[2021 Gib LR 711]

A. FEATHERSTONE (by E. FEATHERSTONE as litigation friend) v. GIBRALTAR HEALTH AUTHORITY

SUPREME COURT (Restano, J.): December 8th, 2021

2021/GSC/32

Civil Procedure—costs—failure to comply with unless order—claim for personal injury struck out for failure to comply with unless order—defendant awarded costs

The claimant brought a claim for personal injury.

The claimant, who suffered from various medical conditions, issued a claim in January 2019 for damages for personal injury arising from the alleged negligence of the defendant, namely a delay in diagnosing a spine fracture and providing appropriate surgery. The claim was filed shortly before the expiry of the three-year limitation period. Thereafter the defendant filed a defence and provided standard disclosure but the claimant failed to provide standard disclosure or to file his schedule of loss and damage by the ordered date. The parties entered into an unless consent order in February 2021, which provided that (1) unless the claimant provided standard disclosure by March 8th, 2021, the claim would be struck out and judgment entered for the defendant; (2) unless the claimant served expert evidence by March 8th, 2021, he would be barred from relying on such evidence; (3) unless the claimant filed and served his schedule of loss by March 8th, 2021, the claim would be struck out and judgment entered for the defendant; and (4) the claimant pay the defendant's costs of the application assessed at £1,357.

The claimant then served his list of documents and his expert evidence. A schedule of loss and damage dated March 8th, 2021 was also served. It was stated that the claimant's medical condition had worsened and that it was believed this was a result of the surgery carried out. This was the first time that the claimant referred to a possible claim arising from the surgery carried out and not just from the delay in diagnosing the fracture. The defendant's lawyers asked for the claimant's new case to be particularized and referred to the need for the claimant to amend the basis on which the claim was being brought. Shortly before a case management hearing, the claimant's lawyers confirmed that the operation had been carried out properly and that the claim would proceed on the basis set out in the particulars of claim, *i.e.* the delay in the operation taking place. A further

unless order was entered into by consent on May 20th, 2021, which provided that unless (1) the claimant paid the sum of £1,357 as required under the order of February 19th, 2021 within 14 days; and (2) the claimant filed and served an amended and completed schedule of loss by May 27th, 2021, the claim would be struck out and judgment entered for the defendant.

The claimant failed to file an amended schedule of loss by May 27th, 2021 (payment of the sum of £1,357 was made, albeit a day late). The defendant submitted that the claim was automatically struck out and sought it costs of the proceedings. The claimant submitted that the requirement to serve an amended schedule of loss was something that the defendant had required but that in the event no amendment had been necessary and that the failure to serve such a schedule was a technical or meaningless breach which should not prevent the claim proceeding.

Held, awarding the defendant its costs:

(1) In the absence of an application under CPR r.3.8 for relief against sanctions, the court could act of its own motion and had the power to consider whether there was some exceptional reason why the sanction should not apply. The claimant's submission that no amendment to the schedule of loss had been necessary and that the failure to serve such a schedule was merely a technical or meaningless breach which should not prevent the claim proceeding should not be rejected out of hand. The proper course was to determine whether there was any merit to the submission (para. 17).

(2) In all the circumstances, this was not an appropriate case for the court's indulgence, especially on its own initiative when the claimant had offered no explanation for his conduct so far and there was no indication that things would change. The progress of the claim overall had been unsatisfactory and the claimant had a poor record of compliance with court orders. The court reached this conclusion with little enthusiasm. However, the failure to comply with the unless order of May 20th, 2021 could not be viewed in isolation and represented the latest in a litany of defaults and non-engagement on the part of the claimant. The claimant's response to this application only served to show that things had not changed in this regard. A balance had to be struck between a claimant's ability to pursue his claim and ensuring that litigation was conducted justly, which included the need for it to be conducted efficiently, at a proportionate cost and for court orders to be complied with. In the present case, the claimant had breached the unless order of May 20th, 2021 which meant that his claim had been struck out. There was no reason why costs should not follow the event. The defendant's application for an order that the claimant pay its costs would be granted (paras. 24–26).

