Case 33
Jagger

v

Holland and Others

[2020] Costs LR 541

Neutral Citation Number: [2020] EWHC 1197 (QB)
High Court of Justice, Queen's Bench Division
12 May 2020

Before:
Geoffrey Tattersall QC (sitting as a deputy judge of the High Court)

Keywords:
alternative dispute resolution, indemnity basis costs

Headnote

Costs orders involving multiple defendants. In proceedings in which the claimant had been injured in a motor accident and had sued D1, later she added D2 and subsequently D3. Each defendant blamed the other for the accident, with the claimant having agreed that she had been contributorily negligent as to 12.5%. At trial, the claimant had won against D1 (as to 65%) and D2 (as to 35%) but D3 was found to have been blameless. It was then revealed to the judge that D3 had offered not to seek any costs had D1 and D2 agreed to withdraw their allegations (which had been declined) and that, in consequence, D3 sought indemnity basis costs against both.

Held. D3's offer had been limited in time, the evidence of D3 at trial had been unsatisfactory and in addition D3 had failed to follow a court direction to consider settling the

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litigation by ADR and to explain its refusal to do so in a witness statement. For those reasons, standard basis costs were appropriate. As to the liability for payment of those costs as between D1 and D2, it had been D2 which had brought contribution proceedings against D3 and the major issue in the case had been between D2 and D3 as to whether D3 was liable. It followed that D2 should bear a higher responsibility for D3's costs which would be paid in the proportions 40% as to D1 and 60% as to D2. Orders accordingly.

Cases Cited

Calderbank v *Calderbank* [1975] 3 All ER 333

Judgment

1. **Geoffrey Tattersall QC:** These proceedings relate to an accident sustained by Joanne Marie Jagger, the claimant ("C") who sustained serious injury when she was in collision with an articulated lorry driven by Austin Holland, the first defendant ("D1") on Midsummer Common in Cambridge on 4 November 2015. Cambridge City Council, the second defendant ("D2") had organised an event for 5 November 2015 consisting of a bonfire, fireworks display and fair. D2 had contracted with Stanley Thurston (trading as SC Thurston & Sons), the third defendant ("D3") to run and organize the fairground event. D1 was to provide the dodgems ride and it was in the course of D1 delivering his dodgems ride to the Common to set up such ride that C sustained her accident.

2. C had originally issued proceedings against D1 alone. D1 denied liability but did not blame either D2 or D3. C amended her claim to include D2. D2 denied liability, blamed D3 and issued third party proceedings against D3. C then further amended her claim to bring claims against all three defendants and in turn each of the defendants blamed the others for the happening of the accident.

3. During the trial it was agreed that C herself was contributorily negligent as to 12.5% and in my judgment delivered on 15 January

2020 I adjudged that there should be judgment in C's favour for 87.5% of the recoverable damages on a full liability basis, that D3 was not negligent, that each of D1 and D2 were negligent and that liability as between D1 and D2 should be apportioned so that D1 bore 65% and D2 bore 35% of the obligation to compensate C.

4. Although I had originally indicated that any ancillary applications relating to my judgment should be determined at an oral hearing, given the current circumstances, on 17 March 2020 I ordered that any such applications should be determined on the basis of written representations.

5. The only application which has been made relates to D3's costs and in particular the basis on which costs should be assessed and who should pay them.

6. I have seen a draft order which was attached [to] D2's submissions. Save for the matters stated in paras 7–8 below, in the absence of any representations by any party I will make the order in the terms drafted.

7. In addition, D2 seeks an order for the payment by D1 to D2 of £37,550 representing an overpayment by D2 of interim payments and costs on account made to C. This seems to me to be mathematically correct but D1 says that although it is highly likely that C's claim will be worth more than the £407,000, the total interim payments to date, at this stage it is not possible to say that D2 has paid more than its appropriate share of the final award.

