Claim No. QB-2020-003242

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Neutral Citation Number: [2023] EWHC 1036 (KB)

Before :

MASTER THORNETT

- -

Between :

(1) TLI
(2) HAA
(3) HEA
(4) KMF
(5) SIF

Claimants

-and-

CITY OF BRADFORD MDC

Defendant

Date: 04.05.23

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MR Gordon Exall (instructed by Ramsdens Solicitors LLP) for the **Claimant**
MR Philip Turton (instructed by Weightmans LLP) for the **Defendant**
Hearing date: 20 April 2023

JUDGMENT

1. This is a reserved judgment on the Claimants' Application to permit the Claimants (i) to appoint a Litigation Friend to act for them in their claim as issued as far back as September 2020 and served in April 2021; and (ii) for the court to validate the steps taken in the litigation on their behalf since. The Litigation Friend is, with her agreement, the Official solicitor.

2. Despite agreement by the Defendant to accept, subject to court approval, the Claimants' Part 36 offers in December 2021, the conclusion of the case has been subject to chronic error from issue through to the hearing date owing to their failure to regularise the proceedings by filing Certificates of Suitability and so amend the Claim Form to reflect representation by the Official Solicitor. It was only until August 2022, upon enquiry and prompting by the Defendant, that the Claimants' solicitors realised the procedural impasse that had been caused. This was despite having sought from the court approval in March 2022 for the proposed settlement, the preparation of the relevant documents for which ought to have, at least by then, revealed the error. Even the necessary, even if late, Application to remedy matters was unnecessarily complicated because the Claimants' solicitors issued, for no apparent reason, two identical Applications seeking the same relief: the first dated 16 November 2022 and the second dated 12 December 2022. When the court asked in correspondence for an explanation in January 2023 why this was, no response was offered and so each application was separately listed for hearing on 20 April 2023. I was informed during the hearing that the correspondence from the court had gone to an administrative department of the Claimants' firm who never forwarded it to the relevant fee earner(s).

3. As at the hearing, when both Claimants and Defendant were represented by counsel, it was accepted that no distinction between the Applications existed and so they were heard together with the obvious confirmation from the Claimant's counsel (but as had remained outstanding until the commencement of the hearing) that a single order could be made in respect of both Applications. Hence, now, as both can be referred to as "the Application".

4. The Witness Statement in support of the Application by the Claimants' solicitor, Ms Natalie Marrison, dated 12.12.22, seeks to portray difficulties at the time of issue as explaining away the omission to file the Certificates. Nothing is offered by way of explanation for the continued omission and delay from 16 September 2020, the date of issue. I find this emphasis upon the state of affairs pre-September 2020 something of a distraction in the broader scheme of things.

5. It is hardly surprising, then, that the Witness Statement in response from the Defendant's solicitor, Ms Helen Brown, dated 17 January 2023, emphasised in stringent terms the poor conduct of the claim to-date rather than just though to issue. Further, she referred to the significant costs that have been expended by the Defendant in dealing with the claim above and beyond that that ought to have been reasonable and proportionate. I read and considered the annexed copy party-party

correspondence to her statement and both follow and agree that criticism is entirely due of the conduct of the claim by those representing the Claimant.

6. In those circumstances, it is perhaps surprising that Ms Marrison's Witness Statement in reply dated 18 April 2023 still sought to focus upon delays and misunderstandings leading to, and just after, the point of issue rather than subsequently. For example, whether the Certificates should be served at the point of issue or service. Engaging nuanced questions these might be in principle, they hardly seem to matter when the omissions in question were only made good during the hearing on 20 April 2023.

7. To elaborate here, very much to their credit given the considerable demands upon their time and resources, representatives of the Official Solicitor also attended the hearing to assist. Once it had been established in the first thirty minutes or so of the hearing that there never had been signed and suitable Certificates but that these could be prepared and signed during the hearing, an approximately 40-minute adjournment was provided to the Claimant, following which signed Certificates were produced to the court. So, some 2 ½ years following issue.

8. Mr Exall on behalf of the Claimant reminds me of my discretion to permit such late filing and also, as is also necessary, CPR 21.3(4), the jurisdiction of the court to order that steps previous taken by the Claimants when without a Litigation Friend should retrospectively be deemed to have effect. He takes issue as to whether the Application is truly one from relief from sanction but conceded at the hearing that the need for cogent explanation for such discretion to be exercised followed very similar if not identical criteria to Applications for relief per *Denton*.

9. In that regard, he submitted that however poor the explanation for the omission there can be no suggestion that the Claimant's solicitors ever acted in bad faith, referring in support to the discussion in *Hinduja v Hinduja & Others* [2020] EWHC 1533 (Ch), as had in turn referred to *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889. Further, no prejudice has been caused to the Defendant. The error had had no material impact on the conduct of the action. He urged me to have regard to all the circumstances of the case and quoted extensively from the judgment in respect of this now very well established third stage test in *Denton*.

10. Mr Exall was less specific as to what all the circumstances of the case might encompass beyond his principal point that the Defendant was willing to settle and had been for some time to-date.

11. At least until the commencement of the hearing, the Defendant and its counsel, Mr Turton, had remained unclear as to the Claimant's position. Mr Turton's skeleton argument had been obliged to explore the procedural history and correspondence through to an eleventh hour suggestion by the Claimant's solicitors (but as not taken up before me) that the hearing should instead be adjourned.

12. The Defendant takes issue with the submission it has not suffered prejudice, pointing to it being a public authority that has been put to substantial expense and inconvenience by the manner in which the litigation has been conducted. For example, the purported common law claim relied upon at issue that the Claimants should have been put into care sooner and the Defendant should have obtained a Care Order at an earlier date. Following the decision in *GN v Poole* [2019] UKSC 25, this argument was "always self evidently hopeless", as Mr Turton describes, as at issue. However, it did not seek its withdrawal until July 2021. He describes the continuing litigation as low value, dwarfed by the procedural disproportionality as has now been caused. In direct contrast to the Claimant's position, he submits that there is indeed serious default without any proper explanation.

13. I follow and agree with the Defendant's observations to the above extent.

14. However, despite the poor history of events preceding the Application, for the following reasons I decline to accept the Defendant's submission that the Application should be refused and the claims, in consequence, be denied their intended conclusion.

    a. The plain underlying principle of Part 21 is that children and protected parties should see the overseeing protection and scrutiny of the court. I approach the Application with this responsibility as the primary focus rather than as a regulator of litigation conduct;
    b. In this context, there is no evidence before me that the steps taken in this litigation ought not to be retrospectively approved. The delay and errors procedurally, however marked, can be disassociated from the central subject matter and purpose of the litigation;
    c. Although I have yet to consider the merits of the proposed settlement, significantly the Defendant has never sought to withdraw its acceptance of the Claimant's offer, even after it became aware that it had been dealing with Claimants who were, in fact, formally unrepresented. To the contrary, the Defendant confirmed at the hearing that, if the Application is granted, it will continue to support the proposed approval. Its decision to settle low value claims of perhaps qualified merit seem to have been made on economic grounds in December 2021. It seems to me that nothing has since changed in this regard, only delay in seeking to conclude that same decision;
    d. The Claimants solicitors, through counsel, conceded during the hearing that they would pay personally the Defendant's costs on the Application thereby avoiding the indirect prejudice the Defendant, as a public body, would sustain even if achieving a costs order against the Claimants but as unenforceable owing to their QOCS protection. Whilst a willingness to pay wasted costs (using the term in its non-procedural sense) would rarely be a sufficient response from a defaulting party, because solvent parties could otherwise simply buy their way out of default, it does seem to me to be at least a factor to take into account once satisfied as to my decision expressed at sub-paragraph b above;

e. The Defendant's submissions about delay and disproportionality of the litigation instead sound in different and discrete ways. Delay and disproportionate conduct of the litigation through to acceptance of the Part 36 are matters the Defendant can still reserve for Detailed Assessment, if that becomes necessary. Given the history of this case, the Claimant's solicitors plainly have a responsibility to prepare with even greater scrutiny than usual the presentation of their work in any Bill of Costs. Delay and neglect as sound in costs following the date of acceptance are, to the contrary, aspects the Claimants' solicitors will respectively have to compensate the Defendant for and bear personally. Here I repeat my observation about it never being a sufficient and complete response for a defaulting party to offer to pay their way out and so argue absence of prejudice. These latter observations are instead to identify and distinguish how the Defendant's valid criticisms apply.

   My conclusion is that they do indeed have application but not in terms of displacing the Claimants' claims and the proposed settlement Application.

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