Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #165 | 09 July 2020

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:

- Invalid service of a claim form
- The assessment of damages under Spanish law
- Part 36
- An unsuccessful claimant being ordered to pay indemnity costs

Malcom Henké
Partner & Head of LACIG

Invalid service of a claim form

Piepenbrock v Associated Newspapers Limited and others (2020) EWHC 1708 (QB

In these proceedings, the claimant claimed damages from the defendants for defamation arising from articles about him published on 10 and 12 October 2018. In pre-action correspondence, the claimant, who was unrepresented, was invited to follow the pre-action protocol for cases of this type. He did not do so, nor did he respond substantively to correspondence from the three defendants' two legal advisers. Instead, on 11 October 2019, the claimant issued the claim form in this claim against the three defendants. After outlining his case under "Brief details of claim", on the reverse of the claim form, the claimant indicated that particulars of claim were "to follow". The claimant chose to serve the claim form himself. He was advised that he had four months to serve the claim form

After issue of the claim form, the claimant did not serve it immediately. Instead, further letters and emails were sent by or on behalf of the claimant, some of which were sent to the defendants and some to their legal advisers.

After a period of inaction, on 10 February 2020, the claimant's wife sent various emails purporting to serve the claim form, particulars of claim and the response pack. The particulars of claim ran to 300 pages (with appendices) and included claims outside the terms of the claim form (e.g. data protection, discrimination, harassment and personal injury) and also made claims against additional defendants not named in the claim form. The attached documents were also sent in the post. They were sent to the postal address for the solicitors representing the defendants.

On 24 February 2020, the defendants filed Acknowledgements of Service indicating an intention to contest the jurisdiction of the court on the basis that the claim form had not been validly served during its period of validity. They then issued applications for orders under CPR Part 11 that the court had no jurisdiction to hear the claimant's claim and declarations that service of the claim form had been ineffective.

The High Court judge held that the claim form in this case had not been validly served on the defendants.

i) Service upon the solicitors was not permitted and was ineffective for two reasons:

a) First, the requirements of CPR 6.7 were not met. None of the defendants had provided their solicitor's address as an address at which the claim form could be served, and the solicitors had not stated that they were instructed by the relevant defendant to accept service of the claim form.

b) Second, and in any event, the solicitors themselves had not previously indicated in writing that they were willing to accept service by email, as required by Practice Direction 6A - 4.1.

ii) Service on the defendants, by email, was not permitted and was ineffective because none of the defendants had previously indicated in writing a willingness to accept service by email, as required by Practice Direction 6A - 4.1.

In his submissions, the claimant placed emphasis on the fact that he had been told by both firms of solicitors that he should correspond with them, rather than their clients. That might be so, but it did not alter the requirements for valid service of a claim form.

Nor should the claimant be permitted an extension of time for service of the claim form under CPR 7.6. In most cases where the application for an extension of time was made under CPR 7.6 after the claim form had expired, the critical factor was the efforts the claimant had taken to serve it within its period of validity.

On the evidence, the claimant had made no attempt to serve the claim form before it was sent by email on 10 February 2020. He had failed to demonstrate that he took all reasonable steps to serve the claim form in the period of its validity. There were no earlier attempts to serve it before the attempt to serve it by email on 10 February 2020. To the extent that it was necessary to consider whether the claimant had a "good reason" for not having attempted service before 10 February 2020, judged objectively, the reasons advanced by the claimant did not amount to a "good reason", either individually or collectively.

In the alternative, the claimant sought an order under CPR 6.15, which provides that an application can be made retrospectively to validate steps a claimant has taken to serve the claim form.

