

IN THE COUNTY COURT AT YORK

York County Court
Piccadilly House
55 Piccadilly
York
North Yorkshire
YO1 9WL

BEFORE:

DISTRICT JUDGE MARK

BETWEEN:

IAN LAWSON

CLAIMANT

- and -

**PAUL CLEMITSHAW
JILL CLEMITSHAW (NOT IN ATTENDANCE)
T/A ABBEY WHARF RESTAURANT, WHITBY**

**DEFENDANT (1)
DEFENDANT (2)**

Legal Representation

Ms Catherine Casserley (Counsel) on behalf of the Claimant
Unknown Advocate on behalf of the First and Second Defendant

Other Parties Present and their status

Mr A Kitney, Ark Design Consultancy - Witness
Ms Jane Simpson, Jane Simpson Access - Expert Witness
Mr Martyn Weller - Lay Assessor

Judgment

Judgment date: 28 February 2020
Transcribed from 15:38:00 until 16:12:18
from 16:13:07 until 16:18:38
from 16:19:45 until 16:19:50

Reporting Restrictions Applied: No

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Number of folios in transcript 77
Number of words in transcript 5,535

District Judge Mark:

1. This is my judgment in the case of *Lawson v Clemitshaw*. I should say that there is two Defendants Mr and Mrs Clemitshaw, but the case has effectively been run by one Defendant, Mr Clemitshaw. I have not heard anything from Mrs Clemitshaw and she has not produced any statements. They trade as an organisation or a restaurant called Abbey Wharf, which is in Whitby. Mr Lawson issued his claim on 29 March 2019 for the alleged discrimination against him for reasons relating to his disabilities by the service providers, the Defendants, trading as Abbey Wharf. He seeks a declaration, an injunction, compensation for injury to feelings and also remedies in relation to the access statement on the website.
2. It is not an issue that the Claimant has the protected characteristic of a disability as defined in the Equality Act, Chapter 1, Section 6, having been diagnosed with motor neuron disease in 2011 and being wheelchair bound since 2014/2015. I should note that default judgment was entered, dated 24 April 2019. The Defendant filed a belated defence of sorts, or a document purported to be a defence but did not apply for judgment to be set aside. I have seen that document in the bundle and part of it is at page 11 of the bundle.
3. The issue before me today and yesterday, I should say, it has been run over the two days, is that when deciding the remedy it is not an issue that I should look only at the impact on the Claimant. There has been some questioning of the Claimant as to whether his intentions in these proceedings are for the wider community. He is in a number of groups and organisations and he has never tried to hide that. He has been clear, in my judgment, in his evidence that the focus of the case is solely for his own benefit and if others go on to benefit from a successful outcome in these proceedings, then so be it. Mr Lawson repeating that, which was said in an earlier interlocutory, that if the others benefit it would be as sure as night follows day, if he is successful, that they would benefit.
4. In relation to the remedies sought, the Claimant firstly seeks a declaration, and it is not an issue that he is entitled to a declaration given that he has got judgment, and essentially that the relevant Act was breached. The duty of care owed to him by the Defendants was breached and that he has been put at a disadvantage because of his disability. So we will come to the wording of the declaration at the end, but I am satisfied that the Claimant has been discriminated against by the Defendants. I have not determined the issue of breach because judgment has been entered, but I am satisfied the Claimant's entitled to a declaration.
5. The second remedy sought is that of injunctive relief. I remind myself that that is an equitable remedy and that it is within my discretion to grant injunctive relief. That I need to be mindful that it only is appropriate where it is in response to the breach complained of, and that it is just inconvenient for me to allow that remedy. It must be one which the Defendants can comply with. I cannot set the Defendant effectively up to fail. I remind myself that an injunction has significant consequences attached to it if breached, alleged contempt of court, which could result in a fine or imprisonment.
6. I also remind myself that where damages are an adequate remedy, I should not grant an injunction if an award for compensation would be an adequate remedy and essentially the Defendants position is just that. That the awarding of compensation here, by way of damages is adequate, and the injunction therefore is not necessary

