THE COUNTY COURT AT MANCHESTER

Claim No. M17X021

Civil Justice Centre
1 Bridge Street West
Manchester

Friday, 28th April 2017

Before:

HIS HONOUR JUDGE MAIN QC

Between:

CORRINA COOKSON

Appellant

-v-

MANCHESTER CITY COUNCIL

Respondent

Counsel for the Appellant: MR. HUGHES

Representative for the Respondent: MR. O'FARRELL

JUDGMENT APPROVED BY THE COURT

Transcribed from the Official Recording by
AVR Transcription Ltd
Turton Suite, Paragon Business Park, Chorley New Road, Horwich, Bolton, BL6 6HG
Telephone: 01204 693645 - Fax 01204 693669

Number of Folios: 68
Number of Words: 4,891

APPROVED JUDGMENT

1. THE JUDGE: This is the case of *Corrina Cookson v The Council of the City of Manchester*, case reference B17YM656(?). On 14th October 2013 Miss Cookson suffered an accident on a highway on West Mosley Street in Manchester. She suffered a left ankle injury and sought to hold the highways authority – the City Council – liable under the conventional provisions of section 41 of the Highways Act 1980.

2. A claims notification form was issued on 5th November 2013 and initially it appears as though there was a denial of liability, no doubt while investigations were being undertaken. However, it appears as though, later, there was an admission of liability on 18th February 2014, by which time it appears (because there had been a denial),= the matter had fallen out of the Portal. A claim form was issued on 11th June 2015 limited to £10,000 and accompanying that claim form, was a particulars of claim dated 1st June 2015 - that set out a pretty standardised Highways claim. That, in due course, was met with a defence (now within CPR Part 7) which essentially consisted of non-admissions as to the facts or circumstances relating to the happening of the accident, an assertion of the statutory derogation under section 58 of the Highways Act 1980 and an assertion of contributory negligence.

3. The case, now within the ordinary tracked system, came before Deputy Glassbrook on 26th August 2015 in Tameside. The deputy made standard directions which essentially allowed for a completed timetable in November 2015 and it appears as though the matter was then heading for the notification of a hearing date. Meanwhile – and it is not disputed – the defendants, at a fairly early stage, once they became made aware of the claim (although at a time when they were not admitting liability or even after they were making non-admissions only) wanted to have details relating to the nature of the injury because it was clearly in their minds to make a 'without prejudice' offer to settle. One would expect that. It appears as though they sent correspondence. It has been referred to in the papers before me, as it was before the judge in the court below, District Judge Osborne, as I will come to.

4. There was a medical report from Mr Malik. He is a surgeon well known to this court. The insurers wanted to see any medical evidence and they wanted to see the claimant's medical records. In due course, whilst the medical report of Mr Malik was disclosed, the medical records were not. The City Council decided that they were not going to make an offer at that stage but instead persisted in their requests and did so on a number of further occasions, seeking the medical records. The medical records were still not forthcoming and it was as a consequence of the failure to make an offer, notwithstanding the request for the medical records, that in fact the claim form was issued and the matter fell out of the Portal and ended up in CPR Part 7.

5. In due course, it is not disputed, once this matter was within Part 7, the defendants made a Part 36 offer. That Part 36 offer was made on 8th October 2015 – it is agreed the offer complied with Part 36 – offering £5,500 in full and final settlement of the whole of the claim inclusive of interest and, in the event of acceptance within 21 days, confirmation that the defendants would pay the fixed recoverable costs and reasonable disbursements under CPR 36.10. It is not disputed that, in due course, on 15th October 2015, the claimant's solicitors, on behalf of the claimant, accepted that offer and then sought their fixed recoverable costs, which would have to be assessed, if they could not be agreed.

6. In due course, the costs could not be agreed, the bill of costs were prepared, 'points of dispute' were raised and the matter was put in front of the court with a view to a preliminary or provisional assessment. That appears to have been undertaken by District Judge Osborne on paper and he determined that the costs should be restricted and he allowed only the sum of £4,834 on his 'provisional' assessment. That was an assessment that suited the City Council. It did not suit the claimant and therefore, perhaps predictably, the claimant sought to have an oral hearing before the same judge with a view to having a formalised assessment - that took place on 13th January 2017.

