Case 41
Holmes

v

West London Mental Health NHS Trust

[2018] 4 Costs LR 763

High Court of Justice, Queen's Bench Division
29 June 2018

Before:
HHJ Gore QC

Headnote

In an action which had progressed with "bimbling" for years (inexcusable delay), the tortious act having occurred in February 2012, but with the trial window not opening until 1 October 2018 and then to last until 30 April 2019, the claimant had made a Part 36 offer in proper form on 17 February 2017 to recover 95% of full liability. That had been rejected on 8 March 2017, but at a subsequent point the defendant had accepted it out of time and thereafter, by consent, judgment on liability as to 95% had been entered. That left the costs. Held: the "bimbling" by the defendant was not the norm: indeed it had been "out of the norm". That justified an order for the costs of the action to date to be made in favour of the claimant on the standard basis up to the end of the relevant period for acceptance, and thereafter on the indemnity basis.

Cases Cited

Excelsior Commercial & Industrial Holdings Ltd v

Salisbury Hammer Aspden & Johnson and Others [2002] EWCA Civ 879
Kiam II v *Mirror Group Newspapers Ltd* [2002] EWCA Civ 66

Judgment

1. **HHJ Gore:** This defendant has known throughout this litigation that the claimant is mentally fragile. She has been under the care of a Dr Bullock from 1994 until 2012 and he prescribed her a cocktail of medications that included the toxic chemical lithium.

2. The claimant developed disturbing symptoms and deteriorating health in early 2012 as a result of which she was admitted to Hammersmith Hospital early on the morning of 16 February 2012. Tests were undertaken and as a result of those tests her lithium levels were found, on 18 February 2012, to be in the severe toxicity range. She was in fact so ill that she remained in the intensive care unit for 19 days and an inpatient in hospital for in excess of two months.

3. In this case she claims compensation from the defendants who were Dr Bullock's employers, for clinical negligence in and about the diagnosis and treatment of her condition.

4. The litigation history is sadly commonplace. The claim form was issued on 13 February 2015. Why are there such delays in initiating claims I ask, not rhetorically? Service was effected on 12 June 2015 on the last day, therefore, of the validity of the claim form for service, but it took another six months to serve particulars of claim then another seven months, from that, for the service of a defence. I have heard no evidence or argument about the reasons for all of this, but my provisional view is that such "bimbling", as one of my daughters calls it, is outrageous.

5. I expressed the provisional view because it is highly relevant that over four years prior to the filing of the defence denying this claim in its entirety the defendants produced a serious untoward incident report into these events which was highly critical of Dr Bullock's standard of care of the claimant, to the point that the assigned Master, at the first CCMC, is reported to have expressed the view that the defendant's case was, "worse than hopeless". Some might say that that

indicated a degree of prejudgment on his part, and moreover it was at a stage when expert evidence had not been exchanged. Not the greatest weight can be attached, therefore, to his remark, but it is part of the background in this case and relevant in my judgment as such.

6. Some rudimentary negotiation took place, including the making of what is, in the vernacular, described as a drop hands deal which invited the claimant to discontinue the proceedings on the basis that each of the parties bore their own costs. However, it culminated in the claimant's solicitors making a Part 36 offer, as it is so described, to settle on the basis that the claimant recovers 95% of the full liability value of the claim. That offer was made on 17 February 2017. There is no dispute that it was in proper form and it was effective. Time for its acceptance expired therefore on 10 March 2017.

7. The resumed full CCMC then took place on 21 February 2017 within the so-called relevant period for acceptance of the Part 36 offer. The claim was case managed by Master Roberts (as he then was), through to a prospective trial on all issues. I note with utter dismay that the trial window specified was from 1 October 2018 to 30 April 2019, which is basically seven years after the relevant events. To compound the distress that this undoubtedly caused to the claimant she remains a patient of the defendants.

8. The defendants rejected the Part 36 offer on 8 March 2017 and so the preparation for the trial dawdled along, witness statements being exchanged late, experts' reports being exchanged even more late, and in fact the agendas for the expert discussions never were agreed. Discussions should have been by 30 November 2017 and joint statements by 7 December 2017, some six months ago now, albeit that consensual extensions were necessary due to the delay in exchanging expert reports.

9. The witness evidence of the claimant's solicitor, Miss Lewin, which I accept, is that the claimant's solicitor has had to chase or hound the defendants all along the way. The claimant's solicitor's evidence is not refuted by evidence filed by the defendant from Mr Bate. The defendant could not even condescend to respond to repeated invitations to engage in ADR. The claimant's solicitors became so frustrated that an application was issued on 22 May 2018. It was, in my judgment, benign and charitable. It simply sought compliance with the case management needs of this case. I am surprised that it did not

either seek to strike out the defence for non-compliance or at the very least seek an unless order that could have led to such an outcome.

