Neutral Citation Number [2017] EWCA Civ 2363

IN THE COURT OF APPEAL
CIVIL DIVISION

Case No: A2/2015/3092

Courtroom No. 63
Room E311
The Royal Courts of Justice
Strand
London
WC2A 2LL

12.17pm – 1.10pm
Thursday, 13th July 2017

Before:
THE RIGHT HONOURABLE LORD JUSTICE GROSS
THE HONOURABLE MRS JUSTICE ASPLIN

B E T W E E N:

BRIGGS

and

CEF HOLDINGS LIMITED

MR K LATHAM (instructed by Atherton Godfrey Solicitors) appeared on behalf of the Claimant
MR M JONES (instructed by Plexus Law) appeared on behalf of the Defendant

JUDGMENT
(Approved)

This Transcript is Crown Copyright. It may not be reproduced in whole or in part, other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

LORD JUSTICE GROSS:

1. This is an appeal against the order of District Judge Bellamy made on 1 September 2015 allowing the then claimant and now respondent's application for an order that it was 'unjust' for the claimant to be ordered to pay the defendant's costs following the claimant's late acceptance of the defendant's Part 36 offer.
2. The claimant claimed damages for personal injuries arising out of an accident at work on 27 January 2010. On 2 June 2015, the claimant accepted the defendant's Part 36 offer dated 18 September 2012 to settle the whole of the claimant's claim in the sum of £50,000.
3. On 16 July 2015, the claimant applied for an order pursuant to the Civil Procedure Rules CPR 36.13(5) that the defendant pay the claimant's costs of the action to 30 October 2014 which, as will be apparent, included a period of more than two years from the expiry of the period for acceptance of the Part 36 offer. The district judge allowed the application and ordered the defendant to pay the claimant's costs of the application.
4. From District Judge Bellamy's order the defendant and now appellant appeals.
5. It is worth taking a moment or two over the chronology. As already indicated, the accident occurred on 27 January 2010. The claimant sustained a crushing injury to his right foot. On 30 January 2012, the claimant issued proceedings, and in the particulars of claim he relied on the medical reports of Mr Elson, a consultant orthopaedic surgeon, dating back to 2010. A defence was served and shortly afterwards the defendant, of course now appellant, made its first Part 36 offer to settle the whole of the claim in the gross sum of £30,000. The claimant's solicitors replied. The offer was not accepted or rejected. They were not in a position to say.
6. On 18 September 2012, the defendant made the second and critical Part 36 offer to settle the whole of the claim in the gross sum of £50,000 gross recoupable benefits. The 21-day period thus expired on 9 October 2012. On 17 October, the claimant's solicitors neither accepted nor rejected the offer by way of a letter in response.
7. Subsequently, examinations on the claimant commenced involving a Mr Getty, a consultant orthopaedic surgeon instructed by the defendant.
8. The Part 36 offer was thus made in September 2012. It was only at the end of May 2013 that the claimant applied for a stay. The defendant consented. In July 2013, a stay was ordered by District Judge Bellamy. The stay continued. The claimant underwent surgery. The final episode was on 3 October 2013. On 14 April 2014, the stay was lifted. Very shortly thereafter, in June 2014, the claimant increased his claim dramatically to a sum then advanced of £248,000-odd. Further examinations followed and it was, if I have understood the evidence correctly, at around this time that there was an increased focus by the defendant on surveillance evidence. It is fair to say that given that the offer was ultimately accepted, that evidence was never tested in court, so it is right to be cautious about what it shows.
9. In June 2014, the claimant applied, successfully in the event, to substitute a Mr Chell as a consultant orthopaedic surgeon in place of Mr Elson who, it appears, had retired. Various other examinations followed, including for completeness a psychological examination.
10. We come to August 2014, and it is then that the defendant disclosed the surveillance

evidence. Mr Chell in due course examined the claimant in August 2014 and produced a report dated 23 October 2014. It is fair to say that the report was in one respect rather less gloomy than Mr Elson's about the future prognosis, but nonetheless the report was highly supportive of the claim advanced by the claimant, and that was the state of play as of the end of October 2014.

11. Various other witness statements followed. The next matter of significance was the joint statement of the consultant orthopaedic surgeons dated 19 November 2014. I turn to that joint report.