7. In the course of that hearing, as the transcription of the hearing confirms – and, in due course, as the learned judge's judgment also I think confirms – the point in issue focussed down to a relatively straightforward point. The judge first considered the behaviour of the claimant's solicitors in their seeming failure, notwithstanding requests which were persisted in, in providing the medical records, which seemingly, as it was put to the judge, had prevented or certainly affected the ability of the City Council to make an offer, which in turn, judging by the correspondence, had then caused the claimants to lose patience and to issue – resulting in the claim leaving the Portal. As a consequence of that, he considered whether that was 'behaviour' which was capable of criticism or not and it is entirely self-evident that the judge took that view it was. As he saw it, in accordance with the 'Overriding Objective', there was an obligation on the parties to try and restrict costs and to encourage settlement, there should have been a response by the solicitors to disclose the medical records, to facilitate settlement and the making of any offer. This behaviour in his judgment merited a restricted costs recovery.

8. He maintained this view having heard oral argument. In effect he made a finding of fact – that there was and had been, so far as the claimant's solicitors were concerned, a premature issue of the claim form that put it into Part 7 - that should not have happened and, had they acted more reasonably, the likelihood is that it would not have happened (although he made no particular finding on that point) with the effect that the case exited the restricted costs regime. On his interpretation of the relevant rules, he found he had a discretion in the circumstances to restrict the costs recovery of the claimant. In his formalised assessment, he maintained his earlier paper assessment in the sum of £4,834 and also allowed an order for costs of £2,264.78 in respect of the costs of the oral hearing. It is against that order that the claimants seek permission to appeal.

9. The matter was considered by His Honour Judge Gore QC. He recognised that a costs determination by an experienced district judge was a difficult matter to appeal against. He observed in his ruling that the threshold was a low threshold, as he put it in his paper determination, and said that there was a potentially realistic argument to be presented in the context of, presumably, the construction of the rules. Therefore, he granted permission on 28th March 2017.

10. In the fullness of time, the court has considered the various arguments presented before the court and of course the skeleton argument served in support of the grounds of appeal on which the appellants rely. There are two grounds of appeal which are identified within the skeleton. The first ground of appeal – which, it seems to me, for reasons I will come back to, is the substantial ground of appeal for current purposes – the judge purported to exercise what he obviously thought was a discretion when in fact, there is no discretion because of the proper construction of the relevant rule and therefore he misdirected himself and made an error of law. Therefore, ground 1 reads at page 36 of the appeal bundle:

"*The learned judge erred in law in restricting the costs to an amount less than those permitted pursuant to the fixed costs regime pursuant to CPR 36.20(2) and CPR 45.13.*"

11. Under ground 2, it is also argued that he erred in law – and it is put as a legal mistake – in determining that the claimant was obliged to disclose medical records prior to the issue of proceedings. For reasons I will return to, I do not take the view that was actually an error of law. It seems to me that it probably was a discretion he was entitled to exercise, as to behaviour on the part of the solicitor in respect of requests made as to whether, in accordance with the 'Overriding Objective', the solicitors had properly sought to participate within a process with a view to effecting settlement and that, therefore, that was a matter within the jurisdiction of the court - it then was a question of mixed fact and law as to whether to make a costs consequence. This is not, in my judgment, therefore, a ground 2 case. It is, however, a ground 1 case and ultimately argument in this case has focussed on whether, on a proper construction of the rules, the judge erred in law in conferring upon himself a discretion to restrict the costs recovery outside what would be the ordinary restricted costs regime under CPR Part 36.20(2).

12. It has to be remembered that this is a case where the matter had fallen away outside of the ordinary protocol, which would effectively bring the matter within the scope and interpretation of Part 45.29. That deals with claims which no longer continue under, for these purposes, the public liability pre-action protocol where there is a fixed recoverable costs regime. It is also a case where, as it is agreed, a Part 36 offer to settle had been made by the defendants and, in due course, had been accepted by the claimants with the provisions of Part 36.20 having been engaged. The heading in the rules provides the costs consequences of acceptance of a Part 36 where section 3A of Part 45 applies. I think it is agreed that that part of this particular part of the rule is engaged on the facts here.

13. Part 36.20(1) provides as follows:

"*This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).*"

I interpose: just so here. Paragraph 2 continues:

"*Where a part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in table 6B, 6C or 6D in section IIIA of part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.*"

It is agreed on the face of it, as I understand it, that this case does fall within the potential provisions of Part 36.20(2).

