IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

[2020] EWHC 3830 (QB)

No. QA-2019-000258

Royal Courts of Justice
Strand
London, WC2A 2LL

Friday, 27 November 2020

Before:

MR JUSTICE ROBIN KNOWLES CBE

B E T W E E N :

JAMES WEST — Claimant

- and -

JOSEPH OLAKANPO — Defendant

MR G. EDMONDSON (Solicitor Advocate, Gavin Edmondson Solicitors) appeared on behalf of the Claimant.

MR R. MALLALIEU QC appeared on behalf of the Defendant.

J U D G M E N T

(Transcript prepared from Microsoft TEAMs recording)

MR JUSTICE ROBIN KNOWLES:

1 On 10 October 2016 there was a car accident involving two vehicles. One of those vehicles belonged to the claimant. The claimant alleged that the second vehicle was a vehicle driven by and owned by the defendant. The central issue between claimant and defendant was whether the defendant and his vehicle were there or not.

2 The defendant supported his alibi with evidence from a third party and his mother, together with timesheets from his work place. The claimant challenged the alibi with (a) a photograph subsequently supported by evidence going to its timing, together with (b) the existence of a business card attributed to the defendant and (c) evidence of what have been termed 'scuff marks'.

3 The claimant, on 11 May 2018, made a Part 36 offer; at the time that was not accepted by the defendant. The case was allocated to the Fast Track. In the event, on 15 November 2018 a Part 36 offer was accepted late by the defendant.

4 The claimant, through Mr Gavin Edmondson, highlights that in the period between the making of the Part 36 offer, and its ultimate acceptance, there had been developments in the case. He describes them as "game changing" events. They include (a) points by reference to the list of documents on the part of the defendant, (b) the claimant's location of the business card that I have mentioned, (c) the defendant's witness statement evidence, (d) third party witness evidence being the subject of a successful challenge to an accompanying hearsay notice, and (e) the defendant not answering Part 18 questions put to him by the claimant.

5 On 28 August 2020 His Honour Judge Hellman, sitting in the County Court at the Mayor's and City of London Court, considered and decided an application on the part of the claimant that the defendant should pay costs on an indemnity basis under CPR 45.29J. That hearing followed a hearing for directions and other matters before His Honour Judge Wulwik.

6 The conclusion reached by Judge Hellman was that costs should be paid by the defendant on the indemnity basis under CPR 45.29J. That rule provides, so far as material, as follows:

> "(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H."

The hearing today has been of an appeal against the decision of Judge Hellman, and it is brought with the permission of Judge Hellman himself. Given the terms of CPR 45.29J, the inquiry of Judge Hellman and the examination before this court centred on the presence or absence of "exceptional circumstances making it appropriate" to order, in this case, indemnity costs.

7 The claimant, by Mr Edmondson, emphasises that in this type of litigation, which is heavily addressed within the rules and related procedural arrangements, a party in the position of the defendant should be taken to appreciate that when they accept a Part 36 offer they may face a request for fixed costs in accordance with the relevant table under the Rules, or they may face an application under CPR 45.29J as happened in the present case.

8 The claimant, through Mr Edmondson, urges that if it was in the contemplation of the defendant that they should not have to pay indemnity costs then that should have been made clear at the point of considering and accepting the Part 36 offer. It might also be said that transparency could have been achieved by the claimant making it clear, as it left the Part 36 offer in place, that if the offer was accepted then an application under CPR 45.29J would follow. These points are really about the level of communication between the parties. Had it been higher, it might have reduced the level of argument that has, in the present case, followed.

9 The central area of alleged exceptional circumstances said to make it appropriate to order indemnity costs concerned the allegation by the claimant against the defendant that the defendant's case was thoroughly dishonest. Mr Edmondson has put the dishonesty allegation in strong and straightforward terms, and did so, on the face of it, before Judge Hellman. In his decision, the principal passages within which Judge Hellman addressed the dishonesty aspect are at paras. 24 to 26 with cross-reference also to para. 28. There is no difference on this appeal between Mr Edmondson, for the claimant, and Mr Roger Mallalieu QC, for the defendant, that dishonesty is capable of being an exceptional circumstance.

