Ingrid Smith v Greater Manchester Buses South Limited

Claim No. A62YJ225

County Court At Manchester

17 December 2015

2015 WL 10382772

Before: His Honour Judge Main QC

Thursday, 17th December 2015

Representation

Counsel for the Claimant: Mr. Murray .
Counsel for the Defendant: Miss Sutherland .

Approved Judgment

The Judge:

1 This is the case of Ingrid Smith v Greater Manchester Buses South Limited under case reference A62YJ225 (that is its appeal reference it was formerly under case reference MI5XII6). The current appeal is brought with permission of His Honour Judge Platt. It concerns the decision of District Judge Stewart from 2'd June 2015 when he ruled in the context of an offer to settle a road traffic claim initially issued under the pre-action RTA protocol within the Ministry of Justice's portal, that such offer remains "open" for acceptance by the defendants long after it was made notwithstanding the making of three counter offers in circumstances when the claim had left the portal, not having progressed beyond Stage 2 of the protocol, and proceedings having been issued under Part 7 of the CPR . In fact this was the conclusion the learned Judge reached when the same issue had been raised before him earlier on 19th February 2015 when he considered detailed submissions. On 2nd June 2015 he, essentially, just reiterated what he had said at an earlier point in time. Plainly, the claimant, now the appellant, maintains that he was simply wrong and I need to analyse the nature of the criticisms of his approach. The facts themselves can be quickly and, I hope, easily summarised. I start off by gratefully adopting the broad descriptions by District Judge Stewart as to the workings of the portal system and the application of the protocol, it seems to me, very adequately and efficiently set that out in his judgment and I adopt it.

2 On 17th March 2011 the claimant suffered an injury at the hands of the defendants. On 13th June 2011 a claim notification form was issued engaging the portal. The defendants did not dispute liability or allege contributory negligence within the insurer's response section and the matter then moved on to Stage 2 of the protocol. The claimant submitted a Stage 2 settlement

pack to the insurers in accordance with the requirements of paragraph 7.32 of the protocol. A claim, in fact, was intimated in the global sum of £4,100 of which £4,050 was for pain, suffering and loss of amenity and £50 for special damages. There then commenced what is referred to as "consideration of the claim" by the defendants. In fact, no request was made, as I understand it, by the defendants for any added time for this purpose, therefore, presumably within the 35 day period allowed for the defendants made an offer to settle the claim and as I understand it that was in the sum, globally, of £2,000. In turn the claimant reiterated the earlier figure of £4,100 and that appears to have been met by an enhanced, slightly revised offer, of £2,500 and this figure was simply expressed by way of damages for pain, suffering and loss of amenity. Therefore, no offer was made in respect of any special damages. At this point in time it is not possible to state when each of these offers and counter-offers or revised offers were made as the dates that would otherwise have been elicited from the portal have been destroyed. Nothing turns on that.

3 The claimant had been examined by Mr Ashok Paul, a local consultant orthopaedic surgeon and her solicitors (that is the claimant's solicitors) were concerned about the nature of the prognosis for her recovery. That was because Mr Paul had raised the prospect of what might be extensive shoulder surgery. The portal jurisdictional limits at that time were £10,000. The solicitors were concerned the value would exceed this sum so by a letter of 12th December 2013 (see page 106 of the trial bundle) they wrote to the defendant's insurers, PSV Claims Bureau Limited or their brokers, and intimated that it was their intention to exit the portal and this in fact took place. In the circumstances this was, to my mind at least, entirely understandable. It is agreed that the claimant had a right to do this under the provisions of paragraph 4.3 and paragraph 7.76 of the protocol. The claimant's solicitors did not at the same time, or, I might add at any later stage, withdraw their portal offer in the sum of £4,I 00. It is common ground that the case then left the portal and on 9th March 2014 Part 7 proceedings were commenced. The defendants then filed their defence on or about 22'd July 2014 and seemingly raised no objection as to the course of action that had been taken by the claimant's solicitors.

4 On 29th September 2014, so six months after the Part 7 proceedings had commenced, the claims handler purported to write to the claimant's solicitors and accept the claimant's earlier Stage 2 portal offer. This letter is at page 107 of the trial bundle. Sadly, it inaccurately purported to accept an offer of £4,050 and enclosed within it, as I had assumed, a sum in that amount with a consent order that was designed to be returned to the court. As is clear the offer to settle had been made in the sum of £4,I 00 so this offer by the defendant, in effect, amounted to what almost certainly was the third counteroffer. However, it is agreed it cannot have been made within the portal process, the matter already having left the portal and gone into CPR Part 7 . Nevertheless, the defendants regarded the matter at that stage as compromised. That issue was then brought before District Judge Stewart on 19th February 2015. Two issues as I understand it and as has been

developed in the course of Mr Murray's skeleton argument were raised. First, whether the letter of 29th September 2014 amounted to a valid acceptance of the Stage 2 portal offer and, secondly, whether the Stage 2 portal offer remained "open" for acceptance. Unsurprisingly, the learned Judge decided that the lesser offer did not make a compromise but in his judgment the Stage 2 portal offer had remained open for acceptance even as late as 19th February 2015. Perhaps, predictably, in the light of this steer the next day a document purporting to be an acceptance of the offer in the correct amount was made and, whether it was the defendant or the claimant it matters not, a declaration was sought as to whether at that stage the matter stood compromised. Unsurprisingly, on 2'd June 2015 the matter was brought back before the learned Judge, he granted the declaration sought and it is from that judgment the claimant now appeals.

