CASE SELLING REPLIES. ALL TO STRIKE THEM OUT FAILS.

Mary Ann Sullivan v Rollingsons Solicitors

Case No. 3LV83770

Liverpool County Court

21 March 2014

2014 WL 4355044

Before: Deputy District Judge Mulrooney

Friday, 21st March 2014

Representation

Mr Finn appeared on behalf of the Claimant.

Mr Robinshaw appeared on behalf of the Defendant.

Judgment

DDJ Mulrooney

1 This is an application by the Defendant, the paying party, the application being dated March 2014, the Defendant seeking an order that the Claimant's reply to points of dispute be struck out and the Claimant pay the Defendant's costs of the application. The application is supported by a statement which appears on the second page of the application signed with a statement of truth, by the paying party's solicitors.

2 Exhibited to the application is a draft order and, particularly, a first instance decision of someone who, I would hesitate to use the title, because I do not think it is right, but Her Honour Deputy District Judge Hussain. So I am assuming this is a deputy district judge, and that would appear to be right. It is a decision by a deputy district judge in a case which is of similar type to the present case. I have enquired and I am told that there are no more senior decisions other than that of the deputy district judge on this topic.

3 I should say that I have read not only the application and supporting documents, but I have also read the relevant parts of Part 3 and Part 47 in particular. I have also read the relevant parts of *Cook on Costs 2014* edition. As I indicated to the parties in the course of submissions, most particularly I have read paragraphs 28.26 and 29.30.

4 The background to this matter is that the Claimant was injured in a road traffic accident on 18th December 2005. That claim was settled and it appears that dissatisfaction arose with the terms of that settlement such that she subsequently sued her solicitors.

5 As I understand it, the claim was settled for £550 plus costs, and the running sore in this case relates to costs. Proceedings were issued in the present matter on 11th March 2013. The acknowledgment of service dated 12th April 2013 did not dispute the principle of costs, only the amount of costs. In consequence, the Court made an order on 17th April 2013 to the effect that the Defendant had to pay the Claimant's costs. A bill of costs was served in timely fashion on 24th April 2013 and points of dispute were served, again in timely fashion, on 14th May 2013.

6 The provisions of 47.13 are in these terms: 47.13 (1), 'Where any party to the detailed assessment proceedings serves points of dispute ... ' I pause there. This happened on 14th May 2013 in the present case. ' ... the receiving party <u>may</u> ... ' and I emphasise the word 'may', ' ... serve a reply on the other parties to the assessment proceedings.' 47.13 (2): 'The receiving party <u>may</u> ... ' and again, I emphasise the word 'may', ' ... do so within 21 days after being served with the points of dispute to which the reply relates.'

7 This contrasts with the approach taken in respect of points of dispute at 47.9 (1): 'The paying party and any other party to the detailed assessment proceedings may dispute ... ', again, I emphasise the word 'may', ' ... any item in the bill of costs by serving points of dispute on (a) the receiving party; and (b) every other party to the detailed assessment proceedings.' 47.9 (2): 'The period for serving points of dispute is 21 days after the date of service of the notice of commencement.'

8 Just pausing there, the wording is, it seems to me significantly different to the wording in 47.13 (2). 47.9 (3), and this is an important distinction with 47.13 — 47.9 (3): 'If a party serves points of dispute after the period set out in paragraph (2), that party may not be heard further in the detailed assessment proceedings unless the court gives permission.' There is both a clear timetable and a clear sanction, it seems to me.

9 The paying party's submissions in this case, very helpfully made by Mr Robinshaw, are that detailed assessment proceedings have a strict timetable which should be conducted expeditiously, efficiently and at proportionate cost. He makes the point that there are sanctions in place in respect of the filing of points of dispute. It is clear from the extract from 47.9 that I have just read that that is right. He makes the point that this procedure is in place in order to enable the issues to be narrowed between the parties.

10 Here, the reply was served very considerably out of time on 14th October 2013, so probably about three or four months beyond the anticipated deadline. The paying party's case is that it gives the receiving party a tactical advantage, additional time to consider offers and counter-offers that may or may not have been made, discussions that may or may not have taken place. The point is made that the matter would proceed to a provisional assessment and that if the receiving party's reply stands, then the paying party will not have the opportunity to redress the balance, because there will not be an oral hearing.