'To read an instruction by solicitors to correspond with them (and not their clients)…as an instruction to serve the claim form on the solicitors rather than the defendants was unreasonable'

Neither firm representing the defendants, in its correspondence in October/ November 2019, represented or suggested that the claim form in any proceedings should be served on them. To read an instruction by solicitors to correspond with them (and not their clients) or to refer further communications to them as an instruction to serve the claim form on the solicitors rather than the defendants was unreasonable. The claimant's principal error was that he thought that service by email was an acceptable form of service when it was not. There were, in this case, no obstacles in the way of valid service of the claim form on the first and second defendants. It could have been posted to the relevant address. The claimant did not, it appeared, have the residential address of the third defendant. But this point could have been addressed by the claimant at any stage after 11 October 2019, had a constructive approach been adopted. On the evidence, the only conclusion that could be drawn was that the issue of service of the claim form was addressed by the claimant practically at the last minute and the method he chose was invalid. The damage had been entirely self-inflicted.

The power to dispense with service retrospectively under CPR 6.16 was limited to "truly exceptional cases". If the facts of this case did not reveal a "good reason" to make the order regarding service of the

claim form sought under CPR 6.15 they could not disclose "exceptional circumstances" sufficient to justify dispensing with service altogether. There was nothing exceptional in the circumstances of this case.

An application under CPR 3.9 for relief from sanction did not assist in the circumstances in which the claimant found himself. The disciplinary element of a decision whether to relieve a party of a sanction imposed for non-compliance with a rule or order was less important when the court was considering the rules governing service of a claim form. Those rules did not impose duties upon a claimant; they simply represented the conditions with which the claimant must comply in order to invoke the court's jurisdiction. Having refused the applications made under CPR 7.6, 6.15 and 6.16, there was not a residual self-standing power available under CPR 3.9 to relieve the claimant of the "sanction" that, as a result of his failure to validly to serve the claim form during its period of validity, it had now lapsed.

Finally, the claimant sought an order under CPR 3.10 remedying his error in not validly serving the claim form. Having considered the authorities the judge concluded that CPR 3.10 could not assist the claimant in this case. Among other points made, he concluded that if CPR 3.10 was given an interpretation that permitted the court, retrospectively, to validate service not in accordance with the CPR on the basis that there had been a "failure to comply with a rule", then that would make CPR 6.15(2) redundant.

The defendants were entitled to the declarations they sought. The claim form was not served during its period of validity. In consequence, the court had no jurisdiction over the claimant's claim and it should be dismissed.

The Claimant appeared in person.

The first defendant was represented by ACK Media Law LLP

The second defendant was represented by Pinsent Masons LLP

Comment

The opening sentence of this judgment sums it up: This is another case about the problems that can arise when a claimant leaves service of a claim form until the last moment. A litigant who does so "courts disaster".

Assessing damages under Spanish Law

Scales v Motor Insurers' Bureau (2020) EWHC 1747 (QB)

This was a quantum hearing in a personal injury case, in which the judge had to apply principles of Spanish law in order to assess the damages that were payable to the claimant (a UK national). The accident had occurred in October 2015, in Almeria, Spain and had involved an uninsured car driver. The defendant was involved in these proceedings because it stood in the shoes of the Spanish equivalent of the MIB.

The principles and rules that determined the measure of damages in road traffic accident cases in Spain were set out in legislation known as the Baremo (which means "tariff"). The approach taken by Spanish law at the time of the accident to the assessment of damages in such cases was very different from the approach taken in English law. There was no clear distinction between general and special damages in Spanish law, as there is in English law. Moreover, the version of the Baremo that was in force at the time of the accident was somewhat ungenerous to claimants, and its provisions were confusing and difficult to follow (even for Spanish lawyers).

There were a number of major disagreements between the parties as to the meaning and effect of the Baremo, and as regards how it should be applied in the present case.

The issues that the judge was required to deal with were:

(1) Whether the court was required to apply the letter of the Baremo, or whether it had flexibility to award compensation for some heads of damage which were not specifically covered by the express language of the Baremo.

'…It was not possible to go beyond the Baremo in order to provide full restitution for a victim by compensating for losses which were not specifically provided…'

The judge held that at the relevant time the Baremo imposed strict limitations on the types of compensation that could be recovered by a victim of a road traffic accident. It was not possible to go beyond the Baremo in order to provide full restitution for a victim by compensating for losses which were not specifically provided for by the Baremo. The result was that the claimant was unable to recover a number of heads of loss that he wished to pursue.