12. Both experts, that is Mr Chell who had been instructed on behalf of the claimant and Mr Getty instructed on behalf of the defendant, agreed that the claimant sustained a crushing injury on the day in question. That injury was to the front of the foot and toes, not anywhere else in the foot. Both experts accepted that some pain and numbness at the front of the foot resulted from the incident. They noted the operations the claimant had undergone. They commented on the claimant continuing to smoke and that, in their view, that was responsible for the failure of the fusion to unite - a part of the surgical procedure designed to heal the injured toe. Importantly, both experts, having discussed the injuries and symptomatology, were of the opinion that a neuroma in the right foot did not relate to this incident, noting the claimant's gait as seen on the surveillance evidence. Both experts (on the balance of probabilities) did not relate the claimant's left knee symptoms to the accident in question. Both experts, and here Mr Chell was commenting on the contents of a surveillance review prepared by Mr Getty, did not identify a gait abnormality when he was seen walking over two hours of surveillance. Both experts noted that he seemed able to squat. 'We both accept that the appearance is not explicable on a good day/bad day explanation nor on the fact he had taken so much medication this would ease symptoms'. Both experts believe on current evidence that he would work to normal retirement age on the balance of probabilities. Finally, both experts said in terms that there were no areas of disagreement between them.

13. It is fair to note that Mr Chell indicated, for whatever reason, he had not seen the actual surveillance *per se* but he had noted Mr Getty's extensive report. I mention that only because it was raised in argument but, as it seems to me, that is neither here nor there for present purposes, whatever the position may be as between the claimant, his solicitors and Mr Chell.

14. Reverting to the chronology, I remind myself that the joint statement was produced in November 2014. District Judge Bellamy listed the case with a trial window of 20 April 2015 to 8 May 2015. In February 2015, the claimant applied to vacate the trial window and for various other orders. Finally, on 2 June 2015, the claimant accepted the Part 36 offer dating back to September 2012 and later on in 2015 the claimant applied to the court and was successful in obtaining an order that the defendant pay his costs down to 30 October 2014, essentially a date fixed by reference to Mr Chell's report.

15. District Judge Bellamy gave, as is to be expected, a short *ex tempore* judgment. That was on 1 September 2015. The judge began by saying that the single issue in the case was, 'for the court to take a view as to when the claimant could reasonably have been advised or taken a view on the offer that was made'. The judge went on to say that in considering

whether it would be unjust to make the usual order flowing from a Part 36 offer the court must take into account all the circumstances of the case, including the terms of any Part 36 offer and the stage of the proceedings, the information available to the parties at the time when the offer was made, the conduct of the parties and whether it was a genuine attempt to settle.

16. There is a slightly puzzling reference, with respect, at [8] of the judgment to the fact that surgery had proved unavailing, in that it is not entirely clear from the judgment why that should have led to the offer becoming more attractive rather than less attractive.

17. The judge, at [10] indicated that he should only consider the claimant's position in terms of injustice, not as the defendant sought to contend then, and somewhat faintly here, that he should have regard to those funding the claimant. For my part, I entirely agree with the judge on that point. It is irrelevant for these purposes that the claimant was litigating on the basis of a CFA and had taken out an ATE premium.

18. At [13] the judge, having noted that the surveillance evidence had never been tested in court, remarked that the sole question was whether the facts and circumstances of the case rendered it unjust for the usual order to take place. In other words, as the judge put it, the claimant has a liability for the defendant's costs from 21 days after 19 September 2012. The judge answered his own question, 'Well, in my view, it clearly would. The injury had not resolved. This injury could have gone, I suppose, either way'. He then considered the difficulties facing a solicitor advising the claimant as of the time the offer was made. Having looked at Part 36.17(5), he accepted the claimant's argument that 30 October 2014 was the date following which the usual order could take effect. It is, as I have said, from that judgment that the defendant appeals.

19. The legal framework starts with the provisions of the CPR. Paragraph 36.13(1) reads as follows:

> 'Subject to paragraphs (2) and (4) and to Rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror'.

Paragraph 36.13(4) provides as follows: 'Where…(b) a Part 36 offer which relates to the whole of the claim is accepted after expiry of the relevant period…the liability for costs must be determined by the court unless the parties have agreed the costs'. Paragraph 36.13(5) then provides as follows:

> 'Where paragraph (4)(b) applies but the parties cannot agree the liability for costs, the court must, unless it considers it unjust to do so, order that—
>
> (a) the claimant be awarded costs up to the date on which the relevant period expired; and
>
> (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance'.

That paragraph is then supported by 36.13(6) which provides that: 'In considering whether it would be unjust to make the orders specified in paragraph (5), the court must take into account all the circumstances of the case including the matters listed in Rule 36.17(5)'. Turning to Rule 36.17(5), it is in these terms:

> 'In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—
>
> (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;
>
> (d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and
>
> (e) whether the offer was a genuine attempt to settle the proceedings'.

