J15YJ964

Cule v Joseph

Judgment

1. This is the reserved judgment in the matter that was heard on 19 December 2022. A combination of a lack of Court time and the issues raised lead me to reserve the Judgment. Following assessment of damages in this matter, the Claimant made an application for costs for unreasonable behaviour pursuant to CPR 27.14(2)(g).

2. The matter arises out of a road traffic accident which occurred on the 31 May 2021. The claim was, properly, entered onto the OIC by SCNF dated the 13 July 2021. In the Compensator Response Form, dated 24 August 2021, liability was admitted in full. The parties had been unable to agree the value of the Claim and, therefore, a Form RTASC Q was issued by the Court on 12 April 2022 with the date of service being 28 April 2022. The Court Valuation Form set out that the Claimant claimed £243.00 in respect of the cost of physiotherapy treatment; nil in respect of a Tariff injury amount; and £3,000.00 in respect of a non-tariff injury. The Compensator Offers are £243.00; nil; and £1,100.00 respectively. It is the text inserted on the CVF by the Compensator that forms the basis of the application for costs for unreasonable behaviour.

3. Directions were given on 1 July 2022 which listed the matter for a preliminary hearing to determine the issues in the case. The order made clear that, if the parties agreed, the Court would use the hearing as a final hearing pursuant to CPR 27.4(3)(b) and would assess quantum on the basis of submissions. At the hearing, the parties agreed. Quantum was assessed at £3,250.00 in respect of damages for the injury (together with the agreed costs of physiotherapy). However, the Claimant then sought costs for what they say is the Defendant's unreasonable behaviour. That issue was adjourned to 4 October 2022. Both parties were given permission to file and serve witness evidence relating to the issue. The Claimant simply sought to rely upon a letter dated 5 August 2022. The Defendant prepared a full witness statement of Rebecca Grundy, dated 23 August 2022.

4. In fact, the telephone conference call on 4 October 2022 had not been arranged and, therefore, the parties agreed to adjourn and relist the matter on 19 December 2022. However, only 30 minutes was allowed for the hearing.

The Rules

> ***27.14*** *(2) The court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal, except –*
> *(a) the fixed costs attributable to issuing the claim which –*
> *(i) are payable under Part 45; or*
> *(ii) would be payable under Part 45 if that Part applied to the claim;*
> *….*
> *(c) any court fees paid by that other party;*
> *….*
> *(g) such further costs as the court may assess by the summary procedure and order to be paid by a party who has behaved unreasonably;*
>
> *(3) A party's rejection of an offer in settlement will not of itself constitute unreasonable behaviour under paragraph (2)(g) but the court may take it into consideration when it is applying the unreasonableness test.*

5. The basis of the unreasonable behaviour is said by the Claimant to be the Defendant's case with regard to the damages for non-tariff injury as set out in the CVF.

6. The CVF reveals the following:

7. **Tariff amount and uplift category:** The Claimant claims nil under both of these sections. The Compensator states that they offer nil. As to the Compensator reasons, they state, "*The medical report concludes that there is not a whiplash injury".* That is, of course, correct.

8. **Injury – non-tariff:** The form sets out that the the Claimant claims £3,000.00 under this head of loss whilst the Defendant offers £1,100.00. Accordingly, the total amount claimed at section H is said to be £3,000.00 for the injury. The Defendant's reasons are given as: *We note that your client has suffered a right knee injury with an 8 month prognosis. We note treatment has been undertaken and completed. We feel your request of £3,000.00 is overstated, we are prepared to offer £1,100.00. We have no offers in respect of the headaches suffered. Your client has not hit their head in the accident and headaches would*

have been an associated symptoms of a whiplash style injury which your client have seemingly not suffered in this accident. The Claimant's reasons are given as: *Our client has sustained a knee injury, with a prognosis period of 8 months and headaches with a prognosis period of 6 months for the accident date. The offer of £1,100.00 is too low when referring the JC Guidelines.*

The Claimant's argument

9. Mr Seed for the Claimant argues that this process is not necessarily a fair fight. If the injury is just tariff, he concedes that it is. However, if there is a non-tariff element to the injury (in whole or in part) the Claimant needs the assistance of a legal representative or Judge. He questions what would happen in this case if there was a Litigation in Person? He, rightly, suggests that, in this case, there is no tariff element i.e., there is no whiplash injury. That is conceded. However, he, again rightly, points out that the Defendant states that the headaches would be part of a tariff award and therefore, they decline to make an offer in respect of the headaches. Given this stance is against the backdrop of medical evidence that, at page 6, sets out that *(1) Headaches. In my opinion, this was entirely due to the material incident*, that cannot be right and is, in his submission, "totally unreasonable". He goes as far as to say that would mislead a litigant in person (albeit inadvertently) and, given that it is plainly wrong, it should have consequences. He submits this is unarguable. He suggests the concern has always been about Insurers bullying Claimants representing themselves and this should be marked to prevent this sort of thing from happening. I also note that the medical report sets out that the headaches were, *due to stress* so there is a cause given.

