Legal Watch: Property Risks & Coverage

May 2019
Welcome to the May edition of PRC Legal Watch.

The spring heralds our annual conference which this year is being held at the Old Library, Lloyd’s and we look forward to welcoming you at this event (please see overleaf for further details).

In this edition:

- The new Disclosure Pilot, which is being trialled in all Business and Property Courts in the UK, is now firmly embedded and we now have the first substantive decision regarding its operation from Sir Geoffrey Vos, the Chancellor of the High Court.

- We take a timely look at the proof required under the no fault provisions of the Consumer Protection Act 1987 and consider again the importance of commissioning independent expert evidence.

- We look at the increasing influence of the Financial Ombudsman Service and the changes brought about to their awards and jurisdiction.

- We look at the new statutory obligation on landlords to maintain a property that is fit for human habitation under the Homes (Fitness for Human Habitation Act) 2018.

- We consider the admissibility of without prejudice material in an application for costs against a non-party under section 51 of the Senior Courts Act 1981.

- In our regular Side Bar column, we are grateful to Carl Troman of 4 New Square for his article on the policy coverage dispute in R & S Pilling (T/A Phoenix Engineering) v UK Insurance Ltd (2019), concerning fire damage to third party property resulting from body repairs to a car, which went to the Supreme Court.

Happy reading and thank you for your continued support.

Contributors

- Paul Cha, Partner
- Louise Wright, Partner
- Natalie Owen, Solicitor
- Chris Wright, Associate & Technical Director
- Harry Dyson, Trainee Solicitor
- Haranpreet Sra, Trainee Solicitor
- Carl Troman, 4 New Square

Get in touch:

If you would like to know more about any of the articles published in this edition of Legal Watch please contact:

Paul Cha, Partner  
T: 020 7469 6235  |  E: paul.cha@plexuslaw.co.uk

Natalie Owen, Solicitor  
T: 020 8774 0832  |  E: natalie.owen@plexuslaw.co.uk
Sixth Annual Property Risks & Coverage Conference

This year we shall be hosting our annual conference from the heart of the insurance market on Friday 17 May 2019 from 1.30pm - 4.30pm.

Registration and lunch will be from 12.45pm at the Old Library, Lloyd’s Building, One Lime Street, London, EC3M 7HA

There will be presentations from leaders in their fields and our own specialist lawyers will be available throughout the afternoon to answer your questions and discuss current issues. Drinks and canapés after the conference will provide an excellent chance for you to exchange views with us and industry colleagues.

Speakers:

Keynote Address: Man vs Machine? Building trust in the future of insurance
Dr Matthew Connell, Director of Policy and Public Affairs, CII

Non-Party Costs against Insurers: The hidden indemnity
Leigh-Ann Mulcahy QC, Fountain Court Chambers and Carl Troman, 4 New Square

An update from FOIL
Anthony Baker, Partner, Plexus Law and Vice President of FOIL

Cavity Wall Insulation Claims: Liability and indemnity
Sarah Cartwright, Partner, and Gordon Walker, Partner, Plexus Law

Costs: What’s trending?
Sarah Cochran, Partner, Plexus Law

Disclosure Pilot: Reducing costs for Insurers
Philip Lawrence, Partner, Plexus Law

We still have a number of places available so to reserve your place please email Jack Simms: jack.simms@plexuslaw.co.uk
First substantive decision on application of Disclosure Pilot

**UTB LLC v Sheffield United & Others [2019] EWCH 914 (Ch)**

The new Disclosure Pilot under CPR PD51U came into effect in all Business and Property Courts on 1 January 2019 and will run for two years. The Pilot is regarded as the biggest reform since the introduction of the Civil Procedure Rules in 1999 and its aim is to bring about a cultural shift in the approach of litigants to disclosure with the object of saving costs.

Parties have a duty to preserve relevant documents as soon as litigation is contemplated and must give Initial Disclosure of key documents with their pleadings. Thereafter, the parties must co-operate in sharing information about the nature, extent and cost of the disclosure required before the Court orders further Extended Disclosure. Standard disclosure is no longer the norm and the Court may select from a number of prescribed alternative Disclosure Models for each of the relevant issues in the litigation.

It was the commonly held view that the Pilot did not apply to cases issued before 1 January 2019, where a disclosure order had been made before that date, unless it had been set aside or varied.