20. In *Civil Procedure Volume 1* there is a very helpful general note at 36.17.5. It reads as follows:

> 'Where an effective Part 36 offer has been made, the court must make the orders referred to in Rule 36.17(3)..."unless it considers it unjust to do so". In considering whether it would be unjust to make the orders, Rule 36.17(5) requires the court to take into account all the circumstances of the case, including the particular matters listed in that sub-rule. The party at risk is 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.
>
> 'The question is not whether the offeree had reasonable grounds for not accepting the offer as if there was some unfettered discretion as to costs but to consider whether the usual order would be unjust (*Matthews v Metal Improvements Co Inc* [2007] EWCA Civ 215, [2007] CP Rep 27 CA). In *Downing v Peterborough & Stamford Hospitals NHS Foundation Trust* [2014] EWHC 4216 (QB), [2015] 2 Costs LO 203), Sir David Eady observed at paragraph 61:
>
> > "It is elementary that a judge who is asked to depart from the norm on the ground that it would be 'unjust' not to do so should not be tempted to make an exception merely because he or she thinks the regime itself harsh or unjust. There must be something about the particular circumstances of the case which takes it out of the norm".

> '…… In *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch)...Briggs J summarised the applicable principles at paragraph 13, adding:
>
> > "The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined'".

21. It is only necessary to make very brief reference to two authorities. The first is *Matthews v Metal Improvements* (*supra).* In that case, the statement of principle emerges from the judgment of Stanley Burnton J, as he then was, at [33] and [34]. At [33], Stanley Burnton J highlighted the litigation risks which arise in many cases. Towards the end of that paragraph, the learned judge said, 'In other words, the function of a Part 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'. At [34], Stanley Burnton J went on to say this:

> 'In my judgment, the Deputy District Judge did not identify any fact that rendered it unjust to make the usual order. There was nothing to justify depriving the Defendant of the protection against costs conferred by their Part 36 payment. Furthermore, she wrongly identified the question whether it was unjust to make the usual order with the question whether the Claimant's advisors had acted reasonably. It follows that she made her costs order on an incorrect basis and this Court is free to substitute its own decision'.

It is right to say that at [37] Stanley Burnton J observed, 'The result might have been different if the Claimant's solicitors had requested' – on the facts of that case a stay – 'and the Defendant's solicitors had refused…until the results of the biopsy were known'.

22. We were also referred to *SG v Hewitt* [2012] EWCA Civ 1053; [2013] 1 All ER 1118. That case concerned brain damage to a child. It was clearly very difficult to form any sort of prognosis as to the outcome. It was held to be unjust for the usual order to follow. For my part, much of the judgment is concerned with the application of the well-established principles relating to Part 36 to the particular facts of that case, even though it is fair to note that the court perhaps did not discount the reasonableness of the conduct of the parties' advisers to entirely to same extent as done by Stanley Burnton J. What is, with respect, helpful is the statement of the test which we need to apply. That appears from [50] of Black LJ's judgment:

> 'Both parties were in agreement that the approach of this court to an appeal such as this was encapsulated in *Summit Property Ltd v Pitmans (a firm)* [2001] EWCA Civ 2020. It is not a question of whether we would have made the order which the judge made. He had a wide discretion and his decision should not be interfered with unless his

> exercise of discretion was flawed in that he erred in principle by taking into account the wrong matters or reached a conclusion which was so plainly wrong that it could be described as perverse'.

