TRANSCRIPT OF PROCEEDINGS

[2018] EWHC 3813 Ch

IN THE HIGH COURT OF JUSTICE
HIGH COURT APPEAL CENTRE CARDIFF
ON APPEAL FROM THE COUNTY COURT AT CARDIFF
ORDER OF HHJ JARMAN QC ON 22ND JUNE 2018
COUNTY COURT CASE NUMBER: D09YX345
APPEAL REF: CF041/2018CA

CARDIFF CIVIL AND FAMILY JUSTICE CENTRE
2 Park Street
Cardiff

Before MR JUSTICE BIRSS

IN THE MATTER OF

MRS JACQUELINE GRANT

Claimant/Respondent

-v-

NEWPORT CITY COUNCIL

Defendant/Appellant

MR JEREMY CROWTHER appeared on behalf of the Respondent
MR GARETH COMPTON appeared on behalf of the Appellant

JUDGMENT
11th DECEMBER 2018, 14.06-14.51
(AS APPROVED)

MR JUSTICE BIRSS:

1. This is an appeal from a decision of His Honour Jarman QC which arises in a personal injury claim. Essentially what has happened is that the defendant applied to use surveillance video evidence. The judge decided that the trial would have to be adjourned if it was allowed in and that the defendant had delayed in bringing the application and so he refused the application. Permission to appeal was given by Lambert J in the period between the decision of Judge Jarman and the date for the trial and so the trial was, at that stage, then adjourned. The matter now comes before me on appeal. I will refer to the parties as defendant and claimant.

2. The defendant submits that the principle to be applied is set out in paragraph 19 of *Rall v. Hume* [2001] EWCA Civ 146, in the judgment of Potter LJ, in which he said as follows:

> "In principle, as it seems to me, the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the plaintiff and her medical advisors upon it, so long as this does not amount to trial by ambush. This was not an 'ambush' case: there had been no deliberate delay in disclosure by the defendant so as to achieve surprise, nor was the delay otherwise culpable, bearing in mind the mutual muddle over the 9 October hearing date. Nor is this the comparatively rare kind of case in which the film has to be independently adduced, because what it shows goes beyond what can be established by cross-examination, and where different directions may be needed."

3. The defendant submits that the evidence in this case was very significant. It shows exaggeration and indeed fraud, allegedly by the claimant. The defendant submits that the judge was wrong to refuse to admit the evidence. He was wrong to say the trial had to be adjourned, there was time for the matter to be dealt with and it is not fair, says the defendant, to say that there was any culpable delay on the defendant's part. The defendant also argues that the judge also failed to appreciate the significance of the evidence.

4. The claimant submits that this was a case management decision by the judge. He applied the overriding objective, he understood the relevance of the evidence, but had to balance that against procedural unfairness. He was right to conclude that the trial could not go ahead and the decision he reached was one that was open to him.

5. One thing said by the defendant now on appeal is that what the judge could have done was adjourned the trial and have the defendant pay the costs. I note that that was not an option which was put to the judge below.

6. I will deal with the chronology. The claim began in April 2017 as a personal injury claim for about £310,000, which included a claim for loss of earnings. The allegation was that the claimant had slipped on water on the floor while working as a cleaner in a school, on premises occupied by the defendant. The accident took place in January 2014. She suffered soft tissue injury to her right knee, which required reconstructive surgery and in her pleaded case she says that she was left with permanent symptoms and was unable to return to work as a cleaner.

7. The Defence makes no admission as to the loss. The allocation and directions were given on 3rd November 2017 with a trial window in the 2nd July to 9th August 2018. Not long after that there was notice of the trial date, which was to be on 26th/27th July 2018, a two-day trial.

8. The claimant was examined by Mr Pemberton, the defendant's medical expert, in December 2017. On 12th January 2018 evidence was exchanged. The claimant's witness statement which was dated in October explains what has happened, it states that she still has to use a stick to help with mobility and is restricted in her walking. It also refers to her plans to sell fabric flowers as part of a wedding planner business by her friend. In effect the evidence confirms what she said to the defendant's expert in December. It does use the term "good days and bad days." The defendants suggested that this leaves open the ability to explain away evidence that the defendant might have been in good health on a particular day.

