Neutral Citation Number: [2023] EWHC 2986 (KB)

Case No. KB-2022-004826

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice,
Strand, London WC2A 2LL

Date: 23 November 2023

Before :

THE HONOURABLE MR JUSTICE PEPPERALL

- -

Between :

(1) NICOLA BAYLESS
(2) DARCY BAYLESS
(3) VIOLET BAYLESS

Claimants

- and -

NORFOLK AND NORWICH UNIVERSITY HOSPITALS NHS FOUNDATION TRUST

Defendant

- -

Richard Baker KC (instructed by **Tees Law**) for the **First Claimant**
There being **no appearance** by the **Second and Third Claimants**
Farrah Mauladad KC (instructed by **Kennedys**) for the **Defendant**

Hearing date: 12 October 2023

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Approved judgment

This judgment was handed down remotely on 23 November 2023
by circulation to the parties and by release to the National Archives.

THE HONOURABLE MR JUSTICE PEPPERALL:

1. This judgment concerns the proper order for costs upon the withdrawal of an application to strike out a claim. That issue turns in part on the practice applicable when seeking to settle dependency claims on behalf of children; the proper construction of a settlement; and the application of the principles in the well-known case of Henderson v. Henderson (1843) 3 Hare 100.

BACKGROUND

2. On 24 April 2016, Stephen Bayless collapsed and died at home. In the days before his death, Mr Bayless had been treated at the Norfolk & Norwich University Hospital for severe chest pains. Tragically the medical staff failed to diagnose that he had suffered an acute type A aortic dissection. The Trust admits that this life-threatening condition should have been diagnosed on 18 April 2016 and that, had it been, emergency surgery would have been carried out within 48 hours. Further, it admits that such surgery would probably have been successful.

3. Mr Bayless was 42 when he died. He was survived by his wife, Nicola, and two young children who were then aged 8 and 13. By a letter of claim dated 26 February 2018, Mrs Bayless gave notice of her intended clinical-negligence claim against the Trust. The letter asserted that her claim was made as widow and administrator of Mr Bayless's estate under the Law Reform (Miscellaneous Provisions) Act 1934 and the Fatal Accidents Act 1976. On 12 July 2018, the Trust admitted liability and invited Mrs Bayless to provide a schedule of loss with a view to the early resolution of her claim.

4. There was then some delay while Mrs Bayless's solicitors prepared her case. In an email exchange in the spring of 2019, they explained that the children's own injury claims were not ready but that it might be in everyone's interests if Mrs Bayless's claim could be resolved. By a Preliminary Schedule of Loss dated 1 May 2019, Mrs Bayless particularised her claim. It comprised three principal aspects:

   4.1 Claims on behalf of the estate under the 1934 Act for Mr Bayless's pain, suffering and loss of amenity between 18 and 24 April 2016, the funeral expenses, and a modest claim for past care.

   4.2 The widow's statutory claim under the 1976 Act for a bereavement award.

   4.3 Claims for loss of dependency under the 1976 Act. Such claims were asserted on behalf of Mrs Bayless and the couple's two children.

5. By a Part 36 offer made on 29 August 2019, the Trust offered to settle the claim for £340,000. Such offer was accepted on 2 September 2019. Although not in evidence, I am told that the settlement money was then paid out.

6. On 8 December 2022, Mrs Bayless and her children issued these proceedings against the Trust. By their Particulars of Claim, each claims damages as secondary victims for psychiatric injury suffered by reason of witnessing Mr Bayless's death.

7. Anticipating a potential limitation defence, Mrs Bayless pleaded that she was not aware that she had suffered a post-traumatic stress disorder until she was diagnosed with the condition in April 2020. Until then she had believed that she was suffering a reaction to her grief that would resolve in time. At paragraph 10(f), she pleaded:

> "[Mrs Bayless] had consulted solicitors with regard to a claim brought on behalf of the deceased's estate. She was not advised to investigate whether she had suffered a psychiatric reaction to her husband's death or of the possibility that she might have a right of action."

8. By an application notice dated 18 May 2023, the Trust sought an order striking out Mrs Bayless's claim as an abuse of process. Such application was to be argued on the basis that Mrs Bayless's claim had been settled by the acceptance of the Part 36 offer in 2019. Alternatively, even if her claim for psychiatric injury had not been settled, the Trust was to argue that it should be struck out as an abuse of process in accordance with the rule in Henderson v. Henderson.

9. Shortly before the application was listed to be heard, the Trust identified that the 2019 settlement had not been approved by the court and that it was not therefore binding upon the parties. Upon making that discovery, the Trust abandoned its application the day before it was due to be heard. The short issue now between the parties is whether, as the Trust argues, the court should make no order as to the costs of the withdrawn application or whether, as Mrs Bayless argues, she should have her costs.

ARGUMENT

10. It is common ground that the acceptance of the Part 36 offer was not effective to settle the claims intimated in 2018/9 since such claims were made, in part, on behalf of two children and yet the settlement was not approved by the court as required by rule 21.10 of the Civil Procedure Rules 1998. While r.21.10(1) only provides that an unapproved settlement is not valid "so far as it relates to the claim … on behalf of … the child", Farrah Mauladad KC, who appears for the Trust, rightly concedes that this lump-sum settlement cannot be severed so as to construe it as also comprising a valid settlement of Mrs Bayless's claim.