11 It is a concern of the paying party that they cannot in effect serve a reply to the replies. I am invited by the paying party to consider that the procedure in respect of offers has changed and that part 36 now applies. In effect, the paying party's submission is that they are prejudiced by the gross delay in the service of the reply and so cannot protect themselves as they should have been able to. It is against that background that the paying party's case is that the reply should be struck out.

12 I am invited by the paying party to have particular regard to the decision of the deputy district judge that I have referred to already, which is in the case of Arif Noquiam v Bahroz Ahmed and Another, which proceeded in the Willesden County Court, claim number 1UB083V6 a decision made 27th September 2013 of deputy district judge Hussain.

13 I am invited in particular to consider paragraph one of that decision, but plainly I consider the totality of it. It does not seem to me that this is a binding decision on me. It is useful background reading, but the decision of the deputy district judge does not require me to adopt the approach taken in that case. I have indicated already that I do take into account the contents of that judgment without rehearsing them in the course of this judgment.

14 The point is made that the receiving party has not served any evidence in response to the paying party's application. I think that is a point well made, but it may go to costs rather than, in my assessment, to the outcome of the application itself.

15 I am invited by the paying party to consider Part 47.13. I have indicated already that it is clear to me that this is not a mandatory provision nor does it contain a specific sanction. I am asked to consider part 3.4 (2) (c), which is to be found at page 78 of the current edition of the *White Book* . This relates to statements of case. There is a description in the commentary at 3.4.1 about the meaning of statements of case, and it seems to me that I am not bound to say that 3.4 relates to a reply in the context of cost proceedings. The commentary makes plain that statements of case means a claim form, particulars claim where these are not included in the claim form, defence, Part 20 claim or a reply to a defence, and include any further information given in relation to that, and so on.

16 In any event, even if 3.4 (2)(c) did apply, it gives me the discretion ... 3.4 (2): 'The court may strike out a statement of case if it appears to the court that (c) there has been a failure to comply with a rule, practice direction or court order.' Here, even if 3.4 applies, I choose not to exercise the discretion to strike out the reply, most particularly because 47.13 is not mandatory, and had it

been intended to be mandatory, it would have echoed the sort of wording that is found in 47.9.

17 I am also asked to look at 3.1(2) (k) and (m). Again, 3.1 gives me a discretion, and I accept that I have a discretion in this case because it is general powers of case management. At (k) I may: 'exclude an issue from consideration.' And (m), I may: 'take any other step or make any other order for the purpose of managing the case and furthering the overriding objective.' I have in mind the overriding objective, most particularly the addition at 1.1(2)(f) of enforcing compliance with rules, practice directions and orders. However, it seems to me, at the risk of repetition, that if 47.13 had been mandatory and if it had contained a sanction, then matters might have been different. However, in my assessment it is neither mandatory nor does it contain a sanction.

18 I do not attach significance to the fact that neither party has yet applied for any other order in the context of these detailed assessment proceedings. It is said by the receiving party that the paying party could vary the points of dispute in this matter in the way described at 13.10 of the practice direction to Part 47. If the paying party chose to take that route, then in my assessment the paying party could rely upon the receiving party's express concession in this case, and this case alone, that that would be a reasonable and appropriate thing for them to do. For the avoidance of doubt it would be, in my assessment, wholly wrong for the receiving party subsequently to take a point on this if they changed their mind on that particular issue.

19 I am, in all the circumstances, persuaded that the approach suggested in *Cook on Costs* is the right approach. Here I am looking at 29.30. 'If the receiving party decides to serve the reply he should do so within 21 days of receipt of the points of dispute.' It carries on: 'But there is no sanction if they are not served in this period and they are often served later, especially in the run-up to the hearing itself. There is no obvious need to seek the court's permission to rely upon them if they are served late' and it goes on. That commentary, in my assessment, assists the paying party and defeats the receiving party's position. Albeit, I take account of the fact that that is a commentary in a leading textbook rather than a binding decision of a high court. Therefore, for all of those reasons I dismiss the application.