Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

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Alexander House
94 Talbot Road
Manchester
M16 0SP

T: 03300 240 711
F: 03300 240 712

www.h-f.co.uk

Welcome to Insight

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

- Court approval of a high value claim to reflect litigation risk;
- Setting aside a judgment obtained during the pandemic
- The summary assessment of costs following a trial.

Malcom Henké
Partner & Head of LACIG

Litigation Risk

PQ (a minor) v Royal Free London NHS Foundation Trust (2020) EWHC 1676 (QB)

In this claim, settlement was reached after two days of evidence. The burden of the liability trial, had focused on whether the defendant should have proceeded to a Caesarean section and, if so, whether in association with delivery by Caesarean section there would or should have been an artificial rupture of membranes in any event.

The settlement had occurred at a stage when the judge had yet to hear from the defendant's obstetric expert, but it was his view, as disclosed in his report and in the joint expert report, that it was wholly reasonable for the defendant to have carried out the procedure which it did and that would have been the case even if there had been a decision to deliver by Caesarean section.

Thus, the settlement had occurred at a stage when the matter was wholly undecided in the judge's mind, not having heard from the defendant's expert or heard argument in relation to the respective cases.

However, the judge accepted that, given the strength of that expert's opinion as expressed in his report and in the joint statement, there remained a very strong risk that he would have found that, whilst many obstetricians would have done as the claimant's expert said he would have done and proceeded to Caesarean section, there would nevertheless have been a reasonable body of obstetricians who would have done as the defendant's expert and the case would have failed on the basis of the Bolam test.

'…the two results were both in play, namely complete success for the claimant and complete success for the defendant'

Therefore, the two results were both in play, namely complete success for the claimant and complete success for the defendant. In those circumstances, the decision to settle the case was a wholly understandable and reasonable one and that it was in the best interests of this child that the court should approve this settlement.

The proposal was that the claim should be settled for a lump sum of £2 million, and the judge needed to consider whether such a settlement properly reflected the risks of the case at this stage.

Whilst it might be thought that for an acute, profound hypoxic ischaemic injury of this kind a lump sum of £2 million was a low settlement compared to some of the settlements or orders or awards which had been made in other cases, there were a number of difficulties in this case even with the establishment of primary liability in relation to causation and those difficulties had been recognised by both the paediatric neurologists instructed for each side.

This would therefore have been a difficult quantification because of the difficulty in distinguishing the parts of the claimant's condition which were the consequence of the acute profound hypoxic ischaemic injury sustained at the time of her birth and the parts of her condition which might be attributable to a congenital or genetic problem which she would have had in any event.

In those circumstances the settlement was approved.

The claimant was represented by Irwin Mitchell LLP

The defendant was represented by Bevan Brittan LLP

Comment

Although dealt with on its facts, this case is a useful reminder that litigation risk arises in cases of all values and, even where court approval for a settlement is required, judges will take a pragmatic approach.

Setting aside a default judgment

Stanley v London Borough of Tower Hamlets (2020) EWHC 1622 (QB)

This was an application by the defendant, to set aside judgment in default awarded in favour of the claimant on 17 April 2020. It also applied for relief from sanctions.

The claimant sued the defendant for breach of the Data Protection Act 1998, breach of the General Data Protection Regulation (Regulation (EU) 2016/679), breach of confidence, misuse of private information, and breach of Article 8 of the European Convention on Human Rights. The claims arose as the consequence of a child protection conference, following which the defendant disclosed the claimant's GP records to those who had attended it.

On 6 November 2019 the claimant instructed solicitors to pursue a compensation claim for 'psychological distress, stress, inconvenience and financial loss.' These were not further particularised; there was no medical report, nor any schedule of special damages.

On 23 January 2020 the claimant's solicitors sent a letter before action to the defendant by post and email. No response was received. On 6 February 2020 the claimant's solicitors sent a second letter by post and email pointing out that the defendant was in breach of the pre-action protocol (which required a response within 14 days). The claimant's solicitor gave the defendant a further seven days to respond.

Again, no response was received, and so on 13 February 2020 the claimant's solicitor, telephoned the defendant's Legal Services Department. Following various discussions, he was told that service by email would not be accepted.

Particulars of Claim were drafted and signed off by counsel on or about 24 March 2020. The defendant had still not replied by that date. The claimant's solicitor put the relevant documents in the post on 25 March 2020 which meant that the deemed date of service was 27 March 2020. The Acknowledgement of Service was thus due on or before 9 April 2020.

By 10 April 2020, the defendant had not filed an Acknowledgment of Service. The claimant therefore applied for judgment in default on 15 April 2020, which was granted by a Master on 17 April 2020.