23. I also keep well in mind that this is a costs appeal. Though the discretion as seen from the note in *Civil Procedure* in respect of Part 36 offers is more circumscribed than it is generally in respect of costs, nonetheless, as demonstrated by the test articulated in *SG v Hewitt*, there is a discretion and there is a heavy burden on an appellant in establishing that the judge's order fell outside the proper ambit available to him.
24. Against that background, I turn to the grounds of appeal. These were as follows. One, the district judge wrongly concluded that such uncertainty as to the claimant's prognosis as existed until 30 October 2014 meant that it was 'unjust' within the meaning of CPR 36.13(6)/36.17(5) for the presumption to apply that the claimant should pay the defendant's costs between 10 October 2012 and 30 October 2014.
25. Two, the district judge wrongly identified the claimant's solicitors' ability to advise on the merits on the Part 36 offer at the time it was made as determinative of the question of whether it was unjust to apply the presumption in Rule 36.13(5).
26. Three, the judge wrongly concluded that the claimant's solicitors could not advise on the merits of the defendant's Part 36 offer dated 18 September 2012 until a final medical report was obtained.
27. Four, the district judge's approach to the question of whether it was unjust within the meaning of CPR 36.13(6)/36.17(5) for the presumption to apply was based on a misunderstanding of the function of a Part 36 offer which is to place the claimant at risk as to costs if, as a result of the contingencies of litigation, he fails to beat the Part 36 offer.
28. Five, the district judge wrongly concluded that the existence of an after-the-event, ATE, insurance policy taken out by the claimant at the outset of the litigation should be excluded from a consideration of all the circumstances of the case within the meaning of CPR 36. As already indicated, that last point, with respect, was a bad one and, for my part, the Judge was entirely right to treat the claimant's insurance position as irrelevant.
29. Developing those submissions today, Mr Jones for the defendant focused on the bigger picture. Insurers frequently encounter substantial claims. Here the claim had, in fact, been increased to nearly £250,000 following the stay to which I have already referred. Later a much smaller figure was accepted. The only effective remedy against such behaviour was for the court to apply the usual operation of Part 36. It was meant to put the risk of costs onto the claimant. Mr Jones focused on the factual history, the increase in the claim, the arrival of the report of Mr Chell in October 2014, the fact that the litigation continued well beyond that and, indeed, well beyond the joint statement. His essential submission crystallised into this proposition: that the claimant's case had really been badly damaged by the joint statement when Mr Chell rather gave way; it was that feature which ultimately prompted or necessitated the acceptance of the offer; there was nothing unjust in rendering the claimant liable for costs dating back to October 2012.
30. In that regard, Mr Jones in his skeleton argument dealt carefully with the factors and circumstances set out in CPR 36.17(5). His submissions in this regard proceeded as

follows: he highlighted that the purpose of Part 36 was to enable a party to protect its position on costs. The offer had been made two years and eight months after the accident and eight months after proceedings had been issued. At the time the offer was made, the claimant had greater information available to him than the defendant. As the case progressed, the only additional information available to the defendant was surveillance evidence – which commenced in March 2013 and was disclosed in August 2014 - but the claimant, of course, was aware of his true condition throughout. He also had access to his own medical records and imaging. The offer was, as indeed was common ground, a genuine attempt to settle the proceedings. By the time the claimant accepted the Part 36 offer, it was almost five and a half years after the accident and two and a half years after the expiry of the period for acceptance. Mr Jones emphasised that the reason the offer was accepted was the substantial ground that had been given in the joint statements. The state of the evidence prior to the joint statements was immaterial to the claimant's decision not to accept the Part 36 offer. Finally, Mr Jones said this:

> 'Insofar as there was material uncertainty as to the outcome of the claimant's surgery, that uncertainty existed for both parties and was a contingency in the litigation against which the defendant properly protected itself against by the making of the Part 36 offer'.

31. As will be seen, the rival contentions at the start of the hearing before us were October 2012 on the defendant's case and October 2014 on the claimant's case. The court invited submissions as to the impact of the stay, running, as will be recollected, from about July 2013 to April 2014. Mr Jones submitted that the stay should not affect the outcome here. Firstly, the claimant had waited some time before seeking it. He waited from October 2012 to July 2013. Secondly, it was immaterial in the sense that it was not causative. Thirdly, the stay needed to be looked at in its overall context. When the stay came to an end, the claim was tripled and then maintained until the change in the medical evidence. Moreover, the period of the stay was, in Mr Jones's wording, 'bookended by exaggeration' on the part of the claimant. In this regard, Mr Jones in particular drew our attention to a still photograph at page 487 of the bundle which, at first blush at least, suggests that the claimant did not have the difficulty suggested in squatting or in mobility as demonstrated by the positions he adopted in washing his car shown in those stills. Mr Jones contrasted those photographs with a nearly contemporaneous summary of what was being said to Mr Getty, the defendant's orthopaedic surgeon.
32. Mr Jones invited us to set aside the district judge's judgment, to apply the normal order and for the claimant to pay the defendant's costs from 9 October 2012.
33. For his part, Mr Latham reminded us that we should not interfere simply because we might take a different view ourselves. In effect, his submission was that we should not intervene or displace the judgment of an experienced district judge unless persuaded that he was clearly wrong in the sense set out in the extract from *SG v Hewitt* which I have already recorded.
34. Mr Latham's submissions involved these propositions: in 2011, the claimant had the benefit of the report from Mr Elson, his then consultant orthopaedic surgeon. That was distinctly

