IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. 511 OF 2009

BETWEEN:

GARY JAMES

PLAINTIFF

AND

WOODS FURNITURE & DESIGN LTD.
(In Voluntary Liquidation)

DEFENDANT

Appearances:

Mr Clyde Allen of Clyde H. Allen Chambers on behalf of the Plaintiff

Ms Alice Carver of Nelson Law on behalf of the Defendant

Before: **The Hon. Justice Kawaley**

Heard: **3 October 2019**

Draft Judgment Circulated: **7 October 2019**

Judgment Delivered: **15 October 2019**

HEADNOTE

Costs of personal injury action in which liability admitted and damages assessed exceeded amount defendant paid into Court-failure to prepare witness statement on quantum as directed by two Court orders- whether costs otherwise recoverable by plaintiff in relation to quantum phase of trial should be reduced by reason of plaintiff's unreasonable conduct-belated admission of liability by defendant seven years after court encouraged settlement of action-pursuit of hopeless contributory negligence defence-whether Defendant should pay indemnity

costs because of its unreasonable conduct-overriding objective-Grand Court Rules, Preamble, paragraphs 1, 4(d)-Grand Court Rules, Order 62 rules 4(2), 4(11)

RULING ON COSTS

Introductory

1. On October 3, 2019, following a trial on quantum, I delivered Judgment in the present matter and indicated that I would hear counsel as to costs, interest and any other matters arising. In the course of the hearing counsel clarified a misunderstanding on my part as to the quantum of agreed medical expenses and I accordingly amended the Judgment to clarify the quantum of the special damages award. I declined to reopen the trial to consider whether the Plaintiff was entitled to an additional award on the grounds that I had failed to adequately consider the significance certain medical evidence to one limb of his loss of earnings claim.

2. My starting assumption was that it was unarguably clear that the Plaintiff should recover his costs of liability, which was belatedly admitted by the Defendant almost 10 years after the action had begun. As far as quantum was concerned, the starting assumption was that as the damages awarded to the Plaintiff (including interest and costs) clearly exceeded the amount paid into Court by the Defendant, although not by a large amount, the Plaintiff should recover his costs overall. A significant dispute at trial was whether the Plaintiff had been contributorily negligent, an issue which was decisively resolved in his favour.

3. For reasons which are unclear, counsel did not agree to exchange skeleton arguments on costs in advance of the hearing which ended up lasting for almost three hours. The Defendant's counsel furnished written submissions running to more than 10 pages to the Court and her opponent at the beginning of the hearing. The Defendant sensibly conceded that the Plaintiff should have his costs relating to liability and contributory negligence. However the following at first blush surprising positions were advanced:

    (a) the Plaintiff's costs on quantum generally should be reduced by 50% because of unreasonable conduct in relation to the quantum phase of the trial generally, including the failure to comply with a Court Order to serve a Witness Statement;

(b) the Defendant should be awarded the costs of its strike-out Summons, which it had been required to renew after liability had been admitted because of the Plaintiff's failure to diligently set the matter down for trial.

4. Ms Carver rightly submitted that she could have made oral submissions; the written submissions were of assistance to the Court. They helpfully included interest calculations, which Mr Allen was willing to accept.

5. As for the costs submissions advanced by the Defendant, the Plaintiff's counsel responded that if conduct was to be analysed, the Plaintiff should be awarded indemnity costs because of the Defendant's unreasonable (a) delay in admitting liability and (b) pursuit of a hopeless contributory negligence defence.

6. Towards the end of the hearing Ms Carver mentioned that she had not been able to take full instructions because she had not been able to share the draft Judgment with her clients, the Defendant's Voluntary Liquidators. That helped to explain the surprising disjuncture between views I had expressed on matters relevant to costs in the Judgment and the Defendant's overly ambitious stance in relation to costs. It is true that draft judgments are generally not to be shared with clients, but the Court routinely grants permission where counsel requests the opportunity to take instructions in relation to matters arising, such as the disposition of costs.

7. The input of professional clients in particular is usually particularly helpful at this stage of civil proceedings and requests for permission to share draft judgments in appropriate cases are, in my experience, routinely granted by the Court.

8. The day following the costs hearing, the Plaintiff filed unsolicited short written Legal Submissions in further response to the Defendant's submissions. These written submissions did not engage with the main thrust of the Defendant's case for a reduction of the Plaintiff's costs, which properly understood was a failure on his part to comply with the Overriding Objective, extracts from which were set out in the opening paragraphs of the Defendant's Submissions. The Plaintiff's further submissions largely memorialised oral submissions made at the costs hearing, which was not unhelpful to the Court.

9. Ms Carver objected to my considering these submissions. I instead indicated that there did not appear to be any new points had been raised which required a response but that

if she did identify any new points which required a response on her part, any such response should be emailed by close of business on October 7, 2019[1].

