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King's Bench Walk

Marsh v Ministry of Justice costs judgment – conduct, indemnity costs, and the interplay between Part 36 and the discount rate

On 31 July 2017 Thirlwall LJ gave an extempore judgment on costs and consequential orders following a lengthy stress at work trial. It raised, amongst other issues, a novel point as to the impact of the change in the discount rate with regard to Part 36 offers. Andrew Roy and Vanessa Cashman instructed by David Marshall and Amanda Hopkins at Anthony Gold acted for the Claimant.

Background

For a report of the substantive judgment click here. For the judgment itself click here. The Claimant recovered over £286,000, albeit he lost a significant number of issues. The Defendant's conduct was criticised in the substantive judgment. The judge made the following comments (amongst others):

- "*Both pleadings are far longer than was necessary to identify the issues in the case. The defence in particular* [running to 114 pages] *includes unnecessary detail, much of which is irrelevant to the claimant. Had proper focus been applied at an earlier stage the trial would have taken at most 8 days, instead of the 15 that it occupied*. [15]"
- That "*the proposed number of witnesses and documents was wholly disproportionate to the issues and value of the claim*." [17]
- Several of the Defendant's allegations of misconduct were unsupportable. This included the very serious allegations that the Claimant drugged and raped a prisoner. The judge held that "*There was no credible evidence in support of this allegation. It should not have been pursued*" [87].
- The Claimant had raised "*a number of justified concerns about the defendant's approach to the litigation. Several of the witness statements submitted on behalf of the defendant contained passages that were identical. The information given by the defendant to the claimant's solicitors in advance of and to the court during the pre trial hearing about the availability of witnesses to give evidence was inconsistent and on occasion simply incorrect*." [229]
- "*The lack of focus in the defendant's case led to a huge workload which was wholly disproportionate to the real issues. That is why statements were served well out of time, with no explanation and why careless errors were made*." [235]

The Claimant made several attempts so to settle the claim:

- On 20 March 2014 he made a Part 36 offer of £223,500.
- On 7 May 2015 he invited the Defendant to participate in mediation.
- On 14 October 2016 he made a reduced Part 36 offer of £180,000.
- In the same letter he again invited the Defendant to participate in mediation.

The Defendant by contrast:

- Made no offers to settle.
- Ignored the Claimant's offers.
- Refused to enter into mediation or any other form of ADR.
- Instead repeatedly pressed the Claimant to discontinue.

The Claimant thus beat both his Part 36 offers by some distance. However, absent the change in the discount rate between trial and the substantive judgment, he would have recovered c. £217,500 (i.e. slightly less than his first

offer, although still clearly in excess of his second offer).

Issues

There were five issues for determination:

- Whether the Claimant should recover his costs of the action in full (as he contended) or whether he should only recover 70% (as the Defendant contended).
- Whether the Claimant's costs should be assessed on the standard or the indemnity basis. The Claimant contended that some or all of the costs should be on the indemnity basis due to the Defendant's conduct and/or Part 36. The Defendant contended for the standard basis throughout (i.e. notwithstanding that the Claimant had better two Part 36 offers, he should receive only 70% of his costs on the standard basis).
- Whether further awards should be made in accordance with Part 36.
- The costs of the Claimant's strike out application.
- Whether there should be a payment of costs on account and if so, how much.

Judgment

The judge attached importance to the Defendant's third party disclosure application to obtain many thousands of documents from the police. She described it as an "*enormous disclosure exercise … which the Claimant resisted on a number of occasions*". She observed that it "*had a very profound effect on the length of the trial and its expense*". The judge held that this exercise had been "*an expensive waste of time*". The starting point for the evidence needed to meet the Claimant's case was the Defendant's own documents. She did "*not understand why the disclosure exercise was not begun on that basis*". The Defendant "*was not able to explain why it was necessary to seek disclosure from the police for documents which belonged to the Defendant*". She rejected as "*absurd*" the Defendant's implicit assertion that if what was known after disclosure had been known at the time of the disciplinary hearing, the decision would have been different. The very wide ranging disclosure which was in fact obtained was not directed to meeting the Claimant's case. It was "*used as the basis for the comprehensive attack on the Claimant*" which failed. The Defendant "*struggled to deal with disclosure*". This had "*led to the problems with court-imposed directions and other errors*". As regards ADR, the judge rejected the Defendant's argument that its stance was reasonable because this litigation was out of the ordinary. The Defendant sought to justify its approach on the basis that many other public bodies were at the time under investigation in respect of allegations of abuse. The Defendant prayed in aid claims of historic sexual abuse against a raft of different institutions and a number of enquiries into them (such as the "Goddard/Jay enquiry" into historical child sex abuse) and the widespread concern thereby generated. The judge was unimpressed by this rationale, stating:

