IN THE LIVERPOOL COUNTY COURT | Claim No. 2BI00320

35 Vernon Street
Liverpool

Friday, 7th December 2012

Before:

HIS HONOUR JUDGE GORE QC

Between:

PURCELL

Claimant

-v-

McGARRY

Defendants

Counsel for the Claimant/Applicant: MR. DUNN

Counsel for the Defendant/Respondent: MR. RANKIN

JUDGMENT APPROVED BY THE COURT

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1. THE JUDGE: There was a road traffic accident on 11th July 2011 involving the claimant/appellant and the defendant/respondent. Liability was admitted in relation to that accident in which the claimant alleged that she sustained personal injury and it was never disputed that it was and remained a low value claim, as a result of which, the claim was initiated under the pre action protocol for low value personal injury claims in road traffic accident cases, the so called protocol. It went through stages 1 and 2 of that protocol, which involved documentation being submitted by the parties through what is called the portal. At stage 2 that process contemplates and, in fact, what occurred in this case was that the claimant submits a pack that includes evidence and also includes offers to settle constituent elements of the case at sums that are specified and in this case, those sums were in relation to loss of earnings, £43.93, other losses £35 and general damages £2,150. The procedure contemplates and requires – although I use the word 'requires' loosely and advisedly – that a defendant responds and does so within certain time limits. Now I use the word 'advisedly' because of course in these processes it is open always for good reason or not, for defendants not to respond at all in which case certain consequences flow. However, on this occasion the defendant did respond in a timely fashion and did as was required by the protocol, submit alternative figures and expressed reasons for those figures and so it was that in relation to the loss of earnings claim they offered £35, they made no offer in relation to the other losses and they offered general damages of only £1,650.

2. The protocol then contemplates the possibility of negotiation between the parties and settlement within what is described as a consideration period or a further consideration period with an end stop of 35 days for the process because, as is correctly submitted by Mr Dunn who appears for the claimant/appellant today, the whole object of this protocol process is to promote and achieve quick settlement at modest costs of this class of claim without, if possible, recourse to the court and in a way that has the effect therefore of minimising the costs of the process and that latter objective is achieved by the provision of fixed costs for protocol cases, depending on what disbursements have been incurred and the stage at which any settlement is reached.

3. The claim having not settled within stage 2 and its consideration period, the claimant is entitled to initiate proceedings that are called stage 3 proceedings by which in the end the court may be called upon to determine at what in this group of courts tends to be called a disposal hearing, what awards of damages to make in relation to the contested heads of claim, which stage 3 hearing and again I use the word 'loosely' and 'advisedly', might be a hearing on the papers resulting in a written decision or might be an oral hearing before a district judge at the conclusion of which a reasoned decision is given. Because this stage 3 process is legal process, it is subject to rules and procedure as well, which include the filing of an acknowledgement of service and once that procedure has been concluded the matter is then fixed for disposal in one of the two ways that I have indicated.

4. The stage 3 proceedings in this case were commenced on 19th January 2012 when the court proceedings pack comprising part A and part B were issued by the claimant. Acknowledgement of Service followed on 1st February 2012 in which the defendant indicated that she intended to contest the amount of damages claimed by the claimant and the matter was listed for hearing before District Judge Peake, the senior resident district judge in the Birkenhead County Court on 9th May 2012. Prior to that hearing,

the defendant's representatives wrote a letter dated 3rd May 2012 purporting having reconsidered the matter to accept the claimant's part B offer in the stage 3 proceedings, which as I understood it also mirrored the offer that the claimant had made at stage 2, as appears by comparing page 35 of the appeal bundle with page 37. The issue before the district judge, therefore, was whether that concluded the claim and constituted a settlement. In that case the claimant's entitlement would be limited to firstly the damages purportedly agreed in the letter of purported acceptance, secondly, the stage 1 and stage 2 costs and uplift thereon of 12.5 per cent because this litigation was funded pursuant to a conditional fee agreement and stage 3 type A costs together again with the uplift of 12.5 per cent. Alternatively, as the claimant submitted, in addition she was entitled to say not only was the offer not open for acceptance any longer at that stage such that she was entitled to pursue the matter to an assessment and obtain an award of damages that at least theoretically could have been at figures higher than those set out in either the stage 2 pack or the stage 3 part A pack, but, in addition to that, to recover type B costs for stage 3 and this time, because the matter was concluding at a hearing on 9th May, 100 per cent uplift on both the type B costs and the type A uplift. The costs consequences therefore were for the potential, additional reward of the claimant/appellant's solicitors of some £750 and the chance – I put it no higher than that – of the claimant obtaining an award above her stage 2 or part A offers.

