IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

No. QA-2019-000103

Neutral Citation Number: [2019] EWHC 3924 (QB)

Royal Courts of Justice

Monday, 18 November 2019

Before:

MRS JUSTICE LAMBERT

B E T W E E N :

MOHAMMED SAQIB RAZAQ	Claimant
and	
IMRAN IQBAL	First Defendant
and	
ESURE SERVICES LIMITED	Second Defendant/Appellant
and	
DUNNE & CO. SOLICITORS	Third Party/Respondent

Hearing date: 18 November 2019

MR HIGGINS instructed by Horwich Farrelly appeared on behalf of the Appellant.

MR CROZIER instructed by Dunne & Co Solicitors appeared on behalf of the Respondent.

J U D G M E N T

MRS JUSTICE LAMBERT:

Introduction

1 This appeal arises from the Claimant's action for damages for personal injury and financial losses following a road traffic accident on 22 March 2014 in which he claimed to have been involved. At trial, the claim was dismissed, found to be fundamentally dishonest and the Claimant was ordered to pay the Second Defendant's costs on an indemnity basis. During the course of submissions on costs, it emerged that a "drop hands offer" ("the Offer") made by the Second Defendant to the Claimant five months before trial had not been communicated to the Claimant by his then solicitor, Mr Oliver Brumby of Dunne & Co Solicitors. The Second Defendant made an application for a wasted costs order against Dunne & Co on the basis that the failure to notify the Claimant of the offer had been improper, unreasonable or negligent and that it had caused loss to the Second Defendant because, if the Claimant had been informed of the offer, he would have accepted it rather than proceed with his claim.

2 The application came before HHJ Hellman on 15 February 2019. He granted Dunne & Co's application for relief from sanctions and permitted the statement from the solicitor who had been instructed by the Claimant, Mr Oliver Brumby, to be adduced. He refused the application for wasted costs on the grounds that, although Dunne & Co's conduct was negligent, he was not satisfied that the conduct constituted a breach of any duty owed by Mr Brumby to the Court. Alternatively, and further, he found as a fact that the conduct was not causative of any wasted costs given that he was not persuaded on balance that the Claimant would have accepted the offer and that the litigation costs thereafter would have been avoided.

3 This is the Second Defendant's appeal from the Order of HHJ Hellman of 15 February 2019 granting Dunne & Co relief from sanctions and permission to rely upon the witness statement of Mr Oliver Brumby and the dismissal of the application for wasted costs. The Judge refused permission to appeal his order granting relief from sanctions, which is now renewed, but gave permission in respect from his dismissal of the application for wasted costs.

4 Before me, the Appellant, the Second Defendant, is represented by Mr Higgins and the Respondent, the Third Party, by Mr Crozier.

The Factual Background

5 The Claimant alleged that he had been involved in a road traffic accident on 22 March 2014 when the Defendant drove into the Claimant's stationary vehicle. Dunne & Co were instructed on his behalf and proceedings were issued on 11 February 2015. Shortly after issue, the First Defendant's insurer, Esure Services Limited, was added to the proceedings as Second Defendant and took over conduct of the First Defendant's case on his behalf. The Second Defendant filed a Defence in April 2015 putting the Claimant to proof of his claim but raising a number of issues concerning the circumstances of the accident. No allegations of dishonesty were at that time pleaded against the Claimant. However, on 28 September 2016, the Second Defendant made the Offer, sent a without prejudice letter to the Claimant by fax setting out its "*serious concerns over the bona fides of the claim*" and making a time-limited drop hands offer. It is accepted that Mr Brumby misplaced the letter and that its contents were therefore not communicated to the Claimant.

6 On 20 December 2016, the Defence was amended to allege that the claim was fundamentally dishonest on the grounds that the claim included a spurious claim for £42,427

for hire car charges, that the Claimant had claimed to have been an IT consultant when, in fact, he was unemployed and that the Claimant had exaggerated the damage to his BMW car.

7 The action was listed for trial on 9 and 10 February 2017. Shortly before the trial however Dunne & Co applied to come off the record due to lack of instructions. The application was granted and the trial vacated. The trial was relisted and took place between 20 and 23 March 2017 before HHJ Wulwik. By this time the Claimant had instructed fresh solicitors, Rana & Co. In his judgment of 28 April 2017, Judge Wulwik dismissed the claim and found the claim to have been fundamentally dishonest. He ordered that the Claimant pay the Second Defendant's costs on an indemnity basis, that the costs award should be enforced in full and that the qualified one-way costs shifting scheme should be disapplied.