and/or one that I can reasonably order and exercise in my discretion. I am satisfied when I come to the final order that it must be drafted dependent on the decision I make in a way that is capable of understanding by the Defendant and that they understand the obligations on them and the consequences of the breach. It is a mandatory injunction that the Claimant seeks, so I need to be satisfied that the scope of the injunction is appropriate. I note that the single joint expert, Miss Simpson, who is an architect and a access expert in a report at page 104 of 12 December 2019 provides various recommendations at page 112 to install a roll on, roll off platform, and at Option C to install a stair riser.

7. The recommendations are caveated and are subject to a feasibility study, listed building consent, planning caveats, building regulations etc at page 111. I note that Mr Lawson, the Claimant, would be content with D, installation of the roll on, roll off platform, which is supported by Miss Simpson, but he would also be satisfied with C, the installation of an over the stair wheelchair platform lifter, stair riser.
8. In relation to the evidence that I have had the opportunity of considering, I have had the opportunity of considering the evidence in both bundles, which were helpfully collated and prepared, and have been great assistance to the Court. I have also had the opportunity of hearing oral evidence from Miss Simpson, the expert, whose report is dated 12 December 2019, found at page 104, and the questions that were put to her at page 142. I found Miss Simpson to be an honest and reliable witness, doing the best she could to assist the Court.
9. Miss Simpson was forthright in her evidence. She presented evidence first and then was discharged and has not had any further input in the case. I then heard from Mr Lawson, the Claimant, whose evidence is at page 181 to 186 and is dated 23 January 2020. I found him to be an honest and reliable witness, doing the best he could to assist the Court. He was candid in his evidence where his recollection failed him in the passage of time, he was clear about that. He was questioned quite closely, for example, about his attendances post diagnosis at paragraph 3 of his statement at 181, and he was forthright in his evidence and candid in his explanations as to why there were gaps in his evidence, in his written statement.
10. In relation to Mr Clemitshaw, as I have said earlier, I have not heard from the Second Defendant, Mrs Clemitshaw, I make no criticism of her in respect of that. But in respect of Mr Clemitshaw, his statement is found at 187 to 192 dated 28 January 2020, plus numerous exhibits. I found him to be doing the best he could to assist the Court. He was honest and reliable but he was reluctant to make concessions. He stuck to his line, which was that he had 39, 40 years' experience in the restaurant, pub trade, and that essentially he was best placed to assess whether the building was able to be adapted to accommodate access.
11. In relation to the question as to whether Mr Clemitshaw's conduct has been brought into question, I will address that now in terms of the way that I see it in the case. He has not been particularly proactive pre issue. He did not respond to the email that was sent arising out of the first attempt to visit on page 98, which is the visit with the cousin from Holland in July 2018, when the booking could not be fulfilled because Mr Lawson could not get access. He told me that the email had gone to front of house and he had only become aware of it in these proceedings. He then failed to respond to the letter of claim, which is 11 March 2019, there was no response from the Defendant to Mr Lawson in relation to that.

