Neutral Citation Number: [2014] EWHC 3062 (QB)

Case No: 3YK08470

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MOLD DISTRICT REGISTRY
MERCANTILE COURT

The Law Courts
Bodhyfryd, Wrexham, LL12 7BP

Date: 13/08/2014

Before :

HIS HONOUR JUDGE MILWYN JARMAN QC

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Between :

GAVIN EDMONDSON SOLICITORS LIMITED	**Claimant**
- and -	
HAVEN INSURANCE COMPANY LIMITED	**Defendant**

- -

- -

Martin Budworth (instructed by **the claimant**)
Lord Marks QC and James Wibberley (instructed by **Flint Bishop LLP**) for the **defendant**

Hearing dates: 11 and 12 August 2014

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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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HIS HONOUR JUDGE MILWYN JARMAN QC

HH Judge Jarman QC :

1. The claimant (the solicitors) entered into agreements with six clients (the clients) to pursue a low value personal injury claim which each had against drivers insured by the defendant (the insurer) arising out of road traffic accidents. The insurers made offers directly to the each of these clients and settled each claim on an inclusive basis, thus depriving the solicitors of their costs. In one telephone conversation in November 2012 with one of the clients, Mr Grannell, the insurer's claim handler indicated that the reason the insurer was offering a little bit more money was that the solicitors "get kept out of it so we don't have to pay their fees..."

2. The solicitors argue that such a course of action was unlawful on a number of bases, namely that the insurer:

   i) Wrongfully prevented the solicitors from establishing a lien on the settlement sums for their costs, which action justifies equitable interference by the court with the disposal of damages and costs, by ordering the insurer to pay the solicitors' costs;

   ii) Induced a breach of the contracts between the solicitors and the clients;

   iii) Unlawfully interfered with the economic interests of the solicitors, by misuse of confidential information obtained though a portal (the portal) operated by the Ministry of Justice, and/or by a breach of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the protocol), and/or by a breach of the Data Protection Act 1998 (the 1998 Act).

3. The insurer denies any impropriety and says there is nothing in law that stops a direct offer of compensation being made in such circumstances and there is no valid cause of action.

4. The portal is a secure online service introduced in April 2010, which enables those with road traffic accident personal injury claims worth between £1,000 and £10,000 to input personal injury details and to follow a streamlined claims process, including the electronic filing of a claim notification form (CNF) and a response. The aim is to reduce the cost of such claims.

5. The portal, as the preamble to it says, describes the behaviour the court will normally expect of the parties prior to the start of proceedings for such a claim. The aims, as set out in paragraph 3, are to ensure that a defendant pays damages and costs using the process set out in the protocol without the need to start proceedings, that damages are paid within a reasonable time, and that the claimant's legal representative receives fixed costs at the end of each stage in the protocol. Stage 1 is specified as the completion of the CNF. Stage 2 deals with medical reports.

6. Paragraph 7.67 provides that where a claimant gives notice to the defendant that the claim is unsuitable for the protocol, for example because there are complex issues of fact or law in relation to vehicle related damages then the claim will no longer continue under the protocol. However, where the court considers that such a notice was unreasonably given, it will award no more than the fixed costs provided for in the

Civil Procedure Rules 1998, rule 45, which provides a fixed costs regime for such cases.

7. It is not in dispute that the protocol does not provide for settlements directly between the clients and the insurer without the involvement of the solicitor, as occurred in this case.

8. Nor is it in dispute that in each case the offer of settlement was made by the insurer with knowledge that the relevant client had instructed solicitors to act on his or her behalf. The CFA in each case covered only the personal injury claim, and not any vehicle repairs. It provided for a "cooling off" period after signing, during which the client may terminate the agreement, but none of the clients did so in this case.

9. Mr Tonkin was involved in an accident on 10th April 2012. He signed a conditional fee agreement ("CFA") with the solicitors on 16th April. Messers Mohsin, Makey, and Wheater and Ms Lunt were involved in the same accident on 23rd June. They entered into CFAs with the solicitors on 20th July. Mr Granell was involved in an accident on 30th August 2012 and entered into a CFA the following day, 1 September 2012.