8 In the course of the costs hearing it became apparent to the Second Defendant that the Claimant had not been informed of the Offer. On 23 May 2017, the Second Defendant wrote to Rana & Co asking whether the contents of the letter had ever been communicated to the Claimant, when the Claimant had first become aware of the letter and whether the Claimant would have accepted the offer had it been communicated to him. In its response of 13 June 2017, Rana & Co. confirmed that the Claimant had not seen the letter and that the Claimant had confirmed that: "*if he was informed by his solicitor that he had a weak case and that you had made an offer for our client to discontinue with the case and no order for costs our client would have accepted this as this is the first time our client has used a solicitor and did not know that his case was weak until we told him*."

9 Following the Second Defendant's application for a wasted costs order of 20 April 2018, directions were given that Dunne & Co should have permission to file and serve a statement

in response to the Appellant's application by September 2018. No statement was served by that date.

10 The application was listed for 15 February 2019. The day before the hearing, Dunne & Co made an application for relief from sanctions and permission to rely upon the statement made by Mr Oliver Brumby dated 14 February 2019. Mr Brumby's statement confirmed that the offer had been received 28 September 2016, but that due to an administrative error the fax copy had been misplaced on the client file and had not been relayed to the Claimant. The statement disputed that, if the offer had been communicated to the Claimant, it would have been accepted. Mr Brumby made a number of points. First that he would not have been able to advise that the Claimant to accept the Offer as, setting aside the merits of the claim, the claim included a claim for the hire, storage and recovery expenses and, absent a written assurance from the relevant hire company (which, at that time, he did not think would be forthcoming) the Claimant would have remained liable for those costs; second, had the Claimant gone against the advice and discontinued the action, then under the terms of the conditional fee agreement, the Claimant would have been responsible for the payment of Dunne & Co.'s costs: third, that the Claimant had been given advice by him, Mr Brumby, on two occasions in early 2017, in which the weaknesses of his claim and the difficulties were explained. The Claimant failed to respond. Even having obtained the written assurance from the hire company that it would exceptionally waive the charges, the Claimant failed to respond to further advice and did not acknowledge the Notice of Discontinuance which Mr Brumby had sent to him for signature.

The Hearing before HHJ Hellman

11 The Claimant attended the wasted costs hearing before HHJ Hellman. He was not represented but had an advisor behind the scenes. It appears that the Claimant only saw the

late Brumby statement for the first time on the day of the hearing and so the Judge granted him time to read it. Mr Higgins, representing the Second Defendant made submissions in respect of the late statement on the Claimant's behalf arguing, amongst other points, that it had been served far too late and that the Claimant may have wished to provide a statement in response.

12 In his ruling on the application for relief from sanctions, the Judge applied the principles in CPR 3.9 and the three stage test in *Denton v TH White* [2014] 1 WLR 795. Although he found that there had been a serious and significant breach of a court order for which there was no good reason, in his judgement, taking into account all of the circumstances of the case, including the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with the rules, fairness required that Dunne & Co should be permitted to rely upon the late statement. He observed that Dunne & Co. were potentially (in his words) "*on the hook*" for a wasted costs order and it was only fair that the Court should be able to take into account the Brumby evidence; that there would be considerable prejudice to Dunne & Co if the statement was not admitted and that the prejudice to Dunne & Co if the statement was not in evidence would outweigh any prejudice to the Claimant who, he acknowledged, was indirectly affected by the application. He noted that, having permitted Dunne & Co to rely upon the statement for the purpose of the wasted costs application, he intended to be "*extremely cautious*" before drawing any conclusions from the statement adverse to the Claimant. Not only had Mr Brumby not been cross-examined upon the statement but the Claimant had not had the opportunity to put in any evidence in reply. Further, he ruled that both the Claimant and Dunne & Co would be given a fair opportunity to comment upon the statement and deal with it.

