Case No: B74YM281

IN THE COUNTY COURT AT BOLTON

Blackhorse Street
Bolton
BL1 1SU

Wednesday, 15th June 2016

BEFORE:

DISTRICT JUDGE SWINDLEY

BETWEEN:

NICOLE CHAPMAN

Claimant

- and -

TAMESIDE HOSPITAL NHS FOUNDATION TRUST

Defendant

MR A McKIE (instructed by Scott Rees & Co) appeared on behalf of the Claimant

MR M SMITH (instructed by Weightmans LLP) appeared on behalf of the Defendant

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Judgment
(As Approved)

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DISTRICT JUDGE SWINDLEY:

1. This has been the hearing of an unusual application, certainly not one which I have come across before. I said somewhat flippantly just before lunch that Deputy District Judge Herzog should have acceded to the parties' application, yesterday, to take this matter before a regional costs judge which would have avoided my having to address this novel but somewhat thorny issue. However I am entirely satisfied it was appropriate for me to deal with it and Judge Herzog's decision was entirely correct.

2. It's an occupier's liability claim. The Claimant alleges that she went to the Defendant's A & E Department and whilst there she slipped on a leaflet on the floor (quite probably a solicitor's leaflet advertising their services), as a result of which she fell and incurred injuries which are set out in the report, which is on the file, from Dr Ballin.

3. Occupier's liability claims now, of course, are commenced in the Portal but this case it dropped out of the Portal. Therefore Part 7 proceedings were issued and they proceeded in a fairly normal fashion, but close to trial they were discontinued and that discontinuance followed some discussions between the parties' solicitors. As a result they sent a consent order to the Court on 8th April, which I had to amend because it provided at paragraph 2:

> (It is ordered that) "the Claimant withdraws her claim for damages."

Of course, the Court has got no power to do that, a common error, but being somewhat pedantic I simply converted that into a recording that the Claimant withdrew her claim for damages, but the crucial part of the order was at paragraph 2 of the order as issued:

> "The Claimant's entitlement to costs (if any) pursuant to CPR 44.2 and 44.11 and the level of those costs should be dealt with by a hearing, 15th June at 11 a.m."

4. The provisions of CPR 44.11 are not in fact germane, though they relate to misconduct in relation to assessment proceedings, but the relevant consideration is, of course, CPR 44.2. That starts off headed: "The Court's discretion as to costs, 44.21:

> "(1) The Court has discretion as to –
>
> (a) whether costs are payable by one party to another;
>
> (b) the amount of those costs; and
>
> (c) when they are to be paid."

And it goes on at 44.2.4:

> "In deciding what order (if any) to make about costs, the Court will have regard to all the circumstances, including –
>
> (a) the conduct of all the parties;"

And 44.2.5:

> "The conduct of the parties includes –
>
> (a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre- Action Conduct or any relevant pre-action protocol;

(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 its 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."

But of course, that final provision is not germane to the issues here.

5. And what the Claimant says is that the Defendant's conduct in dealing with this claim has been such that the Court ought to implement the punitive provisions of 44.2.4 and
5. The provision of that part of the rules is designed to be part of the Court's cost controlling mechanism and to provide a means whereby the Court can impose a penalty on a party who has mis-conducted litigation. And it does have to be said really here, that the Defendant's conduct of this matter has been entirely unacceptable and egregious. It is typified by the first letter in the bundle.

6. The situation here was that this was not an unusual claim. It was a claim by somebody who had gone into the Defendant's premises and slipped as a result, she would say, of contamination of the floor. So it is not an unusual or exotic claim, it's the kind of claim which the Courts are fully familiar with and which practitioners dealing with these matters should also be fully familiar with.

7. The matter is now being dealt with on behalf of the Defendant by Weightmans. At that stage it was being dealt with by the NHS Litigation Authority and I hazard a guess at the number of claims, occupier's liability claims, brought against the Health Service, dealt with by the Litigation Authority must be enormous. They should be familiar with dealing with these claims and appreciate the relevant issues.

8. The letter of 16th February, the first correspondence on the matter:

> "We refer to the above and previous correspondence. We have completed our investigations and confirm liability is denied. Our investigations have revealed that the Trust have no evidence of the incident occurring and therefore, put your client to strict proof that the incident occurred as alleged.
>
> Please note the Trust have no documents to disclose."

In an occupier's liability case, of course, the Claimant clearly has to establish that the accident occurred as she alleges. She then has to also satisfy the Court that the occupier of the premises, in this case the Tameside Trust, have not taken such steps as were reasonable to provide for her safety whilst using the premises.