10. It is common ground that the contractual relationship between each client and the solicitors was governed not only by the CFA, but also by a client care letter each received, and, to the extent that it was not inconsistent therewith, The Law Society's Guidance (the guidance) in respect of such agreements, which the CFAs expressly incorporated. Mr Budworth, on behalf of the solicitors, submits that there is no such inconsistency, but Lord Marks QC, on behalf of the insurer, submits that there is, particularly in respect of payment of the solicitors costs. The guidance provides:

> "If you win your claim, you pay our basic charges, our disbursements and a success fee. The amount of these is not based on or limited by the damages. You can claim from our opponent part or all of our basic charges, our disbursements, a success fee and insurance premium."

11. The client care letter provides:

> "For the avoidance of any doubt if you win your case I will be able to recover our disbursements, basic costs and the success fee from your opponent. You are responsible for our fees and expenses only to the extent that these are recovered from the losing side. This means that if you win, you pay nothing."

12. In my judgment there is a tension between the two provisions. The former clearly contemplates that the client upon success would pay to the solicitors the charges and other sums referred to and would then recover these from the opponent. The latter provides that upon success the solicitors will recover such sums. Although there is reference then to the client's responsibility for fees, that is expressly limited to "the extent that these are recovered from the losing side." Given that the express purpose of this part of the letter is to avoid any doubt, in my judgment it is the latter provision which prevails.

13. In respect of each of the clients, the solicitors promptly completed a CNF on the portal. The insurer was provided with the address details of one of the clients, Mr Tonkin by its own insured, and wrote to him to offer a replacement vehicle before the solicitors were instructed. Mr Tonkin telephoned the insurer on 24th April 2012 to ask for further details about a hire car. As the solicitors were instructed only in respect of the personal injury part of the claim, such direct contact was not surprising. On inquiry by the claim handler, Mr Tonkin confirmed that the cooling off period (which he said was for 14 days whereas in fact it was 7) in the CFA with his solicitors had not expired. An offer of £2,350 compensation in respect of that claim was then made and accepted.

14. The remaining five clients were sent written offers of compensation to the addresses supplied through the portal. Mr Mohsin telephoned the insurer after deciding to accept the offer made to him, and later to the other three clients who were involved in the same accident for whom Mr Mohsin acted as spokesperson. One of the claim handlers who dealt with Mr Moshin on behalf of the insurer was Mr Burns, who was called to give evidence. He readily and frankly agreed in cross examination that it was the insurer's policy then to take the opportunity to try and persuade clients to settle claims quickly and cheaply by direct means. This policy was abandoned in mid 2013. These four claims were settled on 7th August 2012 for £2,000 each.

15. Mr Grannell signed and returned a mandate accepting the offer of £1,900 made to him which was received by the insurer on 14 September 2012, before any direct telephone contact with the insurer. However another person pretending to be him had telephone conversations with the insurer and received payment. Once this was discovered, the insurer paid out the settled sum to him. The conversation in November 2012 referred to at the outset of this judgment occurred after the settlement was agreed.

16. The first cause of action is based upon the decision of the Court of Appeal in *Khans Solicitors(a Firm) v Chifuntwe & Anor* [2103] 4 Cost LR 564, which involved the direct payment to a litigant of £6,000 agreed in respect of his solicitor's agreed costs. Before the payment was made the litigant's solicitors had written to the other side and asked that the money to be paid directly to them.

17. In paragraphs 12 and 13 of the judgment of Sir Stephen Sedley, with whom the other members of the court agreed, he said:

> "Scarman J in *Re Fuld (No 4)* P 727 stressed the readiness of the court and the breadth of its powers, to safeguard a solicitor's entitlement to recover his costs.....
>
> The line of authority which begins with Lord Mansfield's judgment in *Welsh v Hole* [1779 1 Doug 238; 99 ER 155] is consistent in holding that where the paying party has colluded with the opposing party to keep fees out of the hands of that party's lawyers- in other words, to cheat them- payment to the opposing party is not a good discharge of the costs debt."

