Neutral Citation Number: [2020] EWHC 670 (QB)

Case No: QB-2018-005979

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/3/2020

Before :

MR JUSTICE GRIFFITHS

- -

Between :

DSN	**Claimant**
- and -	
BLACKPOOL FOOTBALL CLUB LIMITED	**Defendant**

- -
- -

James Counsell QC (instructed by **Bolt Burdon Kemp**) for the **Claimant**
Michael Kent QC and Nicholas Fewtrell (instructed by **Keoghs LLP**) for the **Defendant**

Hearing date: 20 March 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE GRIFFITHS

Mr Justice Griffiths :

1. Last week, I gave judgment for the Claimant in this case after a trial: *DSN v Blackpool Football Club Ltd* [2020] EWHC 595 (QB).

2. The parties have agreed an order, including damages of £19,746.37 inclusive of interest to the date of judgment on 13 March 2020, together with an additional amount of £1,974.64 pursuant to CPR 36.17(4)(d). Only three points have not been capable of agreement. These are:-

   i) Whether costs should be on the standard or indemnity basis.

   ii) The amount of an interim payment on account of costs.

   iii) Whether there should be permission to appeal.

3. This is my decision on those three outstanding points. I have received helpful written submissions from Counsel on both sides.

(1) Whether costs should be on the standard or indemnity basis

4. It is agreed that costs should follow the event, so that the Claimant gets his costs of the action from the Defendant. However, the Claimant seeks, and the Defendant resists, an order for costs on the indemnity basis.

5. The argument falls into two parts.

Indemnity costs claimed under CPR 36.17(4)(b)

6. Indemnity costs are sought, first, as a result of a CPR Part 36 offer made by the Claimant to the Defendant on 2 December 2019 which is agreed to have been effective. The offer was that the Claimant would accept £10,000 "in settlement of his whole claim". The Defendant did not accept the offer and I have awarded damages which exceed the amount of the Claimant's offer.

7. It is common ground that CPR 36.17(4) applies, so that, in these circumstances:-

> "…the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and

> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below…
>
> (5) 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."

8. The Defendant accepts that it is just for all the consequences specified to follow, except the award of indemnity costs. Therefore, the agreed order includes enhanced interest under CPR 36.17(4)(a) and (c) and an additional amount under CPR 36.17(4)(d).

9. The particular circumstances of the case to which I am directed by the non-exhaustive list in CPR 36.17(5) do not favour the Defendant in any respect, and the Defendant does not argue that they do.

10. The Defendant argues, however, the Claimant's costs budget was approved in March 2018 when the Claim Form said the total value of the claim would exceed £50,000 but would not exceed £100,000, and when the Claimant's schedule of loss included claims for past and future loss of earnings "TBA"; a heading which was dropped from the Claimant's revised schedule of loss dated 22 October 2019. The Defendant argues that an order for indemnity costs will preclude the costs judge from having regard to proportionality, and that it would be unjust to make such an order for that reason because the costs budget was based on an inflated valuation of the claim.

11. I am not persuaded by that argument. It is correct that an order for indemnity costs means that CPR44.3(2)(a) does not apply, with the result that the requirement when costs are assessed on the standard basis that costs should be "proportionate to the matters in issue" does not apply. But that does not make me think that it would be unjust to make the order for indemnity costs which I must otherwise make under CPR 36.17(4)(b). It is an inherent feature of indemnity costs that proportionality is not a factor on assessment, and indemnity costs are the usual order for costs when a Defendant fails to beat a Claimant's Part 36 offer. On no view will the Claimant

recover, even on an indemnity basis, more than the costs he has actually incurred, and, as the Court of Appeal said in *McPhilemy v The Times Newspapers Ltd (No.2)* [2001] EWCA Civ 933; [2002] 1 WLR 934; per Chadwick LJ at para 22

> "The purpose for which the power to order the payment of costs on an indemnity basis is conferred, as it seems to me, is to enable the court, in a case to which CPR 36.21 applies, to address the element of perceived unfairness which arises from the fact that an award of costs on the standard basis will, almost invariably, lead to the successful claimant recovering less than the costs which he has to pay to his solicitor."

12. See also *East West Corporation v DKBS 1912 and AKTS Svenborg* [2002] EWHC 253 (Comm) per Thomas J at para 14:-

> "The purpose of the award of an enhanced rate of interest or indemnity costs is to encourage parties to make offers of settlement in the ordinary sense of that word. It is to compensate the claimant who has made an offer that should have been accepted for the risk of continuing with the action and to bring home to the defendant the risks being run by not accepting it."

