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Court orders Claimant's Solicitors to Pay Defendant's Wasted Costs Following Late Discontinuance in NIHL Claim

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Mr Anthony Hoy –and– The Secretary Of State For The Department Of Transport, D53YJ502, 17/10/2019

In the above matter, Damian Powell, Instructed by Stephen Symington of DWF, appeared for the First Defendant before District Judge Robinson at Middlesbrough County Court on 17/10/2019 at the hearing of the First Defendant's application for an order that:

- The Notice of Discontinuance filed and served by the Claimant's Solicitors the working day before the multi-track NIHL trial listed on 15th to 17th July 2019 be set aside;

- The Claimant's solicitors pay the First Defendant's wasted costs from a date to be determined by the Court.

Background

The Claimant brought a claim for damages for alleged noise-induced hearing loss ['NIHL'] against a number of his former employers, one of which was the First Defendant. Medical causation was in issue between the parties. In particular, there were disagreements over the effect of the Claimant's asymmetrical hearing loss on a diagnosis of NIHL and on whether the extent of any NIHL the Claimant may be suffering from could be said to be any more than de minimis.

The Claimant had obtained a number of reports from Mr Cox, Consultant ENT Surgeon, who was of the opinion that the Claimant could be diagnosed with NIHL notwithstanding his asymmetrical hearing loss and that such NIHL was not de minimis. The Defendants obtained reports from Mr Johnson, Consultant ENT Surgeon, who opined that the asymmetry could negate a diagnosis of NIHL and that any NIHL the Claimant could prove was de minimis and thus should not be compensated. In the joint statement dated 3rd June 2019, both experts agreed that the asymmetry required investigation with an MRI scan to exclude other pathology. They reiterated their opposing positions on de minimis loss.

Upon the First Defendant's application, in light of the above areas of disagreement between the experts, by order of 10th June 2019, District Judge Cook gave the parties permission to call their respective experts at the trial of the matter on 15th to 17th July 2019. By letter dated 13th June 2019, the Claimant's solicitors informed the First Defendant's solicitors that the Claimant would not be calling Mr Cox to give evidence at trial. Instead, Mr Johnson would be cross-examined by counsel for the Claimant on the basis of the contents of Mr Cox's reports.

Further, notwithstanding that both experts agreed that the asymmetry required investigation with an MRI scan to exclude other pathology, at no stage did the Claimant or his solicitors arrange an MRI scan.

On 8th July 2019, in response to a request from the First Defendant's solicitors as to who was representing the Claimant at the trial on 15th to 17th July 2019, a representative of the Claimant's solicitors emailed the First Defendant's solicitors and said: "Mr X of Y Chambers, Middlesbrough is attending the hearing[1]".

On the basis of this information, at about 9am on 12th July 2019 counsel for the First Defendant telephoned Y Chambers and asked to speak to Mr X about exchanging skeleton arguments. She was told by Mr X's clerk that Mr X had not been instructed to represent the Claimant at the trial on 15th to 17th July 2019.

At about 4pm on Friday 12th July 2019, i.e. one working hour before the close of business on the last working day before the trial was due to commence at 10 am on Monday 15th July 2019, the Claimant's solicitors filed and served a Notice of Discontinuance.

The Law

Damian referred the Court to the relevant procedural rules and case law in this area, including: section 51 of the Senior Courts Act 1981, CPR 46PD 5, CPR 38.4, the Court of Appeal authority of ***Dempsey -v- Johnstone*** [2003] EWCA Civ 1134 ['Dempsey'] and the recent (non-binding) county court judgment in the case of ***Mayfield -v- Matthews & Sheffield Smelting Company*** (D46YJ418, 22nd January 2019), in which wasted costs were ordered against the Claimant's solicitors on similar facts to those in this case.

Damian contended that, applying the above, the Court had to decide four issues in order to determine the application. They were:

a) Did a point in time arrive when the Claimant's case became 'hopeless' and, if so, when?;

b) If the answer to a) is 'yes', is it the case that "no reasonably competent legal representative have continued with the action" after that point in time?;

[1] The name of the barrister and the chambers was given in the email from the Claimant's solicitors of 8th July 2019 and the content of that email is recorded verbatim in the written judgment of DJ Robinson and so it is a matter of public record. However, as the Court's finding is that this barrister and those chambers were not instructed to represent the Claimant at trial, the details of the same have been anonymised here.

c) If the answer to both a) and b) above is 'yes', the Dempsey test is made out and the legal representative has acted 'unreasonably' for the purposes of section 51 of the Senior Courts Act 1981 and CPR 46PD 5. Further, the service of the Notice of Discontinuance was an abuse of process and so should be set aside pursuant to the application made under CPR 38.4. The question that then arises pursuant to CPR 46 PD 5.5 (b) is whether that unreasonable conduct has caused the First Defendant to incur unnecessary costs;

d) If the answer to c) above is also in the affirmative, the final question, pursuant to CPR 46 PD 5.5 (c) is whether a wasted costs order against the Claimant's solicitors is just in all the circumstances. If the answer to that question is also 'yes', a wasted costs order should be made from the point in time identified in a) and/or b) above.