12. Mr Clemitshaw then told me that he failed to respond to the letter of 6 February 2019, which is Mr Lawson's letter to him, which was posted this time to the business, in relation to the complaints about the further abortive bookings. The January 2019 booking and the possibility of the future booking, which actually is in the, 19 March letter. In my judgment he has not been proactive in any of the pre action correspondence. He told me that he was on holiday for one of the letters, that the email had gone to front of house. I would expect an organisation like this to have a system in place whereby any letters before action, any complaints, or any issues around disability and access should be flagged up to the owner of the business.
13. Mr Clemitshaw told me that he is there daily, that he has got a hands on approach, and I am not satisfied that he has proactively avoided responding, but find that the system at his end at Abbey Wharf is simply inadequate to deal with these types of complaints.
14. In relation to the question as to whether his conduct at the photograph meeting on Monday, probably around 17 February. I note that these proceedings have been going on for some time. Proceedings of this type always inflame situations and cause people to be frustrated and anxious. That goes for both claimants and defendants.
15. I am not satisfied from what I have read and heard that the Defendant's conduct on that day, on the Monday would be sufficient to call it exceptional. It clearly is a vicissitude of litigation. I am not satisfied that what he told the stallholders was inflammatory, or that he was trying to set it up for failing. It is clear that there was a misunderstanding as to what was expected from a professional photographer, whether it was going to be staged or set, as I am satisfied that the assumption was. The alternative was to use the phone camera, and it is a communication failure which has been made worse by the fact that litigation is pending and the trial date was looming.
16. Overall, although he has not been proactive, he has not provided Part 18 replies to the requests, in my judgment, is to his own detriment, if he has failed to provide evidence about his business's income. The burden shifts when I look at the question of is it a reasonable adjustment. Then I have got no evidence before me to say whether he can afford that or not, but then he cannot discharge his burden, so that is an issue for him. Overall, I am not satisfied that his conduct has amounted to something which amounts to exceptional, and neither have I taken into account any issues around the Defendant's conduct when coming to assess his credibility and the evidence that he gave me in these proceedings today.
17. In relation to Mr Kitney, he is the representative from Ark and his evidence is at 469 to 478, dated 29 January 2020. Mr Kitney was instructed by the Defendant after the instruction of the joint expert, Miss Simpson, to prepare a report on the Abbey Wharf, with an oral instruction over the telephone. It was not clear the extent of the instruction, which almost was along the lines of like, go out and check the property for disability access, although he did only focus on a lift and tells me in his report at 469. I did find him to be an honest and reliable witness, however he is not an expert for the Court. His evidence does not assist the Court in as much as it does not focus or look at the options that Simpson identified at C and D.
18. Mr Kitney has not been instructed in a full way in that he did not, for example, know that the entirety of the ground floor was in the power and control of the Defendant. So

I am going to attach little or no weight to his evidence. I do not find that it assists the Court in taking the matter further.

19. In relation to the questions before me, the first question is, one which is not an issue that I have got the power to grant, an injunction, I think both sides have now agreed that in accordance with *Memorin Royal Bank of Scotland Group Plc v Allen* [2009] EWCA Civ 1213 and agree that I have the discretion to grant an injunction on these facts.
20. The Defendant suggests and contends that the questions for me are, should I grant the injunction? They say that I should not. They go on to say that also that I probably cannot grant the injunction because I cannot be satisfied that the Defendant can comply with it.
21. In relation to the question of should I grant the injunction. I note that it is within my power, it is a discretionary right that I have got to apply an injunction if I am satisfied on the evidence before me that it is reasonable and just for me to grant one.
22. When I am looking at the facts of this case, the question I need to consider is whether damages would be an adequate remedy to save granting the injunction. When I look at the facts before me and the Claimant's statement, and I go back to paragraph 3, the Defendant has put great store in this paragraph, the paragraph that tells me the frequency of visits and so on. The Claimant is telling me that since, in paragraph 3, he was diagnosed with motor neuron disease, 2011, May:

“Which immediately affected my social life. This meant that my visits into Whitby to socialise were reduced to no more than two or three times a year since 2011.”

There is then some question as to issues around mental health and so on, up until 2014, 2015, where the Claimant recovers and makes a concerted effort to go out more and his visits increase.

