Accident claim - reasons for granting the second defendant an extension of time to file expert evidence and for ordering costs on an indemnity basis

[2018]JRC155

ROYAL COURT
(Samedi)

29 August 2018

Before : Advocate Matthew John Thompson, Master of the Royal Court

Between	**Oliver Paul James Newman**	**Plaintiff**
	(by his Curator Paul Richard Newman)	
And	**Wayne Rafael de Freitas de Lima**	**First Defendant**
	The Motor Insurers' Bureau	**Second Defendant**

Advocate G. N. R. Pearce for the Plaintiff.

Advocate L. A. Ingram for the Defendants.

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JUDGMENT

THE MASTER:

Introduction

1. This judgment contains my reasons for granting an extension of time to the second defendant to file expert evidence and for ordering the second defendant to pay the costs of and occasioned by the hearing on an indemnity basis.

Background

2. The plaintiff's claim is for damages following very serious injuries due to a road accident involving the first defendant. The second defendant was pursued because the first defendant was uninsured. The second defendant therefore has led the defence to the plaintiff's claim.

3. Proceedings were commenced in 2016. While liability was admitted, both defendants argued that the plaintiff was partly to blame for the accident. Ultimately, this issue was resolved by agreement recorded in a consent order dated 10th May, 2017.

4. On 6th June, 2017, I therefore gave directions in relation to the assessment of damages which was the sole remaining issue in dispute after the question of contributory negligence had been resolved. The main issue between the parties was the extent of the plaintiff's injuries and therefore the level of care required for the remainder of the plaintiff's life. In summary I ordered expert evidence to be disclosed in stages. Stage 1 concerned the central medical evidence describing the plaintiff's injuries and a report relating to the plaintiff's earning prospects but for the accident. The plaintiff was to provide its reports by 22nd December, 2017 with the defendants responding by 30th March, 2018.

5. Stage 2 evidence concerned evidence from a neuropsychologist and evidence from various therapists. This was to be provided by the plaintiff on 23rd February, 2018 with the defendants responding by 25th May, 2018. This evidence was dependent upon and followed on from the medical evidence to be disclosed by stage 1.

6. Stage 3 concerned evidence that related to care and case management and accommodation which followed on from the evidence of the therapists required by stage 2. This was also to be produce sequentially with the plaintiff's experts producing their reports by 27th April, 2018 and the defendants responding by 27th July, 2018.

7. The rationale for ordering sequential exchange of evidence was to allow the defendants an opportunity to indicate how far they accepted the evidence filed by the plaintiff. If any part of the evidence was not going to be challenged, this avoided the cost of further reports for areas not in dispute.

8. The parties were then to return for further directions at the end of May 2018.

9. This timetable was varied by an order dated 17th January, 2018 because witness statements of fact were exchanged late and the plaintiff also wanted additional expert evidence but did not provide the appropriate justification until shortly before the hearing on 17th January, 2018. The Act of Court of 17th January, 2018 essentially adopted the same approach in terms of the staging of evidence as the Act of Court of 6th June, 2017. The plaintiff was therefore to provide its Stage 1 evidence by 26th January, 2018, with the defendants responding by 4th May, 2018; for Stage 2 the plaintiff's evidence was to provide by 23rd March, 2018 with the defendants responding by 22nd June, 2018.

10. The plaintiff duly complied with the directions of 17th January, 2018. However the defendants failed to file the stage 1 medical evidence on 4th May, 2018. Advocate Pearce on behalf of Benest, Corbett Renouf on behalf of the plaintiff by an email dated 10th May, 2018 sought an explanation from Advocate Ingram for the second defendant as to when the defendants' stage 1 expert's reports were to be produced. No response was received to that email.

11. A chasing email was sent on 5th June, 2018 also reminding Advocate Ingram that experts in the field of neurology/respiratory medicine and employment had been directed to hold a meeting of experts by 22nd June, 2018 no response was received to this email.

12. A further email was sent by Advocate Pearce on 19th June, 2018 enclosing the last of the plaintiff's stage 3 reports and also again chasing for the defendants' stage 1 reports and indicating that an application to court was likely. There was also no response to this email.

13. Accordingly, on 25th June, 2018 a summons was issued seeking disclosure of the stage 1 reports within 24 hours failing which the second defendant's answer should be struck out. An alternative order was sought re-fixing a time frame for expert meetings in the event that the stage 1 expert's reports were disclosed. The summons was returnable on 16th July, 2018.