10. Before resolving the contentious issues, and after summarising the governing legal principles, it is important to take a high level view of the unusually protracted course of the litigation and then to clarify precisely how the key issues were resolved before and/or at trial.

Governing principles

11. The governing umbrella costs principle which applies to resolving the contentious issues is found in GCR Order 62 rule 4:

> "*(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.*"

12. The Defendant's application to deprive the successful Plaintiff of all of his costs engages GCR Order 62 rule 11:

> "*(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party.*"

13. The Plaintiff's application for indemnity costs is dependent upon GCR Order 62 rule 4:

> "*(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

14. The overarching guiding principle for civil litigation as a whole is found in the Preamble to the Grand Court Rules, which requires the parties to assist the court to

[1] The Defendant's counsel did reply on a point of detail which she rightly considered was not material to the present decision.

achieve the Overriding Objective. The key elements of the Overriding Objective include (paragraph 1 (1)):

> "*(a) ensuring that the substantive law is carried out and rendered effective;*
>
> *(b) ensuring that the normal advancement of the proceedings is facilitated rather than delayed;*
>
> *(c) saving expense;*
>
> *(d) dealing with a cause or matter in a way which is proportionate:*
>
> *(i) to the amount of money involved;*
>
> *(ii) the importance of the case; and*
>
> *(iii) the complexity of the issues.*"

15. Costs sanctions are arguably the most important case management tools available to judges charged by the GCR Preamble with actively managing cases with a view to achieving the Overriding Objective. During the course of litigation, this Court presently lacks the resources to actively manage each civil case throughout the course of the litigation. The Court relies on the parties to assist the Court to further the Overriding Objective and if, at the end of the case, it is clear that the parties have failed to discharge this important procedural obligation in one or more material respects, the Court must impose the requisite costs sanctions without fear or favour. Full enjoyment of civil litigant's constitutional fair rights requires the Court not to shirk its responsibilities in this regard. Assessing the reasonableness of the way litigation has been conducted when assessing costs at the end of the trial is not an exercise which is intended to rely primarily on the wisdom of hindsight, but necessarily entails taking into account the merits as determined at trial. Save in the rare cases where wasted costs orders are made against attorneys, findings that litigation has been conducted unreasonably to a material extent do not ignore the forensic reality that striking the right balance between advancing a client's partisan litigation rights and assisting the Court to further the Overriding Objective is frequently an inherently difficult task.

16. The Defendant's counsel did not expressly contend that the Plaintiff's costs should be proportionately reduced because a disproportionate amount of time was spent on superfluous issues (*In re Elgindata Ltd. (No.2)* [1992] 1 WLR 1207) but implicitly relied on this principle. The complaint that his costs should be reduced by 50% because the Plaintiff acted unreasonably by, *inter alia*, failing to progress the matter to trial in prompt and efficient way, only really has traction if it resulted in costs being incurred which were effectively wasted to some extent. The *Elgindata* principle is simply one

illustration of circumstances in which the principle that a successful party may be deprived of all or some of their costs if they have acted unreasonably has been applied.

17. The Plaintiff's counsel sought indemnity costs in relation to liability, as to which the following principles apply (GCR Order 62 rule 4):

> "*(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

Timeline

18. The Court file (as set out in the Judgment) reveals the following pertinent timeline:

- October 14, 2009: Writ filed;
- November 14, 2009: Defence filed;
- June 23, 2010: Plaintiff's attorney gives notice of intention to proceed and argues for a split trial;
- November 2, 2010: Summons seeking trial of preliminary issue filed. Plaintiff's attorney also swears Affidavit exhibiting medical reports, requesting a trial of a preliminary issue and explaining that the Plaintiff is impecunious and cannot have the plates removed from his arm until he recovers damages;
- January 14, 2011: CJ orders split trial over Defendant's objections (and, Mr Allen asserted without dissent, encourages parties to pursue a settlement);
- December 3, 2011: the trial on liability is fixed for hearing on March 13, 2012;
- March 12, 2013: Plaintiff signs his Witness Statement on liability and his attorney signs his Legal Submissions on liability;
- May 10, 2013: Samson and McGrath formally apply for leave to come off the record as attorneys for the Defendant;
- May 3, 2013: Samson & McGrath come off the record;

- December 19, 2014: Plaintiff issues[2] Notice to Fix Trial Date;
- October 27, 2016, Plaintiff issues second Notice to Fix Trial Date;
- November 18, 2016: Diamond Law Attorneys give Notice of Change of Attorneys replacing Samson & McGrath on behalf of the Defendant in voluntary liquidation;
- September 18, 2017: Plaintiff gives Notice of Intention to Proceed;
- March 21, 2018: Defendant files Summons to dismiss for want of prosecution;
- May 11, 2018: Plaintiff gives Notice of Intention to Proceed;
- August 29, 2018: the Defendant having admitted liability, Williams J gives directions for the trial on quantum which contemplate the Plaintiff filing a medico-legal report by September 21, 2018 and a Witness Statement;
- March 20, 2019: McMillan J orders that unless the Plaintiff does all things necessary to progress the case to trial on May 21-22, 2019, the Plaintiff's case shall be dismissed for want of prosecution;
- May 23, 2019: the matter being listed as Case Management Conference, I ordered the trial to take place on August 27, 2019 when it did finally proceed.