9. In January 2018 a Part 18 request was filed by the defendants asking the claimant about her plans to return to work. Unbeknownst the claimant, on 8th and 9th February 2018, the defendant's surveillance witness took footage of the claimant. The next step in the case, as between both parties, was that the medical experts' joint statement was in March of 2018. There the experts agreed that the claimant experienced sensations of her knee giving way and had signs of instability and, that she does remain symptomatic, both subjectively and objectively and uses a stick to partially mobilise herself.

10. The witness statement of the claimant responding to the Part 18 request was on 18th March and it confirmed her case that she was not working. Again, unbeknownst to the claimants in March, and the precise date is not clear to me, but it does not matter, but it was fairly clearly in March or possibly early April, the defendant, with its advisors, considered the surveillance evidence that it had acquired. Although it appeared that that surveillance evidence falsified what was presented to the medical experts as shown in the joint report, the defendants decided not to disclose the February evidence, but rather to see if it could get further footage of the claimant to indicate that she was in fact working.

11. On 23rd April the final schedule of losses from the claimant was served with a claim for just over £310,000, including a claim for loss of earnings into the future. On 29th April, unbeknownst the claimant, the defendant's surveillance person took further video footage of the claimant. This evidence indicates that she is working as a wedding planner or something of that kind or at least, I should say, the defendants contend that that is what it shows, but for the purposes of this appeal I can take it that that is the case.

12. On 14th May, which was the date the defendant's solicitors obtained the footage of 29th April, they disclosed all the surveillance evidence, I think at that stage in edited form, but shortly afterwards in fully unedited form, to the claimant's solicitors. At that stage no application was made by the defendant in relation to the video evidence.

13. Questions to the medical expert, Mr Pemberton, that is the defendant's expert, were formulated and sent on 29th May. Mr Pemberton replied on 6th June describing what he saw in the video, which appeared to show that the claimant was walking apparently normally, cleaning her car, carrying a large bag and doing things that she had told Mr Pemberton she could not do. He said: "She clearly does not require a stick."

14. Mr Pemberton's view expressed in his supplemental report is that the variance between the video footage and what she had told him cannot be explained by a variation in symptomology and that the claimant must have lied deliberately and exaggerated. Notably, Mr Pemberton's evidence is focused on what can be seen in the February footage. It is clear that this evidence is highly relevant and it is, if unanswered, strong evidence of lying and exaggeration in relation to the claimant's symptoms.

15. A draft Amended Defence denying the damages on this basis was served on 13th June. The application notice which came before Judge Jarman was dated 19th June, with a half hour estimate. The matter was heard on the telephone.

16. A curiosity is that the application was put as an application for relief against sanction under CPR Rule 3.9 in relation to the permission to rely on the video evidence. Also, permission was sought to use the Part 35 replies of Mr Pemberton and to amend the Defence. On appeal Mr Compton submitted that it would not have been right for the defendant to have treated the application as an application for relief from sanctions. On the facts of this case I agree. The directions gave the parties permission to apply to rely on further evidence, but importantly for this appeal the judge did not treat this as an application for relief from sanction anyway. He treated it as a case management application governed by the Overriding Objective generally.

17. Mr Compton also submitted that an important factor was the artificiality of having a trial without this evidence, that since now it has been disclosed and the expert has looked at it. I do not accept that. This is the same "Genie is now out of the bottle" argument that was addressed and rejected by Foskett J in ***Hayden v. Maidstone*** [2016] EWHC 1121 QB at paragraphs 40 - 42:

> "40. I will return to this submission in due course, but I would make the following observation about what Judge Collender QC said in [71]. I agree that it would be difficult for an expert who has seen the surveillance evidence to put it out of his or her mind and to make no reference to it, but I do not think that that can be a reason for a court to feel obliged to admit the evidence. Experts are familiar with the need not to refer to the content of any "without prejudice" discussions with their counterparts and the same applies, albeit doubtless with less familiarity, to lay parties who have to be advised by their lawyers not to make reference when giving their evidence to what was said during "without prejudice" negotiations. When, inadvertently, some forbidden material "slips out" during the course of giving evidence, all judges are familiar with the need simply to put such material out of their mind.

