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:

- A judge's approach to the summary assessment of costs
- The abuse of the RTA claims Portal
- Fundamental dishonesty

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Summary Assessment of Costs

RG Securities (No.2) Limited v Allianz Global Corporate and Speciality CE and others (2020) EWHC 2047(TCC)

Following the third defendant's unsuccessful application to strike out the claim against it as being statute barred, the court dealt with the summary assessment of costs.

The judge had limited the parties' written submissions on costs to two pages each. He expressed the view that otherwise there was a danger, when costs were to be dealt with in writing, that a most dispiriting type of satellite litigation ensued. The costs at stake on this application were not large, and the amount of time and effort spent arguing in written submissions could sometimes match the level of costs being argued about. The page limit was designed to avoid that.

The claimant, having successfully fought off the application, sought its costs, in the sum of £25,101 plus VAT.

The third defendant challenged the costs total sought by the claimant for a number of reasons; sought its own costs of issuing the failed application; challenged the number of hours spent by the claimant's legal advisers; challenged the totals; and provided an alternative calculation of the claimant's costs in the sum of approximately £10,000 only.

'…a figure awarded by way of summary assessment was simply that…it was not an item by item detailed assessment'

The High Court Judge held that a figure awarded by way of summary assessment was simply that – a summary assessment. It was not an item by item detailed assessment, and this ruling should not be taken as constituting one. The figure awarded by the court was not intended to be a full indemnity to the party receiving its costs, and some deduction from the overall total was justified.

Costs had to be proportionate and reasonably incurred, and proportionate and reasonable in amount, as this was a requirement under CPR Part 44.4(1)(a).

Counting the number of pages of exhibits to witness statements – which was one of the approaches adopted by the third defendant in there submissions to justify a reduction - was not of particular assistance. This was a reasonably complex application that led to a reserved judgment. The court had a general grasp of what was a proportionate level of costs of such applications, although specific items within the overall total did also have to be considered.

The judge rejected the suggestion that the third defendant had had good grounds for issuing its application. The point in issue had been dealt with in the claimant's reply and defence to counterclaim. Had the third defendant then discontinued its application it might have had an arguable point on costs but in circumstances where the application was continued, it was not a justifiable reason to award the third defendant any of its costs, given the application failed.

The general rule under CPR Part 44.2(2)(a) was that the unsuccessful party paid the costs of the successful party. There was no reason to displace that here, nor was there any particular reason to treat the costs the third defendant incurred in issuing it differently.

The second point related to a challenge to the level of the claimant's counsel's brief fee, which was £8,000. The third defendant maintained that this was excessive, and compared it unfavourably with the lower figure of £4,200 for its counsel's fee. This was a bad point for the following reason.

The only fee paid to counsel for the claimant on the costs schedule was the brief fee. Counsel's fees for the third defendant were, however, split into two; part one was for "advice/conference/ documents", in the sum of £5,610; the second part was the brief fee for the hearing itself of £4,200. Thus, counsel's fees for the third defendant totalled £9,810, compared with £8,000 for the claimant. It would be extremely difficult to conclude that the comparison was a valid one. In any event, the claimant's brief fee was entirely reasonable and proportionate.

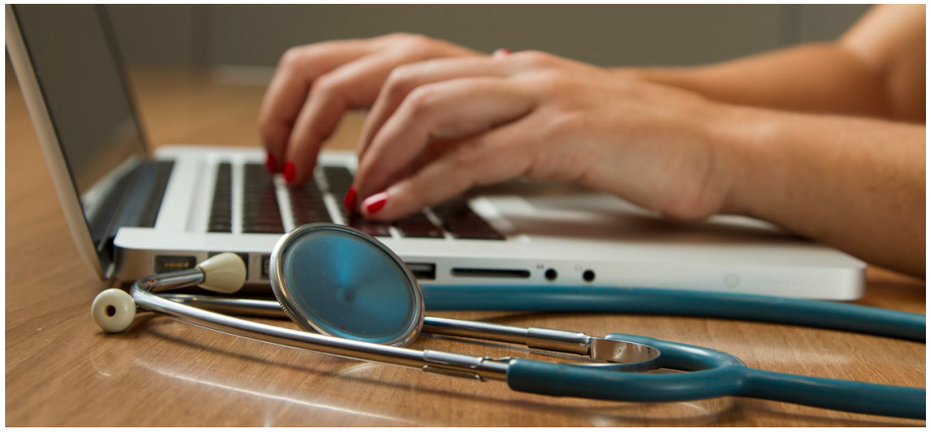
The time spent and the hourly rates were reasonable and proportionate. However, some global reduction was justified and the claimant was awarded the VAT-exclusive sum of £20,000 by way of summary assessment of its costs of the application.