19. This timeline suggests that the present case is emblematic of one where case management (in terms of the parties' duty to assist the Court to achieve the overriding objective) has gone missing in action and the goal of achieving substantive justice has been derailed. The Court should not shirk its duty to impose whatever costs sanctions appear to be required.

The issues in dispute at trial and their resolution

20. The first issue addressed at trial was contributory negligence. This was a significant issue, because the Defendant sought a 25%-50% reduction of any damages awarded to the Plaintiff. Mr Allen submitted that this rejected defence was the "real issue" and that

[2] The Court stamp suggests this was only officially received by the Court on January 30, 2015.

the other quantum issues could not be fairly treated as wholly detached from it. The second significant issue in dispute was general damages for pain and suffering and loss of amenity. The Plaintiff sought nearly $50,000; the Defendant contended for just under $20,000 (but $10,000 on the basis of contributory negligence). The general damages award was $27,000.

21. The third significant issue was loss of earnings. This had two limbs to it: (a) loss of earnings based on the Plaintiff's Caymanian salary ($9,450, 21 weeks); and (b) loss of earnings based on reduced earning capacity ($20,250). Both limbs were said to be wholly unmeritorious; the basis for them was only to any meaningful extent apparent to me when the Plaintiff gave his oral evidence which confirmed that limb (a) was wholly unmeritorious. The Plaintiff recovered only approximately CI$1,850 in respect of the period Dr Waite expects him to be unfit for work after the second operation and based on his own oral evidence as to his Jamaican earnings. I found that there was no relevant expert evidence capable of supporting a finding that the Plaintiff was incapacitated to such an extent as to justify a finding that his earning capacity was reduced to a quantifiable extent. This claim perhaps had marginally more to it than I perhaps gave credit for in the Judgment, because Dr Waite in 2018 described the Plaintiff as suffering from a "*2% whole person impairment*", based on symptoms consistent with those diagnosed by Dr Bailey in April 2009 (without going further to identify a temporary incapacity). This cryptic finding (which Mr Allen suggested at the costs hearing had an American derivation) was meaningless to me and was not even relied upon at trial to any decipherable extent. The degree of the Plaintiff's alleged incapacity since being made redundant by the Defendant in May 2009 and until the second operation depended solely on his own evidence, which I found to be generally unimpressive in this regard and not legally sufficient in any event.

22. With medical expenses being agreed in a total amount of $8,387.10 ($5,309.78+ 3,077.32: Defendant's schedule of Damages), the remaining item in dispute was a 'small ticket' one. The Plaintiff sought $1,350 in travel expenses which the Defendant contended should be wholly disallowed, and was awarded $1,012.50.

23. In summary, the Plaintiff sought a total damages award of CI$ 85,262.84 (Plaintiff's Quantum Schedule); the Defendant contended CI$31,187.10 was appropriate, but discounted by at least 25% and as high as 50% for contributory negligence. The 'high point' of the Defendant's case on quantum was that the Plaintiff should be awarded net between roughly $15,000 and $23,000 in damages. The Plaintiff succeeded in comfortably beating the $35,000 paid into Court, as he was awarded approximately $38,000 before interest is taken into account (as Order 22 requires). He also succeeded in defeating the contributory negligence claim, but the Defendant's payment into Court amount was not very wide of the mark. The Defendant accepted that interest of approximately $4,000 was payable resulting in a total award of approximately $42,000.

24. A median assessment (midway between the lowest amount sought by the Defendant and the highest amount sought by the Plaintiff, the difference between $15,000 and $89,000, adding $4,000 in respect of interest to the $85,000 damages claim) would have been roughly $52,500. The Court's award was closer to the Defendant's best case outcome than to the Plaintiff's, but not to a dramatic extent. That is to analyse the

position more broadly than GCR Order 22 requires but to consider the financial dispute in its widest context.

25. The narrowness of the financial margins in terms of what was paid into Court and what was awarded in terms of damages assessed and interest agreed to be due suggests the need for heightened scrutiny of the extent to which the Plaintiff conducted the quantum phase of the trial in a manner which was proportionate and consistent with the Overriding Objective. Equally, bearing in mind that the Chief Justice in 2011 encouraged the parties to settle the case, the fact that the Defendant delayed admitting liability until 7 years after that judicial encouragement was given and pursued a contributory negligence defence to trial which was unsupported by any positive evidence almost cries out for costs sanctions on even a superficial analysis. The latter view is fortified by the aggravating factor that the Defendant's denial of liability postponed over many years a second operation which the Defendant knew the Plaintiff was required to have and could not pay for.

