Dan Matthews (a patient) who sues by his Receiver and Litigation Friend Andrew James Pace v Metal Improvements Co Inc.

CA on appeal from Wrexham County Court (Deputy District Judge Dowding) before Chadwick LJ; Lloyd LJ; Mr Justice Stanley Burnton. 14th March 2007.

Stanley Burnton J :

Introduction

1. This is an appeal by the Defendant against the order for costs made by Deputy District Judge Dowding on 20 April 2006 when she approved the settlement of the Claimant's claim and gave him permission to accept out of time in settlement of his claim the sum that had been paid into Court by the Defendant pursuant to CPR Part 36. The Deputy District Judge ordered the Defendant to pay the Claimant's costs of the claim, including his costs incurred after the expiration of the period of 21 days from the date of the payment into Court. The Defendant contends that it was entitled to an order that the Claimant pay its costs incurred after the expiration of that period. The appeal is brought with the permission of Pill and Moses LJJ.

2. The appeal raises a point of general application as to the normal incidence of costs where a claimant accepts a payment into court late as a result of new evidence or information indicating that the sum paid into court adequately reflects the value of his claim.

The facts

3. The Claimant, Dan Matthews, was born in June 1944, and is now aged 62. His claim arises out of his accident at work on 21 March 2000. He suffered a minor head injury, but sadly in consequence he developed a hysterical conversion disorder, now known as a dissociative disorder under the ICD10 categorisation of illnesses. It is a disabling but episodic condition. Because of it he is a patient within the meaning of CPR Part 21.

4. Following the accident, the Claimant, through his solicitors, asserted a claim against the Defendant, his employer, for substantial damages, alleging negligence and breach of statutory duty. By letter dated 16 November 2000 the Defendant's insurers admitted primary liability, subject to medical evidence of causation.

5. Coincidentally, in October 2001 the Claimant was diagnosed as suffering from "B" cell non-Hodgkin's lymphoma. The lymphoma has no causal connection with either his accident or his psychiatric condition.

6. The claim form was issued on 6 March 2003. The Particulars of Claim were served on 30 May 2003. In June 2003 the Defendant served its defence, denying liability and alleging contributory negligence.

7. In November 2003, Professor Dyer, the haematologist-oncologist retained on behalf of the Claimant, advised that the lymphoma was very indolent, and that he had a 70 per cent chance of a 10-year survival. As a prognosis in a case of cancer or lymphoma, that was very positive indeed.

8. In June 2004, Doctors Hay and Cutting, the consultant psychiatrists retained by the Claimant and the Defendant respectively, jointly advised that with continued treatment the Claimant's mental illness should remit in approximately 5 years from that date. On that basis, his lymphoma had relatively little relevance to the quantification of his claim.

9. In August 2004, the Claimant served his schedule of damages. It included figures for future loss based on a normal life expectancy. It was subsequently updated.

10. During a medical examination of the Claimant on 6 July 2005, a lymph node in the left supravascular fossa was found which had not been detected a month previously. On 2 August 2005 a biopsy was taken of the lymph node.

11. On 4 August 2005, the Defendant served an amended defence in which they admitted primary liability and alleged contributory negligence.

12. On 8 August 2005, pursuant to CPR Part 36 the Defendant made a payment into Court of the sum offered by them in settlement of the claim. The gross amount of the compensation payment offered was some £520,000, reduced by the amount of specified social security benefits payable to the Compensation Recovery Unit to the sum of £450,000 paid into Court. At that date the Defendant were unaware that a new lymph node had been discovered or of the taking of the biopsy on 2 August or their possible implications for the claim, and those matters played no part in their assessment of its value.

13. On 28 August 2005, 20 days after the payment into court, Professor Dyer updated his opinion. He remained of the view that if the Claimant continued to have low volume extra-nodal marginal zone lymphoma his prognosis would be excellent, probably no different from the rest of the population of his age. However, he referred with emphasis to the lymph node that had been found on 6 July 2005. He stated that a biopsy of the lymph node and a CT scan had been arranged. He was unaware that the biopsy had in fact been taken, but in any event the results of it were not available. Professor Dyer stated that under normal circumstances full restaging, including rebiopsy of any nodal disease, would be mandatory, and added:

   I am concerned that he has developed rapidly enlarging lymphadenopathy, which may herald disease transformation.

   If transformation has indeed occurred, then combination chemotherapy would normally be recommended. The prognosis for transformed disease would be much poorer, of the order of maximally 25% at 5 years.

14. The 21-day period prescribed by CPR Part 36.11 expired without acceptance of the offer or any request by the Claimant's solicitors for that period to be extended. The Claimant's advisors took the view that on a full life expectancy the payment into Court was insufficient. In an email dated 22 September 2005, his solicitors expressly rejected the payment into Court. The email referred to a proposed joint experts' report on the Claimant's life expectancy.

15. In December 2005, the parties agreed an 80/20 split of liability and contributory negligence.

16. It was not until January 2006 that the results of the biopsy became available. They indicated that the lymphoma had become aggressive. In a letter dated 9 February 2006, Doctor Cullen (the oncologist retained by the Defendant) and Professor Dyer jointly advised that the Claimant's life expectancy was approximately 7 years.

17. The reduction in the Claimant's life expectancy compelled his advisors to reconsider the Part 36 payment. They concluded that it would have to be accepted. The Defendant was content for the Claimant to accept it, subject to the question of costs. The Claimant's advisors obtained approval of the settlement from the Court of Protection and applied to the Deputy District Judge for her approval of the settlement and the necessary permission to accept the sum in Court. The costs order that is the subject of this appeal was made at the approval hearing.

The relevant provisions of the CPR

18. It is sufficient to refer to CPR Part 36.20:

36.20 (1) This rule applies where at trial a claimant –

(a) fails to better a Part 36 payment;

(b) fails to obtain a judgment which is more advantageous than a defendant's Part 36 offer or

(c) ...

(2) Unless it considers it unjust to do so, the court will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted without needing the permission of the court.

(Rule 36.11 sets out the time for acceptance of a defendant's Part 36 offer or Part 36 payment)

The hearing before the Deputy District Judge

19. The Claimant's application was heard by Deputy District Judge Dowding on 20 April 2006. The Claimant was represented by Mr Main QC and the Defendant by Mr Nowland of counsel. The Court had before it Mr Main's approval advice. The Deputy District Judge approved the settlement and gave permission for the Claimant to take out the sum in Court in satisfaction of his claim.

20. The issue between the parties concerned the incidence of costs after the expiration of the normal 21-day period for accepting the Part 36 payment into Court (i.e. from 29 August 2005), apart from the Claimant's costs of the approval hearing, which it was accepted would be paid by the Defendant, since those costs would have had to be incurred even if the payment into Court had been timeously accepted. For the Claimant, Mr Main submitted that the Defendant should pay all of the Claimant's costs. The Defendant contended that it should only be liable for the Claimant's costs until 29 August 2005, and that the Claimant should be liable for its costs thereafter, apart from the costs of the approval hearing.

21. The Deputy District Judge acceded to Mr Main's submissions, and ordered the Defendant to pay all of the Claimant's costs. In her judgment, she said that she first had to consider whether it had been reasonable for the Claimant to reject the Defendant's offer when it was made. She said:

2. …. First of all, Mr. [Nowland] refers me to the issue of the life expectancy. Now it is quite clear from the evidence that it is only very recently in the last few weeks that it has become apparent that sadly the Claimant's condition is such that his life expectancy is drastically reduced. So whilst I fully accept that there was an issue raised at a much earlier stage the evidence would appear to have been that there was no real reason to believe that the Claimant's life expectancy was adversely affected. So I am not persuaded by that point that there should be any reason to exercise any discretion in favour of the Defendant rather than the Claimant.

22. The Deputy District Judge then referred to the issue of contributory negligence, and said that it was unlikely to have affected the issue of costs. She then returned to the reasons for the Claimant's rejection of the Part 36 offer and payment into Court. She said:

4. The more difficult question is the expert evidence on the issue of recovery and therefore the proper order for contingency amount, and I accept what Mr. Main tells me that it was the lack of contingency provision which lead to him advising against accepting the offer at the time it was made. The evidence is by no means unequivocal. There is a reference to the balance of probabilities, which Mr. Nolan rightly points out could be fifty-one percent or eight percent or anything else. I think as a matter of common sense and given this Claimant's particular difficulties and the likely difficulty of engaging with the Cognitive Behavioural Therapy, which is not the most straightforward of therapies at the best of times, I think it is reasonable to say that a contingency should have been sought and should have been provided.

23. The provision referred to by the Deputy District Judge was to cover the possibility that the Claimant would not in fact fully recover from his psychiatric condition within the 5 year period jointly advised by the parties' psychiatrists. She concluded:

5. Taking all that into account the question is whether it would be unjust to order payment of costs by the Claimant to the Defendant twenty-one days after the payment into the Court, or alternatively as a second stream, as it were, whether I should simply order the Claimant's costs up to twenty-one days after payment in together with costs of today and make no order for costs thereafter.

6. This is clearly a difficult matter. The Claimant has significant difficulties and whatever those representing him have advised the Court's approval would have to be sought. I take the view that, as indicated, it is proper now to be seeking to accept the payment in. I equally take the view that the reasons for not accepting it were proper and valid. In those circumstances I do not think that it prejudices the Defendant if I exercise my discretion in favour of the Claimant. So the Claimant should have his costs in the usual way.

The submissions before us

24. The submissions before us may be summarised very briefly. For the Defendant, Mr McDermott submitted that the Deputy District Judge had applied the wrong test. She appreciated that the question for her was whether it was unjust to order the Defendant to pay the Claimant's costs after 29 August 2005, but when she addressed that question she considered only whether the Claimant had acted reasonably. The Defendant was entitled to the costs protection given by a successful Part 36 payment, and no valid reason had been identified to deprive them of that protection.

25. Mr Main emphasised the wide discretion enjoyed by the Deputy District Judge in determining the appropriate order for costs, and submitted that she had properly exercised her discretion.

26. Neither Mr Main nor Mr McDermott suggested that any special rule applies to patients, other than that resulting from the need for the Court's approval of any settlement and for its permission to accept the money in Court (see CPR Part 36.18). In addition, in some cases it will be necessary for those acting for a patient to request additional time to consider a Part 36 offer and payment into Court beyond the 21 days provided by Part 36.11.

Discussion

27. Three matters are common ground between the parties, and rightly so. The first is that this Court can only interfere with the costs order made by the Deputy District Judge if she made an error of principle. In ***Summit Property Ltd v Pitmans*** [2001] EWCA Civ 2020, Chadwick LJ said, at paragraph 26:

The first question for this court is not whether it would have made the order which the judge made. The first question is whether this court is satisfied that the basis upon which the judge reached the conclusion that he did has been shown to be flawed. It is only if that question is answered in the affirmative that this court can properly interfere with the exercise of the judge of the discretion entrusted to him. It is only then that this court will go on to consider what order it will make in the exercise of its own discretion.

28. The second is that, as mentioned above, the incidence of costs in the present case is not affected by the fact that the Claimant is a patient. In principle, a defendant in proceedings brought on behalf of a patient is entitled to the same costs protection from his Part 36 offer or payment as a defendant against whom a claim is brought by a competent claimant.

29. The third is that at the approval hearing the same principles fell to be applied by the Deputy District judge to the issue as to the incidence of costs incurred after the last date for acceptance of the Part 36 payment as would have applied if the claim had gone to trial and the Claimant had then failed to do better than the Part 36 payment.

30. It follows from the second and third of these matters that the question for the Deputy District Judge was, as she accepted, whether it was unjust to make the usual order, which is an order that the claimant pays the defendant's costs after the expiration of 21 days from the payment into Court: see CPR Part 36.20 above.

31. The Deputy District Judge referred in paragraph 2 of her judgment to the question of the Claimant's life expectancy and the fact that its drastic shortening had become known only recently. As I understand that paragraph, she concluded that because the Claimant's advisors could not have known that fact earlier there was not on that account any reason to exercise her discretion in favour of the Defendant rather than the Claimant. However, the question before her was rather whether there were grounds to exercise her discretion in favour of the Claimant: it was only if she could properly conclude that it was unjust to order the Claimant to pay the costs in question that she could depart from the usual order. In other words, she did not have the unfettered discretion that the last sentence of paragraph 4 indicates that she believed she had.

32. Secondly, the Deputy District Judge seems to have answered the question whether it was unjust to make the usual order by considering whether it had been reasonable for the Claimant to have rejected the Part 36 payment when it was made and later to accept it. But that consideration, while it may be relevant to the question whether it would be unjust to make the usual costs order, cannot be identified with it. Moreover, she could not sensibly have decided the question of unjustness by reference solely to the Claimant's advisors' assessments of the offer. She would also have had to consider the reasonableness of the Defendant' assessment of the value of the claim. But that was not before her. Her primary function on an approval hearing is to determine whether, at the date of the hearing, it is in the interests of the Claimant to accept the payment. The advice prepared by the Claimant's advisors for submission to the Court as to the adequacy of the Part 36 payment is not disclosed to the Defendant, and they cannot be expected to comment on or to criticise it. Conversely, the Defendant cannot be required to

justify their own assessment of the value of the claim as at the date of the approval hearing, and should not be required to justify the assessment they made when they made the Part 36 payment.

33. Moreover, the Deputy District Judge's approach is based on a misunderstanding of the function of a Part 36 payment or offer. The Defendant may make a conservative payment in the hope that it will tempt the claimant to accept a conservative estimate of the value of his claim. He may make a generous Part 36 payment because he is reluctant to incur the risks and costs of going to trial, and hopes thereby to avoid them. The Defendant may quite properly make a low payment in the hope that events or evidence will favour him: for example, that his expert will advise favourably in due course; that a prognosis of the claimant's injuries which are the subject of his claim will prove over-pessimistic; that cross-examination of the claimant or his witnesses may be successful; or that the trial judge will quantify general or special damages modestly. Conversely, there is nothing unreasonable in a competent claimant rejecting a Part 36 payment in the hope that at trial the judge will take a generous view of his damages. The risks that the parties run are costs risks, in the case of the defendant that he will have to pay all of the claimant's costs, notwithstanding his payment, and in the case of the claimant that he will have to pay the defendant's costs from the last date when he could have accepted the payment. In other words, the function of a Part 36 payment is to place the Claimant on that costs risk if, as a result of the contingencies of litigation, he fails to beat the payment.

34. In my judgment, the Deputy District Judge did not identify any fact that rendered it unjust to make the usual order. There was nothing to justify depriving the Defendant of the protection against costs conferred by their Part 36 payment. Furthermore, she wrongly identified the question whether it was unjust to make the usual order with the question whether the Claimant's advisors had acted reasonably. It follows that she made her costs order on an incorrect basis and this Court is free to substitute its own decision.

35. Before us, neither party submitted that the other had acted unreasonably. Essentially, what has happened is that events have justified the Defendant's assessment of the total value of the claim, and falsified the Claimant's assessment. Changes in circumstances between the date of a Part 36 payment and trial are contingencies inherent in litigation. They cannot of themselves normally justify a conclusion that the defendant should be deprived of the benefit of his payment. It follows that there was no reason to depart from the normal rule.

36. I would however go further. Once they had received Professor Dyer's letter of 28 August 2005, it was apparent to the Claimant's advisors that his life expectancy depended on the results of the biopsy that had recently been taken. His life expectancy was most material to the valuation of his claim. On receipt of that letter, the Claimant's advisors could, and I think should, have asked for an extension of time to consider the Part 36 payment until the results of the biopsy were known; and the parties should have agreed a stay of proceedings until that time. Mr Main rightly said that until the results of the biopsy were known, he could not advise acceptance of the payment. But, as Chadwick LJ pointed out in the course of argument, it was equally the case that he could not advise that it be rejected. But rejected it was. Indeed, the Claimant's schedule of damages dated as late as 2 February 2006 was expressly based on a normal life expectancy and stated that the Claimant's lymphoma was indolent. Sadly, that was not the case, as the joint advice of the parties' oncologists confirmed. The rejection of the Part 36 payment when the Claimant's prognosis was uncertain in my judgment is a further reason why the usual order is the correct order for costs.

37. The result might have been different if the Claimant's solicitors had requested, and the Defendant's solicitors had refused, a stay until the results of the biopsy were known. But that did not happen.

38. For these reasons I would allow the Defendant's appeal, and I would substitute for the order made by the Deputy District Judge an order that the Defendant pay the Claimant's costs of the claim until 29 August 2005 and his costs of the approval hearing, but that the Claimant pays the Defendant' costs incurred after 29 August 2005, apart from the costs of the approval hearing; and that all costs to be paid by either party to the other, if not agreed, should be the subject of detailed assessment, on the standard basis.

Lloyd LJ:

39. I agree.

Chadwick LJ:

40. I also agree.

Peter Main QC (instructed by Walker Smith Way) for the Respondent Claimant
Gerard McDermott QC (instructed by Morgan Cole) for the Appellant Defendant