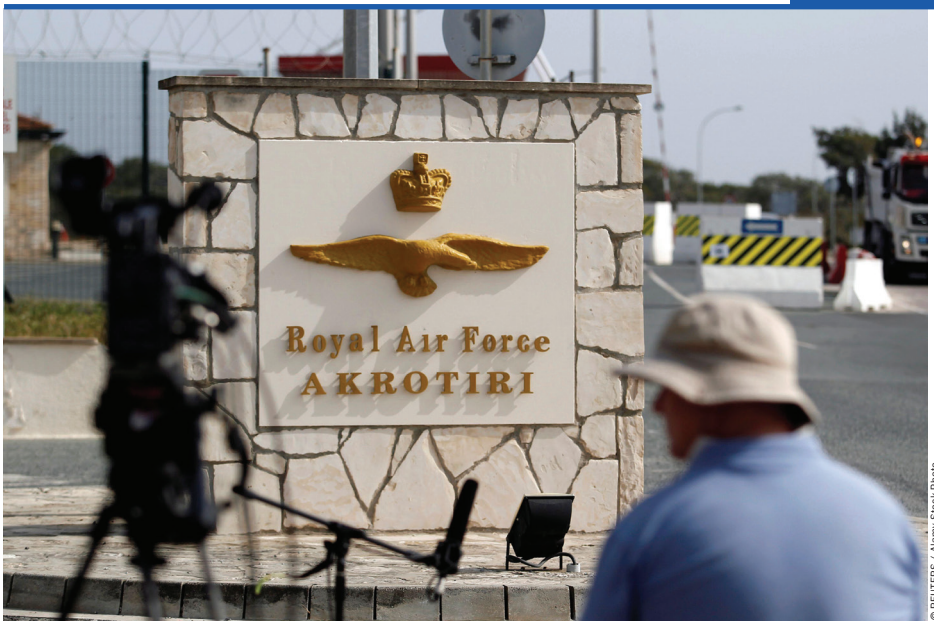

Personal injury: lessons from 2022

Vijay Ganapathy considers key issues dealt with by the courts in headline personal injury cases this year

IN BRIEF

- Determining whether the English courts had jurisdiction to hear a case involving an accident in Cyprus, based on the claimant's residence.
- Enforcing a costs order in a 'mixed' claim.
- Increasing the options for bringing employers' liability claims against dissolved defendants.

As we near the end of the year and head into 2023, one area that fills many practitioners with dread is the likely withdrawal in December next year of all EU regulations and directives implemented here as domestic law. While some may be assimilated back into UK legislation, the changes will be drastic.

Determining residence

It will be interesting to see, therefore, what impact—if any—past decisions have on future rulings. Recently, in *Stait v Cosmos Insurance Ltd Cyprus* [2022] EWCA Civ 1429, the Court of Appeal determined whether the English courts had jurisdiction to hear a case involving an accident in Cyprus in 2017. At the time, the claimant, Mr Stait, a Royal Air Force (RAF) officer, was stationed in a sovereign base area (SBA) at Akrotiri.

Stait issued proceedings in 2020 during the Brexit transition period, which meant the Recast Regulation (Regulation (EU) 1215/2012) still applied. This would enable the court to have jurisdiction if Stait was 'domiciled' here when he issued his claim, which required consideration of whether he was resident in the UK.

Stait was born in the UK and lived here until 2016 when he voluntarily applied for a five-year posting in the SBA. Stait was married with children, and they owned a house in Cumbria which was rented out when they were away. He also remained on the UK electoral roll and paid UK tax and national insurance on his RAF salary. While in the SBA, he lived with his family in accommodation that was provided there, and his children attended local primary and secondary schools.

To determine the issue of residence, the Court of Appeal considered numerous authorities. From these, it concluded this term should be given its ordinary meaning as a place where someone lives with some permanence. After considering Stait's specific circumstances, the court concluded he was not a UK resident when proceedings were issued as he was working full time in the SBA, lived there in accommodation as a family unit, his children went to school in the SBA, and he was stationed there for a long period during which time he only very occasionally returned to the UK. The fact he paid UK tax and voted in the UK showed he maintained links with the UK, but these factors were less relevant to the determination of residence.

The court acknowledged that someone could be resident in two countries, but this was not the case here because there was a 'distinct break' from Stait's residence in the UK as his work, family and social life had moved to the SBA in 2016.

Stait also argued that the right of members of the British armed forces to bring UK personal injury proceedings should be given protection, but the Court of Appeal found no support for treating such claimants differently. Stait was therefore unable to bring his case here.

This case shows how fact-specific the determination of residence is, and while it provides some guidance of the relevant factors, these will only be of temporary relevance, as this right will no longer exist at the end of next year.

Mixed feelings

Another significant milestone in 2023 is that next April marks the ten-year anniversary of qualified one-way costs shifting (QOCS), which was introduced as part of Lord Justice Jackson's costs reforms. Jackson considered that costs in some areas of civil litigation were 'disproportionate' which, in his view, was hindering access to justice. QOCS was therefore introduced to address this, but the implementation of its reforms required claimant and defendant solicitors to make drastic changes which have been difficult to adapt to. Despite the passage of nearly a decade, various aspects of these rules continue to create considerable uncertainty which judges have grappled with in various reported decisions.