The claimant was represented by Stewarts Law

The third defendant was represented by Foskett Marr Gadsby & Head LLP

Comment

Although a case on its facts, this ruling does illustrate the need to take a pragmatic view of an opponent's costs when they are being summarily assessed. It can be seen that none of the points raised by the paying party found any favour with the judge.



RTA Claims Portal/ Abuse

Cable v Liverpool Victoria Insurance Co Ltd (2020) EWCA Civ 1015

This appeal related to the apparent misuse of the RTA and EL/PL Protocols and in particular, what happens if, (in this case) following the making of a claim under the RTA Protocol, Part 8 proceedings are started and then immediately stayed on the false premise that the claim is or remains a low value RTA claim, when it is (or should have been) obvious to the claimant's solicitors that the claim was worth almost a hundred times more than £25,000?

In the light of the many failures on the part of the claimant/appellant's solicitors, the District Judge declined to lift the stay and transfer the claim to CPR Part 7. In consequence, she struck out the claim altogether. The Circuit Judge upheld her order. The issue for this court was whether she was right to have done so.

The claimant was injured in a road traffic accident on 1 September 2014. At the time he was employed in a job with a salary of £130,000 per year. He instructed solicitors at a time when it would not have been apparent that the claim was obviously worth more than £25,000.

On 24 September 2014, the solicitors submitted a claim notification form ("CNF") to the defendant/respondent insurer, under Stage 1 of the RTA Protocol. An admission of liability was made by the respondent on 2 October 2014.

On 28 November 2014, the claimant's appointed medical expert produced a report. It did not give a definitive prognosis, and recommended that a report be obtained from a neurologist. The claimant's symptoms included headaches, dizziness and disorientation. The report also confirmed that the claimant had been off work since the accident, although other evidence showed that he was still being paid. Although it was not clear when, it appeared that this report was provided to the defendant during the RTA Protocol process.

Following the admission of liability, the claim should have progressed to Stage 2 of the RTA Protocol. However, because of the dilatory conduct of the claimant's solicitors, that did not happen. Although an interim payment of £1,000 was made in accordance with the RTA Protocol, thereafter, throughout 2015, 2016 and the first part of 2017, progress was non-existent.

It appeared that the defendant continually chased the claimant's solicitors about the progress of the claim, seeking information as to whether the claimant was off work and whether there was a loss of earnings claim, and asking other questions relevant to quantum. The defendant also sought the claimant's medical notes. But no replies to any of these chasers were forthcoming. The lack of communication was so poor that, in December 2015, when the claimant's employment was terminated, his solicitors did not inform the defendant.

In January 2016, unbeknownst to the defendant, a consultant neurologist, provided a first report to the claimant's solicitors, although it arose from an examination the previous April. That report noted that some aspects of the claimant's condition had deteriorated, that he was struggling with light and high-pitched tinnitus and was unable to work.

On 19 April 2016, after further chasing emails had met with no response, the defendant made a Part 36 offer in the sum of £10,000.

Although, by no later than the spring or early summer of 2017, it could be said with confidence that the claimant's solicitors knew or ought to have known that the claim was worth far in excess of £25,000, on 25 July 2017, they issued a Part 8 claim form, which continued to suggest that the claim fell to be dealt with under the RTA Protocol.

On 31 July 2017, a District Judge allowed the claimant's ex parte application for a stay until 20 August 2018, by which date an application had to be made to lift the stay, or the claim would be struck out. He also stipulated that the order for the stay and the claim form should be sent by the claimant's solicitors to the defendant by 20 August 2017 (which they did not).