**Facts**

The case concerned a dispute over the ownership and purchase of a football club. An order for standard disclosure had already been made in the proceedings before the commencement of the Pilot on 1 January 2019, and the Defendant subsequently made an application for specific disclosure after its commencement. The parties themselves had assumed that the Pilot and PD51U did not apply to the proceedings as there was an existing order for disclosure made before 1 January 2019.

**Issue**

The Court had to decide which procedure applied to the Defendant’s disclosure application, given the Pilot had been put in place without transitional provisions, and the White Book expressly stated that “the pilot does not apply to any proceedings where a disclosure order had been made before it came into force unless that order is set aside or varied”.

**Decision**

The Judge, Vos LJ, concluded he was “…quite satisfied that the Pilot was intended to apply, and does apply, to all relevant proceedings subsisting in the Business and Property Courts, whether started before or after 1 January 2019, even in a case where a disclosure order was made before 1 January 2019 under CPR Part 31”.

Vos LJ said that the White Book, of which he is the General Editor, and the commonly held view of practitioners, was incorrect. He added that simply because the Pilot stated it “shall not disturb an
order for disclosure made before [1 January 2019] ... unless that order is varied or set aside”, did not mean it was not applicable to live proceedings. He said the Pilot was deliberately put in place without transitional provisions so that it would apply to all existing proceedings.

Under paragraph 18.1 of PD 51U, the Court can vary an order for Extended Disclosure (including the making of an order for specific disclosure of documents relating to a particular issue). In varying such an order, the Court must be satisfied that it is necessary for the just disposal of the proceedings and is reasonable and proportionate. The Judge set out in his judgment the full text of paragraph 6 of PD51U, which identifies the parameters in which Extended Disclosure will be ordered. It seemed to him that Extended Disclosure Model C (request-led, search-based disclosure) and Model E (wide, search-based disclosure) were particularly relevant to this case.

**Comment**

It is now clear the Pilot will apply to all relevant proceedings subsisting in the Business and Property Courts, even in those cases where standard disclosure has already been ordered before 1 January 2019.

“In varying such an order, the Court must be satisfied that it is necessary for the just disposal of the proceedings and is reasonable and proportionate.”

The Judge noted that, as the parties had wrongly assumed that PD51U did not apply, they had not given any thought in advance to the Issues for Disclosure or the more general requirements of PD51U; although they seemed to have interpreted the standard disclosure ordered as if it were Model E (wide, search-based disclosure).

So it is imperative when applying for Extended Disclosure under PD51U to give detailed consideration to the new Pilot and specifically as to how it will affect the application.
This case is a timely reminder of the proof required, under the no fault provisions of the Consumer Protection Act 1987, for establishing a defect with a product. It is also a reminder of the importance of commissioning truly independent expert evidence.

**Facts**

The Claimant minors suffered serious injuries as the result of a fire which broke out at their tenanted family home in 2011. The Defendant was an importer and supplier of Matsui fan heaters to retailers such as Curry’s from whom the Claimants’ mother purchased such item in 2009.

The fan heater was an ex-display item and it was sold in a plastic bag, without its box and instruction manual. So the Claimants’ mother was not aware of the instructions and warnings. The fan heater was CE marked and certified to conform to applicable EC requirements under Annex 1 to EC directive 2006/95/EC.

The Claimants brought a claim against the Defendant, under the no fault provisions of the Consumer Protection Act 1987 (‘CPA’), for their loss and damage arising from the fire which they said was caused by the defective fan heater.

**Issue before the Court**

It is usually sufficient to infer that a product is defective if it fails during normal use, and in circumstances where a standard product would not have so failed. It is unnecessary for a Claimant to establish the precise cause or mechanism of the failure of the product.

The principal issue in this case was whether the Claimants could prove on the balance of probability that the fan heater was the source of the fire.

“It is unnecessary for a Claimant to establish the precise cause or mechanism of the failure of the product.”

**Parties’ arguments**

The Defendant argued that the fan heater had various safety features and that it conformed to various EU standards. It claimed that over 16,000 units had been sold without them being implicated in any fire and, so it was argued, the fire at the Claimants’ property must have resulted from misuse of the fan heater rather than a defect. Alternatively, the Defendant argued that there were other plausible explanations for the fire, such as the extension lead and the transformer used in connection with the fish tank owned by the Claimant’s mother.