5. That matter was the subject of argument and submission before District Judge Peake and the issue, essentially, was this. Did the offer in the court proceedings pack remain open for acceptance by the time of the letter dated 3rd May 2012 or had it, in effect, lapsed so that it was no longer open for acceptance thereby rendering the letter of 3rd May of no effect at all. In a short judgment he concluded the former, rejecting the claimant's argument and decided that the offer remained open because it had not been withdrawn at any stage and remaining open as it did it could be and had been accepted by the defendant, thereby producing a conclusion to these proceedings, disentitling the claimant either to seek an award in excess of what had been offered by her and accepted by the defendant and also disentitling those she instructed from recovering the enhanced levels of costs, which they sought. I ought, in fact, to complete the picture to acknowledge that there being no authority cited by either party dealing with the issue before the district judge, District Judge Peake gave permission to appeal in this case and the claimant/appellant acting upon that grant of permission filed form N161 and appealed against his decision and so the matter comes before me today.

6. It is right to say that neither Mr Dunn, who appears for the claimant/appellant nor Mr Rankin who appears for the defendant/respondent appeared before District Judge Peake below and indeed in Mr Dunn's case, he did not prepare but he does adopt the skeleton argument of Nigel Lawrence, dated 4th June 2012, which explains why it is that the claimant submits as a matter of law, the district judge erred because it is submitted, the offer or offers made in protocol cases such as this can only be accepted within the time limits contemplated by the protocol and its subordinate procedures and since this acceptance was purportedly made outside those time limits, it was of no effect.

7. The starting point of the claimant/appellant's submission in this regard is paragraph 7.31 of the Pre Action Protocol For Low Value Personal Injury Claims which provides:

> "Within the initial consideration period or any extension agreed under paragraph 7.29, the defendant must either accept the offer made by the claimant on the stage 2 settlement pack form or make a counter offer using that form".

Now that is the first stage at which it is submitted the protocol envisages acceptance only within certain time limits and not otherwise. It is accepted that the defendant complied with this paragraph in the sense that having not accepted the claimant's stage 2 offer, the defendant did within the requisite time limit make a counter offer using the appropriate form to which I have already made reference. But with respect to both Mr Lawrence and Mr Dunn, what this provision does not do is state in terms, clearly or unequivocally that the offer cannot be accepted at a later stage and it also does not clearly or unequivocally provide that an offer not accepted within the time limit set out therein, automatically lapses.

When, as occurred in this case, the defendant makes a counter offer which after the total consideration period and the further consideration period was not accepted by the claimant, the claimant becomes entitled to issue proceedings under CPR part 8. This was duly done as I have indicated in this case and the practice direction B to part 8 at paragraph 8.1 provides that there must be an acknowledgment of service not more than 14 days after service of the part 8 claim form and then in paragraph 8.3 it is specifically provided that the defendant must state whether he or she *inter alia* contests the amount of the damages claimed and indeed in this case that is what the defendant did, again in time and in accordance with the rules

8. Mr Dunn submits that that provides another time limited opportunity for the defendant to accept any offer that may have been made by the claimant and again it is submitted that a failure to do so within that time frame provided then disentitles the defendant to late acceptance. But again my response is to observe that the practice direction does not say that explicitly.