It was not until 16 August 2018, four days before the expiry of the stay, that the claimant's solicitors emailed the defendant to tell it, for the first time, about the termination of the claimant's employment and his inability to work. On 18 August 2018, two days before the expiry of the stay, the claimant's solicitors issued an application to lift the stay and for the matter to proceed as a Part 7 claim with appropriate and consequential directions. On 21 August, another District Judge made an ex parte order lifting the stay and requiring the amended claim form and particulars of claim to be served by 4 September 2018.

The claimant's solicitors failed to comply with that order, but the defendant's solicitors learned of its existence and, on 6 September, they issued an application to set aside the latest order, thus keeping the stay in place, and to strike out the claim. The amended claim form and particulars of claim were not served until 26 September 2018. Those documents set out a damages' claim in the order of £2.2m.

The Court of Appeal reviewed the authorities on abuse of process and noted that the draconian step of striking a claim out was always a last resort, a fortiori where to do so would deprive the claimant of a substantive right to which the court had held that he was entitled after a fair trial.

The court held that the proper approach was to consider whether there had been an abuse of process and, if so, what was the appropriate sanction for that abuse? In particular, was it proportionate to strike out the claim?

In striking out the claim, the first District Judge had found:

a) At the point when the claimant's solicitors issued the claim under Part 8, they knew (or ought to have known) that this was not a Part 8 claim. They should have issued a claim under Part 7;

b) The solicitors sought a stay so as to comply with Stage 2 of the RTA Protocol when they knew (or ought to have known) that the RTA Protocol was inapplicable to this claim;

c) The solicitors did not intend to and did not in fact use the stay of proceedings for the purposes for which it was sought and granted.

The appellate court found that these three failures were more than sufficient to demonstrate an abuse of process in this case: a) and c) were abuses of the court proceedings themselves, whilst b) was better categorised as an abuse of the RTA Protocol process. An abuse of process could occur regardless of whether or not there was unfairness, let alone manifest unfairness, to the other party.

Having established that there was an abuse of process, the second step for the court was the usual balancing exercise, in order to identify the proportionate sanction. Striking out the claim was an option, but it was not the only, or even the primary, solution. Striking out was not one of the options identified in the practice direction concerned

with compliance with the PAPs, although that did not mean that, in an exceptional case, it would not be the appropriate sanction.

'…there was no evidence of any actual prejudice (to the defendant) at all'

As far as prejudice to the defendant was concerned, there could have been some prejudice because of the failure to switch to the PI protocol in the autumn of 2017, but there was no evidence of any actual prejudice at all. That delay required some form of sanction, but there was nothing to suggest that a more conventional form of sanction in costs or in respect of interest would not have met the justice of the case.

Regarding prejudice to the claimant, he was the victim of an accident for which the defendant had long ago admitted liability. His claim was started in good time under the RTA Protocol, and he was not responsible for the catalogue of errors and delays since then.

His claim form was issued within the prescribed three years. If that claim was struck out now, he would have to start all over again, this time with a professional negligence claim against his current solicitors, with all the risk and uncertainty, not to say cost, that such a claim would involve. Moreover, that would be a loss of a chance claim, which was inevitably an inferior type of satellite claim, particularly when compared to the present proceedings, which involved a claim against the primary defendant who had already admitted liability. Striking out the claim was a disproportionate remedy in all the circumstances.

There were two appropriate sanctions which would reflect the abuse of process in this case. First, the claimant should pay the defendant's costs on an indemnity basis up to and including 17 October 2018 (the day of the hearing before the district judge). Secondly, that the claimant should recover no interest on his special damages for the period up until 17 October 2018.

The Court of Appeal then allowed the claimant relief from sanctions for his failure to comply with the second district judge's order (i.e. the service of the amended claim form and the accompanying documents on 26 September 2018 rather than 4 September, as ordered). The claimant accepted that the default was serious and significant and that, although there was an excuse, there was no good reason for it. Looking at the third stage of the denton test, the failings in the first two stages must be weighed in the balance against two particular elements of the factual background.

The first was that liability for this claim had been admitted by the defendant. The second was that, on 17 August 2018, the heart of the detailed amended claim (and certainly the reason why this was now a large multi-track claim) was provided to the defendant in the form of the medical reports and the claimant's statement. Although that plainly did not obviate the need for proper service of the amended claim form, which was then accompanied by many of the same documents, it inevitably lessened the effect of the delay in service of those documents from 4 to 26 September 2018.

