Phillip Garritt-Critchley and Others v Andrew Ronnan, Solarpower PV Limited

Positive/Neutral Judicial Consideration

Court
Chancery Division

Judgment Date
3 February 2014

Case No: 2MA30319

High Court of Justice Chancery Division Manchester District Registry

[2014] EWHC 1774 (Ch), 2014 WL 2194680

Before: His Honour Judge Waksman, QC

Monday, 3 February 2014

HHJ Waksman QC sitting as a Judge of the High Court

Representation

Mr A Barden (instructed by Pannone LLP) appeared on behalf of the Claimants.
Mr G Maynard-Connor (instructed by Hill Dickinson LLP) appeared on behalf of the Defendants.

Approved Judgment

His Honour Judge Waksman QC:

1. The second matter with which I have to deal with today concerns the claimant's application for their costs to be paid by the defendant on an indemnity rather than a standard basis for the whole costs of the action. That application requires me to say a little more about the nature of the claim, the amounts claimed and how it has proceeded.

2. The letter before claim which was written on 24 February 2012, it being recalled that the terminal incident between the parties, if I can put it that way, was a meeting on 3 January of that year. The letter set out the case for saying that there had been an agreement that shares would be issued and paragraph 5.8 of that letter put the value of the claim at that stage at £208,000. It required proposals for payment but nonetheless the last paragraph read thus:

> "Notwithstanding the above, our clients are willing to enter into an appropriate form of ADR, such as mediation at the appropriate time. We therefore hope that the issue of proceedings will not be necessary."

3. The response from those acting for the defendants was to not engage with that offer of mediation at that stage. The matter resurfaced when allocation questionnaires were filed. In the allocation questionnaire the defendants made plain that they were not prepared to engage in any settlement activity and they did not want the court to arrange a mediation in the event of a stay. The allocation questionnaire gave as the reason that "the parties are too far apart at this stage".

4. When asked in correspondence why they were not willing to mediate after their allocation questionnaire had been noted by the claimants they said that:

> "Both we and our clients are well aware of the penalties the court might seek to impose if we are unreasonably found to refuse mediation, but we are confident that in a matter in which our clients are extremely confident of their position and do not consider there is any realistic prospect that your client will succeed, the rejection is entirely reasonable."

They then went on to reject the notion of the court directing expert evidence on the basis that since there never was any actionable claim for the shares, there was no point in an expert being called. That perhaps takes optimism to a new level, because obviously the court has to proceed upon the basis that liability may be established and quantum will be relevant. As indeed both parties did agree ultimately.

5. The correspondence went back and forth but a fair summary is to say that the claimants kept referring to the sense of having a mediation and the defendants kept saying that they were not prepared to do so because of confidence in the success of the defence and the witness statement of Mr Barnard exhibits numerous pieces of correspondence to that effect.

6. The matter came before District Judge Khan on 28 May, where he gave directions to trial. And at paragraph 8 he recorded that:

> " … the court considers the overriding objective would be served by the parties seeking to resolve the claim by mediation, the parties will no less than 21 days before trial file in a sealed envelope a witness statement which explains why a party refused to attend mediation."

7. That was a theme which was taken up again by the claimants' solicitors on 30 August and they repeated the offer, which was rejected shortly thereafter. The matter proceeded until 4 November and at that point the claimants having said that they will be willing to settle for something like £170,000 plus their costs and the evidence coming in suggested it might be considerably more than that, they produced a new Part 36 offer which said that they would take £10,000 in total plus their costs to-date. The period for accepting that offer expired without it being accepted. On 14 December a counter-offer in Part 36 form was produced by the defendants which was that the claimant should discontinue and the defendants would take three-quarters of their costs.

8. In a final attempt at negotiation, and despite the fact that the claimants thought that if the Defendants' best offer was simply that the claimants should discontinue and pay three-quarters of the defendants' costs, there was not much point in settling, they said this in a letter of 12 December:

> "However, if your clients are prepared to negotiate constructively, rather than inviting our clients simply to discontinue, then we may be able to progress matters."

