Case No: C07YM997

IN THE COUNTY COURT AT

**BRADFORD**

County & Family Centre, Exchange

 Square, Drake Street, Bradford BD1 1JA

Date: 17/05/2019

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**Before**:

HIS HONOUR JUDGE GOSNELL

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**Between:**

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| --- | --- | --- |
|  | **SALEEM ASLAM** | Appellant |
|  | **- and -** |  |
|  | **THE SECRETARY OF STATE****FOR JUSTICE** | Respondent |

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**MR. P. DE BERRY (C)** for the **Appellant**

**MR. T. COUPE (C)** for the **Respondent**

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DRAFT JUDGMENT

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**JUDGE GOSNELL:**

1. This appeal is brought against the decision of District Judge Foster, who struck out the claim of Mr. Saleem Aslam at a hearing on 20th November 2018.
2. Mr. Aslam at the time was serving a sentence at Her Majesty’s Pleasure and was doing some work, I suspect approved by those at the prison, and suffered an accident, and so he ended up suing both The Secretary of State for Justice, as those responsible for the prison he was staying in, and also Leeds City Council who arranged the work.
3. In the end, he discontinued against Leeds City Council and by the time the case came before District Judge Foster, there was only one defendant, which was The Secretary of State for Justice.
4. The history is unfortunate, to say the least. The accident, I say, appears to have happened, on 1st August 2013, because it is not particularly clear from the documentation I have seen when the accident did in fact occur. The claim form seems to suggest it might have been 14th August 2013 and the particulars of claim say 19th August 2016, but I think that was a typing error, at least so far as the year is concerned.
5. The proceedings were issued in August 2016 and served, I think, in November 2016. In the defence, which was drafted by Ms. Francis on behalf of The Secretary of State for Justice, she complains: that the Particulars of Claim are not accompanied by a medical report; that he date of birth of the claimant is not stated in the particulars of claim, contrary to the Practice Direction; and that there was no schedule of loss. So this would be a breach of the Practice Direction to part 16, paragraph 4.2, and the absence of a medical report would be a breach of the Practice Direction to part 16, paragraph 4.3.
6. I think she had perhaps stated it too strongly when she pleaded that at the date of the defence the claimant was not allowed in the future to rely on such evidence, but certainly the point I am making is that these deficiencies were raised in the defence as long ago as November 2016, and so the Claimant’s solicitors were put on notice.
7. This was reinforced then when the parties filed directions questionnaires in late 2016 where the issue was raised again in the defendant’s directions questionnaire.
8. The County Court Money Claims Centre, at Salford appear to have mislaid the file, and I can only assume or infer that the claimant’s solicitors ignored the case and did nothing about it thereafter. The claim seems to go to sleep until around October/November 2018, when the file is transferred to the Bradford County Court. I now know it crossed District Judge Foster’s desk and he listed an allocation hearing for 20th November 2018.
9. I note from his judgment that he listed an allocation hearing because he was concerned about the absence of a medical report, the absence of a schedule of loss and no doubt because he could not really accurately put a valuation on the case, to what track the case should be allocated, although it had been, I think, pleaded at less than £15,000 by the claimant in the particulars of claim.
10. The case came before him and both parties were represented by counsel: the claimant by Mr. Adnan and the defendant by Mr. Coupe. I have the benefit of not only a transcript of the judgment, but a transcript of the hearing, which is very useful. It is clear that the judge went on the offensive at a fairly early stage once Mr. Adnan had introduced the position and asked about the medical evidence.
11. Mr. Adnan replied: “Sir, medical evidence, I have been advised, has not been served yet. They do have it. I think there’s been a complication because the claimant was in prison”. I pause there and wonder why, if the claimant’s solicitors had a medical report and they knew they were in breach of a Practice Direction, they would not have served it even some two years after the date of service of the original Particulars of Claim. District Judge Foster makes that point in a colloquial way by saying: “Well, hang on, it’s two years ago”.
12. There was then an exchange between District Judge Foster and Mr. Adnan and it emerges that there is no explanation. District Judge Foster then says: “You see, if anything, there should be an application really for relief from sanctions”. He points out that there is no application before him, but there has been a flagrant breach of the protocol by the deficiencies the judge had already referred to.
13. There are then further exchanges between the judge and counsel for both parties, and Mr. Coupe, for his part, I think probably it is fair to say, jumps on the bandwagon and complains of the breaches and encourages the judge that there should be an application for relief from sanctions, because of the fact that the claimant was significantly out of time in serving the medical evidence. Eventually, Mr. Coupe suggests that the judge strike out the claim pursuant to Civil Procedure Rule 3.4.2(c) because the claimant had failed to comply with a Practice Direction over two years, had made no application for relief from sanctions and had served no evidence as to why they had not done that.
14. District Judge Foster, at the point when Mr. Coupe makes this submission, says: “Mr. Adnan?”, in other words, inviting Mr. Adnan to address him about what Mr. Coupe has just said. Mr. Adnan then says: “Not a great deal to add. The only thing I can say is that in respect of the medical evidence and the amendments which my learned friend has alluded to, there had been attempts by the claimants to agree those amendments by a consent order”. District Judge Foster quite rightly says: “That is not the point. The crucial point is the Practice Direction says that you must —” and then goes on to point out that the Practice Direction is mandatory.
15. District Judge Foster then reminds Mr. Adnan that: “In two years that has not happened, as far as I can see”.

