



Neutral Citation Number: [2024] EWHC 1471 (KB)

Case No: QB-2020-003439

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
KINGS BENCH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/06/2024

Before :

The Hon. Mr Justice Sweeting

Between :

MR OMAR ELBANNA

Claimant

- and -

MR TOM CLARK

Defendant

JAMIE CLARKE (instructed by **SLATER AND GORDON**) for the **CLAIMANT**
JACK HOLBORN (instructed by **WEIGHTMANS LLP**) for the **DEFENDANT**

Hearing dates: 7th June 2024

Approved Judgment

This judgment was handed down remotely at 14:00pm on 14th June 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE SWEETING

The Hon. Mr Justice Sweeting :

This supplementary judgment is to be read in conjunction with the Court's judgment handed down on 20th March 2024: [2024] EWHC 627 (KB).

Introduction

1. This is my judgment in relation to consequential matters following the handing down of judgment on the 20th of March 2024 and a hearing attended by counsel on the 7th of June 2024.
2. The draft judgment was circulated to the parties on the 11th of March. On the 14th of March I gave permission to the defendant to share the judgment with his lay client's insurer. The parties were told of the date and time of hand down with a request that they seek to agree an order in relation to costs. On the day of the hand down the defendant's solicitor wrote by e-mail to the court saying that they had not had an opportunity to discuss or review matters with counsel (notwithstanding the eight days which had passed since the circulation of the draft judgment), and "*there is the issue of the costs order and other matters to be addressed and we have not yet been party to or received any communications on this point.*" It was suggested that the hand down was delayed until another day.
3. Counsel for the claimant in fact sent a draft minute of order to the defendant's counsel on the same day. The claimant's position was that Mr Elbanna had been expecting the judgment and the court was invited to hand down on the basis that the parties would seek to agree consequential orders and request a hearing if they were unable to agree. I indicated that I intended to deliver the judgment and to deal with consequential matters at a hearing, if necessary, on another day. There was no indication by the defendant that he was seeking permission to appeal or an extension of time in which to do so.
4. Without any further communication with the lower court the defendant then filed an appellant's notice with the Court of Appeal on the 10th of April but took no steps to progress the finalisation of an order with the claimant. I note that the notice of appeal was lodged at the end of the 21 day period for appealing. There was no sealed order which could accompany the appellant's notice because there had been no response to the claimant's draft order.
5. CPR 52.3 and paragraph 4.1 of PD 52A do not require that an application for permission to appeal is made to the lower court, but there is firm guidance that an application to the trial judge should be the usual course: *Re T (A Child)* [2002] EWCA Civ 1736 at [12]–[13].
6. The claimant's counsel chased his opponent on the 15th of April to enquire whether a minute of order could be agreed and a quantum case management conference arranged. It was only on the 24th of April that the defendant's counsel sent a draft "competing" order. This was the first substantive response by the defendant to the claimant's draft order sent on the 20th of March.
7. Between the 15th and 25th of April there was e-mail correspondence with the Court of Appeal by the defendant's solicitors. The claimant's solicitors were not copied into any of these exchanges and so were unaware of them. The Civil Procedure Rules [CPR 39.8] require any communication with the court to be copied to the other party, save in limited circumstances.
8. As it subsequently emerged, on the 25th of April a Court of Appeal manager sent an e-mail to the defendant's solicitor as follows:

“Your email was referred to the Jurisdiction Lawyer, Mrs Levey who has asked me to inform you of the following:

“I refer to your email of 22 April 2024.

This matter was referred to Master Meacher, who has confirmed that your appellant’s notice has been filed prematurely in these circumstances.

You must apply at the consequential hearing in the lower court for an extension of time to file the appellant’s notice in this Court. I draw your attention to the fact that time runs from the date that judgment is handed down, unless extended by the lower court (see case of McDonald v. Rose & Ors [2019] EWCA Civ 4).

Following the hearing, you must re-file the appellant’s notice within the time limit directed by the lower court with a copy of the sealed order your client wishes to appeal.

This case will be closed.”

9. The case referred to by Master Meacher, *McDonald v Rose* [2019] 1 W.L.R 2828, contains guidance from the Court of Appeal at [21] as to the correct procedure to be followed:

“(1) The date of the decision for the purposes of CPR 52.12 is the date of the hearing at which the decision is given, which may be ex tempore or by the formal hand-down of a reserved judgment: see Sayers v Clarke and Owusu v Jackson . We call this the decision hearing.

(2) A party who wishes to apply to the lower court for permission to appeal should normally do so at the decision hearing itself. In the case of a formal hand-down where counsel have been excused from attendance that can be done by applying in writing prior to the hearing. The judge will usually be able to give his or her decision at the hearing, but there may be occasions where further submissions and/or time for reflection are required, in which case the permission decision may post-date the decision hearing.