14. The plaintiff's skeleton argument was filed on 12th July, 2018. The second defendant filed its skeleton argument on 16th July, 2018. By an email dated 11th July, 2018, I also asked Advocate Ingram on behalf of the second defendant for an explanation of why the timetable previously set had not been complied with because Practice Direction RC17/05 at paragraph 20 requires any explanations to be set out in writing. This led Advocate Ingram to send an email dated 16th July, 2018 which states as follows:-

"The submissions put very succinctly are as follows:

The delay with the filing of the stage 1 and 2 evidence have been delayed following a combination of the following:

My inability to be able to secure appropriate experts in the majority of the disciplines, within the time frames directed.

Where certain experts have been identified and contacted, they have been either unwilling or unable to meet the deadlines as directed.

Where other experts have been identified they either cannot/will not accept instructions from the MIB.

Since the middle of May, I needed to hand over the day-to-day conduct of the file to my assistant Miss Wise and she has been attempting to contact and instruct those experts required to comply with the directions.

Miss Wise is on a conference call at the moment and having considered her notes, I see that the Defendant has now secured and instructed experts in all disciplines save for ophthalmology and those who would need to visit Mr Newman are providing their availability to attend before him during August subject of course to his needs and wishes. Reports in all areas of stage 1 and 2 have been directed to be completed and filed prior 21 September 2018, or earlier.

I fully accept that the fault lies with my inability as set out above."

The parties' submissions

15. Advocate Pearce for the plaintiff ultimately contended that the Court had a discretion as to what sanction to impose for a breach of an order by reference to the changes to Rule 6/26 of the Royal Court Rules 2004, as amended ("the Rules") introduced by Royal Court (Amendment No.20) Rules 2017. Rule 6/26(12) as amended provides as follows:-

"(12) If any party fails to comply with an order made under the provisions of this Rule, the Court may, of its own motion or on the application of any other party to the action, make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, that the answer or other pleading be struck out and judgment entered accordingly."

16. The change introduced was to allow the Court of its own motion to impose whatever sanction was appropriate. This gave the Court a wide discretion.

17. The discretion in Rule 6/26(12) was supplemented by paragraph 25 of Practice Direction RC17/05 which stated:-

> ***"25. Where a party fails to comply with a direction given by the Court, any other party may apply for an order that the defaulting party should comply or for a sanction to be imposed or both."***

18. Paragraph 27 of the same Practice Direction stated as follows:-

> ***"27. In deciding what order to make where there has been a failure to comply, the Court will:-***
>
> ***a. as far as possible endeavour to ensure that existing trial dates are not adjourned;***
>
> ***b. direct that any steps required to be taken are taken in the shortest possible time;***
>
> ***c. impose an appropriate and proportionate sanction for non-compliance;***
>
> ***d. make such orders to costs as are appropriate including wasted costs orders against a party and/or a party's legal representative."***

19. This is why the plaintiff sought production of the stage 1 evidence within 24 hours.

20. As Jersey now had in Rule 1/6 an overriding objective identical to that found in the English Civil Procedure Rules (the "CPR"), the guidance given by the English Court of Appeal in Denton v TH White Limited [2014] 1 W.L.R. 3926 was pertinent. Paragraph 24 of the Denton decision stated as follows:-

> ***"24 We consider that the guidance given at paras 40 and 41 of the Mitchell case remains substantially sound. However, in view of the way in***

which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]". We shall consider each of these stages in turn identifying how they should be applied in practice. We recognise that hard-pressed first instance judges need a clear exposition of how the provisions of rule 3.9(1) should be given effect. We hope that what follows will avoid the need in future to resort to the earlier authorities."

21. Advocate Pearce also referred to Rule 3.9(1) of the CPR which states as follows:-

"3.9— Relief from sanctions

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need—

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders."

22. The approach in Denton allowed sufficient latitude to a judge to deal with matters on a case by case basis.

23. In this case a costs order only was insufficient to address a clear breach that was unresolved.

24. Applying the first limit of the Denton test, the breach was clearly serious. The deadline for the provision of stage 1 and 2 expert evidence had also long passed and yet it was only on the morning of the hearing, when pressed by the Court, had any reasons been advanced for the delay.

25. The plaintiff did not understand this delay because it was aware the second defendant had approached and engaged experts in certain of the fields.

26. The plaintiff was still residing at a specialist unit in England and Wales. It was difficult to assess the impact of any examinations upon him should the Court allow further time for the defendants to produce their expert evidence. While the current care being offered to the plaintiff was being met by the States of Jersey, the case was important because it allowed for an additional level of support to be provided, if the plaintiff was successful to augment the treatment currently being received. The previous interim payments had been exhausted which is why a further interim payment had been requested. The delay therefore had a serious effect on the progress of the plaintiff's case.