10. The thrust of the witness statement of Mr Bate for the defendants in reply, simply seeks to justify the defendant's stance on liability essentially on these grounds. Firstly, it was supported by their expert evidence, he says. Secondly, the diagnosis of lithium toxicity, to say the least, was questionable. Thirdly, the serious untoward incident report, though critical, was not the basis of the claimant's pleaded case and in any event, "was the product of an investigation not conducted in the context of a clinical negligence action", and therefore the implication is that it will be submitted to be of little value.

11. That indeed was Mr Barnes' submission because, he submitted, that the incident report was not a review in accordance with the standards that would be applied in judging whether clinical negligence is established in this case. Fourthly, Mr Bate asserts that the current version of the draft agendas are alleged to demonstrate that there has been a change in the main thrust of the claimant's case on liability. Fifthly, therefore, he says it was permissible, if not frankly reasonable to maintain the defence in this case until at the earliest the draft agendas revealed the allegedly new case.

12. With respect to Mr Bate I reject all of that. Serious lithium toxicity, as I understand it, was an established fact, albeit that there may have been issues about its cause and whether any breach of duty gave rise to it. Furthermore, he concedes and accepts that even if the so called alternative case was not the claimant's "main" case, it nonetheless was pleaded. Mr Barnes, for the defendant, so accepts.

13. Finally, I am not persuaded of the legitimacy of the contention concerning the so-called strength of the defence or perceived lack of merit of the claimant's case, which seems to me to be inconsistent with the defendant drip feeding of offers from the so-called drop hands deal to 50%, to 65% then 75%, then 85% and ultimately what I regard as capitulation more than 15 months later to the offer made by the claimant in the sum of 95%. That is not, in my judgment, the hallmark of a reasonably conducted defence based on reliable evidence with reasonable prospects of success.

14. Agendas are not evidence for this purpose. The claimant's case was pleaded and evidenced. It has not changed. There has been no amendment of it. I have not been taken to any striking change of the expert opinions relied upon. The case now is what it always was. What

has changed is the outward appearance of the defendant's view of it; that is all.

15. Mr Bate criticises the claimant for making the application concerning agendas, which he submits was made without warning and was premature. As I have already indicated in the light of the history of this litigation, which I have described at length, I am surprised how benign the application was and by how long was the delay in making it and there is nothing, in my judgment, in Mr Bate's criticism of it.

16. CPR Part 36 has often been said to be a freestanding code that sits therefore outside normal contractual principles. The result is the curiosity that the rejection of the Part 36 offer does not cause the offer to lapse. Rather the offer remains valid and effective unless it is withdrawn. Withdrawal is only permissible in accordance with CPR Part 36.9 and there is no dispute that the claimant's offer to settle never was withdrawn in this case.

17. Accordingly it remained available to accept, even if such acceptance was out of the time limit for acceptance or, as is sometimes described, it constituted late acceptance. Therefore it is that CPR Part 36.11(2) states that the Part 36 offer, "May be accepted at any time unless it has already been withdrawn". That general liberty is made subject expressly to certain other provisions which so far as may have been relevant are set out in CPR Part 36.11(3) and (4).

18. It seems to me that CPR Part 36.11(3) is not engaged because none of the four circumstances specified therein exist in this case. Therefore, the route to a determination by the court of costs provided for by CPR 36.11(4) was not available. CPR 36.13, so far as is material, provides as follows:

> "Where (a) a Part 36 offer which was made less than 21 days before the start of the trial is accepted or (b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period or (c) subject to (2) of Part 36 offer which does not relate to the whole of the claim is accepted at any time, the liability for costs must be determined by the court unless the parties have agreed the costs."

19. Subparagraphs (a) and (b) do not apply to the facts of this case. As regards subparagraph (c) the rider is of no application either, because it deals with defendant's Part 36 offers and this was a claimant Part 36 offer. Therefore it seems to me that the claimant's Part 36 offer did not relate to the whole of the claim because it only dealt with liability, the

rider to CPR Part 36.13(4)(c) having no application, liability for costs "must", I emphasise that word, be determined by the court and thirdly, the only way to avoid that mandatory requirement is if, "the parties have agreed the costs", which they have not in this case.

20. I then come to the offer and its acceptance. Whether in the arena of contract or the self contained code that is Part 36, a distinction needs to be made between an acceptance and a counter offer. Was this an acceptance or a counter offer? Is there a concluded settlement or not? What are its terms if there is? In pure contract a conditional acceptance is no such thing, it is a pure counter offer and it can either be accepted or rejected.