14. In the course of his determination, the district judge, having formed the view that there was relevant behaviour which was going to be potentially condemned in costs on the part of the claimant's solicitors, he asked himself the question as to whether, in these circumstances, his hands were tied in essentially enforcing the requirements under sub-rule (2) of Part 36.20 with a view to offering the relevant table 6B, 6C or 6D costs for the relevant stage that the case had reached, at the time of acceptance of the Part 36 offer. He considered, or presumably considered, the nature of the wording which is set out therein and, as my attention has been emphasised and drawn to in the course of

submissions, the wording is, "*The claimant is entitled to the fixed costs*." The question is this: is that a mandatory requirement, if it is a Part 36 case within the scheme of Part 36, which does not permit of a discretion to be exercised and therefore for a judge to depart from the fixed costs regime or is it one which, because of the structure of the rules themselves and the scheme which the rules are designed to implement, gives rise to the need for the incorporation or inferring of a discretion?

15. The submissions that have been made by Mr Hughes, who appears on behalf of the appellant, is that, looking at the ordinary wording of sub-rule (2), the use of the phrase "*is entitled to*" really connotes only <u>one</u> meaning - that is that there is an <u>obligation</u> and that there is no discretion because the draftsman could easily have used the word "*may*" or words to that effect or, in due course, made the provisions of sub-rule (2) subject to some sort of proviso or restriction in any given circumstances and, as he has observed, it does not and, in the absence of any such restriction or proviso or limitation, and in the face of what appears to be clear words, then there is no discretion and, once the case falls within Part 36, then that is it – if there is an order for costs to be made, it has to be assessed in accordance with the fixed costs set out within that sub-rule. It is actually a straightforward submission.

16. District Judge Osborne expressed himself in the course of his judgment in this way – let me just read into this judgment the way that he addressed it – he turned to the provisions of Part 36.20(2), which he plainly was prepared to consider whatever the position had been set out in advance of the hearing, and he says:

> "*The issue of course is this: what would then a defendant do? This is where there has been the situation that I have described with a premature departing from the portal where they could make a part 36 offer, or not as the case may be."*

He then went on to say:

> "*Does that mean that they would not have dared make a part 36 offer at all but would have had to solider on to trial or suffer the automatic consequences of CPR part 36.20(2)?"*

On his reading of the rules, he went on:

> "*It cannot mean that. Clearly, if the defendants contends that issue had been premature, they must be entitled to make some kind of offer to resolve the proceedings without being bound by the terms of 36.20(2). I think the answer is, as has been cited to me by the defendant, in 36.20(1):*
>
> > *'This rule applies where a claim no longer continues under the RTA Protocol pursuant to 45.29A.*'
>
> *It is simply the case here, in my view, as I have said, there was premature issue, the case should never have exited that procedure. Therefore, having ruled that it was prematurely issued, I conclude that 36.20(2) has no application and that 36.20(1) would be the applicable rule*."

17. So far as the defendants are concerned, they entirely support that determination. Indeed, the expression of the district judge and the reasoning he applies is how it was presented

to him, I assume, in the course of the hearing before him. Indeed, the skeleton that is presented on behalf of the respondents to this appeal, essentially seeks to confirm the rationality of the making of that determination and supporting it.

18. CPR Part 36 is a self-contained code in respect of the potential settlement of litigation which, if it is abided by, gives rise to certain rights and obligations under the provisions of Part 36. It has been said so many times. I have said so in many judgments of my own – the Court of Appeal have confirmed its status as a self-contained code but it is not the only way in which a party can seek to resolve litigation because, within the ordinary provisions of Part 7, it is still available to any party to make an offer – whether it is called a 'Calderbank' offer (probably a misnomer) or whether it is called an 'offer to settle without prejudice to costs' - there are variations on this theme.

19. A court has a broad discretion under Part 7 to determine, under CPR Part 44.2, the nature of offers made, whether they are made under Part 36 or whether they are made in the broader sense either in open correspondence or in privileged correspondence 'without prejudice to costs'. When the learned judge sought to elide the options of the defendant as though they were only within Part 36, that was a mistake. There plainly were alternatives available had the defendant sought to exercise the judgment to make either an open offer or to make an offer that did not comply with Part 36 but was made 'without prejudice subject to costs'. When the learned judge sought to say, "*What else could they do?*", implying that there was no other way in which the City Council could have made any offer to settle he plainly misdirected himself. He either forgot the other alternatives or simply confused himself in restricting himself to CPR Part 36.

20. Plainly, this is a case where Part 36 was engaged. If Part 36 had not been engaged and the case had left the portal prematurely and there was behaviour capable of criticism by the court, then there could have been a costs order made under Part 44.2 that would have reflected any conduct in the context of the general behaviour of the litigation and the proper costs determination thereafter. The case would not then have fallen within Part 36.20 and, therefore, there would have been no need to consider the strictures as they appear at Part 36.20(2). The judge seemingly did not see this alternative.