10 Taking the treatment at paras. 24 to 26 of the judgment of Judge Hellman, the Judge said as follows:

> "24 In the present case the dishonesty alleged goes to the heart of D's case. It is in that sense akin to fundamental dishonesty by a claimant. D avers that neither he nor his car were involved. D says that when the accident took place he was two hours away. If falsified, such factual averments would not merely be dishonest: as they go to the core of D's case they would be exceptional.
>
> 25 There is no need for an oral hearing to determine whether D was dishonest. D had the opportunity to put in evidence in response, he chose not to. I am well equipped to determine the issue of dishonesty. I can do so without a mini-trial.
>
> 26 I find the allegations that D was dishonest are proven. There is the evidence of the photograph of the car and the metadata. That evidence was damning. I cannot think what explanation for it there could be except that D's car was the other vehicle involved in the accident. D proffered no alternative explanation. He adduced no evidence to challenge the metadata. He did not suggest that someone else was driving his car. The evidence of the business card and the scuff marks corroborates his case: the scuff marks are consistent with D's car being involved with the accident, and the business card is indicative that D was the driver but they would not in themselves have been sufficient to establish dishonesty solely on the face of the papers. I agree the court should be slow to uphold allegations of dishonesty without hearing live evidence but this is a very clear cut case."

11 There are a number of observations to make in relation to those paragraphs:

(1) The first is that at para. 24 the judge acknowledged that there were "factual averments" in the case on the part of the defendant.

(2) At para. 25 the judge goes on to reference the opportunity that the defendant had to put in "evidence in response". It is important in the present case to recognise that that evidence in response would be additional to the evidence that was already in the case and which had conveyed the "factual averments". That includes the statement of case of the defendant supported by a statement of truth.

(3) When the judge said at para.25 that he was: "well equipped to determine the issue of dishonesty . . .without a mini-trial" it should be understood that that was in response to a submission from the defendant that was made at the hearing before Judge Hellman, and can be seen within para. 24 of the skeleton argument of counsel for the defendant on that occasion – not Mr Mallalieu QC but Mr George Davies of counsel.

(4) In the course of para.26, and the word "damning" is an illustration, it was quite clear that the judge recognised the power of the argument and evidence available to the claimant, but the central point is whether the judge should have reached a conclusion at that point, however apparently powerful the evidence was.

(5) In the course of para.26 the judge includes the point that the defendant did not suggest "that someone else was driving his car". This is a passage that Mr Edmondson puts forcefully in the centre of opening his oral argument. It is correct, but it is a scenario. The question was whether a scenario was possible other than the scenario of dishonesty alleged by the claimant. Ultimately, that question would require all possible scenarios to be brought within ultimate consideration.

(6) As emphasised by Mr Mallalieu what one does not find in para. 26 is the judge including a treatment of the evidence that had been submitted by the defendant in the course of the case. It is true, as Mr Edmondson emphasises, that the defendant did not update that evidence in the light of developments since; and did not take the opportunity to do so. Those, too, are powerful points, but the question remains whether it was appropriate to reach a conclusion in the way that Judge Hellman did.

12 In the present case, in order to prevail with the allegation of outright dishonesty that the claimant levelled against the defendant, it would be necessary to test the evidence that the defendant had given. This was not a case where a defendant had no evidence in his name at all. It is not a case where the defendant did not turn up at a trial. Mr Edmondson asked me to draw adverse inferences against the defendant for his failure to take up what Judge Hellman describes as: ". . . the opportunity to put in evidence in response." But I neither have a precise formulation of the specific inference that it is said should be drawn, nor do I consider that an inference would go very far at all when it is not a case of no evidence, but just a case of not adding to the evidence.

13 In his written submissions at para. 40 Mr Edmondson said:

> "C is simply baffled as to how D can say that the principles of natural justice were abandoned when they clearly made a conscious decision or a negligent omission, or a tactical decision which backfired, not to file witness evidence."

That, of course, I understand to refer to the decision not to file the "evidence in response". It is not accurate to say that the defendant had not filed any witness statements at all. He had done so in the course of the case and, of course, it is the very contention and counter contention that was the subject of the underlying litigation that features in the current battle which is over whether or not there was fundamental dishonesty.

14 In the present case perhaps, on reflection, the position would have been clearer to both parties had, at the directions stage before Judge Wulwik, there been a discussion about the nature of the hearing that would ultimately be required. As I have indicated by reference to para. 24 of the defendant's skeleton before Judge Hellman, the defendant did contend that a mini-trial would be necessary if there were to be findings of dishonesty against the defendant. His evidence would need to be tested. It is true that the defendant did not put a request for a mini-trial at the forefront of his argument; indeed, his argument was that because a mini-trial should be avoided so the application in the present case under Part 45.29J should not proceed further. It is also the case that the defendant did not actively apply for a mini-trial, but the defendant did make it clear enough that it was contended that a mini-trial would be needed if conclusions were to be reached on the allegation of fundamental dishonesty.

15 It is to be noted as well that Judge Hellman did not say, in the course of his decision, that if the defendant had wanted a mini-trial in the sense of the defendant's position being that if the court was proposing to continue it would need a mini-trial, the judge did not say that the defendant should have asked for that at an earlier point, for example at the stage of directions, and that it was now too late. Instead, Judge Hellman took the view that he should proceed beyond the point of observing that the evidence was "damning" or powerful to the point of reaching a conclusion at the hearing, and without there being a test of the evidence that the defendant did have.

16 In the present case, I take the view that in this respect Judge Hellman fell into error. I am not to be taken to be saying that in no case could a conclusion be reached without a mini-trial; each case will turn on its facts, but the present case is one in which – giving all respect and latitude to the discretion and judgment exercised by the learned Judge – I do conclude that he fell into error; perhaps that is to be pinpointed by the absence of treatment, within para. 26, of the evidence that the defendant had in fact put into the case.

17 The point has been emphasised by Mr Mallalieu that the case was settled by the presence of the Part 36 offer and its acceptance, albeit late, with the claimant knowing all along the defendant's case, and therefore the claimant having well in mind what the claimant thought about that case. That is a consideration, as with all relevant circumstances, that comes into the picture in a particular case, but it is not, in my judgment, conclusive; I do not need to take it further given the appellate role to which I am confined. Suffice to say that on this appeal I accept that the decision of Judge Hellman to reach the conclusion that he did of dishonesty without testing the defendant's evidence at what would be a mini-trial, and to use that as the basis of his decision to award indemnity costs is wrong.

18 There was part of the argument on the part of the defendant to the effect that the claimant should have moved this case to the multi-track if it wanted to run the type of allegation it

wishes to run against the defendant. Suffice to say I do not think the claimant is to be criticised in this case for not moving the case to the multi-track, and I record that point.

19 Although in the course of argument, the individual grounds of appeal were addressed in turn, it was, I think, recognised on both sides that whichever way the matter is approached, the central question was simply whether the judge was entitled at the point that he did to find the exceptional circumstances that he did, and I can rest with that conclusion without dissecting individual grounds.

20 There is a further point raisede, and this turns to a different aspect, that is the aspect of late acceptance of the Part 36 offer; not just late acceptance, as Mr Edmondson emphasises, but late acceptance plus no good reason being put forward for the delay. The judge dealt with this primarily at para. 27, although again it is cross-referenced to para. 28 of his judgment. At para. 27 he said:

> "As to the delay in D's acceptance of the Part 36 offer, I am not satisfied that this is itself an exceptional circumstance, although it is something to weigh in the balance when considering whether, all aspects of the case considered, exceptional circumstances had been made out. D's solicitor's letter of 21 November 2018 implies that the delay was due to D's reluctance to accept his solicitor's advice, but that is speculation. Certainly, there was no good reason put forward for the delay. On the other hand, it is not unusual for parties to settle at the doors of the court, sometimes with great reluctance on the part of at least one of them."

21 In summary, and I think this is common ground as well, the Judge took the view that the combination of late acceptance plus what was described as 'no good reason' put forward for the delay would not have reached the threshold of exceptional circumstances making it appropriate to order indemnity costs in the present case. I am invited to reach a different conclusion to that of the learned judge. In this case, on its facts, I am not persuaded that I should, and I identify with the net conclusion reached by the learned judge. As para.28 makes clear it would only be if dishonesty could be added to the delay, and absence of good reason for delay, that the judge would have found that there were exceptional circumstances, and I have expressed my decision in relation to the dishonesty point. What is left when that is taken out of the picture, is not, in my assessment, sufficient, but more importantly it was not sufficient in the assessment of the learned judge.

22 In those circumstances I must allow the appeal. I will hear any argument on incidental matters.

L A T E R:

23 I have taken into account everything that has been said, and scrutinised the relevant schedules, and I have reached the conclusion that, on a standard basis, I should allow the scheduled figure in full for the hearing below, and the figure on the appeal that I should allow, and this is inclusive of VAT, is £20,000. So, as per schedule below, and £20,000 as a final VAT inclusive total on the appeal hearing.

CERTIFICATE

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This transcript has been approved by the Judge.