A recent example is *Achille v Lawn Tennis Association Services Ltd* [2022] EWCA Civ 1407 in which the Court of Appeal considered whether to enforce a costs order in a 'mixed' claim. The claimant, Mr Achille, sought damages for psychiatric injury and injury to feelings after he was expelled from a Birmingham tennis club (governed by the defendant, the Lawn Tennis Association). His psychiatric injury claim was subsequently struck out as the district judge considered there were no reasonable grounds for bringing it; however, his injury to feelings claim continues and remains to be determined.

In an exception to QOCS, CPR 44.15 allows defendants to enforce orders for costs against claimants without the court's permission where 'proceedings' have been struck out for disclosing no reasonable grounds. Achille was ordered to pay the defendant's costs, and it was considered CPR 44.15 enabled the defendant to enforce this order without needing any further permission from the court.

On appeal, the circuit judge agreed with the first instance decision, so the matter came before the Court of Appeal which considered whether the term 'proceedings' in CPR 44.15 referred to Achille's whole case or just the personal injury claim. If it were the latter, the defendant could enforce its costs order immediately.

The circuit judge ruled a narrow interpretation was necessary to give effect to the QOCS purpose of deterring unmeritorious claims. The Court of Appeal disagreed and held that while there was some inconsistency in the QOCS provisions, sections such as CPR 44.13 made clear the term 'proceedings' referred to all the claims advanced by the claimant in a single action. The Court of Appeal also considered this interpretation did not hinder the purpose of deterring unmeritorious claims as CPR 44.16 (2)(b) enabled courts to remove the QOCS protection in mixed claims to the extent it considered just. Reference was made to *Brown v Commissioner of Police of the Metropolis and another* [2019] EWCA Civ 1724, [2019] All ER (D) 124 (Oct) which provided guidance on the exercise of this discretion. It was suggested the striking-out of the personal injury claim was a factor that could be taken into account when making this determination.

Therefore, while Achille succeeded in his appeal, he will need to await the conclusion of his other claim before it is confirmed whether the court will exercise its CPR 44.16 discretion to enforce the defendant's cost order against him.

While this decision provides some helpful guidance on the interpretation of the QOCS provisions, the fact the courts retain such discretion means the risk of being ordered to pay costs in mixed cases that involve risky claims remains ever-present.

Dissolved defendants

Moving away from costs, a significant case which has increased the options for lawyers bringing claims against dissolved defendants is *Keegan v Independent Insurance Co Ltd and another* [2022] EWHC 1992 (QB). In employer's liability cases involving asbestos diseases, there is usually a long gap spanning several decades between the negligence and development of the disease. This means many potential defendants have either dissolved or ceased trading and there are insufficient funds to compensate claimants. If the relevant employer's liability insurers are identified, a case can be advanced, but if the employer is dissolved, restoration proceedings would likely be necessary, which can take some time and incur substantial costs.

In this case, the claimant, Mr Keegan, developed mesothelioma (a cancer of the lining of the lungs) from alleged negligent asbestos exposure with his employer in the 1970s/early 1980s. Both the first defendant, Independent Insurance Company Ltd, and second, Zurich Insurance PLC, had provided employers' liability cover for this employer (now dissolved) during this time. Instead of restoring the employer, Keegan brought proceedings against both defendants claiming damages of just over £850,000.

Prior to trial, Keegan settled his claim against Zurich for £650,000 who agreed to indemnify his private medical treatment costs which he had already commenced. At trial, Keegan sought the balance of his claimed damages (approximately £200,000) from Independent Insurance. As Independent Insurance had been unrepresented, no defence or counter schedule had been filed. Also, as there was no indication the sums claimed were inflated or unsupported by proper evidence, the court felt there was no basis upon which to reassess quantum.

Therefore, the main issue for the court was whether Keegan was entitled to bring his claim directly against Independent Insurance. The Third Party (Rights Against Insurers) Act 2010 (TP(RAI)A 2010) allows this, but only if the employer's liability was incurred after 1 August 2016 (the Act's commencement date). Such liability would be incurred when the cause of action accrued which, in this case, was the date when Keegan sustained 'actionable damage'.

It was noted Keegan experienced chest pain for the first time in January 2021, following which he underwent various tests which confirmed he had mesothelioma. An earlier CT scan in October 2020 discovered a small amount of fluid in his lungs, but this was not suspected to be mesothelioma-related at the time and it appears Keegan was unaware of this.

It was noted from the ruling in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 that this did not necessarily mean the cause of action had not accrued in October 2020. The key question was whether his disease had reached a stage where a judge could award damages for the harm suffered. The court in *Keegan* considered this a difficult issue but felt on balance, Keegan could be said to be injured when he had the effusion. However, it was unnecessary to determine whether Keegan sustained actionable damage when he had the effusion or when he first had chest pain, as both dates occurred after TP(RAI)A 2010's commencement date. The court held Keegan was therefore entitled to sue both insurers directly, and so succeeded in recovering the balance of his damages.

There was much excitement at the time TP(RAI)A 2010 was given royal assent that this would solve the issue of suing dissolved defendants. This excitement quickly dissipated when it was realised claims would only fall within its remit if the cause of action accrued after the commencement date. With the passage of time, claimants now have a better chance of arguing their cause of action accrued after this date which potentially opens the door to other industrial disease claims against insurers. In mesothelioma cases where time is of the essence, such a course might be preferable to restoration of a dissolved defendant. **NLJ**

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