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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Claim No. HQ10X03202

Royal Courts of Justice
Strand
London
WC2A 2LL

Tuesday, 11th October 2011

Before:

MRS JUSTICE LANG

Between:

STEVEN DAVID LUMB

Claimant

-v-

BARRY HAMPSEY

Defendant

Counsel for the Claimant: MR. NICHOLAS YELL

Counsel for the Defendant: MR. CHARLES WOODHOUSE

JUDGMENT APPROVED BY THE COURT

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1. MRS. JUSTICE LANG: The Claimant suffered a traumatic brain injury when he was knocked from his bicycle by a lorry on 29th May 2008. Because of his injuries he was a protected party acting through a litigation friend until September 2011. The Defendant admitted liability and judgment was entered for the Claimant on 4th September 2009. Following settlement negotiations, the Defendant made a Part 36 offer on 26th July 2010, which was further clarified on 2nd August 2010, and was rejected by the Claimant. A trial on quantum was listed for 10th October 2011. On 27th September 2011, the Claimant decided to accept the part 36 offer.

   The applications before the court today are:

   1. to determine under CPR Rule 36.10 whether the Claimant should pay the Defendant's costs from the date of expiry of the relevant period (the date is 23rd August 2010);

   2. to grant permission for the Part 36 offer to be accepted under CPR Rule 36.9(3)(b) because further deductable benefits have been paid to the Claimant since the date of the offer.

The Law

2. CPR Rule 36.10(4) and (5) provide:

   "(4) Where –

   a) a Part 36 offer that was made less than 21 days before the start of trial is accepted; or

   b) a Part 36 offer is accepted after expiry of the relevant period,

   if the parties do not agree the liability for costs, the court will make an order as to costs."

   "(5) Where paragraph (4)(b) applies, unless the court orders otherwise –

   a) the claimant will be entitled to the costs of the proceedings up to the date on which the relevant period expired; and

   b) the offeree will be liable for the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance."

3. Neither the Rules nor the practice direction provide any guidance as to how the court should exercise its discretion under Rule 36.10 (5). Counsel and I have not been able to find many authorities. In *Kunaka v Barclays Bank Plc* [2010] EWCA Civ 1035 the Court of Appeal held that the court had a discretion not to make the usual order. In a case of late acceptance, it was an "exceptional" case on its facts where it was held that the court should depart from the usual order and award the claimant costs in respect of the whole period because that was what "the fairness of the situation demands". The exceptional circumstances there were that the claimant was a litigant in person who was not made fully aware by the defendant's solicitors of the costs penalty associated with late acceptance of an offer.

4. In *Matthews v Metal Improvements Co. Inc.* [2007] EWCA Civ 215, the Court of Appeal considered the costs consequences of a late acceptance of a Part 36 offer under the earlier version of Part 36. (The current version came into effect on 6th April 2007.) The court held that the incidence of costs was not affected by the fact that the claimant was a patient. In principle, a defendant is entitled to the same costs protection against a patient as against a competent claimant. (I interpose there just to say that, whilst that must be correct as a matter of principle, there may clearly be circumstances in individual cases where the fact that the claimant is a patient does have implications, which may make it unjust for a costs order to be made against him.) The court applied the provisions of what was then CPR Rule 36.20, which provided that at trial, unless it considered it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted, without needing the permission of the court. The court held that the test was whether it was unjust to make the usual order. At that time, under CPR Rule 36 as it was before 2007, there was no equivalent provision to the current provision in Rule 36.10(5) making a presumption in favour of the defendant receiving his costs. Mr Justice Stanley Burnton said at paragraph 33:

> "The Deputy District Judge's approach is based on a misunderstanding of the function of a Pt 36 payment or offer. The defendant may make a conservative payment in the hope that it will tempt the claimant to accept a conservative estimate of the value of his claim. He may make a generous Pt 36 payment because he is reluctant to incur the risks and costs of going to trial, and hopes thereby to avoid them. The defendant may quite properly make a low payment in the hope that events or evidence will favour him: for example, that his expert will advise favourably in due course; that a prognosis of the claimant's injuries which are the subject of his claim will prove over-pessimistic; that cross-examination of the claimant or his witnesses may be successful; or that the trial judge will quantify general or special damages modestly. Conversely, there is nothing unreasonable in a competent claimant rejecting a Pt 36 payment in the hope that at trial the judge will take a generous view of his damages. The risks that the parties run are costs risks, in the case of the defendant that he will have to pay all of the claimant's costs, notwithstanding his payment, and in the case of the claimant that he will have to pay the defendant's costs from the last date when he could have accepted the payment. In other words, the function of a Pt 36 payment is to place the claimant on that costs risk if, as a result of the contingencies of litigation, he fails to beat the payment."

5. The case of *Matthews* is cited in the *White Book* commentary to Rule 36.14. Rule 36.14 provides for costs consequences following a trial and judgment where the court will make an order that the defendant is entitled to his costs from the expiry of the relevant period if the claimant fails to obtain a judgment more advantageous than the defendant's Part 36 offer, unless it would be unjust to do so. The passage at paragraph 36.14(4) reads:

> "The court will doubtless take into account all the circumstances of the case including those specified under rule 36.14(4). If an offeree fails to better the Part 36 offer then the regime provides for an order for costs for the offeror, post the period provided for acceptance. The party at risk is then required to establish grounds for rendering it unjust to make the order and such must be found by the court so as to deny the offeror their costs. Considering whether the offeree had

reasonable grounds for not accepting as if there was an unfettered discretion as to costs is the incorrect approach and wrong in principle – *Matthews v Metal Improvements* [2007] EWCA Civ 215. In *Ford v GKR Construction* [2001] WLR 1397, the Court of Appeal emphasised the need for parties to litigation to be provided with the information that they needed in order to be able to assess whether to make or to accept an offer to settle under Part 36."

6. In my view, the test which I should adopt in deciding the issue under Rule 36.10(5) is similar to that set out in rule 36.14. The test which I apply is whether the usual costs order set out in Rule 36.10 (5) should be departed from because it would be unjust for the Claimant to pay the Defendant's costs after the expiry of the relevant period, in the particular circumstances of this case. Such a departure would be the exception rather than the rule.

7. Rule CPR 36.14(4) gives some guidance as to matters that the court should take into account in considering whether the usual order as to costs would be unjust. These include:

   (a) the terms of any Part 36 offer;

   (b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

   (c) the information available to the parties at the time when the Part 36 offer was made; and

   (d) the conduct of the parties with regard to the giving or refusing to give information for the purposes of enabling the offer to be made or evaluated.

I consider that these are likely to be relevant factors under rule 36.10 also.

The Claimant's Case

8. Mr Darlington who is the Claimant's solicitor explained in his witness statement, dated 7th October 2011, that the medical evidence in this case broke down into two tranches: the initial round of reports which led to the decision to provide neurological rehabilitation at the Oliver Zangwill Centre and the second round of reports after that rehabilitation had completed. The final medical evidence which came into being was from the nursing experts in August 2011. Until 1st September 2011, the Claimant was a protected party under an order of the Court of Protection. Initially his wife, Mrs Lumb, was appointed as his Deputy. However it was becoming apparent in Spring 2010 that relationships between Mr and Mrs Lumb were becoming strained and there were indications of a possible estrangement. Because of the possibility of a subsequent conflict of interest in matters ancillary to divorce, the decision was taken mutually that Mrs Lumb should abandon her position as Deputy and the Claimant's daughter, Mrs Allen, should be appointed instead. That procedure was attended to between June and October 2010.

9. As had been anticipated, while the Claimant was attending the neurological rehabilitation centre the marriage did break down irretrievably and when the Claimant

returned to the former matrimonial home after his rehabilitation, Mrs Lumb and the three step children had left. This had a poor effect on the Claimant's well-being and diminished some of the benefits of the rehabilitation.

