Neutral Citation Number: [2020] EWHC 999 (QB)

Case No: E90MA057

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 April 2020

Before :

MRS JUSTICE FARBEY

- -

Between :

BRIAN JOHN MORROW	**Claimant**
- and -	
SHREWSBURY RUGBY UNION FOOTBALL CLUB LIMITED	**Defendant**

- -
- -

Marc Willems QC (instructed by **Irwin Mitchell LLP**) for the **Claimant appearing by video link from the Manchester Civil Justice Centre**
Geoffrey Brown (instructed by **Plexus Law**) for the **Defendant**

Hearing date: 13 March 2020

- -

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.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:00am on Thursday 30 April 2020.

.....

Mrs Justice Farbey :

Introduction

1. This is my judgment in relation to the costs of a claim for personal injury damages arising from an accident on 28 February 2016. On that date, the claimant was struck on the head and injured by a rugby post while watching a game of rugby on the defendant's pitch. The defendant's liability was not in dispute. At trial, I determined questions relating to (i) the causation of damage and (ii) the quantum of damages. I handed down judgment on 21 February 2020. For those who wish to consult the judgment, its neutral citation number is [2020] EWHC 379 (QB).

2. After I handed down the February judgment, the parties reached agreement on the quantum of damages in accordance with my findings. There remained a dispute about costs which I considered at a hearing on 13 March 2020. The claimant applied for all his costs of the claim. The defendant submitted that the claimant's costs should be reduced by one third (or such other amount as I should determine in my discretion) because the claim was exaggerated and conducted in an unrealistic way.

3. The background to the case is set out in my February judgment. Prior to the accident, the claimant had worked as an independent financial adviser (IFA). It was a central pillar of his case that the accident had caused him to be unfit for work, particularly on psychological and/or psychiatric grounds. He claimed that, as a result of the accident, he would never resume his work as an IFA. He would in future only ever be capable of a minimum wage role. That situation would endure until the age at which he would have retired from his work as an IFA, namely 65 years old. If he had continued to work as an IFA, he would have been promoted and his overall earnings (including bonus payments) would have followed a broadly upward trajectory.

4. The defendant's case was that the claimant was, and always had been, fit for work as an IFA. He was, at least, no less fit for work than he would have been if the accident had not happened. The claimant's documented psychological and psychiatric problems prior to the accident would have prevented him from continuing to work as an IFA irrespective of the accident.

5. The defendant did not maintain that the claimant was dishonest and I did not find that he was dishonest in my February judgment. The defendant maintained that the claimant's case, and the evidence on which it was based, was misleading. He had on multiple occasions with experts and other professionals (and in his witness statements) given a misleading picture about his pre-accident medical history, by failing to mention relevant psychological problems. He had described his post-accident problems in extravagant terms when the medical evidence demonstrated that his pre-accident problems were strikingly similar to his post-accident presentation. Over the five years leading to the accident, there were multiple complaints to his GP and other doctors about a range of problems (fatigue, insomnia, stress, anxiety, palpitations and migraine) which were the sort of factors which the claimant said would prevent him from working in the future.

6. In its written case and at trial, the defendant emphasised that, only nine days before the accident, on 19 February 2016, the claimant's wife had sent an email to his GP practice describing him as suffering from a number of symptoms relevant to his

capacity to continue work as an IFA and seeking a referral to specialist medical advice on account of such problems. The defendant presented this email as meaning that the claimant was not to any material extent less able to work than he would have been if the accident had not occurred. He had not suffered any significant injury beyond the short-term effects of a head injury.

7. As I observed in my judgment, the parties were poles apart at trial, the defendant taking the position that the claimant (save for an immediate recovery period for a head injury) had always been fit for work and the claimant taking the position that his future loss of earnings should extend all the way to retirement age. The court was therefore presented with two extreme positions.

