Neutral Citation Number: [2019] EWHC 510 (QB)

Case No: QB/2018/0312

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2019

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

HELENE BUTLER	**Appellant**
- and -	
BANKSIDE COMMERCIAL LIMITED	**Respondent**

- -
- -

Mr Imran Benson (instructed by **Innovate Legal**) for the **Appellant**
Mr Alex Young (instructed by **Bankside Commercial Ltd**) for the **Respondent**

Hearing date: 4 March 2019

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. The claimant[1] is a company of solicitors. The defendant, a commercial agent, is a former client.

2. On 20 June 2008, the parties entered into a Conditional Fee Agreement ("CFA") under the terms of which the claimant was retained to act on the defendant's behalf in proceedings against Nikon Metrology NV[2] ("Nikon").

3. In November 2013, the claimant sued the defendant for the costs alleged to be recoverable under the terms of their retainer and applied for summary judgment against her in the sum of £238,527.59.

4. That application was successful before Master Yoxall. The matter now comes by way of appeal before this Court in respect of the one ground upon which permission was granted by the single judge.

BACKGROUND

5. The CFA incorporated the pro forma conditions of The Law Society publication: "Conditional Fee Agreements: what you need to know" ("the standard terms").

6. Clause 7 of the standard terms provides, in so far as is relevant:

> **What happens when this agreement ends before your claim for damages ends?**
>
> "(b) Paying us if we end this agreement
>
> …(iii) We can end this agreement if you reject our opinion about making a settlement with your opponent. You must then:
>
> • Pay the basic charges and our disbursements, including barrister's fees;
>
> • Pay the success fee if you go on to win your claim for damages."

7. The defendant's claim eventually prompted a settlement offer from Nikon on 4 May 2011 in the sum of €90,000. This offer was not accepted and the

[1] For convenience and consistency of reference, the appellant and respondent are referred to in this judgment as the defendant and claimant respectively.

parties went on to participate in an unsuccessful mediation process on 24 May 2011.

8. Time was running out. The matter was now heading towards an imminent arbitration hearing and the claimant was clearly and understandably concerned that the defendant would be very well advised to make an urgent and realistic counter-offer.

9. Accordingly, on 26 May 2011, the claimant wrote to the defendant advising, in strong and very detailed terms, that a counter-offer of €90,000 plus 50% of costs should be made. The defendant did not accept this advice.

10. On the following day, the claimant notified the defendant that, unless she gave instructions to make the offer in the terms advised by 2:00pm, it would terminate its retainer, inter alia, on the ground that her refusal to follow its advice would amount to a rejection of its opinion about making a settlement under clause 7(b)(iii) of the standard terms.

11. No such instructions were given. The claimant dropped out of the picture and the defendant soldiered on against her solicitor's advice.

12. In the event, the arbitration was adjourned to January 2012. The result was but a pyrrhic victory for the claimant. She was awarded only £40,636.80 and the costs order was not entirely in her favour. The substantive award fell far short of what the claimant had earlier recommended should be offered and, as the Master observed, "explodes any argument that the claimant was forcing the defendant to settle at an undervalue".

13. In the detailed assessment of costs which followed the arbitration, the sum of £238,527.29 was assessed in respect of the claimant's profit costs, success fee, disbursements and insurance premium. The claimant alleges that it was, in fact, entitled to additional solicitor/client costs from the defendant but, for understandable tactical reasons, elected to abandon these for the purposes of the claim for summary judgment. Thus the only dispute between the parties relates to the defendant's liability to pay any sum whatsoever under the CFA. No issue arises as to quantum.

14. I note, merely in passing, that it has not been necessary for me to adjudicate upon the claimant's unresolved suspicions that the defendant has, to her advantage, set off against any liability she has in respect of Nikon's costs following the arbitration the sums which she now declines to pay to the defendant.

THE RESPECTIVE CASES

15. The defendant contends that her failure to take the claimant's advice on settlement did not fall within the terms of clause 7(b)(iii) and so she is not obliged to pay the claimant's costs. Her skeleton argument of this point contends:

> "12. It is wrong because termination under b(iii) was simply not open to C on the true meaning of b(iii). Advice about making an offer is not the same as advice about "making a settlement".
>
> 13. Making a settlement is an active process which refers to actually settling a case, usually by accepting an offer made by the underlying defendant. Merely making an offer does not equate to "making a settlement" since making an offer does not settle a case. In the same way, D refusing advice (given on short notice and just before the trial) to make an offer cannot equate to a refusal of an opinion about "making a settlement".

16. In response, the claimant contends that the Master was correct to apply a broader interpretation to the scope of the clause and that the defendant's narrow interpretation is unarguably wrong.

DISCUSSION

17. I consider that the Master was entirely correct in his approach to the interpretation of clause 7(b)(iii).

18. On the facts of this case:

    (i) the letters sent by the claimant clearly and unambiguously set out its opinion;

    (ii) that opinion was about making a settlement with her opponent; and

    (iii) the defendant rejected that opinion.

19. I am satisfied that the suggestion that any opinion about "making a settlement" is to be construed as being limited to the consideration of the acceptance any offers made by the opponent is inconsistent with the language of the clause and would, in any event, lead to procedural distinctions devoid of either logical justification or practical coherence.

