defect is a "relevant defect".

When is a defect a "relevant defect"? Section 4(3) provides that a "relevant defect" is a defect in the state of the premises arising from, or continuing because of, an act or omission by the landlord which constitutes a failure to carry out his obligation to the tenant to maintain or repair the premises.

Crucially, a defect cannot be a "relevant defect" for the purposes of the DPA 1972 unless it arises from want of repair (**Alker v Collingwood Housing Association** [2007] EWCA Civ 343). Here are some recent illustrative examples of this point in action:

- **Sternbaum v Dhesi** [2016] HLR 16 **–** the Court of Appeal determined a single question: whether the tenant had established that the premises were in disrepair. Photographs of the premises showed a very steep stairway with no railings. Without a handrail the stairway was clearly a hazard. However, applying **Alker v Collingwood Housing Association**, it was not in disrepair. There had never been a handrail at any relevant time and the Court could not place the landlord under an obligation to fit one. That would amount to placing the landlord under an obligation to improve the premises or make them safe.

- **Dodd v Raeburn Estates Ltd** [2016] EWHC 262 (QB) **–** the defendant was not liable for the claimant's death following his fall down a staircase. The stairs were potentially dangerous as they were steep and had no handrail, but that was not the test for a "relevant defect" under s.4 DPA. A feature of the premises had to be out of repair for a duty to arise, and the staircase itself was well constructed.

- **Hannon v Hillingdon Homes Ltd** [2012] PTSR D37 **–** the claimant, a heating engineer, succeeded against a management company following a fall from a staircase due to the absence of a banister on the open side of a staircase. The current tenants had

removed the banister and the defendant was on notice of that. Because the banister had been removed the staircase was out of repair and a breach of s.4(1) DPA was established.

- **Drysdale v Hedges** [2012] EWHC 4131 (QB) **–** the defendant landlord was not liable when the claimant slipped on painted steps and fell over a low wall to a basement below the steps. The stone of the steps did not require repair and neither did the paint. The presence of paint on the steps was not such that the steps were not in good repair.

Common law

The position at common law is just as troublesome for claimants. In **Cavalier v Pope** [1906] AC 428 the House of Lords decided that a landlord who lets premises in a dangerous condition owes no duty to remedy the defect and no duty of care to a third party injured as a result of the defect.

There are some cases in which a landlord was found liable to a claimant – see for example **Lips v Older** [2004] EWHC 1686 (QB) and **Sowerby v Charlton** [2006] 1 WLR 568. Claimants should approach these cases with caution. In neither case was the Court referred to **Cavalier v Pope** and the latter case was primarily concerned with the application of the Civil Procedure Rules. These cautionary points were adopted in **Drysdale v Hedges** [2012] EWHC 4131 (QB).

The general rule, therefore, is found in **Cavalier v Pope***,* but as always the general rule is subject to a few exceptions:

- In **Rimmer v Liverpool City Council** [1985] QB 1 – the Court of Appeal distinguished Cavalier v Pope on the basis that the local authority had itself designed and built the premises. This is clearly a narrow exception!

- In **Drysdale v Hedges** [2012] EWHC 4131 (QB), John Leighton Williams QC, sitting as a Deputy High Court Judge, considered that a common law duty could exist if a landlord creates a hazard by his own action: *"I see no reason why the Defendant should not have a duty to take reasonable care to ensure its application [of paint to steps] did not create an unnecessary risk of injury. Otherwise a landlord would have carte blanche to act with impunity and create dangers which would not be caught by the 1972 Act"* (para.101). On the facts of that case, and in particular the landlord's use of outdoor paint which did not warn of slipperiness, there was no breach of duty.

It is hoped that this article provides a useful guide as to the issues commonly encountered when dealing with cases such as these. For advice in specific cases please contact Robert in Chambers.

Case Law Update

By Rajiv Bhatt

Phillips v Willis [2016] EWCA Civ 401

(Jackson LJ, Floyd LJ, Macur)

SIGNIFICANCE: Where a claim for personal injury and other loss is started under the RTA Protocol, the mere fact that the personal injury element has settled does not mean that the RTA Protocol ceases to apply.