8. The issues at trial ranged considerably wider than the claim for loss of earnings. Nevertheless, the most complex and time consuming issue was the extent of the claimant's loss of future earnings. The claimant was 46 years old when the accident happened and 50 years old at the date of trial. On the basis of a concession in cross-examination by Dr Ahmed Al-Assra (the consultant psychiatrist called by the defendant), I found proved that the claimant would have continued to work as an IFA until his 55th birthday but no longer. I did not find proved the upward trajectory of earnings that was part of the claimant's case. He would have continued to receive the same basic salary; his bonus payment as a branch head would have been paid for a limited period; and his standard bonus in future years fell to be calculated by taking an average of his bonus payments in 2015 and 2016.

9. The claimant will, as a result of my judgment, receive damages in the sum of £285,658.08 which includes £58,000 in general damages. He had claimed in excess of £1 million which had included a claim for loss of future earnings of £946,097.28 and a clam for £60,000 in general damages.

10. A short time before trial, on 8 October 2019, the clamant made a Part 36 offer to accept £800,000. The defendant had made a Part 36 offer at a much earlier stage (8 June 2018) in the sum of £110,000.

Legal framework

11. The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party (CPR 44.2(2)(a)). However, the court may make a different order (CPR 44.2(2)(b)). In deciding what order, if any, to make about costs, the court will have regard to all the circumstances, including (under CPR 44.2(4)):

> "(a) the conduct of all the parties;
>
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
>
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

12. To the extent relevant to this case, the conduct of the parties includes, as set out in CPR 44.2(5):

    (a) conduct before as well as during the proceedings;

    (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

    (c) the manner in which a party has pursued or defended the case or a particular allegation or issue; and

    (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

13. The court has a broad discretion to reduce the costs recoverable by a successful party by a proportion in an appropriate case (CPR 44.2(6)(a)). However, there are good reasons for respecting the general rule that costs follow the event and for discouraging parties from taking up time and resources with granular analysis of costs issues. A culture of satellite litigation would carry the risk of generating significant additional costs to the parties (in the form of hearings and appeals at which the only issues is costs) and significant costs to other litigants because of the uncertainty which such an approach generates (*Fox v Foundation Piling Ltd* v [2011] EWCA Civ 790, [2011] 6 Costs L.R. 961, para 62).

14. As the editors of the White Book observe, in their commentary on issue-based costs orders, the courts have frequently recognised that in any litigation, including personal injury cases, any winning party is likely to fail on one or more issues. That a claimant has won on some issues and lost on others is not normally a reason for reducing an award of costs.

15. The primary protection for defendants against paying the costs of exaggerated claims is CPR Part 36. Faced with an exaggerated claim, a defendant is able to make a Part 36 offer that takes account of the exaggeration and reflects the value of the claim likely to be accepted by the court. In *Widlake v BAA Ltd* [2009] EWCA Civ 1256, [2010] 3 Costs L.R. 353, para 42, Ward LJ observed:

> "Defendants are…used to having to cope with false or exaggerated claims. Defendants have a means of protecting themselves. Part 36 is that shield. The court may not now always attach the same significance to a defendant's failure to beat his payment into court as applied in the days before the CPR. Coming close can now sometimes have an impact on costs. But the rule remains that a defendant has this ability to win outright by making an offer which the claimant fails to beat and where, as here, the facts were well-known to this defendant from the time of Mr Karpinski's report, the fact that it did not make a sufficiently high Part 36 offer counts against it. The basic rule is that the claimant gets his (or her) costs if the defendant fails to make a good enough Part 36 offer so that goes to the claimant's credit on the balance sheet."

16. Part 36 also affects claimants because those who do not endeavour to reach a settlement run the risk that their refusal will impact upon the costs they may otherwise be entitled to recover (*Widlake*, para 43).

17. In *Fox v Foundation Piling*, the Court of Appeal observed:

> "46. A not uncommon scenario is that both parties turn out to have been over-optimistic in their Part 36 offers. The claimant recovers more than the defendant has previously offered to pay, but less than the claimant has previously offered to accept. In such a case the claimant should normally be regarded as "the successful party" within rule 44.3 (2). The claimant has been forced to bring proceedings in order to recover the sum awarded. He has done so and his claim has been vindicated to that extent.
>
> 47. In that situation the starting point is that the successful party should recover its costs from the other side: see rule 44.3 (2) (a). The next stage is to consider whether any adjustment should be made to reflect issues on which the successful party has lost or other circumstances. An adjustment may be required to reflect the costs referable to a discrete issue which the successful party has lost. An adjustment may also be required to compensate the unsuccessful party for costs which it was caused to incur by reason of unreasonable conduct on the part of the successful party."

