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King's Bench Walk

The admissibility of evidence about compensation schemes in civil proceedings for the same wrong: TVZ v Manchester City FC Ltd.

This article discusses the admissibility of compensation schemes in civil claims for the same wrong, following Cavanagh J's dismissal of the Defendant football club's application to exclude it in *TVZ v Manchester City FC Ltd* [2021] EWHC 1179 (QB). In short, the Judge found that these schemes were not protected by without prejudice privilege by virtue of their ADR and compensatory nature and that if they were, such privilege is waived by their placement in the public domain unless there are public interest considerations to the contrary. The particular features of the Defendant's scheme in this case meant that it was not protected so evidence about the Scheme was admissible at trial.

The Claim

The substantive personal injury claim was and is for psychiatric injury arising from sexual abuse in the 1980's. The Defendant admitted the fact of the abuse, namely that the eight Claimants were abused by their coach, Mr Bennell, whilst they played for boys and youth club teams. It was alleged that the Defendant was vicariously liable for Mr Bennell's actions at the time, which was denied. Vicarious liability was therefore one of the substantive issues in dispute.

It was in the context of this denial of vicarious liability that the Defendant made its application to exclude all references to and information about its voluntary redress scheme, the Manchester City Survivors' Scheme. The Scheme offered compensation to victims of sexual abuse perpetrated by Mr Bennell at the same/ similar times as the Claimants in the case. The Claimants made applications for further disclosure relating to the Scheme, which were heard at the same time but which are not the subject of this article.

The Scheme

The Scheme was launched in 2019 to provide financial compensation, paid counselling and face-to-face apologies to individuals who were victims of sex abuse. There were a number of eligibility requirements relating to the circumstances of the abuse. Particularly relevant to the civil proceedings and the Defendant's application were that (1) the abuse had to be perpetrated by Mr Bennell or one other specified person (2) if perpetrated by Mr Bennell, it had to have occurred between 1976-79 or 1981-84 and (3) it must have occurred whilst Mr Bennell was a scout or coach for specified feeder teams (including the Claimants').

The Scheme self-described as a "*without prejudice save as to costs ADR methodology for the early resolution of Eligible Scheme Claims*"; the FAQ stated payments did "*not amount to an admission of liability by MCFC, or a finding of liability against the Club*"; the Rules were not marked without prejudice themselves, only that an Offer was "*without prejudice save as to costs"*; and there was no requirement to keep use of the Scheme confidential. Additionally, and unsurprisingly given its purpose, the Defendant publicised the Scheme on its own website and mainstream news outlets.

The parallels between the eligibility requirements for the Scheme and the circumstances of the Claimants' abuse are clear, though the Scheme expressly did *not* admit liability for any of the compensatable wrongs.

The Application

The Defendant's application was based on the submission that the Scheme should be seen as a genuine attempt to settle which should be protected by without prejudice privilege in the ordinary way and not be disclosed to the judge until after the substantive issues were decided upon. It further submitted that admitting the Scheme into evidence would prejudice the Defendant's position on liability.

The Claimants, opposing the application, said that the Scheme was not itself protected by privilege, if it had been then the Defendant waived privilege by placing it in the public domain or alternatively it was waived by the parties.

Finding that the information did not attract privilege at all, the Judge noted that these Claimants had not contracted with the Defendant to utilise the Scheme though it had been expressly brought to their attention by the Defendant. He characterised the Scheme as an "*open offer*" which may or may not attract privilege depending on the facts. On these particular facts, he found that the Scheme did not attract privilege and the bare fact it was characterised as ADR did not change that: "*all open offers are a form of Alternative Dispute Resolution, and yet they are not protected by without prejudice privilege*" [at 53].

The Judge found that there was nothing in the Scheme's wording that showed intention to be privileged and that the Defendant had taken active steps to place the Scheme in the public domain. That publication meant that the Defendant (1) failed to meet the prerequisite requirement for privilege that the information was not in the public domain and (2) assumed the risk that the trial judge may already be aware of it anyway. With the Scheme being in the public domain, the Judge found that there was no wider public policy/ interest consideration to justify treating it as privileged and so the existence of, and information relating to the Scheme could properly be admitted into evidence.

The Judge's view was that any potential prejudice was limited in any event, since the Scheme expressly did not admit liability for the events that it compensated. The actual value and persuasiveness of the evidence will of course be for the trial judge to decide.

Comment

There are a number of personal injury compensation/ redress schemes in England and Wales, some of which are widely cast (e.g. the Armed

Forces Compensation Scheme) and others which are limited to particular issues (e.g. the Lambeth Children's Home Redress Scheme and the present Scheme). Redress schemes offer a quicker, cheaper and wider form of compensation than the litigation process, which makes them appealing to prospective applicants. The savings are also beneficial to scheme administrators, but more importantly, voluntarily administering a scheme is a way of accepting some public accountability for events on their watch. Whether they accept any civil liability for those wrongs depends on the wording of the scheme itself.

In some cases, acceptance of a scheme offer can come with a condition that no civil proceedings are subsequently brought, which can be highly effective for prospective defendants if proceedings are issued. Indeed, failure to engage in an effective redress scheme which offers the same substantive compensation as court proceedings can result in a claim being struck out: e.g. *Binns v Firstplus* [2013] EWHC 2436 (QB); or alternatively be raised as a failure to engage in ADR for costs purposes: e.g. *Andrew & Ors v Barclays* [2012] EWHC B13 and as intended in the present case. Therefore legal representatives should carefully advise their clients on whether they could be sanctioned for failure to engage in a relevant scheme at an early stage of instruction.

The problem for the Defendant in *TVZ* was that it could not have it both ways: it could not publicise a scheme that was not held out as privileged at the time of publication and did not bar civil proceedings, and later claim it was privileged when those proceedings arose. In vicarious liability claims in particular, the existence and details of these schemes can provide useful evidence of a defendant's relationship with an individual whose actions are compensated by the scheme but for whom vicarious liability is denied. One imagines that this is the same whether the perpetrators are named in the scheme (as here) or whether circumstances of abuse happen to match the particular perpetrator. However, what is clear from the judgment is that not every Scheme will be admissible: parties should carefully check the wording of the Scheme to identify whether the existence or any part of a scheme is indeed privileged.

The substantive trial is due to begin in October 2021.

A copy of the judgment on the application can be found here.

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