Findings: should the Plaintiff be awarded indemnity costs in respect of successfully establishing liability and contesting contributory negligence?

Key findings

26. The following findings in the Judgment are pertinent to Mr Allen's submission to the following effect. If the Court is to impose costs sanctions for the Plaintiff's unreasonable conduct then Defendant's conduct must also be placed in the scales and, if this is done the Defendant's conduct will be found wanting:

(a) "*In summary, the Defendant was on notice from November 2010 that the Plaintiff was impecunious and unable to fund the completion of his treatment unless in receipt of a damages award. The trial on liability was fixed for hearing on March 13, 2012 and there was no significant unexplained delay before then. The Plaintiff was ready to proceed on March 13, 2013 but it appears that the Defendant (perhaps due to the onset of insolvency) was not. The Defendant did not admit liability until over 5 years later….*" (paragraph 19);

(b) "*The Defendant's pleaded case on contributory negligence must be decisively rejected because it was not supported by any positive evidence and was most convincingly contradicted by the Defendant's own Incident Report prepared on November 24, 2008, only 10 days after the accident in question occurred. This supported the Plaintiff's central thesis that the forklift truck he was driving broke down, he called a colleague for assistance in identifying the problem and while pointing out a loose wire the colleague unexpectedly released a valve causing the load to fall onto the Plaintiff's left hand, crushing it. I accept the*

arguments advanced in the Plaintiff's March 12, 2012 Legal Submissions, summarised in paragraph 24, in this regard." (paragraph 21).

Liability

27. The Defendant could offer no justification as to why liability was only admitted on August 29, 2018 at or shortly before the hearing of its Summons to Dismiss. The 2nd Affidavit of Russell Smith was sworn on August 28, 2019 in support of a dismissal. There is no suggestion that at that point there was a significant and material change of circumstances, which prompted an entirely new assessment of the merits of their Defence on liability. No key witness had suddenly died or become unavailable. The following matters are in my judgment particularly relevant to an assessment of whether the conduct of the Defence on liability was conducted in so unreasonable a way as to warrant the sanction of an indemnity costs award and, if so, in relation to what period:

(a) the best available evidence in support of the Plaintiff's case on liability consisted of admissions made by the Defendant in its own official Incident Report signed 10 days after the accident when the Defendant had an opportunity to identify witnesses contradicting the Plaintiff's account and refute his allegation that this injury was caused by the negligence of one the Defendant's servants;

(b) the Defendant was openly told by the Plaintiff's attorney in correspondence dated June 23, 2010 that he was impecunious and dependent on compensation recovered for his injury to have the second operation he needed. A split trial on liability and quantum was proposed and the Defendant was invited to admit liability and/or agree to an interim payment. These proposals were rebuffed;

(c) the Plaintiff applied for a split trial on liability and quantum. The Defendant opposed this application. Mr Allen's Affidavit deposed to the Plaintiff's financial constraints and exhibited the Medical reports of Drs Quarty and Bailey (admitted for the purposes of the August 27, 2019 trial). These Reports confirmed that the Plaintiff required a second operation and would experience discomfort until this occurred ;

(d) the Chief Justice ordered a split trial on liability and quantum rejecting the Defendant's opposition to the application, on January 14, 2011 and encouraged the parties to explore settlement. The rationale for ordering a split trial can only have been to avoid a wastage of costs on preparing for a full trial and promoting the prospects of settlement;

(e) there is today no basis for finding that the Defendant at the date of the hearing in 2011 had reasonable grounds for contesting liability having regards to the admissions contained in their own Incident Report (dated November 24, 2008). If there were any relevant Defence witnesses, the

Defendant ought to have identified them in the period immediately after the accident and when it was instructing its attorneys to file its Defence in 2009;

(f) it is unclear why the trial fixed on December 3, 2011 for March 12, 2012 did not proceed. But by March 13, 2013 it appears (from the fact that written submissions and a witness statement were signed) that the Plaintiff was ready to proceed and the Defendant was not. Just under 2 months later, the Defendant's attorneys applied to come off the record;