13. The removal of proportionality as a consideration is part of the incentive given for the Part 36 offer to be made and accepted, and I see no injustice in the Defendant in this case paying indemnity costs, having failed to beat the Part 36 offer.

14. It follows that the Defendant must pay the Claimant's costs on the indemnity basis from 24 December 2019 pursuant to CPR 36.17(4)(b).

15. It is not at all clear to me, in any event, that the costs budget was based on an inflated valuation of the claim, or that the costs budget was materially affected by the loss of earnings element of the claim.

Indemnity costs claimed as a result of failure to engage in Alternative Dispute Resolution

16. The Claimant also claims indemnity costs on a broader basis and for a longer period. He argues that an indemnity costs order should be made in respect of all his costs because of the Defendant's conduct and, in particular, its failure to engage in settlement discussions.

17. The relevant chronology is as follows.

18. The Claim Form was issued on 19 January 2018.

19. On 16 March 2018, the Claimant's solicitors made a Part 36 offer to settle the claim for £50,000. The Defendant did not respond to this offer at all.

20. After hearing from the Claimant's solicitor and Counsel for the Defendant on 30 October 2018, Master McCloud gave directions in the case. These included the following direction in paragraph 4:

> "**ALTERNATIVE DISPUTE RESOLUTION**
>
> At all stages the parties must consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation); any party not engaging in any 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."

21. On 26 February 2019, the Claimant's solicitors made another Part 36 offer, this time to settle the claim for £20,000. The Defendant did not respond to this offer either.

22. On 30 October 2019, which was after the exchange of witness statements, the Claimant's solicitors emailed the Defendant's solicitors and said:-

> "I am instructed to invite your client to enter into settlement negotiations in relation to this matter.
>
> Please acknowledge receipt of this offer and I await hearing from you with dates on which you are available in due course. If your client is not willing to enter into settlement negotiations, please provide their reasons in writing."

23. After conferring with their clients, the Defendant's solicitors replied on 6 November 2019 saying:

> "I attach my statement dated 6 November 2019 made pursuant to paragraph 4 of Master McCloud's order dated 30 October 2018. You will note that the Defendant does not intend to engage in settlement negotiations and remains confident in the strength of its defence."

24. The statement enclosed with that communication was from the solicitor and it said as follows:-

> "I make this statement pursuant to paragraph 4 of Master McCloud's order dated 30 October 2018, namely that any party not engaging in any means of Alternative Dispute Resolution (ADR) proposed by another party must, within 21 days of that proposal, serve a witness statement giving reasons for not engaging in ADR.
>
> Olivia Coffey, the solicitor acting on behalf of the claimant, emailed me on 30 October 2019 advising that she had been instructed by the Claimant to invite the Defendant to enter into settlement negotiations in respect of this claim. I attach a copy of this correspondence marked 'CRW1'.
>
> The parties have now completed all outstanding evidential directions prior to trial in this matter (save for service of the

> counter schedule of loss which is due on 26 November 2019). Having considered all of the available evidence, the defendant continues to believe that it has a strong defence to this claim and stands by the contents of its Defence dated 10 May 2018. In the circumstances I respectfully submit that no purpose would be served by any form of ADR."

25. On 2 December 2019, the Claimant made the Part 36 offer to settle the whole claim for £10,000 on the basis of which I have already made an indemnity costs order, which proved to be well below the level of damages awarded at the trial.

26. The Defendant's solicitor responded the next day, 3 December 2019, saying:-

> "I do not have instructions to accept the offer. As advised in my statement dated 6 November, my client continues to believe that it has a strong defence to this claim and stands by the contents of the Defence dated 10 May 2018.
>
> I now urge you to turn your attention to the trial bundle index which is due to be agreed by 23 December 2019…"

27. In summary, the Defendant in this case failed and refused to engage in any discussion whatsoever about the possibility of settlement. It did not respond to any of the three Part 36 offers (except to reject the final one). It was required by paragraph 4 of the Order of Master McCloud "to consider settling this litigation by any means of Alternative Dispute Resolution (including Mediation)". It was warned by the same Order that if it did not engage in any such means proposed by the Claimant it would have to give reasons, and it was also warned that the reasons it gave might in due course be shown to the trial judge when the question of costs arose.