(3) If a party is not ready to make an application at the decision hearing it is necessary to ask for the hearing to be formally adjourned in order to give them more time to do so: Jackson v Marina Homes . The judge, if he or she agrees to the adjournment, will no doubt set a timetable for written submissions and will normally decide the question on the papers without the need for a further hearing. As long as the decision hearing has been formally adjourned, any such application can be treated as having been made "at" it for the purpose of CPR 52.3 (2) (a) . We wish to say, however, that we do not believe that such adjournments should in the generality of cases be necessary. Where a reserved judgment has been pre-circulated in draft in sufficient time parties should normally be in a position to decide prior to the hand-down hearing whether they wish to seek permission to appeal, and to formulate grounds and such supporting submissions as may be necessary; and that will often be so even where there has been an ex tempore judgment. Putting off the application will increase delay and create a risk of procedural complications. But we accept that it will nevertheless sometimes be justified.

(4) If no permission application is made at the original decision hearing, and there has been no adjournment, the lower court is no longer seized of the matter and cannot consider any retrospective application for permission to appeal: Lisle-Mainwaring .

(5) Whenever a party seeks an adjournment of the decision hearing as per (3) above they should also seek an extension of time for filing the appellant's notice, otherwise they risk running out of time before the permission decision is made. The 21 days continue to run from the decision date, and an adjournment of the decision hearing does not automatically extend time: Hysaj . It is worth noting that an application by a party for more time to make a permission application is not the only situation where an extension of time for filing the appellant's notice may be required. It will be required in any situation where a permission decision is not made at the decision hearing. In particular, it may be that the judge wants more time to consider (see (2) above): unless it is clear that he or she will give their decision comfortably within the 21 days an extension will be required so as to ensure that time does not expire before they have done so. In such a case it is important that the judge, as well as the parties, is alert to the problem.

(6) As to the length of any extension, Brooke LJ says in Jackson v Marina Homes (para. 8) that it should normally be until 21 days after the permission decision. However, the judge should consider whether a period of that length is really necessary in the particular case: it may be reasonable to expect the party to be able to file their notice more promptly once they know whether they have permission.”

10. It follows that a retrospective application for permission to appeal, where the judgment has been handed down and the hearing has not been adjourned, cannot be considered by the lower court (see *Lisle-Mainwaring v Associated Newspapers Ltd* [2018] EWCA Civ 1470; [2018] 1 W.L.R. 4766, CA at [15]).
11. In an e-mail exchange on the 2nd of May the defendant's counsel had indicated to his opponent that the defendant intended to ask for a further hearing which was to be an adjourned handing down hearing with time to appeal being extended. The claimant's counsel queried this, pointing out that there had been no adjournment and that in any event the defendant had already lodged its application seeking permission to appeal from the Court of Appeal.
12. The defendant's counsel responded on the 10th of May suggesting that the question of whether the hearing was to be regarded as an adjourned hand down arose from correspondence with the Court of Appeal. This was the first point at which the existence of that correspondence had been disclosed. There was an immediate request from the claimant's counsel to see the correspondence and it was shared later on the same day.
13. The applications before me included an application to extend time in which to re-file a notice of appeal with the Court of Appeal and, if necessary, relief from sanctions supported by a witness statement from the defendant's solicitor dated 26 April 2024. There was a draft order adjourning the hand down of the 20th of March 2024 to a further hearing to consider, amongst other things, the application for permission to appeal. The hearing bundle also contained an application dated the 4th of June 2024 to the Court of Appeal to correct an error by the Court of Appeal in closing the application for permission made on the 10th of April 2024.
14. The defendant's initial position before me was that it was not seeking permission to appeal from the lower court notwithstanding the application for an extension of time to re-file an appeal with the Court of Appeal, but nevertheless was “*entirely in the court's hands*” as to whether the decision hearing had been adjourned. As I indicated at the

hearing, it appeared to me to be fruitless to consider that question (or an extension of time) if I was not also being asked to determine the application for permission to appeal if it was open to me to do so. The defendant agreed that I should either confirm that the lower court had ceased to have jurisdiction on 20 March 2024 or, if I concluded otherwise, deal with permission.

15. I consider that the central question is whether the defendant's solicitors e-mail of the 20th of March 2024 could be regarded as an application to adjourn the decision hearing itself notwithstanding that the hand down of the judgment took place on that day.
16. If the e-mail request was intended to raise permission to appeal as a reason for delaying the hand down of judgment then it was wholly opaque on the point. Any such construction would also be inconsistent with what followed since the hand down went ahead, there was no application to list the matter for a hearing within the time limit for appealing or to extend that period; instead the defendant made an application directly to the Court of Appeal. The suggestion that there might be a further hearing of an adjourned decision hearing appears to have arisen as a result of the closing of the appeal to the Court of Appeal by the Master. The guidance given in *McDonald v Rose*, helpfully reproduced in the White Book, was simply ignored by the defendant. For my part I intended to give the parties further time in which to seek to agree an order carrying the judgment into effect and dealing with the issue of costs. I conclude that the hand down on the 20th of March 2024 was the 'decision hearing' and that this court no longer has jurisdiction to hear an application for an extension of time or for permission.