> Where some obviously deliberate attempt is made to refer to such material, it will weigh heavily in the evaluation of the witness who makes such an attempt.
>
> 41. It follows that, for my part, I do not see this consideration as a determinative consideration when conducting any balancing exercise that is necessary when deciding on an application of this nature.
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> 42. Mr Mooney also submitted, when the matter came before me on the second occasion, that, in the events which have happened, to use his expression, "the genie is out of the bottle" in this case and, accordingly, the court should regard that as a weighty factor. The factor is not irrelevant, but its weight should not be over-stated: to do otherwise would simply enable a party wishing to rely upon surveillance evidence to produce it at the last minute and assert that now it is on the playing field between the parties it is something that must remain in play. That cannot be right."

18. Mr Compton emphasised the importance of this evidence. He submits that it demonstrates exaggeration and fraud by the claimant. I will say that I recognise the importance of this evidence. This is not a trial, nevertheless, it is appropriate to approach this application on the basis that the video evidence is strong evidence that the claimant has exaggerated her claim and on the face of it has deliberately lied.

19. The defendant emphasises the potential consequences under section 57 of the Criminal Justice and Courts Act 2015, that if the claimant is found to be fundamentally dishonest, which they submit this would show, that would lead to the disapplying of the qualified one-way cost shifting and may mean that the claimant loses the entire claim, even if other aspects of it are well founded.

20. Nevertheless, important though it is, that significance does not mean that a party seeking to rely on evidence of this kind is free to deploy it at any stage without heed to the procedural consequences. The defendant emphasises that justice demands the court should get the right answer. Of course, that is so, but a more balanced way of putting that matter, bearing in mind procedural fairness, is, as Mr Crowther put it for the claimant, that the court strives to get the right answer in the right way. That, in my judgment, is encapsulated by the principle enunciated in *Rall v Hume*, which I have already cited.

21. I will add this, in the passage from *Rall v Hume* there is a reference to ambush. It is a referred to as a deliberate attempt to surprise the claimant. In my judgment the principle underlying what the Court of Appeal were saying in *Rall v Hume* is that this sort of evidence should be admitted if it can be done fairly. HHJ Collender said much the same thing in *Douglas v. O'Neill* [2011] EWHC 601 QB at paragraph 46 and following. I will save my voice rather than read it out and simply say at this stage that I agree with what is said there.

22. Putting it another way, an application to adduce this sort of video evidence is not a unique procedural situation. There are a number of situations in litigation in which a party can generate evidence which is privileged at the time it is generated and then deploy it, waiving the privilege whereby that material is then immediately discoverable and disclosable. In my judgment, that principle is not a way around the court's case management powers. So, to take an extreme example, if the claimant chose to waive the privilege on the day before the trial, the court's case management powers must mean that it has the power to exclude the evidence and also the issue that would be raised by that evidence. I say that only because part of the defendant's case on this appeal seemed to be that because this material was not disclosable whilst it was privileged, once the privilege was waived it was entitled to use it regardless of matters of case management. In fairness, I think Mr Compton did row back on that extreme form of his submission and rightly so, in my judgment. It is no doubt another factor to take into account, but it is not a trump card.

23. Getting to the specifics, there are two key factors in this case. The first is whether it is fair to say that the defendant delayed in producing this evidence, particularly in the February video evidence. Was the defendant entitled to wait to carry out the second surveillance without disclosing the first surveillance video and second, was the judge right to consider that the trial would have to be adjourned? Taking the first point, the suggestion was that the defendant was entitled to wait and conduct the second surveillance exercise because at that stage, the first video did not show that the claimant was in fact working. The defendant had some evidence from social media that she was working and wanted to catch her in a lie and for her to nail her colours to the mast relating to work and so, the defendant submitted, they were entitled to wait for the schedule of loss on 23rd April and then do the surveillance on 29th April which proves (it is assumed) that she was working.