FACTS: The Claimant suffered injuries in a road traffic accident. His car was also written off and to this end he hired a car for about a month. He issued a claim under the RTA Protocol for personal injury and hire. Liability was admitted and the Defendant agreed quantum in relation to the personal injury claim. There remained a dispute in relation to hire charges. The Claimant moved on to Stage 3 and issued a Part 8 claim. At the hearing the district judge decided that the matter should proceed as a Part 7 claim in the small claims track as further evidence was required over and above that contained in the Claimant's witness statement. The Claimant's appeal was rejected on the basis that the district judge had made a case management order which could not be interfered with. Permission to appeal to the Court of Appeal was granted.

HELD: The Court of Appeal disagreed with both of the judges who had dealt with the matter previously and allowed the appeal. Jackson LJ held that disproportionate costs would be incurred should the matter proceed under Part 7. As to the district judge's concern in relation to further evidence, Jackson LJ held that this was a small claim and the issues and the parties' arguments were clear; the only additional evidence that would be required was oral evidence in relation to need, and this was not enough for the matter to be dealt with as

a Part 7 claim. Practitioners should note, however, that **Phillips** is not authority for the proposition that all such claims should proceed under the RTA Protocol. If the hire charges are substantial and/or involve complex issues of fact and law, it is likely that a court would exercise its power under CPR 7.2 and order the claim to continue under Part 7. What is clear is that in simple, low value cases the matter should proceed under the RTA Protocol.

Parker v Butler [2016] EWHC 1251 (QB)

(Edis J)

SIGNIFICANCE: In a case where a claimant has the benefits of QOCS at trial, the protection extends to appeals too.

FACTS: The Claimant's claim for personal injuries suffered in a road traffic accident was dismissed following a fast track trial. Her appeal was also dismissed. The Defendant successfully obtained an order for costs in relation to the appeal. It was common ground that QOCS applied to the case. The issue in this case was whether the costs order made on appeal was also subject to QOCS.

HELD: QOCS applied to the costs on appeal. CPR 44.13 states that the section applies to "proceedings" which include a claim for damages for personal injuries. Edis J held that the word "proceedings" includes appeals. His reasoning was based on the fact that the appeal by the claimant was a means of pursuing the claim against the defendant - there is no difference "*between the nature of the claimant at trial and the appellant on appeal. He is the same person, and the QOCS regime exists for his benefit as the best way to protect his access to justice to pursue a personal injury claim*" [17].

Howe v Motor Insurance Bureau [2016]EWHC 884 (QB)

(Stewart J)

SIGNIFICANCE: The QOCS regime does not apply to claims against the MIB for accidents which have occurred abroad.

FACTS: The Claimant suffered serious injuries in a road traffic accident in France. The driver of the vehicle nor his/her insurer could be identified; therefore a claim was brought against the MIB pursuant to regulation 13(1) of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Board) Regulations 2003 ("2003 Regulations"). The Claimant lost at trial, and the issue was whether he was entitled to the protection of the QOCS regime.

HELD: QOCS did not apply. Stewart J made reference to CPR 44.3 which applies to a claim for "damages" for personal injuries. He held that proceedings against the MIB were not for "damages" as the essential feature of damages is that they are "*an award in money for a civil wrong*" [16]; the claim against the MIB was not based upon any breach of duty alleged against them. This argument was further strengthened by the wording of Regulation 16 of the 2003 Regulations which states that any sums owing pursuant to the Regulations are recoverable as a "civil debt". Although **Howe** primarily applies to accidents abroad and claims under the 2003 Regulations, the reasoning may also be applied to claims against the MIB for accidents occurring in the UK and brought under the Uninsured Drivers Agreements 1999 and 2015 (the "Agreements"). The Agreements do not contain the same wording as Regulation 16, however the rationale of Stewart J's decision (that claims against the MIB are not claims for damages) applies equally here. It remains to be seen whether the MIB takes the point in such cases.

Hayden v Maidstone & Tunbridge Wells NHS Trust [2016] EWHC 1121 (QB)

(Foskett J)

SIGNIFICANCE: Foskett J made useful observations as to the use of surveillance evidence in personal injury cases.

