

ENGLAND AND WALES / JUDGMENT

Phillips v Willis

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Neutral Citation Number: [2016] EWCA Civ 401 IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM NEWCASTLE (HIS HONOUR JUDGE FREEDMAN)

- UPON
- TYNE COMBINED COURT CENTRE B3/2014/2997 Royal Courts of Justice Strand London WC2A 2LL Tuesday, 22 March 2016 Appellant/Claimant Respondent/Defendant B e f o r e:
LORD JUSTICE JACKSON LORD JUSTICE FLOYD LADY JUSTICE MACUR
- ----- Between: MR SEAN PHILLIPS v MISS CAROL WILLIS
- ----- DAR Transcript of WordWave International Limited trading as DTI
165 Fleet Street London EC4A 2DY Tel No: 020 7404 1400 Fax No: 020 7404 1424 (Official
Shorthand Writers to the Court)
- ----- Mr Nicholas Bacon QC & Mr Timothy Chelmick (instructed by Winns
Solicitors) appeared on behalf of the Appellant Mr Steven Turner (instructed by Keoghs LLP)
appeared on behalf of the Respondent
- ----- J U D G M E N T LORD JUSTICE JACKSON: This judgment is in three
parts, namely: Part 1. Introduction, Part 2. The facts, Part 3. The appeal to the Court of
Appeal. Part 1. Introduction This is an appeal by a claimant against a case management
decision in an action where the sum claimed was only £3,486. Despite that circumstance,
there is an important issue of principle at stake, which merits an appeal to the Court of
Appeal. Approximately 800,000 cases per year are dealt with under the rules which we are
being asked to construe. The issue in this appeal is how the court should deal with low value
road traffic accident claims where the personal injury element has been resolved and only a
modest dispute about car hire charges remains. In this judgment, I shall use the following
abbreviations: "CPR" means Civil Procedure Rules, "PD" means practice direction, "RTA"
means road traffic accident, "CNF" means claim notification form. I shall use the phrase
"RTA Protocol" to describe the Pre-action Protocol for Low Value Personal Injury Claims in
Road Traffic Accidents, which was in force during the period leading up to 30 July 2013. On
31 July 2013, a different version of that protocol came into force, which does not apply to the
present claim. I must at the outset say something about the changes which were effected at
the end of July 2013. The earlier and the later versions of the protocol had important
similarities and important differences. The main similarity was that both prescribed fixed
costs for cases within their ambit. The important difference was this. Cases which dropped

out of the earlier version fell under the general provisions of the small claims track or the multi track or fast track. Cases which dropped out of the later version fell into a newly created fixed costs regime. The RTA Protocol with which we are concerned sets out the procedure to be followed for all RTA claims involving personal injury, where the damages sought are within specified limits. The procedure comprises three stages. At Stage 1, the claimant submits a CNF with supporting documents and the defendant's insurers respond. If the defendant admits full liability, the case stays within the protocol and proceeds to Stage 2. The claimant submits a Stage 2 settlement pack, comprising: (1), the Stage 2 settlement pack form; (2), a medical report or reports; (3), evidence of pecuniary losses; (4), evidence of disbursements (for example the cost of any medical report). The defendant then either accepts the claimant's offer or submits a counter-offer by setting out his proposed figures on the Stage 2 settlement pack form. The settlement pack may go back and forth between the parties as each side puts forward revised figures. The Stage 2 process leads, or should lead, to a narrowing of issues. Individual heads of claim may be agreed. Indeed, all heads of claim may be agreed. Thus it can be seen that the case may settle during either Stage 1 or Stage 2. If the case does settle, the defendant must pay to the claimant the fixed costs figures prescribed. The defendant is not allowed to settle on terms which exclude the fixed costs. In the absence of any settlement, at the end of Stage 2, the claimant sends to the defendant a court proceedings pack. This pack sets out the claimant's claimed losses, the defendant's responses, and the final offers of both sides. It also includes the evidence that both sides have submitted during Stage 2. The defendant then pays to the claimant the amount of the defendant's final offer together with all fixed costs due up to the end of Stage 2. The case then proceeds to Stage 3, which is litigation. At this point, Practice Direction 8B takes centre stage. PD 8B requires the claimant to issue proceedings in the County Court under CPR Part 8. The practice direction substantially modifies the Part 8 procedure so as to make it suitable for low value RTA claims where only quantum is in dispute. This modified procedure is designed to minimise the expenditure of further costs and in the process to deliver fairly rough justice. This is justified because the sums in issue are usually small, and it is not appropriate to hold a full blown trial. The evidence which the parties can rely upon at Stage 3 is limited to that which is contained in the court proceedings pack. A court assesses the items of damages which remain in dispute, either on paper or at a single "Stage 3 hearing". I shall refer to the entire process established by the RTA Protocol and PD 8B as "the RTA process". In the summary which I have given of the RTA process I have omitted reference to the problems which arise if the claimant is a child or if the end of the limitation period is approaching. There are special provisions dealing with those complications, but those provisions are not relevant to the present case. There are provisions dealing with other complications in the protocol, which also are not relevant to the present case and which I pass over. For present purposes, I shall refer collectively to the provisions of the RTA Protocol, PD 8B and CPR Part 8 as modified by PD 8B as "the rules". It is important to note that the RTA process has an inexorable character. If a case falls within the parameters of the RTA process, the parties must take the designated steps or accept the consequences. The rules specify what those consequences are. The rules also specify when a case must remain