10. As an aside, Mr Seed questioned whether this case ought to have been within the OIC process in any event. I have to say, the answer to that appears to be "yes" when considering paragraph 4.2 of the Pre-action Protocol of Personal Injury Claims below the Small Claims Limit in Road traffic Accidents; the limit being £5,000.00. However, that matters not.

11. Mr Seed emphasises that this application is not made because the low offer was unreasonable; this is about the Defendant's totally unreasonable line of argument in the CVF.

12. He suggests that the Defendant tries to muddy the waters, criticising the Claimant for not entering further negotiation and just issuing an RTASC Q but he points out that there was no negotiation by the Defendant; the Defendant solicitor also just ran with the CVF. That is why he says there should be consequences of this.

The Defendant's submissions

13. The Defendant points out that there is not much authority on this issue but suggests that the question is whether there is a "reasonable explanation" for the behaviour. They, quite properly, point to Dammermann v Lanyon Bowder LLP [2017] EWCA Civ 269. Mr Stanger, Counsel for the Defendant, points out that, in all likelihood, the CVF was completed by an unqualified claim's handler and was just poorly conceived reasoning rather than intended to mislead. He also, rightly, points out that in this case, the Claimant was represented so there is no harm actually done . It is open to parties to make up to 3 offers prior to an RTASC Q being issued but the matter was just issued. For example, the Claimant did not say, "JC Guidelines, k(b)(ii)". This was just a case where a low offer was made which was rejected. If low offers are to be viewed as unreasonable, the floodgates to these sorts of applications will open. Basically, this was just not a well put together offer but is not something that is unreasonable.

14. Mr Stanger suggests that whilst the wording of CPR 27.14(2)(g) does not suggest that there has to be a causative effect linking the behaviour and the costs, but in most cases there will be. Here, he says that the Claimant stood by their offer (and got £250.00 less). [As an aside, I am not sure that is correct. The Claimant sought £3,000.00 on the papers, £3,500.00 at the hearing and were awarded £3,250.00]. However, he says, to descend into this argument because the Defendant's reasoning is ill-conceived and therefore is unreasonable, is not what was envisaged by the OIC process or CPR 27.14.

The Law

15. I was referred to the notes in the White Book at 27.14.4. The authors set out that there is no definition of unreasonable behaviour in the rules. In Dammermann, the Court of Appeal doubted whether any useful guidance could be given as all cases are fact sensitive. However, the court did suggest that the acid test from the wasted costs Jurisdiction (CPR 46.8) and the case of Ridehalgh v Horsefield [1994] Ch 205 at 232F should provide sufficient guidance. In other words, the Court should consider whether the conduct complained of "permits of a reasonable explanation".

16. Following the hearing, I have had the advantage of reading the whole Judgment. I think it is instructive to set the salient parts out in full - paragraphs 30 and 31 per Lords Justice Longmore and McFarlane:

> *30. …… it is necessary to refer to the invitation made by Vos LJ, when granting permission to appeal, to consider the proper meaning of CPR Part 27.14 (2)(g). We doubt if we can usefully give general guidance in relation to the circumstances in which it will be appropriate for a court to decide whether a party "has behaved unreasonably" since all such cases must be highly fact-sensitive. In the somewhat different context of the jurisdiction to order a party's legal (or other) representative to meet what are called "wasted costs" **...**defined as costs incurred "as a result of any improper, unreasonable or negligent act or omission" of such representative**)**, the court speaking through Sir Thomas Bingham MR said:-*
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> *"… conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable," see Ridehalgh v Horsefield [1994] Ch 205, 232F.*
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> *31. While we would not wish to incorporate all the learning about wasted costs orders into decisions under CPR Part 27.14 (2)(g), we think that the above dictum should give sufficient guidance on the word "unreasonably" to district judges and circuit judges dealing with cases allocated to the Small Claims Track. Ridehalgh was, of course, dealing with acts or omissions of legal representatives but the meaning of "unreasonably" cannot be different when applied to litigants in person in Small Claims cases. Litigants in person should not be in a better position than legal representatives but neither should they be in any worse position than such representatives.*

17. The guidance came with a warning that Litigants should not be too easily deterred from using the small claims track by risk of an adverse costs order based on unreasonable behaviour.

