IN THE COUNTY COURT AT SHEFFIELD

Case No. B61YP388

The Combined Court Centre
West Bar
Sheffield

21st December 2016

Before

HIS HONOUR JUDGE ROBINSON

ANGELA WISEMAN

-v-

MARSTON'S PLC

APPROVED JUDGMENT

APPEARANCES

For the Claimant: MR. GORDON EXALL

For the Defendant: MR. JONATHAN PAYNE

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ANGELA WISEMAN -v- MARSTON'S PLC

21st December 2016

JUDGMENT (Approved)

JUDGE ROBINSON:

1. These are consolidated appeals. For reasons that will shortly become obvious, I will continue to refer to the parties as claimant and defendant respectively.

2. The claimant claims damages for personal injuries and other losses arising from a workplace accident on 15 January 2013. By letter dated 22 May 2013, the defendant made an open admission of liability. Thus, the only thing left in issue was the amount of money to be paid by the defendant to the claimant.

3. On 20 April 2016, District Judge Stephenson, sitting at the County Court in Grimsby, determined applications brought by both parties. Both applications were dated 18 February 2016. The claimant's application was superficially straightforward. Proceedings had been issued on 22 December 2015 by the issue of a claim form. The claimant sought permission to amend that claim form by increasing the amount of damages claimed. The amount claimed in the claim form as issued was limited to £50,000 and the court fee appropriate to that claim of £2,500 was paid. If the application was allowed, the appropriate fee would increase by £7,500, which the claimant's solicitors were in a position to pay.

4. The defendant's application sought an order for summary judgment on the basis that the claim was statute barred by reference to the Limitation Act 1980. Alternatively, the defendant sought an order striking out the claimant's claim as an abuse of the process of the court, pursuant to CPR Rule 3.4.

5. The District Judge refused the claimant's application. She made no order on the defendant's applications, but ordered the claimant to pay the defendant's costs of both applications, summarily assessed in the sum of £4,000. Both parties sought permission to appeal decisions made in the course of the same hearing. I granted permission to both parties to appeal.

6. The basis of the claimant's appeal is straightforward. It is submitted that the District Judge was plainly wrong in exercising her discretion to refuse the application to amend the claim form at this early stage in this litigation. The basis of the defendant's appeal is more subtle. It is said the judge should either have granted or dismissed what is described in the grounds of appeal and the skeleton argument, dated 3 May 2016, as "the application" (singular). In fact there were two alternative applications, although success on either of them would have led to the same result, dismissal of the entirety of the claimant's claim.

7. These appeals are concerned with a single issue which is the effect of failing to state the correct value of the claim on the face of the claim form at the time the claim is first initiated by the issue of the claim form and the payment of the proper court fee. The defendant asserts that, on the basis of recent authority, the issue of proceedings not accompanied by the appropriate fee does not stop the limitation clock running. Fees are calculated by reference to the amount claimed. The amount claimed here was limited to £50,000, attracting a fee of 5% of the claim, namely £2,500, which was paid.

8. Had matters stopped there, it is perhaps quite possible that the claim would have proceeded to a final hearing and the issue may then have been what sum the judge could award, if the judge was of the view the claim was worth more than £50,000. But that is not what has happened in this case. In this case, following the issue of the claim form, Particulars of Claim were served with the claim form on or about 27 January 2016. The prayer for relief within the Particulars of Claim claims damages "exceeding £500,000." Any claim with a value of more than £200,000 attracts a flat rate issue fee of £10,000. Thus, asserts the defendant, on any view as at 22 December 2015 (when the claim form was issued), it must have been obvious that the value of the claim exceeded £200,000. That being so, the stated value of the claim on the claim form was false, the fee paid was incorrect and thus the limitation clock did not stop.

9. I should say that within the papers there is reference to the limitation period ending on 14

January 2016. In fact, as I understand it, it is the next day, 15 January, the third anniversary of the accident, which is the last day for issuing proceedings, but nothing turns on that.

10. On the face of it, limitation is a defence which must be pleaded. As at 18 February 2016, when the defendant's application was issued and indeed now, there was and is no defence filed. Thus, on a simplistic view, limitation was not and is not yet in issue.