20. Indeed, there may commonly arise circumstances in which it would be commercially foolhardy for a claimant to make no offer to settle. Examples include but are not limited to:

    (i) cases in which earlier negotiations between the parties have failed but the strength of the claimant's case has since deteriorated,

perhaps in ways unbeknown to the defendant, and the commercial case for the claimant to take the initiative is compelling;

(ii) cases in which the defendant has taken the tactical decision, for whatever reason, to wait for the claimant to make the first move;

(iii) cases in which the defendant is simply dragging its heels;

(iv) cases in which the financial position of the defendant is deteriorating.

21. Where there is no CFA, the client's privilege of ignoring her solicitors' advice, so long as they can continue to act within the boundaries of their professional duties, is preserved intact.

22. Where, however, there is a CFA under which the solicitors, themselves, face significant economic risks in the event of an adverse result at trial, one would not expect the level of protection which they are afforded against the whims of the unreasonably optimistic client to turn upon the random happenstance of whether or not the other side has made an approach which can be categorised as a contractual offer capable of acceptance. For such solicitors to be required to wait, like Vladimir and Estragon, for an offer from the other side which might never come rather than, where appropriate, to take the initiative in negotiations would impose artificial and unjustifiable limits on their ability to protect their own legitimate interests.

23. On a true construction of clause 7(b)(iii), a solicitor's opinion about making an offer, on the facts any given case, is perfectly capable of being one which is about "making a settlement". A settlement is an end point but the making of one is a process.

24. Furthermore, if it had been intended that the opinion of a solicitor would only fall within clause 7(b)(iii) when it came to the consideration of an offer made by the other side then it would have been simplicity itself to draft a clause which achieved this unattractive object.

25. The defendant raises the spectre of unscrupulous solicitors who wilfully undersell their client's case in order to serve their own financial interests in costs. This objection is, however, significantly weakened by the following considerations:

(i) Unscrupulous solicitors could still be tempted to give unduly pessimistic advice on the wisdom of accepting a low offer made by the other side. Indeed, in many claims the other side may well be tempted to test the waters with a deliberately low opening bid. On the defendant's approach, solicitors advising a client to accept such an inadequate offer would fall comfortably within the parameters

of clause 7(b) (iii) but those advising upon the making of a realistic higher counter-offer would not. Thus a narrow construction of the clause provides a random and wholly ineffective protection against advices to settle a case at an undervalue;

(ii) Solicitors are bound by their Code of Conduct to provide services to their clients in a manner which protects their clients' interests in their matter and a breach of this obligation is likely to give rise to disciplinary consequences and reputational damage;

(iii) Bad advice leading to loss is liable to expose the solicitors to a claim in professional negligence.

26. Undeterred by such objections, the defendant seeks to derive some support for her stance from the observations of Hughes LJ in ***Jones v Wrexham BC*** [2008] 1 WLR 1590, stated at paragraph 95:

> "By Law Society condition 7(b)(iii) the solicitors may terminate the agreement if the client rejects their advice about settlement with the defendants. The client is to be given the opportunity to take a second opinion from a different solicitor, but at her own expense. The agreement imposes no responsibility on the solicitors to accept that second opinion, if different from their own, nor to continue with the CFA. In the event of such termination, the client is liable for the solicitors' own charges, and for any own-side disbursements, and indeed remains liable for the solicitors' success fee if she continues with the case via other solicitors or on her own and recovers damages (it would seem any damages, whether more or less than any offer). Those are, from the point of view of the client, onerous, not to say draconian, provisions. They give to the solicitors complete control over the decision whether or not to accept an offer made by the defendants, however low, subject, of course, to the constraints which one would expect to be imposed by professional standards, and to the legal possibilities of an action for professional negligence or a report to the Law Society."

27. It is, however, to be noted that the Court in this passage was not purporting to define the scope of clause 7(b)(iiii) and, indeed, had not been invited to. No competing arguments had been raised by the parties. It is clear that Hughes LJ was doing no more than giving an example of circumstances to which the clause might commonly be applied. He was not attempting to fix its parameters. I do not, therefore, consider that this passage advances the claimant's case.

28. There may, of course, be cases in which a genuine issue will arise as to whether, as a matter of construction, a solicitor's opinion falls within the scope of clause 7(b)(iii) and each such case must be decided on its own

facts. There may also be cases in which, for example, the timing of the opinion and/or the particular circumstances in which it was communicated to the client may open the door to an argument that the solicitors were thus in breach of an implied term the scope of which precludes them from relying upon their opinion to trigger the operation of clause 7(b)(iii). On the facts of the present appeal, however, I find that no such issues can arguably arise.

29. By way of a respondent's notice, the claimant identified other grounds upon which the Master's decision could and should have been upheld in the event that I were to find that his interpretation of the standard terms was wrong but these contentions have now been rendered academic.

CONCLUSION

30. For the reasons I have given, I am satisfied that the Master was entirely right in his interpretation of the terms of the CFA and he correctly concluded that the defendant had no real prospect of successfully defending this claim.

31. The claimant has generously indicated that, apart from applying for the imposition of charging orders and registration at HM Land Registry, it will not take any other steps to enforce the orders in its favour until any further appeal or application for a stay is finally determined by the Court of Appeal. For my own part, I will merely observe that I would not have given permission to appeal if I had the power so to do.

32. This appeal is dismissed.