10. Prior to the breakdown of the marriage, Mrs Lumb had been a primary carer, supplying her services on a gratuitous basis, the value of which would be included in the claim. Looking forward it was clear that such assistance would have to be obtained commercially, thus increasing the value of the claim.

11. Mr Darlington said that the evidence obtained from the Claimant's experts and his own doctors, when taken in the round, indicated that during this period the Claimant had not regained sufficient capacity to permit the discharge of the Court of Protection order. Until the second round of the medical legal assessments had been undertaken in early Spring 2011, the Claimant and his advisers had no firm evidence on which to project the likely value of his ultimate case, it was as the Claimant's counsel described, "wholly speculative".

12. There had been a joint settlement meeting in June 2010, the outcome of which was an agreement that the Defendant would make funds available to fund the rehabilitation and interim payments were made. The joint settlement meeting also included discussion on the future conduct of the action, directions for reports, schedules and witness statements.

13. Mr Darlington said the Part 36 offer made in August 2010 was given extremely careful consideration and was the subject of an Advice from counsel. The Claimant's representatives considered the procedure they would have been obliged to adopt if the offer had been recommended for acceptance, including liaison with the Court of Protection. The Master would have considered an Opinion on Quantum from counsel which described the case as speculative. It did not seem to the Claimant's representatives that, even if they were minded to recommend acceptance, the necessary procedure for approval could be successfully completed.

14. A schedule of loss, which had been drafted as a working document indicated that the valuation of the Claimant's case by his representatives was £170,000 greater than the Part 36 offer with a level of commercial care incapable of accurate quantification. Thus the offer was not accepted until the second tranche of medical reports was available and attention could be given to the consequences so far as future care and support were concerned. In the event, following exchange of final reports, the Claimant was advised that while his claim still exceeded the Part 36 offer, the amount by which it now did was reduced and the prospects of contesting an action on the basis of the difference was disproportionate. Negotiations between the parties permitted acceptance of the Part 36 offer of £900,000 on 27 September 2011.

15. Mr Yell, counsel for the Claimant submitted in his skeleton argument, expanded in oral submissions before me today, that there were a number of reasons why it would be unjust to order the Claimant to pay the Defendant's costs. First, the Claimant was in neurological rehabilitation in the Oliver Zangwill Centre between July and November 2010 and so it was reasonable for the Claimant and his advisers to wait to see how successful that rehabilitation would be before deciding whether to accept the Part 36 offer.

16. Secondly, the Claimant was a patient at the material time and so any settlement would have required the approval of the Court of Protection. There was also the added difficulty that it was necessary to change Deputy between June and October 2010. It is very unlikely that the Court of Protection would have given approval since counsel specifically advised on 6th August 2010 against acceptance of the Part 36 offer, on the basis that it was too low, and that further medical evidence needed to be obtained.

17. Thirdly, directions were agreed at the joint settlement meeting. It was reasonable to await the completion of the obtaining of the medical and nursing reports before seeking to accept the Part 36 offer, such evidence was likely to be required by the Court of Protection on an approval hearing. Given the state of the expert evidence, it would have been irresponsible of the Claimant's legal advisers to have advised acceptance of the Part 36 offer at the time it was made.

18. Fourthly, the decision to advise the Claimant to accept the Part 36 offer in September 2011 was prompted in a large part by the improvement of the Claimant's neurological condition and capacity to conduct litigation on his own behalf. There was also a change in his personal circumstances as he has recently met a new partner, potentially increasing the difficulty of the claim for commercially provided care in the future.

