Case No: QB-2017-002002

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

[2019] EWHC 3090 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/11/2019

Before **:**

MASTER THORNETT

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Between :

Mr Ali-Akbar Palizban
(by his wife and litigation friend Mrs Susan Shams Moorkani)

Claimant

- and –

Protech (UK) Limited

Defendant

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Mr Sharghy (instructed by Bolt Burden Kemp) **for the Claimant**
Miss Wyles (instructed by Kennedys) **for the Defendant**

Hearing date: 1 November 2019

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JUDGMENT

1. This is a decision on costs as reserved from the hearing on 1 November 2019 of the Defendant's Application dated 29 August 2019. The Application sought variations of my Order dated 31 July 2018 and then for the case to be listed for a Case Management Conference ["CMC"]. The hearing on 1 November 2019 was devoted to the circumstances and events leading to the variation of directions sought by the Defendant's Application and the CMC element was adjourned to a further date to be fixed to reflect additional issues remaining for consideration.

2. The essence of the Defendant's Application is that the timetable for exchange of care evidence and the production of the joint care experts' statement needed to be extended owing to substantial documentation having been served by the Claimant on the Defendant on 8 August 2019, only weeks before the 30 August 2019 due date for the exchange of care expert evidence. At the first CMC on 7 November 2017 formal disclosure by List had been directed but, predictably in a complex case that is still some time away from trial, there has been a sequence of disclosure since. There is nothing unusual, of course, about this in principle. I note this case is listed in a trial window commencing on 22 June 2020.

3. However, the Defendant's complaint is that there had been no real effort by the Claimant's representatives to present ongoing evidence in an intelligible and easily navigated format. The August 2019 disclosure was, for example, sent in a "drop-box" internet link and comprised 6 lever arches. The material was an unidentified combination of documentation that had previously been disclosed together with new material. Some of the documents went back to 2015. In addition, although not the subject of its Application, the Defendant complains that some of the documentation had been redacted for reasons that are not immediately apparent. The Claimant's solicitors appear, therefore, to have been able to process the material for one purpose but not another.

4. The Application adds that, as at the date of drafting on 29 August 2019, the Claimant's solicitors had mentioned in a telephone conversation that a further tranche of disclosure was awaited by them as covered a period from late 2018 to-date ; hence the Application reserving time for further consideration and direction by the court at a hearing.

5. The parties have never really disagreed that there needed to be an extension of time in respect of the expert care evidence owing to the volume of material disclosed in August 2019. By the time of the CMC, specific revised dates had been agreed. However, the Claimant argues that because of the willingness to agree an extension it was not necessary for the Defendant to issue the Application or, more particularly, to seek that the costs of the Application to be paid by the Claimant.

6. Underlying the ostensibly only remaining argument about costs is a point of litigation practice. Whilst not the first example of receiving mixed and disordered voluminous disclosure from the Claimant in this case, the Defendant argues it felt obliged on this occasion to protect its position by raising the point and to seek its costs in consequence. Because of a disagreement as to both principle and practice that has arisen between the parties, the overall costs of the dispute will now exceed the specific period of contact that took place between the parties when they agreed that the care expert evidence dates needed to be varied. Taking this period in isolation, and having regard to the agreement to extend time, the Claimant argues that such costs should simply be in the case. To the contrary, the Defendant argues it was obliged to issue an Application given all the circumstances that had preceded and that the Claimant has increased costs by failing to acknowledge that he was the cause of

the Application through his solicitors or more particularly his care and rehabilitation agency.

7. In response to such criticism from the Defendant, the Claimant's solicitor Miss Petrie filed a very detailed witness statement to elaborate and justify the Claimant's position on ongoing disclosure. The statement is some 61 paragraphs and, with the numerous exhibits, extends to over 400 pages.

8. By way of side comment on a point of practice, I note that most of the exhibits comprise party-party correspondence. In some cases, single letters are the sole subject of an exhibit. The narrative of the statement then introduces each letter and summarises its contents.