Case cited:

(1) *Marcan Shipping (London) Ltd.* v. *Kefalas*, [2007] EWCA Civ 463; [2007] 1 W.L.R. 1864; [2007] 3 All E.R. 365; [2007] C.P. Rep. 41; [2007] 1 CLC 785, referred to.

N. Gomez (instructed by Charles A. Gomez & Co.) for the claimant;
G. Stagnetto, *Q.C.* with *S. Danino* (instructed by TSN) for the defendant.

1 **RESTANO, J.:** By way of an application notice dated August 2nd, 2021, the defendant seeks an order that the claimant pays its costs in these proceedings following what it contends is the striking out of the claim following the breach of an "unless order." The claimant contends that the claim has not been struck out and is asking that there should be a trial on the issue of liability. The application is supported by the witness statement of Shane Danino dated September 16th, 2021. No evidence in response to this application has been filed by the claimant.

Background

2 The claimant's claim was issued on January 7th, 2019 and concerns a claim for damages for personal injury arising from the alleged negligence of the defendant in the period beginning on January 9th, 2016. Thus, the claim was filed shortly before the expiry of the applicable three-year limitation period. The particulars of claim alleges that the claimant who suffers from cerebral palsy, learning difficulties, poor speech and grand mal epilepsy had a fit and fell hitting his head against a door whilst at the Dr. Giraldi Home. On January 11th, 2016, the claimant was taken to St. Bernard's hospital where he was found to have a wedge fracture to his spine but he was discharged and some treatment was recommended. Three further attendances by the claimant between January and April 2016 resulted in the doctor concluding that there was nothing abnormal and then that whilst he could have a hemangiomatous lesion, there was no wedging of the spine. As a result, the claimant was eventually discharged. On April 18th, 2016, the claimant was admitted to Xanit International Hospital, where an MRI scan showed that the claimant had a severe wedge fracture to the spine as well as other factures which required kyphoplasty surgery which took place on April 20th and 27th, 2016. It is therefore alleged that the GHA breached its duty of care to the claimant in that it failed to diagnose the claimant's condition and provide the appropriate surgery and treatment. The particulars of claim states that a schedule of special loss would be served in due course.

3 After various extensions of time, the defendant filed a defence and this was followed by directions leading up to a trial which were set out in an order dated March 3rd, 2020. This provided, amongst other things, for standard disclosure to take place by April 3rd, 2020, permission for expert evidence to be relied on and required the claimant to file his schedule of loss and damage by July 27th, 2020. The claim was stayed on March 17th, 2020 pursuant to the Supreme Court (Covid-19 Contingency) Rules 2020 which had the effect of moving back the deadlines contained in the directions order. Standard disclosure was pushed back to June 25th, 2020

and the filing of the claimant's schedule of loss and damage became due on October 16th, 2020. Although the defendant provided standard disclosure, the claimant failed to provide standard disclosure and he also failed to file his schedule of loss and damage. A further directions order was entered into by consent between the parties on September 16th, 2020 which provided, amongst other things, for the exchange of expert evidence by November 9th, 2020 and for service of the schedule of loss by January 11th, 2021, although this did not provide for standard disclosure being provided by the claimant.

4 Following further defaults on the part of the claimant, the parties entered an "unless" consent order on February 19th, 2021 and one of the recitals to that order states as follows: "The claimant having failed to previously set out reasons for the failure to comply with the earlier orders of this Court dated 3 March 2020 and 16 September." This order provides, amongst other things, that (1) unless the claimant provides standard disclosure by March 8th, 2021, the claim will be struck out and judgment entered for the defendant; (2) unless the claimant serves expert evidence by March 8th, 2021, he will be barred for relying on such evidence; (3) unless the claimant files and serves his schedule of loss by March 8th, 2021, the claim will be struck out and judgment entered for the defendant; and (4) the claimant pay the defendant's costs of the application assessed at £1,357. Clearly, the reference in this order to standard disclosure being provided by the claimant meant that this had been overlooked in the order of September 16th, 2020 which made no reference to standard disclosure.