(2) Alternatively, was a court entitled to 'bump-up' the award of general damages for permanent injuries to take account of costs that were not otherwise recoverable (the corrective factors)?

This was something that a Spanish court would be entitled to do, and so was something that would be within the scope of the judge's discretion to do.

The potential harshness of the application of Baremo was somewhat mitigated by the discretion to increase the award for the appropriate permanent injuries corrective factor to take account of financial losses that would otherwise not be recoverable at all (see point 8 below).

(3) What was the date of 'consolidation'?

The date of consolidation occurred when the injuries reached a point of plateau/ stabilisation, after which the victim's injuries could not improve significantly with medical treatment and medical discharge was given.

The judge faced the difficulty that he did not have a medically-qualified Forensic Medical Examiner, who in Spain. would advise the judge of his/her view of the consolidation date and also, in a case like this, it was somewhat artificial to proceed on the basis that there was a specific date when recovery stopped and the treatment began to deal only with the maintenance of the status quo.

On the evidence, the judge found the consolidation date was 23 October 2017, i.e. two years post-accident.

(4) The award of compensation for temporary incapacity prior to the consolidation date.

This was determined by reference to the decision on the consolidation date and also as to whether all of the days before it were "impeded" days, or whether some were "non-impeded" days.

The judge held that all of the days between the claimant's discharge from hospital and his consolidation date should be treated as impeded days. He was a very fit and active man, who was completely impeded from doing any of the forms of activity that he had previously engaged in, in the two years after his accident. Accordingly, the award was the agreed sum of €9,626.56 for the claimant's period in hospital, and the sum of €34,870.77 for 597 impeded days between release from hospital and consolidation.

(5) The award of compensation for the claimant's permanent on-going symptoms.

This award was not for the severity of the original injury. Rather, it was for the permanent on-going symptoms, or sequelae, that the claimant was suffering from after the date of consolidation. The task of the judge was to allocate a number of points for each symptom and then convert the points into a cash value in accordance with the Balthazar scale in the Baremo.

There were twelve sets of symptoms which needed to have a score allocated to them. The judge carried out that exercise and that resulted in a score of 81 points, resulting in a monetary value of €125,579.16.

(6) The award of compensation for aesthetic damage.

The Baremo provided a separate head of damage for aesthetic or cosmetic damage. This was concerned with any detrimental change to physical appearance, by reference to six categories, ranging from mild to very significant. There was no definition in the Baremo that was in force in 2015 of the types of cosmetic damage which fell into each of these six categories. However, the post-2016 Baremo provided definitions. The judge took the view that it was appropriate for him to take account of the category definitions which were set out in the post-2016 Baremo. This resulted in an additional ward of 18 points and compensation of €13,165.74.

(7) Was the claimant a gran invalido?

On the evidence, the claimant was not a gran invalido. The definition of "gran invalido" in the Baremo was somewhat more specific than the definition of other concepts in the compensation scheme. It was clear that it was only the most severely disabled accident victims who qualified as gran invalidos. The claimant did not need the assistance of third parties to carry out the most essential activities of daily life, in the sense meant by the Baremo, as interpreted by the Spanish Supreme Court.

(8) Compensation for financial losses and expenditure prior to, and after, consolidation.

The judge then made the following awards:

Head of expenditure	**Amount Awarded**
Subrogated in sur-ance	£26,203.77
Case Management	£2,809
Travel expenses	£2,393
Equipment	£50
Therapies	£1,816
Miscellaneous ex-penses	£2,229.62
Other increased costs	£130.85
Total	£35,632.24

The following claims were not allowed, on the basis that the damages under these headings were only payable up to the date of consolidation or to a gran invilado:

- Medical, pharmaceutical and hospitalisation costs incurred after the consolidation
- Third party care/personal support
- Emotional distress and gratuitous care costs/personal support by the claimant's wife
- Accommodation/property adaptation costs
- Adaptation of own vehicle
- Other increased costs
- Services

(9) The appropriate category for permanent injuries or corrective factors and the appropriate award of compensation under this head.