Mr. Adnan says: “Yes, sir. Like I said, sir, I do not have an explanation as to why it has not been served, considering the timescales, sir. Obviously, there has been some reference made to it in the Particulars of Claim, it being evidenced that they did not have the medical evidence at the time. The claimant’s position would be to make a relief from sanction application, because —”

District Judge Foster interrupts: “But there is not one”.

Mr. Adnan says: “Yes, sir, there is not one before you, sir”.

 District Judge Foster says: “No”.

 Mr. Adnan says: “There is nothing further I can really add to that, sir”.

District Judge Foster says: “I think you have argued everything you could possibly argue on the point”, and then proceeds to give judgment.

1. His judgment is set out at page 87 and 88 of the bundle, and I accept it is an *ex tempore* judgment which was given no doubt as soon as the parties had finished their submissions. He sets out the history, which I have attempted to do already, but he perhaps sets it out in a clearer way than I have, but then points out that: “We are now 22nd November 2018, some five and a bit years down the line —” from the cause of action, which is said to have arisen on 1st August 2013.
2. He sets out Practice Direction PD4.3, about the mandatory obligation to serve a report from a medical practitioner and also, 4.2, about a schedule of loss. He then says: “Particulars of claim were served. We are now in November 2018 and there has been a failure by the claimant to comply with some of those very basics, notwithstanding they are pointed out within the Defence by Ms. Francis of counsel. Furthermore, at no stage has there been an application for relief or for permission to serve without medical evidence”.
3. He then says: “It should be noticed that the use of the word ‘Must’ is a consistent feature in the Practice Direction. The use of “must” means obligatory, mandatory and necessary, essential. It directs a party that something has to be done. The claimant even now has not complied with the requirements of the Practice Direction”.
4. In paragraph 10, he says: “I am told by Mr. Adnan today that a medical report is available but has not been disclosed, and there is no application before me for relief from sanctions. In the absence of such an application, I take it upon myself to look at the court’s powers in respect of case management. The court has a power under 3.4 to strike out a statement of case where there has been a failure to comply with a rule, Practice Direction or order”. He then says: “There is a complete and ongoing failure by the claimant’s solicitors to make any progress. We are now five years on from the purported accident. We also are at the best part of two years from when the Particulars of Claim were served and there has literally been no progress in this case”.
5. He then says: “I am told today that the claimant wishes to make amendments to the particulars of claim which the defendant so far has not agreed to, but that is not the defendant’s problem. The problem here and the real problem here is that there has been a failure to grasp what this litigation is about and move the case on. As I say, a delay of two years in which to fail to address the matters which are highlighted in the defence, is beyond belief”.
6. “For those reasons and in line with the overriding objective, I remind myself that the overriding objective is to deal with cases proportionately and at a proportionate cost and that involves the parties, on an equal footing, saving expense and dealing with the case in a manner which is proportionate due to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party, and also to ensure that it is dealt with expeditiously and fairly and allotting to it an appropriate share of the court’s resources whilst taking into account the need to allot resources to other cases and enforcing compliance with rules, Practice Directions and orders”.
7. I pause there to point out that that addition to the overriding objective, in my recollection, was made at the time of the Jackson Reforms in 2013.
8. He then says: “This is a case where the claimant has done nothing meaningful to progress the action since November 2016, or very little has happened on the claimant’s part for the best part of two years. There has been a failure to comply with those Practice Directions, and this case itself has taken up a percentage of the court’s time when the resources could have been added to other cases before the court”.
9. “So, drawing those strands together, for those reasons, the claim is struck out pursuant to Civil Procedure Rule 3.4.2(c)”.
10. The claimant appeals against that decision and the grounds of appeal are put concisely by Mr. De Berry, who today appears for the appellant and did not appear below. He says: “The decision was wrong or unjust for the following reasons. A) The District Judge wrongly considered that the claimant needed to make an application for relief from sanctions; b) the District Judge failed to fairly balance the various factors in the scales; c) the decision was procedurally unfair because the claimant was not afforded an opportunity to provide witness evidence on the issues at hand”.
11. So there are three interlinked grounds there, and I have been very much assisted by both Mr. De Berry and Mr. Coupe today in providing both written skeleton arguments and also helpful oral submissions.
12. I will deal with the last allegation first, that the decision was procedurally unfair. What the claimant effectively complains about is that this was an allocation hearing listed for 30 minutes. There was no application before the court in writing to strike out the case. Had there been such an application, perhaps the claimants might have taken the hearing more seriously and produced some evidence to support their position. The inability to put evidence before the court and have the opportunity to do so, was unfair in the circumstances.
13. I do not agree with that categorisation of the hearing, for these reasons. Firstly, in the defence document itself, the deficiency about which the complaint was made by the judge had been clearly set out by Ms. Francis as long ago as November 2016, namely, no date of birth in the particulars of claim, no medical report, no schedule of loss. There was also reference to some of those deficiencies in the directions questionnaires.