11. Mr. Jonathan Payne for the defendant says that the issue is engaged via CPR Part 11 and the defendant's jurisdictional contest as noted in the acknowledgement of service. I have not been called so far to rule upon that.

12. The alternative part of the defendant's application was for a strikeout on the basis of abuse of process. It is asserted that deliberately issuing a claim form with the wrong fee is an abuse of the process of the court, which would then engage the powers of the District Judge to strike out the claim form pursuant to CPR Rule 3.4.

13. There is something deeply unattractive in this argument. The claimant has an unassailable claim for a very large sum of money, almost certainly measured in hundreds of thousands of pounds. However, because the claimant has only issued her claim for a lesser, albeit substantial, sum namely £50,000, that is an abuse of the process of the court and thus the defendants do not have to pay a penny, because the claim must be struck out.

14. Let me look further at what happened in this case. As already noted, there was an early admission of liability. Extensive work was done on obtaining medical reports and the like. Late in 2015, the claimant's solicitor, appreciating that proceedings must be issued to protect the limitation period, sought counsel's advice on quantum. Counsel promptly told his instructing solicitor he would be unable to attend to those instructions until the New Year. What is the conscientious solicitor to do? He wants to issue protective proceedings, but what value should be stated? In this case, it is common ground that the solicitor gave no thought to value. I think this must mean no real or proper thought. In his witness statement, dated 18 February 2016, the claimant's solicitor says that in the absence of counsel's advice, he

estimated the value of the claim and plumped for £50,000. Had he given detailed consideration to the matter, based on the material to hand, I am prepared to accept that he should have identified £200,000 as the minimum likely to be claimed.

15. Does this amount to an abuse of the process of the court? If it does not, then it is agreed between the parties that the claimant's appeal must be allowed and the defendant's appeal must fail, subject to tidying up the order made by the District Judge. If, however, the claimant has abused the process of the court, consideration must be given to the defendant's appeal.

16. I have been asked to consider first the claimant's appeal for fairly obvious reasons. It must first be acknowledged that the law has moved on since the District Judge dealt with this case. I must deal with this case on the basis of the law as it now is and not as it was in April 2016. There are three recent decisions of importance: *Dixon and Dixon v Radley House Partnership and Others* [2016] EWHC 2511 TCC; *Glenluce Fishing Co. Ltd. v Watermota Ltd.* [2016] EWHC 1807 TCC; *Wells v Wood* (unreported), a decision of His Honour Judge Godsmark QC, the Designated Civil Judge for Nottinghamshire. Although unreported, it was delivered in written form on 9 December 2016 and I have a copy of it. It is of persuasive authority only, but it does review all of the cases which have been cited to me or referred to in argument.

17. Let me consider the nature of the alleged abuse. It is the simple fact of issuing a claim form which, in the light of the true value of the claim as it was or should have been known at the time of issue, undervalued the claim, so that the issue fee paid to the court did not reflect the true likely value of the claim. What amounts to an abuse of process in circumstances such as these was considered in *Lewis and Others v Ward Hadaway* [2015] EWHC 3503 (Ch). This is a judgment of Mr. John Male QC, sitting as a Deputy High Court Judge. I read paragraphs 37 through to 40 from his judgment where the Deputy High Court Judge himself refers to earlier authority.

"37. In *Attorney-General v Barker* [2000] 1 FLR 759 at para 19, Lord Bingham described an abuse of process as:'a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process.'

38. In *Johnson v Gore Wood & Co.* [2002] 2 AC 1 at 22C/D, Lord Bingham stated in relation to applications to strike out that:'Litigants are not without scrupulous examination of all the circumstances to be denied the right to bring a genuine subject of litigation before the court ...'

39. But, Lord Bingham then went on to say that:

> 'This does not however mean that the court must hear in full and rule on the merits of any claim or defence which a party to litigation may choose to put forward. For there is, as Lord Diplock said at the outset of his speech in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536, an 'inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.'

40. A little later in his speech, Lord Bingham referred, at p.31E, to the need for:

> '... a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial decision whether, in all the circumstances, a party is misusing or abusing the process of the court ...'"

