Case No: A2/2016/1737

Neutral Citation Number: [2018] EWCA Civ 1461
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE OXFORD COUNTY COURT
HIS HONOUR JUDGE CHARLES HARRIS QC
3YQ07200

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/06/2018

Before :

LORD JUSTICE UNDERHILL
LORD JUSTICE BEAN
and
LORD JUSTICE SALES

- -

Between :

ANNA LOUISE TUSON	**Appellant**
- and -	
DEBBIE MURPHY	**Respondent**

- -
- -

Roger Mallalieu (instructed by **Royds Withy King**) for the **Appellant**
Brian McCluggage & Ben Morris (instructed by **BLM Law**) for the **Defendant**

Hearing date: 24 May 2018

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Judgment

Lord Justice Bean:

1. On 19th August 2010 the Claimant, Ms Tuson, fell from her horse during a lesson at the Defendant's riding school and broke her right arm. She subsequently developed Obsessive Compulsive Disorder which two psychiatrists attributed to the accident. On 2nd May 2012 liability was admitted subject to an agreed deduction of 15% for contributory negligence. She gave up her work as a schoolteacher in September 2012, and issued proceedings on 9th August 2013.

2. Her claim was initially valued at over £1.5 million, based on the premise that she would be unable to work again.

3. In November 2013 the Claimant obtained a franchise in a playgroup organisation under which she ran "messy play" workshops for children under the name Creation Station. She ran her first playgroup session in January 2014.

4. On 18 April 2014 the Claimant served her first witness statement (p171) in the case dated 8 days earlier, running to 26 pages, describing in detail the impact of her obsessive compulsive disorder (OCD) on her life. Her mother also served a supporting statement dated 25th March 2014. Neither of these statements mentions Creation Station. On the contrary, Ms Tuson wrote at paragraphs 85-86:-

> "I planned to work until retirement and had plans to become a special educational needs co-ordinator and an NQT (newly qualified teacher mentor). Middle management was also a natural goal. Now I would like to see myself going back to work when Harry (her son) gets to school age; assuming that is when he is 4½, it would be the Autumn of 2017."

5. At paragraph 157 she described her "dreams for 2014" as being:-

> "To be off the antidepressants, to become pregnant again, to sell my own home and to buy a new home with my husband, to live as a family in my new home, to be in control of my OCD and not the other way around."

6. Prior to the issue of proceedings, the Claimant had obtained a psychiatric report from Dr Jacqueline Scott in September 2012. On 4th June 2014 she was seen by another consultant psychiatrist, Dr Veale, on behalf of the Defendant's insurers. Again no mention was made of the playgroup activity. Dr Veale diagnosed severe OCD caused by the accident (p319).

7. On 16 July 2014 the Claimant served a schedule of loss signed with a statement of truth. It included a substantial claim for future loss of earnings based on the report of an employment expert, Mr Keith Carter, dated 16th April 2014. Mr Carter had not been told about the playgroup. Nor had the Defendant's employment expert, Ms Susan Arblaster, who reported on 12 May 2014.

8. It appears that by September 2014 the Claimant had virtually ceased the playgroup activity. The Creation Station franchise was transferred in January 2015.

9. On 29 April 2015 the Defendant's solicitors became aware of the Claimant's involvement in Creation Station the previous year. By letter of 22 June 2015 they informed the Claimant's solicitors accordingly.

10. In her third witness statement dated 7 September 2015 the Claimant set out in detail the involvement she had had with the playgroup. She wrote:-