8. Although I hear what D1 says, I have no doubt that *at this time* D2 has made an overpayment and that D1 should forthwith pay to D2 the sum of £37,550 within 21 days. I thus order that such a provision should be added to the draft order submitted by D2.

9. I have read and considered the submissions of all the parties.

10. D3's submissions may be summarised thus.

11. Although D3 had no interest in which of D1 and/or D3 should pay D3's costs, it noted that D3 was only joined into the proceedings as a result of allegations made initially by D2.

12. By letters dated 16 October 2018 to the solicitors representing D1 and D2 marked "without prejudice save as to costs", D3 suggested that attempts should be made to negotiate C's contributory negligence and, whilst conceding that such contributory negligence was unlikely to be more than 20%, suggested that negotiations started at that level. I do not know whether such negotiations ever took place.

13. By letters dated 19 December 2018 to the solicitors representing D1 and D2 again marked "without prejudice save as to costs", D3 invited both D1 and D2 to withdraw their claims against D3 whereupon D3 would bear his own costs. It was made clear that this was a *Calderbank* offer which remained open for acceptance until 9 January 2019 and would then be withdrawn. It was expressly stated that, if appropriate, D3 would rely on such letters on the issue of costs, including an application by D3 for indemnity costs.

14. D3 seeks an order for its costs on the standard basis until 9 January 2019, i.e. after the 21-day period had expired, and thereafter on an indemnity basis.

15. It is self-evident that the offer by D3 to bear its own costs upon the claims against him being withdrawn should have been accepted.

16. D2's submissions may be summarised thus.

17. As to the appropriateness of an award of indemnity costs D2 submitted that in particular I should have regard to:

17.1. The letters dated 19 December 2018 expressly stated that the offers were withdrawn at the expiration of 21 days and as such should be contrasted with a Part 36 offer or a *Calderbank* offer without limitation of time. Because the burden of establishing an entitlement to costs is on the party seeking them, D3's application for indemnity costs should thus be rejected as a matter of principle.

17.2. D2 relied upon the criticisms I had made of D3's evidence, in particular his failure to explain inaccuracies between his witness statement and the evidence he gave.

17.3. Paragraph 2 of Master Eastman's directions order made on 3 May 2018 provided that the parties should consider settling the litigation by ADR and that any party not engaging in such means should file a witness statement giving reasons therefor. D3 refused to attend a round table meeting proposed by D1. It has failed to file any such statement explaining why it did not so engage.

18. Although it is not in dispute that D1 and/or D2 should pay D3's costs, D2 submits that D3's costs should be paid by itself and D1 on the 65/35% basis on which I apportioned liability between them to C. In support of such submission D2 says that:

18.1. Although D2 had issued third party proceedings against D3 claiming a contribution or indemnity which led to C joining D3 as an additional defendant, thereafter D1 made an additional claim against D3. In so doing D1 took on the costs risk of so doing. Had D1 not done so the costs risk would have fallen solely on D2, but D1 stood to benefit from his claim against D3 and should thus bear the consequences of so doing. Moreover, D1 elected to obtain and rely on Mr Hopwood, his own independent expert, and Mr Hopwood gave evidence in support of D1's claim against D3.

18.2. Although both D1 and D2 had admitted liability on the eve of the trial, if D1 had admitted liability at the outset the only issue would have been C's contributory negligence and it would have been for D1 to claim a contribution or indemnity from D2.

18.3. D1 did not adopt a passive role at trial. His counsel called evidence, cross examined D3 and his witnesses and made closing submissions that D3 was liable.

18.4. On 27 August 2019 D2 made a *Calderbank*/Part 36 offer to pay one-third towards the liability of the defendants. That offer was only fractionally below the 35% at which I assessed D2's liability at trial. By contrast offers made by D1 of initially one third made on 3 April 2019 and subsequently 50% made on 31 October 2019 were significantly less than the 65% which I assessed D1's liability at trial.

