THE COUNTY COURT AT LIVERPOOL
SITTING AT THE ST HELENS HEARING CENTRE

Claim No. A53YJ080

Corporation Street
St Helens

Wednesday, 8th July 2015

Before:

HIS HONOUR JUDGE WOOD QC

Between:

BOBBY PRIOR

Claimant/Respondent

-v-

SILVERLINE INTERNATIONAL LIMITED

Defendant/Appellant

Counsel for the Claimant/Respondent: MR. CARROLL(?)

Counsel for the Defendant/Appellant: MR. PERRY

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE JUDGE: This matter proceeds by way of appeal from the decision of Deputy District Judge Grosscurth given on 19th March 2015 whereby he determined a preliminary issue in detailed assessment proceedings which had not yet gone to provisional assessment, in favour of the claimant/respondent.

2. The Deputy District Judge actually gave permission to appeal on the basis that the area of law with which his decision was concerned would benefit from upper court guidance; namely, how does a court determine whether proceedings have been issued prematurely. However, I expressed a little surprise in exchange with counsel that permission was given because the Deputy District Judge specifically stated that his decision turned on a matter of fact. Be that as it may, I have indicated to counsel that I do not intend to give detailed guidance on the approach to this so-called premature issue point because I agree that each case is fact specific, but it may be that some of the comments I make in the course of this judgment will benefit if the issue arises in a similar context in future.

3. I now turn to the facts and the relevant chronology. This claim arose out of an accident with the claimant on 28th February 2013. A claims notification form, which is the process by which the matter is commenced within the *MOJ* portal for this type of claim, was submitted on 12th March 2013; that is just over three weeks after the relevant accident. It was a collision between two vehicles, ideally suited to the MOJ portal which is designed to try and resolve the matter at minimal cost.

4. Towards the end of the year of 2013 there was an offer made on a 50/50 basis to settle the case in the sum of £750 offered in acknowledgement of the claimant's claim. This was, seemingly, rejected, although I am not entirely sure when, because on 30th January 2014 whilst the 50/50 split was accepted, medical evidence, together with an appropriate schedule, put the claimant's claim at a significantly or at least a measurably higher value than that.

5. What happened thereafter is quite important, as we will see when we look at the relevant protocol for this type of claim, because within about 15 to 16 days of that offer the defendant had written to the claimant's solicitors providing an offer to settle the case at a sum just over £1,200. It is said by the claimant that this letter was never received (and I will come on to the consequences of a letter being sent and not received in a few minutes). However, with the effluxion of time and what the claimant believed to be 21 days from the time that the medical evidence and schedule of loss had been sent to the insurer, the claimant's solicitor wrote to the defendant's insurer to advise that proceedings had been issued.

6. In fact, they had not been issued in the sense the court had completed the process. What had happened was that the claimant's solicitors had sent the relevant issue pack to the court at the Bulk Business Centre in Salford and the process had not yet been completed for that issue to take place, but on 26th February the defendant, by its insurer, presumably in response to the letter of 20th February 2014, said, "*Look, we made an offer on 15th February of £1,217.50,*" and a further copy of the letter was sent. If the negotiation that was clearly emanating from that particular sequence of correspondence had been undertaken in mid-February, then none of the matters that arise in this case

would have troubled the court because what the claimant did was to reject the defendant's offer and counter-offer to settle in the sum of £1,417.50.

7. On 28th February, without either party communicating with the court, the proceedings were formally issued. In the meantime, negotiation had continued, with a splitting of the difference by settlement in the sum of £1,317.50 on 3rd March 2014.

8. If this had not been a case which had proceeded by way of issue of court proceedings but had been settled either within the portal or when it had come out of the portal and before issue, the full entitlement of the claimant to costs, ie his solicitors costs, would have been on the basis of fixed costs of the application of CPR 45.9. However, proceedings were issued and therefore a claim for costs with an appropriate bill was produced by the claimant which then proceeded to detailed assessment. The total claim was £8,622.42. I am told that the sum to which the claimant's solicitors would have been entitled had this matter been dealt with on a fixed costs basis would have been just under a quarter of that. So one can see straightaway that there is a very significant disparity between fixed costs and those costs actually claimed, even if ultimately they were being considered to be either unreasonably incurred or disproportionate.

9. The matter then proceeded in the usual way, with points of dispute filed by the defendant in which it was asserted that the proceedings had been issued prematurely.

10. District Judge Doyle decided at the beginning of this year that the question of premature issue should be dealt with as a preliminary issue and, thus, the matter came before the court and particularly Deputy District Judge Grosscurth, who made the order that he did to the effect that the proceedings had not been issued prematurely; thus, deciding that preliminary issue and allowing the matter to proceed thereafter to provisional assessment.