9. I have asked myself in the course of the argument what indicators there are as to whether offers remain open even if not accepted at these two stages, when acceptance is either explicitly or implicitly contemplated because it seems to me the issue is whether the claimant/appellant is correct in submitting that offers lapse and cease to be available for acceptance or whether, as the defendant/respondent submits, offers remain open for acceptance unless or until withdrawn. There are a number of provisions within the protocol and the rules that indicate to me that what is contemplated in this class of litigation is that offers do remain open for acceptance even if they have not been accepted within the strict time frame contemplated by either the protocol or the rules. For example, therefore, at the stage 2 stage of the process, paragraph 7.39 provides:

> "Where a party withdraws an offer made in the stage 2 settlement pack form after the total consideration period or further consideration period , the claim will no longer continue under this protocol and the claimant may start proceedings under part 7 of the CPR."

The use of the word 'may' is permissive, equally permissive though it is not stated is that the claimant may elect to proceed under stage 3 and indeed did so in this case because there were no other good reasons why the claimant would be entitled to treat the claim as exiting for the protocol but the point about this provision is that in referring to withdrawal of offers after the total consideration period or further

consideration period it seems to me that the rules are contemplating that stage 2 offers remain open, at least, unless or until they are withdrawn in accordance with the entitlement provided for in 7.39. The same is true in my judgment in stage 3 because in stage 3, practice direction 8B paragraph 10.1 provides, "A party may only withdraw an RTA protocol offer after proceedings have started, with the court's permission".

After court proceedings within this paragraph, clearly means and contemplates part 8 proceedings in stage 3 of the protocol. As Mr Rankin points out in his skeleton argument when asking a less than rhetorical question what is the point of paragraph 10.1 entitling the court to give permission to withdraw a protocol offer if the truth of the matter as submitted by the claimant/appellant is that the protocol offer or offers no longer remain open for acceptance. I am fortified in answering that question by saying clearly, therefore, the rules contemplate that a stage 3 offer remains open for acceptance by the provisions of CPR part 36.20, which deals with the restrictions on disclosure of RTA protocol offers during stage 3 proceedings. Those rules specifically provide at 36.20 sub paragraph (2): "Any other offer to settle must not be communicated to the court at all." That, it seems to me, again supports the proposition that offers or other offers can be made and remain open for acceptance and that there is in this protocol process the same philosophy or principle that applies to all litigation, namely that parties remain free and able to bring claims to a conclusion by masking offers or accepting offers or negotiating, at any stage up until but before the court makes a determination of the issues between the parties. If a claimant wishes to not be bound by what is perceived to be a generous offer to settle at an earlier stage then he or she must do so by exercising the powers that he or she has to withdraw the offers that had been made if and so long as and subject to the conditions or restrictions imposed on his or her power to do so. So, for example, a stage 2 offer cannot be withdrawn during the consideration period. A stage 3 offer cannot be withdrawn without the permission of the court. But both of these provisions run contrary to the submission made by Mr Lawrence on paper and Mr Dunn orally that the offers somehow lapse and cease to be open for acceptance if not accepted within the time limits contemplated by the protocol. Mr Dunn asks what are the consequences to the defendant that can be visited upon him or her for late acceptance, otherwise than in accordance with the time limits provided for in the protocol or the rules. That is a perfectly proper question to ask, in the sense that the purpose of this edifice is to promote settlement and therefore there must be sticks as well as carrots but as he himself conceded, the stick is that having delayed the acceptance until after stage 3 proceedings had been commenced, the defendant/respondent attracted a liability that would have been avoided had she accepted the offer at the stage 2 stage, that liability being stage 3 type A costs and uplift thereon. So the stick does exist within the edifice that I have described and that further supports, in my judgment, the contention that offers remain open for acceptance unless or until they are withdrawn. What we have here, as with the part 36 structure, is a free-standing structure to regulate the making of offers and the giving of acceptances in the negotiated settlement of Pre Action Protocol Low Value Personal Injury Claims where liability is admitted and therefore that the ordinary rules of contract to the effect that the making of the counter offer constitutes a rejection of the original offer which thereby lapses, has no application in this arena. In fairness to both Mr Lawrence and Mr Dunn, neither of them seek to submit to the contrary in this appeal. That being the case, for all of the reasons that I have given, in my judgment there was no error of law on the part of District Judge Peake and therefore this appeal fails.

(End of judgment)

(Discussion in respect of costs follows)