The Claimants contended that their mother had switched on the fan heater on the morning of the fire, that it had not been mis-used, that she had located it away from the sofa or other items of furniture, and that she had seen flames and smoke emanating from the fan heater.
Expert evidence was obtained by both parties in support of the arguments with conflicting views. The Judge assessed the expert evidence to be highly unsatisfactory and partisan. He determined that the issue of liability was not to be found in the opinions of the experts but rather on an assessment of the factual evidence regarding what was witnessed at the time of the fire and what was discovered by the investigators immediately afterwards.

Judgment

Ultimately, the Judge accepted the Claimants’ mother’s evidence as being more consistent and reliable, and corroborated by the evidence from the fire investigation. He decided in favour of the Claimants. He found that the fan heater was the source of the fire, and thereby excluded the possibility of other causes of the fire such as the extension lead and transformer.

“The Judge was scathing of the experts and he was wholly unimpressed with the blatant advocacy of at least one of the experts.”

The Judge held that it did not matter that the Claimants were unable positively to identify the specific mechanism or cause of the ignition. It was sufficient that, in the absence of any evidence of mis-use, the fact that the fan heater ignited spontaneously, when it should not have done, meant it fell below the standard of safety that the Claimants were reasonably entitled to expect and so was defective within the meaning of the CPA.

Comment

The Judge was scathing of the experts and he was wholly unimpressed with the blatant advocacy of at least one of the experts. He deemed them partisan and that they had failed to assist the Court. This case serves as a timely reminder of the importance of securing reliable and independent evidence from experts who are aware of and are able to discharge their duties to the Court. This is particularly so in fire claims where much of the physical evidence is destroyed and there is often a dearth of other contemporaneous evidence. It underlines the importance of securing early evidence from the fire service and the police force, all of which is directed to assisting the Judge with piecing together the factual background and establishing the cause.
The Financial Ombudsman (“FOS”) was set up in 2000 by Parliament as an independent public body to resolve complaints between financial businesses and their customers.

Their stated aims are to “resolve individual disputes between consumers and business – fairly, reasonably, quickly and informally”.

An estimated two million people contacted the FOS with problems last year.

Up until 1 April 2019 the FOS compensation limit was £150,000.

From 1 April 2019 that limit significantly increases to £350,000 for complaints about acts or omissions taking place after 1 April 2019.

For complaints about acts or omissions that took place prior to 1 April 2019, but referred to the FOS after that date, the limit increases to £160,000.

Both limits will rise in line with the Consumer Price Index (“CPI”) each year, from April 2020.

In addition the qualifying criteria for customers to access the FOS’ services as an ‘eligible complainant’ have changed to widen the reach to the following:

- Small and Medium Enterprises with an annual turnover of less than £6.5 million (previously £2 million); and
- Either:
  - Fewer than 50 employees (previously 10 employees);
  - OR
  - A balance sheet under £5 million

The increase in scope will likely lead to delays and further backlogs. Evidence given to the Treasury Select Committee in January 2019 suggested there were around 30,000 complaints waiting to be allocated and a backlog of 8,000 claims where the investigation had been completed but were waiting for a decision to be made.
The Act came into force on 20 March 2019. It amends the Landlord and Tenant Act 1985, so that any tenancy agreement (with a few exceptions such as shared ownership) will now contain an implied covenant that the dwelling must be fit for human habitation at the start of the tenancy and will remain fit for human habitation during the term of the tenancy.

A landlord cannot contract out of the Act.

The Act will apply to:
- new tenancies of less than 7 years including renewals of an existing tenancy from then;
- a tenancy that was a fixed term tenancy and becomes periodic on or after 20 March 2019;
- where the tenancy has become periodic before 20 March 2019, the Act will apply to the periodic tenancy 12 months from commencement (20 March 2020).

In determining whether a house or dwelling is unfit for human habitation a Court will have regard to the following matters:
- Repairs
- Stability
- Damp
- Internal arrangement
- Natural lighting
- Ventilation
- Water supply
- Drainage and sanitary conveniences
- Facilities for preparation and cooking of food and for the disposal of waste water
- Any prescribed hazard

A property will be regarded as unfit for human habitation if it is so far defective in one or more of the above respects that it is “not reasonably suitable for occupation” in that condition. For example, a property may be regarded as unfit if affected by damp and mould growth, carbon monoxide and fuel combustion products, electrical hazards and structural collapse and falling elements.