gloomy. When the offer was made in 2012, his medical position remained uncertain. Subsequently, he underwent three bouts of surgery in an effort to cure the problem. The final surgery took place at around the end of the stay period. It had failed to produce improvement. That prompted the increase in the claim on a worst-case basis. It was only, in Mr Latham's submission, when Mr Chell's report was available in October 2014 that a clearer view began to emerge in the sense that Mr Chell did not adopt the gloomiest prognosis which had found favour with Mr Elson. However, that report remained very promising for the claimant, a position which altered significantly after the joint statement. Mr Latham accepted that for any period after the production of the Chell report in October 2014 he could not seek his costs, but he submitted that until the Chell report became available it was unjust for the claimant to bear the defendant's costs. For that reason, the claimant drew the line at October 2014 other than at any later date. If he was wrong about that, he submitted that the relevant date was the end of the stay period. That is approximately April 2014. In seeking the stay, the claimant's solicitors had done that which was encouraged in both the *Matthews* and the *SG* cases. That was explicable in terms of the uncertainties of prognosis and the surgery which the claimant was undergoing. Therefore, if wrong on his primary case, the court should at least not set the date any earlier than April 2014.

35. I should say at once that the court was most grateful to both Mr Jones and Mr Latham for their very helpful and full submissions.

36. In my judgment, it is very important not to undermine the salutary purpose of Part 36 offers. It is important too that in considering often attractively advanced submissions as to uncertainty the court should not be drawn into microscopic examination of the litigation details. It is true that every case in this area is fact-specific but the important point is that there is a general rule which emerges from Part 36, namely, that if the offer is not accepted within time then the claimant bears the costs of the defendant until such time as the offer is accepted. If, of course, the offeree can show injustice, then a different situation will prevail - but it is up to the offeree to show injustice, not simply that it may have been difficult to form a view as to the outcome of the litigation. The whole point of the Part 36 offer is to shift the incidence of the risk as to costs onto the offeree. As observed in the note in *Civil Procedure* (set out above), it is important not to undermine that salutary purpose. Nothing in these observations is in any way at odds with *SG v Hewitt*. For my part, with respect, *SG v Hewitt* was a very clear case on the other side of the factual line. It was a very extreme case concerning brain damage to a small child. That is a very different situation from that prevailing here where, as one of the contingencies of litigation, it was perhaps difficult to work out how it might go. As Stanley Burnton J observed in the *Matthews* case, that is not infrequently the case and it is to guard against that risk that a Part 36 offer is made.

37. For my part, I would not go so far as to find that the still photograph at page 497 of the bundle necessarily shows exaggeration. One would need to be cautious before reaching that conclusion given that it has never been tested and still photographs can present a partial picture.

38. Nonetheless, I find the progress of the litigation in this case very troubling. It is sufficient,

for my part, to conclude that I can see nothing here which is distinguishable from the usual litigation risk. On the facts here, quite plainly the decision did not await Mr Chell's report. That came in October 2014. The claimant carried on. Notwithstanding the joint report shortly thereafter which, in my judgment, holed the claimant's case below the waterline, the claimant continued, all the way through to June 2015. The reality here was that it was the joint report which undermined the claimant's position. It was not a problem of awaiting the guidance in Mr Chell's October 2014 report. Until then, there were uncertainties in litigation and the usual contingencies of litigation risks. Struggle though I have, I have been unable to detect anything which would render it unjust for the usual order to operate.

39. I have considered too the *via media* of the stay. At first blush, I confess to being somewhat attracted to it, and I might have been persuaded by it had the suggestion of the stay followed promptly on the defendant's Part 36 offer in September 2012, but it did not. It followed a good deal of time later. Even without a finding that the photograph demonstrates exaggeration, nonetheless there is some force in Mr Jones's submission about the ever-increasing size of the claim which accompanied certainly the end of the stay period. I am not therefore persuaded that in this case, albeit it might in many others, a stay justifies displacing the usual rule.

40. In the circumstances, though I would always hesitate long and hard before interfering in a costs appeal, with great respect, the decision of the judge cannot stand. I understand the sympathy which perhaps informed his approach but, with great respect, the decision was wrong in principle in failing to give effect to the purpose underlying Part 36 offers. If I had to express it in terms of the test in *SG v Hewitt* at [50], I would be driven to conclude that the conclusion was plainly wrong within the meaning of that paragraph. I reach that conclusion with respect for the judge, but ultimately on the facts before this court that is the conclusion to which I am driven. There is, in short, nothing unjust which has been identified by the judge to warrant departing from the usual order.

41. In the circumstances, I would allow the appeal.

MRS JUSTICE ASPLIN: I agree with the judgment of Gross LJ for the reasons that he has given, and I have nothing further to add.

End of Judgment

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com