18. In *Welsh,* Lord Mansfield compared the case to the case of an assignment of a chose of action and this analogy was referred to in a number of 19th century authorities. Sir

Stephen Sedley deals in some detail with these in paragraphs 16 to 21, and disagreed with the reasoning in one *Brunsdon v Allard* (1859) 2El & El 19 (QBD), in this way:

> "If its reasoning is, as it seems to be, that notice could only operate, if at all, by analogy with an equitable assignment, we would respectfully differ. The true parallel is with collusion, not because the two are the same or even similar but because both operate in equity to interpose the unpaid attorney's entitlement between the paying and the receiving party.
>
> 22. Stirling J's carefully reasoned decision in Ross v Buxton [(1889) LR 42 Ch D 190] contains a valuable analysis of the state of the law towards the end of the 19th century. He was right in our judgment, to conclude that collusion and notice were parallel routes to equitable interference with the disposal of damages and costs:
>
>> "Where a valid compromise has been entered into under which a sum of money, the fruit of the action, is coming to the plaintiff, the Defendant or his solicitor is not at liberty, after express notice by the plaintiff's solicitor of his claim to a lien, to pay that sum over to the plaintiff in disregard of the notice.""

19. At paragraph 27 he said:

> "In principle it is unacceptable that a client can compromise his own solicitor's legitimate interests for any sum he chooses, leaving the solicitor to sue him for money which he has now taken and spent. In practice, provided the solicitor moves rapidly, notice of his interest ought to be sufficient to block both compromise of the debt and payment to the client. "

20. Finally at paragraph 33 he concluded:

> "In our judgment, the law is today (and, in our view, has been for fully two centuries) that the court will intervene to protect a solicitor's claim on funds recovered or due to be recovered by a client or former client if (a) the paying party is colluding with the client to cheat the solicitor of his fees, or (b) the paying party is on notice that the other party's solicitor has a claim on the funds for outstanding fees. The form of protection ought to be preventative but may in a proper case take the form of dual payment."

21. No definition was given in that case of the term 'collusion' but in the earlier decision of *Manley v The Law Society* [1981] 1 WLR 335 Lord Denning MR said at page 347 B:

> "...But there is a question as to what constitutes 'collusion' for this purpose. On this point I am content to go by the observation of Brett MR in *The Hope* (1883) 8 P.D. 144, 145 "...the plaintiff's solicitors must show that both the plaintiffs and the defendants entered into the compromise with the intention of depriving them of their lien" ".

22. Mr Budworth acknowledges that the facts of *Khans* are not on all fours with the present facts, but emphasises the passages in the judgment which he says make it clear that the court has a broad power to prevent a solicitor being deprived of costs. Counsel very helpfully put before the court an agreed statement of propositions of law. For a finding of collusion, it is agreed that both parties to it must have the aim of keeping the settlement sum away from the solicitors to cheat them out of fees.

23. I am not persuaded on the evidence that there was a sufficient act of collusion between any of the clients and the insurer in the way contemplated by the court in *Khans.* It is clear in my view that the insurer in each case did intend to avoid paying the solicitors costs, which it would have to do if the claim proceeded through the portal. However, there is no sufficient evidence from which to infer that any of the clients had any aim other than to achieve a speedy settlement of his or her claim. What little express indication there is suggests that such was the aim. Mr Grannell in the November 2012 conversation, after being told of the reason for offering a bit more money, indicated he was absolutely happy, that he had just become a father, and that as he was not working the money meant a lot to him.

24. There is an issue as to whether notice of the solicitors' claim to a lien or potential lien needs to be express or not. In my judgment, the language used by Sir Stephen Sedley and his examination of the analogy with equitable assignment in *Khans*, strongly suggests that such notice needs to be express.