Conclusions

19. I do not consider that the Claimant has established sufficient grounds to justify departure from the usual rule in Rule 36.10(5), for the reasons which have been put forward by the Defendant through their counsel Mr Woodhouse in his skeleton argument and his oral submissions. At the date that the Defendant's Part 36 offer was made, the Claimant's legal advisers had a substantial amount of expert evidence available to them. On 27th July 2009, Dr Rose, the Claimant's consultant in neuro-psychiatric rehabilitation had reported. On 27th July 2009, Mr Foy, the Claimant's consultant orthopedic surgeon, had reported. On 11th November 2009, Miss Dunning, the Defendant's care expert had reported. On 20th November 2009, Mrs Sargeant, the Claimant's care expert, had reported. On 1st December 2009, Dr Collins, the Claimant's speech and language therapist had reported. On 26th February 2010, Dr Oliver Foster, consultant neurologist, had been jointly instructed to provide a report. On 19th April 2010, Dr Jacobson, the Defendant's consultant neuro-psychiatrist had provided a report. On 5th July 2010, the Claimant had started neuro rehabilitation at the Oliver Zangwill Centre, with an assessment.

20. The report from Dr Foster, consultant neurologist, dated 26th February 2010 described Mr Lumb's very severe brain injury and stated that Mr Lumb was still within the 2 to 3 year window in which organic recovery from brain injury can be seen. He said:

> "Mr Lumb appears to have improved between his assessment by Dr Rose and my own which is entirely compatible with the natural history of organic brain injury. At this point, however, almost two years after the accident, any organically-mediated improvements are likely to be modest. There is, however, scope for improvement through development of neurobehavioural coping strategies and to some extent, re-learning.
>
> On the basis of the evidence so far presented, I think it likely, on the balance of probabilities, that Mr Lumb has now regained Capacity though this opinion may require revision in the light of any further information which subsequently

becomes available … … His presentation to me suggested that he had sufficient preservation of cognitive function to be able to understand material appropriately explained to him, weigh up such information, form a judgment based on such information and reliably express such a judgment though he would require considerable support because of difficulty understanding complex material and his poor memory.

It is my understanding that Mr Lumb has recently been allocated a case manager, and he is in receipt of 9 hours of support worker input per week. Case management is in my view appropriate at present to co-ordinate Mr Lumb's further rehabilitation and to take some pressure off his wife. Depending on any further biological recovery, and his response to rehabilitation, it is possible that he may not require case management indefinitely, though it is too early to judge this However, were his marriage to fail then he would probably require a degree of case management in the longer term.

Mr Lumb would, in my opinion, benefit from further rehabilitation. This could take the form either of a residential program such as that proposed at the Oliver Zangwill Centre, or an intensive community based programme.

Mr Lumb is severely disadvantaged on the labour market at this point and will not be able to return to his pre-accident employment. At this point it is too early to judge what kind of employment might be possible for Mr Lumb. Support worker input is appropriate at this stage but it is likely that this could be reduced in the longer term."

21. During the course of the hearing, I heard submissions from counsel as to whether Mr Lumb's condition has altered significantly from that described in Dr Foster's report in February 2010. It is common ground that although he has, of course, made progress through rehabilitation, Dr Foster's report remains essentially accurate. Dr Rose who was the Claimant's consultant neurologist, provided a second report in the early part of 2011 agreeing that Mr Lumb had now regained capacity.

22. In Dr Foster's report there was a reference to the possible failure of the marriage and the consequences that that would have for Mr Lumb's care. On 16th April 2010 the Oliver Zangwill Centre prepared an admissions assessment report which included this sentence, "Mr Lumb confided that his wife is intending to terminate the marriage and plans for separation are underway." It therefore followed that by the time of the joint settlement meeting on 28th June 2010, the Claimant's legal advisers were well aware that the marriage was likely to come to an end which would have implications for the cost of care and indeed Mrs Lumb did leave the matrimonial home on 31st August 2010.