(g) save for the potentially futile course of seeking a judgment in default (which would likely be set aside), the Plaintiff had no effective means of prosecuting the action against a company which was not legally represented. In Voluntary Liquidator Mr Russell Smith's 1st Affidavit, he deposes that he was appointed Voluntary Liquidator of the Defendant on January 16, 2016. The books and records included no reference to the Plaintiff's case. Diamond Law attorneys came on the record in November 2016, but Mr Allen (in explaining the difficulties he experienced in negotiating with Mr Diamond) informed the Court that the Defendant's second attorneys also had difficulties accessing their client's previous attorneys' litigation files. Presumably, a lien was being exercised for unpaid fees. I accept from him that he supplied copies of documents the Defendant ought to have had in its possession to Mr Diamond to enable him to represent the Defendant;

(h) objectively viewed against this background, it was unreasonable for the Defendant in the months preceding the admission of liability on August 29, 2018 to be complaining (through a Summons to Dismiss) of the Plaintiff's delay in fixing a trial on liability, because the Defendant belatedly acknowledged that such a trial was not needed (presumably because it had no Defence). The suggestion that the Plaintiff's delay had made it impossible for the Defendant to identify witnesses was simply wholly unjustified when the history of the proceedings is taken into account. Nonetheless, the evidence filed in support of the Summons to Dismiss reveals that both lawyers were communicating in 2017-2018 primarily about quantum and settlement. During this period, the Plaintiff cannot complain that the Defendant was acting unreasonably as regards disputing liability, because the Defendant was intermittently asking the Plaintiff to fix the matter for trial and the Plaintiff (during this period) was effectively waiving the right to insist on a trial on liability before issues of quantum were addressed. A straightforward view of the correspondence is that the Plaintiff's counsel was seeking to avoid the costs of a trial on liability altogether and reach a global settlement.

28. I find that the Defendant acted unreasonably and/or improperly in its defence of the Plaintiff's liability claim between June 23, 2010 and May 10, 2013 when its initial attorneys were forced to apply to come off the record. The Plaintiff's costs relating to liability for this period shall be paid by the Defendant on the indemnity basis. The

Defendant knew or ought to have known that it had no serious Defence on liability based on its own Incident Report admissions, but instructed its lawyers to adopt an obstructionist approach before (it appears from the record) ceasing to instruct them at all. The Defendant knew or ought to have known that in delaying admitting liability and addressing quantum the Plaintiff was being denied access to medical treatment he needed to remediate medically documented ongoing symptoms in circumstances where liability to pay an amount which would cover the second operation could not in good faith ever be disputed .

29. Where the defendant to a personal injury claim which has implicitly admitted liability out of Court before proceedings are commenced is requested to admit liability in order to save costs and facilitate the treatment the claimant requires for his injuries, adopting stonewalling tactics clearly constitutes a breach of the following requirements of the Overriding Objective:

(a) ensuring that the substantive law, which in the present case is designed to compensate the victim of a tortfeasor for their recoverable loss, is carried out and rendered effective;

(b) facilitating the advancement of the proceedings rather than their delay;

(c) saving expense;

(d) helping the Court to further the Overriding Objective: "*In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure to help in this respect*" (paragraph 3).

30. The Plaintiff's costs relating to liability up to June 23, 2010 and after May 3, 2013 are awarded on the standard basis. There is no basis for finding that the Defendant during those periods acted unreasonably or improperly, as regards liability, in the requisite costs sense. The matter appears to have gone to sleep between 2013 until November 2016 when the Defendant's Voluntary Liquidators' new attorneys came on the record. The Defendant's ability to deal with the case effectively was impaired by its inability to access its former attorneys' files. The parties sporadically explored a global settlement without success, with the Plaintiff not seemingly incurring any or any significant costs in relation to liability. More importantly still, the Plaintiff was not during this period demonstrably progressing the trial on liability.

Contributory negligence

31. It is obviously unreasonable and improper, having regard to a civil litigant's legal obligations under the Overriding Objective, to pursue to trial a pleaded claim it is incapable of proving and to positively advance an entirely new un-pleaded version of the claim. This is precisely how the Defendant conducted its contributory negligence defence, in circumstances where its own nearly contemporaneous Incident Report provided no support for either version of the defence. There is a fundamental distinction

between assessing exposure to liability, which a claimant has to establish, and advancing a defence which the defendant has to prove. In my experience it is unprecedented for a party who bears the burden of proving a negligence claim to succeed at trial in circumstances where:

(a) they have no positive evidence to adduce in support of the claim; and/or

(b) they are unable to rely on documented admissions made by the opposing party either shortly after the incident in question or at some other point before the trial.

32. Civil litigation is required to be conducted based on rational real world assessments. In my judgment it was fantastical to imagine that the Defendant could prove that the Plaintiff was negligent in a way which was unsupported by any document and inconsistent with most reliable document. As far as the Defendant's pleaded case is concerned, the Defendant could only have succeeded if the Plaintiff was persuaded to abandon almost altogether his version of how the accident occurred. A positive case was required to establish that the Plaintiff was negligent in pointing out a wire to a co-worker he thought was standing beside him and that in those circumstances placing his hand under the raised load. The position is essentially the same as regards the new un-pleaded allegation the Plaintiff's injuries were partially caused by his negligence in 'parking' the forklift truck with the loaded forks raised.