Permission to appeal

17. If I am wrong in relation to jurisdiction then I would have refused permission to appeal.
18. By reference to the judgment; the defendant was an experienced amateur rugby player [4]. Rugby is a contact sport with rules regulating contact which are necessary to ensure that the game is played safely; the rules expressly prohibit playing an opponent without the ball [11]. At the kick-off the defendant ran forward at speed and continued at full speed on a line heading for the claimant [19]. He did not slow down as he approached the claimant [20]. The claimant experienced a massive impact from behind which threw him forward [20 & 21]. The suggestion that the claimant should have remained stationary and not moved for his own safety, that is to say to avoid injury, was raised by the defendant's expert and in argument. The defendant accepted that he did expect a player in the claimant's position to move. There was no obligation on the claimant to choose a "safe" option to avoid injury or any expectation that he would do so by not moving [29]. The collision was avoidable. The defendant's actions were deliberate, he chose to run so close to the claimant that even a slight movement would result in a forceful contact with most of the force being transferred to the claimant [30]. Running directly at the claimant at full speed in the manner in which he did was a breach of the rules designed to prevent injury and was a deliberate courting of the risk of injury by the defendant [33].
19. I reached my own findings of fact [16-26]. Both experts gave evidence (orally and in their reports) about what was to be seen on the recording, drawing on their extensive experience as players and referees. The defendant's case was primarily articulated by reference to his expert's evidence. I indicated where and why I disagreed with his interpretation of the footage. That is an entirely conventional approach to the role of experts and the use of video recordings (see *Czernuszka v King* (KBD) [2023] 4 WLR 26 – which was cited by both parties).

The Claimant's Part 36 offer

20. The case had been carefully case managed by Master Eastman who had ordered a trial of preliminary issues as to breach of duty, negligence and the causation of the claimant's spinal injury only (in relation to which the defendant had set out a positive case in his amended defence).
21. On the 13th of December 2022 the claimant made a written offer to settle in the following terms:

“The Claimant will settle the issue of liability in this claim on the basis that the Defendant will accept 75% of the Claimant's claim for damages to be assessed.”
22. By letter of the 30th of December the defendant's solicitor replied saying that the offer was not clear as to what was meant by “the issue of liability” and without prejudice to that contention rejected the offer. There was a response from the claimant's solicitor on the 4th of January saying that he considered that the terms of the offer were clear. The defendant's letter cited the case of *Seabrook v Adam* [2021] 4 W.L.R. 54 to which I was referred during the course of the hearing.
23. In *Seabrook* breach of a duty of care had been admitted but causation had been denied in relation to both heads of damage claimed. A denial of causation of loss prevented the claimant from obtaining judgment and therefore had to be resolved at trial. The claimant made two-part 36 offers in similar but not identical form to accept 90% of the claim for damages and interest to be assessed on the basis that liability was admitted. The offers were not accepted. The claim succeeded in relation to one of the heads of loss but nothing was awarded in relation to the other. The question which arose was as to the effect of the offers to settle and whether the defendant had beaten those offers.
24. In concluding that the offers applied to both causation issues, so that the claimant could not rely on them where he had succeeded on one issue alone, Asplin L.J. observed:

14. It seems to me that the real question here is how these Part 36 offers should be construed. They must be interpreted in the light of the pleadings and, in particular, in the light of the fact that Mr Adam had admitted breach of duty which had been referred to as “primary liability” but had disputed causation in relation to both heads of damage.

15. With that context in mind, it seems quite clear that the reasonable reader would have understood both offers to be addressing liability and causation and to relate to both heads of damage.

[...]

21. It seems to me therefore, that the judge was right to conclude as she did. Had Mr Adam accepted either of the Part 36 offers, it would have meant that he had admitted liability for both the neck and the back injuries and he would not have been able to argue, subsequently, that he had not caused the back injury at all. It follows that as he was only found liable in relation to the neck injury, he bettered both Part 36 offers.
25. So the starting position is how the liability offer in this case ought to be construed. As the Court of Appeal concluded in *Seabrook* the term liability is apt to include issues both of breach of duty and causation.
26. The claimant submitted that it was open to him to protect his position in the preliminary issue hearing by making an offer on the basis of, what is often referred to, as a “liability discount”. It followed that the offer was intended, by the claimant, to apply to the liability issues which had been identified as preliminary issues and should be construed as such. Accordingly if the defendant had lost on breach of duty but succeeded in

relation to the causation issue then, as in *Seabrook*, he would have been entitled to contend that he had bettered the offer.

27. The claimant submitted that if there was any doubt about the scope of the offer it was clarified once the defendant conceded the causation issue in relation to the spinal injury, on the eve of the trial. The only matter then left in issue for that hearing was breach of duty against an extant offer to settle for 75% of the eventual damages that might be awarded.
28. However, whatever may have been intended by the claimant, the defendant's solicitor was right, in my view, to be cautious about the precise extent of the offer to settle and what it referred to. The wording of the offer did not make reference expressly to breach of duty or the causation issue which was initially to be determined at the preliminary issue hearing. Rather it referred to the issue of "liability in the claim". That might on its face refer to issues of breach of duty and causation, the latter going beyond the single issue of causation which had been identified as a preliminary issue. The medical evidence was still at a fairly early stage, and as the defendant argued, contained a number of standalone claims such as that for psychiatric injury and potential brain injury which had yet to be the subject of medical opinion. There was a need for some precision about exactly what the offer related to. The claimant had the opportunity to provide an explanation which would have put the matter beyond doubt and confirm that the offer related to the issues identified as preliminary issues or, by the time of trial, the issue of breach of duty alone.
29. In *Seabrook* the Court of Appeal emphasised that [22]:

"Cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which has arisen here, especially in a low value claim, it is important to make express reference in the Part 36 offer to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates, in accordance with CPR 36.5(1)(d). In particular, if the issue to be settled is "liability", it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty."

30. It follows that I do not consider that the offer made was effective so as to give rise to the Part 36 consequences which would otherwise follow from the claimant's success at the trial. It may however have those consequences at a later stage when all "liability" issues have been determined, but that is a matter for further argument if it arises.

The Defendant's Application for Specific Disclosure

31. The defendant made an application for searches to be carried out and or specific disclosure of the video recording of the first half of the match in which the claimant had been injured. This had been viewed by the claimants expert and it was within the claimant's control, in that it could be accessed at the stage at which it was examined.
32. The claimant did not provide such a witness statement but his solicitor has now done so and it is accepted that the witness statement is sufficient to deal with the original application. The short answer to the inquiry which prompted the application is that the relevant video recording is no longer available. The question of costs remains. In my view the defendant was justified in seeking the material requested and obtained an order

that a witness statement should be served. The claimant should therefore pay the defendant's costs of the application.

The Amount of the Payment on Account of Costs

33. CPR 44.2(8) provides:

“(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so.”

34. It was accepted that the claimant is entitled to an order requiring a payment on account of costs. The dispute was as to the level at which the payment should be set against a current budget of nearly £195,000, but which is said to include items which are likely to be subject to dispute including incurred, unbudgeted costs, counsel's brief fee in respect of a vacated trial listing and the cost of the attendance of a neurosurgeon at trial. I consider that the claimant is likely to recover a significant proportion of the unbudgeted costs and will have a strong argument in relation to the attendance of a neurosurgeon who was not required only because of the late concession as to causation and the spinal injury. I consider that a reasonable sum is £165,000. It is agreed that the claimant is entitled to an order that the defendant is to pay the cost of the preliminary issue. The claimant sought an order that in default of agreement those costs should be assessed forthwith. I consider that the general rule in CPR 47.1 should apply and that there should be no detailed assessment until the conclusion of the proceedings. Any immediate prejudice to the claimant is mitigated by the payment on account of costs.

Amendment of the Defence

35. The concession as to the causation of spinal injury led to discussions between counsel and solicitors as to the precise terms of the wording of the concession. It is no longer in issue that there should be an amendment to the amended defence to reflect this concession.
36. The only point of contention was as to when the amendment should be made. On the basis that the order itself will set out the full terms on which the defendant conceded the causation dispute in relation to the spinal injury it seems to me that there is no urgency in requiring an amendment in circumstances where, for good reason, a number of further amendments to the amended defence are likely to be required. In those circumstances although an amendment should follow in due course it need not be the subject of an order with any time limit attached at present. There will be further case management at which the question of amendment can be considered.

The Order

37. The defendant sought an order which would not result in any payment on account of costs or by way of an interim payment on account of damages within any specified period. The defendant accepted at the hearing that this would have required an application for a stay which had not been made and which, in any event, I would not have granted since I would not have granted permission to appeal.
38. I consider, on reflection that the parties ought to have the opportunity to agree an order in the light of the rulings set out above and the discussions which took place at the hearing rather than the court finalising an order which might generate further argument.

MR JUSTICE SWEETING
Approved Judgment

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