24. I do not accept this analysis for two reasons. First, in the Part 18 response in March the claimant had already nailed her colours to the mast and made it clear that her case was that she was not able to work due to injury. Second, the February video was clearly very significant. It falsified what the claimant had told Mr Pemberton. That can be seen from Mr Pemberton's Part 35 replies, which are all focused on the February video. The important thing is that in March the defendant decided not to disclose the February video at that stage. That was despite the fact that the trial was impending. It was due to be heard in July. Time was beginning to get short. The defendant plainly could have disclosed the February video in March. It decided not to because it wanted to get further evidence on a different point about the claimant working rather than her symptoms.

25. In my judgment it is fair to say that the defendant could and should have disclosed the February video at that stage. It should have, in the sense that if it wanted to ensure there was no risk of procedural unfairness to the claimant, that is what it should have done. The defendant took a calculated risk, balancing the risks and consequences of litigation. The risk of later disclosure of the video evidence was that the disclosure would be so late that the claimant could not fairly deal with it.

26. Having taken that stance, once the defendant got the later video evidence, I simply cannot understand how it took a whole month to make the application to use it, that is from 14th May to the 19th June application notice. There was a suggestion that the defendant had to ask questions of the doctor and so on. That will not do. Given that on 14th May, the trial was then only nine weeks away, the defendant should have applied immediately for permission. Having taken a calculated risk in March and then not moved expeditiously, the

court's sympathy for the defendant, even recognising the importance of this evidence, is inevitably reduced.

27. Turning to the second issue, did the trial have to be adjourned? This is the critical issue.

28. As I think I have mentioned, there was a suggestion on the appeal that, even if it had to go, the judge could have adjourned the case with the defendant to pay the costs of adjournment. I reject that. It was not put to the judge on that basis. In the modern era trial dates are there to be kept and costs are no substitute. Another relevant element to that consideration is another aspect of litigation risk. I do not know why the matter was not put to the judge in that way, but perhaps it was not mentioned because the defendant did not then want to pay the costs of the adjournment. Maybe, if the defendant had made that submission, the judge would have adjourned the case, but made the defendant pay. Now on appeal, having lost the previous application, the defendant has nothing to lose by making such a submission, but it did have something to lose at the hearing below. So, for those reasons I do not accept that this appeal should be allowed on the footing that the judge should have adjourned the case with the defendant to pay the costs.

29. Now turning to the adjournment itself, Mr Compton makes two fundamental submissions. First, he says that the judge erred in approaching the decision on the necessity to adjourn on the basis that there were four weeks between the application and the trial. (There was also a problem that the claimant was at a family funeral abroad and would not be back until 3rd July, which only left three weeks.) The defendant says that actually the judge ought to have looked at the matter on the basis that there was nine weeks between 14th May and the trial at the end of July. The claimant's advisors had not done things which could have been done, such as putting the video to the claimant herself or putting questions to the claimant's medical experts. The absence of that should count against the claimant and nine weeks was enough time for all the matters to be dealt with.

30. Second, Mr Compton submits that in any event four weeks was enough time to be dealt with fairly. I do not accept the latter point. As the claimant submitted, the work which had to be done included getting further evidence from the claimant and the claimant may well have needed to try and find corroborative evidence to support her case, if that is what she wanted to do and to refer the matter to experts. The timing was very tight. The judge was an experienced judge and, in my judgment, he was entitled to reach the conclusion that if only four weeks was left the trial would have had to have been adjourned if the evidence was allowed in.

31. What about the nine weeks issue? Mr Crowther for the claimant submitted that the claimant's advisors were right to do nothing about this evidence until the defendant had obtained permission to rely on it. At one stage the claimant suggested that cost budgeting was a reason why it was legitimate to do no work on this until permission had been given and the matter re-budgeted. I do not accept that budgeting is a reason. Things happen in budgeting cases which had not been budgeted for. The correct approach from the point of view of budgeting when something unexpected occurs is to do what needs to be done and apply to have the budget amended. A party is not entitled to use budgeting itself as a reason not to act.