27. The delay also meant that further directions to progress the case to trial would be pushed back having the consequence that trial dates could not yet be fixed.

28. The ultimate objective was to try to get the plaintiff in a position to allow him to return to the Island to be closer to family and friends. That could not occur until the Court had assessed or the parties had agreed what compensation was due. The delay therefore had a severe effect.

29. The defendant had failed to apply for a variation before the time limit had expired as required by paragraphs 19 and 20 of Practice Direction RC17/05. These paragraphs state as follows:-

> ***"19. It is essential that any party who wishes to vary a direction takes steps to do so as soon as soon as possible and in particular before any time limit for compliance with the direction has expired.***
>
> ***20. Any such application shall be accompanied by an appropriate written summary and submissions setting out what steps have been taken to adhere to the timetable set, why the previous directions have not been complied with, what variation is sought and its impact on any directions previously given."***

30. Advocate Pearce accepted ultimately what he was asking for was a strike out order albeit the summons asked for the reports to be produced within 24 hours. Advocate Ingram in response firstly contended that the need for the January order was due to the plaintiff's failing to provide its witness statements of facts on time and the requiring additional expert evidence. This meant that

the defendants' experts could not meet the original timeframe. This was relevant to the exercise of discretion.

31. In relation to how the discretion should be exercised, Advocate Ingram reminded me by reference to Cummins v Howland dated 1st September, 2014 reported at [2014] JRC 165 at paragraph 17 as follows:-

> ***"it is not appropriate without submissions on Denton to consider how far the approach of the English courts in the Mitchell and Denton should be followed by the courts in Jersey."***

32. Advocate Ingram did not challenge the first two limbs of Denton namely there was a serious or significant breach and there was no good reason for the breach. He also agreed with Advocate Pearce that the correct approach to adopt was a more general exercise of a discretion rather than giving weight to the factors listed in CPR of 3.9. However he drew to my attention the first sentence of paragraph 44 of Denton which states:-

> ***"44 We should also make clear that the culture of compliance that the new rules are intended to promote requires that judges ensure that the directions that they give are realistic and achievable."***

33. This extract did not mean that Advocate Ingram was arguing that timetables when set were unrealistic or unachievable; rather the above quotation was relevant to how a discretion should be exercised.

34. He also counselled that I should take care not to apply an approach set out in England which was based on a different regime of rules which had not been adopted in Jersey.

35. A more general discretion rather than following the third limb of Denton led to evolution rather than revolution in terms of the development of Jersey's civil procedure rules.

36. The approach of the plaintiff was draconian and effectively amounted to a strike out which had not been asked for.

37. The current position was that all experts apart from one in the field of ophthalmology had now been retained. Arrangements did have to be made for some experts to assess the plaintiff in

person. However the defendants could produce their experts' stage 1 and stage 2 expert evidence towards the end of September 2018. This then allowed for the production of the stage 3 evidence and a directions hearing to take place in early December 2018 to enable trial dates to be fixed at that stage.

38. The effect of the breach was not to postpone trial dates but only to postpone of the fixing of trial dates by some six months.

39. Advocate Ingram, as set out in his email referred to above, accepted that the reason for non-compliance was his fault due to his involvement in another significant case which was at trial.

40. He proposed standard costs because when the plaintiff breached the previous January, a costs order was not sought against the plaintiff because of the nature of the injuries suffered by the plaintiff. This was relevant to how any discretion was exercised.

Decision

41. Where an order has been breached, I agreed with both counsel that the power to make orders in relation to any non-compliance is found in Rule 6/26(12). In interpreting Rule 6/26(12), Rule 1/6, which contains the overriding objective and was introduced in June 2017 by Royal Court (Amendment No.20) Rules 2017 duly the Rules requires me to both give effect to and to interpret rules in light of the overriding objective.

42. In relation to the question I posed in Cummins v Howland as to how far I should follow the approach adopted in Denton, I consider that the first two stages of the approach, as summarised at paragraph 24 of Denton set out at paragraph 20 above, are equally applicable to any breach of any rules in this jurisdiction.

43. In relation to the first of those two questions, what needs to be considered are the orders that have not been complied with and the effect of such non-compliance on the progress of the litigation either to a trial or to a settlement.

44. It is also appropriate for me to ask why an order has not been met. I further agree with the Court of Appeal at paragraph 30 in Denton that it would not be appropriate to describe what may be good or bad reasons. Rather explanations should be evaluated on a case by case basis.