And they said in paragraph 1.6 that they are willing to conduct further negotiations in correspondence.

9. This trial started on 14 January 2014 and there was therefore the opportunity for a final attempt to have some negotiations which could be by way of mediation or not, still being canvassed by the claimants and still being refused by the defendants. The trial took place over four days but before I gave my judgment which would have been today, the defendants decided to accept, out of time, the offer to pay the claimant £10,000 and pay all of their costs, at least on a standard basis.

10. I am asked to grant an indemnity costs order principally on the basis of an unreasonable failure to engage in mediation. I uphold that contention for the following reasons, and in giving those reasons I accept that since it is the claimants' application for indemnity costs it must justify it and if it wishes to persuade the court that a party has acted unreasonably in whatever way then it must satisfy the court that that has happened, so I accept the burden of proof is on the claimant.

11. This was an action of a fairly typical kind where the allegation was whether a binding agreement had been made or not. As is evident from the lack of cases or authorities put before me prior to my giving judgment, this was essentially a question of fact applying well-known contractual principles, in relation to a contract which did not itself require to be in writing. It therefore, was a very fact intensive and evidence intensive exercise where the court would have to judge the credibility of their witnesses and look at the importance or otherwise of contemporaneous documents and the commercial sense or otherwise of each side's case. That is classically a case where both parties needed to engage in a risk analysis as to whether their side of the coin would be accepted or not.

12. The second aspect of this claim was that there was an obvious sliding scale of a compensatory award if the claimants succeeded. This was not an all or nothing case on quantum where the parties would have to agree that if liability was established the obvious amount of damages would be X. This was a case where the services of an expert, therefore a matter of opinion, was required, in order to see what the range of awards would be and as was apparent to me in the course of the trial and the points being taken, the range was really very considerable indeed.

13. That again is a classic matter where mediation should be considered because there is ample room for manoeuvre within the wide range of possible quantum scenarios. Unfortunately, as it seems to me, the defendants did not approach this matter in the correct way at all. I take as my starting point the leading Court of Appeal authority of Halsey and I will refer to this as I look at the reasons for the failure to mediate given by Mr Tyrrell of the defendants' solicitors in his witness statement of 24 December.

14. His first point is that this is not a claim which provides any natural middle ground between the parties because it centres on whether a concluded agreement was reached. But that is usually the case on liability: it usually is a binary issue. There

may be various liability outcomes in a more complex case but in a simple case the question is going to be, “Was there a breach of duty of care? Was there a breach of contract? Was there a contract?”; and so on and so forth. To consider that mediation is not worth it because the sides are opposed on a binary issue, I'm afraid seems to me to be misconceived.

15. The points on the nature of the dispute raised in Halsey indicate that the sort of case where exceptionally its nature might rule out mediation will be where the party wishes to resolve a point of law, considers a binding precedent would be useful, or in cases where injunctive or other relief is essential to protect the parties. But paragraph 17 concludes, “In our view most cases are not by their very nature unsuitable for ADR.” In my judgment, this case by its very nature was eminently suitable for ADR as the claimants appreciated in their first letter.

16. Paragraph 5A of Mr Tyrrell's witness statement goes on to say that the defendants are “confident that no agreement will ever be reached”. I am not going to make pronouncements in a judgment which I am not now giving. All I will indicate is that given the nature of this dispute, it does not seem to me to be realistic for someone in the position of Mr Ronnan to say that all the odds are so stacked in his favour that there is really no conceivable point in talking about settlement.

17. Indeed if that had been his view then it is surprising that no application for summary judgment was ever made, which it was not. Of course the reason why it was not is because there was evidence going both sides: both sides were relying on documents and the inferences which could or could not be reasonably drawn there from. So to say “extreme confidence”, does not, in my judgment, seem to be a reasonable position to take. And that really is reinforced by what is said in paragraphs 18 and 19 of Halsey about the merits of the case:

> “Borderline cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way.”