21. Quite separately, in his submissions, Mr Hughes has taken my attention to authority in the Court of Appeal. I have not on the whole found that, on the facts of this case, to be all that helpful. There are a number of authorities in the bundle presented to me: the case of *Butt v Nizami*, which I think is quite a well known case, but that has not been argued in the case before me; similarly, the case of *Davies & Others v Greenway*, which is a more recent case but not on point, I do not think, so far as today's hearing is concerned.

22. The focus of the submissions has been in respect of the second appeal in *Kilby v Gawith [2008] EWCA Civ 812*, a decision from May 2008 before the Court of Appeal involving the then Master of the Rolls, Sir Anthony Clarke, Lady Justice Arden and Lord Justice Dyson, sitting with a costs assessor, Master Hurst. To stand back from this in parenthesis, it does not get any better than that. It was a decision and second appeal from the earlier determination, which itself was an appeal, from His Honour Judge Stewart QC (then the designated judge in Liverpool). The case effectively involved a quite separate determination in respect of 'success' fees and conditional fee agreements and the question of disbursements. None of that is relevant for current purposes but the judge at first instance, in determining the appeal from the costs determination by the

deputy district judge, took the view that – and it might be argued a surprising view on first reading – and there the court was concerned under Part 44.11(1) – when the rule itself referred to the word "may", that did not connote a discretion but gave rise to a mandatory obligation. Although, on the face of it, it is a surprising conclusion, Judge Stewart QC concluded that the use of the word "may" not only was capable of amounting to the word "shall" (which of course is an imperative) but in fact, on the facts of that case, actually did mean "shall" for those purposes.

23. The learned judge explained how he came to that conclusion. The matter went to the Court of Appeal and, although the Court of Appeal was not satisfied as to all the reasoning of Judge Stewart QC (as he then was), they were satisfied for the reasons they themselves explained that, for the purposes of that interpretation of the rule, the word "may" in that rule did in fact mean "shall". In the course of various dicta – it is obvious that the members of the Court of Appeal – Lady Justice Arden and Lord Justice Dyson – agreeing with the Master of the Rolls, accepted that, if the connotation seen more generally within the structure of the scheme, meant that the court had to give effect to what the draftsman really meant to bring about in the scheme and give consistency to the scheme, if that meant that a given word had to be given a different meaning, then so be it.

24. The reason why I have not found it a helpful case is that that was a case where the word "may" had been used and Judge Stewart and the Court of Appeal determined that that actually meant "is" or "shall" or "is entitled to". They are my words but that ultimately was the conclusion. In other words, what appeared to connote a discretion did not actually give a discretion when properly constructed. As I have observed in the course of this appeal, "context" is all to give substance and consistency to the aims of the scheme which the Rules purport to underpin – there is a necessary corollary – even where a mandatory form of word is used construed in terms of the scheme more specifically a discretion can be found. There is no reason why it is a one-way door here - it can work either way.

25. In the event, I entirely agree with Mr Hughes' submission that, on its face, there is no doubt Part 36.20 was engaged here on the facts. I have also no doubt that the words "*is entitled to*" is a mandatory requirement. It does not on its face connote a discretion. It seems to me that the judge, in determining the outcome of this case, should have set that out. He did not. Instead, he sought to confuse himself that Part 36 was the only option open to the City Council. Having confused himself and ignored the fact that offers could be made outside Part 36 that could and would have costs consequences. He has simply got it wrong.

26. Therefore, it seems to me that ground 1 of this appeal has to be allowed.

27. I have said at the outset that I am not attracted by ground 2 of this appeal because ultimately, as a quite separate question, a judge is always entitled to say of a party and his conduct, that he/she does not like the behaviour. The fact is that there was no room for that behaviour to fall into this assessment here. That is why the appeal is allowed. It is a ground 1 case. Therefore, I do not need to deal with ground 2. In fact, if it was ground 2, that would be essentially a factual determination as to whether behaviour could be criticised. Whether it could or could not, would fall within the ordinary discretion of the judge actually and it seems to me that I would not criticise or seek to set aside myself a determination of a very experienced judge in these circumstances.

Therefore, I am not going to determine this case in relation to the second ground of this appeal. The appeal succeeds.

(End of judgment)

(Discussions as to costs followed)