In support of the defendant's application, the solicitor appointed explained that when she was instructed on 27 April 2020, she wrote to the claimant's solicitor indicating that she was instructed to accept service. The following day she received an email indicating that judgment in default had already been entered. The solicitor then discovered the proceedings had been posted on 25 March 2020.

Due to the coronavirus, the defendant's offices had been shut on 23 March 2020 in accordance with the lockdown, with staff working from home after that. The defendant's solicitor was also working from home and she assumed the claimant's solicitor did also. A 'skeleton staff' were working at the defendant's offices, but they were not familiar with court proceedings. As far as the defendant's solicitor was aware the relevant legal team within the defendant's legal services department had not received the papers which were sent by the claimant's solicitor.

The defendant argued that it was unreasonable for the claimant to effect service by post when he knew that the defendant's offices were shut.

The High Court Judge hearing the application held that he first had to decide whether one or both limbs in CPR 13.3(1) were satisfied and if so, he then had to exercise his discretion about whether to set aside default judgment in accordance with the Mitchell/Denton principles.

CPR r 13.3 provides (so far as is relevant to this summary):

"(1)….the court may set aside or vary a judgment entered under Part 12 if –

(a) the defendant has a real prospect of successfully defending the claim; or

(b) it appears to the court that there is some other good reason why –

(i) the judgment should be set aside or varied; or

(ii) the defendant should be allowed to defend the claim.

(2) In considering whether to set aside or vary a judgment entered under Part 12, the matters to which the court must have regard include whether the person seeking to set aside the judgment made an application to do so promptly."

The judge found that as things stood at present, the defendant had real prospects of successfully defending the claim. The claimant was claiming for personal injuries, namely psychological distress arising out of the defendant's alleged data protection breach. The claimant had not, however complied with the relevant sections of CPR PD 16, which provided that in personal injury cases:

"4.2 The claimant must attach to his particulars of claim a schedule of details of any past and future expenses and losses which he claims.

4.3 Where the claimant is relying on the evidence of a medical practitioner the claimant must attach to or serve with his particulars of claim a report from a medical practitioner about the personal injuries which he alleges in his claim."

At the time of the application, there was therefore no evidence that the claimant had suffered any actionable loss as a result of the defendant's alleged unlawful conduct. Without loss, there was no cause of action.

'(The) reason (to set aside the judgment) was the unprecedented national health emergency which was unfolding at precisely the time the claimant posted her documents to the defendant'

Even if wrong on that, the judge was satisfied that on the second limb of the test, there was a good reason to set aside the default judgment. That reason was the unprecedented national health emergency which was unfolding at precisely the time the claimant posted her documents to the defendant.

The claimant's solicitor's witness statement was entirely silent as to why he thought it appropriate to post documents to the defendant's offices when he knew or should have known they were shut and the defendant was highly unlikely to be in a position to respond.

The defendant had not exactly covered itself in glory with how it had dealt with (or rather, not dealt with) the pre-action correspondence. Its non-responsiveness was not acceptable. However, that was history by the time of lockdown.

Turning to the three stage Mitchell/Denton test, there had been a serious and significant default by the defendant in its failure to serve an Acknowledgement of

Service and a Defence. However, the circumstances which led to the default were unique and relief from sanctions should be granted having regard to the second and third stages of the test and the criteria in CPR 3.9. Here, the court was bound to have regard to CPR PD 51ZA (Extension of time limits and clarification of Practice Direction 51Y – coronavirus), which provided at [4]:

"4. In so far as compatible with the proper administration of justice, the court will take into account the impact of the Covid-19 pandemic when considering applications for the extension of time for compliance with directions, the adjournment of hearings, and applications for relief from sanctions."

The reason for the defendant's default was the COVID-19 crisis, and but for the defendant's offices being shut, it would have responded in time to the claimant's claim. Whilst the defendant had shown something of a cavalier attitude prior to the issuing of proceedings, it would have acted in accordance with the rules once proceedings had actually been issued.

Another relevant circumstance was that the claimant's solicitor was at fault for not checking whether service by post was still possible and feasible. That was an obvious step which he should have taken.

Overall, the interests of justice required judgment in default to be set aside.

The claimant was represented by Irvings Law

The defendant was represented by Plexus Law

Comment

This is an entirely common-sense decision but it will no doubt be of comfort to a number of defendants finding themselves in a similar position.

Costs and Summary Assessments

DVB Bank SE and another v Vega Marine LTD and another (2020) EWHC 1704 (Comm)

Following the handing down of judgment in this case in June, the judge dealt with a number of consequential matters, including whether the costs should be assessed on a summary basis and if so, what amount to allow.

As the successful party, the claimants should receive their costs from the defendants. The claimants sought a summary assessment of their costs, referring to CPR PD 44 - 9.2:

"The general rule is that the court should make a summary assessment of the costs – …

(b) at the conclusion of any other hearing, which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim, unless there is good reason not to do so, for example where the paying party shows substantial grounds for disputing the sum claimed for costs that cannot be dealt with summarily."