And quoting from Mr Justice Lightman in the case of Hurst v Leeming :

> “The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants.”

And I endorse that observation.

18. The next point taken by Mr Tyrrell is that it was highly relevant to the decision not to mediate that there was a considerable dislike and mistrust between the parties, which may be a factor in the claim being brought originally. That is very often the case unfortunately in relation to parties to litigation. All one can say, at least as far as the claimant is concerned, is that they at least were prepared to mediate from the word go. And in any event it is precisely where there may be distrust or emotion between the parties, which it might be thought is pushing them down the road to an expensive trial, where the skills of a mediator come in most usefully. They are well trained to diffuse emotion, feelings of distrust and other matters in order that the parties can see their way to a commercial settlement. So I consider that that is a reason which does not have any real foundation either.

19. It is right to say that the parties had been involved in some earlier litigation which caused the rift to widen even further. But again those are matters which a mediator should consider and can deal with. On that point it is worth noting that in one of those earlier pieces on litigation where in fact these claimants or one of these claimants was defendant and won and where some pronouncements were made in passing on matters that were raised before me, the learned judge having given judgment said this:

> "The profits generated have come to an end, I would urge the parties to see if there is a way in which they can reach a settlement of the issues between them. The company is not trading at the end of the day. The claimant, Mr Garritt-Critchley, is only going to be looking for a payment of money. There will have to be some payment made if the case goes against you." [To Mr Ronnan:] "I don't know if there has been any attempt at mediation, it strikes me that this sort of case, where the parties have had a relationship a number of years before this blew up where mediation might be a fruitful way forward. I would urge you to explore that option which will keep everybody's costs down in the run up to that case."

It does not surprise me at all that the judge made that observation, it should have been taken on board.

20. This is not a case where there have been other settlement attempts made, so that the party resisting mediation can say, "Well we've had a very lengthy and detailed round table discussions, they have not gone anywhere and it's not sensible to spend any money on the case." That did not happen here at all.

21. At paragraph 5C, Mr Tyrrell said that the claimants' approach had not assisted the matters. Principally the defendants' concern was that the claimants considered the claims worth a substantial six-figure sum and they point out why they say that and they point out the previous offer which was £120,000, whereas the defendants have always considered the claim in a small company with limited value.

22. This gets back to the point about parties being too far apart. Parties don't know whether in truth they are too far apart unless they sit down and explore settlement. If they are irreconcilably too far apart, then the mediator will say as much within the first hour of mediation. That happens very rarely in my experience.

23. There is no question of delay arising here but there is a further point which arises and Mr Tyrrell deals with it in paragraph 10 and, of course, this was the witness statement he wrote after the claimants had made a revised offer, significantly reducing what they wanted to £10,000. So that was an offer which could have been accepted in late last year before this trial. And what he said was this:

> "The defendants have … recognised that a day of mediation is likely to cost as much as the value of the latest offer, and that, accordingly, they consider the cost of mediation to be disproportionate to the sums involved in the claim."

And then they say that they refer to, without prejudice, negotiations by correspondence.

But I agree with Mr Barden that that seems to me to be misconceived. The point is that you compare the costs of a mediation with the costs of a trial. And the costs of a mediation, on any view, would have been far less than the costs of the trial, as both parties costs figures demonstrate.

24. Indeed it might be thought that where the claim is in lower figures there is even more of a reason to mediate than otherwise and that is particularly true here because the last stab at mediation or some sensible detailed negotiations was made by the claimants after their Part 36 offer had been made. Where apart from the question of costs, the difference between the parties would have been very slight indeed. And by that stage the claimants' costs estimate was only a costs estimate with some £65,000, whereas its total costs bill now is some £161,000.

25. But in my judgment it is not just a matter of not seizing the opportunity to negotiate at the late stage, though it would have saved everyone a vast amount of money. It was a continuing failure to engage with the process from the word go and the reasons that have been given simply don't stack up and don't accord with the authorities in my view.

