High Court applies Jackson principles to Group Litigation

On 20 May 2014, the High Court handed down judgment on applications by 17 Claimants to join the register of claims after the cut-off date in the case of *Candis Holloway & Others v Transform Medical Group (CS) Limited (1&2) & Others* [2014] EWHC 1641 (QB). The decision is the first 'Jackson' decision in the context of Group Litigation.

Prashant Popat QC and Andrew Kinnier act for the Third Party, Clover Leaf Products Limited.

1. The case is concerned with claims by over 1000 women for alleged loss and damage arising out of the use, in breast augmentation surgery, of implants manufactured by the French company PIP. The Claimants claim that the implants were of unsatisfactory quality. The Defendants in the case are, in the main, the owners of private clinics in which the surgery was carried out. They resist the claims. Clover Leaf Products Limited, the UK suppliers of PIP breast implants, face claims for an indemnity from the Defendant clinics.

2. This judgment was in respect of applications by 17 Claimants to join the register of claims after the cut-off date.

BACKGROUND TO THE APPLICATIONS

3. On 24th October 2012, Mrs Justice Thirlwall ordered that no claim could be added to the group register without permission of the Court after 4pm on 8 April 2013. 17 Claimants applied to join the register of Claimants after this cut-off date: 13 Claimants filed their applications on 4th February 2014, the remaining 4 on 11th February 2014.

4. The Claimants who were already on the register maintained a neutral position in respect of the applications but reserved the right of the steering group to be satisfied that any applicants fulfil the criteria for admission to the Register (which included having appropriate ATE cover and CFA arrangements).

5. Transform Medical Group (CS) Limited, against whom 14 of these claims were made, and Clover Leaf opposed the applications.

6. All 17 applicants were represented by AVH Legal LLP trading as Tandem Law. Tandem Law was a firm of solicitors that went into administration in May 2013. The applicants' evidence was that in May 2013, the clinical negligence team was given 300 PIP files with an indication that there were some 40 claims which would need "caretaking" while Tandem Law's financial position was addressed. Some of the 300 claims for which Tandem Law were responsible were already on the Register.

7. No protective application was made to extend the date for joining the register. No reason was given for this failure or for the failure to make an application expeditiously after the passing of the cut-off date.

THE APPLICATION OF THE JACKSON REFORMS

8. Mrs Justice Thirlwall reviewed the context in which these applications were made, both in relation to the case itself and within the wider procedural context following the Jackson reforms.

9. The applicant Claimants argued that as they were not seeking relief from sanction, CPR 3.9 was of no relevance. The applicant Claimants sought to rely on ***Taylor v Nugent Care Society*** [2004] 1 WLR 1129. In that case, the court overturned a decision striking out as an abuse of the process of the court a claim by a litigant who had failed in his application to join his claim to a group action but who wished to proceed outside the group. The court drew a distinction between a Claimant who is part of a group not complying with a direction and the position of a Claimant who has not yet joined. That person, Lord Woolf CJ stated, had never been subject to an order of the court which he had disobeyed.

10. The applicant Claimants argued that, as they were never part of the group and subject to the GLO, they had not disobeyed an order of the court. Thus CPR 3.9 did not apply. Transform and Clover Leaf argued that this application, properly analysed, was an application for relief from sanctions under CPR 3.9 but even if it were not, the principles set out by the Court of Appeal in ***Mitchell v News Group Newspapers Ltd*** [2013] EWCA Civ 1537 should be applied to the present case.

11. Mrs Justice Thirlwall agreed with Transform and Clover Leaf that the present application was one for relief from sanctions and therefore CPR 3.9 applied. The Judge noted that CPR 3.9 required the court to consider "*all the circumstances of the case*" including the prejudice to the parties that may be occasioned by the decision in the case. That said, following the decision in ***Mitchell***, prejudice carries less weight than the need for

litigation to be conducted efficiently and at a proportionate cost and the need to enforce compliance with rules, practice directions and orders.

12. The Judge also rejected the applicant Claimants' arguments that the claims were at an early stage, there was no prejudice to the Defendants and Clover Leaf and the other Claimants would be prejudiced if the applicants were to benefit from any favourable findings without bearing a share of the common costs.

13. The applicant Claimants argued that if the group litigation Claimants were successful and the Defendants were ordered to pay damages and costs, the Defendants may not have sufficient funds to satisfy any judgments obtained after conclusion of the group action. Mrs Justice Thirlwall also rejected this reasoning. First, she noted that, while this was a matter of speculation, the corollary of the argument was that if the applicants were to join the register and succeed, the pool from which the damages are to be paid would be smaller for those Claimants on the register than it would otherwise have been. Secondly, the Judge emphasised that if the applicants were to suffer loss as a result of a failure to join the group they would have a strong claim against their solicitors.

14. Mrs Justice Thirlwall concluded that the applicants' solicitors had:

    a. Failed to have the claims joined to the register before the cut-off date;

    b. Failed to male an application or an extension before the cut-off date for an extension; and

    c. Having taken a decision after 8 months to make an application, failed to do so until 10 months had elapsed.

15. The Judge considered that these failures were serious and sustained, that there was no good reason for any of them and that nothing was done to

meet the cut-off date. The Judge went on to state that the applications, whether considered under CPR 3.9 or CPR 1.2, were "*hopeless*" and that to grant them "*would undermine the discipline of this litigation*". She noted that she was quite sure that, even before the changes in the CPR, and the shift of approach from ***Mitchell*** onwards, her conclusion would have been exactly the same.

20 May 2014