Settlement: Joanne Dunhill (by her litigation friend Paul Tasker) v W. Brook & Co. (a firm) and Justin Crossley [2018] EWCA Civ 505

By Gabriel Adedeji

3PB Barristers

Summary

The Appellant appealed against the dismissal of her claims for damages for professional negligence brought against the First Respondent (the solicitors' firm) and the Second Respondent (the barrister). The Court of Appeal confirmed that a judge had been entitled to conclude that a Claimant's solicitor and barrister had not been negligent in recommending settlement of her claim for personal injury in the sum of £12,500.

Facts

The Respondents had represented the Appellant in her claim in the county court in respect of a head injury sustained in a road traffic accident in 1999. Proceedings had been issued in May 2002. The total claim was limited to £50,000. Since quantum was uncertain, the District Judge ordered a split trial of liability and quantum. The Second Respondent, accompanied by a junior trainee from the First Respondent's firm, represented the Appellant. After half a day of discussions between the parties, the claim was settled, ostensibly with the Appellant's consent, in the sum of £12,500 and costs.

The Second Respondent took the view that the failure of a key witness to attend the trial constituted a significant setback and that there was a real risk that the entire claim could fail. The First Respondent had not given the Second Respondent all of the available medical evidence, as the trial was to be in respect of liability only. The medical evidence seen by the Second Respondent was to the effect that the Appellant had lost her sense of smell and taste, had experienced some personality changes, and, that she had a slight risk of developing epilepsy. A report from a neuropsychologist which painted a far more serious picture of the extent of the Appellant's recovery had been received by the First Respondent the day before the trial, but this was not passed on to the Second Respondent.

On appeal, the Appellant succeeded in having the settlement set aside on the basis that she did not have capacity at the time of the settlement. She pursued her original claim against the Defendant. The claim was negotiated as to liability in her favour to the extent of 55% of its full value. The parties agreed a figure for quantum far above the upper limit of £50,000 originally placed on the claim. The Appellant's case was that the Respondents had been negligent in recommending a full and final settlement in the sum of £12,500.

The appeal judge found that the view reached by the Second Respondent was not negligent on the basis of the material known to him at the time. She rejected the allegation that he had been negligent in relation to the assessment of quantum, finding that it was inevitable that the evidence prepared on quantum in a legally aided claim would be provisional where a split trial had been ordered. It was therefore unrealistic to suggest that the he could have obtained an adjournment to obtain more evidence on quantum given that he had clearly been unaware of the relevance of the further medical evidence. The judge accepted that the Appellant felt aggrieved, but accepted that neither Respondent had pressured her to accept the settlement.

Appeal to the Court of Appeal

Giving judgment, Sir Brian Leveson found, although it was likely that the case could have been run successfully based solely on the evidence of the Defendant's witnesses, that was far from saying that the judge, having heard the Second Respondent, and, who was in the best position to assess his doubts and his assessment of the position at the relevant time, was not entitled to take a different view. To interfere with her conclusion that the barrister had been entitled to fear that the case could fail in its entirety ran contrary to what was the clear approach to the assessment of a trial judge, as set out by the Court of Appeal in *Fage UK Ltd v Chobani UK Ltd.*

As at the first day of trial, the First Respondent had not read the neuropsychologist's report. He was not aware that a key witness had not attended the trial or that quantum and potential full and final settlement figures were being considered. Furthermore, as found by the judge, although the Second Respondent had been alerted to the existence of the neuropsychologist's report, he had formed the impression that it would merely explain the Appellant's reluctance to attend trial.

The judge on appeal had dealt with all of the arguments advanced by the Appellant, recognising that, in a legally aided case, quantum would not fully be investigated until the liability had been established. The upshot was that the Second Respondent had to do the best he could if seeking to obtain some form of compensation for his client in a case which he considered that he faced fighting and losing. He had been entitled to rely on the medical

evidence which he had seen and was not negligent in arriving at the quantum figure which he arrived at.

The judge had the responsibility of assessing the overall evidence, including the approach that had been taken by counsel. The Court stated:

'Again, the judge had the responsibility of assessing the overall evidence including the approach of Mr Crossley (with the benefit of the way he responded to lengthy cross examination only in part conveyed by the transcript). Again, the perils of "island hopping" as identified in Fage UK Ltd v Chobani UK Ltd…and imposing this court's (different) view for her judgment, reached with a far broader appreciation of the circumstances itself of the judgement of Mr Crossley requires us to conclude that his advice was "blatantly wrong"…Only with the benefit of hindsight can that be said to have been so. As with my conclusion in relation to liability, faced with the position as it was on 7 January 2003 and his concern that the case could fail in its entirety, I am not prepared to say that it was'.

On the basis that the Second Respondent was not negligent, it could not sensibly be suggested that the case could succeed against the solicitors if it failed against the barrister. The appeal was dismissed accordingly. Obiter, the Court stated that there was merit in the proposition that it fulfilled the solicitors' duty of care to permit a trainee to accompany properly instructed counsel to a split trial, provided that he or she had instructions that a solicitor (preferably having the conduct of the case) was available if the need arose.

Comment

This case serves to highlight that post-settlement remorse will not be enough to establish failings on the part of solicitors and/or counsel. Furthermore, it is essential that those acting in personal injury litigation always be alert to capacity issues, particularly when serious head injuries have been sustained.

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Gabriel Adedeji

3PB Barristers

020 7583 8055
gabriel.adedeji@3pb.co.uk

3pb.co.uk