13 Having given this *ex tempore* judgment on the issue of relief from sanctions, the Judge then heard submissions on the wasted costs application. During the course of those submissions, he was reminded by Mr Higgins of the need to exercise considerable caution when accepting anything that Mr Brumby had said which had not been susceptible to challenge. Mr Higgins submitted that by the time of the Offer the claim for hire charges had, in effect, gone and there did not appear to be any evidence of a conditional fee agreement having been entered into by the Claimant. He submitted that whatever Mr Brumby's advice may or may not have been, the Claimant would, no doubt, have taken his own course in response to the offer of discontinuance, bearing in mind that his claim was at that stage a relatively small one, limited to personal injury and vehicle damage.

14 In a further *ex tempore* judgment, the Judge refused the application. He applied the 3-stage test in *Ridehalgh v Horsefield & Anor* [1994] Ch 205. He was not satisfied that the failure to bring the offer to the attention of the Court was a breach of the solicitor's duty to the court, although he was satisfied that the failure was negligent and a breach of the solicitor's duty to the client. He noted that: "*A legal representative must be shown to have acted not only in a way which was improper, unreasonable or negligent, but that it had also been in some way a breach of the duty to the court (see Radford & Co. v Charles & Anor [2003] EWHC 3188 (Ch) where Neuberger J observed that a negligent failure which occurred before proceedings were commenced could not be a negligent act or a breach of duty to the court.*" The Judge stated that he intended to adopt a cautious approach to the issue of whether this particular breach was not only negligent but also a breach of the solicitor's duty to the Court by failing to comply with, and advance, the overriding objective and that on the basis of the submissions which he had received and in the absence of case law on the point he was not prepared to make such a finding. As he put it: "*Any such duty would presumably flow from the supposed wider duty to the court to conduct litigation*

competently, but defining the scope of that wider duty might prove problematic." On this basis, the Judge therefore found that the application fell at the first *Ridehalgh* hurdle.

15 The Judge also found that the application did not succeed as he was not persuaded that the conduct of Mr Brumby in failing to communicate the Offer had caused the Second Defendant to incur unnecessary costs. He noted the competing claims by the Claimant, that he would have discontinued the claim had he been advised of the Offer, and of Mr Brumby, that it would have advised continuing with the claim. As the Judge put it: "*It is tempting to say with respect to both parties, that they would say that.*" The Judge considered that any finding as to the content of the advice that Mr Brumby would hypothetically have given and what the Claimant would have done in response was "*a matter of speculation*." He bore in mind that notwithstanding representation by a different firm, Rana & Co, the Claimant did press the claim to trial. The Judge concluded therefore that he could not be satisfied on balance that the Offer would have been accepted and the litigation costs avoided.

16 The Judge went on however to find that, had the application not failed on limbs one and two he would, applying the third limb of the *Ridehalgh* test, have granted the application on the basis that, in all of the circumstances of the case, it would have been just to order Dunne & Co to compensate the Second Defendant for the costs incurred after the offer was made.

The Appeal

17 I therefore turn to this appeal. I deal first with the renewed application for permission to appeal the grant of relief from sanctions.

18 There is no renewed application for permission to appeal this element of the Order. Nor, I understand was the application foreshadowed in correspondence. Mr Higgins tells me that

this is due to oversight by those instructing him. Mr Crozier, sensibly, did not submit that he would be prejudiced by my hearing oral submissions for permission. Mr Higgins' submissions were made on behalf of the Second Defendant and the Claimant who have a common interest in the outcome of the application. In summary form, he repeated his submissions to HHJ Hellman below: that the statement had been served egregiously late; that the Claimant had not had a sufficient opportunity to consider the statement and seek legal advice or serve evidence in response; and that the Judge had been wrong to proceed to hear the application without an adjournment to give the Claimant an opportunity to respond to the statement and/or the decision was unjust because of a serious procedural irregularity.

19 I refuse permission to appeal the Judge's decision to give relief from sanctions. Mr Higgins is unable to identify any error of law in the approach taken by the Judge who applied the *Denton* framework meticulously. It is fair to observe that other judges may have reached a different conclusion on the application, but that is no basis for my granting permission. I see no flaw in the Judge's approach to the application. He applied the law correctly and exercised his discretion taking into account all of the circumstances of the case including the matters raised in CPR 3.9(1)(a) and (b). The Judge's finding that his ruling on the substantive application for wasted costs would be difficult if the party "*on the hook*" was unable to advance evidence on his own behalf is unobjectionable. Nor can the Judge's conclusion that the balance of prejudice favoured the admission of the statement rather than its exclusion be undermined. I do not find that the Judge's decision was, even arguably, wrong.