26. Mr Barden makes a separate point about making unrealistic offers. I agree that if the defendants' final ground really was three-quarters of their costs should be paid with the claimant having to discontinue the action, that is not a very fruitful way forward but it is plain from Pannone's letter in December that they didn't necessarily regard that as their last shot, nor should the defendants. Nor, in fact, did they and this is the significance of what happened afterwards because at the end of the day, after the trial the defendants did accept the claimants' offer meaning that they paid £10,000 plus all of the claimants' costs, at least on a standard basis.

27. For all of those reasons I think that the failure to engage in mediation or any other serious ADR was unreasonable.

28. I make just these final of points. Mr Maynard-Connor has referred me to the PGF case and in that case he has drawn my attention to paragraph 30 which talks about the ADR handbook: not ignoring an offer, responding promptly, not closing it off and raising any shortage of information. None of that assists the defendants here. They did respond, they gave reasons but they were misconceived. So the fact that they responded promptly each time a letter was written is neither here nor there. It wasn't a question of shortage of information being an obstacle. And not closing off ADR of any kind and for all time, effectively that is what the defendants, I'm afraid to say, were doing here, so that case really doesn't assist Mr Maynard-Connor.

29. None of what I have just said is meant to be discouraging parties from accepting Part 36 offers late, I am not dealing with that matter at all. I take note of what was said by Mr Justice Coulson in the Fitzpatrick case, but this case essentially is not about the late acceptance of an offer though it has provoked this debate before me, it is about the unreasonable failure to engage in a mediation.

30. Now I have one more submission from Mr Barden, which was not at the forefront of his earlier submissions, which invited me to express some view about the evidence in the case when I haven't given a judgment amounting to whether there has been some further unreasonable conduct, deception on the part of the defendants. I simply decline to engage in anything of that kind, it does not seem to me to be appropriate in the circumstances where I am not giving a judgment so I simply take no note of that submission and I indicate that I did not wish to hear from Mr Maynard-Connor on it.

31. Mr Maynard-Connor has made a final point which really deals, I suppose, with quantum more than anything else, which is if I were against him on principle, I should make some deduction or carve-out for the fact that the trial costs appear to be high in this case. I see why he made this submission, because we already know that £7,000 in relation to the hearing bundle was incurred out of £14,000 for trial preparation and he says that it looks as if two representatives of the claimants' solicitors were in court all the time, although Mr Barden has told me that that is not the case. I don't consider that it is right for me to start making carve-outs if I take the view overall that indemnity costs are appropriate, especially as I take the view that one of the significant defects of this failure to engage in mediation was that this trial took place at all. But it doesn't stop me from making two observations for the purpose of any detailed assessment, albeit on an indemnity basis. I have already expressed the view that £7,000 for a hearing bundle seems very high. And proportionality quite apart, that may well be a matter which the cost judge will have to consider even bearing in mind the burden of proof when he considers reasonableness.

32. The second is that if there has been duplication of representatives at this relatively short trial, that is another matter which the costs judge may well feel he needs to take into account when considering reasonableness quite apart from proportionality. Beyond that I am not prepared to go. I think I should tell the parties that although in the end I decided it was not my place once the trial had started to make these points, since the parties had come to trial and decided to fight the matter, it did occur to me at the outset to wonder why it was that this case had not settled before it got to this stage. I'm sorry that my reasons have taken rather longer than I anticipated, I think Mr Barden, that simply leaves your application for an interim payment.

33. The order will be: 1) that the defendants do jointly and severally pay the claimants costs on an indemnity basis to be subject of detailed assessment if not agreed (save as provided in paragraph 3 below), save that the claimants shall only be entitled to 50 per cent of their solicitors' costs of preparation of the trial bundle; 2) the defendants shall jointly and severally make a payment on account of such costs to the claimants in the sum of £80,000 plus VAT to be paid by 4.00 pm on Monday, 3 March; and 3) the defendants to pay the claimants' costs of today to be assessed on standard basis if not agreed.