Painting v University of Oxford [2005] ADR.L.R. 02/03

Before Lord Justice Longmore, Lord Justice Maurice Kay. CA. 3rd February 2005

1. **LORD JUSTICE LONGMORE**: I shall ask Lord Justice Maurice Kay to give the first judgment.

2. **LORD JUSTICE MAURICE KAY**: Mrs Yvonne Painting was employed in an administrative capacity by the University of Oxford. On 1 June 1999 she was using a ladder to take a file from a high shelf, when she fell. She sustained injuries to her back, pelvis and head. The more serious injury was to her back. She was heavily pregnant, but fortunately she suffered no damage in that regard and gave birth to a little boy some six weeks later.

3. On 10 May 2002 she commenced proceedings claiming damages for personal injury and consequential loss. The University admitted liability but asserted contributory negligence. On 20 February 2003 judgment was entered against the University with an agreed deduction of 20 per cent for contributory negligence. The assessment of damages came before Mr Recorder Morse QC sitting at Walsall County Court. The quantum sought by Mrs Painting was about £400,000 - that is £500,000 less 20 per cent. The damages awarded were £25,331.78, based on a full liability figure of £31,664.73. Neither party has sought to appeal that award.

4. The issue arising on this appeal relates solely to costs. The learned recorder ordered the University to pay all Mrs Painting's costs of the action. However, the case for the University was and is that the appropriate order for costs should be substantially in its favour. It is necessary to describe the history which is said to support that approach.

5. On 4 February 2004 the University made a payment into court of £184,442.91 pursuant to CPR Part 36. At that time the hearing date for the assessment of damages had been fixed for 27 February. Soon after the payment into court the University, or its advisers, belatedly realised that it had significant video surveillance evidence which seemed to undermine Mrs Painting's case in relation to the severity and duration of her injuries. That evidence had been recorded between September and November 2003 and had been in the possession of the University's solicitors since December 2003. On 13 February 2004 the University issued an application for permission to withdraw all but £10,000 of the money in court. On 24 February His Honour Judge Oliver Jones QC granted that permission and vacated the hearing date of 27 February. He ordered the University to pay Mrs Painting her costs of the application summarily assessed at £2,298.59, and further ordered that the University pay interest from 27 February until the postponed hearing at twice the rate ordered by the trial judge on the eventual award of damages. There is no dispute about that order for costs.

6. At no stage did Mrs Painting accept or apply to take out of court either the £184,442.91 or the £10,000. Neither did she make a Part 36, or indeed any, offer. At the assessment hearing her case remained that she had sustained a long-term debilitating back injury which would prevent her from working again, and justifying damages in the region of £400,000 after allowing for the 20 per cent deduction.

7. The University contended that she was exaggerating her symptoms and that the reality was a full recovery within six months after the accident. On that basis there would be no loss of earnings because Mrs Painting had been on maternity leave throughout the six months. The University relied on a second report from the jointly instructed medical expert, Mr Fairbanks, who had revised his opinion after seeing the video recording.

8. Clearly the principal issue at the assessment hearing was that of exaggeration. The Recorder found that Mrs Painting had misled Mr Fairbanks when he had examined her before he had been shown the video material. That examination had taken place only a day or two after the earliest video material had been recorded. In short, the Recorder was satisfied that Mrs Painting had exaggerated her injuries and that she had made an effective recovery for purposes of loss of earnings and other heads of special damage not by early 2000, as the University's primary case had become, but by the turn of the year 2002 into 2003. She remained on the University's books until June 2003 when she was retired on grounds of ill-health. She had suffered no loss of earnings up until then, because from the accident until retirement she had been in receipt of either maternity pay or sick pay, apart from one week when she had unsuccessfully returned to work.

9. The award of damages comprised the following components: general damages - £6,500 plus interest, £1,204.38; travel - £687.18; computer - £1,204.38; prescriptions - £345.40; cleaning - £8,736; gardening - £4,160; osteopath - £678; exercise regime - £1,939; BUPA - £4,614; interest on special damages - £2,484.85. Grand total £31,664.73, of which 80 per cent amounted to £25,331.78. All the items of special damage were agreed or were readily calculable once the Recorder had made the essential findings of exaggeration and the cut-off date.