The judge held that the claimant fell within the absolute permanent incapacity. Both Spanish law experts were clear that the judge had a very wide discretion in this respect. The category ranged from €95,575.94 to €191,151.88. The claimant was awarded the maximum sum.

(10) Interest

Interest was a recoverable head of loss under Spanish law, under which there were two alternative types, and rates, of interest which were applicable in claims against insurers. First, there was "standard" interest, which was 3.5% in 2015, and, since 2016, had been 3%. Second, there was a "penalty" rate of interest.

The Spanish Supreme Court had laid down the general principle that applied to quantification of penalty interest. This was that penalty interest was calculated as follows:

(1) For the first two years from the date when interest started running (the dies a quo), interest would accrue at 150% of the current Spanish legal interest rate. The appropriate rate, therefore, was 5.25% in 2015, 4.5% in 2016 and 4.5% in 2017;

(2) Two years after the dies a quo, interest accrued at a rate of 20% per annum.

The Spanish authorities showed that it was only in an exceptional case that the defence of proceedings was treated as a justified reason to delay payment. This was more likely to be the case where there was some reason to doubt that the claim was covered by the wording of the insurance policy.

The defendant was ordered to pay interest at the penalty rates from 25 August 2016, calculated at €180,359.08.

The claimant was represented by Irwin Mitchell

The defendant was represented by Weightmans

Comment

The full but lengthy judgment in this case contains a detailed analysis by the judge of how the relevant version of the Baremo should be interpreted and applied to individual heads of damage. Having determined the correct category into which the claimant's injury fell, it is clear that the judge then used the very broad discretion which extended his power to "bump up" the compensation to take account of the fact that the claimant had suffered or would suffer financial losses or expenditure which was not otherwise catered for by the Baremo.

PART 36

Scales v Motor Insurers' Bureau (2020) EWHC 1749 (QB)

Following on from the judgment in the case reported above, the court dealt with a number of further issues, including whether there should be an issue-based costs order; and the Part 36 consequences to which the claimant was entitled. It was common ground that English law and procedure applied to these issues.

The defendant accepted that, in the main, costs should follow the event in these proceedings. The claimant had recovered substantial compensation. The defendant had not made a Part 36 offer and an offer made after the quantum hearing but before the judgment had been handed down was ineffective.

Nevertheless, the defendant submitted that this was a case in which an issue-based costs order should be made. The judge noted that CPR 44.2 set out the court's general discretion as to costs. CPR 44.2(2) provided that the general rule was that the unsuccessful party would be ordered to pay the costs of the successful party, but that the court might make a different order. CPR 44.2(4)(b) provided that in deciding what order to make about costs, the court would have regard to all of the circumstances including whether a party had succeeded in part of its case, even if the party had not been wholly successful.

CPR 36.17(4) applied where, as here, the judgment against the defendant was at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 Offer.

It was clear from CPRs 44.2 and 36.17 that, different tests could apply to the award of costs for the period before and after 1 April 2020 (the date on which the defendant failed to accept the claimant's Part 36 offer). For the period before 1 April 2020, the normal approach under CPR 44.2 applied. For the period after 1 April 2020, the claimant was entitled to all of his costs unless it would be unjust, in all the circumstances, to award him some or all of his costs.

The defendant argued that the claimant was unsuccessful in two parts of his claim. He was unsuccessful in his contention that he was entitled to care costs and to future costs. He lost on those issues because of the application of established principles of Spanish law. Moreover, had those issues not been pursued, the care expert evidence, which dealt not only with care costs but also with services and future case management, none of which, in the event, was recoverable, would not have been necessary. The care expert evidence alone occupied one day of the trial.