Comment

The Act consolidates a tenant’s means of redress against landlords who fail to meet their covenants in providing properties fit for human habitation. It thus provides a statutory cause of action against landlords, and creates a further potential liability for property owners, and may result in increased premiums for landlords operating in this sector of the market, such as the provision of social housing and buy-to-let.
Admissibility of without prejudice material in application for costs against a non-party

*Peter Willers v Elena Joyce & others [2019] EWHC 937 (Ch)*

**Issue**

The Court determined the admissibility of evidence on which the applicants wished to rely in an application for costs against the respondents pursuant to s.51 of the Senior Courts Act 1981. The evidence in question comprised of references in inter parties correspondence marked “without prejudice save as to costs” (WPSAC) as to what was said and done in the course of settlement discussions at a mediation which was agreed to be “without prejudice”.

**Background**

The Claimant in the instant case was subject to a claim by a company called Langstone Leisure Ltd. That claim was discontinued by Langstone Leisure Ltd with the result that they were ordered to bear the costs of those proceedings. The costs were assessed resulting in a shortfall of £2m. That action was considered to be malicious and therefore the Claimant brought the instant case seeking damages for malicious prosecution, which included as a head of damage the £2m costs shortfall. The parties engaged in without prejudice mediation that was unsuccessful. At Trial the malicious prosecution action was dismissed with the Claimant ordered to pay the Defendants’ costs.

The Claimant had no assets with which to discharge the costs liability so the Defendants sought an Order joining the Claimant’s lawyers (i.e. the respondents) as parties to the proceedings for the purpose of securing a costs order against them given their financial interest (among other reasons) in the litigation.

In the supporting witness statement the Defendants placed reliance upon what was said and done at and around the without prejudice mediation. The Claimant contested the admissibility of evidence of matters they said were covered by the without prejudice rule.

**Decision**

It was quickly decided that when considered without the WPSAC correspondence the mediation itself and the discussion shortly thereafter in respect to the same would be inadmissible by operation of the without prejudice rule.

That therefore left only the issue of whether there had been a waiver of the right to rely on what was said during without prejudice settlement discussions. It was noted to be established law that waiver must be mutual and it is not to be lightly inferred. It was further noted that once the protection of the without prejudice rule had been waived the waiver covers the whole of the communication or discussion and not just the aspects of it that one party has sought to deploy.

It was found that the first WPSAC letter from the Claimant demonstrated a clear intention to use evidence of what was said and done during the without prejudice settlement discussions at a future costs hearing. It was accordingly, in the context of the usual without prejudice rule, “an offer to vary its terms.” That offer was held to have been accepted by the Defendants in their response, which made clear that both parties would deploy detail of offers and what was said at the mediation for argument on costs.
As to the without prejudice discussion four days after the mediation this was not part of the WPSAC correspondence. However, the Court found that the discussion was so proximate to the mediation, and indeed concerned matters discussed at the mediation, that it was a direct continuation of the discussions that took place at the mediation and so was admissible.

It was further found that the Claimant’s realisation that the decision to open up without prejudice matters could result in material being deployed against them came too late and their attempts to limit the scope of the agreement already reached were ineffective.

The Court found the evidence was admissible on the basis of agreement between the parties.

Comment

The decision maintains the sanctity of the without prejudice rule that communications and discussions entered in to “without prejudice” will not be admissible in evidence by either party. However, it serves as a reminder that it is possible for the parties to agree upon a variation of that usual rule, either explicitly or implicitly. That outcome can arise and ultimately prove detrimental to the unwary party if care is not taken. It is not possible to selectively admit in evidence parts of a without prejudice discussion, it is all or nothing, requiring a considered decision whether the cloak of without prejudice should be drawn aside or not. Any and all subsequent exchanges in relation to a without prejudice discussion/meeting should in turn be “without prejudice” if the intention is to preserve that protection.

...communications and discussions entered in to “without prejudice” will not be admissible in evidence by either party.