20 The real question for the Judge dealing with the relief from sanction issue was whether to adjourn the hearing in order to permit the Claimant to put in evidence in response. I recognise that, at first blush, the Judge's decision to proceed may seem generous. But this is

to overlook that the Judge had clearly formed a preliminary view that he should be "*extremely cautious before drawing any conclusions from the statement adverse to Mr Razak..*" and that, when granting relief, the Judge intended that both the Claimant and the Second Defendant would have the opportunity to respond to the statement. In this context, Mr Higgins made detailed submissions directed at undermining the reliability of the statement and the Claimant also made submissions, or rather gave evidence, as to what he would have done had he received the Offer and why he would have been "*very keen to take up*" the Offer given that it was a new situation for him and "*considering the circumstances at the time that the offer was made*."

21 I therefore see no procedural irregularity in the Judge having granted relief without also directing that the hearing should be adjourned. I refuse permission to appeal this decision.

22 I therefore move on to the appeal by the Second Defendant against the refusal of its application for a wasted costs order. Permission was granted by Judge Hellman given his view that "*the issue of whether a solicitor owed a duty to the court (under the overriding objective) to pass on an offer of settlement to a client*" was novel and would benefit from fuller argument and consideration by a higher court.

23 I informed the parties at the outset of the appeal hearing that I was not prepared to deal with the Second Defendant's challenge to the Judge's ruling upon the first stage of the *Ridehalgh* test. I recognise that the challenge raises the potentially important and interesting issue of the duties owed by a solicitor to a client and those owed to the court and indeed the overlap between the two. However, and regrettably, the Appellant's skeleton argument dealt with this issue in a few short sentences running to no more than five lines. The Appellant's argument was simply that it would be "absurd" if a solicitor's failure to advise his client was

not also a breach of the solicitor's duty to the Court. The argument was not developed in any way in spite of the issue being centre stage of the appeal. Mr Higgins may be correct in submitting that the issue was "barn door obvious" as he put it, but it also raises issues of much wider significance which I would need to consider with some care. Therefore, in exercising my case management powers, I adjourned this ground of appeal to be dealt with if necessary after hearing submissions on the further ground of appeal challenging the Judge's conclusion on causation. I turn to that issue now.

24 The Judge concluded that he was not satisfied on balance that the Claimant would, had he been informed of the Offer and advised on its merits, have discontinued with no order for costs. He took into account the unchallenged finding of Judge Walwik that the claim was fundamentally dishonest and that notwithstanding advice from other solicitors, Rana & Co, (who had advised the Claimant that the claim was weak) the Claimant had pressed his case to trial (although noting that, by that stage, there was no offer of settlement open to him to accept).

25 I remind myself that before allowing this ground of appeal I must be satisfied that the Judge was wrong in reaching his conclusion on the point. The body of case law concerning CPR 52.21(3) is replete with authority to the effect that findings of fact by the first instance judge are not to be undermined on appeal where there is an evidential basis to support the finding and the finding is not one which no reasonable judge could have reached. See for example: *The Mayor and Burgesses of the London Borough of Haringey v Ahmed & Ahmed* [2017] EWCA Civ 1861.

26 I am unable to conclude that Judge's decision on the issue of causation was wrong. The burden, such as it is, of establishing that costs would have been avoided but for the

impugned conduct is upon the applicant and, as the Judge observed, the reliability of the Claimant's case on the point and that of Mr Brumby were both bound to be influenced by their differing perspectives ("*they would say that*"). The fact that the Claimant had pursued a dishonest case to trial and done so in spite of being advised that his claim was weak were matters which the Judge was entitled to take into account. In the same position, I too would have found it impossible to be satisfied on balance that the Offer would have been accepted by the Claimant. I therefore reject this further ground of appeal.

27 It follows that this appeal will be dismissed. Having dismissed the challenge to the Judge's conclusion on causation, any analysis of the issue raised in the appeal from the Judge's conclusion on the first stage of *Ridehalgh* is academic only.
