Keoghs

Client ALERT

6 July 2017

Never too late for a change of heart?

Blake v Croasdale & esure [2017] EWHC 1336 (QB)*

Insurers reeling from the sweeping change to the discount rate earlier this year will have spent the past few months re-considering their tactics in high value claims, and with this in mind this recent Keoghs case will be of interest.

The Decision

On 18 April 2017 esure successfully applied for permission to withdraw from a pre-issue admission made almost two and a half years prior to the hearing.

The significant feature of the application was that no further evidence had come to light since the admission had been first made.

The decision to seek permission to resile had been made following a careful reappraisal of the facts, in light of the allegedly vast increase in value of the claim, which started life in the Portal but after service was said to be worth in excess of £5 million.

The judge was persuaded to follow *Woodland v Stopford [2011] EWCA Civ 266* and granted the application, plus rather tellingly, made a significant costs order against the claimant who had vigorously opposed the order.

In an interesting passage for insurers the judge found:

"In my judgment esure's approach was a perfectly sensible one and I do not consider that it is to be criticised for what has been described, in my judgment erroneously, as a last-ditch effort to avoid liability. It is correct to say that the material enabling esure to raise the defence has been available to esure from an early stage, but esure cannot possibly have imagined that it was facing a multi-million pound claim when the claimant's own solicitors considered it appropriate to have started the claim within the portal. Even when the initial medical evidence was served in November 2015, esure could not then have foreseen that this was what is now described as "a catastrophic" claim running into many millions of pounds, its response then being to make an offer of £100,000 net. Accordingly, it seems to me that esure should be entitled to withdraw its admission and that to refuse to do so would discourage defendants, especially insurers, from acting proportionately, which would make the giving of admissions in like cases where it is appropriate, in the interests of reasonableness and proportionality, to give them, more difficult to secure."

The claim, in which esure argued there was at least a good arguable case for the defendant to succeed with a defence of **ex Turpi causa** based on a joint criminal enterprise between the occupants of the claimant's vehicle, namely drug dealing, has now been listed for a trial on the preliminary issue of liability.

Prominent legal commentators have suggested that this decision may go as far as justifying a change in mind simply due to the increasing value of a claim, which would put it at odds with the decision in *SE Wood v Days Health UK [2016] EWHC 1079 (QB)*, and while this was not the sole determinant in what is undoubtedly a complex case, it is hard to argue that this was not a highly significant feature of the decision.

continued overleaf

Practical Guidance

The precise circumstances in which permission to withdraw will be granted are intensely fact specific, but for insurers considering whether to seek permission to resile from an admission, section 7.2 of Practice Direction 14 provides an excellent starting position.

The key features to look out for when considering whether to seek permission to withdraw an admission are:

- **The length of time since the admission and the stage the case has now reached.** The longer the period and the more advanced the claim, especially if a trial date has been fixed, the less likely the application will be to succeed.

- **New information which was not available at the time the admission was made.** If new information could materially change the dynamic of the case this will increase the prospects of a successful application.

- **The prospects of success/ strength of the case in the event the application is granted.** The applicant will need to show that the defence will have at least some realistic prospect of success.

- **Admissions made by mistake or without sufficient authority to bind**. The respective level of prejudice to the parties will be a key consideration here.

- **A considerable increase in value, which leads to a careful re-appraisal of the facts.** This will be particularly relevant in cases such as *Blake* where the claim started life in the Portal, and/ or potentially where there is a changing legal landscape (e.g. development of the law specific to the case in question).

In cases where a potentially arguable case to withdraw is identified, action needs to be taken quickly and decisively. In the event proceedings have been issued an application will need to be made promptly, and on notice, with clear communication to the other party about the decision taken and supporting reasons. While the other party should be given the opportunity to consent, it would be wise to file the application and, if appropriate, amended pleadings pending discussions.

* http://www.bailii.org/ew/cases/EWHC/QB/2017/1336.html

For further information, please contact:

Mathew Perkins
Partner
☎ 0238 190 7017
✉ mperkins@keoghs.co.uk

Keoghs LLP
2 The Parklands, Bolton, BL6 4SE
T: 01204 677000 F: 01204 677111 E: info@keoghs.co.uk