23. Mr Lawson nevertheless did not try to visit this establishment for some time, until his cousin was coming over from Holland, and he had identified it on a website as a place he would like to go, so they booked in July '18. The party went in July '18, I think 21 July '18, and it was discovered that Mr Lawson could not access the building. He had thought that he could access the building because he had recalled a stairlift or a Stannah type chair in the building from previous visits. This had been removed by the Defendants when they were renovating the building, and that renovation started in 2015. The January renovation and was completed in the April 2015, which would mean that Mr Lawson must have been last at the property some time before 2014, when it was still The Shambles and that is when he had seen the stairlift, thinking it was still there for him to use in 2018.
24. The letter of claim at page 507 refers to the reasons to go:

“Wonderful harbour views.”

And this refers as well:

“I believe at the time, from memory that access was possible using the stairlift. It was a disappointment to us both not being able to get in.”

Mr Lawson told me in oral evidence that when they could not get July 18 in they went further down Church or Chapel Street towards the steps, and there is a pub there where they went in. He could not remember if they had eaten, but they had a couple of drinks. They had missed the opportunity to go into the restaurant that they had booked.

25. There was then another couple of attempts to book the restaurant in January '19, the Claimant attempted to book and there was no change in the access so he was unable to go. And then a friend booked round the March '19 and when Mr Lawson was advised he had to tell her that he was not able to go because there was no access. In respect of the further attempts to book the further bookings, or the opportunities to make further bookings, I do not criticise the Claimant for that. The Defendant contends that the Claimant was trying to put the Defendant in a position where he would fail. It is noted that this is a continuing breach of the relevant regulations that the Claimant has a fundamental right of access that is being potentially denied to him.
26. At the moment and this continues, it is an ongoing discrimination, in my judgment, the fact that Mr Lawson cannot enter this premises. Mr Lawson told me that this was the subject of embarrassment to him on the day with his cousin in July 2018 and I accept that. I accept that he has not tried to go frequently to this venue, but nevertheless he has tried to go on a number of occasions, and he told me in his evidence, and the Defendant does not dispute the fact that this venue also holds events, Goth Fringe, for example. The Regatta, although it was put that it was only the handing out of the trophies, it was not said that it was closed to the public whilst that was going on and that Mr Lawson told me that if he could, he would be going to those sorts of events, he is deprived of that because of the lack of access.
27. The position is that, in my judgment, the Claimant has attempted to attend this venue on a number of occasions, and has been deprived of that opportunity because of the lack of access and that caused him some distress and upset. And when I look at the entirety of the circumstances of this claim, I am not satisfied that damages would be an adequate remedy here. I accept the Claimant's counsel's contention that there is an infringement here of Mr Lawson's fundamental rights of access that there is ongoing discrimination to allow for damages only to be an inadequate remedy in these proceedings. I accept it would amount to effectively for the Claimant to be bought off by the Defendant to only receive damages for compensation and to be deprived of the access to a property in Whitby, which is one of the standout locations. It is well known in the area, and when I remind myself of the website, literature which is in the bundle towards the back, the Defendants themselves say that they are looking to be the premier fish restaurant in Whitby, and that is something that they have been successful in working towards, given the number of people that attend.
28. I have not seen the weekday data for the attendances, but I am satisfied, given the weekend, Friday, Saturday attendances which was on average 2,605, that the foot fall for this establishment, on an average week, would be somewhere in the region of 5,000 to 6,000 visitors. It is clearly a popular location and the Claimant should not be deprived of the opportunity to share in that with his friends and family. So on balance then, I am not satisfied that the damages would be the adequate remedy or the only remedy available to this Claimant. The damages would be an inadequate remedy in my judgment.

29. In relation to the question then, can I properly grant an injunction? I remind myself of the consequences of the Defendant breaching the injunction. Contempt of court, the Defendant could be fined or imprisoned, and I remind myself that that is a serious consequence that I must guard the Defendant against being set up to fail. I must be satisfied when I look at the injunction that the terms of it can be fully adhered to and that they are within the Defendants power to comply. When I look at the recommendations by the expert, Simpson, and take in the order of the recommendation that Simpson endorses, the installation of the roll on, roll off platform lift on page 112 running onto 113, and she confirms her recommendation at 115.