> "6. Whilst searching online for local groups I could attend and keeping in mind my personal CBT goal of taking Harry to 'messy' play to challenge myself, I discovered the playgroup organisation Creation Station. I went to a taster session with Paul and Harry in York around October 2013. It was suggested by Creation Station that I could purchase a franchise to run my own group.
>
> 7. In one way I was excited and optimistic as I hoped it would benefit my personal CBT focused goals, and give me a reason to get up and do something and that Harry would benefit from mixing with other children. There was also the possibility of making some friends. Getting out of the house would hopefully have its own benefits for me but also give some respite to my parents.
>
> 8. I never saw this venture as a way of making any income and in fact I lost money. The purchase was more about me making a playgroup for Harry and me that suited us time-wise and focused upon my CBT goals. I only ever envisaged being able to cover my costs which I failed to do. I feel very guilty about not contributing and Paul and my parents paying for everything.
>
> …
>
> 41. I stopped virtually all activities by the time I was admitted to ADRU which I believe was October 2014. I did the odd party I was committed to and did think about doing something at Christmas but decided against that idea.
>
> 42. Creation Station failed in the end and was bound to fail for any of two reasons. On the one hand, it did not make any money and was a financial drain. My OCD restricted what I could attempt to do which meant that it could never make money. On the other hand, even if it was a successful business, regardless of the restrictions of running it during restricted hours, I could not ultimately cope with it because of my OCD. And nothing has changed."

11. Under the heading "Why I did not mention the playgroup in my evidence" she wrote:-

> "64. I should have raised this matter before. I know that.

65. However, please do not think this means I have misrepresented my health and my claim because I have not.

66. The reasons for not mentioning this before are a little complicated but essentially because I did not want to open myself up to criticism generally but especially in case I failed in attempting to operate the playgroup and then indeed it having failed.

67. I have said that the playgroup was not a business – I believed it was a way to combat/control my OCD in a goal based therapy."

12. After strongly criticising the Defendant's solicitors and insurers, saying that she felt "violated and disgusted by their attacks on her" she continued:-

"76. The point is that my family and I are always just trying to do our best with varying degrees of support and upsetting attacks from the Defendant.

77. Creation Station was not raised in previous statements partly because it was never regarded as gainful employment - it was just a way of giving me something other than OCD to focus on. This is something I feel strongly about when I mentioned that my life is not a case. My feelings of guilt, shame and being a financial burden are some of the main reasons I began to think about starting Creation Station, but the driving force was being personal CBT therapy. I did not want to attract more criticism for my family and I over a course of action that was rehabilitation and not a business.

78. What I was doing with the playgroup was a million miles away from normal, never mind normal paid work. In some sense it does not add anything to the case except perhaps to support it, through highlighting yet again what my OCD prevents me from doing.

79. I should say that I had briefly mentioned to my solicitor the aim to attend playgroups and perhaps looking at an art group.

80.I am sorry that I did not raise the playgroup before because I should have done. In my mind it has very little bearing on what is said about my claim. Whilst this is true I can see that not raising the subject was misguided.

81. Apart from being wrong, the Defendant's aggressive reaction and their threats have been far more upsetting than would have been the case. They have taken my attempts to improve my condition and suggested I have been deceitful about my health, which is not the case, and this diminished my feelings of progress.

> 82. The mere fact I have had to write this to justify myself has caused me great stress and anxiety."

The Defendants' Part 36 offer

13. A week after receipt of this witness statement the Defendant's solicitors made a Part 36 offer by letter of 17 September 2015:

> "We are instructed by Debbie Murphy t/a Angel Riding Centre Defendant to offer £352,060 gross in full and final settlement of this claim.
>
> This offer is made in accordance with Part 36 of the Civil Procedure Rules. The terms of the offer are as follows:
>
> 1. Our client offers £352,060 gross of apportionment by way of a lump sum in full and final settlement of your client's claim. This offer is made in relation to the whole of your client's claim.
>
> 2. The sum is gross of benefits repayable to the CRU. Accordingly, if the offer is accepted, any such benefits will be deducted from this sum. We have obtained an up to date CRU certificate confirming nil recoverable benefits are owing.
>
> 3. This offer is intended to take account of the 85:15 liability apportionment and is NET of interim payment previously made totalling £72,600. The net amount offered is therefore £299,251.00.
>
> 4. If the offer is accepted within 21 days, our client will pay your client's legal costs in accordance with Part 36 Rule 20 of the Civil Procedure Rules.
>
> If your client accepts the offer after the 21 day period then either we will need to agree the costs liability or the court will have to make an order as to costs."

14. The 21 day period for acceptance of the offer expired on 8 October 2015. The Claimant did not accept the offer. The Defendant was given permission to instruct a new psychiatrist, Dr Holden, who by a report served on 23 November 2015 disputed the causation of the Claimant's OCD.