"*I fail to see how widespread public concern about the abuse of people in care or other settings can properly be said to affect the conduct of the Defendant in personal injury litigation brought against it by a member of staff. It doesn't take this ligation out of the ordinary. Claims against government departments are not uncommon. It does not entitle a defendant to conduct itself without regard for the need to conduct litigation proportionately or to disregard an order for mediation. If the Defendant did not wish to engage in mediation for public policy reasons it must be prepared to take the costs consequences of that approach.*"

The judge reiterated her prior criticisms of the Amended Defence. She noted that "*The effect of this pleading apart from extending the length of the trial was to subject the Claimant to a prolonged process at the end of which he knew the allegations would have to be dealt with at a public hearing*". She was particularly critical of the Defendant's pleading and persisting with its "*hopeless*" allegation that the Claimant drugged and raped a prisoner. This had been "*drafted in the knowledge that the complainant did not want to pursue the complaint*" and despite "*a very clear message as of June 2012* [the previous disciplinary hearing] *that the complainant would not make a good witness on this issue*". It was pursued despite her not in the event giving evidence at trial. The judge had "*not found it easy to understand why this 11(i) allegation was held over the head of the Claimant all the way to final submissions*". The judge concluded her preliminary remarks as follows:

"*I regret that the Defendant's conduct in the ways I have described is at best dispiriting.*"

She then turned to the issues for determination. On issue (1), the judge rejected the Defendant's arguments that there should be a reduction. She held that on any fair reading the Claimant was successful and should have all his

costs. The result on issue (2) was mixed. The judge held that it was unjust for the first Part 36 offer to bite given that it only did so because of the interim change in the discount rate. She relied upon ***Novus Aviation Ltd vs Alubaf Arab International Bank*** [2016] EWHC 1937 (Comm) where it was held that it would be unjust for the consequences of Part 36 to flow when the reason that the sum had been exceeded was because of a dramatic fall in sterling just after the EU referendum on 23 June 2016. She rejected the Claimant's submission that this was a vicissitude of litigation no different from an unforeseen change in medical evidence, especially as it had been public knowledge since 2012 that the rate was under review. The judge held that "*a change to the discount rate is different in kind*". (It might be observed that she did not elaborate on the nature of the difference). The judge however went on to hold that the Amended Defence was "*a significant misjudgment by the Defendant, for the reasons which are known to them and may involve some notion of public policy*". She held that from service of the amended pleading in July 2016 the conduct of the defence was such that from that date indemnity costs were payable. On issue (3) the judge held that there was no answer to the later Part 36 offer. She therefore awarded an extra 10% on the judgment sum (adding c£28,500) and enhanced interest from the date of expiry of the second offer at the maximum permissible rate, 8.5% on general damages and on past losses at 10% (adding c£4,000). The Claimant thus recovered over £319,000 in total. She also awarded interest on costs for the same period, again at the maximum permitted rate of 10.5%. On (4), the judge held that although she did "*not think it unreasonable that the application was made given the state of the evidence in the period just before trial and the dismissive approach taken by the Defendant to the Claimant's legitimate concerns which were expressed in clear terms at the PTR*" the Defendant was the successful party and should have its costs of the strike out application on the standard basis. On (5), the judge held that there was no good reason not to order costs on account. She rejected the Defendant's argument that uplift should be excluded when ascertaining the correct figure. She held that there was no likelihood of the final figure being less than £900,000 and ordered £600,000 on account. For the note of the judgment as agreed between the parties click here.