

JERSEY / JUDGMENT

Jamera v Le Feuvre [2020]

JRC 154 (03 August 2020)

[2020] JRC 154

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judgment

the MASTER:

Introduction

1. This judgment contains my decision on costs in relation to the substantive judgment dated 18 th February, 2020 reported at Jamera v Le Feuvre

[2020] JRC 030 handed down by me in relation to this matter. The issue decided by that judgment was that I permitted the plaintiff to rely on the evidence of an alternative orthopaedic expert in lieu of the evidence of a Mr Jasani. Background and Submissions 2. Following the judgment being released to the parties, I indicated in accordance with Practice Direction RC 20/004 in force at that time that my inclination was that the plaintiff should recover the costs of the hearing on the standard basis. However I also suggested that the plaintiff should pay to the defendant any wasted costs incurred by the defendant in relation to considering Mr Jasani's evidence and that the plaintiff should not be permitted to recover from the defendant any costs associated with obtaining Mr Jasani's evidence. 3. Advocate Littler for the plaintiff was content to accept this indication and made the following submissions in support of her position. 4. She fairly agreed that wasted costs had been incurred and did not seek to argue that I should make any different order other than the one proposed in terms of those wasted costs. 5. In relation to the costs of the hearing, the application was issued four months after the loss of confidence. There was therefore no unnecessary delay in bringing the application. 6. In respect of the criticisms at paragraph 53 of the substantive judgment against the plaintiff's English Solicitors for not following up with Mr Jasani, this was based at the time on a genuine belief that Mr Jasani was qualified to provide an opinion because he had referred to the shoulder surgery in the advice he had provided. 7. The majority of the hearing concerned the defendant opposing the application to replace Mr Jasani. As this opposition was unsuccessful, costs should follow the event and be paid on the standard basis. 8. This was not a case like *Young v Greaves*

- [2019] JRC 234 where the plaintiff had an opportunity to plead a claim for damages for psychological injury as a result of the road accident much earlier in time. Nor was it a case like *Pallot v Allain*
- [2015] JRC 086 where there was an unexplained gap of a year before the plaintiff sought a second opinion. Why the application had to be brought as noted at paragraph 46 of the substantive judgment was that Mr Jasani had failed to advise. He had also not commented on whether or not he had observed muscle wastage and had not raised the issue of credibility as set out at paragraph 48 of the substantive judgment. 9. In relation to the question of whether the entire hearing was concerned with the application to replace Mr Jasani, the only other substantive issue explored was whether an expert in pain management was required. In relation to this issue the plaintiff was in a difficult position because she could not obtain treatment for pain management on the National Health Service. Nor was the defendant willing to fund such treatment. Nor was an interim payment application possible for funding such treatment because of the overall dispute in relation to the quantum of the plaintiff's claim. This left the plaintiff in the position of having to pursue such a claim as best she could. 10. Advocate Corbel both in her skeleton argument and orally emphasised the other issues raised at the hearing that led to the substantive judgment. She contended it was not right for the defendant to pay the costs of those other issues when there were directions issues. 11. She was particularly critical of the plaintiff's approach to pain management because by the time of the hearing the plaintiff knew that the defendant's insurers were not going to fund any such treatment. The identity of Mr Chong as an appropriately qualified individual to provide an opinion on pain management was also clear from the report he had already provided as a neurologist. 12. She also emphasised all of the factors listed at paragraph 1 of the head note of *Watkins v Egglislaw*
- [2002] JLR 1 in particular sub-paragraphs (c) - (f). 13. Paragraph 53 of the substantive judgment she argued meant that the application could have been avoided either had enquiries been made by the plaintiff and/or her solicitors earlier or if Mr Jasani had advised. This meant that the defendant was not to blame for a hearing being required. Decision 14. In relation to the subject matter of the hearing, and the preparation for it, firstly I agree that some of the issues raised related to other directions which were dealt with partly at the previous hearing which led to the substantive judgment and also at the present hearing. However, the primary focus of the previous hearing was the application to replace Mr Jasani which was opposed. When deciding what costs order to make, I therefore do not consider it just for the defendant to bear the entirety of the costs insofar as costs incurred related to other directions. In my judgment looking at matters in the round 30% of the costs incurred related to other directions and to that extent costs should be in the cause. 15. In relation to the main argument before me which was the application to replace Mr Jasani by the plaintiff, it is right to note that this application was opposed by the defendant. In other words the defendant argued that permission should be refused to replace Mr Jasani. What I stated at paragraph 45 of the substantive judgment in relation to how to approach this dispute is as follows:- "45. I also agree with Advocate Littler that "some degree of latitude"

should be allowed to an assertion that confidence in an expert has been lost, as recognised by paragraph 47 of Pallot. As also noted in paragraph 47, the court's task is to test the assertion that confidence has been lost to see whether there is a basis for it and that it is not just expert shopping." 16. This followed on from Pallot v Allain where I stated at paragraph 47 as follows:- "Loss of confidence, while it should be tested by the court, and should not be allowed to be used as a cover for expert shopping, will contain an element of subjectivity because ultimately it is a party, i.e. the plaintiff in this case, asserting that confidence has been lost. The court's task is to test such an assertion to see whether there is a basis for it and that it is not just expert shopping." 17. What this extract means is that in cases post Pallot v Allain the approach the court is to take is clear. Any argument will therefore be about whether there is a justification for an assertion that confidence has been lost. A defendant, who wishes to oppose such an assertion and to argue the opposite, where that argument is unsuccessful, should generally be regarded as a loser for the purposes of costs. 18. There may be exceptions to the general position that a costs order following the event in the winner's favour would not be justified. In Pallot v Allain itself, the order in respect of the hearing itself was defendant's costs in the cause. This was because the plaintiff took 12 months to instruct another expert and did not inform the defendant that he was no longer relying on the original expert before the time came to exchange experts' reports. This led to wasted costs orders on an indemnity basis, but also meant it was not just for the plaintiff to recover the costs of the hearing itself although permission was granted. 19. In relation to the present case, the criticisms of the plaintiff's English Solicitors and Mr Jasani at paragraph 53 of the substantive judgment justify a wasted costs order being made. Had either the English Solicitors acted earlier or Mr Jasani expressed views before the meeting of experts, then the plaintiff could have retained a different expert. However, in my judgment these criticisms are separate from the costs of the hearing itself. The plaintiff acted promptly once her advisers were aware of the problem and there was no unjustified period of delay requiring a different costs order in respect of the hearing from costs on the standard basis. 20. The defendant's approach in resisting the argument was an attempt to compel the plaintiff to rely on Mr Jasani and to place the plaintiff in the position summarised at paragraph 52 of the substantive judgment. That attempt failed which also justifies an adverse costs order 21. Accordingly, the plaintiff should recover 70% of the costs of her application to replace Mr Jasani on the standard basis. The plaintiff should also recover 70% of the hearing leading to this judgment because again 30% of the submissions related to future directions with the balance relating to the arguments on costs, again on the standard basis. 22. In respect of the wasted costs order, I also considered this should be on the standard basis because although I have criticised the plaintiff's English Solicitors and Mr Jasani, this criticism is not sufficient to cross the threshold to justify an indemnity costs order. Authorities *Jamera v Le Feuvre*

[2019] JRC 234 . Pallot v Allain

[2015] JRC 086 . Watkins v Egglshaw

[2002] JLR 1 Page Last Updated: 11 Sep 2020 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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