Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- Limitation in a disease claim
- Reducing a claimant's costs for exaggeration
- Interest where a claimant borrowed money to fund a disbursement.

Malcom Henké
Partner & Head of LACIG

Limitation

Gregory v H J Haynes Limited (2020) EWHC 911 (CH)

This was an appeal from a decision of a District Judge, exercising the jurisdiction of a Circuit Judge, in which he declined to extend the limitation period applicable to a personal injury claim under an application made pursuant to S33 Limitation Act 1980.

The claimant was a roofer employed by the defendant company from 1959 to 1971/2. It was his case that during the period of his employment he was required to saw, cut and drill asbestos containing materials and was exposed to the dust. As a result, he suffered from pleural thickening giving rise to respiratory disability and is at risk of mesothelioma and asbestosis. The relevant chronology was as follows:

1972 to 2009 - claimant self-employed and worked for a number of employers in a similar trade.

15th December 1992 - defendant company dissolved.

21st November 2008 - the claimant first acquired knowledge of his disease. Limitation period of 3 years started running.

3rd March 2009 - claimant contacted solicitors with a view to making a claim. The solicitors made enquires with the Employer's Liability Tracing Office (ELTO) in order to identify any relevant insurer covering the period when the claimant was employed by the defendant. None were identified.

20th July 2010 – 30 July 2010, the claimant's solicitors wrote unsuccessfully to a number of possible sources trying to identify an insurer.

21 November 2011 – limitation period expired.

2009 to 2012 – a round of further enquiries were made of ELTO to identify possible insurers. None were identified.

12 November 2013 – details of the defendant's insurers were uploaded to the database used by ELTO. This event, as such, was not known to the claimant or his solicitors.

2 September 2014 – an ELTO search in respect of another claim being dealt with by the same solicitors in relation to the same employer revealed the identity of the defendant's insurers during the relevant period.

25 September 2014 – letter of claim sent by the same solicitors to the defendant's insurers in respect of the other claimant for a period from 1965 to 1973/74.

27 March 2015 – the claimant's solicitors sent a letter of claim on his behalf to the defendant's insurers.

27th March 2015 - defendant company restored to the register for the purposes of other litigation.

20 April 2015 – a representative of the defendant acknowledged receipt of the claim.

10 November 2016 – a witness statement and HMRC schedule was sent to the defendant by the claimant solicitors.

20 January 2017 – claimant disclosed a medical report.

28 July 2017 – claim form received by the court.

5 September 2017 – claim form issued.

This chronology demonstrated certain periods of inactivity most of which the defendant sought to characterise as culpable delay on the part of the claimant. The judge below accepted that characterisation in most instances.

It was accepted that the limitation period did not start running until 2008 when the claimant first found out about his medical condition. The decision of the District Judge focused on the period from then until the date proceedings were issued and investigated the reasons for delay and questions of prejudice to the parties.

He went through the factors appearing in section 33(3) of the 1980 Act. He then went on to refer to matters such as the effect of delay, prejudice and the effect on a fair trial and concluded that the application made under S33 to disapply the limitation period S12 should be dismissed.

The period relevant to the permitted ground of appeal was the period from March 2009 to November 2014. The District Judge held that this was culpable delay on the basis that something could and should have been done in this period to further the claim.

Allowing the appeal, a High Court Judge held that this was an error. It was not possible to see what more the claimant could realistically and sensibly have done in this period. There was a dissolved company and, even if restored, apparently penniless defendant.

There was no point in seeking to restore it to the register unless and until it was apparent that there was some money available. Searches of the insurer database had been done at least four times. Reasonable searches had been done and no insurer had been found. There was no insurer on the database until 2013, so even if searches had been repeated daily (which was not a reasonable requirement) nothing useful would have emerged until then.

Because the finding of culpability was unjustified, and because that obviously affected the weight given to that period of delay, it followed that the judge took into account an irrelevant consideration, and that it had a material effect on his ultimate decision.

