

LANGLEYS' PUBLIC SECTOR UNIT - TOP TIPS

Langleys' Public Sector Unit has continued to be successful in defending a wide variety of claims for its local authority clients. Here are a couple of our recent successes:-

Drainage Obligations



Langleys' Public Sector Unit recently handled a claim for damages arising from the loss of a potato crop by tenant farmers ("the farmers") which they alleged had been caused by the local authority's failure to maintain its drainage ditch.

The local authority owned drain was part of a larger drainage network in a relatively flat low lying area of land in which the Claimants' tenanted farm was located. In previous years, the local authority had engaged a drainage contractor to maintain and clean the drain every 2 to 3 years. This

maintenance would normally be carried out in the autumn for environmental reasons. By the end of June 2006 the farmers noted the field in which the potato crop was growing was becoming increasingly wet until they became water logged at the end of October 2006 when emergency drain clearance was undertaken. The potato crop was subsequently removed and was rotten.

The Court considered whether the local authority owed the Claimant a duty and if so the extent.

The Court found that it was just and reasonable to impose a measured and limited duty of care given the relationship between the parties and the fact that the local authority was aware the land was being used for agriculture. The duty had to be limited and put into its proper context as the farmers had prescriptive rights of access to the land and a right to maintain the drain anyway.

The Court found that the local authority's duty was to respond reasonably to the reports of the soil conditions by the farmers either by causing the work to be done in a reasonable time or by indicating to the farmers that they themselves should do the work. It was found that the farmers had not flagged up the urgency until well into October 2006 when the Court found the potato crop was already lost. As a result, the Court found there was no breach of duty.

Pre-Action Disclosure of Confidential Records

Requests for disclosure of documentation including personal data such as medical notes, school pupil's files and care records often cause concern for local authorities as these records contain confidential personal information.

Under section 35(2) of the Data Protection Act 1998 personal data is exempt from the non-disclosure provisions where disclosure is necessary for the purpose of legal proceedings, including prospective legal proceedings. In circumstances where it is deemed necessary therefore, confidential records can be disclosed in accordance with the pre-action protocol.

Langleys were recently involved in a pre-action disclosure application brought by a Claimant seeking disclosure of pupil

records. Disclosure of pupil records relating to the Claimant himself were provided, however the school were concerned about disclosure of further records which contained information regarding other school pupils, disclosure of which would ordinarily have required parental consent.

At the Pre-Action Disclosure Hearing, the Court found that the further pupil records were necessary for the Claimant to fully consider liability but agreed that the Local Authority had not unreasonably refused those documents and had correctly sought clarification from the Court. Such guidance from the Court was necessary to protect the Local Authority from any potential grievances in relation to the records of other pupils being disclosed, with the Court emphasising the need for all records

disclosed to remain confidential and used only for the purpose of legal proceedings.

The Court also refused the Claimant's application for costs arising from the Application, ordering costs in the case on the basis that in these circumstances the Local Authority's actions had been reasonable and the Pre-Action Disclosure Hearing was necessary in order to determine the issue of disclosure.



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CPR UPDATE : PRE-ACTION CHANGES • COURT SPOTLIGHT • LANGLEYS' TOP TIPS •

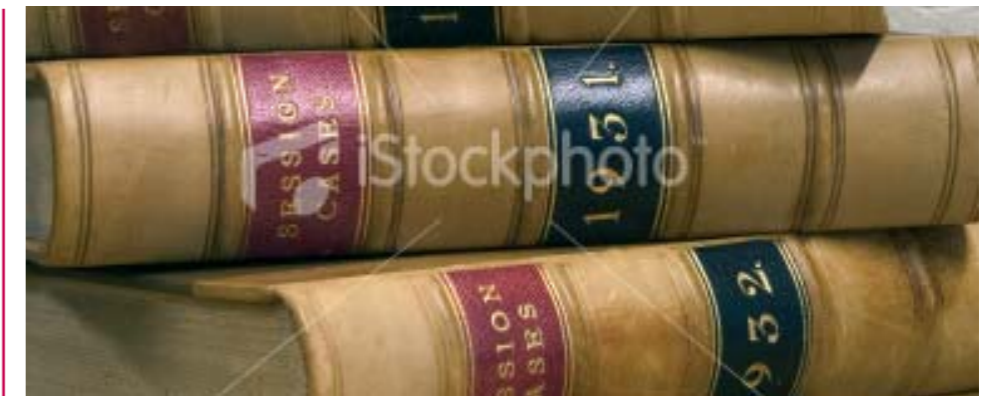
Hot off the press are the latest Civil Procedure Rule changes which came into effect on 6 April 2009. These incorporate a practice direction termed 'Pre-action conduct'. This is essentially aimed at forcing the parties to settle or to at least narrow the issues in dispute. Considering the amendments reduce the timescale for responding to the pre action protocol letter it is surprising little advance notice was given. For further detail please look within!

