General liability newsletter

February 2019

Costs order upheld against litigant in person

Litigants in person are often given a generous amount of flexibility when it comes to compliance with rules of evidence and court rules generally, so that the court does not appear to penalise a Claimant unduly for lack of knowledge about such things. However, the litigant in person in *Ogiehor v Belinfantie* [2018] EWCA Civ 2423 (2 November 2018) (Lindblom and Irwin LLJ) pushed this flexibility too far when he blatantly flouted the rule that without prejudice offers must not be made known to the trial judge until after judgment has been given.

The Claimant had failed before the trial to respond to the Defendant's expert evidence based upon surveillance, which showed the Claimant driving and lifting heavy objects (which the Claimant had alleged he could not do). In attempting to counter the suggestion at trial that he was exaggerating his claim, the Claimant replied that if the Defendant had thought that his claim was fraudulent he would not have been offered £10,000 in settlement.

The Claimant had been warned beforehand by defence counsel not to disclose the existence of the offer to the judge, who had no alternative but to stop the trial, recuse himself and order a new trial. The trial judge ordered the Claimant to pay the wasted costs of £11,000 to the Defendant.

The Claimant thought that this was unfair, and appealed the decision.

The Court of Appeal decided the Court's treatment of the Claimant was not unfair. He had deliberately disclosed a without prejudice offer to the trial judge; he had been warned against doing so by counsel; the judge tried to stop the Claimant from disclosing the offer but he had carried on regardless. Also, the Claimant had failed to comply with previous orders. Even if the Claimant did not understand the without prejudice rule, he must have appreciated from the efforts of others to stop him that in mentioning the offer he was doing something that he should not do. That amounted to improper conduct justifying an award to the Defendant. The Court's assistance to litigants did not extend to allowing them not to observe the rules.

Accordingly the Court of Appeal agreed with the trial judge that it was appropriate for the Claimant to pay wasted costs to the Defendant.

Any comments or queries?

Gavin Reese
+44 20 3060 6895
gavin.reese@rpc.co.uk

Nick McMahon
+44 20 3060 6896
nick.mcmahon@rpc.co.uk

Jonathan Drake
+44 20 3060 6718
jonathan.drake@rpc.co.uk

Judgment allegedly obtained by fraud cannot be set aside through same proceedings

In *Summers v Fairclough Homes* [2012] UKSC 26, the Supreme Court decided that the Court had the power under its inherent jurisdiction and under the Civil Procedure Rules to strike out a statement of case at any stage of the proceedings, even when it had already been determined that the claimant was, in principle, entitled to damages in an ascertained sum.

The Supreme Court in Summers said that such a power would be used only in exceptional circumstances. In *Terry v BCS Corporate Acceptances Ltd and others* [2018] EWCA Civ 2422 (2 November 2018) the Court of Appeal considered that using the Court's inherent power or the Civil Procedure Rules to strike out a default judgment on the basis that the claim was fraudulent was not appropriate.

In Terry the Claimant had obtained judgment in default of a Defence being filed, and in an application to have the default judgment set aside the Defendants relied upon the Summers judgment and a witness statement from the Defendant's solicitor alleging the Claim was fraudulent and an abuse of process. The applications having been dismissed, the Defendant appealed to the Court of Appeal.

The Court of Appeal agreed with the first instance judge that where a party sought to overturn a judgment on the basis that it had been obtained by fraud, the appropriate course of action was to bring a new action seeking to set aside the judgment and detailing the explanation for setting the judgment aside in a fully pleaded case.

The Court of Appeal decided that there was no good reason why the Defendant should not have adopted such a procedure. Accordingly, the attempt to set aside the judgment by other means, and to seek to do so without the need properly to plead and prove fraud, was misconceived.