25. Mr Budworth submits that the insurer knew of the CFAs and was therefore on notice of the solicitors' entitlement of costs, and in Mr Grannell's case this was express. He relied upon the acceptance of Mr Burns in cross examination that if a client didn't accept the offer, the process would have to continue through the portal. The aim of the protocol is to ensure a defendant pays the claim and fixed costs. An insurer who contacts a client directly using information received through the portal knows it might have to pay such costs. There is no need for express notice where an insurer knows how the system works.

26. In my judgment this knowledge is insufficient to amount to the notice contemplated by the court in *Khans.* There is no evidence that, or from which it can be inferred that, the insurer knew of the contractual terms as to payment between the clients and the solicitors, other than whether the cooling off period had expired. The only indication as to that was given by Mr Tonkin, and that suggests that it had not, as indeed was the case, and so he like the other clients came to the settlement at a time when his or her CFA with the solicitors was cancellable.

27. Accordingly I am not satisfied that grounds for interference by the court with the settlements have been made out. I turn next to the second cause of action.

28. Again, counsel have helpfully agreed some (although not all) propositions of law in respect of the tort of inducing a breach of contract, which are drawn in the main from the decisions in *DC Thomson and Co Ltd v Deakin* [1952] 1 Ch 646, *OBG Ltd v Allan* [2007] UKHL 21, and *Meretz Investments NV v ACP Ltd* [2008] Ch 2445. The agreed propositions, as applied to the facts of this case, include:

    i) Inducing a breach of contract is an accessory liability in tort. It can only be committed as an accessory, where there is an actionable breach of contract by the clients;

    ii) There must be an actual breach by the client of his or her contract with the solicitors,

    iii) The insurer must have notice of the contract and its terms, although that can arise by wilfully ignoring the obvious.

    iv) The insurer must have induced the breach of contract by the client.

    v) The insurer must have known it was inducing the breach of contract.

29. In respect of proposition iv), such inducement can be by encouragement, threat or persuasion, so long as such acts have a sufficient causal connection with the breach (see Lord Hoffman in *OBG* at paragraph 36).

30. There is an issue between the parties as whether recklessness is sufficient for the knowledge required by proposition v), as opposed to that required by proposition iii). At paragraph 62 in *OBG,* Lord Hoffman said:

> "If someone knowingly causes a breach of contract, it does not normally matter that it is the means by which he intends to achieve some further end or even that he would rather have been able to achieve that end without causing a breach."

31. The solicitors rely on the following breaches of the CFAs, by reference to the guidance which was incorporated into the CFAs:

    i) Failing to pay the solicitor's basic charges, disbursements and success fee (page 2 of the guidance);

    ii) Failing to give the solicitors instructions to allow it to do its work properly and failing to cooperate (page 4 of the guidance);

    iii) Failing to provide the solicitors with an opportunity to agree the success fee (page 4 of the guidance);

    iv) Agreeing a settlement to which the solicitors did not consent involving payment of the success fee at a lower rate than that set in the CFAs (page 5 of the guidance); and

    v) Failing to pay the settlement cheque into a designated account (page 5 of the guidance), which, the solicitors say, must also apply to a BACS payment, which is how the payments were made in this case.

32. I have already made a finding as to the first alleged breach. If I am wrong about that, the insurer accepts that a term is to be implied into the CFAs as to the time for payment in order to give them business efficacy, but also relies upon the provisions of the Solicitors Act 1974, section 69(1) of which provides:

> "Subject to the provisions of this Act, no action shall be brought to recover any costs due to a solicitor before the expiration of one month from the date on which a bill of those costs is delivered in accordance with the requirements mentioned in subsection (2)..."

33. It appears that only Mr Mohsin has been billed. On behalf of the insurers it is submitted that an implied obligation cannot make payment due before the right to payment could be enforced, and the breach must be actionable. I accept that submission.

34. In respect of the other alleged breaches, the CFAs do not contain any term preventing any direct contact or settlement between the clients and the insurers. Indeed such contact might be expected to deal with any vehicle damage. On behalf of the insurer it is submitted that the requirement to give instructions and to co-operate with the solicitors do no more than require the client to provide the solicitors with instruction when required, to follow advice and to respond to reasonable requests. Moreover, the guidance does not require the client to seek the recovery of costs but explains their ability to do so. The terms relating to the level of the recoverable success fee only applies where recovery of costs is being made. As to the fifth alleged breach, there is no reason to interpret this part of the guidance other than literally.