5 The claimant then served his list of documents and his expert evidence. Further, a schedule of loss and damage dated March 8th, 2021 was served under cover of a letter of the same date from the claimant's lawyers, Charles A. Gomez & Co. which states that the claimant's condition had worsened and that it was believed that this was as a result of the surgery carried out. The schedule of loss itself makes a claim for pain, suffering and loss of amenity which is valued at approximately £45,000 and also makes a claim for future losses which states that the claimant has been unable to walk or move as he was able to before the injury and operation, that he is almost entirely wheelchair-bound, and that he did not have any of these issues before the operation. The claimant reserved his right to file a further schedule and refers to claims for medical and orthopaedic treatment and physiotherapy to be assessed. In its letter, Charles A. Gomez & Co. suggested a stay of three months to June 10th, 2021 to enable the claimant to establish whether his current injury was in fact as a result of the operation, that the claimant serve an amended schedule of loss by June 24th, 2021 and that the defendant serve a counter schedule by July 8th, 2021. Thus, for the first time, the claimant referred to a possible claim arising from the surgery carried out and not just from the delay in diagnosing his condition.

6 In response, the defendant's lawyers, TSN wrote to Charles A. Gomez & Co. on March 22nd, 2021 referring to the claimant's new case, asking for this to be particularized and referring to the need for the claimant to amend the basis on which the claim was being brought. Charles A. Gomez & Co. did not reply to TSN's letter until May 20th, 2021, which was the date when a case management conference had been listed for hearing at 2.30 p.m. Shortly before the hearing itself and in an email timed 8.52 a.m., Mr. Nicholas Gomez of Charles A. Gomez & Co. wrote to Mr. Danino of TSN confirming that the operation had been carried out properly and that the claim would be proceeding on the basis set out in the particulars of claim, *i.e.* the delay in the operation taking place. In his email, Mr. Gomez provided draft directions in the hope that these could be agreed in advance of the hearing. Mr. Danino replied in an email timed 10.49 a.m. stating that the claimant's schedule of loss had to be suitably amended as it was based on the claim that had been referred to in the letter of March 8th, 2021 which was no longer being advanced, and he provided an alternative draft order. In an email timed 10.50 a.m., Mr. Gomez confirmed that this was agreed and a further consent "unless order" was entered into on May 20th, 2021 shortly before the hearing, which meant that the hearing did not need to go ahead. This provided that unless (1) the claimant paid the sum of £1,357 as required under the order of February 19th, 2021 within 14 days; and (2) the claimant filed and served an amended and completed schedule of loss by May 27th, 2021, the claim be struck out and judgment entered for the defendant. Provided these requirements were complied with, further directions were agreed for the filing of a counter schedule of loss and further directions leading up to trial.

7 On June 1st, 2021, TSN wrote to Charles A. Gomez & Co. stating that the claimant had failed to file an amended schedule of loss by May 27th, 2021 and that the claim had automatically been struck out under the "unless order" of May 20th, 2021. Charles A Gomez & Co. then sent a letter to TSN on June 4th, 2021 (this letter was mistakenly dated March 3rd, 2021) enclosing a cheque for £1,357 dated June 3rd, 2021. TSN replied on June 4th, 2021 stating that although payment of the sum of £1,357 had been made (albeit one day late) the amended schedule of loss had still not been served and that the claim had therefore been automatically struck out. They further stated that the defendant would be seeking its costs of the proceedings to be assessed if not agreed. No reply was received to TSN's letter by Charles A. Gomez & Co. and the defendant proceeded to file this application on August 2nd, 2021 seeking its costs of the proceedings. Whilst the defendant indicated in the application notice that the application could be determined without a hearing, at my request the registry asked Charles A. Gomez & Co. whether the application would be opposed. Mr. Gomez sent an email to the registry and Mr. Danino on August 20th, 2021 confirming that the claimant did not accept that it was in breach of the

"unless order," that he did not agree to the order being sought, and that the matter should be listed for hearing. The application was first listed for hearing on September 22nd, 2021 but that hearing was then adjourned at Mr. Gomez's request and the matter came before the court on November 19th, 2021.