Document not recorded by the court deemed not filed

In *Extreme Adventure Ltd v Dolan and others* [2018] EWHC 3040 (IPEC) (2 October 2018) the Defendant maintained that an Acknowledgement of Service had been hand-delivered to the Court on 4 January 2018. The Court had no record of the Acknowledgement of Service on its file and when the Claimant applied to have default judgment entered, granted the application.

The Defendant's application to have judgment set aside was dismissed on the basis that an Acknowledgement of Service and a Defence are filed if they are recorded on the court file as having been filed. If there is no such record, they have not been filed.

The judge said that if there was very clear evidence that something must have gone wrong within the Court system, that might form a sound basis for the Court to exercise its discretion, but nevertheless the document would still not have been actually filed.

This case could be regarded as compelling argument for filing documents at Court electronically, in which case the Court will automatically acknowledge receipt of the email. However, the acknowledging Court email does not actually confirm the document being filed at court, and copying in the opponent to the original email would provide additional evidence supporting an argument, if needed, that the Court actually received a document but lost it.

Failure to serve medical report and schedule of loss with proceedings not fatal to claim

In *Stephen Mark v Universal Coatings & Services Limited and Barrier Limited (23 November 2018)* [2018] EWHC 3206 (QB) the High Court considered whether failure to comply with CPR Practice Direction 16 paragraph 4.3 was something for which relief from sanctions must be obtained. PD 16.4.3 says that a personal injury Claimant must serve a medical report and schedule of loss with the Particulars of Claim.

At first instance the judge decided that failure to comply with PD 16.4.3 was sufficient for him to strike out the claim.

On appeal, however, the High Court judge not only decided that the Practice Direction did not contain an implied sanction, but that failure to serve a medical report and a schedule of loss in complex injury claims was relatively commonplace and not in the same category of seriousness as, for example, failure to serve Notice of Appeal on time.

The Appeal judge said that the provisions of PD 16.4 are intended to be directed towards simple claims rather than complex claims (such as the claim under Appeal) where initial medical reports and schedules of loss tended to be unhelpful and uninformative. In the context of a significant personal injury claim he thought that striking out a claim was not a proportionate. He considered that a more proportionate approach would be to take steps such as an application for an Unless order and costs penalties.

The Appeal judge gave the example that in a simple personal injury action such as a road traffic accident claim, there will usually be no difficulty in serving a medical report and schedule of loss with the Particulars of Claim such that the Defendant may assess the merits of the claim and if advised, make settlement offers.

Whilst this decision does not assist in determining when a case will be regarded by the Court as a simple claim where compliance with PD 16.4 is expected, the overriding sense is that in cases of non-compliance the Court will regard applications for Unless orders to be made rather than strike-out applications.

A party cannot buy relief from sanctions by offering to pay costs

In *BMCE Bank International plc v Phoenix Commodities PVT Ltd and another* [2018] EWHC 3380 (Comm) (19 October 2018) the Defendant's solicitor overlooked a deadline for filing a costs budget, which was eventually filed two weeks late.

The automatic sanction for this was that the Defendant was treated as having filed a costs budget comprising only court fees. The Defendant's application for relief from sanctions was not made until the morning of the costs Case Management Conference, and without any prior warning. No doubt realising that any chance of success required significant concessions, the Defendant's solicitors had undertaken to pay both the parties' costs thrown away at the CCMC and any subsequent CCMCC on an indemnity basis.

However, that was not enough to escape sanction. The judge considered that although the undertaking reduced the prejudice to the Claimant, the effect on the Court and other litigants had to be taken into account. Almost all the time allocated for the CCMC was spent addressing the application for relief which, if granted, would make a further CCMCC necessary. If a defaulting party could negate any prejudice to the other party by paying costs, then the principle underlying CPR 3.9 (Relief from sanctions) would have no effect and be undermined.

Whilst payment of costs was a consideration, it was only one of the factors to be taken into account as part of all the circumstances.