Relief from sanctions was granted.

The claimant was represented by Slater & Gordon

The defendant was represented by Keoghs LLP

Comment

Readers will probably be struck by the contrast between this judgment and that in *Tandara v EUI Limited* which we reported only last week.

Fundamental dishonesty

Pegg v Webb and another (2020) EWHC 2095 (QB)

At first instance, despite having dismissed the claim, the trial judge ordered the second defendant, the insurer of the first defendant, to pay 60% of the claimant's costs. The reason for the unusual costs order made by the judge was that the second defendant had run a case of "fundamental dishonesty" against the claimant and this had meant that what would otherwise have been a one-day fast-track claim became a two-day multitrack claim. There were two grounds of appeal: first that the judge erred in failing to make a finding of fundamental dishonesty against the claimant; secondly, in any event, the costs order made was wrong in principle.

The principal line of defence on the part of the second defendant was that this was a bogus claim based upon a collision which never happened or, if it did occur, was contrived between the parties. Having heard the evidence, the judge came to the conclusion that the claimant had proved his case and that there was a genuine collision and that this was not a dishonest claim with no collision having taken place or with any collision having been staged with the claimant's knowledge. The second defendant did not appeal against that finding.

However, at trial the second defendant had a second string to its bow, namely in relation to the damages claimed by the claimant based upon his medical expert's report. The second defendant alleged that the claimant had so exaggerated his injuries and had so misled the doctor, both in what he said and what he failed to say, that he had been fundamentally dishonest in relation to his injuries even on the basis that there had been a genuine collision.

The judge found that there had indeed been a failure on the part of the claimant to give the expert relevant information and what he told him about the longevity of the injuries was inconsistent with his own evidence at trial such that no reliance could be placed upon the expert's medical report and, without medical support, the claim had to fail. However, despite that, the judge did not make a finding of fundamental dishonesty.

The first ground of appeal was that the judge was wrong in failing to find the claimant fundamentally dishonest pursuant to CPR 44.16. In the present case, where the damages claimed were confined to pain, suffering and loss of amenity in relation to the injuries and the cost of physiotherapy, dishonesty as to the extent of the injuries would be fundamental because the extent of the claimant's injuries was not merely

incidental or collateral but formed the very basis of the claim. This was shown by the fact that the judge, having been unable to find the injuries claimed proved, dismissed the claim.

The present case was unusual in the sense that the weaknesses in the evidence led the judge to conclude that the claimant had failed to prove any injury or loss at all and he thereby dismissed the claim. However, that reasoning did not lead the judge to draw an inference or make a finding that the claimant had been dishonest. Should it have done?

There were factors in this case which pointed strongly, if not inexorably, to the conclusion that the claimant had been dishonest in his presentation of his injuries to the expert instructed and also to the court, but which the judge failed to deal with, either adequately or, in some cases at all.

Having reviewed the relevant evidence in detail, the high court judge held that no judge could reasonably have failed to have come to the conclusion that the claim for damages as presented by the claimant in this action was a fundamentally dishonest one, perpetrated by fundamentally dishonest accounts to the only medical expert and in the various court documents.

The appeal was accordingly allowed and the order dismissing the claimant's claim would be endorsed with a finding of fundamental dishonesty on the part of the claimant in relation to the claim for damages

Given the finding of fundamental dishonesty, and the application of CPR 44.16, and given that the claim had failed, it was appropriate to make an order that the claimant pay the second defendant's costs. The second defendant was justified in alleging fundamental dishonesty and this had the effect of taking the case out of the fast-track and into the multi-track.

However, a significant part of the evidence and court time was directed towards the question whether the accident was bogus and the parties had colluded, and some adjustment to the full order must be made to reflect the second defendant's failure to prove fundamental honesty in that regard.

The claimant should pay 70% of the second defendant's costs, to be assessed on the indemnity basis.

The claimant was represented by Sheldon Davidson Solicitors

The defendant was represented by Keoghs Solicitors

Comment

This case further illustrates a point that we have made in a number of earlier editions of *Insight*. Where the costs of a discrete issue may be separated out from the costs of the action as a whole, it becomes possible to deprive a successful party of a proportion of its costs, irrespective of its level of overall success.