21. However, in CPR Part 36 there is no such thing as conditional acceptance. Either there is acceptance or there is not, something conceded and accepted now by Mr Barnes but not conceded or accepted by Mr Bate in his witness statement or indeed in the correspondence.

22. If there is acceptance it is to be in conformity with the provisions of Part 36. Those provisions dictate that in the factual circumstances of this case costs are to be determined by the court unless agreed by the parties. It follows that whatever might have been the pure contractual position, under Part 36 once the offer is accepted the court must determine costs unless the parties have agreed them. Not only does that give me the jurisdiction to entertain this application, but it also means that the effect of the letter dated 30 May 2018 is notice in writing, as required by the rule, of acceptance of the claimant's liability offer. Paragraph two is not a "Condition" as the writer, Mr Bate, purports to express it to be. It is nothing more than the defendant's offer as to costs. If not agreed by the claimant, it does not oust the jurisdiction of the court to determine the costs as required by CPR Part 36.13(4).

23. I am fortified in my view in so concluding in that the way for the defendant to have achieved their goal in this case was themselves to have made a CPR Part 36 offer to pay 95% of the full liability value of the claim on the basis that only standard costs would be recoverable. If such an offer had been made the claim would not have fallen to be considered under CPR Part 36.11(2), in which case if accepted by the claimant the entitlement to recover costs would have been limited to the standard basis under 36.11(3).

24. However, that is not what the defendants did. In no way can the

letter be construed as a Part 36 offer. It does not comply with the requirements. It can only be construed as an acceptance of the claimant's offer and an offer as to costs. So much is now accepted by Mr Barnes though, as I have already indicated, not by Mr Bate in his witness statement.

25. Therefore, it now falls to me to determine the liability for costs. The starting point's CPR Part 44.2. In summary the default position is that costs follow the event and that the basis for their assessment should be the standard basis. However, that may be displaced because CPR Part 44.2(2)(b) provides "The court may make a different order". CPR Part 44.2(4) directs that:

> "In deciding what order, if any, to make about costs the court will have regard to all the circumstances including (a) the conduct of all the parties, (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

26. Conduct is in issue in this case and I will return to that later, but I transgress to note that the claimant has succeeded on part of its case, that is by obtaining settlement of the liability issue at 95% of the full liability value claim, albeit that that is not whole success. That is clearly what is envisaged in sub (b). The rule continues:

> "(5) The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
>
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
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> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim."

27. Conduct is in issue in this case and I have described the slow process that the litigation followed and my views about that. Whether

it was reasonable for a party to pursue a particular allegation is a focus in this case and for the reasons that I have already started to explain it is a little difficult to characterise the conduct of the defendant as reasonable pursuit of a defence when it eventually capitulates by acceptance of the claimant's offer of 95% of the full liability value of the claim.

28. I have described the manner in which this case was defended and though the claimant has not succeeded in full, she has virtually succeeded and there is certainly no evidence or allegation at the moment that she has in any, let alone a significant respect, exaggerated her claim. I direct myself that in seeking to depart from what I have called the default position the burden is on the claimant to satisfy me. She seeks to do so and to invite the court to order costs in this case on the indemnity basis from the relevant date by which the Part 36 offer fell to be accepted in the first instance.

29. Mr Hyam, who appears for her, puts the conduct reasons shortly as follows in para 10 of his skeleton argument:

> "Here there is ample justification for making an award on other than the standard basis having regard to the factors in CPR 44.2 in relation to conduct. In particular (a) the damning content of the SUI report, (b) the Master's observations at the CMC in December 2016, (c) the failure of the defendant's own expert to deal with the key issues on liability, (d) the defendant's own negative assessment of the prospects of defending liability as demonstrated by the defendant's offers of 65%, 75% and then 85%, (e) the defendant's wholesale failure to respond to requests for ADR."

30. Mr Barnes, who appears for the defendants, rejects each and all of those assertions. I have already explained why it is that he says that the SUI report is not damning in content, but I do not agree with that. It does provide evidential background basis albeit that the investigation was not conducted in accordance with the standard of proof required in a clinical negligence claim, but it was, as Mr Hyam characterises it, damning and that is evidence that is significant.

31. The Master's observations I have already dealt with. I do not attach no weight to that as a factor, but I have explained why it may not be the strongest factor. Contrary to the submissions of Mr Barnes and indeed Mr Bate, there is, in my judgment, failure on the defendants' part to deal with the key issues on liability which are

simply not addressed in the final conclusions set out in the defendants' report and it is conspicuous and noteworthy in this regard, now that my attention has been drawn to that report in its entirety, that it was first dated and therefore addressed to the defendants presumably at about that date, 21 March 2016, so that more than two years ago the defendants had the opportunity to consider whether it was or was not an adequate response to the claimant's pleaded case, which, as I have already explained, has never changed.