The judge held that in the present case, it would not reflect the overall justice of the case to deprive the claimant of any part of his costs. It was true that he was unsuccessful in relation to some of the points of Spanish law that were argued.

'It would not be just, or appropriate, to treat the argument on the points of law on which the claimant was unsuccessful as being a discrete aspect of the case…'

However, he was successful in other respects. In particular, he was successful in the argument that, under Spanish law, the award for permanent incapacity, also known as the "corrective factor" award, could be "bumped up" to include compensation for costs or expenses that would not otherwise be recoverable under the Baremo. The argument on this issue effectively overlapped with the argument about whether, in any event, the claimant was entitled to recover heads of losses that were not specifically mentioned in the Baremo, such as future costs and care costs. It would not be just, or appropriate, to treat the argument on the points of law on which the claimant was unsuccessful as being a discrete aspect of the case.

Moreover, when awarding the maximum amount for the claimant's absolute permanent incapacity, the judge had taken into account the sums that, ideally, the claimant would have been allocated for care management, third party support, gratuitous support, and future therapies. It followed that the evidence from the care experts was not wasted.

The defendant further submitted that the judge should take account of the fact that the defendant had already been penalised, via the penalty interest payable under Spanish law, for failing to pay the claimant his compensation, for not accepting the offer, and for taking the matter to trial. Penalty interest under Spanish law imposed a much higher financial penalty than Part 36 consequences did under English law.

The judge rejected this submission. It was true that the rate of interest that the defendant would have to pay was higher than would be payable if the accident had happened in England, but on the other hand, the compensation payable to the claimant was lower, and probably very much lower than it would have been had the accident happened in England rather than in Spain. In any event, this factor was wholly irrelevant to the decision on the question whether there should be an issue-based approach to the assessment of costs.

As to the claimant's Part 36 offer, the judge repeated that he must apply each of the consequences provided for by CPR 36.17(4) in a case in which a claimant had "beaten" his Part 36 unless it would be unjust to do so.

The judge found that it would not be unjust. The penalty interest in Spanish law dealt with something different from Part 36. Spanish penalty interest was payable, in a case such as this, if the Guarantee Fund failed to pay compensation within three months of being notified of the claim. In contrast, the Part 36 consequences in this case followed because the defendant did not accept the Part 36 offer made by the claimant Mr Scales on 11 March 2020.

As for the rate of interest, the judge had a broad discretion to determine the rate of interest on the costs from 1 April 2020, up to a maximum of 10% over base rate. He awarded 6%.

The claimant was represented by Irwin Mitchell

The defendant was represented by Weightmans

Comment

As we have commented before, for a defendant to obtain an issue-based costs order, it is necessary to isolate costs that would not have been incurred but for the issue(s) on which the |claimant lost.

Indemnity costs against claimant

Bailey and others v GlaxoSmithKline UK Limited (2020) EWHC 1766 (QB)

In this protracted litigation and only shortly before the trial of seven generic issues, the claimants submitted to judgment being entered in the defendant's favour. This brought an end to this long-running litigation.

This hearing dealt with the recovery of the defendant's costs. Those issues relevant to this summary were as follows:

i) whether the general rule that the successful party should recover its costs should apply. The unsuccessful claimants submitted that the general rule concerning recovery of costs (CPR 44.2(2)(a)) should not apply and the appropriate costs order in this case was no order for costs, save for payment of £250,000 representing the defendant's costs of an application for summary disposal. This argument was advanced on the basis that neither party complied with the duty imposed in CPR 1.1 to further the overriding objective in enabling the court to deal with the case justly and proportionately by seeking a pre-trial ruling from the court on the lawfulness of the claimants' case;

ii) if the general rule should apply, the basis of the assessment: the defendant submitted that from 21 June 2018 (that being 28 days following the handing down of the judgment in Gee and others v Depuy International Limited (2018)) the assessment of costs should be on the indemnity basis as from that point (if not earlier) the claimants ought reasonably to have appreciated that the action was so speculative or weak or thin that it should no longer be pursued.