in the RTA process, when it must drop out of the process, and when it may drop out of the process. The provision which is of particular importance to the present case is section 7 of PD 8B. This relates to Stage 3 of the process. It provides: "7.1. The parties may not rely upon evidence unless --

- (1) it has been served in accordance with paragraph 6.4;
 - (2) it has been filed in accordance with paragraph 8.2 and SMITH BERNAL WORDWAVE 11.3; or
 - (3) (where the court considers that it cannot properly determine the claim without it), the court orders otherwise and gives directions. 7.2. Where the court considers that --
 - (1) further evidence must be provided by any party; and
 - (2) the claim is not suitable to continue under the Stage 3 procedure, the court will order that the claim will continue under Part 7, allocate the claim to a track and give directions. 7.3. Where paragraph 7.2 applies the court will not allow stage 3 fixed costs."
13. Having summarised the relevant rules, I must now turn to the facts. Part 2. The facts
 14. On 28 June 2013, a car driven by the defendant pulled out of a side road and collided with a Vauxhall Astra car driven by the claimant. The Astra was damaged beyond repair and the claimant sustained personal injuries, principally whiplash. If the claimant wished to make a claim in respect of these matters, he was obliged to, and did, proceed under the RTA Protocol.
 15. On 29 June 2013, the claimant hired an alternative car, namely a Vauxhall Corsa, from a company called On Hire Limited. On 1 July 2013, the claimant's solicitors submitted a CNF to the defendant's insurers, claiming both general and special damages. On 15 July 2013, the defendant's insurers acknowledged the claim and admitted liability. On 23 July, the defendant's insurer paid to claimant the full value of the Astra which had been written off. The claimant then terminated his car hire arrangement with effect from 30 July 2013.
 16. On 10 September 2013, the claimant submitted the Stage 2 settlement pack to the defendant's insurers. The three specified heads of damages were as follows. Hire charges £3,486; physiotherapy treatment £571; general damages £2,500. Details of the period of hire, the rate of hire and all associated costs were attached to the Stage 2 settlement pack. On 24 September 2013, the defendant's insurers responded to the Stage 2 settlement pack. The claims for treatment and general damages for personal injury were agreed. An offer of £2,334 was made in respect of car hire. Thereafter, exchanges continued between the parties in accordance with Stage 2 of the RTA process, but no settlement was achieved.