18. In *Widlake*, para 39, Ward LJ held that, in having regard to a party's conduct, the court should enquire into its causative effect and ask to what extent lies or exaggeration had caused the incurring or wasting of costs. He went on to say:

> "41. In addition to looking at it in terms of costs consequences, the court is entitled in an appropriate case to say that the misconduct is so egregious that a penalty should be imposed upon the offending party. One can, therefore, deprive a party of costs by way of punitive sanction. Given the judge's findings of dishonesty in this case, that may be appropriate here. I sound a word of caution: lies are told in litigation every day up and down the country and quite rightly do not lead to a penalty being imposed in respect of them. There is a considerable difference between a concocted claim and an exaggerated claim and judges must be astute to measure how reprehensible the conduct is."

19. More recently, in *Welsh v Walsall Healthcare NHS Trust* [2018] EWHC 2491 (QB), [2018] 5 Costs L.R. 1025, Yip J regarded part of the claimant's conduct of proceedings as going beyond "the ordinary situation where one part of a party's case is stronger than another and depends on consideration of the evidence at trial" (para 24) such that it was not reasonable for the party to have brought a particular issue to

trial and maintained it. Yip J departed from the general rule by reducing the successful claimant's costs by a "meaningful" proportion, not as a mathematical exercise but as a judgment as to how best to do justice between the parties (paras 43-44). On the facts of that case, the deduction was 15%.

20. I was directed by the parties to other case law which elucidates the circumstances in which a court may award less than full costs to a successful claimant. I do not need to deal with those cases here. The principles relating to costs have been well-rehearsed by appellate courts and are well-known; not least, they are summarised in the commentary that accompanies CPR Part 44 in the White Book. The case law emphasises (among other things) the fact-sensitive nature of the court's discretion.

The parties' submissions

21. On behalf of the defendant, Mr Geoffrey Brown submitted that the claimant should not recover his costs in full because significant time had been taken up in the proceedings, particularly at trial, in investigating and dealing with the claimant's exaggerated account of his pre-accident difficulties, the impact of the accident, and his post-accident progress. Mr Brown relied on those passages in my February judgment in which I concluded that the claimant had endeavoured to minimise his pre-accident physical, psychological and psychiatric difficulties and dramatised his post-accident difficulties. Numerous elements of the claimant's pre- and post-accident health had to be investigated and challenged by the defendant because they were fundamental to the presentation of the claimant's case that he should recover in excess of £1 million. Much of what the defendant maintained in its counter-schedule of damages concerned these matters and was upheld by the court.

22. Mr Brown submitted that a number of the claimant's witnesses had given exaggerated evidence. His wife's evidence about the claimant's health had been highly unreliable and in the main rejected. The evidence given by witnesses in regard to the claimant's likely future earnings had been unreliable, exaggerated and florid, with evidence from the claimant's former line manager on likely salary increases being particularly implausible. The advancing of an exaggerated claim for loss of future earnings had caused significant time to be unnecessarily taken up in investigating and meeting it, both in the course of the proceedings generally and, more specifically, at trial. More generally, much of the expert opinion evidence adduced by the claimant in relation to his medical condition had not been accepted (where it was different from the defendant's expert evidence).

23. Mr Brown invited me to treat the claimant as having lost on central issues, particularly in relation to the loss of future earnings. Dr El-Assra's concession that, if the accident had not happened, the claimant would have continued to work for a period of years had not prevented the claimant from losing on the key issue to the extent that he did. These various factors warranted a one-third reduction to the costs that would be awarded to the claimant on a detailed assessment.