23. It is suggested that the Claimant was unable to quantify the claim. However, the evidence that I have seen indicates that the Claimant's representatives were in a position to provide quantum summaries with specific figures and take part in meaningful negotiations with the Defendant at that time. The quantum summary prepared by the Claimant showed a figure of £1,807,287, including Court of Protection costs and future care costs, with an uplift for the loss of the marriage as part of the general damages. The Claimant's final offer was £1,227,156. On 26th July, the Defendant made his Part 36 offer of £900,000. It was clarified at the request of the Claimant on 2nd August 2010 and on 27th September 2010, the Claimant made his own

Part 36 offer in the sum of £1,100,000. Thus it is clear that the Claimant was capable of valuing his claim at the time when the Part 36 offer was made. He was valuing it at the joint settlement meeting, even though he was about to undergo his rehabilitation programme, he was still a patient and his marriage was breaking down. On 27th September 2010 he was sufficiently able to value his claim so as to make a Part 36 offer, again in the midst of his rehabilitation and when he was still a patient and by then his marriage had broken down. Therefore, the contention that the Claimant was unable to accept the Part 36 offer earlier, because of inability to value the claim and lack of information about the Claimant's condition, and the marriage, is simply not supported by the evidence.

24. The Claimant has made much of the difficulties involved in obtaining approval of a Part 36 offer from the Court of Protection. However, this is a hypothetical problem in this case. At the time, the Claimant's counsel considered that the Part 36 offer was simply too low and advised accordingly. He also advised that there was too much uncertainty for the future as to be able to accept an offer at that stage. So no application was ever made to the Court of Protection. There was no question of difficulties with approval from the Court of Protection, no approval was ever sought.

25. The Claimant's representatives did not at any stage raise these issues that are now relied upon until after they indicated his acceptance of the Defendant's offer in September 2011. They did not inform the Defendant that they were not able to settle for any of the reasons now relied upon. They did not, for example, say that they wished to await the outcome of the neurorehabilitation, nor that the change of circumstances in the Claimant's home life meant that they had to wait to reassess the value of the care claim. They did not indicate that there were difficulties with the identity of the Deputy and possible approval with the Court of Protection. If they had been frank about these difficulties they could have asked for an extension of time for acceptance of the Part 36 offer. They could have suggested that the Defendant should not incur further costs in preparing for trial and even apply for a stay of the proceedings.

26. The Claimant's representatives did not go down this route. Instead, they simply held out for a higher offer from the Defendant, as they were entitled to do. They did not disclose either the strengths or the weaknesses of their hand, they did not really have meaningful negotiations. They hoped that they would succeed in persuading the Defendant to increase his offer. At the eleventh hour they concluded that that was not going to happen and therefore just before the trial on quantum which was listed for the 10th October, they made another Part 36 offer. When that was not accepted they accepted the original Part 36 offer. Of course by accepting the offer so close to trial, the costs incurred by the Defendant, and indeed by the Claimant, were bound to have escalated greatly.

27. It is suggested that the fact that the Claimant had recently struck up a new relationship in September 2011, was a critical factor in deciding that the Part 36 offer should be accepted. I struggle to accept this. It is most unlikely, in my view, that a court would accept that such a new relationship, particularly with someone as vulnerable as the Claimant, was a firm basis on which to mount an assumption that commercial care would not be required. I do not accept that it so altered the landscape of the Claimant's case as to justify a complete change of stance. The Claimant's representatives were not candid about this factor with the Defendant and it only

became apparent during the hearing today, although it was referred to obliquely in the skeleton argument.

28. Considering the matters that CPR 36.14(4) invites the court to take into account, which I referred to at the beginning of my judgment, in this case the terms of the Defendant's offer were made clear by 3rd August 2010. The offer was made at an appropriate stage of the proceedings; proceedings had been served; medical and care evidence had been exchanged; and the offer was made well in advance of the trial. I find that at the time the offer was made, the parties had sufficient evidence to value the claim and this is not a case where criticisms can be made of the Defendant's conduct. For all these reasons, I consider that the usual order should be made, pursuant to CPR 36.10(5).

End of judgment

(Discussions follow on the wording of the order)