28. The reasons given for refusing to engage in mediation were inadequate. They were, simply, and repeatedly, that the Defendant "continues to believe that it has a strong defence". No defence, however strong, by itself justifies a failure to engage in any kind of alternative dispute resolution. Experience has shown that disputes may often be resolved in a way satisfactory to all parties, including parties who find themselves able to resolve claims against them which they consider not to be well founded. Settlement allows solutions which are potentially limitless in their ingenuity and flexibility, and they do not necessarily require any admission of liability, or even a payment of money. Even if they do involve payment of money, the amount may compare favourably (if the settlement is timely) with the irrecoverable costs, in money terms alone, of an action that has been successfully fought. The costs of an action will not always be limited to financial costs, however. A trial is likely to require a significant expenditure of time, including management time, and may take a heavy toll on witnesses even for successful parties which a settlement could spare them. As to admission of liability, a settlement can include admissions or statements which fall short of accepting legal liability, which may still be of value to the party bringing a claim. In the present case, for example, I have already in my previous judgment commented (at [2020] EWHC 595 (QB) paras 188-189) on the opportunity missed by the Defendant at the very least to acknowledge and accept that the Claimant was sexually abused by Roper (it having no positive case to the contrary, and no evidence to support a case to the contrary). The passage in the Claimant's

witness statement which I quoted in paragraph 188 of my previous judgment shows that the Claimant was not primarily motivated by money (and the low figure of his final Part 36 offer confirmed that). He "expected the club to want to engage and to understand what had happened". The club could have engaged with him (having received his statement, which was dated as long ago as 28 May 2019) without prejudice to what it presented at trial as its strongest defences: namely, that the claim was outside the limitation period and that the club was not vicariously liable for Roper's sexual abuse of the Claimant, even if that abuse were to be admitted. It did not engage at all.

29. If the Defendant had been correct that it had "a strong defence", its responses to the Claimant's settlement overtures, and the statement made in compliance with paragraph 4 of the Order of Master McCloud would still, in my judgment, have fallen short of an acceptable level of engagement with the possibility of settlement or Alternative Dispute Resolution. As Sir Geoffrey Vos C said in *OMV Petrom SA v Glencore International AG* [2017] EWCA Civ 195 at para 39:

> "The parties are obliged to make reasonable efforts to settle, and to respond properly to Part 36 offers made by the other side. The regime of sanctions and rewards has been introduced to incentivise parties to behave reasonably, and if they do not, the court's powers can be expected to be used to their disadvantage. The parties are obliged to conduct litigation collaboratively and to engage constructively in a settlement process."

30. As it turned out, the Defendant did not have a strong defence. It lost the case. That alone would not justify an award of indemnity costs but the conduct I have set out, in my opinion, does. It is conduct which "takes the case out of the norm": *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnston (Costs)* [2002] EWCA Civ 879 per Lord Woolf at para 19. It is "outside the ordinary and reasonable conduct of proceedings": *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595 per Waller LJ at para 25, see also *Whaleys (Bradford) Limited v Bennett* [2017] EWCA Civ 2143 at paras 19-25. The response to paragraph 4 of Master McCloud's Order is particularly disappointing in this respect: cf *Dunnett v Railtrack plc* [2002] EWCA Civ 303 [2002] 1 WLR 2434 per Brooke LJ at para 15.

31. However, in my judgment this would not justify awarding the Claimant's costs on the indemnity basis for the whole of the proceedings. I consider that the fair and appropriate date from which indemnity costs should be awarded is 1 December 2018. That is one month after Master McCloud ordered the parties "at all stages" to "consider settling this litigation by any means of Alternative Dispute Resolution" (para 4 of the Order of 30 October 2018), and over 8 months after the Claimant's first Part 36 offer of 20 March 2018.

32. I will order the Defendant to pay the Claimant's costs on the standard basis until 30 November 2018 and on the indemnity basis from 1 December 2018.

(2) The amount of an interim payment on account of costs.

33. It is agreed that this is a case in which an interim payment on account of costs should be ordered. The Claimant's approved budgeted costs were £153,583 excluding VAT and I do not see any good reason to depart from that as a starting point for the costs covered by the budget: *MacInnes v Gross* [2014] 4 WLR 49 per Coulson J at paras 25-27. This would be the starting point even if costs had been awarded on the standard basis throughout: CPR 3.18. In addition, the costs budget was approved when there had already been incurred costs of approximately £48,000 excluding VAT and I am told that the total incurred costs are now £164,000. Bearing in mind that I have awarded costs on the indemnity basis, and discounting the figures to allow for arguments that may arise on a detailed assessment, I will order an interim payment of £200,000 on account of costs.

(3) Whether there should be permission to appeal.

34. The Defendant's written submissions suggest a variety of grounds of appeal, all of which appear to me, on examination, to be appeals against my findings of fact on the evidence and none of which seem to me to have a real prospect of success as required by CPR 52.6. I therefore refuse permission to appeal.