IN THE BOLTON COUNTY COURT

Claim No. 0BL02347

The Law Courts
Blackhorse Street
Bolton
BL1 1SU

Friday, 12th January 2011

Before:

DISTRICT JUDGE SWINDLEY

Between:

MR. LESLIE VICTOR ROBINSON

Claimant

-v-

ROLLS ROYCE PLC

Defendant

Solicitor for the Claimant: MR. NICK BERRY

Solicitor for the Defendant: MR. JOHN APPLEYARD

JUDGMENT APPROVED BY THE COURT

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Number of Folios: 29
Number of Words: 2,053

(This is a very poor recording with background interference. Also, both counsel spoke particularly quickly and it was difficult to hear what was being said. We have used our best endeavours, however, in transcribing the same.)

APPROVED JUDGMENT

1. THE DISTRICT JUDGE: The situation in this case is tht the claimant is evidently suffering from loss of hearing, which he believes is attributable to a period of employment, an extensive period of employment ,with Rolls Royce when he was exposed to what he would say was excessive noise from industrial boilers. He instructed MRH who are a firm of solicitors, to pursue a claim for damages arising from his alleged noise exposure. MRH sent a letter of claim. They sought disclosure of documents and when no documents were supplied they then issued an application for pre action disclosure pursuant to part 31 of the CPR and, in fact, at that point liability was conceded, subsequently disclosure was conceded and the live issue that I have got to decide is the question of costs.

2. The rules in relation to the costs element of pre action disclosure are contained at rule 48.1(1). It starts off by saying:

> "This paragraph applies where a person applies for an order under section 52 of the County Courts Act 1984. The general rule is that the court will award the person against whom the order is sought, his costs of the application; and of complying with any order made on the application."

And it goes on 48.1(3)

> "The court may however make a different order, having regard to all the circumstances, including – (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and (b) whether the parties to the application have complied with any relevant pre-action protocol."

3. I have been referred in the course of argument to four cases, three of them were county court decisions and as far as I am concerned, in accordance with the 1st May 2001 practice direction they are simply not citable. They are simply decisions on the facts of particular cases at first instance with judges exercising the discretion they have at 48.1(3) and they are simply not something which I can pay any heed to. What I can do is certainly pay heed to decisions of higher courts, such as the High Court of the Court of Appeal, in relation to the exercise of discretion. The fourth case which I have been referred to, the case of *SES Contracting Limited v UK Coal Plc & Others* has been cited and is clearly something which I have to take heed of. That, however, is an entirely different beast of a case. It was a commercial claim of some considerable significance financially, brought by one company against other companies, based on some form of breach of contract and it clearly is a situation where no pre action protocol applied. It also has to be said that the actual disclosure was heavily contested and it took three days to hear.

4. The CPR, of course, is premised on the ethos that litigation should, wherever possible, be avoided. The parties should settle disputes without recourse to the courts. The logic is that the resolution of disputes without recourse to the counts will expedite

matters, will save the parties costs and it will save the public purse a significant amount because the need to use the courts, which are extremely expensive institutions, is avoided. By way of example it is costing the State £125 an hour to pay me to be here, before you take into account these palatial buildings, the heating and so on and so forth. Of course, under rule 1.3, both parties are obliged to further the overriding objective. Cases such as road traffic accidents, industrial deafness cases, tripping cases and so on, are common place. They often involve very modest damages and costs are often disproportionate to the damages. They take place at a high volume. The rules provide that the parties should comply with the pre action protocol. Pre action protocols are there specifically to further the overriding objective and to enable there to be an exchange of information at an early stage, so the parties can effect settlement of the majority of cases and only litigate in cases where it is necessary for that to be done. In relation to cases such as those routine high volume cases where everybody knows exactly what the issues are, the provisions of that part of the rule at 48.1(3)(b) (that is whether the parties to the application have completed until any relevant pre action protocols) are crucial. In a situation where there has been non-compliance with the pre action protocol which has necessitated unnecessarily the instigation of proceedings, then the overriding objective has been frustrated and I think it is fair to say that the customary order in such situations is that the defaulting party, the party who has not provided the pre action disclosure, bears the costs. That is demonstrated by the order made by District Judge Hovington, who, of course, is a local judge with considerable experience. Similarly HHJ Birles QS made an order for costs against the party who had failed to give pre action disclosure and I am sure that was because the judge accepted exactly the same argument as me that the overriding objective was being frustrated by the party not complying with the pre action protocol and the overriding objective, of course, is always what the rules are there to further. It is fair to say that the majority of these applications are conceded by the defendant and almost invariably costs are also conceded.