9. This style of presentation is not uncommon in solicitors' witness statement but, in my judgment, often quite unnecessary. Judges are quite able to understand at least most solicitors' correspondence without having to be given an introductory paragraph for every letter. Conversely, Judges are not always either interested or have time to read every item of party-party correspondence if a relevant event or sequence can sufficiently be described in the narrative of the witness statement. If needed, copies of correspondence can always be provided by way of supplement at the hearing. In short, witness statements from Solicitors in support of interim applications are not the same thing as witness statements disclosed by lay witnesses who are called to give oral evidence at trial and cross-examined as to their contents. The former should strive to provide the court with a comprehensive but easily read overview applied to clearly identified points of observation, proposition and conclusion. Such an aim is usually of far greater help to the court than forensic introduction of each and every letter at each and every stage in the sequence of events. There will be exceptions, of course. In cases where a compromise agreement, for example, is relied upon I follow how the court may well need to look at each and every letter during a particular phase. Even then, however, it is less easy to follow why every letter must also be paraphrased and introduced in the witness statement narrative.

10. A further general observation is that the navigation of a sequence of correspondence is made very much more difficult if the correspondence has pointlessly been divided into individual exhibits. I see no reason in a case such as this why a single paginated exhibit of correspondence cannot be annexed. The narrative within the witness statement narrative should then, as above, provide general submissions in support of the deponent's position. Significant letters can still, of course, be highlighted by way of reference to the relevant page within the paginated correspondence exhibit.

11. Ms Petrie comments that this was the first time the Defendant's solicitor had raised queries about disclosure. The complaint came just before she was due to commence leave before the August Bank Holiday weekend and this was only days before the deadline for exchange of care expert evidence. Ms Petrie remarks that the disclosure was exactly that that had been provided to the Claimant's expert, so there was no inequality. Further, she is unable to identify how there could have been any real prejudice to the Defendant's expert if *"some of the day to day case management*

records such as emails / invoices etc had not been received and reviewed". Accordingly, she saw no reason for the Defendant's Application and its term as to costs. She makes a fair point that, because the Claimant is a Protected Party, she could never have been able readily to agree to pay the Defendant's costs, only to agree to the extension of time.

12. The comment about those representing a Protected Party not being able, or not readily so, to agree to pay an opponent's costs does not preclude or somehow indemnify conduct that should give rise to a costs order. Whether a Protected Party or not, any litigant clearly has responsibilities not to increase the costs of an opponent unnecessarily or in a way that could have been avoided. In circumstances where such conduct ought to be conceded, those representing a Protected Party can still do just that and indicate that they are obliged to take a neutral stance in response to an applicant's request for a costs order.

13. Ms Petrie comments that in March 2019 the Defendant had been sent redacted case management records up to December 2018 and so "*ought to have known there would be additional records from that date and, if they considered the documents were relevant, it was incumbent upon them to request disclosure of the same in good time to allow completion of their expert's report for exchange according to the directions".*

14. The Claimant's case is that disclosure has been provided as efficiently as reasonably possible to the Defendant. Ms Petrie helpfully provides a detailed "Disclosure Timeline" table as illustrates what documents were received, and when, from the Claimant's Case Manager, what documents were sent to the Defendant, and when. The statement acknowledges that updated case management records are sent (redacted) by her firm "*en masse*". She maintains this is the most efficient and proportionate manner to deal with the disclosure of often voluminous case management records. *"It is not practical or proportionate to continuously request updating case management records and so it follows the parties will not always be in possession of the full file at all times".*

    Further, in the Claimant's submission, *"Such documentation is not key in the litigation and we avoid providing disclosure in a piecemeal fashion which would increase administrative work and costs disproportionately. We instead disclosure the full file, which encapsulates everything".* She accepts there might be exceptions to this approach : "*When key documentation relevant to the litigation is received directly from the case manager as an e-mail attachment, such as rehabilitation update reports, we* ***sometimes*** *[my emphasis added] forward a copy to the Defendant outside of bulk disclosure".*

15. I note how this selective pattern of disclosure is illustrated in the "Disclosure Timeline" table. Some documentation is disclosed to the Defendant relatively soon following receipt from the Case Manager. However, much is amassed for a while and then forwarded in bulk. I note how the time intervals between disclosure are not

regular and can be lengthy at times. For example, documentation received in June 2016 was disclosed in December 2017 and documentation received from December 2017 onwards saw disclosure in tranches in respectively August 2018 and March 2019.

16. The justification for sending a collection of material and waiting for it to amass over a reasonable period could be logical in principle in a particular case but only providing that (i) none of that material ought to have been disclosed much sooner (ii) the intervals of disclosure are fairly frequent and (iii) there is a degree of understanding and acquiescence between the parties to adopt such a practice. Sporadic and unpredictable disclosure of sometimes historic documents *"en masse"* is plainly rather different.