33. The Defendant had admitted in its own Incident Report in 2008 (a) that the forklift truck had broken down and had not been simply 'parked' in the ordinary course of work and (b) that the way in which the load came to be released was unexpected. The Defendant had no evidence of a safety policy which strictly prohibited leaving a loaded forklift truck with the forks raised under any circumstances. The Plaintiff could only have proved this new allegation through persuading the Plaintiff to effectively abandon his version of the accident altogether and admit that he ought to have foreseen when he left the stalled truck that the co-worker he was going to summon would release the load while the Plaintiff had his hand in harm's way. Wishful thinking apart it is impossible to identify any objective basis for the Defendant believing that the Plaintiff could be encouraged through cross-examination to admit that he was contributorily negligent.

34. I find that the Plaintiff should be entitled to all of his costs of successfully responding to the contributory negligence defence on the indemnity basis. Williams J on August 29, 2018 apparently noted, correctly, that the Court has no power to compel the parties to settle a case. But the case management powers conferred by GCR Preamble include "*helping the parties to settle the whole or part of the proceeding*" (paragraph 4.2 (d)). It is one thing if a Defendant fobs off judicial encouragement to settle and succeeds in disputing liability or establishing a significant degree of contributory negligence at trial. On the other hand, a Defendant that elects to ignore the Court's encouragement to settle and unreasonably disputes liability and/or pursues a hopeless defence must receive an appropriate costs sanction at the end of the trial.

Findings: should the Plaintiff's costs in relation to his successful claim for damages be reduced because his case was conducted in an unreasonable and/or improper manner?

35. Mr Allen submitted that the Court should not look beyond the fact that the Plaintiff beat the amount of the Defendant's payment into Court. That fact in reality only justifies the conceded primary finding that the Plaintiff is entitled to his costs. The question of whether those costs should be reduced because of the way in which success overall was achieved is an entirely distinct question. In this context, the Plaintiff counsel appeared to be inviting the Court into a parallel Universe in which the Overriding Objective and costs penalties do not exist.

36. To the extent that one is considering a complaint that a disproportionate amount of time was spent on hopeless heads of claim, it is relevant to consider whether a claimant has, for instance, beat the payment in by a whisker in circumstances where the bulk of the quantum dispute related to unmeritorious claims. This was not the primary complaint here, but the proportionality of the Plaintiff's decision to pursue the handicap in the labour market claim must be considered together with the complaints that the Plaintiff acted unreasonably by:

    (a) failing to comply with the August 29, 2019 Williams J Order requiring a Witness Statement to be served;

    (b) failing to file evidence in support of claims for travel expenses and loss of earnings and failing to file an updated Schedule of Damages. (It was initially also argued that if the recoveries made for those heads of claim were not taken into account, the Plaintiff would have recovered less than the amount of payment in, but this point was not pursued because costs and interest fall to be taken into account as well); and

    (c) failing to respond to the settlement offer made with a counter-offer, generally adopting a less realistic approach to the likely total recovery than the Defendant and generally failing to cooperate with expeditiously proceeding to trial.

37. Mr Allen responded to complaint (a) with the retort that the Defendant's attorneys never pressed him to produce a Witness Statement. That is merely mitigation and not a valid excuse for failing to comply with a Court Order. The Defendant's trial preparations were complicated by a late change of lawyers and understandable anxiety to have the case heard. This is why at trial no application was made to require a Witness Statement to be prepared and the Court was content to waive the requirement (GCR Order 38 rule 2A (10)).

38. This does not absolve the Plaintiff from blame for failing to comply with Williams J's Order and the usual practice. This was unreasonable conduct which justifies depriving

the Plaintiff of a portion of his costs. Witness Statements are a central feature of evidence in civil proceedings. They are designed to promote efficiency and settlements by ensuring that parties are not ambushed at trial and to avoid wasting Court time with oral evidence-in-chief. They are also an important tool in terms of trial preparation for both counsel and the Court so the nature of the parties' factual case is clearly understood. The Schedule of Damages did not clearly explain the two limbs of the loss of earnings claim, and the Plaintiff's oral evidence differed on travel expenses from the Schedule. Roughly half the Plaintiff's evidence at trial related to his loss of earnings claims. The failure to prepare a Witness Statement had practical effects for the efficiency of the trial.