“Do You Use or Not to Use — That is the Question”

On 12 June 2010 Mr Thomas Holden, a mechanical fitter employed by R&S Piling, was at their garage premises effecting repairs to corrosion on the underside of his car, which then caught fire as a result of his welding work. The fire spread to the garage and adjoining premises. The insurers of R&S Piling, Axa, paid out over £2m to R&S Piling and the owners of adjoining premises in respect of the fire damage and brought a subrogated claim in the name of R&S Piling against Mr Holden. The obvious purpose of that claim was to make a recovery from Mr Holden's motor insurers, UKI, Mr Holden not having £2m. UKI sought a declaration they were not liable to indemnify Mr Holden in respect of the loss.

Mr Holden’s motor insurance policy provided as follows:

“We will cover you for your legal responsibility if you have an accident in your vehicle and:

- you kill or injure someone;
- you damage their property; or
- you damage their vehicle.”

That policy had to comply with s145 of the Road Traffic Act 1988 (“the RTA”):

“...the policy – (a) must insure such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person or damage to property caused by, or arising out of, the use of the vehicle on a road or other public place in Great Britain . . .”

(emphasis added)

At first instance HHJ Waksman QC (R&S Pilling v UK Insurance Ltd [2016] 4 WLR 38) had found for UKI on the basis that the fire was not caused by, and did not arise from, the use of the car but by welding works done to the car. The Court of Appeal ([2017] QB 1357) reversed that decision on the basis that s145 required the policy to be read as follows:

“We will cover you for your legal responsibility if you have there is an accident in involving your vehicle...”

Sir Terence Etherton MR also held that repairs to a car constituted use of it.

In the Supreme Court ([2019] 2 WLR 1015) UKI argued for the first time that the insuring clause did not have to be read so as to comply with s145 because that was already achieved through wording in the policy certificate. That argument was rejected on the basis that the RTA treats insurance policies as a distinct concept from certificates of insurance. That did not, however, resolve the appeal.

The decision of the Supreme Court, and the return to the construction of the policy of HHJ Waksman QC, is to be welcomed as a return to common sense...

Lord Hodge JSC (with whom the other members of the Court agreed) identified three questions:

a. What is the extent of the insurance cover which s145 requires?

b. What words should be read into the policy to achieve that requirement?

c. Whether Mr Holden’s accident falls within the wording of the policy as so interpreted?
The answer to the first question is that s145 must be interpreted as:

“...mandating third party motor insurance against liability in respect of death or bodily injury of a person or damage to property which is caused by or arises out of the use of the vehicle on a road or other public place. The relevant use occurs where a person uses or has the use of a vehicle on a road or public place, including where he or she parks an immobilised vehicle in such a place (as the English case law requires), and the relevant damage has to have arisen out of that use.”

The Court of Appeal answered the second question incorrectly because it added to the policy more than that which was needed to make the cover comply with the RTA. Its formulation removed the statutory causal link between use of the vehicle and the accident. The Supreme Court determined that the policy should instead have been read as follows:

“We will cover you for your legal responsibility if you have an accident in your vehicle or if there is an accident caused by or arising out of your use of your vehicle on a road or other public place and...”

The answer to the third question was that Mr Holden’s accident did not fall within the wording of the policy, properly construed, because the fire did not arise out of the use of his car because carrying out repairs to it did not constitute using it.

The decision of the Supreme Court, and the return to the construction of the policy of HHJ Waksman QC, is to be welcomed as a return to common sense and serves as a warning to the Courts to do as little violence to contracts when construing them as they are obliged to do.
Whilst we take care to ensure that the material in this newsletter is correct, it is made available for information only, and no representation is given as to its quality, accuracy, fitness for purpose, or usefulness. In particular, the articles in this newsletter do not give specific legal advice, should not be relied on as doing so, are not a substitute for specific advice relevant to particular circumstances. Plexus Law accepts no responsibility for any loss which may arise from reliance on information or materials published in this newsletter.

Get in touch

If you would like to know more about any of the articles published in this edition of Legal Watch please contact:

Paul Cha, Partner
T: 020 7469 6235 | E: paul.cha@plexuslaw.co.uk

Natalie Owen, Solicitor
T: 020 8774 0832 | E: natalie.owen@plexuslaw.co.uk

Plexus Law | Peninsular House | 30-36 Monument Street | London | EC3R 8NB

www.plexuslaw.co.uk