17. On 29 January 2014, the claimant moved to Stage 3 of the process by issuing a claim form under CPR Part 8 in the Gateshead County Court. The claim form stated that the SMITH BERNAL WORDWAVE claimant required an oral hearing, rather than a paper determination of quantum of damages. On 7 March 2014 the court notified the parties that the hearing of the assessment of damages would be on 9 April 2014.
18. On 9 April 2014, counsel for both parties duly attended court, ready to argue the quantum issues. Events then took an unexpected course. District Judge Howard was presiding. He informed the parties that since the only issue between them was the proper amount of car hire charges, the action would proceed under CPR Part 7 on the small claims track. He made an order to that effect and fixed a fresh hearing date of 12 June 2014. He also gave directions, to which I shall return later in this judgment.
19. The claimant was aggrieved by the district judge's order and appealed to a circuit judge. His Honour Judge Freedman heard the appeal on 8 July 2014. He dismissed the claimant's appeal and upheld the district judge's order. He stated that the district judge had made a case management decision in the exercise of his powers under PD 8B paragraph 7.2. An appellate court could not interfere with that decision.
20. The claimant was aggrieved by the circuit judge's order. Accordingly, he appealed to the Court of Appeal. Part 3. The appeal to the Court of Appeal
21. By an appellant's notice filed on 10 September 2014, the claimant appealed against the circuit judge's order on grounds which have undergone fairly drastic amendments over the last two years. Those grounds of appeal now present a bewildering kaleidoscope of red, green and black. Despite all that colourful pleading, there is really only one issue in this case. That is the issue identified by the circuit judge. The issue is whether the district judge had power under paragraph 7.2 of PD 8B to order that the claim should continue under Part 7.
22. The appeal has been argued today very fully by counsel on both sides, with an abundance of documentation and an overflowing bundle of authorities. Mr Nicholas Bacon QC for the appellant submits that the two preconditions set out in paragraph 7.2 were not satisfied. He submits that no further evidence was needed to enable the court to determine the outstanding damages issue. Furthermore, the claim was perfectly suitable to continue under the Part 8 procedure. Mr Steven Turner for the defendant submits that the district judge was entitled to take the view that further evidence was necessary and that the case was not suitable for the Part 8 procedure.
23. Let me first look at the evidence before the court on 9 April 2014. That evidence comprised only (and was required by the rules to comprise only) the documentation which the parties had exchanged during Stage 2. That documentation included a witness statement by Mr Chris Cullingworth, the manager of On Hire Limited. It will be recalled that On Hire Limited was the company from which the claimant had hired a replacement vehicle.

24. The exhibit to Mr Cullingworth's statement includes a very helpful schedule of comparative figures. This schedule shows exactly how the actual car hire costs SMITH BERNAL WORDWAVE incurred by the claimant were made up. The claimant hired a Vauxhall Corsa car with an engine size of 1,229 cc. The gross daily rate was £78. There were additional charges of £25. There was a delivery and collection charge of £30. The schedule shows that if the claimant had hired a Peugeot car from Avis with a similar engine capacity, and if he had done so on a daily rate comparable to that upon which he hired the Corsa, the charge would only have been £2,866.56. Furthermore, if the claimant had hired the Peugeot car from Avis on a weekly hire rate rather than a daily hire rate, the cost would have gone down to £2,404.80. The schedule very helpfully shows exactly how these various figures are made up.
25. 26. 27. If the defendant's insurers disputed Mr Cullingworth's figures, they could have obtained and put in separate evidence to show that cheaper hire rates for appropriate vehicles were available, but the insurers did not do that. Mr Sangha, who was the defendant's counsel at the hearing on 9 April 2014, explained to the district judge that he proposed to argue the case on the basis of Mr Cullingworth's figures. He did not have much choice, as his clients had chosen not to get any evidence of their own. Mr Sangha made it clear that he did not take any point on impecuniosity. He did not dispute that a period of 32 days was a reasonable hire period. In those circumstances, although the district judge did not actually allow either side the chance to develop their submissions, it is quite clear what Mr Sangha was going to argue. He was going to point to Mr Cullingworth's schedule and to say that the claimant had failed to mitigate his loss. The claimant should have hired a Peugeot car from Avis. On any view, the costs would not have been more than £2,866.56. Mr Sangha would probably have gone on to argue that the claimant should have further mitigated his loss by hiring the Peugeot from Avis on a weekly rate rather than a daily rate. However, neither counsel had the opportunity to develop those interesting arguments, because the hearing took the course which I have outlined in part 2 of this

judgment.

In the course of argument today, the court inquired of Mr Turner what further evidence the district judge could possibly need in order to assess damages. Mr Turner said that oral evidence from the claimant would be necessary to determine whether it was reasonable to hire a replacement vehicle on a daily basis as opposed to a weekly basis. Mr Turner very candidly conceded that he could not point to any other evidence that was necessary for resolution of the damages issue.

28. The amount of money which turned on this particular issue was just £462, as Lord Justice Floyd pointed out during argument. Neither party at the hearing on 9 April 2014 sought an adjournment in order to obtain further evidence for the purpose of resolving that question. It is hardly surprising that neither party sought an adjournment. That would be a grossly disproportionate step to take, and unlikely, one would have thought, to give rise to a successful application. The district judge, however, caused the parties to incur substantial extra costs as a result of the order which he made of his own motion.