30. I note the caveat on the expert's report that, and this is at 111:

“Any recommendation may require a feasibility study and listed building planning application.”

I also note a response to the question:

“Are any of these options or is Option D ‘a goer?’”

She said she could not say on the face of the evidence, she would need a team, the architects, the local planner, the building owner, which is Scarborough Borough Council, engineer for the structural changes and so on. That does not mean, in my judgment, that I cannot make a meaningful determination as to whether D is a reasonable option on the facts of this case in respect of the injunction.

31. I am satisfied that I can formulate the injunction in terms which would not put the Defendant at risk of breaching the injunction if he cannot comply with the installation of a roll on, roll off platform lift, because of a third party blocking the implementation of that. And by that I mean because the owner of the building will not consent to it, the Scarborough Borough Council, or that the listed building officer will not endorse it, or that the building regs will not sign it off, or the conservation officer will not endorse it and so on. I remind myself of the letter in the bundle at page 87 from Scarborough Borough Council to Mr Lawson that sets out:

“This is a Grade II listed building, set within a conservation area. It would appear that and install the disability access might be possible, such proposal would need to be submitted to Building Control Partnership for approval along with ourselves as the landlord for consent. I can confirm from a landlord's point of view we would act reasonably in considering any proposals in order to try and help resolve this issue. With regard to planning permission consents, guidance on proposals affecting listed buildings, the local authority would be happy to engage in pre application discussions. No charge for this service.”

And so on.

32. When I remind myself of the input of Ark, they are at the back of the bundle. There was some discussion with planning with Ark. They were only looking at a lift type access though rather than the access at D and C. And I look at the email, that Mr Kitney meets with Karen Lawton from Scarborough on site. She emails to ask, has

the building been inspected by the independent assessor, that is on 9 December, and then it is back to sent her the report on 14 January.

33. It is clear to me that the local authority would be proactive in looking at any changes in respect of this building. They also have public sector obligation under the Equality Act and they would be obviously, in my judgment, live to their duties and obligations in respect of the Act and assisting in having the access implemented, as best it can, being sympathetic to the building itself.
34. In relation to Option C which is installation of an over the stair wheelchair platform lift, I am satisfied again on the facts of this case and on the evidence before me, that there is a reasonable prospect of that being able to be implemented with proper feasibility studies and discussions with the landlord, the local authority, planning, historic buildings and so on. The opportunity for that to be implemented was not considered fully by Mr Kitney, he was focused on the lift type access.
35. In relation to any fire escape issues, I note that there are three potential fire escapes here, well two fire escapes. The main building entrance has been put to me as a fire escape by the Defendants, being the main entrance, exit point. It is not on the face of it a fire escape as such, although it is a means of escape, and when I look at the evidence before me, I am satisfied with the right minds looking at that entrance that the installation of C could be implemented with the relevant adjustments to take into account the foot fall from the building. To take into account the queuing at the top for the takeaway. To take into account the fire risk of people trying to evacuate in haste and so on.
36. The Defendant held himself out effectively as a pseudo expert. He told me in his evidence that he had decided that this building was unavailable to be accommodating over access. He told me that he did not feel that, he said that:

“The stairlift would foul the stairs, it would foul the stair treads. It would be too much for the footfall.”

He told me that he had 39, 40 years’ experience in the trade and that he had come to that decision based on his own experience. Well with all respect to the Defendant, it is not for him to decide what the best means of disability access is here.
37. He told me in his oral evidence that he had had a number of surveys on site with the architects, with the local authority, with the planners and so on, in the context of the 2015 renovations. There is no evidence at all before me in written form as to the outcome of any of those discussions, or whether those discussions did in fact take place. I am not satisfied that the Defendant’s own assessment of the situation is an adequate reason for the implementation not to take place. I appreciate that Simpson, the expert for the case, the joint expert is unable to tell me in respect of the feasibility study and so on. But I am satisfied that when drawing the injunction, that the question marks in respect of the implementation of Option C or Option D can be addressed in a way that does not bind the Defendant so as to put him at the risk of breaching an injunction for a reason that is out of his control.
38. I am satisfied on balance that the injunction can be granted in respect of the implementation of Options C and D as per Simmons [sic] report and we will come to the wording of that in a moment. The injunction shall be a time limited injunction