The parties' submissions

8 Mr. Stagnetto, Q.C., who appeared for the defendant, submitted that the claimant's failure to serve an amended schedule of loss by May 27th, 2021 in breach of the terms of the "unless order" of May 20th, 2021 meant that the claim had been automatically struck out and that the defendant was entitled to the costs of the proceedings. Mr. Stagnetto pointed out that the claimant had not only failed to apply for relief against sanctions but had failed to engage in this matter at all. Mr. Stagnetto submitted that there was no excuse for this especially as the claimant had had the benefit of the defendant's skeleton argument in this matter since around September 20th, 2021, given that the hearing was originally listed for September 22nd, 2021. Despite this, he said that the first time that the claimant had set out the basis on which he was opposing this application was in the short skeleton filed by Mr. Gomez on the eve of the hearing on November 18th, 2021 which, in any event, had no merit as Mr. Gomez was suggesting that no breach of the "unless order" had taken place when this was clearly not the case.

9 Mr. Stagnetto pointed out that not only was the claim for future losses in the schedule of loss based on the allegation that the operation had been negligently carried out, which had fallen away, but that the claim for pain, suffering and loss of amenity which was valued at approximately £45,000 fell at the upper end of the JSB Guideline and therefore also appeared to relate to more than a claim concerning a delay in the operation being carried out. He further pointed out that in any event, the claimant had agreed to an "unless order" which required an amendment of the schedule of loss.

10 Mr. Stagnetto relied on *Marcan Shipping (London) Ltd.* v. *Kefalas* (1) as clear authority for the proposition that the effect of CPR 3 r.8 was that the sanction embodied in an "unless order" took effect without the need for further order. Thus, if the claimant wished to escape the consequences of the order of May 20th, 2021, which was the striking out of the claim and the entering of judgment in favour of the defendant, he should have made an application for relief against sanctions which he had failed to make either properly or even orally at the hearing and that there was no material before the court seeking to explain the claimant's conduct. Further, he said that the defendant should not continue to be prejudiced by having to drag the claimant to trial.

11 Mr. Gomez, who appeared for the claimant, submitted that the claim had not been struck out because the claimant had no intention of filing an amended schedule of loss and would be relying on the one which had been served on March 8th, 2021. Further, he stated that the email from Mr. Danino dated May 20th, 2021, which led to the "unless order" of May 20th, 2021 being entered, was sent under the misapprehension that the schedule of loss served related to the claim based on the surgery having gone wrong which was not the case and that the defendant was insisting on an amended schedule of loss being served which was unnecessary.

12 In the course of the hearing, Mr. Gomez conceded that the only part of the claim referred to in the schedule of loss which was being pursued was the claim for pain, suffering and loss of amenity totalling £45,000 and that this figure was at the upper end of the JSB Guidelines bracket for injuries of this sort because the claimant suffered from cerebral palsy and that his condition meant that he was unable to rest as required following the accident. Further, he confirmed that the claims for future losses, namely medical orthopaedic treatment and physiotherapy, were not being pursued as this treatment was provided at no cost to the claimant by the defendant.

13 Mr. Gomez accepted that there was no good reason why an application for relief against sanctions had not been made and no good reason why he had only served his skeleton on the eve of the hearing in breach of circular no. 6 of 2014 dated June 17th, 2014 which requires that skeleton arguments be filed at least three clear working days before a hearing. When asked about the various defaults, Mr. Gomez accepted that there had been injustice in the way that the matter had proceeded and that much that he would like to say that the case would be perfectly run if it were allowed to proceed, the reality was that he did not know what tomorrow held in store but that in his submission the best way to proceed would be to have a trial on liability first which is commonplace in personal injury claims. Further, he said that this might bring an end to the claim altogether if the claimant was not successful, in which case there would be no need to consider the question of quantum at all. Mr. Gomez accepted that if the claim had in fact been struck out, there was no basis on which he could resist the order for costs being sought by the defendant.

Analysis

14 The "unless order" of May 20th, 2021 which was entered into by consent clearly provides that unless the claimant files and serves an amended and completed schedule of loss by May 27th, 2021 the claim will be struck out and judgment entered for the defendant. It is clear from *Marcan* (1) that the sanction embodied in this "unless order" takes effect under CPR Part 3 without the need for any further order (see also CPR PD 3A para.1.9 at 3 APD.1). Therefore, as an amended schedule has not been

served, the claim has been struck out and judgment entered for the defendant.