Whenever a court makes an order about costs which does not provide only for fixed costs to be paid the court should consider whether to make a summary assessment of costs".

Further, CPR 44.6(1) provides that *"Where the court orders a party to pay costs to another party (other than fixed costs) it may either (a) make a summary assessment of the costs; or (b) order detailed assessment of the costs by a costs officer, unless any rule, practice direction or other enactment provides otherwise".*

The court therefore had the power to make a summary assessment in the present case.

Here, the claimants' statement of costs for the whole claim amounted to £96,834.11. Unless the defendants showed substantial grounds for disputing that sum which could not be dealt with summarily, this was an appropriate case for the summary assessment procedure. No such grounds had been shown.

As to the quantum of those costs, the judge held that they were payable under the terms of a contract but in case he was wrong on that point, he considered what costs the claimants would be entitled to recover on an assessment on the standard basis.

CPR r.44.3(2) provides:

"Where the amount of costs is to be assessed on the standard basis the court will – (a) only allow costs which are proportionate to the matters in issue. Costs which are

disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

In assessing the amount of costs, the court should have regard to all the circumstances of the case, as well as the factors set out in CPR 44.4(3). These include the *"conduct of the parties"* (CPR 44.4(3)(a), *"the amount of value of any money or property involved"* (CPR 44.4(3)(b), *"particular complexity of the matter or the difficulty or novelty of the questions raised"* (CPR 44.4(3)(d)); *"the skill, effort, specialised knowledge and responsibility involved"* (CPR 44.4(3)(e)); and *"the time spent on the case"* (CPR 44.4(3)(f)).

The claimants submitted that their costs should be assessed at (or near) the figure set out in their statement of costs, because:

i) the costs incurred (about £97,000) were proportionate to the sum in dispute (around US$ 12 million);

ii) the profit costs (solicitors' costs excluding disbursements) set out in the schedule already included a substantial discount bringing the total of those costs down by about 30% from £93,386.70 to £63,241.98;

iii) whilst it might be said that the headline hourly rates exceed those set out in the 2010 Guideline Hourly Rates, such an objection would overlook the discount that had been applied to the profit costs. In any event, it had been recognised that the guideline rates from over a decade ago were not helpful in determining reasonable rates today. The rates claimed were reasonable in light of the nature of the work and the specialist skill and knowledge required to conduct it;

iv) as could be seen from the schedule of work done on documents, about 70% of the work was carried out by associates or trainees. Moreover, the claimants were not claiming for any partner time in relation to the preparation for or attendance at the hearing; and

v) the work covered by the statement included the issue of proceedings, the preparation of particulars of claim, the issue of the applications, the preparation of the supporting evidence and the hearing itself. Although this was on one view a relatively straightforward claim for debts, the defendants' failure to engage in the proceedings generated additional work and it was necessary for the claimants to obtain foreign law advice as to the enforceability of an English judgment in Greece.

'A full costs recovery was rare in English court proceedings, even in those cases where costs were assessed on an indemnity basis…'

The High Court Judge held that the hearing before him and the evidence filed had given him a good sense of the amount and complexity of work involved in the proceedings. He was satisfied that the hourly rates, the hours spent, the division of work between more and less senior staff, and the disbursements, were broadly reasonable.

On the basis that there would be no detailed assessment, and given that he had not received any submissions from the defendants about the claimants' costs, however, the judge did not think it would be right to assess the costs at 100%.

A full costs recovery was rare in English court proceedings, even in those cases where costs were assessed on an indemnity basis (which under CPR 44.3(3) involved a somewhat similar presumption to that set out in CPR 44.5 for cases where a party had a contractual entitlement to costs). The summary assessment of costs was not intended to be a 100% costs recovery regime.

On the other hand, there was no good basis in the present case on which to make any very substantial discount to the sum claimed in order to reflect the uncertainties involved, and it was accepted that the costs claimed already included a significant discount to the claimants' solicitors ordinary rates. In all the circumstances the costs were summarily assessed at £91,500.

Post-judgment interest was also allowed at 8%, pursuant to S17 Judgments Act 1838 (as amended).

The claimants were represented by Stephenson Harwood LLP

The defendants did not appear and were not represented.

Comment

Although this was a case in the Commercial Court, it offers insight into a High Court Judge's approach to the summary assessment of costs, which is relatively common in lower value personal injury actions.

Useful links:

PQ (a minor) v Royal Free London NHS Foundation Trust (2020) EWHC 1676 (QB)

Stanley v London Borough of Tower Hamlet (2020) EWHC 1622 (QB)

DVB Bank SE and another v Vega Marine LTD and another (2020) EWHC 1704 (Comm)