IN THE LIVERPOOL COUNTY COURT (APPEALS)

A23YJ619

County Court
35 Vernon Street
Liverpool

28th April 2016

Before:

HIS HONOUR JUDGE PARKER

B e t w e e n:

BRENDA DAWRANT

Claimant/Respondent

and

PART AND PARCEL NETWORK LTD

Defendant/Appellant

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MR PERRY appeared on behalf of the Claimant/Respondent

MR MCMASTER (instructed by Taylor Rose Law) appeared on behalf of the Defendant/Appellant

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JUDGMENT
APPROVED

Tuesday 26th April 2016

BRENDA DAWRANT – v – PART AND PARCEL NETWORK LTD

JUDGMENT

JUDGE PARKER:

1. This is an *ex tempore* judgment in this appeal. The claim number is A23YJ619 and the defendant is the appellant, that is Part and Parcel Network Ltd, and Mrs Brenda Dawrant is the claimant and respondent to this appeal.

2. The grounds of appeal sets out how it is that this appeal comes before the court and I should say for the record that whilst I am the appellate judge dealing with the matter, I have been ably assisted by the regional costs judge, District Judge Jenkinson.

3. The appeal is brought against a decision of Deputy District Judge Powell who, as the grounds of appeal makes clear, dealt with a preliminary issue as to whether the claimant's costs should be limited to fixed costs. The defendant argued that the claimant had failed to present the claim to the defendant's insurer via the RTA protocol. It was common ground that the RTA protocol applied and the deputy district judge found that the claimant had not sent a claim notification form as is mandatory under the protocol to the defendant's insurers but went on to decide against limiting the claimant's costs to fixed costs as indeed she had a discretion so to do. She herself granted permission to appeal against that decision.

4. The appeal is brought on the basis that the deputy district judge was wrong in her construction and/or application of Civil Procedure Rule 45.24 (and more of that later). Having rightly found that the rule applied, she misdirected herself as to what should be taken into account under the discretion conferred by the words, "The court may order the defendant to pay no more than the fixed costs," in Rule 45.18.

5. Ground 6 is that the deputy district judge was wrong to apply hindsight. The decision should have been based only on the facts as they appeared at the time. The claimant failed to re-send a CMF to the defendant's insurer, the correct insurer, subsequent events were irrelevant, most, if not all, of the circumstances cited by the deputy district judge arose out of the failure to submit a claim notification form to the defendant's insurer and, finally,

that the deputy district judge was wrong to speculate about what might have happened had the claim been brought under the RTA protocol and to conclude that there was evidence it would have exited in any event .

6. The grounds have been supplemented by a skeleton argument that has been prepared in this case by Matthew Hoe of Taylor Rose Solicitors, although it is right to record that Mr McMaster of counsel appears to present the appeal.

7. In terms of the background as set out in the skeleton argument, the claimant's claim was within the scope of the RTA protocol. The claimant purported to send a CNF to one insurer but in fact that was not the correct insurer. The claim was pursued, therefore, against a different insurer than the defendant's insurer and a CNF was never sent to the correct insurer as required by the protocol. That in fact was a finding made by the deputy district judge, that finding in the face of the claimant's case, That a CNF had been served upon the defendant's insurer. Therefore, the claim proceeded outside the RTA portal and proceedings ultimately culminated in acceptance of a Part 36 offer by the claimant.

8. The detailed assessment hearing came before Deputy District Judge Powell on 30th April 2015. She gave permission to the parties to file and serve witness statements in relation to the protocol point that had been taken and also gave directions for skeleton arguments. The defendant filed a witness statement but the claimant did not.

9. In terms of the decision of the deputy district judge as paragraph 13 of the skeleton argument makes clear, she found she was not satisfied that a CNF was sent to the defendant's insurer AXA and therefore the claimant was in breach of paragraph 6.1 of the RTA protocol. She found that it followed that CPR 45.24 applied. At page 29 of the bundle the reasons for her decision that she was not satisfied that a claim notification form was sent to AXA on either 19th December 2012 or at all were as follows, and I begin from 5.1.1.

> "This matter was conducted by a meticulous claims handler who seems to have kept a copy of everything, except this one document and for this reason as there is no copy of this document I am not satisfied that it ever existed.

Then at 5.1.2:

> "There is nothing that links the screen shots from the portal showing the claim being redirected to another insurers upon which the claimant relies to this claimant."

Then 5.1.3:

> "The email to AXA of 21st May 2013 suggests that the claim handler has been seeking redress elsewhere other than with this insurance company.

5.1.4:

> "Evidence that there was a CNF sent to AXA in a related case, in my judgment, is irrelevant as to the issue of whether there was actually a CNF sent to the correct insurer AXA in this case."