It further followed from that that the first stage of the first ground of appeal was made out and the reasoning in the decision, and as a result a final decision based on it, could not stand. That conclusion meant that the decision on the application had to be re-taken.

The delay in bringing the claim in overall terms was apparent. It was considerable. The period of delay started at the very

latest in 1971-72 when the claimant's employment ceased, and ended with the issue of proceedings in 2017. However, it was necessary to break that period down.

In the period 2014 to 2017, there was culpable or inexcusable delay in objective terms. The delays in this period ought not to have happened. Having discovered the insurers late in the day, the claimant would be expected to get on with his claim with due despatch, and he did not do so.

The degree and nature of prejudice likely to be suffered by either party as a result of delay was actually a question of fact. The prejudice to the claimant in not being to bring his claim was obvious. The prejudice to the defendant in being deprived of a limitation defence was equally obvious though less relevant as a single factor. What was more significant was the prejudicial effect of the delays that had occurred in this matter.

'…by the time of the identification of insurers all the real prejudice to the defendant had accrued'

In summary, there was gathering prejudice in the form of diminishing evidence throughout the whole of the period since the claimant's exposure, but by the time of the identification of insurers all the real prejudice to the defendant had accrued. The same was probably true in relation to the claimant's evidential case.

Although what mattered was the position as at the ultimate date of the issue of the claim form, the appellate judge preferred to approach the matter in a couple of stages in order to identify where the real issue lay.

No limitation point would have arisen if the claimant's solicitor had managed to identify insurers (and therefore arrange for a restoration of the defendant to the register) between 2008 and 2011. However, he could not do so.

If he had sought to commence his proceedings in 2014, or even at the beginning of 2015, and made his current application then, it was highly likely his application would have succeeded. He would have made it at what could broadly be regarded as the first reasonably available opportunity, and while the defendant would have been prejudiced, the balance of fairness would clearly have favoured a claimant who sued at the first reasonably available opportunity, taking into account all the matters debated above.

That being the case, what should the effect of the passage of another two years or more be? So far as the defendant was concerned, its evidential position was probably not worsened by that passage of time. There would come a point at which the claimant's own delay would make it unfair to extend the period. This case came close to that, but not quite close enough.

The delay was apparently attributable to the solicitors and not dilatoriness on the part of the claimant himself, it was quite enough to deprive the claimant of the disapplication of the limitation period to which he would have been entitled in 2014, or perhaps 2015.

If there had been any evidence of additional prejudice to the defendant arising out of that last period of delay, the decision would probably have been different; but in the absence of that additional prejudice, the delay was not quite bad enough to weigh down on the claimant in terms of the fairness of the relief sought.

The claimant was represented by BC Legal

The defendant was represented by Novum Law

Comment

The essence of this appeal was that although the claimant had been inactive for something like nine years, only the last three were inexcusable. However, during that period the defendant suffered minimal additional prejudice.

Exaggerated Claim

Morrow v Shrewsbury Rugby Union Footbal Club (2020) EWHC 999 (QB)

In Insight 147, we reported the judgment in this case relating to causation and quantum. This hearing dealt with the costs, following the parties reaching agreement on the amount to be paid to the claimant. The defendant submitted that the claimant's costs should be reduced by one third (or such other amount because the claim was exaggerated and conducted in an unrealistic way.

The defendant did not maintain that the claimant was dishonest but that the claimant's case, and the evidence on which it was based, was misleading. He had on multiple occasions with experts and other professionals (and in his witness statements) given a misleading picture about his pre-accident medical history, by failing to mention relevant psychological problems.

He had described his post-accident problems in extravagant terms when the medical evidence demonstrated that his pre-accident problems were strikingly similar to his post-accident presentation.

