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Case no: HQ13X01778

IN THE ROYAL COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts Of Justice
Strand, London
WC2A 2LL

Wednesday, 28 October 2015

BEFORE:

MASTER O’HARE

BETWEEN:

REID

Claimant

- and -

BUCKINGHAMSHIRE HEALTHCARE NHS TRUST

Defendant

MR BLACKBURN for and on behalf of the Claimant

MR SHARPLES for and on behalf of the Defendant

JUDGMENT

(As Approved)

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MASTER O'HARE

1. This clinical negligence case was proceeding to a ten day split trial on liability only but liability was agreed more than a year before that trial commenced. It was listed for a two day detailed assessment before me but, by the start of the second day the costs to be allowed had been agreed. I am asked now to rule upon the Claimant's entitlement to the costs of the assessment.

B

2. There are three key dates to note: 24 July 2015, the date of the Claimant's solicitors letter inviting the Defendant's solicitors to proceed to mediation; 28 September 2015, the date of the Claimant's solicitors' letter enclosing a Part 36 offer as to all of the costs to be assessed; and 6 October 2015, the date of the Claimant's solicitors letter enclosing a Part 36 offer in respect of counsel's fees, that is to say part of the costs to be assessed.

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3. In the result the defendants failed to beat either offer and accordingly the claimant seeks remedies pursuant to Part 36.17 and also seeks further penalties having regard to the defendant's refusal to agree to mediation.

4. I shall start my judgment with the order I intend to make and then explain my reasons for it. The order I intend to make is more limited than the claimant invited me to make. It is in these five points.

D

a. I award a sum equivalent to ten per cent of the costs assessed. That is a figure of £13,000-odd.

b. I award interest on the costs assessed at eight per cent from the day of the judgment, the day of the award for costs. That was 7 January 2015.

c. I order the Defendant to pay the Claimant's costs of detailed assessment up to 27 July 2015 on the standard basis.

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d. I order the Defendant to pay the Claimant's costs of detailed assessment from 27 July on the indemnity basis.

e. Lastly, I want to award interest on item (i) and on the costs of assessment (items three and four) at eight per cent starting from today.

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5. As to (i), I am making the standard order which ought to be made when a paying party fails to beat the receiving party's offer to settle. It seems to me no good reason has been shown to me to make an exception; as to that, see Cashman v Mid Essex Hospital Services NHS Trust [2015] EWHC 1312 (QB).

Whilst there are some points which might lead one to think the standard penalties are unjust in this case (the imbalance of information between the parties (the claimants know more about their bill than the defendants do) and the claimant's failure to alter that imbalance by making replies) but those factors did not influence me to depart from the standard order. I think the defendants did have suitable information to make an assessment of the sum likely to be awarded, bearing in mind the high costs of assessment if this matter went as it did to a two-day hearing. The offer was made well before any detailed assessment was in the offing. No hearing appointment was made until several weeks after the offer was made.

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6. But now I will say what I have not allowed. I did not think it right to order an additional percentage reward or penalty in respect of the offer of 6 October. That offer relates to counsel's fees. The penalty on the defendants in respect of counsel's fees has already been awarded in respect of the earlier offer. I did not think it right that a receiving party can multiply the number of ten per cent awards he obtains simply by itemising different parts of his offer and expecting the court to increase allow 10% increases in respect of all of them.

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7. Also I think it is not right to allow any enhancement of interest either on the costs assessed or on the costs of assessment. It seems to me the ten per cent sum I have awarded is by itself a sufficient reward or penalty. I think it would be disproportionate to impose further penalties.

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8. Next, I think it is not right for me to award interest on the ten per cent itself for any period starting earlier than today. That is a sum which is being assessed and awarded today; it is not a sum which the defendants could reasonably be expected to pay before today. Its arrival time is now. It having arrived, interest on it will run under the Judgments Act at eight per cent per annum from today, but that is not something I need state; that is the automatic effect of the Judgments Act 1838.

D

9. In respect of the defendant's failure to mediate, I think the only sanctions available for me to impose are to award costs on the indemnity basis and to award interest on those costs from a date earlier than today, today being the normal date. I am persuaded that the defendant's refusal to mediate in this case was unreasonable. It took them six weeks to reply to the offer and they then replied in the negative. But nevertheless I do not think I should impose the indemnity basis penalty from a date earlier than the date the defendants are likely to have received the claimant's offer, and that is why, in item (iii) I said interest should run from 27 July, that is, some three days after the offer was sent. I do not think I have any power to award a percentage penalty as I can in respect of a Part 36 offer. In my view I do not have power to alter the rate of interest payable and I do not think it proportionate to add interest penalties on top of an award on the indemnity basis from a date earlier than today.

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10. I want to end with a brief note of caution about sanctions imposed on parties who unreasonably refuse to mediate. Case law on this topic is largely about penalties imposed on parties who are in other respects the successful party. In Halsey v Milton Keynes NHS Trust [2004] EWCA Civ 576 and in other cases, penalties imposed upon winners. They do not involve the imposition of further penalties upon losers. One can see that throughout the judgment in Halsey. I will read out a sentence from paragraph 28:

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“As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation.”

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11. There are many other such references to this being a penalty against winning parties, for example, see paragraphs 13 and 34.

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12. If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake. This penalty is imposed because a court wants to show its disapproval of their conduct. I do disapprove of this defendant's conduct but only as from the date they are likely to have received the July offer to mediate.

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