Then at 5.2:

> "In my judgment, therefore, it follows that CPR 45.24 applies."

10. In reaching the view, as she did, that the claimant should not be limited to the RTA protocol fixed costs she appears to have placed reliance upon a decision of my brother judge, his Honour Judge Gregory, in a case called *Raja v Day and MIB*, 2nd March unreported sitting at the County Court at Liverpool and in addition to that the following circumstances as set out at paragraph 15 of the skeleton argument: (a) the claimant (i) recognised that the RTA protocol applied and sent a CNF, albeit to a different insurer; (ii) informed the defendant's insurer about the accident by presenting the related passenger claim; (iii) notified the correct insurer about the claim on 21st May 2013, albeit not by CNF; (iv) sent sufficient evidence to the defendant for an offer to be made; (v) sent a defendant only CNF to the defendant personally on 21st December 2012; (vi) chased the defendant several times before starting proceedings; (vii) gave notice of intention to issue and (b) the defendant at (i) failed to request a CNF; (ii) did not give a clear indication regarding costs during the claim; (iii) did not deal with the claim practically before proceedings were started; (iv) failed to file a timely acknowledgement of service so that default judgment was entered; (v) applied for permission to file a defence and to allocate to the fast track; (c) that there was evidence that the claim may not have reached or settled at stage 2 in the RTA protocol because liability was not admitted and there was delay in settling the claim once the evidence was provided until after proceedings were started.

11. In dealing with the law, in the skeleton argument reference is made to the definition of the word "defendant" in the protocol meaning the insurer of the person who is subject to the claim under the protocol unless the context indicates that it means the person who is subject to the claim and at 5.2, where the claimant has sent the CNF to the wrong defendant, the claimant may in this circumstance only send the CNF to the correct defendant. The period in paragraph 6.11 or 6.13 starts from the date the CNF was sent to the correct defendant.

12. At 6.1 of the protocol the claimant must complete and send the CNF to the defendant's insurer, that is a clear provision, it is mandatory, it is a must. Then CPR 45.24 provides that the rule applies where the claimant (a) does not comply with the process set out in the relevant protocol and subrule 2(c), subject to paragraph 2(a) where a judgment is given in favour of the claimant but (c) the claimant did not comply with the relevant protocol at all despite the claim falling within the scope of the relevant protocol, the court may order the defendant to pay no more than the fixed costs in Rule 45.18 together with the disbursements allowed in accordance with 45.19.

13. Reference is then made and passages cited from the following authorities; *Francis v Francis & Dickinson* [1955] 3 WLR 973 at page 980, then approved post the CPR by the Court of Appeal in *Ku v Liverpool City Council* [2005] 1 WLR 2657 at paragraph 20. Also reference is made to a decision of Regional Costs Judge Jenkinson in an unreported decision *Tennant v Cottrell* sitting at the county court at Liverpool on 11th December 2014, *Straker v Tudor Rose* [2008] 2 Costs Law Reports page 205, quoted with approval, *Jonty Estates v Secretary of State for the Environment* [2001] Law Reports for England and Wales, Court of Appeal Civil Division 535 at paragraph 6 and also paragraph 36. Those decisions are all made with exactly the same point in mind and that is that the court should guard against using the benefit of hindsight and speculation in dealing with matters relating to the assessment of costs.

14. The argument then run by the defendant/appellant is that the whole purpose of CPR 45.24 is to encourage claimants strongly to comply with the relevant protocol which, if they fail to do, exposes them to the risk of limited costs. There is a discretion and it is for the claimant in this case to justify why in the face of failure to comply with the protocol they should not be limited to those costs that they would have recovered had the matter proceeded through the protocol.

15. Furthermore, taking into account circumstances that the court should have in mind in exercising discretion, the court should mainly have regard to the circumstances listed in CPR 45.24(2) itself and appropriate and particular weight should be given to those factors in exercising discretion. The point is made that the deputy district judge appeared to give weight only to the breach of protocol in determining that CPR 45.24 applied and did not appear to give it any particular weight in determining whether to limit the costs.

16. The point is made about hindsight, that the deputy district judge appears in her judgment to have adopted the benefit of hindsight , it is suggested, wrongly and that goes hand in glove really with the submissions as to her speculating what would have happened had the appropriate CNF been served by the claimant upon the defendant, that she was wrong to suggest either expressly or implicitly that had the claimant served the claim notification form properly and in accordance with the protocol that that would have been a pointless exercise (my phrase, not hers) in that the claim would have exited the portal in any event.

17. The case advanced on behalf of the respondent through the late skeleton argument that in fact was received by the court only this morning and by counsel on behalf of the appellant as late as eleven o'clock last night, (I have dealt with that by extending the time for service of the skeleton argument even though it should have been served by four pm on 30th March) comprises ten points .