15 Further, the claimant has failed to apply for relief against sanctions as required under CPR r.3.8 when a party in default wishes to escape the consequences of the effect of an order. No reason was advanced by Mr. Gomez to explain this failure other than to say, for the first time at the hearing, that this was not necessary because no amendment to the schedule of loss was required. Leaving that to one side for a moment, it is clear that the claimant's lawyers knew full well about the defendant's intentions to take action further to the breach of the "unless order" and they still did nothing about the matter. TSN wrote to Charles A. Gomez & Co. on June 4th, 2021 informing them that their view was that the claim had been struck out and that they were accordingly applying to the court for an order for costs. No response was received by TSN to that letter and no attempt was made to explain the claimant's position.

16 The application notice was then filed by the defendant seeking an order for costs and this indicated that the hearing could be dealt with without a hearing. It was only when the court inquired whether the defendant's application was opposed, to determine whether a hearing needed to take place, that the claimant's lawyers confirmed that the application was being opposed but even at that point, they said nothing about the basis on which they opposed the application or what their proposals were for the claim. The application was originally listed for hearing on September 22nd, 2021 but it was then adjourned to November 19th, 2021. This afforded the claimant's lawyers additional time to put their house in order which they still failed to do. Given the clear terms of the "unless order," one would have expected the claimant to have made an application for relief against sanctions and put forward proposals for the progress of the claim but none of this happened at any point and even at the hearing, no reason was given for this omission.

17 Even in the absence of an application for relief against sanctions, the court can still act of its own motion and has the power to consider whether there is some exceptional reason why the sanction should not apply. Mr. Gomez submitted that the requirement to serve an amended schedule of loss was something that the defendant had required but that in the event no amendment was necessary and that the failure to serve the schedule was in effect nothing more than a technical or meaningless breach which had come about at the defendant's insistence and that it should not prevent the claim from proceeding especially when a trial on liability was the first thing which should take place. In those circumstances, I do not consider that the claimant's submission should be rejected out of hand because no application for relief against sanctions has been made, unsatisfactory as that omission

may have been, and the proper course in my view is to determine whether there is any merit to the submission being advanced by the claimant.

18 The first point to be made about the requirement to serve an amended schedule and the consequences of not doing so under the "unless order" of May 20th, 2021 is that this was something which was agreed by the parties' lawyers and that the "unless order" was not made following consideration of a contested application by the court. This order, however, was made after a previous "unless order" was also entered by consent on February 19th, 2021 and which provided for service of a schedule of loss. This earlier "unless order" had become necessary because the orders dated March 3rd, 2020 and September 16th, 2020 which provided for service of the schedule of loss, amongst other things, had not been complied with by the claimant and no explanation had been offered by the claimant for his failure in this regard. It seems to me, therefore, that it was appropriate for an "unless order" to be entered on May 20th, 2021 in the terms which were agreed. In the course of his submissions, Mr. Gomez referred to the requirement to serve the amended schedule under the "unless order" of May 20th, 2021 as a "direction." This is incorrect and downplays the importance of an "unless order," one of the most powerful weapons in the court's case management arsenal. Further, this "unless order" spelled out very clearly the consequences of not providing the amended schedule no doubt because of the history of defaults on the part of the claimant in this case.

19 Further, the need for an updated schedule of loss was raised by the defendant's lawyers prior to the "unless order" being entered on May 20th, 2021 as they considered that the schedule of loss needed to be amended so that the losses which it was alleged were attributable to the delay in conducting the operation rather than the operation itself were properly itemized. This was entirely reasonable so that the scope of the claim and damages sought were properly defined. Mr. Gomez agreed to this and consented to the order of May 20th, 2021 on that basis. If he had considered that this was not necessary or that there should first be a trial on liability, he should not have agreed to an order requiring service of an amended schedule, let alone an "unless order" which provided that the claim would be struck out if this was not provided.