9. Accordingly the issues which the Court would have to deal with were firstly, whether the accident occurred as claimed as a pure issue of fact and, of course, in relation to that the Defendant may have information in that the accident may have been witnessed by its staff. But often it will be the case that it has no direct evidence, in which case its entirely appropriate for it to say to the Claimant "well you prove that it happened". It is in relation to the second element that its response really was entirely unsatisfactory. The Litigation Authority must have been aware that once the Claimant had satisfied the Court that the accident had occurred as she alleged, it was then up to

it to establish to the Court's satisfaction that it had a suitable system in place and the Court would clearly expect that system to be documented.

10. Under the Pre-action Protocol ("PAP") the Trust -- or the Litigation Authority on behalf of the Trust, was under a duty to set out, not on a fully pleaded basis but concisely, what its case was and in particular, was then under an obligation to provide documentation. That is dealt with in the rules under the Pre-action Protocol for PI claims and appears at page 2385 in the present White Book, paragraph 265:

> "The Defendant should also enclose with the response, documents in their possession which are material to the issues between the parties, and which would be likely to be ordered to be disclosed by the Court, either on an application for pre-action disclosure, or on disclosure during proceedings."

Clearly in any proceedings such as this claim the Court would have made an order for standard disclosure. Disclosure would have to be given of any documentation which set out the system and in particular, any records to confirm that the system was indeed being complied with. It is one thing to say we have this system, a piece of paper which says "this is what our system is", it is another thing for the Court to be satisfied that in fact that system is being properly implemented. The obligation was on the Defendants to provide at that early stage that documentation. This reflects the "cards on the table" ethos incorporated into the CPR to try and deal with issues at an early stage and avoid, whenever possible, litigation. It obviously would be somewhat burdensome for the Defendant. It would require somebody at the Trust to go through the documentation to pull out the appropriate pieces of paper. One would not have thought that it would be that difficult, but it was an obligation they were subject to. It is not here a case of the Defendant not dealing with disclosure. The Litigation Authority state in terms "we have no documents to disclose". That, perhaps not unreasonably, was taken by the Claimant's solicitors as an indication, somewhat unbelievably, that in the Defendant did not have any systems, because otherwise they would clearly have documentation to disclose. Had the Defendant failed to address the issue of documentation the Claimant would have probably issued an application for pre action disclosure. Such an application was inappropriate because the Defendant's legal representative had said that the Defendant did not have any documents.

11. So, proceedings were issued, a defence was then filed. The defence again put the Claimant to proof at paragraph 1, but goes on at paragraphs 2(a), 2(c) to set out that it has a proper system in place. It says:

> At paragraph 2a "Relevant risk assessments have been performed prior to the Claimant's attendance at the Trust. The Defendant took such care as is reasonable to ensure the Claimant would be reasonably safe when attending the premises" and
>
> At paragraph 2(b) "The Defendant employed contract cleaners to clean the area and regularly inspect it to ensure the floor was clean. In addition all employees are trained to look for and report any hazards."

So the Defendant is specifically pleading that they have a system in place for ensuring, as far as they can, that the premises are safe. It must be borne in mind that the obligation under the 1957 Act is not absolute but is to take reasonable steps. That

was fully appreciated by the Claimant's solicitors, who were aware of the Ward v. Tesco decision and cited it repeatedly to the Defendant's representative.

12. The Court made the usual directions, including a direction for disclosure. The Defendant's first disclosure was made on 5th January 2016 in the usual form. It is important to appreciate that that form was signed -- one never knows who it is signed by because somewhat strangely this form does not mirror the statement of truth provisions which require the name of the signatory to be given, but it is signed on behalf of the Defendant and it states:

> "I certify that I fully understand the duty of disclosure and to the best of my knowledge I have carried out that duty. I fully further certify that the list of documents set out in or attached to this form is a complete list of all documents which are or have been in my control and which I am obliged under the order to disclose."

In fact, all of the documents which are listed at page 10 are

i. Trust assessments for slips, trips and falls:
ii. Trust's slips, trips and falls policy.

ii. Standard cleaning schedule for Accident & Emergency."

So they are saying at that stage, not as they had said previously, "we have not got any documents," but they are saying, "we have documents and these are all the relevant documents" and there is a certificate to that effect signed by somebody on behalf of the Defendant.