32. However, on the general point about whether the claimant was entitled to wait for the application to rely on the material, I refer to what Foskett J said in the Hayden case at paragraph 21:

> "21. By the time of the hearing before me, the Claimant's legal team had copies of the edited surveillance evidence, but not of the unedited footage. In accordance with their perception of what was correct practice they had not invited the attention of any of the experts instructed on behalf of the Claimant to view and comment upon the footage. That was indeed a proper course to take: there was no reason in the circumstances why they should have been "bounced" into simply beginning the process of engaging the Claimant's experts with this new material at that time."

33. Mr Crowther submitted that the principle there applies just as much to the claimant herself as to the claimant's medical experts. I agree with that up to this point. There is nothing to stop a party engaging with evidence of this kind as soon as it has been disclosed, but the onus is on the party producing material of that kind to bring an application on proper grounds. I cannot criticise the claimant in this case for waiting to see what the defendant does. A defendant who waits from 14th May to 19th June to even bring the application at all, when the trial is so close, only has itself to blame. The fact that the Part 35 answers in the Amended Defence were not ready on 14th May or shortly afterwards is no reason not to come to court urgently given the impending trial.

34. In my judgment, what has happened here is that last year the defendant approached the surveillance evidence as a whole as if the matter was not urgent and as if this evidence, given its importance, was always going to be admitted irrespective of procedural fairness to the claimant. That is not the right approach. The judge was right to consider that the relevant period was from the hearing on to trial. He was not required to place weight on the period prior to the application notice.

35. Standing back, the judgment is very brief. It is too brief, given the significance of the issue to be decided; all the same, I note that the defendants had estimated that the entire matter was to be done in a half hour hearing. However, despite its brevity it does just cover the important matters. The judge did recognise the significance of the evidence, that it falsifies the claimant's case. Just because he did not go into any more detail is not an indication that the judge did not comprehend its significance. The judgment does not cite *Rall v. Hume* or the other principles I have referred to, but the principle the judge applied was clearly the Overriding Objective, weighing the importance of the evidence against the fact that the trial might have to be adjourned and the absence of good reasons why the February video evidence was not disclosed until May.

36. As I have concluded, the judge was entitled to find that the trial would have to be adjourned and was entitled to take the view that there was no good reason for the delay in

disclosure of the February video evidence. Although he did not spell it out, the point is that that means that if the evidence was adduced and the trial had been kept the claimant would not have been able, fairly, to deal with it. He was entitled to reach that conclusion. I therefore will dismiss this appeal.

37. However, before leaving this appeal I will add this. I am very concerned about the practical reality of where we now are. The trial was in fact adjourned in the end. So the position today is that in fact the entire procedural unfairness to the claimant of this evidence can be wholly mitigated. She can have as much time as she needs to deal with it. There was a suggestion by Mr Crowther that if the appeal was dismissed and the defendant was to apply again to rely on this evidence, that would be an abuse of process. I must say it is not clear to me why that is so.

38. As I have said, the procedural situation today is that the trial date has been lost and so the evidence can be readily accommodated, particularly given its importance. It is not a situation that I would welcome and costs are never a complete compensation, but one has to manage a case in the situation in which it is.

39. The question which I will pose to both counsel is why should I not direct now that this evidence should come in, albeit that the defendant has to pay the costs of the adjournment of the trial and, for that matter of this appeal.

40. That is my judgment.

Further argument

41. In the judgment I have just given, I decided to dismiss this appeal. I will not rehearse the background any further, it is in my previous judgment. However, at the end I raised the question of whether the appropriate thing to do today now, in the circumstances as they now are with the trial having been adjourned as a result of the events after HHJ Jarman QC's decision, would be to make an order now admitting the evidence into the case and taking the matter forward in that way.

42. The submission from the claimant, the respondent to the appeal, was that for such an application to be made would be an abuse of the process having regard to the fact that the defendants had failed to get the evidence adduced before, had lost the appeal and this was all matters to be laid at the door of the defendant.