5 The reasoning provided by the learned Judge and, in effect, repeated in June of 2015 is, essentially, to be found under paragraph 13 of the transcript of his judgment at page 41 of the trial bundle. Under the CPR as it then was he observed that if the portal had led through to Stage 3 then the process would have been governed by Practice Direction 8B paragraph 10.1 in respect of the withdrawal of offers. A party was only allowed to withdraw a protocol offer after proceedings had started with the court's permission and the court would only give permission where there was "good reason" for the claim not to continue under the Stage 3 procedures. In those circumstances the old provisions of CPR Part 36.16(2) would govern the court's approach to these offers. At Stage 3 of the protocol any offers previously made and not withdrawn were as he put it, "crystallised." The ordinary rules of contract had absolutely no effect on this. Therefore, by analogy, allowing for the fact that the current claim is now within a Part 7 process and had not proceeded to Stage 3 a similar situation should arise and the court should approach the determination in a similar fashion otherwise, as he put it, the outcome would be both illogical and inconsistent. The offer continues to have effect even though the claim had left both the portal and the protocol at Stage 2. The appellant submits that the learned Judge, essentially, confused himself conflating quite separate procedural systems found itself equating this case to a Part 7 / Part 36 offer which had not been withdrawn which simply could not have applied. Necessarily, the Rules under the protocol, had this remained a Stage 3 case governed by PD8B, cannot have applied as the case never reached that stage this matter having been issued into Part 7 . Both Miss Sutherland, acting for the defendant, and Mr Murray acting for the claimant or appellant, agree that the protocol and PD8B do not provide a specific answer to the current facts. Mr Murray submits that once the claim departs the protocol and does not go into Stage 3, the consideration of the acceptance of any offers can only be considered under the relevant section, Section 1 of the provisions of CPR Part 36 as it then was, as plainly, those provisions cannot apply, this offer not being expressed under CPR Part 36 with its specific requirements. Therefore, consideration of the offer can only be undertaken under the general law on any view the making of any subsequent counter-offers and against the original offer to make it incapable

of later acceptance. I think that broadly summaries the claimant's primary submission. Miss Sutherland recognises in part, I think, the force of this argument and submits that under the protocol rules in force at the time and bearing in mind, importantly, the more recent changes that have appeared in the protocol due to the revisions to Part 36.20 , I should imply, filling in any ambiguity or lack of specific provision, that when a protocol offer is made and not withdrawn it shall still be deemed to be open for acceptance, in effect, the last offer being taken into account before the claim leaves the protocol. Whilst at the moment the rules committee under CPR Part 36.20(8) only appear to apply to the claimant's time for acceptance of the defendant's protocol offer, Miss Sutherland submits there is no reason that that should not also equally apply to any claimants' offers and, effectively, for defendants within the Rules I should read also claimants. In the event, I should state immediately that I have not been persuaded by the defendant's submissions. It seems to me that the submissions that Mr Murray made are accurate and to my mind entirely correct. The District Judge therefore, to my mind, was wrong to conclude that the offer remained open for acceptance after the portal had closed, the portal ceasing to apply and the matter, in effect, reverting to Part 7 unless the specific provisions of Part 36 were met. On the facts here, plainly, they were not.

6 Therefore, let me pose the question for myself why have I reached this conclusion? In that regard I turn, in part, to the grounds of appeal that have been identified. Under ground I — and I will summarise them broadly- the Judge it was stated treated the claims that had left the protocol as though they had passed on to Stage 3 of the protocol with similar rules applying. On the face of it that appears to be so and to my mind the learned Judge sought to align together which are, in my judgment, quite distinct and different processes. In the case of the protocol once the Stage 3 process is engaged the final offer and only one offer can be placed before the court at the end of the process for the assessment of the value of the claim. In contrast, in the context of a Part 7 claim there are no such restrictions. The provisions of either Part 36 , if engaged, or any other offers to settle under CPR Part 44.2 are potentially available for consideration by the court with (depending on the conduct provisions under Part 44) multiple offers being potentially taken into account and being relevant as to any later costs orders. Therefore, to my mind they are entirely different processes and procedures so as to have, effectively, elided one process as though the same as the other to my mind was not as correct.