13. What then happened is quite clear from the correspondence and documentation which I have been shown, that issues were raised by the Claimant's solicitors and they were then drip-fed further documentation, culminating in the disclosure at the end of February of 2016 of the crucial documentation, which was the Mitie documentation, Mitie being the cleaning contractor engaged by the Defendant to whom reference is made in paragraph 2 of the defence. The crucial documents are in fact documents 10 and 11, that is the Mitie cleaning rota for the year from week commencing 15th December 2014 and a copy of Mitie's daily work schedule for the A & E Department. That is the documentation upon which the Defendant is relying to say, not only that it has a proper system in place and has taken reasonable steps to ensure that visitors to its premises are safe, but also that that system is being implemented and is in operation. That documentation should have all been supplied back at the beginning of the proceedings, before issue and clearly demonstrates that the final paragraph of the Litigation Authority's letter of 16th February 2015 is, in pure and simple terms, false.

14. What then happened was that after a further short flurry about photographs, the Claimant's solicitors reviewed the matter, took further instructions and then held discussions which resulted in the discontinuance of the claim, having reached the agreement with Weightmans which was recorded in the order made by me on 8th April.

15. The Defendant's behavious in the conduct of this litigation was entirely unacceptable. It's exactly the type of conduct which Part 44.2 is designed to address. Under the modern costs provisions, of course, the costs sanctions become increasingly

important. The Claimant's solicitors are pursuing these matters, PI claims, and at the end of the claim are recovering costs which are fixed and which are not by any stretch of the imagination, generous. There is a danger of -- I am not saying it has happened in this case -- this is a pure inadequacy of approach by the Litigation Authority and the Trust, but there is a danger that defendants and their representatives will cause difficulties in the course of litigation, so as to run up the work which claimant's solicitors are having to do in the knowledge that those solicitors cannot recover costs reflecting that work. And of course, it always has to be borne in mind the provisions of CPR 1.3, that the parties to litigation have an obligation to assist the Court to further the overriding objective. The overriding objective firstly being to try and avoid costs and the issue of proceedings if at all possible, which is the whole purpose of the pre-action protocol, of course and secondly, when such claims are brought that they be dealt with in an efficient manner, in a proper manner so as to avoid excessive costs, involving public resources, delay and so on.

16. Various issues have arisen, the first is the question of evidence., Mr Smith makes the valid and very fair point that, strictly, there is no evidence that has been filed by the Claimant in support of his or her contention that the claim would have been abandoned at an early stage had the Defendants produced the documentation which they were under an obligation to produce. Clearly there should have been a statement by Ms Ireland that should have been in proper form and should have been provided. I do not have that. What I do have is a detailed skeleton argument prepared by Ms Ireland, which, whilst it does not bear her signature, does at the end bear her name and is clearly a document produced by her of which she is the author. It is not endorsed with a statement of truth, but of course, I have discretion under Rule 3.10 in relation to errors of procedure and so on and I am satisfied in the circumstance that it is appropriate for me to treat the factual content of that document as evidence. And I am satisfied on the balance of probabilities that had the NHS Litigation Authority produced under the PAP the documentation which they should have produced, i.e. the risk assessments and most crucially the Mitie documentation, then the claim would not have gone any further. There clearly was misconduct on the part of the Defendant.

17. The matter does not rest there, however, because this is a fixed costs case and it is suggested by Mr Smith that it is a binary system and that you either get the fixed costs or none at all, the fixed costs for a settlement at that stage would have been £3,790. Issues of indemnity also arose, they were in fact raised by me, I set that particular hare running. But I have been referred to, I cannot remember whether it was High Court or Court of Appeal decision, which indicates that the indemnity principle does not apply in cases covered by the fixed costs regime.

MR SMITH: It is Simon J, sir.

DISTRICT JUDGE SWINDLEY: Thank you.

18. I am satisfied that the provisions of Rule 44.2 can be applied. It would be a nonsensical situation if the rules which are provided by Rule 44.2 to give the Court the power to impose sanctions to penalise those who abuse the system, and clearly there has been abuse here by the Trust and possibly by the Litigation Authority initially representing them. I am certainly not suggesting that Weightmans have been

dealing with it improperly, they are obviously having to deal with what information they are supplied. But it would be a nonsensical situation if the rules, in an appropriate case where the fixed costs regime did apply, precluded the Court from imposing the sanctions provided under Rule 44.2 and 44.2, of course, gives the Court an unqualified discretion. I do not accept that I am bound by the Part 45 scales, but I clearly have to bear them in mind. It would be nonsensical if the Claimant's solicitors could achieve a windfall and recover more costs than they would have done had the matter gone to trial or settled in favour of the Claimant at the stage that it was discontinued. That would be absolutely nonsensical.