20 Turning to the schedule of loss itself, Mr. Gomez starting off saying that no amendment to this document was required. The claim for future losses set out in the schedule of loss states that the claimant has been unable to move or walk as he was able to before the injury and the operation and further states that he did not have any of these issues before the operation. This all suggests that there is some sort of a claim based on the allegation that the operation had been carried out negligently and this is precisely the reason why the amended schedule was sought by the defendant's lawyers. Further, the schedule also refers to the claimant reserving the right to file a

subsequent schedule and contains claims, to be assessed for medical orthopaedic treatment and physiotherapy. In the course of the hearing Mr. Gomez accepted that those future losses were not being pursued and that contrary to what he had said originally, the schedule would need to be amended to correct this. This all shows that the intention behind the "unless order" was clear and that material amendments to the schedule of loss were in fact required.

21 Even then, I do not consider that that should be the end of the matter especially as the claimant is saying, albeit at a very late stage, that the default concerns quantum and that it would not be just to strike out the claim for this reason when there has not yet been a trial on liability. In my view, a determination needs to be made as to whether allowing the claim to proceed would be just taking into account the wider picture and not just the breach of the "unless order" of May 20th, 2021.

22 There is no dispute that the progress of the claim overall has been unsatisfactory and that the claimant has a poor record of compliance with court orders and as can be seen from the "unless order" of February 19th, 2021 which was entered into by consent and which refers to the claimant having failed to previously set out the reasons for the failure to comply with the orders of March 3rd, 2020 and September 16th, 2020. There was then the second "unless order" made on May 20th, 2021 which came about following the service of the claimant's schedule of loss under cover of a letter which referred to the claimant's belief that his condition was as a result of the operation. Despite the claimant having breached the "unless order" of May 20th, 2021 and the very serious consequences that followed, he failed to apply for relief against sanctions without providing any reason for this, let alone a good reason, and the claimant's last minute submission that no amendment needed to be made to the schedule of loss turned out to be specious. If the claimant's past conduct is anything to go by, progress of a trial on liability will not proceed expeditiously.

23 What is more, the proposal that a trial of liability should first take place was also raised at the very last minute. Whilst it is often the case in personal injury claims for a separate trial to be ordered on the issue of liability, this requires a proper determination after hearing the parties and this has not taken place here. Mr. Gomez accepted in the course of the hearing that the claim was for no more than £45,000. Further, I was informed that the same experts would give evidence on liability and quantum. It may well be, therefore, that this is not a case where it would be proportionate to order a split trial bearing in mind the cost of experts attending court, their often limited availability and the value of the claim. I can put it no higher than that because a decision as to whether this would be appropriate could only be made following proper consideration of this issue but the point is that the claimant has once again failed to address this

important issue in a satisfactory manner. Apart from only making this proposal at the eleventh hour in response to this application, it was not advanced in a considered fashion. The conclusion to be drawn from all of this is that even at this late stage, the claimant's conduct of these proceedings continues to be half-hearted.

Conclusion

24 In all the circumstances, I do not consider that this is an appropriate case for the court's indulgence, especially on its own initiative when no explanation has been offered by the claimant for his conduct so far and where there is no indication that things will change. This is a conclusion which I have reached with little enthusiasm especially as the claim concerns a complaint made by a disabled person who has suffered an accident. The failure to comply with the "unless order" of May 20th, 2021 cannot, however, be viewed in isolation and represents the latest in a litany of defaults and non-engagement on the part of the claimant. The claimant's response to this application only serves to show that things have not changed in this regard.

25 A balance must be struck between a claimant's ability to pursue his claim and at the same time ensuring that litigation is conducted justly which includes the need for it to be conducted efficiently, at a proportionate cost and for court orders to be complied with. There comes a point where a line must be drawn in the sand and it seems to me that that point has been reached in this case.

26 The claimant has breached the "unless order" of May 20th, 2021 which means his claim has been struck out. The court's function is to decide what order should properly be made to reflect the striking out of the claim and, in particular, whether any order for costs should be made in favour of the defendant. At the hearing, Mr. Gomez conceded that if the claim was in fact struck out there was no basis on which he could resist the order for costs being sought. There is in any event no reason in my view why costs should not follow the event and the defendant's application for an order that the claimant pay its costs occasioned by these proceedings is therefore granted such costs to be assessed by the costs judge if not agreed.

Order accordingly.