18. First of all, that a significant threshold must be crossed before an appellate court may interfere with the decision of a judge at first instance and the decision of the learned deputy district judge was not wrong and her decision could not be considered to be unreasonable or outside the generous ambit of her discretion.

19. Second, the application of CPR 45.24 is a discretionary one.

20. Third, the factors to be taken into account are not qualified or fettered by the rule itself; indeed it is silent as to the exercise of discretion.

21. Fourth, that the learned deputy district judge's finding that all the circumstances of the case should be considered was plainly correct.

22. Fifth, to suggest that the learned deputy district judge was incorrectly applying hindsight and was not permitted to take into account features of the case or conduct of the parties, both before and after the CNF was

required to be served, must be wrong; the only appropriate exercise was to consider all the circumstances of the case.

23. Sixth, the deputy district judge correctly identified features of the case that led her to conclude that it would not be appropriate to limit the respondent's costs and those factors were outlined in her judgment at paragraphs 8.4.1 and 8.4.2 at pages 30 and 31 in the bundle.

24. Seventh, that the protocol was followed in spirit throughout the litigation even if not by service of the CNF.

25. Eighth, the deputy district judge's judgment that she did not enter into speculation was set out at paragraph 8.4 of her judgment. The appeal was, therefore, allowed in *Raja v Day & MIB* [2015] because District Judge Peak exercised his discretion having taken into account a matter which should not have been taken into account, namely his erroneous belief that the claim would have exited the portal in any event; that is not the basis of the deputy district judge's decision in the present case.

26. Ninth, this reference to speculation must be readily distinguished from the present case which considers the overall circumstances of the case.

27. Tenth, it is submitted that the deputy district judge would have been entitled to conclude that the matter would have exited from the protocol even if the appellant's insurers had been served with the CNF.

28. In addition to that, in supplemental oral submissions, from Mr Perry of counsel on behalf of the respondent, he added the following points; first, there is a fine distinction between a finding of did not send a CNF and a case where the respondent had asserted that they did send a CNF and he argued it was implicit in the deputy district judge's finding that the respondent believed that a CNF had been sent and that is why another was not sent. Second, that CPR 45.24 by its unfettered existence indicates that the court should consider facts after the failure to serve the CNF. Third, there was clear evidence in this case that the claimant did not approach this claim, to use his phrase, as trigger happy litigation and, fourth, if CPR 45.24 is not applied, it simply means that the claimant recovers such costs as are reasonable and proportionate rather than heavily restricted costs.

29. In my judgment, a claim notification form was not sent to the defendant's insurer, that is the finding of the deputy district judge, there is no appeal against that finding and this court is bound by it.

30. There was a mandatory requirement on the claimant to do so pursuant to paragraph 6.1 of the pre-action protocol for low value personal injury claims in road traffic accidents. Due to that failure the provisions of CPR 45.24 applied and, in particular, in my judgment, 45.2(4)(ii)(c).

31. As a result, the deputy district judge had a discretion to order the defendant to pay no more than the fixed costs in Rule 45.18 together with disbursements allowed in Rule 45.19.

32. In the event that the claimant was in breach of the protocol, the first factor that the deputy district judge should have turned to was the claimant's explanation for failing to comply with the protocol.

33. In this case there was no explanation offered. The claimant ran a case that her claim notification form had been served which failed.

34. In those circumstances there was an evidential void in this respect. The court was left with an unexplained failure.

35. I cannot and do not imply into the findings of the deputy district judge that she was finding that the claimant believed that a claim notification form had been served, hence the failure to do so, just as I do not imply that there was a dishonest attempt to run a case that a claim notification form had been served. I simply do not know because there was no evidence of the reason for that failure.

36. The deputy district judge sought to fill the void by factors that were, in my judgment, largely irrelevant together with the application of hindsight and speculation which, in my judgment, she should not have done and I refer again to the list of authorities that are set out earlier in this judgment and those passages cited in the skeleton argument of the appellant.

37. I deal now with my assessment of the reasons that the deputy district judge gave, which are set out at pages 30 and 31 of the bundle, and in particular sections beginning 8.4.1, 8.4.2 and 10.

38. First, 'that the claimant recognised that this was a case to which the personal injury protocol in low value personal injury cases applied and at first instance attempted to comply with it by conducting an MID search identifying the insurer and by submitting a CNF to that insurer.' That, in my judgment, is irrelevant.

39. Second, ‘put this insurer on notice of the incident if not about this particular claim within the case on 19th December 2012 when they submitted a CNF on a linked case, that of a passenger in the same accident.’ That, in my judgment, is irrelevant.

40. Next, ‘notified the correct defendant’s insurer about this case on 21st May 2013.’ That, in my judgment, simply revealed an opportunity to comply with the protocol. They had identified the correct insurer and were dealing with it.