11. Ms Mauladad accepts that the Trust cannot therefore succeed on its strike-out application. She characterises the lack of approval as something that the Trust has only latterly discovered following a query that was raised three days before this hearing. Ms Mauladad seeks to cast the blame for that state of affairs on Mrs Bayless's previous solicitors and contends that they were clearly negligent in failing to obtain the court's approval. While accepting that the Trust has not been successful in its application, she argues that the court should only consider the general rule that the unsuccessful party should pay costs once it has first answered the threshold

question of whether to make any order as to costs pursuant to r.44.2(1). She argues that the Trust did not act unreasonably by bringing the application in these circumstances and that the Trust would be "fully justified" in seeking a wasted costs order against Mrs Bayless's solicitors lawyers but does not do so because it acknowledges that the Trust could have raised the issue earlier. Ms Mauladad therefore argues that it would be just to make no order as to the costs of the application.

12. Richard Baker KC, who appears for Mrs Bayless, insists that the lack of approval is an issue for the Trust just as much as it is for the claimants. He argues that the Trust has withdrawn its application and is plainly the unsuccessful party. Further, he argues that in considering the parties' conduct under r. 44.2(5), the court should reflect the fact that it was not reasonable for the Trust to have raised and pursued the strike-out issue. Mr Baker argues that, even if there had been an effective settlement of the first claim, the application was in any event misconceived:

    12.1 There was no question of the settlement compromising Mrs Bayless's injury claim since the offer would be construed as having settled the claim that had then been made.

    12.2 Further, the second action would not have been struck out under the principles in Henderson v. Henderson given that Mrs Bayless acted in good faith; was not aware of her own psychiatric injury at the time of accepting the Part 36 offer; and the new action was not oppressive.

ANALYSIS

13. In view of the concession that acceptance of the Part 36 offer was not effective to settle Mrs Bayless's first claim, the strike-out application was bound to fail:

    13.1 First, any argument that the purported settlement compromised Mrs Bayley's personal injury claim necessarily fails.

    13.2 Secondly, there was, on this analysis, no earlier settlement that could lead the court to invoke the rule in Henderson v. Henderson.

14. Ms Mauladad is right to observe that the failure to seek approval of this settlement put Mrs Bayless and her children at risk since the 2019 settlement was not valid. Subject to any estoppel argument, the Trust would be as entitled as the claimants to resile from the 2019 settlement: Drinkall v. Whitwood [2003] EWCA Civ 1547, [2004] 1 W.L.R. 462; Revill v. Damiani [2019] EWHC 2630 (QB).

15. While such criticism is properly made, one might think that the Trust's own solicitors are in something of a glass house. The Trust has paid out £340,000 plus costs in settlement of a claim without obtaining a good discharge. It is elementary that one does not pay sums in settlement of a claim brought by or on behalf of children or protected parties without first requiring such claimants to obtain the court's approval. It is no answer to say that the Trust's lawyers assumed that that had been done. Indeed, any application for approval of this pre-issue settlement required the issue of a Part 8 claim pursuant to r.21.10(2). Such procedure would of course have

required the service of proceedings and notice of the date for the approval hearing upon the Trust. While Mrs Bayless and her children were put at unnecessary risk that the Trust might withdraw the offer, the Trust was equally put at risk:

15.1 First, the Trust faces the risk that the claimants might seek to resile from their earlier acceptance of the Part 36 offer.

15.2 Secondly, even if the parties agree to abide by the terms of their earlier settlement, the youngest claimant remains a child and the settlement can only now be made binding upon obtaining the court's approval. Such approval will have to be sought on the basis of the 2023 value of the child's dependency claim which will not necessarily be the sum that was agreed in 2019.

16. I do not therefore accept that the lack of approval was something known only to Mrs Bayless's lawyers or for which they alone are responsible. It should have been clear on the face of the Trust's lawyers' own files that the 2019 settlement had not been approved by the court. Accordingly, on the material that was available to the Trust upon proper investigation, this was always a hopeless application to strike-out Mrs Bayless's claim.

17. Even if the 2019 settlement had been approved by the court, I am not in any event satisfied that the Trust reasonably sought to strike-out Mrs Bayless's personal injury claim. Taking the matter shortly given that the application has been withdrawn:

17.1 Claim compromised by the settlement: On the proper construction of the intended settlement, the parties compromised the claims that had been advanced in the pre-action correspondence and schedule of loss. No personal injury claim was asserted by Mrs Bayless in the 2018 letter of claim or the 2019 schedule of loss.

17.2 Henderson v. Henderson abuse:

a) There is a heavy burden on defendants seeking to strike out a second claim on the basis of Henderson v. Henderson abuse. It must be shown that it would be "oppressive" or "manifestly unfair" to allow the second action to proceed: Johnson v. Gore Wood & Co. Ltd [2002] 2 A.C. 1, at p.60; Michael Wilson & Partners v. Sinclair [2017] EWCA Civ 3, [2017] 1 W.L.R. 2646, at [100]. Findings of abuse will be rare: Johnson, at p.31; In Re. Norris [2001] 1 W.L.R. 1388, HL, at [26]; and Michael Wilson, at [48].

b) It was never likely that the court would strike-out a personal injury claim that, on the evidence before the court, Mrs Bayless was not aware of at the time of the 2019 settlement in circumstances where the Trust, without complaint, was in any event to face claims for psychiatric injury from other secondary victims of its clinical negligence.

18. For these reasons, I conclude that the Trust withdrew an application that it ought to have realised, on proper investigation, was always liable to be dismissed. In doing so it has put Mrs Bayless to unnecessary cost and it should now pay her costs on the standard basis.