14. I ask rhetorically what the claimant’s solicitors thought the purpose of the allocation hearing was? It is somewhat unusual in connection with a straightforward fast-track personal injury claim for there to be an allocation hearing, because these days, according to the rules as they are drafted at the moment, the court can make a presumptive decision in relation to the track and then a District Judge, having received the directions questionnaires, will then make an order usually confirming the allocation to the fast-track and making procedural directions, including the listing for trial within 30 weeks.
15. In this case, it was listed for an allocation hearing. I accept it did not give notice to the claimant’s solicitors that there might be some problems. I have got to say, however, a competent solicitor must have considered the absence of service of a medical report and a schedule of loss as the sorts of issues that were going to be dealt with by the court, and the passage of two years in time was going to be a quite significant difficulty. It is one of those hearings where colloquially, one might recommend to a colleague that they put a crash helmet on, because it is going to be quite a difficult hearing anticipated, I would have said.
16. So, I do not accept that the claimants were caught by surprise, because if they were, it was their own fault.
17. So far as how the judge dealt with the hearing, he did somewhat robustly challenge Mr. Adnan about these difficulties, but in my view, he was right to do so. It could not be said that he did not give Mr. Adnan the appropriate opportunity to address him. I am going to deal with the issue of relief from sanctions in relation to a separate ground of appeal, but certainly Mr. Adnan was given every opportunity to meet the accusations which were being made against the claimant’s solicitors, both when Judge Foster said: “Mr. Adnan?”, question mark, directly after Mr. Coupe had said that the case should be struck out, and Mr. Adnan, perhaps somewhat unwisely said: “Not a great deal to add, sir”.
18. Now, that may be because he had not been given any real explanation why the medical evidence had not been served; my suspicion is, because there was no good explanation why that had not been done. Mr. Adnan could have said: “I hadn’t realised it was going to get quite so serious. I would like an adjournment to file evidence which will assist me in dealing with this application in the face of the court, for the case to be struck out”, or even because all parties seemed to think at that point that it was a relief from sanctions application; to make the relief from sanctions application that had not been made before the court.
19. However, Mr. Adnan did not do that, and when District Judge Foster pointed out there was no application for relief from sanctions, Mr. Adnan agreed that there was not, and there was nothing further that he could add. So, he could have applied for an adjournment. He could have made an application in the face of the court for relief from sanctions. He could have tried to persuade the court not to make the order that Mr. Coupe sought, but he did not really make any real spirited opposition to that application. It was not because he was not given the opportunity by the judge, it was because he just failed to do so.
20. So, I do not accept that that ground of appeal is made out. In relation to the other two grounds of appeal, I will deal with those together, because I think they are linked.
21. This hearing took place on 20th November 2018 and on 23rd November 2018, Mr. Justice Martin Spencer handed down his decision in  *Stephen Mark v Universal Coatings Limited* [ 2018] EWHC 3206. I do not intend to quote from that decision, other than to say for the first time a Judge in the higher courts found that where a party has failed to comply with the Practice Direction to part 16, paragraphs 4.2 and 3, that is obviously a breach of a Practice Direction, but it is not one of those instances that involves an implied sanction, such as an application to extend time for an appellant’s notice, or an application to extend time for a respondent’s notice, or perhaps even an application to extend time for witness statements. That is because in the latter example there is a sanction set out in the rule, and the two former examples, the higher courts have found that those are applications that involve an implied sanction.
22. So, Mr. Justice Martin Spencer said that there was no implied sanction and so there was no need for an application for relief from sanctions. He did not specifically deal with the issue of whether the claimant would need to make an application for an extension of time to comply with the Practice Direction, in which case that would have brought him swiftly back to rule 3.9. However, that is not something I can deal with today.
23. What I do know is that Judge Gargan’s decision was overruled because he had applied rule 3.9 as if there was an implied sanction, and when he undertook the three-stage test, he found the claimant to have not passed the test in the sense that the balancing exercise at the end and the thresholds in the first two legs of the test had not been reached by the claimant, and accordingly he reached the view that almost automatically the claim had to be struck out. It was that thought process Mr. Justice Martin Spencer felt was wrong and formed the basis of the decision.
24. Had District Judge Foster, Mr. Coupe and Mr. Adnan known of this decision on 20th November 2018, I suspect they would not have gone down the road of there being an obligation on the claimant to seek relief from sanctions, because the decision in *Mark* says that that is not necessary. I think the issue for me is whether that impugns the decision of the District Judge or not.In connection with that issue, I also need to look at the subsidiary point, which is that the judge has failed to properly balance the various factors in the scale. I remind myself that I can only grant an appeal where I find the judge below was wrong. I also remind myself that both counsel have helpfully referred me to previous authorities of the higher courts in relation to the appropriate test on appeal. One of them is a quote from *AEI Rediffusion Music*, which states:

*“Before the court can interfere, it must be shown that the judge has either erred in principle on his approach, or has left out from account or has taken into account some feature that he should or should not have considered. Or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale”.*

1. The other one I will quote is from Lord Fraser from *G v G*, which is:

*“The appellate court should only interfere when they consider that the judge at first instance has not merely preferred an imperfect solution, which is different from an alternative imperfect solution, which the Court of Appeal might well have adopted, but has exceeded the general ambit within which a reasonable disagreement is possible”.*

 It is that last phrase which is most often quoted.

1. Mr. Coupe, for his part, quotes Lord Neuberger in *Global Torch Limited v Apex Global Management Limited,* where Lord Neuberger said:

 *“The essential question is whether it was a direction which Mr. Justice Vos could properly have given. Given that it was a case management decision, it would be inappropriate for an appellate court to reverse or otherwise interfere with it unless it was plainly wrong, in the sense of being outside the generous ambit where reasonable decision-makers may disagree”.*

1. So, I think it is fair to say that those three quotes together set out what the Appellate Court’s approach in relation to case management decisions should be.
2. Looking at District Judge Foster’s decision, I agree with Mr. Coupe that it is clearly expressed, and obviously he should be commended for coming up with a clear judgment like this on an *ex tempore* basis. The judgment is capable of criticism, because it contains the mistaken view that there should have been an application for relief from sanctions, which was not made.
3. In paragraph 10, he says: “I am told by Mr. Adnan today that a medical report is available but has not been disclosed, and there is no application before me for the relief from sanctions. In the absence of such an application, I take it upon myself to look at the court’s powers in respect of case management, and the court has a power under 3.4 to strike out the statement of case where there has been a failure to comply with the rule, Practice Direction or order”.
4. So, what Judge Foster was saying was, there was an obligation on the claimant to apply for relief from sanctions, but that application has not been made, so he does not go on to consider it. It is noteworthy that he does not undergo the three-stage test, because he takes the view that there perhaps should have been an application for relief from sanctions but it was not made, and so he had no such application to consider .
5. He is then looking at the position through the lens of rule 3.4, which is very broadly drawn. It states that: “The court may strike out a statement of case if it appears to the court that there has been a failure to comply with the rule, Practice Direction or court order”. It is obvious that this rule could possibly apply in this case and that whether to apply the full rigour of that rule or whether to not apply it, or to apply it by the imposition of an unless order, is part of the court’s general case management powers.
6. District Judge Foster was right that if he was considering whether to make an order under rule 3.4.2(c), he would need to consider it in accordance with the overriding objective. In paragraph 13 he sets out fully what the various considerations are from the definition of the overriding objective.
7. So, technically he is entitled to consider the matter under rule 3.4.2(c) and the appropriate test is the overriding objective.