We are still awaiting the House of Lords decision on the case of Smith v Northamptonshire CC [2008] ICR 826 which I am reliably informed is due any day! That case involved a local authority employee who sustained an accident whilst using a wheelchair ramp at a private residence which had been installed by the NHS. It remains to be seen if the House of Lords overturns the Court of Appeal's finding that an employers' duty under Regulation 5 of the Provision and Use of Work Equipment Regulations 1998 only extended to that work equipment which the employer had some right over or responsibility for its maintenance.

Finally – do not miss out on Langleys Public sector seminar here in York on the 13 May. Hot topics will cover practical tips for handling abuse claims, the House of Lords decision in Smith v Northamptonshire CC and managing the accident aftermath and the HSE inspector. (Please contact me to book a place) Otherwise I look forward to seeing you the ALARM annual conference when I will be speaking on Lone Workers.

Enjoy the read.

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CPR UPDATE : PRE-ACTION CHANGES

The 49th Update to the Civil Procedure Rules came into force on 6 April 2009 introducing significant changes, the most notable of which is to pre-action conduct marking a considerable change to the handling of claims before proceedings. The new Practice Direction to CPR Part 3 on Pre-Action Conduct makes changes to the Practice Direction on Protocols and introduces new guidance on a pre-action procedure for cases where no specific Pre-Action Protocol applies.

The principle behind the Pre-Action Conduct Direction is to encourage parties to exchange information and consider using a form of alternative dispute resolution enabling more disputes to be settled without formal proceedings being issued, which in turn will support the ability of the Court to efficiently manage those cases in which proceedings cannot be avoided.

The Practice Direction makes clear that the Court will carefully monitor and consider parties' pre-action conduct and their compliance with the specific pre-action protocol relevant to the particular type of claim. The Court will assess whether parties have complied in substance with the relevant principles and requirements of the relevant pre-action conduct or protocol, taking into account the proportionality of the steps taken in comparison to the size and nature of the claim. The parties should act in a reasonable and proportionate manner with each other, with examples of

non-cooperation being a failure to disclose requested documents without good reason, an unreasonable refusal to consider ADR and a failure to provide sufficient information to enable the other party to comprehend the issues in dispute. Claimants will be required to certify compliance with the relevant pre-action conduct and protocol in the claim form or particulars of claim.

The extent to which parties have complied with the Pre-Action Conduct Direction or relevant Pre-Action Protocol will now be considered by the Court when giving case management directions and when making orders for costs. The Court may ask parties to explain what steps were taken prior to proceedings so parties would be well-advised to document all steps made pre-proceedings, particularly efforts made to settle and co-operate pre-proceedings in order to safeguard their position should any allegations of non-compliance be raised at a later stage.

If the Court determines that a party has failed to comply and that non-compliance has had an adverse effect upon the claim, sanctions which the Court may impose include a stay of proceedings until steps which ought to have been carried out are taken, an order that the party at fault pays costs (even in Small Claims Track cases) and orders both limiting or increasing interest recoverable upon any damages subsequently awarded.

CPR UPDATE : PRE-ACTION CHANGES

The specific Pre-Action Protocols for personal injury claims, disease claims and housing disrepair cases etc are well established but the new Pre-Action Conduct Direction now introduces a new Pre-Action Protocol governing the conduct of parties in any case not subject to a specific protocol.

The new Protocol repeats the general principles that the parties should exchange all relevant information and make all reasonable and proportionate attempts to settle the claim without recourse to proceedings.

A formal letter of claim should be provided by the Claimant, detailing specific information and setting out the grounds and extent of the claim. The Defendant should acknowledge receipt of the letter of claim within 14 days and where the matter is straightforward, the defendant will be expected to provide a full response to the claim within those 14 days. Where the matter involves an insurer, or a third party or there are issues concerning evidence then the Defendant's full response to the claim should be made within 30 days. Should the claim be particularly complex and require expert advice for example, then a period of longer than 30 days for the Defendant's response may be appropriate, but only in exceptional circumstances will a period of longer than 90 days for the Defendant's full response be considered reasonable.

The Claimant themselves are also required to reply to any request by the Defendant for documents within a reasonable period. Whilst the new Protocol imposes tight timetables for the progress of all claims not governed by a specific pre-action protocol, it is made clear that the new Practice Direction must not be abused by parties as a tactical device to generate unnecessary costs or to secure an unfair advantage against the opponent.