7 Ground two raises the Judge's overall approach whether the rules of contract were engaged or not on the current facts. He plainly found they were not. To my mind that wholly misunderstands the special basis under which both the portal applying the rules of the protocol to which specific provision of Part 36 apply and the rules of Part 36 more generally apply. Under these special schemes the general common law contractual rules are expressly displaced. Offers stand, notwithstanding counter-offers unless and until withdrawn. This has the benefit of a simplified system and very much is supported by the senior judiciary in accordance with the overriding objective.

However, they need to be understood as special rules which depart from the ordinary rules that would otherwise apply. Here, once the claim left the portal in my judgment for current purposes once the Part 7 process had been commenced, unless Part 36 is engaged by the nature of the offers made, ordinary contractual principles of compromise would apply. I do not see it is appropriate for me to fill in any perceived gaps by devising surrogate rules broadly equivalent to these special rules once the Part 7 claim has been made.

8 Turning to the third ground of appeal, it does seem to me that if the rules which were adopted by the learned Judge were to apply, if only one offer can be taken through to Stage 3 as appears to be so, what does happen if the claimant's condition- seemingly as here and certainly as, potentially, might be the case in other claims -worsens and perfectly and entirely reasonably the value of the claim increases. Inevitably to prevent the claim being settled as an undervalue that earlier offer would have to be withdrawn under the current requirements as suggested by Miss Sutherland for fear it would be accepted which under the rules of the protocol — if one takes into account the provisions of paragraph 7.46 -would mean that the claimant would have to be jettisoned from the protocol. This is a point which Mr Murray takes up in his skeleton. I take the point that this provision is essentially designed to ensure offers which reach Stage 3 and go on into that process are maintained throughout that process and there is only one offer and that if those offers are withdrawn then, effectively, the process comes to an end. However, it seems to me that the provisions of7.46 do create a problem in the current circumstances if a case then goes into Part 7 .

9 I turn to ground four. This is, in effect, a catch all. Once the claim leaves the portal any Stage 2 offers unless Stage 3 is engaged at that time when the matter goes forward, the general rules on offer and acceptance I think will apply. That is the basis upon which I determine that this appeal should be granted and the decision of the learned Judge set aside. However, I have been addressed separately on two separate cases and, therefore, in deference to those presenting those cases and the learned Judges who handed down decisions in those cases, I will touch upon them briefly. The first case I will consider is a decision by District Judge Goodchild in the Rornford County Court on 161 February 2015 in a case known as Akinyoki(?) v Esure Services . The second case I will consider is a case handed down by His Honour Judge Gore QC sitting in the Liverpool County Court on 7th December 2012 in the case of Purcell v McGarry . As to Akinyoki , District Judge Goodchild essentially carne to the same conclusion on very similar facts to the decision reached by the learned Judge in this case, District Judge Stewart. Within paragraphs 8 and 9 of his judgment he seems to have persuaded himself that because the provisions of Part 36.14 permit acceptance at any time and, therefore, the general rules of contract are displaced (and these are well known provisions) that principle permeates other areas and certainly applies to the portal claims and even those portal claims that move into Part 7 . For the reasons I have already stated, with respect to District Judge Goodchild, I do not agree with the conclusion he

reaches.

10 If I turn to Purcell His Honour Judge Gore QC was dealing with a Stage 3 case where Practice Direction 8B had already been engaged where a defendant wished, after Stage 3 had commenced, to accept an offer that had been made in Stage 2 and the claimant had objected stating it was too late to do so as within the protocol the defendant had moved beyond that point where that was permissible. The learned Judge disagreed. However, that seems to be entirely in keeping with the aims and intentions of the protocol and in relation to the rules that the defendant was able to accept an earlier offer without difficulty to any costs consequences flowing thereafter. Indeed, it seems to me the outcome the learned Judge reached was entirely self-evident. Miss Sutherland seeks to take comfort from some, if I may put them, more general *obiter* remarks. They did not go to determining the decision the learned Judge reached but Judge Gore did make some reference in paragraph 9 of his judgment that where within the protocol process he made it clear that a claimant wished to, effectively, avoid the effects of an overly generous offer, then so as not to be bound by it, he or she must (and those were the words he used) withdraw it subject to any conditions or restrictions which the protocol imposes on doing so within Stages 2 and 3. Those were the words he used and the implication from those words, if I understand Miss Sutherland's submission- is that he was essentially implying, if not stating expressly, for Stages 2 and 3 *(inaudible)* even if the matter is removed from Stage 2 and taken into Part 7 . However, it is entirely unclear to me that Judge Gore was seeking to deal with the situation where as here the portal had closed, the claim had moved from the protocol into Part 7 and that had been started and was well under way. Whilst Judge Gore's comments and observations, with respect, do need to be carefully considered and they are entirely apposite if I may say so to a portal case that moves through Stage 2 into Stage 3 engaging PD8B, I am not persuaded his comments were designed to have any wider effect. In any event, on the current arguments I would not have been persuaded that it was otherwise.

11 Therefore, in those circumstances the appeal will be allowed and I make that determination under the relevant provisions of Part 52.11 3(a) . I judge that the learned Judge in the court below simply was wrong.

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