Neutral Citation Number: [2020] EWHC 656 (QB)

Case No: HQ17P02006

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/03/2020

Before:

MR JUSTICE CHAMBERLAIN

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Between:

BXB

Claimant

- and –

(1) WATCH TOWER AND BIBLE TRACT SOCIETY OF PENNSYLVANNIA

(2) TRUSTEES OF THE BARRY CONGREATION OF JEHOVA'S WITNESSES

Defendants

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James Counsell QC (instructed by **Bolt Burdon Kemp**) for the **Claimant**
Catherine Foster (instructed by **Legal Department Watch Tower**) for the **First and Second Defendants**

Hearing dates: 25 - 29 November & 10 December 2019

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Approved JudgmentNo. 2

Mr Justice Chamberlain :

1 The Claimant sought damages for personal injuries arising from a rape which took place in 1990. The rapist was Mark Sewell. At the time he was an elder in the Barry Congregation of Jehovah's Witnesses. On 30 January 2020, I gave judgment for the Claimant against the Second Defendants, the Trustees of that Congregation, in a sum to be assessed. I extended time to allow the claim to be brought, upheld the vicarious liability claim, held that the Claimant's psychiatric injuries were attributable to the rape and awarded the Claimant £62,000 in general damages. I rejected the principal claim for special damages – which was based on the proposition that, but for rape, the Claimant would have secured better paid employment as a teacher. Other parts of the claim for special damages were to be the subject of written submissions. In the event, the parties have been able to agree the quantum of those other claims, together with simple interest on general and special damages, in the sum of £7,500. This means that there will be judgment in the total sum of £69,500.

2 There are consequently only two issues for determination. Both concern costs. The issues are narrow. First, because the Claimant has 'beaten' her first Part 36 offer (made on 9 July 2019), the Second Defendants accept that they must pay the Claimant's costs on the indemnity basis from 30 July 2019, 21 days after that offer was made. The Claimant, however, says that the Second Defendants should pay *all* her costs on the indemnity basis, in view of the Defendants' unreasonable conduct, in particular their refusal to engage in alternative dispute resolution ('ADR'). Second, there is a dispute about the enhanced rate of interest applicable to damages and costs from 30 July 2019 pursuant to CPR r. 36.17(4).

3 On the first issue, Mr Counsell QC for the Claimant relies on the direction made by Deputy Master Brown in the standard form on 20 April 2018:

> 'At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in such means proposed by another must serve a witness statement giving reasons within 21 days of that proposal; such witness statement must not be shown to the trial judge until questions of costs arise.'

Despite that, Mr Counsell submits, the Defendants did nothing even to try to explore settlement other than to suggest (in a 'without prejudice save as to costs' conversation on 17 January 2019) a 'global offer' to settle the Claimant's case and those of CXC and DXD, who had also been sexually assaulted by Mark Sewell and were represented by the same solicitors. The Claimant's solicitors made clear in that conversation, and reiterated in an email on 22 January 2019, that a global offer would give rise to a conflict of interest for them and invited the Defendants to make separate offers. In response, on 6 February 2019, the Defendants offered a joint settlement meeting 'with your clients CXC and DXD only'. The Claimant's solicitors asked whether the Defendants would be amenable to a similar meeting in BXB's case. The response, on 25 February 2019, was that 'we have no authority to negotiate settlement of BXB's claim at the JSM', but said that if there were proposals in that case they would be considered. There was then a round table meeting about CXC's and DXD's cases in March 2019, but no further discussion of the Claimant's until she made her Part 36 offer to accept £62,750 on 9 July 2019. The Defendants rejected that offer without giving a reason on 31 July 2019. The Claimants

made a further Part 36 offer on 31 October 2019, this time to accept £25,000. This was also rejected – again without giving a reason – on 7 November 2019.

4 Mr Counsell notes that the Defendants breached the obligation imposed on them by Deputy Master Brown's order. They made no real attempt to settle this claim. They did not even offer to settle quantum subject to liability. Had they done so, the Claimant would have been spared most of the intrusive questioning she in fact had to endure.