Court's discretion in considering whether to disapply limitation

In a case based upon interesting and unusual facts, the High Court permitted a Claimant to pursue his claim against his GP after the expiry of the limitation period even though there was no doubt that the Claimant had actual knowledge of the allegedly negligent act that formed the basis of his claim.

In *David Ellis v (1) Heart of England NHS Foundation Trust (2) University Hospitals Birmingham NHS Foundation Trust (3) Swayam Iyer (20 December 2018, High Court)* [2018] EWHC 3505 (Ch) QBD the Claimant alleged that his GP, the Third Defendant, had inadequately examined him in February 2013, leading to delay in urgently-needed treatment which led in turn to the development of epilepsy, disruption of his cognitive and behavioural functioning, and permanent left-sided weakness.

Letters of claim were sent by the Claimant's solicitors to all three Defendants in May 2015. Following agreed extensions of time, including an extension to the limitation period, the Third Defendant denied liability. Because the Claimant had no favourable medical report, the claim against the Third Defendant was dropped in September 2016. The other two Defendants agreed further extensions of the limitation period up to 27 January 2017. Shortly before that date, the Claimant obtained a favourable opinion and issued proceedings against all three Defendants. The Third Defendant maintained that the claim against him was statue barred (which it clearly was) and the Claimant asked the Court to exercise its discretion in his favour under s33 of the Limitation Act 1980.

The judge allowed the claim to proceed on the basis that it was just and equitable to do so, following the principles set out in *Chief Constable of Greater Manchester v Carroll* [2017] EWCA Civ 1992. In particular the judge decided there was no justification for qualifying the Court's s33 discretion through the application of case law relating to relief from sanctions. The correct approach was to look at the matter broadly and decide where the balance of prejudice lay.

The relevant prejudicial factors in this case were:

- relatives of the claimant had visited the Third Defendant early in March 2013 to discuss his delay in referring the claimant to hospital. He therefore knew at that stage that there might be a claim for damages
- the Third Defendant was aware of the claim in May 2015 and had been able to notify the Medical Protection Society, record his recollections, and discuss the matter with his solicitors
- he had been able to send a letter of response in March 2016 following an extension of time which he had asked for
- he had been able to fully consider, investigate and respond to the claimant's allegations well within the primary limitation period
- the agreement to extend the primary limitation period suggested that he and his legal team were content, at that stage, that the extension would not prejudice his ability to defend the claim
- the Third Defendant had not identified any prejudice to the investigation, preparation or presentation of his defence caused by the delay.

In contrast if the Claimant could not pursue a claim against the Third Defendant the prejudice to him would be profound. It would be wrong to criticise him for not pursuing his claim sooner, because of the previous adverse medical opinion. It was accordingly just to allow the claim against the Third Defendant to proceed.

Statistical data on life expectancy is permissible in appropriate cases

Medical experts often give an opinion within their reports on the likely effect of a Claimant's pre-existing medical condition on life expectancy. This is common for example in mesothelioma claims. However, in *Stephen Mays (a protected party by his litigation friend, the Official Solicitor) v Drive Force (UK) limited (4 January 2019)* [2019] EWHC 5 (QB) the Claimant was severely injured in a fall at work and the instructed medical experts were unable to comment on all aspects of the Claimant's pre-existing medical conditions and lifestyle in relation to his life expectancy.

The Defendant sought permission to instruct an expert in life expectancy to give an opinion on the effect on the Claimant's life expectancy of his pre-existing hypertension, obesity, colitis, and his smoking habit. Such opinion would include analysis of statistical data. The Claimant's representative objected.

The judge decided that in high value claims such as this (with a value of at least £1.5m) and where a difference in life expectancy could make a significant difference to the sum awarded, it was appropriate to allow the parties to instruct a life expectancy expert to prepare a report which included analysis of statistical data. However, because such data was open to challenge, it was for the trial judge to decide on the cogency of the data alongside the opinions of the other medical experts when determining the likely life expectancy of the Claimant.

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18809

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000