The new Pre-Action Conduct Practice Direction highlights how the Courts will now be considering pre-action conduct in more detail and the chances of sanctions being imposed for non-compliance are certainly

49TH AMENDMENT TO CIVIL PROCEDURE RULES : THE KEY CHANGES

- The new Pre-Action Conduct Practice Direction restructures the Practice Direction on Pre-Action Protocols and introduces a new Pre-Action Protocol for all claims not already governed by a specific Protocol.
- Compliance with the new Pre-Action Conduct Direction and Pre-Action Protocols will be considered and taken into account when the Court gives case management directions and sanctions including costs orders may be imposed for non-compliance.
- Fast Track limit increased from £15,000 to £25,000 for all claims issued on or after 6 April 2009
- Fast Track Trial costs for claims between £15,000 and £25,000 will be £1,650
- Costs Capping Orders may now be made but only in exceptional circumstances.

greater. The tight timetable for handling claims not governed by any specific protocol will place more pressure on local authorities and insurers to handle all claims as quickly and efficiently as standard personal injury, disease and housing disrepair claims. Claims handlers for Defendants will need to communicate effectively with claimants to establish when a full response on liability will be made and what, if any, further information and documents are required from the claimant themselves. All aspects of the Pre-Action Conduct Direction and Protocols emphasise the need for open co-operation between parties and promotion of alternative dispute resolution as a means of resolving claims without proceedings.

Whilst it is the new Practice Direction that is likely to have the greatest impact on claims handling, the CPR amendments are not confined to just pre-action matters. In accordance with the recent Ministry of Justice reforms, the amended CPR Part 26 increases the financial limit of claims within the Fast Track from £15,000 to £25,000. The maximum Fast Track Trial costs are in turn increased for those claims falling between £15,000 and £25,000.

The amendments to Part 44 General Rules about Costs and the Practice Direction supplementing Parts 43-48 also introduce

costs capping orders, which are orders which limit the amount of future costs (including disbursements) which a party may recover under a later costs order.

A costs capping order may be made in respect of the whole of the claim or any issues ordered to be tried separately and can be made at any stage of proceedings against all or any of the parties. A costs capping order may be made if there is a substantial risk that costs will be disproportionately incurred and the Court is not satisfied that the risk can be adequately controlled by case management directions and detailed assessment of costs.

When considering making such an order, the Court will consider whether there is a substantial imbalance between the financial position of the parties, whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the case, the stage at which proceedings have reached and the level of the costs incurred to date, together with the level of future costs. The rules emphasise however that the Court will only make a costs capping order in exceptional circumstances and any application for such an order must be made as soon as possible.

COURT SPOTLIGHT

Recent cases of interest include the following:-

Grant Couzens v T McGee & Co Limited (now T/a McGee Group Limited) (2009)

Mr Couzens was involved in an accident whilst driving his employer's tipper waste lorry when it overturned due to him driving too fast. He claimed that he had been unable to move his foot from the accelerator to the brake as a piece of scrap metal which he kept in the side pocket of the driver's door had caught in his trouser leg. Mr Couzens kept the scrap metal as a makeshift tool which he used for a variety of tasks on the lorry, such as scraping mud from the tyres and kept it in the driver's door pocket as there was nowhere else suitable in the lorry. Mr Couzens sought damages from his employers alleging they had breached the duties owed under the Provision and Use of Work Equipment Regulations 1998 in failing to provide a suitable place for him to keep his makeshift tool. Mr Couzens' claim had failed but he appealed the decision to the Court of Appeal.

Mr Couzens' Appeal was also unsuccessful however. The Court of Appeal found that if an item of equipment that had not been supplied by an employer was being used by an employee at work, it would only be "work equipment" for the purposes of the Regulations if the employer expressly or impliedly permitted its use or must be deemed to have permitted its use. Deemed permission would be inferred where the employer ought to have realised that an item was being used but had not and therefore did nothing to stop it. On this occasion the Court of Appeal found that the employers did not know that Mr Couzens was using the scrap metal or transporting it in the door pocket, so they could not have either expressly or impliedly given permission for Mr Couzens to use it. The employers had undertaken frequent and thorough inspections of the lorries but the presence and use of the makeshift scrap metal tool had not come to light. There was no evidence that Mr Couzens had used the tool openly or for a significant time. The Court of Appeal concluded that the piece of scrap metal could not properly be considered as work equipment under Regulation 3(2) of the 1998 Regulations and therefore the Regulations did not apply.

N.B. Mr Couzens has filed a petition to the House of Lords for permission to appeal.



Robert McIntyre v Basildon District Council (2008)

Mr McIntyre sought damages from Basildon District Council in their capacity as the local Highway Authority in respect of personal injuries arising from a tripping accident in which he tripped over a cracked pavement where the tarmac had broken up with a deviation measuring more than 1.5 inches. The Council sought to establish the statutory section 58 defence maintaining that they had undertaken a highway safety inspection of the pavement in question every 4 months and that the alleged defect had not been present at the time of the last inspection.

The Council's defence failed and Mr McIntyre succeeded in his claim. The Council's own Code of Practice had provided that the driven safety inspections should be undertaken with a driver and inspector, not a sole inspector both driving and inspecting as had been the case in the 4-monthly inspections. The inspector's evidence that the drive-by inspection was conducted at just 10mph was doubted by the Trial Judge, who was not satisfied that the Council's evidence showed a series of adequately performed inspections.