15. On 1st December 2015 the Claimant accepted the Defendant's Part 36 offer of £352,060. The trial of quantum which had been set for 9-11 December 2015 was vacated. But since the parties were unable to agree costs, a hearing on costs took place on 7 March 2016 before His Honour Judge Charles Harris QC ("the judge"). No application was made that the Claimant should attend for cross-examination on her witness statements.

Judge Harris' judgment on costs

16. By a reserved judgment given orally on 6 April 2016 the judge ordered the Defendant to pay the Claimant's costs only up to 1st April 2014 and ordered the Claimant to pay the Defendant's costs thereafter. The material parts of the judgment were as follows:

> "18. The position therefore is, in short, should the usual costs order apply or is the court persuaded that this would be "unjust"?
>
> 19. The defendant says it would be unjust and this was a dishonest claimant who seriously misrepresented her position. She was in "contumelious default" of her disclosure obligations and presenting her case on an "utterly misleading" basis. Had she made accurate disclosure, then the defendants could have made a realistic valuation of her claim and settled it at an early stage. Mr McCluggage submits therefore that it should not have to pay the defendant's [sic] costs pre-offer or at worst only some of them and that the claimant should pay the defendant's costs after the acceptance.
>
> 20. The claimant says that it is not unjust. The defendants chose to adopt the Part 36 procedure and did so at a time when they were in full possession, albeit late, of the claimant's condition and history, when her previous reticence had been exposed. The defendant could have made a *Calderbank* offer (*Calderbank v Calderbank*, 1976 Fam 1993 and see Lord Clarke in *Summers v Fairclough* 2012 1 WLR 2004, para 54) making it clear that costs would not be offered. Since the Part 36 procedure was deliberately adopted, it is not unjust, argued Mr Moore, for its normal consequences to be applied. He submits that the claimant should get all her costs up to the date of acceptance and, optimistically and with less confidence, afterwards as well.
>
> …
>
> 28. Each case is of course different. In the instant case, the claimant's dishonesty was in relation to a period before the Part 36 offer was made. My view is that the "normal" order in the instant case would be unjust because it would mean that the claimant is not sanctioned in any way (depending upon the order in relation to post-acceptance but where the costs would be modest in any event) for presenting her case on a misleading basis, for failing to disclose discoverable documents and for failing to tell the defendant, the court and the doctors about activities which she engaged in, which clearly cast significant doubt on her assertions about the extent to which she was disabled by OCD.
>
> 29. For my part, I do not see why the defendant should not be allowed to use the Part 36 mechanism and argue injustice in order to avoid a normal costs order. The very terms of the rule

> itself envisage that that is possible. Otherwise, the defendant would in effect be punished by not choosing an alternative method of making an offer, possibly more favourable, outside the structure of Part 36, which is a rule which has been provided for the use of litigants who wish to settle claims.
>
> 30. I have considered the matters which the court is enjoined to consider. The offer is substantial and perhaps more than it would have been if the expert doubts about causation had been earlier appreciated. The offer was made at a time after the claimant's lack of candour had been demonstrated but before the claimant offered to accept perhaps half what she had been claiming. Most materially, the claimant's conduct was dishonest and misleading about what she could do. The offer was clearly a genuine one.
>
> 31. The defendants were being actively misled about the extent of the claimant's disability, at least from the dates upon which disclosure and witness statements were due, namely March and April 2014. That is some 18 months before the 15 September Part 36 offer.
>
> 32 Accordingly, in my judgment, the appropriate order here is that the defendant should pay the claimant's costs up to 1 April 2014, the date from which it can be said that the claimant commenced to mislead them. Thereafter, the claimant should pay the defendant's costs. That is, the defendant's costs up to the date of the payment in and thereafter."

Grounds of Appeal

The availability of an alternative form of offer

17. The Claimant's principal ground of appeal is that where a Defendant's Part 36 offer (relating to the whole claim and made more than 21 days before the start of a trial) is accepted within 21 days of being made the Claimant is entitled by virtue of CPR 36.13(1) to her costs up to the date on which notice of acceptance is served on the offeror. Thus, if the Claimant had accepted the offer of £352,060 on or before 8 October 2015 she would have been entitled to her costs as of right.