35. Again I accept those submissions. In my judgment clear words would be needed to restrict the ability of the client to speak to the insurer direct or to settle his or her claim without involving the solicitors. None of the terms relied upon are clear enough to restrict such an ability.

36. If I am wrong about that, then for the reasons already given I am not satisfied that the insurer knew of the terms or that it knowingly induced any breach. It accepts that its claim handlers told Mr Tonkin to cancel his CFA, but that was, so far as it knew, during the period when he could legitimately do so. A similar indication was given to Mr Grannell, but that was after the settlement had been made.

37. Both counsel, in very thorough and well presented arguments, made other points on this and other parts of the claim, but in view of the findings I have made, and with due deference to counsel's industry, I need not deal with them.

38. I do however, have to deal with the third cause of action, in respect of which yet again counsel have substantially agreed the propositions of law derived from the opinion of Lord Hoffman in *OBG,* which as applied to this case can be summarised as follows:

    i) Causing loss by unlawful means is a tort of primary liability;

ii) The unlawful means must involve interference by the insurer with the clients ability to deal freely with the solicitors;

iii) The actions of the insurer must be actionable by the clients, although it is sufficient if they would have been actionable if the clients had suffered loss and the only reason they are not actionable is that there was no such loss.

39. The first unlawful means that is relied upon by the solicitors is a breach of the protocol. I do not accept that there was such a breach. The protocol is not mandatory. There may be adverse cost consequences in not using the portal if the court takes the view that such non use was unreasonable, but that in my judgment does not render its non use unlawful.

40. The second such means is particularised as a misuse by the insurer of confidential information, and in particular the information on the CNF including that relating to the respective injuries of the clients. It is not in dispute that such information was confidential and was used by the insurers when settling with the clients. To do so behind the back of the solicitors, it is submitted, is a misuse. I do not accept that submission. In my judgment the information was provided on behalf of the client to the insurer of an opposing litigant for the purposes of bring a claim, and the use made by the insurer of such information was to settle such claims to the satisfaction of the clients.

41. The third and final such means is said to be a breach of the 1998 Act. The insurer accepts that in using the information on the CNF, it processed personal data within the meaning of Schedule 2, and also sensitive personal data, namely information relating to health of the clients, within the meaning of Schedule 3 of the 1998 Act, but submits that the clients gave explicit consent to the processing and that the same was necessary for the administration of justice within the meaning of those schedules. Section 4 of the 1998 Act provides that those schedules set out conditions applying to what is referred as the first principle, namely that personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless (a) at least one of the conditions in Schedule 2 is met, and (b) in the case of sensitive personal date, at least one of the conditions in Schedule 3 is also met.

42. Mr Budworth accepts that the clients gave consent for such information to be used by the insurer and that the insurer's processing of it for the purpose of providing a response to the CNF under the portal (which in the event was not needed) would be necessary for the administration of justice. Nevertheless he submits that none of them gave explicit consent for it to be used for the purpose of settlement without the involvement of the solicitors. Moreover, although for this particular purpose may be desirable from the insurer's view, it is not necessary for administration of justice.

43. I cannot see the justification for such a fine distinction as to the purpose of the processing set out in the 1998 Act. Although, as I have already indicated, use of the portal was not mandatory and although one of its aims was the payment of costs, its aims also included that damages are paid within a reasonable time, and without the need for proceedings. That aim was achieved in the respective claims of the clients. For that aim to be achieved it was necessary to put the data onto the CNF and for the insurer to process such data. In my judgment the insurer had explicit consent to do so and furthermore that was necessary for the administration of justice.

44. Again, counsel made other points in relation to this cause of action, which because of my findings I need not deal with.

45. For all those reasons, the claim is dismissed.