45. There are also other helpful observations in Denton which apply to the conduct of litigation in this jurisdiction. I therefore refer to paragraphs 40 and 41 of Denton which state:-

> ***"40 Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) co-operation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR r 1.3 provides that "The parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.***
>
> ***41 We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new CPR r 3.8(4)."***

46. Where I consider that a different approach should be taken to Denton relates to the exercise of discretion. The third stage of Denton was directly affected by the two factors listed in 3.9(1) if the CPR. The Court of Appeal in Denton stated that these factors were:-

> ***"…of particular importance and so particular weight should be given at the third stage, when all the circumstances of the case are considered."***

47. In my judgment in this jurisdiction, the discretion is a more general one. This discretion still requires me to consider whether the case can be dealt with justly and at proportionate cost and any relevant factors listed in Rule1/6. However, I consider that I am also required to look at the case as a whole and the nature of the proceedings in particular, what is in issue where some form of strike out of a claim is contemplated. In cases involving a failure to issue a summons for directions (albeit pre-dating the overriding objective), the Royal Court has noted that the most severe sanction of striking out a plaintiff's claim should not be applied if there are other sanctions which could be applied which would enable justice to be done between the parties – see for

example Viera v Kordas [2014] JRC 042 at paragraph 19 and Mayhew v Bois Bois [2016] JRC 024 at paragraphs 8 and 9. Whether the failure is to issue a summons for directions required by the Rules or a failure to comply with a particular order, I consider that the same approach should be taken to imposition of sanction which has the effect of striking out a claim or counterclaim or an answer, thus depriving a party of their day in Court.

48. I also consider it may be possible to make orders which fall short of striking out the entire claim. Depending on the breach it may be possible to limit the sanction to striking out part of a case or that if a particular step is not complied with part of the case will be struck out or evidence may not be adduced on a particular issue. There is also the sanction of costs.

49. I have referred to these different possibilities available to the Court because they are all illustrative of the more general discretion available to the Court where a party has not complied with a Court order. In reaching this view, it should not be forgotten that procedure is a means to an end namely a trial or settlement and breaches should be kept in that context. The key issue is therefore the effect of any non-compliance and whether or not a fair trial can take place after a breach. I accept I have to also take into account, if it is right to impose a sanction for non-compliance, whether that non-compliance was either deliberate or there is no justification for it. In every case there will always come a point where the conduct of a party in ignoring Court orders will lead to the ultimate sanction of a case being dismissed even if a trial could still take place. This judgment should not therefore be taken as any indication that non-compliance of any Rules and Practice Directions is acceptable, will be tolerated, or will not, in appropriate cases lead to the ultimate penalty of a claim or answer being struck out.

50. Turning now to the facts of the present case, I have no doubt that the breaches of the January 2018 order were serious and significant. After May 2017 the only issue in dispute is what damages the plaintiff is entitled to as the question of contributory negligence had been resolved. Expert evidence was always going to be at the heart of this issue. That is why directions were given shortly after settlement of the issue of contributory negligence to enable the issue of assessing damages to progress to a trial.

51. The way in which the orders for expert evidence were structured was also favourable to the defendants because it allowed the defendants to decide to what extent it wished to challenge any expert evidence filed by the plaintiff. This was an opportunity for the defendants to narrow the issues in dispute; the fact that the defendants have not taken advantage of this opportunity by filing their expert evidence is an additional reason why the breaches are serious.

52. Thirdly, while the breaches did not lead to trial dates setting being set aside, they have pushed back the date by which trial dates can be fixed and therefore the ultimate date for a trial by six months. This is a failure by the second defendant to help the court further the overriding objective because the claim has not been dealt with as expeditiously as it might have been.

53. In relation to the second question i.e. whether there is any good reason for the excuse, Advocate Ingram, as set out in his email of 16th July, 2018 quoted above, fairly accepted that there was no good reason and the fault was entirely his due to pressure of work. In relation to this extract, at paragraph 41 of Mitchell v News Group Newspapers Ltd [2014] 1 W.L.R. 795 the Court of Appeal stated:-

> ***"We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner."***

54. While Denton sought to modify Mitchell the above extract was cited in Denton with approval. In my view the comments in Mitchell in paragraph 41 apply equally within this jurisdiction. While the profession is smaller than England and Wales, there are many more qualified lawyers than ever before and more to come. The application of the approach in Mitchell in my judgment will not therefore lead to any party not being able to find appropriate representation because an individual lawyer is too busy.

55. In relation to how I should exercise my discretion generally, firstly Advocate Ingram must have known before expiry of the relevant time limits that the orders were not going to be complied with. Where a time limit is not going to be met and this is known to a party, Practice Direction RC17/05 at paragraphs 19 and 20 requires an application to be made before such a time limit expires. The failure to do so is therefore a factor to be taken into account, which counts against a defaulting party.

56. In this case the position is worse because no application was ever made by the second defendant for relief from sanctions. The only summons issued was that by the plaintiff seeking to enforce compliance. A party not in compliance is less likely to incur the Court's displeasure if it acts

promptly to issue an application to vary the order, even out of time, rather than leaving it to the party.

57. Thirdly, Advocate Ingram was at fault for failing to respond to the emails from Advocate Pearce sent on 10th May, 5th June and 19th June, 2018. His failure to respond is an illustration of the failure of lawyers to cooperate as discussed at paragraph 40 of Denton.

58. As against the above, the injuries suffered by the plaintiff were extremely serious and which mean that the amount of compensation sought by the plaintiff is very substantial. There are also complex issues to be determined. The approach of the plaintiff in asking for compliance within 24 hours was effectively asking the defendants to do the impossible and so was an application for an immediate strike out, but by the back door. The sanction sought by the plaintiff therefore went too far in asking for an unrealistic timeframe.

59. It is also right to take into account the overall conduct of the litigation. While the present default by the defendants have delayed the fixing of trial dates, it would be wrong to ignore completely earlier periods of non-compliance by the plaintiff which have also had the effect of delaying a trial. These earlier delays to be clear do not mean that the second defendant's breaches are not serious or significant. Nor do the earlier breaches by the plaintiff provide a good reason for the second defendant's default. However, when looking at the impact of the second defendant's breaches it is appropriate to look at what earlier breaches may have taken place and their effect on a resolution of the trial.

60. This is also not a case where sanctions had already been attached to the orders. Where a party has previously breached the same order with a result that at a later order has been made carrying a sanction, the second or subsequent default, if excused at all, is likely to carry a greater sanction than a sanction for an initial breach. In making these observations I do not wish any party to consider that they can breach Court orders and to assume that their behaviour will be excused. Any party breaching a Court order unless that it is not serious or not significant will have to justify the breach and should expect sanction.

61. In exercising my discretion vested in me I therefore reached the conclusion that a fair trial can still take place because ultimately this depended on expert evidence which can still be produced and that I should allow the defendants more time to file their expert evidence. As Advocate Ingram indicated that the Stage 1 and Stage 2 evidence could be ready by the end of September 2018, I made an order to this effect. However, I also made an order that if any category of expert evidence required under stage 1 and stage 2 was not filed by the end of September 2018 then the defendants would not permitted to call evidence from any expert in any category where a

report had not been produced. The second defendant was therefore given a final opportunity to file its expert evidence. I did not impose a general unless order striking out the entirety of the defence because of the scale and complexity of this particular case. In other cases such an order would be appropriate. Such an order might also be appropriate depending on the specific obligation a party is required to adhere to.

62. In relation to the stage 3 evidence, I gave the second defendant until 23 November, 2018 to file this evidence with such order being a final order. This is because at the date of the application the defendants had not breached the order to file its evidence. However, an extension of time was needed because the stage 3 evidence followed on from stage 1 stage 2. Accordingly, I granted an extension that made the order a final order which means that any non-compliance is likely to carry a sanction if not adhered to. The sanction, unlike the stage 1 or stage 2 evidence however is not automatic at this stage.

63. I further required the second defendant to pay the plaintiff's costs on an indemnity basis. This was for the following reasons:-

(i) No application was made before expiry of the relevant time limit for an extension of time;

(ii) No application was made for relief from sanction;

(iii) There was no response to entirely appropriate communications from the plaintiff asking when compliance would take place; and

(iv) The second defendant's explanation was only filed on the morning of the hearing and following a communication from me.

64. Taking all these circumstances together, the overall conduct of the second defendant in relation to non-compliance with the orders made in January 2018 was not acceptable and justifies the Court expressing its displeasure by requiring the costs of and occasioned by the present application to be paid on an indemnity basis.

Authorities

Practice Direction RC17/05.

Royal Court Rules 2004, as amended

Royal Court (Amendment No.20) Rules 2017

English Civil Procedure Rules.

Denton v TH White Limited [2014] 1 W.L.R. 3926.

Cummins v Howland [2014] JRC 165.

Viera v Kordas [2014] JRC 042.

Mayhew v Bois Bois [2016] JRC 024.

Mitchell v News Group Newspapers Ltd [2014] 1 W.L.R. 795.