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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Neutral Citation Number

[2019] EWHC 2660 (QB)



No. QA-2019-000025

Royal Courts of Justice  
Strand  
London, WC2A 2LL

Wednesday, 31 July 2019

Before:

MRS JUSTICE LAMBERT DBE

B E T W E E N :

JULIAN ARBOLEDA-QUICENO

Respondent/Claimant

- and -

NEWHAM LONDON BOROUGH COUNCIL

Appellant/Defendant

Richard Hartley QC instructed by Express Solicitors for the Claimant  
Derek O'Sullivan QC instructed by DAC Beachcroft for the Defendant

Hearing Date: 30 July 2019

**J U D G M E N T**

MRS JUSTICE LAMBERT:

1. This is the Defendant's appeal from the order of Deputy Master Sullivan of 14 January 2019 refusing the Defendant's application for permission to withdraw a pre-action admission of liability. The appeal proceeds with the permission of Andrew Baker J following an oral renewal of the application on 16 May 2019.

#### Procedural History

2. The Claimant, who was born on 10 November 1976, suffered an injury to his knee whilst playing five-a-side football at the Memorial Recreation Ground which was owned and managed by the Defendant. The letter of claim dated 8 October 2015 alleged that the injuries had been sustained during a fall caused by the Claimant's right foot having become stuck in a hole in the astro-turf pitch for which the Defendant was responsible under the Occupiers Liability Act 1957 ("the Act"). The letter of claim alleged a breach of the common duty of care under s. 2 of the Act and a failure by the Defendant to ensure a reasonable system of inspection and maintenance. The letter recorded the Claimant's injuries to be a fracture of the right tibial plateau which had been treated by open reduction and internal fixation and that ongoing pain had led to further investigations (an MRI scan and right knee arthroscopy) and ongoing treatment. The letter also stated that the anticipated value of the claim "*fell well beyond the value considered for any pre action protocol*" and that an orthopaedic surgeon was to be instructed to examine the Claimant.
3. In December 2015 the Defendant's insurer asked for further details of the Claimant's injury, including details of his recovery, his post-accident mobility and whether there was any further planned surgery or treatment. It also sought information concerning how long the Claimant had been off work. The response of the Claimant's solicitor of 23 December 2015 stated that the likely value of the claim was "*as set out in the pre-action letter of 8 October 2015*".
4. On 23 February 2016, the Defendant's insurer wrote to the Claimant's solicitor stating that "*the Defendant admits that it was negligent and/or in breach of statutory duty in respect of the accident on 12 June 2015. For the avoidance of doubt however, no admissions are made as to any personal injury, loss or damage your client is said to have sustained and your client must prove this.*"

5. In July 2017 the Claimant made an application for an interim payment, serving a report from a consultant orthopaedic surgeon, Mr Paul Mitchell, dated June 2016 in support. Mr Mitchell reported that the Claimant's injuries consisted of "*severe disabling pain and stiffness in the knee as a result of a major knee injury, scarring within the knee, chronic pain and psychiatric issues. All of these combined together mean that Mr Arboleta Quiceno is completely disabled by his knee, barely able to even weight bear on it...There is no prospect of him being able to return to work...From an orthopaedic perspective there is no more to be done at this time.*" The letter which accompanied service of the report noted additionally that the Claimant was undergoing extensive treatment and investigations and that he was under the care of his GP for his worsening depression. The report from Mr Mitchell was followed shortly by a report from Mr George Harrison, a pain expert, dated February 2017. The report described chronic pain affecting not just the knee but the shoulders, arms and hands and lower back. He recommended the intervention of a chronic pain specialist but noted that the prognosis was poor, that there was no cure for the pain and that there was a possibility that the pain would become worse. In the wake of service of these reports, the Defendant made a voluntary interim payment of £10,000 in August 2017.
6. Proceedings were served on 4 June 2018 and accompanied by a provisional Schedule of Loss. The Schedule of Loss generated a claim of over £2.9 million. It stated that since the accident the Claimant's life had collapsed, the Claimant was unemployed and unemployable, he was disabled and almost entirely dependent upon his partner and that there was no prospect of any significant improvement. The cause of the disability was chronic pain with a degree of central sensitisation and neuropathic pain coupled with secondary pain problems extending into the lower back, shoulders, forearms and hands, left leg and right foot and psychological injury. The Schedule pleaded a claim for personal care past and future of 38 hours per week, a modest residual earnings capacity and the need for adapted ground floor accommodation. The Schedule included a claim for provisional damages based on the risk of a significant deterioration of the right knee leading to the need for elective amputation.
7. On 29 June 2018 the Defendant issued an application to withdraw its pre-issue admission of liability and served a Defence in which liability was denied. The central contention in the Defence was that, whilst it was accepted that one of the pitches at the Memorial Recreation Ground had a hole in the turf, the Claimant had not in fact been playing on that pitch. It was

denied that the Claimant's right foot had ever become stuck in the (or any) hole and averred that the injuries were due to the Claimant just landing awkwardly. The Defendant raised the defence of fundamental dishonesty pursuant to s.57 Criminal Justice and Courts Act 2015. Further or alternatively, liability was denied on the basis that, if the presence of a hole had been the cause of the Claimant's fall, then there had been nonetheless a reasonable system of inspection and maintenance and no breach of duty.

8. In support of the application to withdraw the admission, the Defendant served a witness statement from the manager of the Recreation Ground, Ms Alison Davenport. The statement accepted that there had been a hole in the astro-turf at the date of the accident, but that the hole had been in Pitch 2 which was not the pitch upon which the Claimant and his team (a Latin American team called "Freddy's Latins") had been playing on 12 June 2015. The statement asserted that Freddy's Latins had been playing on their usual pitch, which was Pitch 3. It included hearsay evidence from Freddy (of Freddy's Latins) which recounted a conversation which Ms Davenport had had with Freddy. He apparently remembered an incident in which a player had fallen and been injured during a match but his recollection was that the fall had not been caused by a hole in the pitch, just an awkward landing. Freddy had remembered an ambulance coming to the ground and an injured player being taken to hospital. He had told her that the reason he remembered the incident was because during the same session an Albanian player (playing with an Albanian team) had also been injured and an ambulance had been called to take him to hospital too. According to Ms Davenport's statement, Freddy had told her that the injured person on Pitch 3 had approached the paramedic attending the Albanian team player for help on Pitch 2. Freddy was clear that the accident involving his team player took place on Pitch 3 not on Pitch 2.
9. The Defendant additionally served two statements from Mr Asif Patel dated 2 March 2018 and 10 December 2018. Like Freddy, Mr Patel remembered the Claimant's accident because it had been so unusual for two ambulances to have been called to the ground. His statement confirmed Ms Davenport's understanding that Freddy's Latins had been playing on Pitch 3 and not Pitch 2. He remembered that the injured player from Pitch 3 had been either carried or helped from Pitch 3 to Pitch 2.
10. In response to the application, the Claimant served evidence, including a statement from Mr Jorge Santos (dated February 2017) who was playing in the same team as the Claimant. He said that the pitch which Freddy's Latins usually played on was Pitch 3 but that the team had

been switched to Pitch 2 owing to the team on Pitch 3 overrunning. He referred to the Claimant having twisted his ankle in a hole. A statement from the Claimant himself was served in which he said that he had been injured after his right foot had gone into a hole.

#### The Hearing before the Deputy Master

11. The Deputy Master was directed to the relevant legal principles to apply which are set out in CPR PD 14.7.2:

*“In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all of the circumstances of the case, including –*

*(a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;*

*(b) the conduct of the parties, includes any conduct which led the party making the admission to do so;*

*(c) the prejudice that may be caused to any person if the admission is withdrawn;*

*(d) the prejudice that may be caused to any person if the application is refused.*

*(e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial.*

*(f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the admission is made; and*

*(g) the interests of the administration of justice.”*

12. In her ruling, the Deputy Master worked carefully through each of the considerations in the Practice Direction, expressing her conclusions in respect of each factor. She rejected the argument that the admission should be withdrawn on the basis that the claim as formulated in the Schedule of Loss was different in character from that which had been intimated in the Letter of Claim. She concluded that although the pleaded claim of “*just shy of £3 million*” was higher than perhaps had been anticipated, the claim was not in itself of a different character. She remarked that the letter of claim described a serious knee injury and ongoing treatment and that it was always likely that the claim would be of significant value.

13. Having rejected the Defendant’s first submission, her conclusion that permission to withdraw the admission should not be granted was based on three factors: the merits of the defence if the admission were to be withdrawn; the prejudice to the Claimant if the admission were to be withdrawn and the administration of justice.

14. Her consideration of the merits of the defence of fundamental dishonesty involved her analysing the factual evidence in some detail. For example, she traced through inconsistencies in the statements of Mr Patel in comparison with a video of the aftermath of the Claimant's accident which she had viewed; she observed that there was no documentary confirmation of Ms Davenport's evidence concerning the allocation of the pitches on the evening in question; she noted that the evidence from Freddy was hearsay only. She remarked that there was no evidence at all of any proper system of inspection and yet there clearly was a hole in Pitch 2. Whilst she concluded that the defence was not fanciful and that there was a real prospect of the defence succeeding, her view was that the merits of the defence now advanced was not "*very strong bearing in mind the totality of the evidence*" she had seen. She directed herself that in any event, whether there was a real prospect of the defence succeeding was not the test which she should apply: her function was to weigh all of the various factors in CPR PD 14.7.2, only one of which was the merits of the defence.
15. The Deputy Master was persuaded that the Claimant would be prejudiced if the admission were to be withdrawn, concluding that he would be in real difficulties in tracking down relevant witnesses and obtaining "*proper evidence from them*" both in respect of the circumstances of the injury and the system of maintenance which the Defendant operated at the relevant time. She was also persuaded that the interests of finality and the administration of justice came down in favour of refusing the application as claimants should be able to rely on pre action admissions in the knowledge that they would only be withdrawn by consent or with the permission of the court. Her view was that unless there was a significant change in circumstances admissions should be final.

#### The Appeal

16. At the hearing of the appeal before me, the Defendant/Appellant was represented by Mr O'Sullivan QC and the Claimant/Respondent by Mr Hartley QC. I am grateful to them both for their helpful submissions.
17. I mention two preliminary matters to the appeal. The first is that, no doubt as a result of the submissions and discussion at the oral renewal hearing before Andrew Baker J, permission to pursue the appeal was granted on the condition that the Defendant gave an undertaking that if the appeal were to succeed "*the Defendant will admit that it is liable for the Claimant's injury if it was suffered whilst playing on pitch 2 of the Memorial Recreation*

*Ground on 12 June 2015.*” As I observed during the course of this appeal hearing, the scope of any trial on liability will therefore be relatively narrow. It is not contentious that the Defendant has undertaken not to pursue a defence of reasonable maintenance and reasonable systems of inspection. However, also, on a plain reading of the undertaking, the Defendant has undertaken not to pursue a liability defence based on the factual premise that the accident may have taken place on pitch 2 but that the cause of the accident and injuries was not the hole in the astro-turf. Mr O’Sullivan does not accept that the undertaking precludes such a defence; alternatively if it does, he submits that the undertaking was not intended to have this effect. I will return to this point later in this judgment. The second preliminary point to note is that the Defendant accepts that the Deputy Master was exercising a discretion in refusing permission to withdraw the admission and that the threshold for success in this appeal is therefore a high one. The Defendant acknowledges that it must demonstrate that the Deputy Master erred in law by not balancing the factors in CPR PD 14.7.2 lawfully or fairly such that her exercise of her discretion was wrong.

18. Although the grounds of appeal run to several paragraphs, they drill down into two main grounds.
19. The first main ground of appeal is that the Deputy Master was wrong in her conclusion that the claim as intimated in the letter of claim was not different in size and character from that which the Defendant faced following service of the Schedule of Loss. The Schedule valued the claim at just short of £3 million and included a claim for provisional damages. It was submitted that this was a massive increase upon the value of the claim suggested in the letter of claim. Although the letter of claim had stated the claim to be well over the value of a claim for fast track purposes, Mr O’Sullivan submitted that there was nothing in the letter to suggest that, downstream, the Defendant would face a Schedule of Loss running to £3 million. Mr O’Sullivan’s linked point is that the reason the Schedule was so high was because the Claimant had developed some form of chronic pain syndrome and psychological sequelae, none of which were intimated in the letter of claim.
20. The second main ground of appeal is that the Deputy Master erred in her approach to the assessment of the prospects of success of the defence. It was submitted that, having recognised that the Defendant had raised a real, as opposed to fanciful, defence of fundamental dishonesty, she went wrong in going on to evaluate, in detail, the various inconsistencies and possible mistakes in the evidence. She had, it was submitted by Mr

O'Sullivan, conducted a mini trial on the papers leading her to the conclusion that the merits of the defence were "*not strong*". In undertaking such an analysis the Deputy Master had inevitably deprived herself of hearing from the witnesses first hand and assessing their demeanour. What she should have done, it was submitted, was to recognise that the Defendant had raised a real as opposed to a fanciful defence of fundamental dishonesty and having done so, resist the temptation to evaluate the evidence further.

21. I do not set out Mr Hartley's submissions in response in detail. In effect, his submission was that the Deputy Master made no errors in her weighing of the various factors in CPR PD 14.7.2. He supported her conclusion for the reasons which she set out in her ruling.

#### Discussion and Conclusion

22. I take each of these two grounds of appeal in turn.
23. I am not persuaded that the Deputy Master was wrong to conclude that the claim as formulated in the Schedule was not of a different size and character from that intimated in the letter of claim. Whilst I accept that there was nothing in the letter of claim which suggested that the Defendant was facing a catastrophic injury claim, the letter of claim was drafted only four months after the accident and contained, so far as I am aware, an accurate description of the Claimant's injuries and his condition as they were understood to be at that time. It could not reasonably be said that the character of the claim had changed for the reason that the claim as set out in the letter of claim was not characterised either in terms of value or significance. The letter made clear that the knee injury had not resolved, that treatment was ongoing and further investigations had been performed. No prognosis was stated. I agree with the Deputy Master that the facts in *Wood v Days Healthcare UK Ltd & Ors* [2017] EWCA 2097 to which she was taken were very different to those with which she had to grapple. In *Wood* both Claimant and Defendant had reasonably concluded that the claim was suitable for the fast track and that damages were limited to £25,000 and it had been common ground between the parties that the claim had changed its character completely as a result of new evidence which had emerged since the admission had been made.
24. However, I accept the Defendant's submission that the Deputy Master erred in her approach to the evaluation of the merits of the Defendant's case. Having determined that the defence of fundamental dishonesty had a real as opposed to a fanciful prospect of success, the Deputy Master was in error in going on to evaluate that evidence in such detail on the papers



leading her to the conclusion that the defence case, whilst carrying that real prospect of success was, nonetheless, not particularly strong. Her evaluation was conducted on the basis of the papers alone. She did not have the benefit of seeing or hearing from the witnesses and her assessment of the evidence was bound to be incomplete.

25. I accept that under CPR PD 14.7.2(f) one of the factors which the court must take into account in considering whether an admission may be withdrawn is the merits of the claim in relation to which the admission is made. However, there must be limits to the permissible examination of evidence for that purpose at an interlocutory stage. I do not accept the Defendant's submission that in every case the court is limited to considering only whether there is a real prospect of success or not, as there may be cases in which it is appropriate to enter into a more detailed examination of the evidence, for example, when the new evidence is limited to documentary evidence or CCTV footage of the incident. But this is not such a case. There may be mistakes or inconsistencies in the witness statements served in support of the application but none are so glaring or gross as to lead reasonably to the conclusion that the weight to be placed upon that evidence could be determined by a paper exercise alone.
26. Nor did the Deputy Master evaluate all of the evidence. For example, she did not consider the potentially important evidence of what the Claimant himself said of the circumstances of his accident when speaking with the ambulance officers who conveyed him to hospital or when giving the history of the accident to the staff in the emergency department. The Claimant told none of those personnel that he had fallen because his foot had gone into a hole. Although the Deputy Master should not be criticised for not considering this evidence given the submissions made to her in the context of a short interlocutory hearing, it demonstrates the real danger of embarking upon a nuanced analysis of the merits of the defence beyond recognising (or not) that there was a real liability issue to be tried.
27. I agree with the Defendant's submission therefore that the Deputy Master undertook a trial on the papers, having expressly disavowed that this was her function. I find that for this reason the decision cannot stand and the appeal must be allowed. I recognise that the merits of the defence was only one of the three factors which led the Deputy Master to dismiss the application. But it was a factor which obviously carried considerable weight, the strength of the defence of fundamental dishonesty influencing her reasoning on the administration of justice and her conclusion that such a serious allegation demanded strong evidence.

Considering the ruling as a whole therefore I have no doubt that the decision is vitiated for the reasons set out above.

28. Having set aside the decision of the Deputy Master, neither party submits that I should remit the application back to the Deputy Master for a re-hearing. It therefore falls to me to address the issues afresh.
29. I, like the Deputy Master, find that the evidence deployed in support of the application raises a defence with a more than fanciful prospect of success. Also, like the Deputy Master, I agree that the two other factors of particular significance are the prejudice to the parties if the admission is/ is not withdrawn and the administration of justice.
30. I do not accept that the Claimant will be prejudiced if the admission is withdrawn. Whilst he may not be able to track down all of his team mates from the day in question, he already has the benefit of the evidence of Mr Dos Santos. The video of the aftermath of the evidence shows that his wife and other friends and family were present on the side lines. There is no evidence before me that any of those potential witnesses are now unable to say upon which pitch the claimant was playing. Nor do I accept that the Claimant is now prejudiced by having received an interim payment of £10,000 which has been spent and cannot be returned in the event that the defence succeeds at trial. The trial judge, armed with this judgment, will be able to consider the fair approach to the refunding of this sum at the end of the trial. I also bear in mind that the Defendant has now given an undertaking the uncontentious effect of which is to remove the defence of a reasonable system of maintenance. On the other hand, if the admission were not to be withdrawn, the Defendant would be deprived of running its defence on liability for what on any account is a very substantial damages claim in circumstances in which the reliability of the account given by the Claimant is in doubt.
31. I find that the administration of justice in this case weighs in favour of the Defendant's case on liability being permitted to proceed to trial. There is a doubt over the reliability of the Claimant's account of the circumstances of his accident. The Defendant faces a very substantial claim for damages. As Ward LJ observed in *Woodland (by her father and litigation friend Ian Woodland) v Stopford & Ors.* [2011] EWCA (Civ) 266 "... justice [can] cut both ways and it [is] not in the interests of the administration of justice to impose on the other party a state of affairs where there is good evidence that this might result in an injustice."

32. Adopting a global approach to the factors in CPR PD 14.7.2 or, as Davis LJ expressed it in *Wood*, a “*stand back and see approach*,” I accept Mr O’Sullivan’s submission that, notwithstanding that admissions made at any stage in the litigation should be adhered to, a fair balancing of the factors listed in CPR PD 14.7.2 comes down in favour of this admission being withdrawn.
33. For the reasons given above therefore I allow the appeal and I give leave for the Defendant to withdraw the admission made in pre-action correspondence. If there is a doubt as to the meaning of, or intention underlying, the undertaking given by the Defendant to Andrew Baker J, then this must be re-visited by him, either on the papers or otherwise as he directs. He would doubtless benefit from a transcript of the hearing or an agreed note of the hearing but, and this is accepted by the parties, he is best placed to consider the Defendant’s submissions on the point.

**CERTIFICATE**

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