18. It is immediately clear that there is no room for any exercise of discretion in determining whether conduct is or is not abusive. If it is abusive, all judges seized with the issue will determine it is and will then go on to determine how to deal with the abuse. If it is not, all judges will determine that it is not. I repeat: there is no room for the exercise of discretion.

19. *Lewis v Hadaway* was a case where a deliberate decision had been taken to issue proceedings and to save money by paying a fee that was derisory in the context of the issues at stake. It was held that such conduct amounted to an abuse of the process of the court.

20. In *Page v Hewetts Solicitors* [2013] EWHC 2845 (Ch) Hildyard J was dealing with a case where the fee paid, having regard to the remedies claimed, was deficient by £400. That was the difference between the £990 paid, which is the correct fee for a claim for common law damages, and £1,390, the correct fee for a claim for equitable remedies. The judge said this at paragraphs 56 and 57:

> "56. It is, in a way, concerning that the fate of a claim should depend upon the miscalculation by such a relatively small amount of a court fee. I have considered whether it is so de minimis that the Court should not take it into account, or make some exception or allowance.
>
> 57. However, as I read Lewison LJ's judgment in the Court of Appeal, the rationale of treating the receipt by the court of the required documents as sufficient and as transferring to the court the risk of loss or delay thereafter (see paragraph 31 of Lewison LJ's judgment) is that it is unfair to visit such risk on a claimant after he has done all that he reasonably could do to bring the matter before the court for its process to follow. Lewison LJ expressly described what had to be established by the Claimants: that the claim form was (a) delivered in due time to the court office, accompanied by (b) a request to issue and (c) the appropriate fee. In my judgment, the failure to offer the appropriate

fee meant that the Claimants had not done all that was required of them; and they had left it too late to correct the error, which was a risk they unilaterally undertook."

21. It is not clear what is meant by "too late" in this context. In the case before me, the application to amend was made on 18 February 2016, well within the four months allowed to serve the claim form and the Particulars of Claim. Had the proceedings not been served as they were on 27 January 2016, the claimant would have been permitted to amend without permission: see Rule 17.1(1) of the CPR. This is subject to a right on the part of the other party to have the amendment disallowed: see Rule 17.2. Mr. Payne says that an application to amend after the proceedings have been served is too late. He also says that an application to amend should in any event be disallowed because the limitation period has expired.

22. It is true that by 15 February 2016 the limitation period had expired, but, at least provided the claim was not itself abusive, an increase in the value of the claim does not affect the fact that the proceedings themselves were issued in time. It quite often occurs that post-limitation it is necessary to increase the value of the claim in cases where, at the time of issue, the value is properly stated on the basis of facts then known.

23. The question of the effect of issuing a claim at an undervalue with a reduced fee was considered recently in one of the two new cases. I refer to *Dixon v Radley House Partnership*. In that case, no suggestion of abuse arose and the issue was simply whether the effect of such issue was to stop the limitation clock running. Stuart-Smith J said this at paragraph 70:

"In the absence of an allegation of abusive conduct, intention to claim further amounts or even knowledge that their claims would be greater than claimed in the claim form does not prevent the proceedings as issued from being effective to stop time running for matters that can subsequently be advanced given the terms of the Claim Form. The

risk for a Claimant adopting this approach is that a failure to identify the claim with sufficient clarity in the proceedings as initially issued may lead the Court to hold that a later amendment involves a new claim which may engage s. 35 of the Limitation Act. This is axiomatic; and it is reasonable. I would regard a principle that left the validity of proceedings to be determined by satellite litigation that investigates the (non-abusive) state of a Claimant's mind and intentions on issue as detrimental to the efficient and fair conduct of litigation. To my mind, the undesirability of the principle for which the Defendants contend is brought into sharp focus when it is remembered that the payment of fees is a matter for the benefit of the Court and is very largely irrelevant to the opposing parties. When asked what actual prejudice their clients had suffered as a result of the asserted underpayment of issue fees in this case, Counsel for [the Defendants] were unable to identify any substantial prejudice at all. The best that could be suggested was that the underpayment of issue fees left the Claimants more money with which to fight the Defendants. In the context of the overall costs of this action, that suggestion pales into insignificance."