5 Ms Foster for the Second Defendant notes that an award of indemnity costs is appropriate only where the conduct of the paying party is 'unreasonable to a high degree': *Dixon v Radley House Partnership* [2016] EWHC 3485 (QB). In this case there was nothing unreasonable about the Defendants' conduct. The Claimant's case was very different from CXC's and DXD's. They were children at the time of the assaults, so different issues arose both in relation to limitation and in relation to liability. Given that the Claimant was an adult at the time of her rape, and a friend of the perpetrator, there was a proper factual and legal basis for the Defendants to defend the Claimant's claim; this was made clear at the joint settlement meeting held in relation to the other two cases. This is 'the first known judgment whereby a religious organisation has been held liable for the rape of an adult by an unpaid, volunteer minister'. The Second Defendant is a registered charity and it would not have been appropriate for it to concede liability in circumstances not previously identified by the courts as giving rise to liability. An award of indemnity costs would deprive the Second Defendant of the opportunity to challenge the 'significant' costs claimed by the Claimant, in circumstances where 'it appears that the Claimant has made an inappropriate apportionment of incurred costs in order to shift the burden to the costs bill in this action rather than to the bills relating to CXC and DXD'. Finally, Ms Foster draws attention to the 'grossly inflated' sums claimed (£541,441.84 in the original schedule of loss; £349,133.69 in the updated schedule of loss served before trial on 8 November 2019) by comparison with the damages award actually made.

6 I start by setting out the applicable principles:

(a) Whether to order that costs be assessed on the standard or the indemnity basis is for the discretion of the judge, having regard to the conduct of the parties and the circumstances of the case. But an award of indemnity costs requires something that 'takes the case outside the norm': *Excalibur Ventures LLC v Texas Keystone Inc. (No. 2)* [2017] 1 WLR 2221, [21].

(b) An unreasonable refusal to engage in ADR may justify an award of indemnity costs to a claimant, even where the claimant recovers very substantially less than originally claimed: *Garritt-Critchley v Ronnan* [2014] EWHC 1774 (HHJ Waksman QC). One reason for this is that '[p]arties don't know whether in truth they are too far apart unless they sit down and explore settlement': ibid, [22].

(c) Silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds: *PGF II SA v OMFS Company 1 Ltd* [2013] EWCA Civ 1288, [2014] 1 WLR 1386, [34] (Briggs LJ). This is in part because 'a failure to provide reasons for a refusal is destructive of the real objective of the encouragement to parties to consider and discuss ADR, in short to engage with the ADR process': ibid, [37].

(d) However, a finding that a party has unreasonably refused even to engage in discussion about ADR produces no automatic results in terms of a cost penalty. It is simply an aspect of the parties' conduct which must be addressed in a wider balancing exercise: ibid: [51]; *Gore v Naheed* [2017] EWCA Civ 369, [2017] 3 Costs LR 509, [49] (Patten LJ).

7 In this case, there was a specific direction, made by the Deputy Master on 30 April 2018 in the terms set out in [3] above. That direction was made in the exercise of the court's duty under CPR r. 1.4(1) to further the overriding objective by 'actively managing cases', which by r. 1.4(2)(e) includes 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such a procedure'. 'Alternative dispute resolution procedure' is defined in the glossary of the CPR as the 'collective description of methods of resolving disputes otherwise than through the normal trial process'. A joint settlement meeting is, on this definition, a form of ADR.

8 The direction in this case imposed two obligations on the parties: first, an obligation to consider ADR 'at all stages'; second, when refusing to engage in a form of ADR suggested by the other party, to serve a witness statement explaining the reasons within 21 days of the proposal. In this case, neither party appears to have suggested ADR for the best part of a year after the direction was made. The Defendants' initial suggestion of a global settlement was rejected for the (good) reason that it would put the Claimant's solicitors in an impossible position. After that, the Claimant suggested a joint settlement meeting, but the Defendants refused on 25 February 2019. At that stage, they were 'not engaging in [a form of ADR] proposed by another' and so should, under the terms of the direction, have served a witness statement explaining why. They did not do so. Indeed, there is still no witness statement explaining why they chose not to have a joint settlement meeting. This is, therefore, a case not just of silence in the face of an invitation to participate in ADR, but of breach of an obligation imposed by court order to explain a refusal so to participate. That conduct is, in my judgment, unreasonable.

9 In a case such as this where the Claimant has succeeded at trial, the main costs sanction available is an order that costs be paid on the indemnity, rather than the standard basis. I turn then to consider whether, in all the circumstances of the case, such an order is appropriate. In doing so, I make clear that I have taken into account the explanations proffered by Ms Foster in her submissions, despite the absence of any witness statement of the kind envisaged by the Deputy Master's direction.