29. The costs which the district judge caused the parties to incur were totally disproportionate to the sum at stake. First, the parties would have to pay a further court SMITH BERNAL WORDWAVE fee of £335 as a result of the district judge's order. Secondly, the parties would incur the costs of complying with the district judge's elaborate directions. Those directions read as follows: "1. The parties must file at the court and serve on the other party not later than 14 days before the hearing the following:
- (a) copies of all documents upon which they wish to rely;
 - (b) statements of all witnesses (this includes both the claimant and the defendant) upon whose evidence you wish to rely. The statements shall be typed, dated and signed by the witness and stating that he/she believes that the facts stated in the witness statement are true.
2. All original documents must be brought to the hearing.
3. Parties should note that if they do not file and serve documents and statements as set out above then the court may decide not to admit the evidence of the party in default.
4. If the claimant wishes to raise the issue of impecuniosity, then the claimant's witness statement must include the following evidence:
- (a) wage slips for the period of three months pre-accident and covering the period of hire;
 - (b) copy bank statements and savings books for a period of three months pre-accident and covering the period of hire;
 - (c) copy credit card statements for a period of three months pre-accident and covering the period of hire.
5. Should the claimant fail to comply with paragraph 4 of these directions, the claimant shall be debarred from raising impecuniosity at the final hearing.
6. Each party is permitted to rely on a short survey of spot hire rates in the claimant's locality, as recommended by the Court of Appeal in *Burdis v Livsey* [2003] QB 36. These surveys are to be exchanged no later than 14 days before the hearing.
7. The claimant shall attend the final hearing to give oral evidence unless the defendant has agreed in writing to dispense with such attendance." 30. I dread to think what doing all that would have cost, but that was not the end of the matter. Both parties would need to instruct representatives to attend the further hearing. They would also have to write off the costs of the 9 April hearing. At the end of all SMITH BERNAL WORDWAVE 31. 32. that, the winning party would recover virtually no costs, because the case was now proceeding on the small claims track. In my view, the district judge's decision taken on 9 April 2014 that further evidence was necessary to resolve the outstanding dispute between the parties was irrational. The district judge was not entitled to reach that conclusion. I turn now to paragraph 7.2(2) of PD 8B. Mr Turner points out in paragraph 38 of his skeleton argument that by the time this case reached Stage 3, the personal injury element of the claimant's

claim had been settled. That personal injury element was the "gateway" which, back in July 2013, had enabled the claimant to enter the RTA process.

33. That observation is perfectly correct. It is also irrelevant. Once a case is within the RTA protocol, it does not automatically exit when the personal injury claim is settled. On the contrary, the RTA process is carefully designed to whittle down the disputes between the parties as the case passes through the various stages. It is to be expected that the sum in issue between the parties will be much smaller when the case reaches Stage 3 than it was back in Stage 1. The mere fact that the personal injury claim has been resolved is not specified as being a reason to exit from the RTA process.
34. I therefore come to the conclusion that this case did not fall within the ambit of paragraph 7.2 of PD 8B. The district judge had no power under that paragraph to direct that the case should proceed under Part 7.
35. There has been some debate as to the circumstances in which paragraph 7.2 of PD 8B might apply. We do not need to decide that question today. I should, however, point out that there can be cases where, as a consequence of paragraphs 4.6, 6.4(1), 7.43 and 7.44 of the protocol, claims are proceeding under the protocol which involve very high car hire charges. Such cases might involve complex issues of law or fact which are not suitable for resolution at a Stage 3 hearing. I need not speculate what orders the court might make in those cases. Suffice it to say that the case before us is not such a case.
36. Mr Turner has drawn our attention to CPR 8.1(3). This provides: "The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate."
37. Mr Turner submits that rule 8.1(3) enables the court to transfer a protocol case to Part 7 even if paragraph 7.2 of the practice direction does not apply. I am bound to accept that the language of rule 8.1(3) is wider than the language of paragraph 7.2 of the practice direction. On the other hand, CPR 8.1(3) cannot be used to subvert the protocol process.
38. In the present case, I do not think that the district judge was relying upon rule 8.1(3). Like the circuit judge, I believe that the district judge was relying upon paragraph 7.2 of the practice direction. If I am wrong, however, then in my view it would have been an impermissible exercise of the power under CPR rule 8.1(3) to transfer the present case SMITH BERNAL WORDWAVE out of Part 8 and into Part 7 of the CPR.
39. Let me now draw the threads together. For the reasons set out above, in my view the district judge did not have the power to make the order which he made in April 2014. If my Lord and my Lady agree, this appeal is allowed and the district judge's order is set aside.
40. LORD JUSTICE FLOYD: I agree.
41. LADY JUSTICE MACUR: I also agree. SMITH BERNAL WORDWAVE

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