24. On behalf of the claimant, Mr Marc Willems QC submitted that the defendant, in its written case, had only accepted the sum of £829.54 for past losses, and an unassessed amount for general damages. All other claims were denied, including loss of earnings. The claimant, therefore, had to go to court to achieve an award of more than £110,000, which was the defendant's only offer and which was easily beaten.

25. Mr Willems referred to the defendant's argument at trial in relation to the legal test for causation of damage. I had rejected the defendant's legal submissions. Yet, the defendant's legal argument – that as a matter of value judgment the defendant should not be held responsible for the claimant's injury – had informed its entire approach to the case. The defendant's wide-ranging denial of causation, based on a misapprehension of the law, had led to a full trial of all issues.

26. Mr Willems emphasised that the defendant had also shaped its case around the claimant's wife's February 2016 email. Yet, I had not accepted that the email marked such a crisis that the claimant would at that time have stopped working as an IFA in any event.

27. The court had found that the claimant would probably have worked until his 55th birthday on the basis of a concession made by the defendant's consultant psychiatrist in cross-examination. It had until then been the defendant's case that that the accident was simply coincidental to the claimant having to give up work in any event. The defendant ought to have "stress tested" the psychiatrist's evidence before trial. Had that happened, the medical basis upon which the defendant's case was founded would have been appreciated to be far weaker than it was on paper. The defendant would have appreciated that, on its own evidence, its Part 36 offer was inadequate.

28. The claimant's Part 36 offer of £800,000 was approximately 60% of the pleaded claim. This in itself indicated a significant inclination by the Claimant to negotiate, and the offer should be considered in the context of failure to negotiate. The claimant made significant attempts to engage the defendant in alternative dispute resolution during 2019. The claimant initiated a request for the defendant to attend a joint settlement meeting on 16 April 2019, which the defendant indicated it was, in principle, considering. Thereafter, the claimant made seven further requests for a settlement meeting but the defendant had refused to engage.

Analysis and conclusions

29. It is not in dispute that I should make an order for costs in favour of the claimant who is the successful party. He has beaten the defendant's Part 36 offer by a considerable margin. The issues for me to decide are (i) whether there are any reasons for departing from the general rule that costs follow the event; and (ii) if so, the extent of the deduction that I should make.

30. In accordance with my findings in the February judgment, I am in no doubt that the claimant exaggerated his claim for loss of future earnings. He was not dishonest. His psychiatric or psychological condition (including what I have called anankastic stubbornness in the judgment) may have made him prone to exaggeration and prone to pursue his claim beyond what common sense and realism would dictate. However, he was at all material times able to instruct and take advice from his lawyers. Litigation involves strategic decisions. There is - and could be - no suggestion that he lacked the capacity to take them. I do not accept that he would have been unable rationally and reasonably to make decisions in his own case. He chose to put an exaggerated claim to the court.

31. Mr Willems submitted that, if the defendant had been willing to engage in settlement meetings or negotiations, it would have been possible for the claimant's lawyers to

reveal his approach to the litigation which could in turn have led to compromise. I accept that, in any negotiations, the claimant's lawyers would have presented his case skilfully with a view to ensuring some higher offer from the defendant. They would however have been bound by the claimant's instructions. He does not appear to have instructed his lawyers to make a Part 36 offer until a matter of weeks before trial. The offer of £800,000 was unrealistic and nearly three time in excess of what he recovered at trial. The timing of the offer and its lack of realism are sufficient to defeat the inference that he had an intention to settle which was thwarted by the defendant.

32. In my judgment, the claimant preferred to put forward an exaggerated case in court. The extent of the exaggeration is reflected in the gulf between the damages claimed and the damages awarded. The defendant's Part 36 offer proved too low but the defendant's offer was significantly closer to the damages awarded than the claimant's offer.