32. Both parties now agree that the best guidance as to the parameters of my jurisdiction in these circumstances is described in the judgment of the Court of Appeal in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson and Others* [2002] EWCA Civ 879. The principle judgment in that case was given by the then Lord Chief Justice. Relevant guidance is to be found in the following passages: "The provisions of Part 44.3", I digress to say the predecessor of the current 44.2, "make it clear how wide and generous is the discretion of the court in making orders as to costs. Equally it is made clear that, in exercising its judicial discretion, it is the obligation of the court to look at the circumstances of the case in general", I emphasise those words in general, "And here I make particular reference to the wide terms of para 44.3(5)."

33. He continued at para 19: "The clear inference from the absence of any reference to an indemnity basis in 36.20", a rule under the previous guise of CPR Part 36 that is no longer replicated in the current rules, "is that, in normal circumstances, an order for costs which the court is required under that Part to make, unless it considers it unjust to do so, is an order for costs on the standard basis. That means that if the court is going to make an order for indemnity costs, as it can in a case where Part 36.20 applies, it should do so on the assumption that there must be some circumstance which justifies such an order being made. If I may here adopt the way it was put in argument by Waller LJ, there must be some conduct or (I add) some circumstance which takes the case out of the norm."

34. Therefore the threshold criterion is whether there is conduct or circumstance that takes the case out of the norm. At para 29 he continued: "All relevant circumstances must be taken into account". At para 31 he said:

35. "In the context of that case", that is a reference to the earlier Court of Appeal decision in *Kiam II v Mirror Group Newspapers Ltd*

[2002] EWCA Civ 66, "I see that those paragraphs set out the need for there to be something more than merely a non-acceptance of a payment into court, or an offer of payment, by a defendant before it is appropriate to make an indemnity order for costs", omitting two sentences he continues, "An indemnity order may be justified not only because of the conduct of the parties, but also because of other particular circumstances of the litigation".

36. He continued at para 32 that in relation to examples that he had given later in para 31, they were nothing more than illustrations of, "The fact that there is an infinite variety of situations which can come before the courts and which justify the making an indemnity order". However, he continued in the penultimate sentence of that paragraph to say, "There must be conduct or some circumstance which takes the case out of the norm, that is the critical requirement".

37. Waller LJ concurred and associated himself with the views expressed by the Lord Chief Justice and added that the threshold to satisfy a court of the appropriateness of making an order for indemnity costs where, and these are his words, "all that was relied upon is the failure to accept a reasonable offer", would be high.

38. Mr Barnes submits that that is this case, that all that is relied upon is the defendant's failure in a timely fashion to accept the claimant's Part 36 offer. Mr Hyam disagrees and relies on the five factors that I have referred to. I remind myself that the indemnity basis does not mean what that word implies. It does not entitle the receiving party to recover any more than reasonably incurred costs and in reasonable amounts and proportionate to the claim. It only has the effect of reversing the burden, shifting it from the claimant to satisfy those criteria to the defendant to show non-satisfaction.

39. In that context I agree with Mr Hyam's submission that this is not a case where all that is relied upon is the late acceptance of the offer. All of the factors that he identifies operate and indeed in considering all of the circumstances of the case the whole conduct of this litigation is relevant to the court's judgment and I will not repeat the views that I have expressed concerning that.

40. For those reasons, which I have now explained at length, I have come to the view that the conduct of this litigation is not the norm, but in my judgment is out of the norm. "Norm" for this purpose is a reference to how litigation should normally be conducted and in my judgment simply because a litigation history is "sadly commonplace"

as I have earlier described it, does not mean that that was the relevant "norm". Not only for the five stated reasons relied upon by Mr Hyam, but also for all of the reasons that I have described and deprecated earlier in this judgment, conduct here was not "the norm". And this therefore is a case in which I am satisfied in accordance with the wide discretion that I have as to costs, that the burden of proof should be shifted by ordering that the costs in this case should be paid by the defendant from the end of the relevant period for acceptance of the Part 36 offer on an indemnity basis.

41. There were other issues that were the subject of the application before me, but they have fallen away by agreement sensibly reached between the parties and so it is that there will be, by consent, judgment for the claimant for 95% of the full liability value of the claim to be assessed. Not by consent the defendant will be ordered to pay the claimant's costs of the action to date, on the standard basis to the end of the relevant date for acceptance and thereafter on the indemnity basis to date.

Mr J Hyam QC (instructed by Leigh Day) appeared for the claimant.

Mr M Barnes (instructed by Bevan Brittan) appeared for the defendant.