11. That is the chronology and the background. Before I turn to the decision of the Deputy District Judge itself, it is necessary to ask how the question of premature issue might arise when the court is dealing with these circumstances, because there is no specific provision in the CPR which deals with or defines the concept. CPR 44.3 is a useful starting point and the template for costs assessment which provides for a stepped approach. It is the basis for assessment and it directs that the court would not, in either a standard or indemnity case, allow costs which are unreasonably incurred or unreasonable in amount and thereafter says that the court will only, stepping back, allow costs which are proportionate to the matters in issue.

12. It has been stressed that this is the usual approach when dealing with the question of a bill and summary detailed assessment and the overarching principle in *re: Lownds (*the case referred to by Mr Perry of counsel on behalf of the appellant/defendant), that still remains, i.e. that it was a fundamental requirement under the CPR that litigation should be conducted in a proportionate manner and at proportionate cost. This, it is said, means that the question of proportionality and reasonableness are interwoven. In other words, it would be unreasonable to incur costs which are wholly disproportionate, and this is a matter which should be at the forefront of the court's thinking when it comes to the question of premature issue. So I ask the question has the claimant, even if strictly permitted so to do, acted unreasonably by embarking on a course which is wholly disproportionate to the value of the claim and the relief sought?

13. The court has further assistance as to how that question should be determined by reference to CPR 44.4 which is headed up "*Factors to be taken into account in deciding the amount of costs*." This is the rule which provides an opportunity for the court to have regard to all the circumstances of the case, which includes the conduct of the parties in the seven, now eight, pillars of wisdom in sub rule 44.4(3),

> "…conduct before, as well as during, the proceedings in order to try to resolve the dispute."

14. This is how the question of premature issue normally arises in these cases because the court is focussing on whether or not the proceedings and, indeed, the costs consequence of those proceedings, were a result of an absence of effort on the part of one or both parties, usually in this context the claimant, to try and resolve a matter which was capable of easy resolution.

15. We then turn to the relevant pre-action protocol which can be found at page 2739 in the *White Book* volume one. Of course, there is a new pre-action protocol which applies for low value RTA claims after July 2013, but this is not such a claim so we are using the more general pre-action personal injury protocol in this context. The protocol is intended to apply, as I say, to lower value PI fast track claims. It seems to me to promote early resolution and to avoid the escalation of disproportionate costs. It does not have the force of a Practice Direction but it is considered to be guidance and particularly relevant when the court is applying the 44.4(3) pillars of wisdom. Attention is drawn to paragraph 2.16 in the guidance which emphasises that litigation should be seen as a last resort. Not that these parties should have resorted to some form of recognised alternative dispute resolution, but that negotiations should be preferred to litigation and negotiation should be seen as a two-way street which was the way it was expressed by Lord Justice Longmore in the case of *Painting v University Oxford [2005] EWCA Civ 161* a case which is seminal in the context of establishing exaggeration as an element of the circumstances to be taken into account.

16. The relevant part of the protocol which was the focus of the decision here, and which has been referred to counsel, is paragraphs 3.1 to 3.6 and I can summarise it in this way. It sets out the steps which a claimant should take when communicating with a potential defendant the details of a claim which is to be brought and the essence of the procedure is one that enables the defendant to have a clear indication as to how the claim is to be dealt with. So sufficient information is given to the insurer or the solicitor to enable the insurer's solicitor to commence investigations and put a broad valuation of the risk, as it states in paragraph 3.5. Once that information has been received, at 3.6 the protocol goes on to say:

> "*The defendant should reply within 21 calendar days of the date of posting of the letter identifying the insurer, if any, and, if necessary, identifying specifically any significant omissions from the letter of claim. If there has been no reply by the defendant or insurer within 21 days* <u>*the claimant will be entitled to issue proceedings*</u>."

I emphasise those last few words because that lies at the heart of the discussion in this case. To what extent is that entitlement set in stone?

17. This is a protocol which ought to be complied with and there is a discretion vested in the court to apply CPR 44.4 as part of the overall consideration when dealing with any

suggestion that proceedings have been issued prematurely; that is having regard to the conduct of the parties. If a party issues proceedings within the 21 days before expiry, clearly he has not acted reasonably. However, does it follow that invariably he will be deemed to have acted reasonably and proportionately in all cases where the 21 days has expired?

18. I now turn to the decision of the Deputy District Judge contained within the appeal bundle. As I indicated in exchange with counsel, I do struggle to find a clear basis for the application of the correct principles and the asking of the questions which I have defined. The only reference, it seems to me, appears to be a nodding acknowledgement at paragraph 3 which is subsequently side-lined. He says:

> "The defendants make the point that on the various decisions of *Home Office v Lownds* and *Painting v University of Oxford*, whilst I must have regard to the CPR, the two-way street with regard to negotiation and issues of proportionality, I accept all that but, in my judgment, this turns on a matter of fact."