8. I take the view that his error in saying that there should have been an application for relief from sanctions, is actually not material, because although he says there should have been an application and there was not, he does not attempt to deal with the case by using rule 3.9. In fact, had he done so, I suspect the claimant would have had no chance of satisfying that test. He actually does so under the basis of rule 4.2(c), which is actually, in my assessment, a much higher threshold for the court to make an order striking out a claim, than it would have been had he considered it under rule 3.9.
9. I take the view that District Judge Foster’s error, which is firstly entirely understandable because *Mark* had not been handed down on that day, and secondly, did not in fact affect his decision, because he did not actually use rule 3.9 to decide the case does not impugn his conclusion. He was looking at 3.4.2(c) and saying whether this was one of those cases where the breach is so egregious that the case should be struck out.
10. The appellant complains that the judge did not consider the prejudice to the claimant, and I accept that within the words of his judgment he does not actually say that: “If I strike out, the claimant will not be able to pursue his case against the Ministry of Justice”. I do not think that matters, because it is obvious that that is the case. It is an obvious consequence of the judge’s decision. I do not think it really matters that he did not consider whether it was the claimant’s fault or the claimant’s solicitors’ fault, because that particular issue has been much less important since rule 3.9 was changed in 2013, from previously being one of the specific considerations the court should have regard to, and thereafter not being mentioned as a consideration in favour of the two sub paragraphs in the modern Rule 3.9 , one of which is the need to comply with rules, Practice Directions and orders.
11. I accept the thrust of Mr. Coupe’s submission that many judges would have given Mr. Adnan a ticking off about the way the case has been conducted to date, but given the claimant a last chance to comply by making an unless order with a relatively short timescale, coupled with the sanction of striking out the case and the costs of the hearing against the claimant. I think that probably the majority of District Judges would have done that.
12. However, I accept that there is perhaps a minority, but it is a significant minority who in the face of wholesale disregard of the rules, like we have in this case, and the real lack of any effort to move the case forward for two years, would take a more draconian view and strike out the case. Certainly, in the early days following *Mitchell*, this sort of thing was happening up and down the country with some regularity. Following *Denton v White*, it happened less often, but courts were still encouraged to make robust case management decisions and the Court of Appeal have said that where the court does make robust case management decisions, the appellate court should support those decisions unless they are a decision that no reasonable judge could have taken.
13. I take the view that the failures in this case are so significant and lamentable that Judge Foster cannot be said to be wrong in striking out the case pursuant to rule 3.4.2(c). He did not apply rule 3.9, and so there is no damage done where he mistakenly seemed to have anticipated that an application should have been made for relief from sanction. He decided the case under rule 3.4.2(c). In my view, that is a higher threshold to strike out than rule 3.9, and he reached a decision which a reasonable judge could have taken, albeit one who was being robust on the day. One of the main thrusts of the Jackson reforms in 2013 was to attempt to give the rules some teeth and discourage wholesale disregard of the rules which had become fashionable before those reforms took place. District Judge Foster’s decision was one that I believe Lord Justice Jackson would have supported.
14. So, for those reasons, I find that District Judge Foster was not wrong. He did not deal with the case unfairly, and the appeal should be dismissed.

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