41. Fourth, ‘once the correct insurer had been identified, sent sufficient evidence on which an offer might be made, as they would have done through the portal on 23rd June 2013, within a month, and it is evidence that this was sufficient evidence for an offer to be made by the fact that an offer was made on 3rd August 2013.’ Again that simply demonstrates that they were able to identify the correct insurer and still gave no explanation as to why the protocol was not complied with.

42. Next, ‘served the correct defendant, Part and Parcel Network Ltd, with a copy of the CNF albeit directed to the wrong insurer endeavouring to comply with the protocol paragraph 6.1 on 21st December 2012, so that it had been open to them since that date to have sent it to the correct insurers which they did not. In fact there is no evidence that they did anything at all with it other than ignore it.’ In my judgment, that is irrelevant. There is no obligation on the defendant itself to send CNFs to its own insurance company. The obligation to serve a CNF on the insurance company is placed fairly and squarely on the claimant’s shoulders.

43. Next, ‘chased AXA a number of times before issuing proceedings and left it three months before doing so,’ once again that is irrelevant. It simply shows that they had the ability to identify the correct defendant and, therefore, had the ability to comply with the protocol and 8.4.2, by contrast the defendant failed to request that the claimant submit a further claim notification form, again that is irrelevant, in my judgment. There is no obligation on them to do so under the protocol. The protocol is explicit and the obligation is placed on the claimant to serve the claim notification form.

44. Next, ‘did little or nothing thereafter until proceedings were issued in January 2014; in particular the defendant failed to even admit liability and/or explain why quantum could not be agreed,’ again, in my judgment, this is irrelevant and is the beginning of the deputy district judge falling into the trap of speculation and hindsight.

45. Next, ‘failed to file an acknowledgement of service so judgment was entered and only instructed solicitors in March 2014,’ again, in my judgment, that is irrelevant and beginning to fall into the trap of speculation.

46. Finally, ‘those solicitors then applied to file a defence running to some eight pages, made an application for the matter to be transferred to the fast track,’ again irrelevant, in my judgment, and the deputy district judge falling into the trap of speculation and failing to acknowledge the fact that the way that a defendant’s insurance company reacts to Part 7 proceedings can be very different from the portal.

47. Then in terms of paragraph 10, the defendant submits that this case would have settled at stage 2 had the CNF been submitted but at 10.1, “It seems to me, however, that there is no evidence that this is the case,” then 10.2, “There is, however, evidence that this matter may well have never reached stage 2 in the portal had the CNF been submitted because there was still no admission of liability even at the date of settlement and that the issue of liability was resolved as a result of the defendant failing to file an acknowledgement of service”; 10.3, “Further, if we take stage 2, the point at which the claimant sets out sufficient details of the claim, such the defendant is able to make an offer, this occurred at the latest when details of the loss of earnings claim was provided on 9th August 2013 and at best on 23rd June 2013, on which basis a partial offer was in fact made and it was a further eight months before the claim settled with no additional information being requested or supplied in the interim”; 10.4, “So instead I do have evidence that the case did not settle until after proceedings had been issued, when the claimant had shown no indecent haste in issuing these proceedings and by which time the defendant itself had filed an application supported by a statement of truth to the court which suggested that this matter should be allocated to the fast track.”

48. This, in my submission, is clear speculation using the benefit of hindsight and the deputy district judge was clearly asking herself the question, ‘would it have made any difference if the claimant had complied with the protocol and served a claim notification form on the defendant’s insurer,’ and arriving at the answer no. She did not think that that would have made any difference and that was, in my judgment, dangerous speculation and she was wrong so to do.

49. Because the deputy district judge was wrong I must then consider the exercise of my discretion afresh and on the correct principles. I must

consider the circumstances as they were at the time that the claimant failed to comply with the protocol noting that there has been a failure to comply that has gone unexplained by the claimant. In my judgment, there was no good and sufficient reason for the failure to comply with the protocol by the claimant on the facts of this particular case. The overriding objective is to enable the court to deal with cases justly and at proportionate cost, CPR 1.1(1). At CPR 1.1(2), dealing with a case justly and at proportionate cost includes so far as practicable and then a list of factors is given. The magnetic factors, in my judgment, are (b) saving expense, (c) dealing with the case in ways which are proportionate, (d) ensuring that it is dealt with expeditiously and fairly and (e) allotting to it an appropriate share of the court's resources, all of which, in my judgment, are why the protocol exists and the protocol is designed to achieve all of those objectives.

50. Most notable in this particular case, in my judgment, is enforcing compliance with rules, practice directions and orders. That is what the claimant failed to do in this case. In the absence of any proper explanation for non-compliance and on the facts of this particular case, the costs of the claimant should be limited to the fixed costs appropriate.

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