with the caveat that it is predicated on the fact that planning permission, building regulation control, Historical England control consent, and all third party consents are obtained by the Defendant. If a third party refuses their consents or permission to the change, then the Defendant will not be held in breach of the injunction. That said, there will have to be some thought put to the wording of the injunction so that the Defendant is compelled to engage those third parties. He has been, in my judgment, dilatory in his approach to this issue for a number of years.

39. Mr Clemitshaw has reacted with the Ark instruction, albeit after the letter of instruction for the joint expert, but that in itself is inadequate, it is now time to bring this to a conclusion for the benefit of the Claimant.
40. When I look at the damages in terms of quantum, I have been referred to *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871. We all know that is an Employment Law case, but it is settled law now that it is applied to cases of this type. The Defendant contends that having regard to the impact on the Claimant, the lowest bracket applies and they contend for a value in the region of £4,000 to £5,000. The Claimant contends that it should be more into the middle bracket, around the £10,000 mark, given the impact on the Claimant. When I look at all of the circumstances of the case, the impact on Mr Lawson in respect of the emotional harm that this breach has caused him, I am satisfied that a value of quantum of £7,500 is reasonable in all of the circumstances.
41. In respect of the access statement on the website, I am satisfied that an access statement should be posted on the website. Mr Clemitshaw told me that he had a system in place for people who were partially able to access the building with some assistance, help up the steps. To attract the attention of the people working in the takeaway at the top of the steps, they would then come down and help them up. There was no method of the person trying to gain access to alert the employee to the fact that they were trying to gain entrance to the property. There was no question of any system of relaying messages and so on. In my judgment an access statement is required so that third parties, including Mr Lawson, can properly alert their presence when they arrive at the premises.
42. I am satisfied when I look at the costs, and just for completeness I look at the costs that are set out in the report of Simpson. She tells me it is £31,605 I think for C. That is net of VAT, but the Defendants are VAT registered, so it is likely to be that as a figure or thereabouts. The Defendants has failed to provide any evidence about their income and expenditure, their profit and loss and so on, so I am satisfied that the costs, given the footfall through this business, I am looking at page 114 of the report are not prohibitively expensive for an organisation of this type. I note that the case of *Royal Bank of Scotland Group Plc v Allen*, the costs of their installation was £200,000. I appreciate that is against the Royal Bank of Scotland, but nevertheless it is reasonable, in my judgment. If I need to address that point, given that the burden has shifted and the Defendant should show that it is not reasonable and they failed to do that, that the costs of the works are reasonable.

(proceedings continue)

43. The declaration was agreed, the order can reflect then there is a declaration that the Claimant has been discriminated against by the Defendants. We will come back to the injunction because the wording of that needs some thought. If we have that damages

for injuries to feelings are assessed at 7,500. And that the Defendant shall ensure the website, www.abbeywharfwhitby.co.uk, so that website has the access statement posted by 20 March.

44. In relation to the wording of the injunction. The Defendant shall by 7 September install a roll on, roll off platform lift or install an over the stair wheelchair platform lift (stair riser) at the premises, Abbey Wharf, 6 Market Square, Whitby, YO22 4DD, subject to the relevant third party permissions with liberty to apply if such permissions are not forthcoming.

(proceedings continue)

45. And then there will be the usual penal notice attached to paragraph 4.

This Transcript has been approved by the Judge.

The Transcription Agency hereby certifies that the above is an accurate and complete recording of the proceedings or part thereof.

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