19. The approach taken by Ms Ireland in her submission as to costs seems to me entirely appropriate. What she basically says is, had we been successful we would have been awarded our base costs (that is the costs without the added 20% of damages) which at that stage were £3,790, but had we not proceeded after we had been supplied with the appropriate documentation by the Trust Litigation Authority, we had already incurred some costs, the scale figure for those would be £950 and the accordingly the appropriate way of dealing with it is to set one against the other and award the Claimant's solicitors £2,840 plus VAT. I am satisfied that is an appropriate way of dealing with the matter and I award that sum, plus the fee for Mr Ballin's report at
£426, which I calculate to be a total of £3,834. In relation to the various costs or the Court fees rather, I see that Scott Rees have already written to the Court sending the forms completed by their client to get a return of the fees, she apparently being someone who was exempt from the payment of fees.

20. Accordingly, I make an order in favour of the Claimant for £3,834.

(Cost submissions and order)

MR MCKIE: Sir, could you give me that figure again please?
DISTRICT JUDGE SWINDLEY: £3,834.

MR MCKIE: Sir, can you just----

DISTRICT JUDGE SWINDLEY: Have I got it wrong?

MR MCKIE: The medical report, have you allowed the medical report----

DISTRICT JUDGE SWINDLEY: Yes.

MR MCKIE: ----of£426.

DISTRICT JUDGE SWINDLEY: Yes.

MR MCKIE: Did you -- there is no allowance for -- sir, there was also responses to part 35 questions and a witness summons of the two----

DISTRICT JUDGE SWINDLEY: Well the witness summons again is----

MR MCKIE: Will be within the remission, yes.

DISTRICT JUDGE SWINDLEY: ----will be covered by the remissions.

MR MCKIE: Yes. Yes, it is £3,834 which is the £2,840 plus VAT plus the fee of Mr Ballin, which is £3,834.

DISTRICT JUDGE SWINDLEY: Yes.

MR MCKIE: Oh yes, sorry. Sir the £90 was Part 35 questions to Mr Ballin, so there are two lots of £50 in relation to the witness summons, so----

DISTRICT JUDGE SWINDLEY: Oh sorry, yes, I have missed that----

MR MCKIE: Yes.

DISTRICT JUDGE SWINDLEY: Oh sorry, yes, yes I have missed that

MR MCKIE: So that makes sir, £3,924.

DISTRICT JUDGE SWINDLEY: £3,924.

MR SMITH: Just before you finalise that.

DISTRICT JUDGE SWINDLEY: Yes.

MR SMITH: I have not seen vouchers in relation to either of those or indeed the documents.

MR MCKIE: You have a----

DISTRICT JUDGE SWINDLEY: I have got a certificate -- well, are those documents available, have we got the whole file here?

MS IRELAND: I have not got the whole file here, but they were originally filed with the first costs schedule that was withdrawn, in fact it is still not paid sir.

MR MCKIE: Well sir, Ms Ireland is an officer of the Court and if she tells you that that they have been----

DISTRICT JUDGE SWINDLEY: Oh, I do not doubt that those are the charges, that is not what I say what is said. I do not doubt whether the charges. Often the voucher will say at an hourly rate of to assist----

MR MCKIE: Are you referencing the Part 35----?

MR SMITH: No, just purely from the quantification the quantification order. Here we are, it is all right, I have got them. Report with review, it does not say any more, it does not say what the hourly rate is.

DISTRICT JUDGE SWINDLEY: It would not normally be on there on a medic report.

MR SMITH: Well that is usually the downfall.

DISTRICT JUDGE SWINDLEY: I mean, you say -- again, it a matter in my discretion. Do you say that's an inappropriate figure Mr Smith?

MR SMITH: So far as the report is concerned, no. So far as the questions are concerned, I simply have not seen them.

DISTRICT JUDGE SWINDLEY: For a medic to receive a set of questions, then to go back, look at his file, look at his report, compose his response, the figure seems quite modest.

So that just leaves the question of the costs of----

MR SMITH: Which becomes £3,924, is that agreed?

MR MCKIE: It does, yes.

MR SMITH: Yes.

DISTRICT JUDGE SWINDLEY: It leaves the costs of this little shindig, doesn't it.