17. Ms Petrie provides further explanation and justification for the practice this case has seen.

18. First, the need to redact privileged information contained within the records. *"The task of redacting substantial records is time consuming and means there is inevitably a delay between us receiving the records in and then disclosing the redacted copies to the Defendant".*

19. Secondly, the feature of sporadic, unpredictable and not always well organised material emanates from the Claimant's Care and Rehabilitation agency. The agency apparently sends the Claimant's firm material on a USB stick which is *"not sorted…in a particularly helpful manner nor [do] they isolate the previously disclosed records. They simply send us everything they had. This causes difficulties when attempting to ascertain which documents are new".* Ms Petrie expresses empathy with the Defendant's "*feelings regarding the unsorted nature of the records*" and agrees it is "*frustrating*".

20. This observation and concession was emphasised by Mr Sharghy, the Claimant's counsel, at the hearing. I was told that the agency had been requested on numerous occasions to provide documents in a more intelligible order but the problem from them still continues. As such, whether or not the court attempts to resolve the predicament by directing the exchange of further Lists of Documents, I was informed that in the run in to trial it seems inevitable that the same problem will yet again arise.

21. The Defendant refused the Claimant's suggestion that costs be "in the case" on the Application. This presumably reflects the fact that judgment for the Claimant with damages to be assessed was entered in the Order dated 10 November 2017. The reality of "costs in the case" in any such case means therefore that a claimant will always receive the costs of the steps in question, Part 36 implications aside. I accept that in most such cases, the offer of "costs in the case" is a fairly empty one from a defendant's viewpoint.

22. A statement in reply on behalf of the Defendant is dated 25 October 2019. In it, Ms Marley concedes that some of the August 2019 disclosure had previously been provided. However, because of the mixed and voluminous state of the documentation as disclosed in August 2019, the Defendant's care expert had expressed difficulties in concluding her draft report in time for the 30 August 2019 deadline. Indeed, she was still in such difficulty just before expiration of the recently agreed extension to 4 October 2019. The Claimant had refused any further extension of that deadline, such that the Defendant disclosed the care report on the due date but as featured a caveat at Para 25 in the report that remarked upon difficulties encountered by the haphazard presentation of the care and case management documents, commented upon the substantial but not always entirely explicable redactions as well as a problem of missing or incomplete records. The expert has expressed a view that she will require the additional material before she can provide a definitive opinion.

    Such reservations in an expert report are obviously unhelpful to everyone and all effort should be made to avoid circumstances that give rise to them.

Discussion and conclusion

23. Costs on the Application at this point concern the costs of the Defendant preparing the Application through to and including the hearing on 1 November 2019. To the extent that the 1 November 2019 CMC has gone part-heard, it seems to me that cost of preparing for and attending the next CMC are separate because they concern other case management directions, particularly those now sought by the Claimant. The appropriate costs order for that episode has yet to be decided.

24. In the context of the discussion about disclosure generally in this case so far, I am quite satisfied that there was a need for the Defendant to issue an Application if only on a protective basis and to reserve the opportunity for a review of directions by way of a CMC. The Application cannot be described as premature. The antecedent background to the Application distinguishes it from a straightforward application to extend time and the issue of costs cannot be negated simply because the Claimant had promptly agreed to an extension of time in principle. His willingness to agree an extension is not really the point here, neither was it particularly emphasised at the hearing.

    The underlying root of the problem is the manner and sequence of the disclosure that has featured and, according to the Claimant's solicitors, is a not uncommon feature of this type of litigation when using agencies.

25. Pragmatism is always to be encouraged in litigation ; an appropriate modicum of "give and take", so to speak. Clearly, not all irregularities or delay should see complaint and still less applications to the court. However, it does not seem to be a good point for a party to argue that because documentation has been dispatched previously in a haphazard and disorderly manner and the receiving opponent has not previously complained then that should pre-empt any future complaint. This rather

unfairly presumes that the recipient will always be able both to accommodate the problem and in time. Sometimes, indeed, the recipient may well be able to do so, as I infer from Ms Marley to have been the case previously. On this particular occasion, however, there was real and, as I accept, justifiable concern.

26. The Claimant, through his solicitors, do not really have an answer to this. Indeed, his solicitors have expressly concede their own frustration with the format of the documentation as provided to them by the agency. Plainly, it must follow that the Defendant upon receipt is bound to experience at least the same inconvenience and delay. Arguably more so because the Defendant will not have had the benefit of working through the documentation for the purposes of redaction.