19. The extent to which he accepts it all and applies it is a little unclear because in paragraph 4 the Deputy District Judge seems to be preoccupied by the role of either side to have done something about stopping the issue of proceedings, there being a gap clearly between 20th February and 28th February when proceedings were formally issued by the court, and his decision appears to turn upon a conclusion at whether the claimant or the defendant should have done something about it. He says this:

> "Now the point has been made by the defendant that the claimants could have written to the court, got hold of the court and told them, 'Don't issue it'. However, there has been nothing produced to me that suggests that the defendants ever put that forward as a proposal as to something that should be done. They appear to merely allow the matter to progress in their knowledge that the paperwork had already gone to the court. For those reasons, I am satisfied that the issuing, in the circumstances of this particular case, has not proved premature."

20. In my judgment, this is an irrelevant consideration and, in any event, does not amount to an application of the appropriate test. Effectively, it reverses the responsibility to act reasonably imposing the burden on the defendant, and in these circumstances I cannot be satisfied he has considered the application with the appropriate test and that his judgment is a correct one. It is unnecessary, it seems to me, to deal with this matter on the basis of an excess of the ambit of discretion. I can consider this matter afresh and apply my own discretion.

21. In doing so, there are three features which, in my judgment, should be taken into account. The first is that this is a case where prior to February 2014 there had been significant cooperation between the parties. Liability had been compromised and an offer to settle had been made; thus, the claimant was not dealing with a silent and stonewalling insurer as often happens.

22. The second is that there was a significant benefit to be made by solicitors in issuing proceedings which raised a real spectre that the rewarded costs would be disproportionate to the value of the claim. It seems to me immaterial that an automated system existed, based upon a 21 day countdown so to speak, that there was an

entitlement for automatic issue if there had been no response. It was incumbent upon the potential receiving party to acknowledge the apparent disparity between fixed and assessed costs and the disproportionality that that would create, and I will come back to this in a moment because this is germane to the conclusion at which I arrive.

23. The third and final matter that is relevant, in my judgment, is the unusual way in which the claimant became aware of the offer and I proceed on the assumption the Part 36 letter was sent and not received or deliberately overlooked. I think this presented something of a conundrum for the deputy District Judge who did not want to find that this was a fabricated letter by the insurer attempting to avoid some sort of consequence, or indeed a deliberate attempt to pretend it had not been received by the claimant's solicitors. Both these parties are above that sort of conduct, but certainly it was something with which he felt uncomfortable because he could not make a finding one way or the other. Indeed, it is uncomfortable for me but I am proceeding on the basis that this was a mistake on both sides. Clearly at a stage before actual issue occurred, the claimant did become aware of an offer. Was it at that stage inevitable that proceedings could not be prevented? That seems to me is not a matter of who should have the initiative to deal with it. In my judgment, the costs consequences should have been uppermost in the minds of solicitors who were faced with a clear willingness on the part of an insurer to negotiate a settlement of the claim and not to regard a potential missed letter as an excuse to go down a disproportionality expensive course. If litigation was to be conducted on the basis, "*Ah, you're far too late now. Tough. You're just going to have to pay the consequences*," then the system, which is predicated upon a degree of cooperation as exemplified in the protocol, would break down. There must be more flexibility in the system than that and whether or not the proceedings could have been stopped the protocol entitlement was clearly questionable against such a background and the spirit of the protocol would still, at the very least, have been observed.

24. It does seem to me that if the proceedings were properly initiated on 20th February 2014, that is after 21 days had elapsed, (and although there is an argument that that might not have been the case, the protocol would still, perhaps, allow such a conclusion on the basis that if the date of posting is important but it is very, very tight and very close to the wire and clearly a case of proceedings ready to be issued at one minute past midnight, metaphorically speaking), it is insufficient, in my judgment, for the claimant to rely solely upon the fact, this fact, to justify this proportionately expensive course of action. Whether one calls it a rain check or an opportunity for reflection is neither here nor there. It cannot, in my judgment, be assumed that entitlement to assessed costs is absolute if the issue ball starts rolling at one minute past midnight.

25. Therefore, in the circumstances of this case, I have come to the conclusion that it is appropriate to say that these proceedings were issued prematurely. These days, more than ever before, I accept there is pressure on the participants in the civil justice system to do more for less reward. These are tough times with restrictions on funding, with the implementation across the board of fixed costs and this court must acknowledge that it becomes less profitable for solicitors to pursue these claims, and there is more incentive on insurance companies to try limit their exposure. However, proportionality remains very much at the heart of the process, not just the protocol but of also the CPR and civil litigation generally. The only guidance that I am willing to give in this case is that it should not be assumed that a legitimate protocol issue automatically entitles a party to its costs without regard to the background. Every case, of course, will turn on its own facts, but in this case I am satisfied, as I have indicated, that it would not be appropriate

in the light of all that had gone on. Whether this is to be deemed an exceptional case or whether it would mean that from here on parties will proceed on the basis that greater regard is had for the background is something upon which I cannot comment. All I am prepared to say is the entitlement is not absolute in the context of a requirement to act proportionately in the circumstances.

(End of judgment)