10 First, I accept that this case was very different from CXC's and DXD's. Because the Claimant was an adult at the time when she was raped, the Defendants could reasonably conclude that they had stronger arguments in her case, both as respects limitation and as respects vicarious liability. This did not, however, necessarily mean that there was nothing to discuss. One important purpose of a joint settlement meeting is to convey a defendant's view about the strength of its case. In any event, the possibility of agreeing quantum subject to liability provides a good reason to engage in discussions even in a case where the defendant is confident about its case on liability. In this case, that would have shortened the trial and avoided some of the intrusive questioning which in the event was necessary.

11 Second, it is fair to say that the sums sought by the Claimant were considerably in excess of those eventually recovered. That is because I rejected the main part of the Claimant's

special damages claim, which was based on the proposition that, but for the rape, the Claimant would have secured more remunerative employment as a teacher. But that does not excuse the failure to engage *at all* with the proposal of a joint settlement meeting. As the first Part 36 offer shows, the Claimant was willing to settle the case for less than she was ultimately awarded. There is every reason to think that, had the Defendants engaged with the proposal at an earlier stage, that willingness would have become known.

12 Third, an award of indemnity costs would not deprive the Defendants of the opportunity to have determined their contention that the costs have been inappropriately apportioned as between the Claimant, CXC and DXD. If made out, that would amount to a contention that costs had been unreasonably incurred or were unreasonable in amount. Such a contention can be advanced on a detailed assessment even where the assessment takes place on the indemnity basis. The only difference is that the paying party bears the burden of proving the alleged unreasonableness.

13 For these reasons, and in all the circumstances, an order that the Claimant's costs be assessed on the indemnity basis is, in my judgment, appropriate. But it should not apply to the whole of the Claimant's costs – only those incurred after 25 February 2019, the date of the Defendants' unreasoned refusal to engage with the invitation to attend a joint settlement meeting.

14 The second matter in dispute relates to the enhanced interest rate applicable to damages and costs from 30 July 2019 pursuant to CPR r. 36.17(4), which (by r. 36.17(1)(b)) applies where 'judgment against the defendant is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer. Rule 36.17(4) provides (subject to r. 36.17(7), which is inapplicable here) that the court must, unless it considers it unjust to do so, order that the claimant is entitled to interest on damages and on costs 'at a rate not exceeding 10% above base rate'. This enhanced interest rate fulfils two functions: first the private function of compensating the claimant for the cost of money but also for the inconvenience, anxiety and distress involved in litigating (*Petrograde v Texaco Ltd* [2002] 1 WLR 947 (Note), [63]-[64] (Lord Woolf MR)); second, the public function of encouraging settlement so as to make better use of the court's resources in the interests of other litigants (*Petrom v Glencore International AG* [2017] 1 WLR 3465, [39] (Sir Geoffrey Vos C)).

15 However, the wording of r. 36.17(4) makes plain that an enhanced rate of 10% above base rate will not always be appropriate. Nor do I accept the submission made on behalf of the Claimant that the wording of r. 36.17(4) ('a rate not exceeding 10% above base rate') implies that it will be the default position, nor that it implies any different approach to the exercise of discretion than would be implied by 'up to 10%'. The applicable rate is a matter for the discretion of the court, taking into account all the circumstances of the case and the effect of the other consequences that flow from Part 36 of the CPR: *Petrom v Glencore International*, [41].

16 In this case, the agreed order already provides for an 'additional amount' of £6,950 pursuant to CPR r. 36.17(4)(d). As to the Defendants' conduct, I have already drawn attention to their unreasoned refusal, from 25 February 2019, to engage in ADR. But aside from that, there is no aspect of the Defendants' conduct which can be said to have been particularly unreasonable. The Defendants' case was certainly not so weak that the decision to litigate it, as distinct from the failure to explain that decision, was itself unreasonable. There was no other reprehensible conduct of the kind criticised in the

Petrom case. In the circumstances, and in the exercise of my discretion, I determine the enhanced rate of interest as 4% above base rate.

17 Finally, the draft order submitted by the Claimant provided for the refusal of permission to appeal. I shall remove that from the final order. It would not be appropriate for the final order to record any decision on permission to appeal, whether positive or negative, because no application for permission to appeal was made by the Defendants to this Court.