Over the five years leading to the accident, there were multiple complaints to his GP and other doctors about a range of problems (fatigue, insomnia, stress, anxiety, palpitations and migraine) which were the sort of factors which the claimant said would prevent him from working in the future.

The claimant would receive damages in the sum of £285,658.08 which included £58,000 in general damages. He had claimed in excess of £1m which had included a claim for loss of future earnings of £946,097.28 and a clam for £60,000 in general damages. A short time before trial, on 8 October 2019, the clamant made a Part 36 offer to accept £800,000. The defendant had made a Part 36 offer at a much earlier stage (8 June 2018) in the sum of £110,000.

The general rule was that the unsuccessful party would be ordered to pay the costs of the successful party (CPR 44.2(2)(a)). However, the court might make a different order (CPR 44.2(2)(b)). The court had a broad discretion to reduce the costs recoverable by a successful party by a proportion in an appropriate case (CPR 44.2(6)(a)).

The courts had frequently recognised that in any litigation, including personal injury

cases, any winning party was likely to fail on one or more issues. That a claimant had won on some issues and lost on others was not normally a reason for reducing an award of costs.

It was not in dispute that the judge should make an order for costs in favour of the claimant who was the successful party. He had beaten the defendant's Part 36 offer by a considerable margin. What had to be decided were (i) whether there were any reasons for departing from the general rule that costs follow the event; and (ii) if so, the extent of the deduction that should be made.

There was no doubt that the claimant exaggerated his claim for loss of future earnings. He was not dishonest. His psychiatric or psychological condition may have made him prone to exaggeration and prone to pursue his claim beyond what common sense and realism would dictate. However, he was at all material times able to instruct and take advice from his lawyers. He chose to put an exaggerated claim to the court.

The extent of the exaggeration was reflected in the gulf between the damages claimed and the damages awarded. The defendant's Part 36 offer proved too low but the defendant's offer was significantly closer to the damages awarded than the claimant's offer.

That said, in the absence of dishonesty, the claimant's exaggeration was not the sort of egregious misconduct that in itself deserved a punitive costs order. Although the defendant's Part 36 offer was closer to the award of the damages than the claimant's offer, it represented an assessment of the value of the case which was rejected by the court.

The defendant chose to contest almost every allegation and almost every issue relating to quantum. The breadth of the defendant's denials meant that the claimant would have needed to go to court to recover the damages which flowed from the earlier judgment.

In circumstances where each party stuck to its guns, how should the balance be struck in relation to the award of costs in an exaggerated but not dishonest claim?

'…the claimant's conduct was a cause of unnecessary expense…(and)… the balance lay in favour of reducing the award of costs'

This was not a case where a claimant had – for whatever reason – simply given an inaccurate picture in a witness statement or in oral evidence. Exaggeration and an inflated claim for damages was built into the structure of the claimant's presentation of his claim, both before and at trial.

The judge gave considerable weight to exaggeration (under CPR.2(5)(d)) in a case where it was engrained. Some weight was given to the fact that the claimant's Part 36 offer was multiple times higher than the award of damages (CPR.2(4)(c)).

Those factors led to the conclusion that the claimant's conduct was a cause of unnecessary expense. Taking an overall view of the justice of the matter, the balance lay in favour of reducing the award of costs.

The exaggeration of his claim had not caused the claimant's costs to rise by one third, as suggested by the defendant. The claimant's exaggeration prolonged the trial and prolonged the cross-examination of multiple witnesses, including the psychological and psychiatric witnesses as well as those who gave evidence relating to the quantification of loss of earnings.

Such prolongation was indicative of how the claimant's conduct caused unnecessary costs. A deduction of 15% was broadly appropriate to mark the additional costs caused by the claimant's exaggerated case. A higher deduction would begin to make inroads into areas in which both the claimant and the defendant overstated their respective cases.