39. The Court and the Defendant struggled to grasp precisely what the case on loss of earnings was. Overall, the trial time was probably roughly divided in the following way: 50% contributory negligence; 25 % general damages; and 25% loss of earnings. The Plaintiff's Witness Statement on liability had been prepared over six years ago and covered the contributory negligence issue. It was not apparent on what basis the Plaintiff was claiming 21 weeks loss of earnings based on his Cayman salary until trial, and it was or ought to have been obvious that this head of loss was based on an un-pleaded wrongful dismissal claim and therefore hopeless. The contentious aspect of the loss of earning capacity claim was not supported by any relevant expert evidence (expressly stating that his ability to work would be impaired to a discernible extent by reference to specific types of work).

40. The Plaintiff's oral evidence as to what his earning capacity was unimpressive and (in the absence of a Witness Statement) incoherent in terms of supporting that limb of the damages claim. It enabled the Court to assess his loss of earnings during the recovery period after the second surgery, but not to find that his earning capacity had been reduced to a specific extent because the injuries caused by the Defendant's negligence. The medical evidence based on an examination in 2009 did not support any loss of earning capacity claim. The finding for the first time in 2018 that the Plaintiff had a "2% whole body impairment" as a result of his injuries was evidentially unintelligible and/or unreliable. This head of loss ought not to have been pursued in the way it was, if at all.

41. The prejudice caused by the absence of documentary evidence for his travel expenses claim could have been eliminated by the explanation the Plaintiff gave in his oral evidence (which I accepted) being explained in a Witness Statement on quantum or an updated Schedule of Damages. Complaint (b) in my judgment overlaps with complaint (a).

42. The complaint about failing to negotiate reasonably and failing to proceed diligently to trial were advanced by Ms Carver as an application for the costs of the Defendant's Summons to Dismiss. Bearing in mind that this Summons was ultimately unsuccessful, for reasons which I elaborate upon below, I consider the best way to address those complaints is by reference to the conduct of the Plaintiff in preparing for trial overall after liability was admitted in Chambers on August 29, 2018. The Order made by Williams J on August 29, 2019 was essentially an Order for pre-trial directions.

43. Mr Allen did not refer the Court to any counter-offer made by the Plaintiff after the $35,000 settlement offer was made. By email dated October 22, 2018, the Plaintiff's counsel sought clarification of what assets the Liquidators' held and confirmation that they held sufficient funds to meet the Plaintiff's claim together with his costs. The response on November 7, 2018 was that the Plaintiff was not entitled to this information. That was an unreasonable response to a reasonable request for information which was relevant to the basis on which the case might be settled and to the Plaintiff's assessment of whether it was advisable to proceed to trial. The Plaintiff ought perhaps to have responded that in those circumstances it would be assumed that the Defendant had sufficient assets to meet his claim in full and make an appropriate counter-offer.

44. Accordingly, in my judgment the failure in these particular circumstances to make a specific written counter-offer does not constitute material misconduct for costs purposes. I also accept that the Plaintiff cannot be blamed for the delays in serving Dr Waite's Reports which were ultimately agreed.

45. By email dated December 7, 2018, the Defendant's former attorneys complained to the Listing Officer that because the Plaintiff had failed to comply with Williams J's August 29, 2018 Order (which had not yet been perfected), the Defendant wished to renew its Summons to Dismiss. The non-compliance related to principally Witness Statements and fixing a trial date. Bearing in mind that the Defendant had now belatedly admitted liability seeking to obtain a listing of the trial on quantum was the only reasonable and proportionate application for the Defendant to make. The Plaintiff had failed to comply with the pre-trial directions, and the Defendant was reasonably entitled to compel compliance with those directions, not to seek to dismiss the action altogether.

46. McMillan J, when the Summons was next heard, unsurprisingly gave further firm pre-trial directions so the application achieved an appropriate case management outcome via a somewhat uneconomical route. The Plaintiff's conduct complained of in the Third Affidavit of Russell Smith as grounds for dismissing the entire action only clearly supported firm directions for the listing of the trial. No reasonable Court, properly directing itself, could rationally dismiss an action such as the present which had been on foot for several years only months after the Defendant had belatedly admitted liability.

47. It is noteworthy that on March 20, 2019, McMillan J made a further Order requiring the Plaintiff to serve additional witness statements 21 days before the trial on quantum and contributory negligence which the Court directed should be fixed for May, 2019. The costs of the Summons were reserved. However, McMillan J clearly accepted that the Plaintiff had been guilty of some failure to progress the action diligently because paragraph 5 of his Order provided:

> "*5. Unless the Plaintiff timeously does each and all things necessary to progress the cause to trial on 21 and 22 May 2019 the Plaintiff's Cause shall be dismissed for want of prosecution.*"

48. When the parties came before me in May, counsel were still apparently seeking to compromise the matter which was adjourned by consent to the effective trial date in August. So the Plaintiff aggravated the initial failure to comply with a direction to serve a witness statement, albeit a direction expressed in general terms. The Plaintiff also was dilatory in listing the trial on quantum after Dr Waite's Reports had been obtained. The unreasonableness of this delay is to a significant extent cancelled out by the disproportionate response of seeking to dismiss the entire action. It is difficult to believe that McMillan J would not have given similar relief if the Defendant had simply written to request a relisting of the Summons for further directions because the Plaintiff had failed to file his own quantum Witness Statement and failed to list the matter for trial. The antiquity of the case was self-evident from the title to the proceedings and the year date of this Cause. Ms Carver rightly submitted that the Defendant was required to take steps to progress the action, but the form of relief which was sought 'over-egged the pudding'.