10. Before the Recorder Mr Waters, on behalf of the University, submitted that although Mrs Painting had beaten the payment into court the circumstances were such as to call for a departure from the general rule that the unsuccessful party should pay the successful party's costs. She had tried to mislead the court, had been found out, and had recovered only about 6 per cent of the sum she was claiming. In rejecting these submissions, the Recorder said:
"On this question I understand the arguments addressed to me by Mr Walters for the defendant university and I have to say that I can think of circumstances in which I would be likely to uphold them, but they are not the circumstances of this case. The window of opportunity for this claimant to make any decision about a formal offer of settlement in the sense of money paid into court was very limited and in my judgment so limited as effectively in these circumstances not to exist. That is because although the amount of money paid into court early in February 2004 was very substantial, and it is true that Mrs Painting has come nowhere near achieving it, it remained in court for the smallest conceivable period of time and was then, with leave of the learned judge, reduced to a figure about which I accept Mr Farmer's submissions that it was a figure that the claimant could in no circumstances have been expected to accept. Whilst I appreciate the defendant's difficulties in such cases or perhaps in any case in these circumstances it is in my judgment true of this case that the figure of £10,000 which the defendant elected to leave in court was in all foreseeable likelihood never going to meet any award beyond one that found the claim to be fraudulent almost from its inception, and that was never likely to occur. In those circumstances I am going to order simply that the defendant pay the claimant's costs."

At that point Mr Waters reminded the judge of a reference that he had made to CPR Part 44, whereupon the Recorder added:
"I rather thought that I had taken that into consideration and made it plain that I had. I accept that this is a case in which I have found that the claimant has exaggerated her claim, but it seems to me that it is also a case in which the remedy available to the defendants to safeguard their position in costs was available at the beginning of 2004, and in their decision to leave so small a sum in court taken by them, that is to say that even allowing that this was an exaggerated claim a more realistic assessment of the likely outcome could have been made than a global sum of £10,000 damages to compensate for the whole claim. That is what I intended to say, if I hadn't made it plain."

11. It is at this stage necessary to refer to the relevant provisions of the Civil Procedure Rules 1998. By Rule 44.3(1) it is provided that the court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. The rule then provides as follows:
"(2) If the court decides to make an order about costs -
(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but
(b) the court may make a different order
...
(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -
(a) the conduct of all the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).
...
(5) The conduct of the party includes -
(a) conduct before, as well as during the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol;
(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;
(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;
(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

12. Mr Waters accepts, as he is bound to do, that a trial judge has a wide discretion on costs. It is common ground that this court will only interfere if the trial judge has *"exceeded the generous ambit within which reasonable disagreement is possible"*. Those are the words of Brooke LJ in **Tanfern v Cameron McDonald** 1 WLR 13, 11, quoting Lord Fraser in **G v G (Minors)** [1985] 1 WLR 647, 652. Another way of putting it was stated by Stuart Smith LJ in **Roache v News Group Newspapers Ltd** [1998] EMLR 161 at 172: the court should only intervene where

"... the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that [the exercise of] his discretion is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

Against this background Mr Waters submits that the Recorder erred: (1) in the way he approached the Part 36 payment; and (2) by failing to have regard to the circumstances referred to in CPR 44.3. There is an obvious overlap between these submissions.

13. Mr Waters' first submission is that the Recorder erred because he rejected the University's reliance on the exaggeration by reason of the insufficient Part 36 payment and for no other reason. He points out that under CPR 44.3(4(a) the court is **obliged** to have regard to, amongst other things including the Part 36 payment, "the conduct of all the parties". By CPR 44.3(5(d) that includes

"whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim."

14. For my part I do not doubt that the Recorder did have regard to the exaggeration of the claim. He said that he did; and he prefaced his ruling with the observation that he could think of circumstances in which Mr Waters' submissions would be likely to succeed. However, he considered them to be outweighed by the inadequacy of the Part 36 payment. In my judgment, it is when one stands back and considers the totality of the Recorder's approach that Mr Waters' submissions become more persuasive and irresistibly so.

15. It is appropriate at this point to refer to two authorities cited by counsel. The first is **Islam v Ali** [2003] EWCA Civ 612 . There, Mr Islam was seeking to recover from Mrs Ali remuneration for his services as a chartered accountant in running the accountancy business of her late husband. The trial judge assessed his entitlement at £12,000. The final negotiation positions before trial had been that Mr Islam would have settled for £45,000, including interest, and £15,000 for costs, whereas Mrs Ali sought a withdrawal of the claim and payment of her costs which exceeded £15,000. As Auld LJ put it in paragraph 6:

"The amount awarded by the judge ... was somewhat closer to Mr Islam's Part 36 offer than the offer or proposal of Mrs Ali, but they were both significantly distant in their opposite ways from the sum awarded."