27. Even if the August 2019 disclosure was not entirely new and no more than had been provided to the Claimant's expert, the Defendant's solicitors and expert(s) could only realise this upon attempting to assimilate the material very shortly before the deadline for exchange of reports. Drawing from the admission of internal difficulties upon receiving such documentation featured in the Claimant's witness statement, I am satisfied that the predicament in which the Defendant was being placed in early August 2019 must have been quite obvious to the Claimant and this was unreasonable.

28. Taken objectively, the Claimant and his solicitors have to be treated as responsible for the predicament created. Whilst I have carefully considered the explanations I do not find they justify what happened.

29. I reject the argument relying upon the absence of previous complaint and implied acceptance by the Defendant as to the manner of disclosure previously experienced. Or, putting the same observation slightly differently, it was the Defendant's fault for not raising a request sooner. Two wrongs do not make a right.

30. The submission that the state of the documentation as received from the agency should be treated as an unavoidable *fait accompli*, and can be remedied only in so far as the court is willing to approve the Claimant taking over the process and so being permitted a much more generous level of costs under the Disclosure phase at costs management, is equally unpersuasive. It seems to ignore the plain fact of there being a contractual relationship between the Claimant and the agency and the answerability of the agency that arises from that relationship.

31. Care and Rehabilitation agencies do not provide their services for free. Indeed, a frequent vexed point on costs budgeting is the extent to which a Case Manager is entitled to charge for his or her various involvement through to trial at a level that often puts them alongside, or close to alongside, the Part 35 experts. Indeed, some parties include the Case Manager within the experts' phase. I say nothing of the merits of that practice here but it serves to illustrate the professional status asserted by such agencies and as sought by them to be recognised, both in principle and financial value.

32. In these circumstances, there seems no excuse or justification for a professional agency repeatedly providing documentation in a haphazard, erratic and unprofessional manner. As a contracting party with a Claimant, whether directly or through their solicitors, an agency should be directly answerable if the obvious requirement for the orderly provision of documentation has not been satisfied.

33. However, a claimant's solicitors cannot regard themselves as purely incidental or unconnected with this relationship if poor standards have a consequential effect upon the litigation. First, because poor or unacceptable standard serves to expose their clients to the risk of a costs order. Secondly because, as officers of the court, they have a reasonable duty to manage and control third party agents if their conduct, directly or indirectly, is affecting the litigation.

34. I follow how the latter duty has its limits and pass no comment whether the Claimant's firm in this case has or has not done all it might to have avoided this predicament. However, I am satisfied that the manner of disclosure described cannot be objectively justified and treated as something the Defendant should simply have had to accommodate.

35. Providing an agency assembles and discloses documents in a reasonable and intelligible order, and on a regular basis, the notion that additional funds need to be allocated on costs budgeting to a claimant firm for disclosure falls away. In short, it ought not to be the work of a claimant's solicitor to put in reasonable order documentation produced by a third party as contracted by a litigant to provide a fee paid professional service.

36. On a practice note, in a case where disclosure is obviously going to arise in tranches over an extended period before a trial some time away, the solicitors' work ought instead to be to identify and agree a timetable for cyclical disclosure of identified categories of documents. If a particular method or format for the disclosure is preferred, that too should be identified and hopefully agreed at a very early stage. Both are quite capable of being reflected in the Order made at the first CMC. In short, an early agreed strategy about the regular disclosure of documents, as seeks to avoid surprise or prejudice, will then be easier to apply and if necessary enforce by way of a Part 23 application if things then go wrong.

37. None of these observations have anything to do with the Claimant's work of redaction in this case, or the admissibility of the redacted material. These do not arise in this Application although, in passing, it does seem to be relevant to question why the same documents could not have been re-assembled in at least a slightly more orderly fashion for onward transmission following redaction than as described. One might have thought it not too onerous in the course of considering redaction at least to identify such documentation as had already been disclosed and to make this clear to the Defendant.

38. There should be a costs order against the Claimant in favour of the Defendant. Who ultimately discharges that payment is a matter between the Claimant and his agency.

39. To reflect costs referable to my above conclusions but separating any aspect of ongoing consideration and direction, the Order shall be that the Claimant shall:

    39.1 Bear his own costs of and occasioned by the Defendant's application between 29 August 2019 and 1 November 2019;

    39.2 Pay the Defendant's costs of issuing the Application and the Witness Statement of Ms Marley dated 25 October 2019;

    39.3 Pay the costs of the Defendant attending the hearing on 1 November 2019.

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