The Qualified One-Way Costs regime did not apply to this claim as it started well before that regime came into effect in 2013.

On the first issue, the question for the judge in determining the claimants' application was whether, in complying with its duty (under CPR 1.3) to help the court to further the overriding objective the defendant ought to have made an application for summary disposal of the claim. The claimants identified the defendant's failure to do so as conduct sufficient to justify the displacement of the general rule concerning recovery for costs and to penalise the defendant by depriving it of the lion's share of its costs.

The High Court Judge rejected this argument and held that the general rule should apply and there should be an order that the claimants bear the costs of the defendant.

First, the duty to run the claimants' case rested on the shoulders of the claimants' legal team. It was the responsibility of that team to evaluate and re-evaluate the merits of the action as the litigation unfolded and make decisions accordingly.

'…there was no authority for the proposition that the defendant should be penalised for failing to make an application for summary disposal of a weak claim'

Secondly, there was no authority for the proposition that the defendant should be penalised for failing to make an application for summary disposal of a weak claim. The case law was however replete with authorities for the contrary proposition, that claimants who continued to prosecute a weak or thin or speculative claim did so at the risk of incurring the penalty of indemnity costs.

Thirdly, throughout the litigation, the claimants' consistent position had been that the action should proceed to trial where the claimants would be successful, notwithstanding the defendant's objection to the way in which the case was formulated in the pleadings. Even following the handing down of a judgment of the Court of Appeal in November 2019, the claimants' position (at least front of stage) was that the claim remained arguable. It was only two working days before the hearing of the issues in May 2020 that the claimants submitted to judgment: several months after the ruling of the Court of Appeal. This application was an application by the claimants to have their cake and eat it.

On the second issue, CPR 44.4(2) and 44.4(3) identified the two differences in substance between a standard order for costs and an indemnity order for costs. The appropriate question posed was whether at any time following the commencement of the proceedings a reasonable claimant would have concluded that the claim was so speculative or weak or thin that it should no longer be pursued. Pursuing a weak, but arguable, claim would not in itself usually justify the penalty of indemnity costs.

The judge found the issue a straightforward one to determine. In dismissing the appeal by the claimants in March 2017, the Court of Appeal had set out an analysis of the pleadings, making clear that the claimants' case was limited to the "worst in class" case and making equally clear that it would not permit the case to be expanded or amplified by any means. The claimants' legal team was then left with that judgment as the definitive statement of the limit of their case. Allowing for some time to take stock, it should have been discontinued within a short time following Gee or steps taken to attempt to compromise the litigation on favourable terms (if possible).

Against that short analysis, the question was posed of whether a reasonable claimant would or should have concluded in May/June 2018 that the claim was so speculative or weak or thin that it should be stopped. The answer to that was, yes, and compellingly so and from, at the latest, shortly after the handing down of the judgment in Gee. Posing the question of whether the decision to pursue the litigation beyond 21 June 2018 was unreasonable to a high degree, again the answer was yes, and compellingly so. Taking all of the circumstances into account, the claimants' conduct beyond this point was out of the norm.

That conclusion would be a sufficient basis for an award of indemnity costs. However, the claimants' conduct after June 2018 and the associated delay until May 2020 in submitting to judgment compounded the problem. The award of indemnity costs did not require the judge to find conduct worthy of moral disapprobation: all that was needed was conduct which was out of the norm. The conduct was also both

The claimants should therefore pay the defendant's costs to be assessed on the standard basis until 21 June 2018 and on the indemnity basis thereafter, save for the appeal costs which were to be assessed on the standard basis.

The claimants were represented by Fortitude Law

The defendant was represented by Addleshaw Goddard

Comment

Although this case was pre-QOCS, it may be recalled that CPR 44.15 may displace QOCS where the proceedings have been struck out on the grounds that –

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court's process; or

(c) the conduct of –

(i) the claimant; or

(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct, is likely to obstruct the just disposal of the proceedings.

Had QOCS applied, such an application may have proved attractive to the defendant.