18. Where a Part 36 offer is accepted outside the 21 day period CPR 36.13(5) provides that:-

> "… the court must, unless it considers it unjust to do so, order than a) the claimant be awarded costs up to the date on which the relevant period expired; and (b) the offeree do pay the offeror's costs for the period from the date of expiry of the relevant period [of 21 days] to the date of acceptance."

19. CPR 36.13(6) states that in considering whether it would be unjust to make the orders specified in paragraph (5) the court must take into account all the circumstances of the

case including the matters listed in Rule 36.17(5). One of these is "the information available to the parties at the time when the Part 36 offer was made".

20. It is now accepted that the Claimant must pay the Defendant's costs in the court below from 8 October 2015 until her belated acceptance of the offer on 1 December 2015. Mr Mallalieu, however, submits that the judge's order that the Claimant should pay the Defendant's costs from April 2014 onwards was a retrospective penalty which was unjust and disproportionate. Before considering this issue I will deal with the judge's characterisation of the Claimant's conduct as dishonest and misleading.

Dishonest and misleading conduct?

21. In his skeleton argument in this court counsel for the Claimant submitted at paragraph 5:-

> "The judge penalised the Claimant for conduct - her non-disclosure of her attempt to run a playgroup (Creation Station) for a few hours a week which had failed and resulted in a loss. This was despite the Defendant having full knowledge of this conduct at the time that the Part 6 offer was made and despite the evidence not proving that the Claimant had exaggerated her claim (her contention was that it in fact supported her case that she was not able to undertake paid employment)."

22. In his witness statement of 3rd March 2016 the Claimant's solicitor, Mr Richard Brooks submitted at paragraph 20:-

> "The non-disclosure plainly opens up the Claimant to questions about her credibility, but, as I put to BLM solicitors, it is a very long way from demonstrating the Claimant has in fact fabricated her disability."

23. I agree with Mr Brooks that the Claimant's modest attempts to run a playgroup do not amount to evidence that the Claimant's disability was fabricated. If they had, the Defendant's would not have made an unconditional Part 36 offer in excess of £350,000 (allowing for the contributory negligence deduction, valuing the claim at over £400,000). This is not a case of gross exaggeration on the scale of *Summers v Fairclough Homes Ltd* [2012] 1 WLR 2004. But the Claimant's attempts to run the playgroup were certainly material to her argument that she was, and might remain for a long period, incapable of any work. She plainly withheld the information about the playgroup from her solicitors, since if she had told them I have no doubt that they would have given disclosure of the relevant documents and would not have allowed the first witness statement to be served without any mention of the playgroup. Nor would the Claimant's employment expert have reported in the terms he did if he had been told about the playgroup. The Claimant clearly made a deliberate decision to withhold the information from her advisers, the Defendant's advisers and the court, and the reasons given for this in her third witness statement are unconvincing. The judge was in my view entitled to describe her conduct as dishonest and misleading.

24. Nevertheless, I cannot agree with the judge's decision on costs or the reasoning which led him to that decision. His judgment, with respect, does not grapple with the

argument that the Defendant's Part 36 offer was unconditional, rather than a *Calderbank* offer, and that it was made with knowledge of the Claimant's material non-disclosure.

25. The Defendant's insurers, through their very experienced solicitors, made the unconditional Part 36 offer in full knowledge of the Claimant's material non-disclosure, and knowing that acceptance within 21 days would (by virtue of CPR 36.13(1)) give the Claimant her costs to date as of right. Mr McCluggage valiantly submitted that the insurers were entitled to choose this option in the interests of greater certainty, and that once the 21 day period had expired the Claimant's dishonesty rendered her liable to an adverse costs order in the exercise of the judge's discretion.

26. It is striking, however, that in the *Summers* case, where the dishonesty of the Claimant was on a scale far greater than in the present case, the Supreme Court emphasised the importance of the Defendant's ability, in a claim for damages, to make an offer on special terms as to costs. At paragraph 54 Lord Clarke JSC said:

> "There was much discussion in the course of the argument as to whether the defendant can protect its position in costs by making a Part 36 offer or some other offer which will provide appropriate protection. It was submitted that a Part 36 offer is of no real assistance because, if it is accepted, the defendant must pay the claimant's costs under CPR 36.10. We accept the force of that argument. However, we see no reason why a defendant should not make a form of *Calderbank* offer (see *Calderbank v Calderbank* [1976] Fam 93) in which it offers to settle the genuine claim but at the same time offers to settle the issues of costs on the basis that the claimant will pay the defendant's costs incurred in respect of the fraudulent or dishonest aspects of the case on an indemnity basis. In *Fox v Foundation Piling Ltd* [2011] EWCA Civ 790 the Court of Appeal correctly accepted at para 45 that the parties were entitled to make a *Calderbank* offer outside the framework of Part 36. The precise formulation of such an offer would of course depend upon the facts of a particular case, but the offer would be made without prejudice save as to costs and, unless accepted, would thus be available to the defendant when the issue of costs came to be considered by the trial judge at the end of a trial.".

27. The judge referred to this paragraph of Lord Clarke's judgment in *Summers,* but, with respect, failed to follow the guidance given in it.

CPR 36.14(4): the threshold of "injustice"

28. Mr McCluggage reminded us that in *SG v Hewitt* [2015] 5 Costs LR 937 at paragraph 29 Black LJ said:

> "I do not think it wise to attempt to prescribe or restrict in the abstract the circumstances in which the court may reach the

> conclusion that it is unjust to make the normal order. Rule 36.14(4) requires that, in considering whether it is unjust to make the normal order, the court must take into account all the circumstances of the case. The four factors specifically identified as relevant cast quite a wide net on their own but they are not the only matters that fall for consideration and anything else which is relevant must be considered as well. Costs decisions are particularly sensitive to the facts of the individual case."

29. I agree that costs decisions are fact-sensitive and that it may be unwise to attempt to list the categories of case in which it would be unjust to make the normal order. But it is painting with too broad a brush to say that the decision is entirely a matter of discretion, either generally or even in any case where a party has behaved dishonestly.

30. In *Webb v Liverpool Women's NHS Foundation Trust* [2016] 1 WLR 3899 at paragraph 38, Sir Stanley Burnton (with whom Simon and Gloster LJJ agreed) said that Part 36 is a "self-contained code", and continued:-

> "[A] successful claimant is to be deprived of all or part of her costs only if the court considers that would be unjust for her to be awarded all or that part of her costs. That decision falls to be made having regard to "all the circumstances of the case"……... The principles were aptly summarised by Briggs J (as he then was) in *Smith v Trafford Housing Trust* [2012] EWHC 3320 (Ch):
>
> > "13. … For present purposes, the principles which I derive from the authorities are as follows:
> >
> > a) The question is not whether it was reasonable for the claimant to refuse the offer. Rather, the question is whether, having regard to all the circumstances and looking at the matter as it affects both parties, an order that the claimant should pay the costs would be unjust: see *Matthews v Metal Improvements Co. Inc* [2007] EWCA Civ 215, per Stanley Burnton J (sitting as an additional judge of the Court of Appeal) at paragraph 32.
> >
> > b) Each case will turn on its own circumstances, but the court should be trying to assess "who in reality is the unsuccessful party and who has been responsible for the fact that costs have been incurred which should not have been": see *Factortame v Secretary of State* [2002] EWCA Civ 22, per Walker LJ at paragraph 27.
> >
> > c) The court is not constrained by the list of potentially relevant factors in Part 36.14(4) to have regard only to the circumstances of the making of the offer or the provision or otherwise of relevant information in

> relation to it. There is no limit to the types of circumstances which may, in a particular case, make it unjust that the ordinary consequences set out in Part 36.14 should follow: see *Lilleyman v Lilleyman (judgment on costs)* [2012] EWHC 1056 (Ch) at paragraph 16.
>
> d) Nonetheless, the court does not have an unfettered discretion to depart from the ordinary cost consequences set out in Part 36.14. The burden on a claimant who has failed to beat the defendant's Part 36 offer to show injustice is a formidable obstacle to the obtaining of a different costs order. If that were not so, then the salutary purpose of Part 36, in promoting compromise and the avoidance of unnecessary expenditure of costs and court time, would be undermined."

31. Thus the "formidable obstacle" test set out by Briggs J in *Trafford* received the endorsement of this court, which applied it to the case of a successful claimant.

32. In *Tiuta PLC (in liquidation) v Rawlinson & Hunter (a firm)* [2016] EWHC 3480 (QB) (a judgment given after Judge Harris' decision now under appeal) a Part 36 offer had been made at a very early stage of the dispute with a 21 day period for acceptance expiring on 11 January 2016. The Claimants served notice of acceptance but only on 3 October 2016, nearly nine months after the 21 period expired. Andrew Baker J noted at paragraph 14 that:-

> "It is common ground that the persuasive burden must lie on the party contending that the court should not rest with the default rule [that the claimant accepting an offer late should have costs up to the expiry of the period for acceptance but should pay the defendant's costs thereafter] on the basis that it would be unjust to do so. In that regard, and as general background to the consideration of injustice the authorities have repeatedly emphasised the importance of remembering that the part 36 regime is there to provide a clarity and balance for the encouragement of the resolution of claims that would otherwise be litigated through to a trial."

33. At paragraphs 29-30 Andrew Baker J said:

> "The essence of the Part 36 strong prima facie justice is that the Part 36 offer, to have been a qualifying Part 36 offer, must have involved a considered acceptance of the value, as much to the offeror as to the offeree, of the claimant recovering its pre-offer costs, together with whatever is being offered to resolve the substantive claims. The essence of the enquiry as to injustice where that offer is accepted only after the relevant period, as it seems to me, must therefore be whether there is something in the particular circumstances of the case that undermines that assessment on the part of the offeror, particularly if that is the

> consequence of, although it is elusive to see in what circumstances this will be so, the fact that the offer has been accepted after, rather than within, the relevant period.
>
> I accept in principle that it cannot be sufficient to say that there is no injustice that the consequence in question would have applied as of right if the offer had been accepted within the relevant period. As a matter of logic, that would prove too much and it would never be possible to depart from the claimant's pre-offer costs default rule that I am considering. It would therefore, as a matter of analysis, contradict CPR 36.13(6). However, it does mean, it seems to me, that in the case of a claimant's acceptance of a defendant's Part 36 offer, where the acceptance is given after the expiry of the relevant period, *if nothing emerges from the facts to show that the defendant's assessment of the risks and benefits involved in making the offer he made is in some significant way upset or contradicted or misinformed, it is highly unlikely to be unjust to apply the default rule*. The defendant must be taken to have been content to compromise on the basis of paying the claimants' costs on the standard basis to the end of the relevant period by reference to his assessment of matters as they stood when the offer was made. If nothing is shown to the court clearly to upset or undermine that assessment, there will almost always be nothing unjust about holding the defendant to it. One should never say never, of course; one cannot be entirely prescriptive. For example, in particular, one can envisage, and I will come back to that in this case, that there could be a change of circumstances after the expiry of the relevant period not known to the defendant which can be demonstrated – bearing in mind that we are not descend into lengthy satellite trial litigation over the question of the Part 36 consequences – would or might well have led to the withdrawal of the Part 36 offer prior to its actual acceptance." [emphasis added]

34. This decision was cited with approval by Warby J in *Optical Express Ltd v Associated Newspapers Ltd* [2017] EWHC 2707 (QB).

35. I agree entirely with what Andrew Baker J said in *Tiuta.* In particular, he was right to emphasise the difference between:

    a) a case where the facts known to the defendant's advisers at the time of the Part 36 offer do not change significantly during the period before the delayed acceptance; and

    b) a case where the defendant's advisers' assessment at the time of making the Part 36 offer of the true value of the case, based on the facts then known to them, is upset or undermined by subsequent events or subsequently discovered facts.

In the first type of case it is highly unlikely to be unjust to apply the default costs rule.

Conclusion

36. Even though the Claimant's material non-disclosure can properly be described as dishonest, and was certainly misleading, I regard the judge's exercise of his discretion as flawed. I would allow the appeal and order the Defendant to pay the Claimant's costs up to 8 October 2015, the Claimant remaining liable to pay the Defendant's costs from 8 October to 1 December 2015.

Lord Justice Sales:

37. I agree.

Lord Justice Underhill:

38. I also agree.