43. Mr Crowther for the claimant submitted that the principle is the Overriding Objective, to deal with matters justly and at proportionate cost and take into account all the various familiar factors, equal footing, saving expense, proportionality, to deal with things expeditiously. He particularly drew my attention to a couple of matters: in particular the share of the court's resources, noting how much of the court's resources have already been spent on this litigation; and ensuring procedural compliance, noting what had happened here was that the defendants have not complied with the appropriate rules and procedures before the court and were now effectively having a second bite of the cherry.

44. I must say I sympathise to some extent with Mr Crowther’s submissions in that, it is certainly a very unusual situation for a respondent to an appeal to find that they have succeeded in the appeal, succeeded therefore in the court upholding the decision of the judge

below to exclude evidence, only to be told at the end of the matter that the court is contemplating allowing in the very evidence which the whole matter had been there to fight to resist. But, in my judgment, this is a highly unusual situation. The only reason, as far as I am aware, why this evidence might not be admitted into these proceedings was then and remains a matter of procedural fairness to the claimant in the sense that she has a proper opportunity to deal with it.

45. Entirely as a result of the way in which this matter has been dealt with and the fact the trial has been adjourned, it is in my judgment plain that the claimant now has as much of an opportunity as she could ever need to deal with this evidence and it will be no hardship to her at all for this evidence to now be admitted. The only reason why this evidence might not be admitted at this stage would be as some form of punishment to the defendant for the manner in which it has conducted this matter.

46. I do accept that it would be possible for the court to take that line, but it seems to me that in the circumstances, particularly given the nature of this evidence, which does, on the face of it, falsify the evidence the claimant is advancing in these proceedings, it would be a strong thing indeed for the court to refuse to admit such evidence when, and this is the critical point in my judgment, the claimant can now deal with it. That is nothing to do with the appeal, it is simply to do with the fact that the position is today the trial was adjourned and has not been refixed and there is more than sufficient time for the claimant to deal with this evidence.

47. I have given this matter a lot of thought and I have taken Mr Crowther's submissions carefully into account and I will repeat, I do understand how it might appear from the point of view of a successful respondent, to feel that the defendant is getting a second bite of the cherry.

48. But in my judgment the most efficient and, critically, the fairest way of dealing with this matter overall, is that I should allow this evidence to be admitted into these proceedings. I do not need to make any more detailed directions, they can be dealt with by the court below. That is the appropriate way forward. The claimant can have a complete opportunity to deal with this evidence and to take whatever steps she needs to take. She will need to be given enough time to do that, but I am quite sure that when a trial is re-fixed it will be fixed in such a way that all of that time will be available to the claimant. That is my decision.

Further argument

49. I am not satisfied that I should make an order only that the costs should be claimant's costs in the case. I recognise the importance of the public policy point, which the defendants have made that it may be that these proceedings ultimately lead to a finding that the claimant has lied and then ordinarily one would not expect her to recover any costs. But the costs I am dealing with are the costs of this appeal. This was an appeal as a self-standing issue relating to the decision of His Honour Judge Jarman, which I have dealt with extensively and the appeal has failed.

50. Unusually, I have made an order, as I have explained a moment ago, allowing in the evidence, but that was not because the appeal was well-founded. In my judgment it was not. The fair and appropriate thing to do is not to depart from the normal principle, which is the costs be awarded to the successful party unless there is a good reason why not. I am not satisfied there was a good reason why not, so I will award the respondent's the costs of this appeal. I will summarily assess them.

Further argument

51. The total ex-VAT for this appeal is £8,733. The two matters which were drawn to my attention, one is two hours, although it is described in a way which does not really make sense, would seem clearly to be time spent by the solicitors perusing the appeal bundle. I am not persuaded that that is an excessive amount of time in the context of this case. As far as counsel's fees is concerned, the fee was £6,000. The hearing was brisk but dealing with the judgment, this matter has taken more than half a day and, in my judgment, that is a fair, reasonable and proportionate sum for this appeal. I summarily assess the costs in the sum claimed.

52. Okay. Presumably it is right to include VAT, I never quite get this the right way around.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge