Neutral Citation Number: [2020] EWCA Civ 203

Case No: A2/2019/0711

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION**
**Mr Justice Turner**
**QB/2018/0312**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 February 2020

**Before :**

**LORD JUSTICE LEWISON**
**LORD JUSTICE DAVID RICHARDS**
and
**LADY JUSTICE ROSE**

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**Between :**

| | |
|---|---|
| **HELEN BUTLER** | **Appellant** |
| **- and -** | |
| **BANKSIDE COMMERCIAL LIMITED** | **Respondent** |

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**Imran Benson** (instructed by **Innovate Legal**) for the **Appellant**
**Simon Browne QC & Alex Young** (instructed by **Bankside Commercial Limited**) for the **Respondent**

Hearing date : 18 February 2020

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# Approved Judgment

## Lord Justice Lewison:

## Introduction

1. The issue on this appeal is the interpretation of a provision in a standard form of conditional fee agreement (a "CFA") made on Law Society terms. The term in question entitles the solicitors, on termination of their retainer in certain circumstances, to payment both of their basic charges and disbursements and also their success fee if the client goes on to win her claim. What is in dispute is what triggers that entitlement. The relevant provision of the CFA expresses the trigger event as follows:

> "We can end this agreement if you reject our opinion about making a settlement with your opponent."

2. In a nutshell, Mrs Butler had a claim for damages against Metris arising out of the termination of a commercial agency. She entered into a CFA with Bankside Commercial Ltd on terms which included the above. Metris made an offer of settlement of €90,000. Bankside advised her to make a counter-offer of €90,000 plus 50 per cent of her costs. Mrs Butler did not respond to that advice. Bankside then wrote to her stating that if they did not receive final instructions by a specified deadline, they would treat their retainer as brought to an end in accordance with the CFA. Again, Mrs Butler did not respond. Bankside terminated the retainer; and Mrs Butler proceeded with her claim with different solicitors. Ultimately, she achieved an arbitration award of a little more than £40,000.

3. Bankside then presented her with a bill. On a detailed assessment between Mrs Butler and Metris, Bankside's allowable costs (including profit costs, success fee, disbursements and ATE premium) were quantified at £238,527-odd. It subsequently emerged that Mrs Butler had already paid some of the disbursements. That left a balance of £209,518-odd. There is no dispute about quantum. The dispute is about whether the terms of the CFA triggered Mrs Butler's liability to pay it. Bankside claimed that sum under the terms of the CFA. Master Yoxall gave summary judgment for that sum in their favour; and Turner J dismissed Mrs Butler's appeal. The judge's judgment is at [2019] EWHC 510 (QB), [2019] 1 Costs LR 169.

## The CFA

4. The CFA was made as long ago as June 2008. It began by stating that it was a legally binding contract and that it "must be read in conjunction with the Law Society document "What you need to know about a CFA"." Under the heading "Paying us" it stated:

> "It may be that your opponent makes a Part 36 offer or payment which you reject on our advice, and your claim for damages goes ahead to trial where you recover damages that are less than that offer or payment. If this happens, we will not claim any costs for the work done after we received notice of the offer or payment."

5. The remaining terms about payment are, for the most part, contained in the Law Society document. It is common ground that they are incorporated into the CFA. Under the heading "What do I pay if I win?" the document refers to the possibility of a Part 36 offer or payment and continues:

> "Refer to the "Paying Us" section in the CFA document to establish costs we will be seeking…"

6. Under the heading "Ending this agreement" it states:

> "If you end this agreement before you win or lose, you pay our basic charges and disbursements. If you go on to win, you also pay a success fee."

7. Under the heading "What happens when this agreement ends before your claim for damages ends?" it states:

> "(a) *Paying us if you end this agreement*
>
> You can end this agreement at any time. We then have the right to decide whether you must:
>
> - pay our basic charges and our disbursements including barristers' fees but not the success fee when we ask for them; or
>
> - pay our basic charges, and our disbursements including barristers' fees and success fees if you go on to win your claim for damages.
>
> (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 barristers' fees;
>
> - pay the success fee if you go on to win your claim for damages.
>
> If you ask us to get a second opinion from a specialist solicitor outside our firm, we will do so. You pay the cost of a second opinion."

## The rival interpretations

8. The argument for Mrs Butler is that there are two possible meanings to be given to the phrase: "if you reject our opinion about making a settlement with your opponent." The broad meaning encompasses an opinion about the client making an offer. The

narrow meaning is limited to an opinion about something which would directly result in the making of a settlement. In practice that would be restricted to advising the client to accept an offer of settlement made by their opponent.

9. The argument for Bankside is that the clear and natural meaning of the phrase is that it encompasses advice about settlement with an opponent, including advising the client to make their own settlement offer. There is no reason for departing from that clear and natural meaning.

## The judgment

10. In an admirably concise and clear judgment, the judge accepted Bankside's interpretation. At [19] he said:

> "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 [of] 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."

11. He went on to point out the differences between a case where there is no CFA, in which case the client is entitled to ignore the advice of her solicitors, and a case governed by a CFA where the solicitors themselves are at financial risk. He said at [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."

12. And at [23] he added:

> "a solicitor's opinion about making an offer, on the facts [of] 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."

## The appeal

13. Mr Benson, on Mrs Butler's behalf, advances essentially the same arguments that he advanced before the judge. The process of contractual interpretation is an iterative

process which entails both textual and contextual consideration of the contract. In some cases greater weight is given to the text; in other cases to the context. For these propositions he relies on the decision of the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

14. Here, he says, the textual interpretation favours the narrow interpretation. Making a settlement means causing a settlement to be made. It does not refer to the making of an offer which might or might not lead to a settlement.

15. Contextual considerations point in the same direction. First, at common law, solicitors' retainer is an entire contract. If solicitors do not complete the task for which they are retained, they are not entitled to be paid at all. That is also the philosophy applicable to a CFA. Solicitor and client have agreed that whether the solicitor will be paid (and if so how much) will depend on the outcome of the case. Second, the broad interpretation would allow solicitors to drop out of a case simply because they and the client disagree about whether to make an opening offer, or when to make it, or how much to offer; yet still retain their entitlement to a success fee if the client goes on to win the case. The narrow interpretation would mean that the client cannot snatch a win from the grasp of the solicitor by turning down an acceptable offer. But if the client simply disagrees with the solicitors' advice about making an offer, the solicitors remain "locked in" until the conclusion of the case. If money is on the table, the solicitors should be entitled to their fee, but not otherwise. Third, the benefits to a client who retains solicitors under a CFA in not making their own offer are small in comparison to the risk to such a client in refusing to accept an offer made by their opponent. So there is no reason for the CFA to enable solicitors, in effect, to compel the client to make an offer. Fourth, the broad interpretation sits ill with the circumstances that apply if the client decides to terminate the retainer. In that event the solicitors must elect between unconditional payment of basic charges and disbursements; or conditional payment of basic charges, disbursement and the success fee, but only if the client wins the case. If the client ultimately loses the case, the solicitors are not paid (although they will be entitled to disbursements). Clause (b) (iii) by contrast gives the solicitors an unconditional right to basic charges and disbursements *plus* the success fee in the event of a win. The solicitors, in that scenario, take no risk; and the potential entitlement to the success fee is pure upside. Fifth, if there is any doubt about the correct interpretation the doubt should be resolved in the client's favour because (a) the broader interpretation is onerous and draconian and (b) the solicitors (or what amounts to their trade union) were responsible for its drafting, and ambiguities should be resolved in favour of the consumer.

16. In my judgment, there are a number of difficulties with Mr Benson's argument. First, if (b) (iii) were limited to the acceptance of an offer already made, the clause would have said so. Although this point does not always carry weight, the fact is that both the CFA itself and the Law Society document do deal with the refusal of a Part 36 offer in terms. It cannot be said that the drafter was unaware of the possibility of accepting an offer already made. The phrase "advice about making a settlement" is a much looser expression. Second, although it is possible to point to a contrast between (a) and (b) (iii), an earlier provision in the Law Society document already (quoted above) contemplates payment of both basic charges and success fee in the event that the client terminates the retainer. The only possible reading of clause (b) (iii) is that

the solicitors are entitled to their basic charges and disbursements irrespective of the eventual outcome of the case. That is a major breach in the underlying principle of "no win no fee" upon which Mr Benson relies. Third, as the judge pointed out at [22] "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." That protection is, in essence, protection against the risk that if the client only makes a small recovery they will not be able to pay the additional costs incurred by the solicitors in pursuing the case to the bitter end. Fourth, the outcome is not entirely surprising. The CFA provided for the payment of the solicitors' costs and disbursements, and the success fee, if the client won. She did. So the outcome respects the underlying bargain. Fifth, there is no ambiguity in the words of the contract. The clause is not confined to "making" a settlement. It extends to advice "about" making a settlement. That is wider than Mr Benson's argument would allow. As a matter of ordinary English, advice "about" making a settlement includes advice to the client about making an offer of their own calculated to lead to a settlement. The words are clear, even though the result may expose the client to a greater liability than they might have expected. It is not necessary for the purposes of this appeal to attempt to delineate the outer reaches of that expression.

17. The judge summarised the position at [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."

18. I agree.

19. In *Re Portsmouth City Football Club Ltd, Neumans LLP (a firm) v Andronikou* [2013] EWCA Civ 916, [2013] Bus LR 1152, Mummery LJ said at [38]:

> "If the judgment in the court below is correct, this court can legitimately adopt and affirm it without any obligation to say the same things over again in different words. The losing party will be told exactly why the appeal was dismissed: there was nothing wrong with the decision appealed or the reasons for it."

20. I do just that. In my judgment the judge was right for the reasons that he gave. I would dismiss the appeal.

**Lord Justice David Richards:**

21. I agree.

**Lady Justice Rose:**

22. I also agree.