The judge rejected the suggestion that a 15% deduction would be more suitable for cases of improper or unreasonable conduct rather than simple exaggeration. He also considered whether, conversely, a 15% reduction would be too little to be meaningful. If so, it could encourage other litigants to take up disproportionate court time in the hope of gaining some comparatively small costs advantage. He concluded that, in the context of a 7-day trial with very numerous witnesses, the overall costs were bound to be high enough that a 15% reduction would be meaningful.

Accordingly, the defendant was to pay 85% of the claimant's costs to be subject to a detailed assessment if not agreed.

The claimant was represented by Irwin Mitchell LLP

The defendant was represented by Plexus Law

Comment

The key factor in cases such as this is to be able to prove that an element of costs has been incurred unnecessarily because of the exaggeration. That is not always easy, as it requires separating out the costs necessarily incurred to prove a head of loss from those relating only to the exaggerated element.

Borrowing to pay a disbursement

Nosworthy v Bournemouth & Christchurch Hospitals NHS Foundation Trust (2020) EWHC B19 (Costs)

The issue that arose in this case was whether the claimant should be awarded interest on an element of his costs, in particular a disbursement said to have been funded by the taking out of a loan at an interest rate of 15%. The sum claimed was £235.

Following agreement of the claimant's costs, interest was agreed and paid from the date of the costs order. The claimant now sought interest for the period prior to the order. The particular disbursement which was said to justify the claim was the expense of an expert medical report which was said to have been paid for on 3 May 2017. The report cost £1,280 plus VAT. The loan was discharged on 11 May 2018 after payment of damages.

It was the claimant's case that he could not fund the disbursement himself and that for this reason he entered into an agreement with a lender. He could not have pursued the claim without obtaining finance as he would not have been able to prove liability or quantum without the report. Further, he said that interest on the loan had been paid out of damages recovered.

As to the rate of interest at 15% per annum, this was said to be an unremarkable or unexceptional rate of interest on unsecured borrowing by private individuals of limited means.

'The making of an order of the sort which was requested by the claimant would introduce an unnecessary level of sophistication into the process for assessing costs'

Rejecting the claim, a Master held that there were no circumstances in this case to take it out of the ordinary. The making of an order of the sort which was requested by the claimant would introduce an unnecessary level of sophistication into the process for assessing costs.

If it were right that the court were required in general specifically to consider the interest rate applicable to experts funding, presumably also the same would apply to counsel's fees, solicitors' fees and other disbursements (such as court fees). Further, the parties would have to take into account such matters as the payments on account of costs and the allocation of such payments to different expenditure. Yet further, paying parties might legitimately question whether they should be paying any interest if the receiving party had, for instance, the means, by way of insurance or otherwise, to pay up front for disbursements without taking out a loan. The potential for yet further legitimate disagreement would be substantial in the context of ordinary litigation (which might involve litigants in person).

It was clear that in general the costs of funding were not recoverable as an item of costs in a Bill of Costs.

Moreover, costs recovery was not intended to be a complete indemnity. Under the pre-LASPO costs regime the element of the success fees which was attributable to the delay in payment of fees was not recoverable inter partes.

Indeed, it might reasonably be thought that if Parliament had now intended there to be a recovery of the costs of funding or borrowing in litigation of this sort in the manner in which it was now claimed it would have provided an appropriate mechanism for its ascertainment. But the scheme for Provisional Assessments under CPR 47.15 (or indeed generally in respect of the assessment of costs) did not provide any such mechanism.

The claimant was represented by Hugh James

The defendant was represented by Acumension

Comment

It can be seen from this judgment that one of the Master's several concerns was the risk of introducing arguments about impecuniosity into the costs' process, akin to those that bedevil credit hire claims.

Useful links:

Gregory v H J Haynes Limited (2020) EWHC 911 (CH)

Morrow v Shrewsbury Rugby Union Football Club (2020) EWHC 999 (QB)

Nosworthy v Bournemouth & Christchurch Hospitals NHS Foundation Trust (2020) EWHC B19 (Costs)