24. I entirely agree with the sentiments expressed within that paragraph. However, in this case abusive behaviour is alleged.

25. That was also one of the issues in the next, what I will describe as new, case of *Glenluce Fishing Co. Ltd. v Watermota Ltd.* There the Deputy High Court Judge, Mr. Roger ter Haar QC, said this at paragraphs 48 to 50:

"[48] What I am concerned with in this case is, in my judgment, an attempt to extend that principle further to a case where a claim has been properly 'brought' for the purpose of the Limitation Act, but an

application to amend a claim form is made.

[49] The argument has these stages, as I understand it:

(1) The claim form stipulated a value of the claim, namely £69,694.06;

(2) The appropriate fee for a claim of that size was paid;

(3) The claim is now valued at £162,132.06;

(4) Had the claim been valued at that figure in the Claim Form a significantly higher Court Fee would have been paid;

(5) With due diligence, the Claimant could and should have identified at the time that the Claim Form was issued that the amount claimed was understated;

(6) The Limitation Period has now expired;

(7) Therefore, applying the authorities to which I have referred, the application to amend to increase the claim should be refused.

[50] The Defendant does not suggest that there has been an abuse of process here, but for the avoidance of doubt I would have rejected any suggestion that the course adopted was adopted for any extraneous purpose, as in *Lewis*, and I think the Defendant was entirely realistic not to make any such suggestion."

26. The Deputy High Court Judge then went on to determine the application to amend in accordance with CPR 17.4 and he said this at paragraphs 54 to 60:

"54. Thus, if the test is whether the Claimant did all that it reasonably could to bring the matter before the court in the appropriate way, including identifying before issue of the Claim Form the true value of the claim, reflecting that in the Claim Form and paying the resultant fee, then I would be bound to resolve this matter adversely to the

Claimant.

55. However, if that is the true position in law today, it appears to me to be a significant departure from the way such amendment applications have been approached certainly since the equivalent of the present CPR rule 17.4 was first introduced, an approach set out in the Court of Appeal decision to which I have referred at paragraph 27 above. In particular the approach advocated by Mr. Jagasia on behalf of the Defendant eliminates from the factors to be taken into account by the Court whether any prejudice will be suffered by the Defendant if the application to amend is granted. If that is right, the recent decisions have effected a significant change in the extent of CPR rule 17.4 without any change having been considered by the relevant Rules Committee.

56. Moreover, in the passage from the judgment of Thomas L.J. which I have set out above, he recorded that 'no reasons were advanced by the claimants which explain why the new case has not been pleaded originally'. Thus, in his judgment, an investigation as to whether the claimants had done all that they reasonably could to bring the matter before the court earlier was not necessary (albeit there are many cases where such matters would be relevant to the exercise of the court's discretion). If the recent authorities are to be applied to the exercise of the court's discretion to permit amendment in the manner now suggested, it seems to me that in every case such as the present such an investigation would be necessary with the claimant bearing the burden of establishing the exercise of all diligence to the satisfaction of the court.

57. In my view the recent first instance decisions upon which Mr. Jagasia relies should be limited in their application to the circumstances expressly considered in those cases, namely applications to strike out claims on the basis that those claims were not 'brought' within the applicable limitation period. I do not consider that any of those decisions justify a root and branch revision of the approach to be adopted to an application to amend.

58 . I recognise that the situation might be different if the situation were analogous to that considered in *Lewis*, where the underpayment of fees amounted to an abuse of the process of the Court. Such abuse might be relevant to the exercise of the court's discretion under CPR r. 17.4.

59. Accordingly I approach this application along 'traditional' lines. To the extent that the amendment introduces a new 'claim' (which Mr. Macaulay for the Claimants does not accept, and which is certainly an arguable point), it does not introduce a new cause of action, but only significantly altered heads of claim.

60. True it is that the increase is significant in monetary terms and as a multiple of the claim first put forward. However in the absence of any prejudice to the Defendant if the amendment is allowed, and the significant potential prejudice to the Claimant if it is disallowed, in my view this is an amendment which should be allowed."

27. It seems to me that that is the approach that I should adopt in this case. However, the issue of abuse still has to be determined.