MR MCKIE: I do not have a schedule. It raises the question, sir, of whether today -- well, there are two ways I can deal with it. It raises the argument as to whether it is a fixed cost case, a fixed application under the rules which would mean a standard fee in accordance with table A and B, but I would make an application under Part 45.29(J), which re costs outside fixed recoverable costs in respect of the application. This is an application that has involved a bundle of documents skeleton arguments from both sides, two hours worth of costs argument and I now seek an order that those costs be assessed.

MR SMITH: It cannot work.

MR MCKIE: But failing that, I accept that I am stuck with----

DISTRICT JUDGE SWINDLEY: Costs should have been summarily assessed.

MR MCKIE: Yes. I do not have a schedule.

MR SMITH: Sorry, I interjected too early. That argument cannot work for two reasons. Number 1, there is no schedule and number 2, the application under CPR45.29(J) - I entirely accept this case is exceptional. This is not normal, that is the way the Court's judgment started. But of course, the application is to take it outside of fixed costs whereby the indemnity principle would apply, whereby the Claimant would have to satisfy you of a need to pay the costs and they are not prepared to do that, they rely on (inaudible) and that cannot apply here.

DISTRICT JUDGE SWINDLEY: Well I am not satisfied. It would be again a nonsensical situation if solicitors acting for the Claimants in this situation on cases which were normally on a fixed basis did not have to prove indemnity. But in relation to an abuse where they have incurred costs, wasted effectively, because of the Defendant's abuse that they then should not be able to recover those. If the fixed costs regimet is a non-indemnity system then that must apply to ancillary matters, but there is no schedule, there clearly should have been.

MR MCKIE: There should have been and I apologise, but the correct sanction, if there is no schedule, should be costs to be assessed if not agreed, but the Claimant bears the costs of the assessment exercise in those circumstances.

MR SMITH: Whether it is a question of preparing one skeleton argument and one brief to counsel, to suggest that those costs should be the subject of a detailed assessment is wholly disproportionate, in my submission.

MR MCKIE: Well, it is not only that, it is the cost of preparing a bundle. It is the cost of preparing the skeleton argument, all of the documents, reviewing the defence----

DISTRICT JUDGE SWINDLEY: Again, this all should have been----

MR MCKIE: ----it should, I accept, but there is a sanction that you can attach to that sir, and it is that the Claimant bears the cost of the assessment exercise whatever the outcome.

DISTRICT JUDGE SWINDLEY: Yes. I find that is appropriate. I am sure that will in practical terms, prevent the matter from coming back before the Court. So, I will order the (inaudible). The Defendant to pay Claimant's costs pursuant to CPR 44.2 of £3,924. 2. The Defendant do, 2.1, pay the Claimant's costs of today's hearing of and associated with today's to be assessed unless agreed.

MR MCKIE: Sir, can the order reflect that 45.29(J), because I do not want it to come to the assessment exercise of the costs and then the fixed argument be raised again at that stage, because the Court has resolved that issue today by sir saying that it is a non- indemnity system and therefore, in the light of abuse costs of the application are -- the effect of my learned friend concession that it is an exceptional case, therefore 45.29(J) kicks in. And if my learned friend has----

MR SMITH: I ought to respond to that. This Court's jurisdiction and with making the costs order, what law then applies to that is a matter for the Court in whose hand the

matter falls. This Court by all means -- and I do not seek to constrain anybody's voice -- this Court by all means can express the view that the indemnity principle no longer applies, but that would not bind the judge who follows.

DISTRICT JUDGE SWINDLEY: What I will do is, I will not provide for that, but I will provide for any detailed assessment to come back before me. 2.2 Any detailed assessment is reserved to DJ Swindley. 2.3 Unless the Court is satisfied that the Defendant has behaved unreasonably, the Claimant shall not be entitled to recover any costs of the assessment.

MR SMITH: Sir, I know that is not what you have -- I know that is what you have just written down by way of your order. That was not the order that my learned friend----

DISTRICT JUDGE SWINDLEY: What were you seeking Mr----

MR SMITH: What my learned friend conceded was that his clients should have to pay the costs of any assessment proceedings.

MR MCKIE: Yes.

DISTRICT JUDGE SWINDLEY: Sorry, yes. Shall bear the costs of any assessment. Yes, that must be right. I will put in the additional proviso, additional proviso, of course, because the absence of (inaudible) saying happened that the Defendant could behave entirely unreasonably, reject an entirely sensible figure of costs and force the matter to come back before the Court and there should be sanctions about whether that happened.

Right, thank you very much.

MR SMITH: Sir yes, and thank you for sitting beyond one o'clock.