33. That said, in the absence of dishonesty, the claimant's exaggeration is not the sort of egregious misconduct that in itself deserves a punitive costs order (*Widlake*, para 48, above). Although the defendant's Part 36 offer was closer to the award of the damages than the claimant's offer, it represented an assessment of the value of the case which I rejected. Both as a matter of law and as a matter of fact, the defendant denied that the accident caused the claimant to be unfit to work. The defendant lost on that issue. Its legal argument on causation failed. Its reliance on the February 2016 email as demonstrating that the claimant would have given up work was misplaced. The defendant chose to contest almost every allegation and almost every issue relating to quantum. The breadth of the defendant's denials meant that the claimant would have needed to come to court to recover the damages which flow from my judgment.

34. In circumstances where each party stuck to its guns, how should the balance be struck in relation to the award of costs in an exaggerated but not dishonest claim? On the one hand, it would have been open to the defendant to protect itself from costs by increasing its offer – particularly as it ought to have known that its own expert, Dr Al-Assra, held the opinion (not expressed in any written report) that the claimant may not have ceased work for a number of years but for the accident.

35. However, this is not a case where a claimant has – for whatever reason – simply given an inaccurate picture in a witness statement or in oral evidence. Exaggeration and an inflated claim for damages was built into the structure of the claimant's presentation of his claim, both before and at trial. Even with the assistance of lawyers as skilled as Mr Willems and his instructing solicitors, the claimant's exaggeration operated across multiple and cumulative witnesses (the claimant, his wife, his line manager, others who gave evidence on loss of future earnings, the exaggerated instructions that the claimant gave to experts) and across multiple days in court. I give considerable weight to exaggeration (under CPR.2(5)(d)) in a case where it was engrained. I give some weight to the fact that the claimant's Part 36 offer was multiple times higher than the award of damages (CPR.2(4)(c)). These factors lead me to the conclusion that the claimant's conduct was a cause of unnecessary expense. Taking an overall view of the justice of the matter, the balance lies in favour of reducing the award of costs.

36. I turn to the question: to what extent did the claimant's conduct cause the incurring of costs (*Widlake*, para 39, above)? I am not persuaded that the exaggeration of his claim caused the claimant's costs to rise by one third, as suggested by Mr Brown. As I have indicated, the defendant must take some responsibility for the trial lasting as long as it did.

37. The claimant's exaggeration prolonged the trial and prolonged the cross-examination of multiple witnesses, including the psychological and psychiatric witnesses as well as those who gave evidence relating to the quantification of loss of earnings. Such prolongation is indicative of how the claimant's conduct caused unnecessary costs. In my judgment, a deduction of 15% is broadly appropriate to mark the additional costs caused by the claimant's exaggerated case. A higher deduction would in my judgment begin to make inroads into areas in which both the claimant and the defendant overstated their respective cases.

38. Mr Willems suggested, by reference to the *Welsh* case, that a 15% deduction would be more suitable for cases of improper or unreasonable conduct rather than simple exaggeration. However, each case will be fact sensitive and the *Welsh* case (as Mr Brown forcefully submitted) does not set a legal benchmark.

39. I have considered whether, conversely, a 15% reduction would be too little to be meaningful. If so, it could encourage other litigants to take up disproportionate court time in the hope of gaining some comparatively small costs advantage. I have come to the conclusion that, in the context of a 7-day trial with very numerous witnesses, the overall costs are bound to be high enough that a 15% reduction will be meaningful. It was not disproportionate of the defendant to seek a reduction in these circumstances.

40. The reduction of 15% does not take into account the evidence of Mr Saeed Mohammad, the orthopaedic surgeon called for the claimant who gave evidence to the effect that the claimant had (among other things) developed a pain syndrome. I was not persuaded that, as an orthopaedic surgeon, Mr Mohammad had gained the expertise necessary to deal with pain syndrome (see para 155 of the February judgment). Mr Brown was critical of the claimant for relying on evidence outside Mr Mohammad's expertise but I did not hear discrete submissions on what proportion of the costs of Mr Mohammad's evidence related to pain syndrome. The judge on detailed assessment may wish to consider whether the whole of Mr Mohammad's costs should be awarded or whether a modest reduction should be made, given that he travelled to some degree into territory beyond his expertise.

41. I shall order that the defendant shall pay 85% of the claimant's costs to be subject to a detailed assessment if not agreed.