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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
[2021] EWHC 3247 (QB)



No. QB-2020-00175

Royal Courts of Justice
Strand
London
WC2A 2LL

Monday, 8 November 2021

Before:

MR JUSTICE MARTIN SPENCER

B E T W E E N :

PATRICIA ANN LOCK

Claimant

- and -

GUHENDRAN RAVI-SHANKAR

Defendant

MR N. SPENCER LEY appeared on behalf of the Claimant.

MS K. GOLLOP QC appeared on behalf of the Defendant.

APPROVED J U D G M E N T

(via Microsoft Teams)

(Transcript produced without the aid of documentation)

MR JUSTICE MARTIN SPENCER:

- 1 By an application dated 15 October 2021 the defendant applied for a full and complete list with a statement of truth in relation to disclosure, together with a witness statement attesting to the searches that had been made. It was further sought that there should be amended particulars of claim and further witness statements.
- 2 The context for that application was the serving by the claimant of a draft agenda for the meeting of causation experts on 4 October 2021 which referred to Facebook messages between the 6 and 15 June 2018 which had never previously been disclosed. This was picked up by the defendant's solicitor and concern was raised because in April 2021 the claimant had served a list of documents which made no reference to Facebook messages at all, only to WhatsApp messages and, furthermore, the defendant has served a Part 18 request on 26 August 2021 asking: on what date does the claimant allege the flu-like symptoms began; the particulars of claim and letter of claim only reference early June; asking for the date and, if known, the time on which the claimant was sent home from work ill in June 2018; whether she was working on 10 June and sent home and what was the nature of the illness that caused her employer to send her home.
- 3 In answer to the first of those questions on 27 August, the claimant responded:

“The claimant has an irreversible brain injury and is not capable of recalling. Her husband is elderly and cannot recall the first date on which symptoms began. The claimant's daughter, Mrs Lesley Parnell, does not live with her parents and cannot assist beyond her own statement and the medical records which the defendant has.”

Pausing there, that response was on its face inaccurate because it now appears that Mrs Lesley Parnell did have access to Facebook messages between 6 June and 15 June which casts significant further light on the way in which the claimant's illness developed both in relation to the date and in relation to the symptoms which she had and also referring to her being off work on either 6 or 7 June, which is a date significantly earlier for these purposes than 10 June.

- 4 Thus the defendant's concern was that the documents first disclosed in the preamble to the agenda for the experts were not only inconsistent with the list of documents that had been served in April 2021, but also showed that the response to the Part 18 request was significantly less helpful than it could have been by reference to those documents. Unfortunately, the application was only one working day before the matter came back before me on 19 October and Mr O'Brien, of counsel, who represented the claimant on that occasion, said that he needed more time to deal with the application in order to take instructions from the solicitors dealing with the matter on behalf of the claimant and for these matters to be cleared up. On that basis, I adjourned the hearing indicating that the court required an explanation from the claimant's solicitor as to how it was that these documents had been disclosed in this way, explaining the disclosure process, because it seemed to me that the defendant's solicitors were entitled to an explanation given the way in which those documents had come to light through the preamble to the expert's agenda.

5 Pursuant to that hearing and what I said on that occasion, there has been a witness statement from Mr Timothy Spring, who is the claimant's solicitor, dated 29 October 2021 in which certainly a partial explanation has been given for this to have happened in this way and I have had further information from Mr Spencer Ley, who has represented the claimant today, indicating that the inclusion of the reference to those documents in the agenda was based upon a misunderstanding on his part because he had understood that those documents had been disclosed and he said he (which I completely accept) would not have included those documents in that way had he known that they had not already been disclosed.

6 Unfortunately, it is clear that there are certain errors in Mr Spring's statement. Thus, for example, in para.8 he says on 22 April 2021 the defendant was provided with the claimant's schedule of documents which listed WhatsApp and Facebook messages as a class document. When one looks at the schedule of documents referred to there is no reference to Facebook messages, only to WhatsApp messages. The significance of that is that there were no WhatsApp messages before 15 June, therefore, any documents prior to 15 June would not have been WhatsApp messages but Facebook messages.

7 At para.12 Mr Spring explains how on 6 September 2021, Mrs Parnell, the Litigation Friend, located and provided further Facebook messages from which it subsequently appeared other messages might with appropriate assistance be found. He then says:

“However, it was not until 7 October 2021 that though the claimant's original phone had been lost it was appreciated that with a new mobile phone and a password owned by another family member that additional material might be retrieved more directly from the claimant's own home.”

The difficulty with that is that it does not explain the discovery and the inclusion in the expert's agenda of the Facebook messages which were cited in that agenda because that was drafted and sent on 4 October. That is, of course, a date between the two dates mentioned in para.12, ie 6 September and 7 October, so it is quite clear that Mr Spring's explanation is not full because it does not explain how the Facebook messages referred to in the agenda came to light and how it was that they had not been disclosed.

8 At para.7 of that statement, Mr Spring says:

“The Litigation Friend has been properly advised with regard to disclosure obligations and that fulfilling the obligation and continuing to do so is of great importance both with regard to documentary and electronic disclosure. Specifically advice was provided on 31 March 2021, 6 April 2021, 12 April 2021 and 16 April 2021.”

9 As Ms Gollop has rightly pointed out in her skeleton argument, it is provided in the **White Book** at Part 32 that:

“It is necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after the claim form is issued, not only the duties of disclosure and inspection which will arise if disclosure is agreed or ordered by the court but also the importance of not destroying documents which might possibly have to be disclosed. Moreover, it is not enough simply to give instructions that documents be preserved. Steps should be taken to ensure that documents are preserved.”

It is further provided at Part 31.11 that:

“If documents to which the duty extends come to a party’s notice at any time during the proceedings, he must immediately notify every other party.”

- 10 The claim form was issued in this case and the particulars of claim was served in May 2020 and, of course, the process of investigating this claim started significantly earlier. It was in September 2018 that the claimant first sought disclosure of her medical records and the CFA was entered into on 4 February 2019. In those circumstances it certainly came as a surprise to me and apparently as a surprise to Ms Gollop QC, who represents the defendant, that Mr Spring should be suggesting that advice was provided only on 31 March 2021. If that was really the earliest date on which advice was provided, then there would have been a significant breach of the duty in relation to disclosure.
- 11 However, Mr Spencer Ley said that in fact he is instructed that disclosure advice was provided in December of last year and he has now explained that in fact even that was a mistake and what he meant to say was December of the year before last which would be 2019. If that is right, then it is surprising that Mr Spring did not say so in his witness statement for the purposes of this application but only referred to advice being provided with an earliest date of 31 March 2021.
- 12 For those reasons it seems to me that the court and perhaps, more importantly, the defendant, is entitled to a further statement clearing up these discrepancies and setting the record completely straight.
- 13 I have given this short judgment in this way so that the history is on the record in relation to those matters to avoid a tendentious preamble being included in the order which I am going to make today.
- 14 On that basis I would ask that the preamble be removed; that para.1 of the draft order be amended to include the Litigation Friend and the claimant’s husband but not be so wide as to include any members of the claimant’s family; that para.5D be removed and para.6 be removed but, otherwise, I will make an order in the terms which have been proposed by the defendant for the purposes of this hearing.

CERTIFICATE

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This transcript has been approved by the Judge