He concluded that on an investigation of the issues and their resolution, the reality of the case was that Mrs Ali was the winner and that Mr Islam had lost the case on principle in relation to the main issues. He said at paragraphs 23 to 24:

"The disparity between what Mr Islam sought, including what he put Mrs Ali through to get it, and what he received was so large as to put the relatively small amount finally awarded in the balance between two rival contentions into relative insignificance.

In my view, the judge erred in principle in failing to have due regard in the exercise of his discretion to the fact that Mrs Ali had won the case in principle, or as near as could be, given the large competing sums being canvassed between the parties and the wide issue between them as to the proper basis of the claim. I would therefore allow the appeal."

Agreeing, Mummery LJ said at paragraph 30:

"... the judge fell into error in the exercise of his discretion because there were, contrary to his view, special circumstances in this case and he failed to take them into account. The special circumstances were those identified by my Lord and focus principally on the question of the basis on which Mr Islam claimed that he should be remunerated. This court is therefore entitled to interfere with the judge's exercise of his discretion, and I agree with my Lord that no order as to costs would properly reflect the realities of the ultimate outcome of this litigation."

16. We were also referred to **Molloy v Shell UK Ltd** [2001] EWCA Civ 1272, a personal injury case in which the claimant had sought over £300,000. The defendant had made a Part 36 payment of £15,000, and the judge eventually awarded £18,897. The claimant had exaggerated his claim and, until exposed a few days before trial, had advanced a dishonest case about his loss of earnings and employment. The judge

ordered the claimant to pay 75 per cent of the defendant's costs. The Court of Appeal increased that to 100 per cent. Laws LJ said at paragraph 18:

"[The judge] fell into error. At least since the particulars of claim were filed... and until he was found out the respondent's approach to this action has been nothing [short] of a cynical and dishonest abuse of the court's process. For my part I entertain considerable qualms as to whether, faced with manipulation of the civil justice system on so grand a scale, the court should once it knows the facts entertain the case at all save to make the dishonest claimant pay the defendant's costs. However, all that is sought here is an order for 100 per cent of the appellant's costs instead of 75 per cent, the costs in question being only those incurred after the date of the Part 36 payment. The appeal certainly cannot be resisted on that basis. I would allow it and make the order sought."

These decisions are useful illustrations. I have referred to the facts of the cases because inevitably cases in this area are very fact-sensitive.

17. Relying on the approach illustrated by those authorities, Mr Waters submits that the Recorder exceeded the generous ambit of discretion within which reasonable disagreement is possible, and that he failed to accord appropriate weight to the points advanced on behalf of the University that justice required. He emphasises the following points:

(1) the exaggeration of the claim;
(2) the relative amounts of the money in court, the damages awarded and the amount sought to be recovered;
(3) the success of the University on the central issue of exaggeration which dominated the trial;
(4) the perception that, when viewed objectively, the University had won the case;
(5) the difficulties faced by a defendant when a claimant persists in an exaggerated claim;
(6) the likelihood that, absent the exaggeration, the case would have been settled at an early stage when costs would have been minimal;
(7) the omission of Mrs Painting to respond to the Part 36 payment; and
(8) the fact that the costs order made by the Recorder would require the University to pay for medical examinations and reports which were skewed by the exaggeration.

Mr Waters submits that all but the last of these points were drawn to the attention of the Recorder.

18. The submissions of Mr Farmer are:
(1) exaggeration was not the only issue in the case;
(2) the ultimate issue was the quantification of Mrs Painting's claim;
(3) on that the Recorder concluded that she was entitled to approximately two and a half times the amount of the Part 36 payment; and
(4) that that payment was wholly inadequate and bound to be exceeded.

Mr Farmer also made a restrained attempt to down-play the degree of obloquy which is appropriate to lay at Mrs Painting's door.

19. I am not impressed by Mr Waters' suggestion that the defendant is placed in a very difficult position by an exaggerating claimant. Of course it is not easy to anticipate to a nicety the amount of the eventual award, but there is nothing unusual about that where there are unresolved issues of fact and expert opinion.

20. What the University chose to do was to make a Part 36 payment which amounted to a rock-bottom figure even on the basis that it established exaggeration to the maximum extent. If it had chosen to do so, it could have pitched the payment higher without for a moment weakening its position on the central issue in the case.

21. However, when one turns to Mr Waters' other points the picture moves substantially in his direction. To the question: who was the real winner in this litigation? there is, in my judgment, only one answer. The two-day hearing was concerned overwhelmingly with the issue of exaggeration, and the University won on that issue. Mr Farmer's submission that that was only one issue, the other issue being the quantification of the claim, is not persuasive. Quite simply, that second issue was hardly an issue at all once the Recorder had found the exaggeration and the cut-off date. It is true that that cut-off date was later than the one advanced on behalf of the University, but, viewed objectively, the totality of the

judgment was overwhelmingly favourable to the University. It was in real terms the winner. Moreover, the costs incurred after the reduction of the money in court were expended almost entirely on the preparation for and conduct of a trial in which the central issue was that of exaggeration.

22. There are two additional points which seem to me to have called for the affording of considerable weight by the Recorder, whereas the transcript does not suggest that he afforded them any weight at all. The first is the strong likelihood that, but for exaggeration, the claim would have been settled at an early stage and with modest costs. The second is that at no stage did Mrs Painting manifest any willingness to negotiate or to put forward a counter-proposal to the Part 36 payment. No one can compel a claimant to take such steps. However to contest and lose an issue of exaggeration without having made ever a counter-proposal is a matter of some significance in this kind of litigation. It must not be assumed that beating a Part 36 payment is conclusive. It is a factor and will often be conclusive, but one has to have regard to all the circumstances of the case.

23. It is with reluctance that I find myself interfering with an exercise of judicial discretion on costs, but I cannot avoid the conclusion that in the particular circumstances of this case the Recorder's order fell outside the generous ambit to which I have referred. I would set aside his order and in its place order, as Mr Waters suggests, that the University pay Mrs Painting's costs down to 25 February 2004, and that she pay its costs thereafter. Even that is not ungenerous to her, because it leaves the University with the bills in relation to, for example, the video surveillance recording and at least one medical examination and report which were founded upon her lack of candour. However, I am taking a broad view which I consider accords with the justice of the case.

24. **LORD JUSTICE LONGMORE**: I agree. At the end of a long court day Mr Recorder Morse QC sitting in Walsall understandably gave a short judgment on costs in the terms already read by my Lord. For the reasons given by my Lord, I am persuaded that the Recorder did not clearly address the question of who was the overall winner or give the fact that the University of Oxford was the effective overall winner appropriate weight; nor did he properly weigh the balance between the deliberately misleading claim as against the inadequacy of the payment into court.

25. I add very short observations on two matters only. The first is this. The court is required, as my Lord has said, to have regard to the conduct of the parties by virtue of Part 44.3(4)(a). Part 44.3(5) provides that the conduct of the parties includes: "(b) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim." The court therefore has to have regard to exaggeration.

26. However, exaggeration can take many forms and the rule makes no distinction between intentional exaggeration or unintentional exaggeration. Here, Mr Farmer was constrained to accept that Mrs Painting had been deliberately misleading in the course of the claim, and the fact that the exaggeration is intended and fraudulent is, to my mind, a very important element which needs to be addressed in any assessment of costs.

27. The second matter is that I agree with my Lord that it is relevant that Mrs Painting herself made no attempt to negotiate, made no offer of her own and made no response to the offers of the University. That would not have mattered in pre-CPR days but, to my mind, that now matters very much. Negotiation is supposed to be a two-way street, and a claimant who makes no attempt to negotiate can expect, and should expect, the courts to take that into account when making the appropriate order as to costs. To my mind it is not apparent from his short judgment that the Recorder gave proper weight to that element. In the result, I agree with the order proposed by my Lord.

(Appeal allowed; Respondent to pay Appellant's on the standard basis, up to 18 January 2005, but on an indemnity basis thereafter; no order about interest).

MR JULIAN WATERS (instructed by Messrs Berrymans Lace Mawer) appeared on behalf of the Appellant
MR GABRIEL FARMER (instructed by Messrs Thompsons) appeared on behalf of the Respondent