FACTS: A trial on the issue of quantum was fixed for 11 April 2016 for 5 days. On 24 March 2016 Defendant sent to the Claimant by post surveillance evidence. Due to the Easter break, this was received on 30 March 2016. The Defendant's application to rely on the evidence was heard on 8 April 2016, 3 days before the start of the trial. Foskett J adjourned the trial in order to give the Claimant some time to consider her position.

HELD: The matter came back before Foskett J a month later. The Defendant was ordered to pay the costs of the vacated trial on an indemnity basis, but the surveillance evidence was nonetheless admitted on the basis that the interests of justice required it. Foskett J made a number of general observations about the use of such evidence: (1) Material may be held to be inadmissible if there has been an "ambush". An ambush does not require a sinister motive on the party seeking to rely on the surveillance evidence - the focus is on whether the delay was otherwise culpable and whether the Claimant has had a fair opportunity of dealing with it; (2) However, Foskett J endorsed the principle that a defendant is entitled to wait until the claimant has "pinned his sail to the mast" before it undertakes surveillance; (3) If experts have seen the surveillance evidence before it has been admitted, this is not a reason for the court to feel obliged to admit it – experts are familiar with the need not to refer to without prejudice discussions with their counterparts and likewise would be able to do the same in relation to such evidence; (4) If claimant solicitors perceive that there may be a risk of surveillance evidence being relied upon at a future date (particularly if medical experts express reservations about the claimant's condition) they should raise the issue with the court in order for the court to either make an order for a date by which such evidence must be served or record the parties' position; (5) A very significant factor in deciding

whether to admit late evidence is the time at which the defendant should have commissioned the surveillance. The longer this is left and the nearer to trial, the more likely the court will regard the conduct as culpable.

English Heritage v Taylor [2016] EWCA Civ 448

Court of Appeal (Lord Dyson MR, McFarlane LJ, Beatson LJ)

SIGNIFICANCE: When considering the common duty of care under s2 of the Occupiers' Liability Act 1957 ("OLA 1957"), the court reiterated the position that adult visitors do not require warnings of an obvious risk except where they did not have a genuine and informed choice.

FACTS: The Claimant visited Carisbrook Castle where he fell and suffered a serious injury. The castle contained a designated walk which went around the tower fortifications where there was a cannon firing platform. Directly below the platform was a steep slope and a grass pathway. There was an informal path down the slope to the pathway. On the other side of the pathway was a dry moat which had a sheer 12 ft drop. The Claimant went down the informal path, lost his footing and fell over the steep moat. The issue for the trial judge was whether anyone contemplating going down the informal slope could have seen the sheer drop into the moat such that the danger was obvious. The judge visited the site and found that the danger was not obvious and so the Defendant was in breach of s2 OLA 1957 by not erecting a warning sign. The Claimant was found to be 50% contributorily negligent. The Defendant appealed.

HELD: Appeal dismissed. The risk the Claimant took was that he would lose his balance and fall on the steep grassy slope – this would unlikely have caused him the serious injuries he suffered. The risk of falling 12 ft down a sheer drop was not obvious and was a different risk. The court recognised that the question of whether a danger is obvious may not always be

easy to resolve. If the occupier is in doubt as to whether the danger is obvious, it should take reasonable steps to reduce/eliminate the danger.

Bruno Manuel dos Santos Mendes v Hochtief (UK) Construction Ltd [2016] EWHC 976 (QB) (Coulson J)

SIGNIFICANCE: The trial advocacy fee under the fixed costs regime under CPR 45 Part IIIA is recoverable if the case settles on the day of the trial but before the commencement of it.

FACTS: The Claimant suffered personal injuries following a road traffic accident. The matter was started through the RTA Portal and so the costs were subject to the fixed costs regime under CPR 45 Part IIIA (which applies to cases that no longer continue under the RTA Protocol). The matter settled on the morning of the trial. The judge refused to award the fixed trial advocacy fee on the basis that the case settled before the final contested hearing had commenced.

HELD: The advocacy fees were recoverable. Section B of Table 6B reads "If proceedings are issued under Part 7, but the case settles before trial". Coulson J held that the table contained an obvious typographical error and should in fact right "on or after the date of listing but prior to the date of trial". The rationale behind the decision is that the interests of justice would be better served if advocates were not penalised financially for negotiating a settlement at the door of the court.

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