28. There is to my mind a world of difference between these two scenarios. A solicitor seeking to play the system deliberately states the value of a claim to be very low to save money.

Perhaps it is a *Lewis* type claim. Perhaps liability is far from clear and the solicitor wants to see how far things go. His intention is always to seek to amend to claim a higher amount and pay the increased fee if things look up. That may well be abusive behaviour. In this case, a competent, well respected solicitor bang up against the limitation period knows he must issue. He knows the value of the claim is substantial. Counsel's advice is awaited, but will not be received until after the limitation period has expired. He knows he has an open admission of liability. It appears that he does not engage his mind as to the value of the claim, but he knows it is substantial. He fixes on £50,000 as the appropriate sum to state on the claim form, resulting in an obligation to pay the substantial fee of £2,500, being 5% of the sum claimed. Once counsel's advice is obtained and he has the Particulars of Claim he takes immediate steps to serve what he has. Rather than delay until mid-April, which is four months after issue, he also applies promptly for permission to amend the claim form, so the proper value is shown and the proper fee paid.

29. I cannot think of anything further away from abusive conduct than that. My analysis, it seems to me, is perfectly in accordance with that reached in much greater detail by His Honour Judge Godsmark QC in *Wells v Wood*, whose more detailed analysis I gratefully adopt. Application of his analysis to the facts of this case results in the conclusion that the actions of the claimant by her solicitor did not amount to an abuse of the process of the court.

30. For the avoidance of doubt, even if the original act of issue was abusive – and I am firmly of the view it was not – the actions of the claimant by her solicitor thereafter cured the abuse. Those actions comprised prompt service of the pleadings and a prompt application to amend. The District Judge was, with respect to her, wrong when she categorised the actions of the claimant by her solicitor as constituting an abuse of the process of the court. It is fair to point out that I have had the advantage of the more recent jurisprudence on this issue.

31. The District Judge never considered properly the exercise of her discretion to permit the amendment sought under Rules 17.3 and 17.4. Rule 17.4 applies to applications to amend

after the expiration of the limitation period, "in one of the ways mentioned in this rule." First, as a result of my finding that there has been no abuse in this case, the limitation period expired on 15 January 2016. The issue of the proceedings in December 2015 stopped the limitation clock running for the purposes of the proceedings, but the application to amend made on 18 February 2016 was an application to amend made after the end of the relevant limitation period.

32. What are the ways mentioned in the rule?

> "(2) The court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

Pausing there, it does not seem to me that, in the context of this case, an application to increase the value of the claim amounts to adding or substituting a new claim.

33. Sub-paragraph (3) deals with a mistake as to the name of a party. That is not relevant here. Sub-paragraph (4) concerns an amendment to alter the capacity in which a party claims. Again, that is not relevant here.

34. So at first blush it does not seem to me that Rule 17.4 has any application but, even if it did, it would clearly be appropriate to permit the amendment for the same reasons as under 17.3, which deals with amendments to statements of the case with the permission of the court.

35. The amendment was sought promptly. There is no prejudice to the defendant other than that the defendant must now compensate the claimant in full rather than only partially and will probably have to pay by way of costs, subject to any relevant and valid Part 36 offer, an additional £7,500, being the extra fee that the claimant has to pay in order to bring the claim before the court. On the other hand, the injustice to the claimant would be immense and, in any event – and whether this is relevant or not it is nevertheless a fact – would further occupy

the time of the court with the inevitable claim by the claimant against her own solicitor, thus litigation would be multiplied. I am not saying that is a relevant consideration, but it is nevertheless a fact.

36. Had the District Judge conducted the relevant analysis, it seems to me she would inevitably have concluded that the application should be allowed, particularly on the principles outlined in the *Glenluce* case. It follows that in this case the claimant's appeal is allowed.

37. It emerged in the course of argument that the claimant's solicitor has in fact already tendered the additional fee of £7,500, which has been accepted by the court and not returned to him. Thus, the appeal having been allowed and the amendment having been approved, it does not seem that any further fee is in fact payable.

38. I will now listen to submissions concerning consequential matters, including whether, despite what Mr. Payne has said about the status of his appeal, there is anything for me to determine and also costs, case management and the like.