49. The Plaintiff's failure to comply with two Orders requiring further witness statements to be served before the trial on quantum was not only improper in and of itself, it undermined the efficiency of the preparations for the trial and the trial itself, helping to obscure the lack of merit in the Plaintiff's unsuccessful loss of earnings claims. These are clear and cogent grounds for depriving the Plaintiff of a proportion of his costs in relation to quantum.

50. This conclusion does not ignore the fact that the Plaintiff's counsel appears to have been conducting the case on the basis that his impecunious client would pay his fees out of costs recovered, in circumstances where the Defendant was unwilling to confirm the Defendant's own financial ability to pay any judgment in full. I also acknowledge that Mr Allen, as late as May 2018, was considering applying for an interim payment so that the second operation could take place before the final damages were assessed. I indicated at the costs hearing that the Plaintiff would have to assume the risk of the second operation being unsuccessful and the agreed future medical expenses amount being insufficient.

51. Anxiety about this risk would have justified the Plaintiff's counsel in being less than enthusiastic about hastening forward to trial, even though on balance I consider that the passage of time made proceeding with the trial at the Plaintiff's risk the only sensible case management approach after liability was belatedly admitted in August 2018, almost 10 years after the accident.

52. The Defendant sought a 50% reduction of the Plaintiff's costs relating to quantum overall. Mr Allen submitted that if any discount was required no more than 5% would be appropriate. My very rough and ready assessment is that 25% of the post-August 29, 2018 trial preparations (including contributory negligence) and the trial itself are attributable to the unsuccessful loss of earnings claims and that the failure to prepare a quantum Witness Statement contributed to those claims being pursued in an unreasonable and/or improper manner. Those largely unsuccessful claims represent roughly 50% of the costs attributable to quantum proper overall. I also take into the fact that the Plaintiff is being awarded all of his costs of defeating the contributory negligence claim (roughly 50% of all non-liability related costs) on the indemnity basis.

53. In these circumstances I find it to be just that the Plaintiff be awarded only 50% of his costs incurred after August 29, 2018 in relation to the assessment of damages claims on the standard basis. All quantum-related costs before that date shall be in the cause and are awarded on the standard basis.

Findings: costs of the Defendant's Summons to Dismiss

54. The Defendant's Summons to Dismiss was in substance unsuccessful and only served as a Summons for Directions. To the extent that the Defendant was justified in expediting the trial process, and achieved some success, I find that it acted disproportionately in seemingly genuinely seeking to dismiss the entire action not long after it had belatedly admitted liability. The appropriate costs Order overall is costs in the cause, having regard to the fact that the Plaintiff's own unreasonable conduct is being penalised to the extent set out above. For the avoidance of doubt, having regard to the awards made above, this means that:

(a) the Plaintiff is awarded all costs relating to the March 20, 2018 Summons (whether related to liability or quantum) up to and including August 29, 2018 on the standard basis;

(b) the Plaintiff is awarded his post- August 29, 2018 quantum-related costs on the standard basis but is only entitled to recover 50% of those costs.

Findings: costs of the costs hearing

55. Unless either party applies within 14 days by letter to the Court to be heard as to costs, the Plaintiff is awarded the costs of the costs hearing to be taxed if not agreed on the standard basis. Having regard to the issues raised, in my judgment the Plaintiff has achieved more substantial success than the Defendant on the costs application viewed as a whole.

Summary

56. The following costs Orders are made:

(a) the Plaintiff is awarded his costs of successfully pursuing the liability issue to be taxed if not agreed on the following bases:

(i) on the standard basis from the commencement of the action until June 23, 2010;

(ii) on the indemnity basis from June 23, 2010 until May 3, 2013;

(iii) on the standard basis from May 3, 2013 until August 29, 2018;

(b) the Plaintiff is awarded all of his costs of successfully contesting the contributory negligence defence on the indemnity basis;

(c) the Plaintiff is awarded all of his costs in relation quantum up to and including August 29, 2018 on the standard basis;

(d) the Plaintiff is awarded 50% of his quantum-related costs after August 29, 2018 on the standard basis; and

(e) subject to hearing counsel if required, the Plaintiff is granted his costs of the present costs application on the standard basis.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

GRAND COURT CIV-02 CAYMAN ISLANDS