Damian further contended that if there were other 'unreasonable conduct' that could be relied upon in addition to or in place of a) and b) above and/or as amounting to an abuse of process for the purposes of the application to set aside the Notice of Discontinuance made under CPR 38.4. Counsel for the Claimant agreed with this legal analysis and thus this was the structure the Court applied when considering the application.

Submissions

Damian made the following submissions:

a) Did a point in time arrive when the Claimant's case became 'hopeless' and, if so, when?;

The Claimant's claim became 'hopeless':

i. In September 2018 when Mr Johnson's report was served stating that: *"I agree [with Mr Cox] this degree of asymmetry requires an MRI examination to exclude additional pathology…"* and yet the Claimant and/or his solicitors did not obtain an MRI scan; or

ii. On 3rd June 2019 (or within 14 days thereafter to allow the Claimant and his time to digest the contents of the joint statement) when the experts in the joint statement of that date said that they agreed that: "*…the asymmetry has not been caused by noise exposure, and that asymmetry does not necessarily*

iii. *negate a diagnosis of noise induced hearing loss"* and *"…the asymmetry requires investigation with MRI scan"*; or

iv. 13th June 2019 when the Claimant's solicitors sent a letter to the Defendant's solicitors informing them that the Claimant was not going to call Mr Cox to give evidence at the trial on 15th to 17th July 2019. At that point any prospect the Court at trial would prefer Mr Cox's evidence contained within his reports and the joint statement but untested by cross-examination to the evidence of Mr Johnson which was not only contained within his reports and the joint statement but would also be tested by cross-examination and was available to the trial judge for clarification was no more than 'fanciful' and, as such, the Claimant's case on medical causation and thus the whole of his case became 'hopeless' at that point.

b) Would "no reasonably competent legal representative have continued with the action" after that point in time?;

No reasonably competent legal representative would have continued with the action after the points in time identified at i. to iii. above.

c) Has that unreasonable conduct caused the First Defendant to incur unnecessary costs?

The unreasonable conduct of the Claimant's legal representatives in continuing with a hopeless case when no competent legal representative would have continued with the action did cause the First Defendant to incur unnecessary costs, in particular, from June 2019, the costs of preparing the case for trial, including the costs of the expert setting aside time to attend the trial, the costs of the pre-trial conference with the expert, the costs of briefing counsel to attend a 2 day multi-track trial and the costs of this application.

d) Is a wasted costs order against the Claimant's solicitors is just in all the circumstances

In all the circumstances of the case, a wasted costs order against the Claimant's solicitors is just.

Damian further submitted that should the Court find that, on the basis of the content of the email dated 8th July 2019 and the witness statement from the First Defendant's trial counsel in respect of her conversation with Mr X's clerk on 12th July 2019, the content of the email of 8th July 2019 was disingenuous or even dishonest, the

same amounted to improper and/or unreasonable conduct for the purposes of section 51 of the Senior Courts Act 1981 and CPR 46PD 5, in addition to or instead of a) and b) above. Further, such conduct rendered the service of the Notice of Discontinuance an abuse of process and so it should be set aside pursuant to the application made under CPR 38.4.

Judgment

In a 13 page written judgment produced and handed down by District Judge Robinson on 17th October 2019, the learned District Judge made the following findings:

i. The Claimant's claim became hopeless on 13th June 2019 when the Claimant's solicitors informed the Defendant's solicitors the Claimant would not be calling Mr Cox, the Claimant's medical expert, to give evidence at trial, in the knowledge that the Defendant's expert would be giving evidence. In those circumstances, and with the burden of proof on medical causation being on the Claimant, his claim became hopeless at that point (see paragraphs 34 to 41 of his written judgment);

ii. The email sent by the Claimant's solicitor on 8th July 2019 stating that Mr X "is" attending the trial on 15th to 17th July 2019 to represent the Claimant *"…was not only disingenuous, but was dishonest"* (see paragraphs 42 to 45 of the written judgment);

iii. It follows from i. above that no reasonably competent legal representative would have continued with the case after 13th June 2019 (see paragraph 47 of the judgment);

iv. On the basis of the findings set out at i. to iii. above, the conduct of the Claimant's solicitors was unreasonable and akin to an abuse of process pursuant to the dicta set out in paragraph 28 of Dempsey. Therefore, it followed that:

- The Notice of Discontinuance should be set aside pursuant to the First Defendant's application under CPR 38.4 (see paragraph 46 of the judgment);

- The matters set out under a) and b) above and thus the 'Dempsey test' was made out;

v. On the balance of probabilities, the First Defendant incurred the costs incurred after 13th June 2019, in particular, the costs of preparing the case for trial and of this application as a result of the above unreasonable conduct (see paragraphs 48 and 49 of the judgment);

vi. The making of a wasted costs order was just in all the circumstances (see paragraph 50 of the judgment).

Accordingly, District Judge Robinson ordered the Claimant's solicitors to pay the First Defendant's wasted costs incurred after 13th June 2019. He summarily assessed those costs in the sum of £13,800, payable within 21 days. No application for permission to appeal any part of the above judgment was made by counsel for the Claimant before District Judge Robinson. At the time of writing, it is not known whether the Claimant's solicitors will be making a written application for permission to appeal this judgment.

Copies of District Judge Robinson's written judgment in the above matter are available from Damian on request. Damian's email is: damianpowell@ropewalk.co.uk

Damian Powell
October 2019