18. Also following the hearing, I have read and considered the notes to the White Book beneath Rule 46.8 being mindful that the whole of this test is not to be imported into CPR 27.14(g). They set out the principles in Ridehalgh.

19. The following points seem to me to be of particular relevance:

    a. There is a three stage test:

i. Have the legal representatives of whom complaint is made acted improperly, unreasonably or negligently?
ii. If so, did such conduct cause the applicant to incur unnecessary cost?
iii. If so, was it, in all the circumstances, just to order the legal representative to compensate the applicant for the whole or part of the relevant costs?

b. The conduct should be identified;
c. It is rarely safe for the Court to assume that a hopeless case is being litigated on the advice of the lawyers. They are there to present the case and the Judge is there to judge it;
d. Demonstration of a causal link between the conduct and the wasted costs is essential. The regime is not punitive nor regulatory. It is compensatory.

Conclusion

20. To my mind, Dammermann makes the 27.14(2)(g) power more akin to the wasted costs provisions than perhaps what might have been more tempting to consider at first blush, namely the "conduct" provisions in CPR 44.4.

21. It seems clear to me that the behaviour has to be something more than "not very good". Rather, it has to be "*conduct that permits of a reasonable explanation" and, "If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable".*

22. Turning to this case, the words on the CVF are, very plainly, wrong. There is actually no evidence at all that the headaches were due to a (non-existent) whiplash. Quite the reverse, the evidence is that they were due to stress and entirely due to the index accident. They were nothing to do with the tariff at all. Incidentally, in my view, that would have been the case even if there had been a whiplash injury on the basis of the evidence before the Court although it has to be accepted that would have been a more arguable case. As it happens, here, it was straight forward; there was *no* whiplash injury. Whether in consequence of this misunderstanding by the person who completed the form or not, a low offer was made. All that said, very frequently, low offers are made whether in Stage 3 cases, Part 7 cases or, indeed, OIC cases. There is nothing particularly unusual in that.

23. As an aside, 27.14(3) of course highlights failure to accept an offer *may* be a factor for the Court to take into account although, of itself, is not unreasonable but 27.14 does not refer to *making* a low offer having the potential to found unreasonable behaviour. However, in my view, it must be a matter that I *could* take into account when considering the relevant parts of the test. However, that is not this case. If an offer of £1,100.00 had been made absent the words, Mr

Seed concedes this argument would not have been run. It is the (incorrect) words that found the argument.

24. So, taking all of these matters into account, is the conduct identified capable of reasonable explanation?

25. There is no arguing that their reasoning was wrong as I have set out above. However, this is not the first "pleading" to be wrong and it surely will not be the last. It was also information entered onto the system in 2021 (or early 2022 at the latest) which, on any view, is relatively early in the OIC process. The valuation of injuries, particularly the non-tariff element, has already taken up a considerable amount of Court time generally and the operation of the scheme cannot be described as clear and straightforward. So, against that backdrop, can I say this is "not capable of a reasonable explanation" or that the writing of the words somehow makes a low offer unreasonable? It seems to me that the answer is no. It is capable of a reasonable explanation in the circumstances. As was recognised by the Court of Appeal; these cases are fact specific.

26. Further, whilst I cannot see that the behaviour alleged under CPR 27.14(g) has to be causative of loss, I think causation must be also be valuable consideration. In this particular case, it has actually caused no loss at all. Had there been no words and the same low offer, precisely the same would have happened; an RTASC Q would have been issued and the matter would have been assessed. There is nothing here that tips the balance against my views above.

27. Yet further still, Ridehalgh states in terms that the wasted costs regime is not to be punitive or regulatory. In such circumstances, I find it hard to think that the CPR 27.14(g) regime should be so punitive. The Claimant's case (in part) is that this sort of conduct should be marked, punished, deterred. I am not sure that is correct. I cannot see this argument should operate to change the conclusions I have already reached.

28. Accordingly, the Claimant's application for costs for unreasonable behaviour fails.

29. This Judgment will be handed down on 3 March 2023 at 2 pm (elh 30 mins) when any ancillary matters can be dealt with. Of course, should the parties be able to lodge a Consent order to bring this judgment into effect prior to that, they are welcome to do so and no attendance will be required.

DJ Hennessy