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The construction of CPR 25.7(1): interim payments

Buttar Construction Limited v Arshdeep (2021) EWCA Civ 1408

This appeal raised issues about the proper construction of CPR 25.7(1)(e) and wider questions about the construction of CPR 25.7(1).

On 21 August 2020 the claimant was working as a labourer on a building site in Swindon when he suffered catastrophic injuries. He was employed by the second defendant ["YKS"] who were engaged by Buttar as independent brickwork contractors. The first and third defendants were the individuals who control YKS and Buttar respectively. By the time of the application to the court below, no interim payment was sought from them; the application was pursued against YKS and Buttar.

The claim was brought in negligence against each of the four defendants. Both YKS and Buttar denied liability.

Before the judge below, the claimant applied for an interim payment against each of YKS and Buttar relying "squarely" upon CPR 25.7(1)(e). The judge decided that the pre-conditions specified in CPR 25.7(1)(e) were satisfied in the present case. In favour of ordering an interim payment was, primarily, that the claimant needed rehabilitation and he would not get it without an interim payment. As against that, he recorded the defendant's objections. First, in reliance on *O'Driscoll (1984) WL 978567*, it was submitted that no interim payment should be ordered if it was reasonably likely that an insurer would not pay out the

IN BRIEF

The Court of Appeal upheld the judge's interpretation of CPR 25.7(1) in relation to an interim payment application brought in an EL claim against two defendants, both of which denied liability.

relevant sum. The judge held that the evidence and argument that insurers had either a contractual right not to pay out or to repudiate the policy was "very thin", amounting to "a mere assertion in a letter written by solicitors who were not on the record for any party in this case expressing a view as to the future position for the insurers", which he regarded as "loose ground on which to base such a submission". There was nothing before him to suggest that there was any immediate prospect of repudiation and, while recognising that insurers were entitled to adopt this course, he noted that they had chosen to raise the issue by a letter and without providing a copy of their policy.

The third factor identified by the judge as material to his exercise of the discretion was that, in accordance with the provisions of CPR 25.8, the court could at trial order repayment of any interim payment that he made now if it was appropriate to do so. Having decided to exercise his discretion in favour of making an interim payment, he concluded that an interim payment should be made in the sum of £300,000 and he directed YKS to pay £150,000 by 4pm on 24 June 2021 and Buttar to pay £150,000 by 4pm on 8 July 2021.

The grounds of appeal as formulated by Buttar were:

1. The judge erred in law in that he failed to consider whether the conditions specified by CPR 25.7(1)(c) were satisfied against the YKS, before dealing with the claimant's application against YKS and Buttar under CPR 25.7(1)(e).
2. The judge erred in law in that he was wrong to conclude that the conditions specified in CPR 25.7(1)(e) were satisfied, in particular: (a) he was wrong to conclude that if the claim went to trial the claimant would obtain judgment for a substantial amount of money against the YKS or Buttar but he could not determine which; he should have concluded the claimant would obtain judgment for a substantial amount of money against the YKS but could not determine whether the claimant would obtain judgment for a substantial amount of money against Buttar as well; (b) The judge was wrong to conclude YKS and Buttar were insured in respect of the claim; he should have concluded that, due to the fact the insurers of the YKS and the insurers of the Buttar had reserved their rights neither defendant was insured in respect of the claim, alternatively it was not appropriate to make an order for an interim payment applying the dictum of Griffiths LJ in *O'Driscoll v Sleigh*.
3. The judge erred in law in deciding in the exercise of his discretion that Buttar should make an interim payment because of the substantial chance the claimant's claim against Buttar would fail and Buttar would not be able to recover the monies paid because the claimant is impecunious and the solicitors acting for YKS's insurers stated there was a very real prospect the YKS would not be indemnified in respect of the claimant's claim.

Dismissing the appeal, the Court of Appeal held that there was no substance in Ground (1). The claimant was entitled to bring the application under CPR 25.7(1)(e) and to have it decided under that ground.

Ground 2(a) as formulated was more substantial but the appellate court was unable to accept Buttar's proposed interpretation of the phrase "(but the Court cannot determine which)" in CPR 25.7(1)(e)(i). The judge was astute to follow the guidance (given in respect of CPR 25.7(1)(c)) in *HMRC (2021) EWCA Civ 57* and this ground did not disclose any error of principle in his approach;

rather the complaint was about the conclusion he reached. The court upheld the judge's conclusion that, although he was satisfied that the claimant would obtain judgment for a substantial amount of money against at least one of YKS or Buttar, he could not determine which, within the meaning of sub-paragraph (e)(i). Even if an application against YKS under CPR 25.7(1)(c) would or should have succeeded, the requirements of sub-paragraph (e)(i) were satisfied.

Turning to ground 2(b), the court held that both YKS and Buttar were insured in respect of the claim within the meaning of CPR 25.7(1)(e)(ii)(a).

In relation to Ground 3, the court accepted that the possibility that YKS's insurers might not indemnify YKS in the event that it was held liable to the claimant was a material feature to be taken into account when the judge came to exercise his discretion. The judge considered it. He considered that the material before the court in relation to the reservation of rights by YKS's insurers was "very thin". It was and is open to the insurers not to provide more information, but at present all the court knew for sure was that Underwriters had issued a policy providing Employers' Liability cover which remained in being despite the reservation of rights. Even less information had been provided in relation to Buttar's insurance, and so the same conclusion applied. Buttar had not shown that the judge's balancing of factors that weighed in favour or against the exercising of his discretion was either wrong in principle, included immaterial features, excluded material features, or reached a conclusion that was outside the ambit available to him.

The full judgment may be found at: [Buttar Construction Ltd v Arshdeep \[2021\] EWCA Civ 1408 \(29 September 2021\) \(bailii.org\)](#)

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