18.5. It would thus be unjust for the court to conclude that D2 should solely bear D3's costs. Albeit that D2 contended for an order for costs should mirror that of D1's assessed liability, in the alternative D2 submitted that D1's liability for D3's costs should be no less than 50%

19. D1's submissions may be summarised thus.

20. D3's letters dated 19 December 2018 did not create any entitlement to indemnity costs, nor even would a Part 36 offer because, in deciding whether to award indemnity costs, a court must take into account all the circumstances of the case, including the conduct of the parties. The latter is presumably an oblique reference to my finding that D3's evidence was generally unsatisfactory.

21. In so far as D2 contends that D3 was only added as a party because D1's defence blamed D3, this is factually incorrect because D1

did not seek to blame D3 in his defence. In so far as subsequently D1 did blame D3, he did so by adopting the allegations of negligence made by C against D3. D2 first blamed D3 and was thereby responsible for him becoming a party.

22. Even had D1 admitted liability at the outset of proceedings, D2 would have still pursued a case against D3 in either contribution proceedings or the main action and D3 would still have incurred the costs that he did.

23. D1's additional claim against D3 was only made after C and D2 had joined D3 in the proceedings and raised no new allegations against D3.

24. In so far as D1 instructed Mr Hopwood, this did not cause D3 to incur any additional costs, given that D2 instructed its own expert. Moreover, Mr Hopwood gave evidence which was helpful to, and relied upon by, D2.

25. Given that apportionment of liability between D1 and D2 was greater in each case than their respective settlement offers, they are irrelevant.

26. Two issues thus arise: firstly, whether costs should be paid on the indemnity basis rather than on the standard basis; and secondly, which of D1 and/or D2 should pay the costs and if both, in what proportion.

27. I bear in mind that the award of costs are [*sic*] matters for the exercise of my discretion.

Indemnity Costs

28. Whilst noting that D3's solicitors letters dated 19 December 2018 put D1 and D2 on notice that it might seek indemnity costs, I do not believe that an award of indemnity costs, as opposed to costs on a standard basis, would meet the justice of this case, particularly because the offer contained [in] such letters was limited in time and D3 did not comply with para 2 of Master Eastham's directions order and in the absence of any reasons I am driven to conclude that there was no good reason for D3's failure to do so. More importantly, I rely upon the general unsatisfactory nature of D3's evidence, the full details of which are set out in my judgment.

29. I am thus satisfied that D3's costs should be assessed on the standard basis.

Who Should Pay the Costs

30. I am satisfied that both D1 and/or D2 should share the responsibility for the payment of D3's costs since both actively argued at trial that D3 was liable.

31. However, although I note my apportionment of liability between D1 and D2 in respect of C's claim was that D1 should bear 65% of liability, I am satisfied that such is too high given that D2, and not D1, brought contribution proceedings against D3 which led to C amending her pleadings to join D3 as a defendant and to D1 making a claim against D3. Moreover, at the trial any reasonable observer would have believed that the major issue in the case was between D2 and D3 as to whether D3 was liable although both D1 and D2 jointly pursued a finding of liability against D3. Although I have had regard to the D2's offer on 27 August 2019 to compromise D2's liability for one third when my judgment provided that D2 was liable to the extent of 35%, in my judgment it carries little, if any, weight.

32. I am satisfied that it is equitable and just that on the facts of this case D2 should bear a higher percentage of D3's costs than D1. I thus order that D3's costs are to are paid be paid by D1 and D2 in the proportions of 40% and 60% respectively.

Conclusion

33. I thus order that D3's costs are to be paid on the standard basis by D1 and D2 in the proportions of 40% and 60% respectively.

Bernard Doherty (instructed by Barr Ellison LLP) appeared for the claimant.

Nigel Lewers (instructed by Kennedys) appeared for the first defendant.

Derak O'Sullivan QC (instructed by DAC Beachcroft) appeared for the second defendant.

Richard Hartley QC (instructed by Clyde & Co) appeared for the third defendant.

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