5. Here, therefore, the situation is that a letter of claim was sent on 13th April. It is a comprehensive document. There are some niggles, detailed issues, complaint made about it but essentially it complies with the protocol and the precedent. Indeed, when Cunningham Lindsey, a firm of loss adjusters experienced in this work, originally replied they did not quibble with the letter, they did not contend that MRH were not compliant with the protocol. They responded on 30th April. They asked for some more information and they sent a couple of mandates through and the claimant's solicitors responded to that request for further information on 18th May and 25th May. MRH had therefore sent the letter of claim to Rolls Royce. Rolls Royce had referred it to Cunningham Lindsey. Cunningham Lindsey had looked at it, decided what further information they wanted, requested it and it had been supplied and indeed that on 7th July, Cunningham Lindsey acknowledged receipt of the letters of 18th and 25th May and said they did not seek anything further. They said:

> "Our investigations are currently ongoing. We look forward to receiving outstanding information when you are in receipt of the same."

What exactly outstanding information they were even talking about, I am not entirely sure. What then happened was that the claimant's solicitors sent an Inland Revenue schedule to Cunningham Lindsey, having received it from H M Revenue & Customs. I gather from Mr Berry that often those matters take six months to come through. At the same time, by the letter of 17th August, they pointed out that they were still

awaiting the decision of Cunningham Lindsey in respect of breach of duty and the letter goes on:

> "The letter of claim is now well in excess of four months old. If we have not heard from you within the next 14 days with a definitive response on the issue of breach of duty, we shall issue an application for pre action disclosure. This will carry with it costs consequences."

In response to that, Cunningham Lindsey wrote on 19th August:

> "Thank you for your letter of 21st July. We require no further information from you at this stage. We are currently undertaking investigations into your client's claim. We will provide you with our view on liability in due course. We note you are seeking your client's instructions about outstanding points raised in our letter dated 30th April and await these. In particular, please return signed forms of authority for access to records and provide Inland Revenue schedule."

On 20th August they wrote in very similar terms:

> "Please accept our apologies for delay in providing you with our decision on liability. The papers are currently with our external investigators and we have requested that they complete their enquiries as soon as possible. As such, we thank you for your patience and request that you delay your intention to make a pre action disclosure application, bearing in mind our current efforts to conclude our enquiries into your client's claim. Meanwhile, we await signed forms of authority. We note from the Inland Revenue schedule that your client has been employed with a significant number of other employers. Please advise the nature of employment with these employers and whether exposed to noise during the course of these periods of employment."

That last point, of course, related not to their question of breach of duty but to causation and quantum and there is that suggestion in Cunningham Lindsey's letter that they cannot deal with liability in the absence of tht further information. MRH in response to that letter of 20th August wrote on 7th September saying that they were prepared to hold off making an application for disclosure for a further 14 days and they went on to say that the letter of claim was now almost five months old and they sent the mandates at that stage. It has to be said that the mandates were, in fact, dated 25th May and Mr Berry concedes that there was an error on his part in not sending them through earlier. There was no response from Cunningham Lindsey to that. There is no suggestion tht the late receipt of the mandates affected their decision or their inquiry into in relation to the question of breach of duty and after a further delay (that is on 6th October – a further four weeks) MRH issued the application and it was served on 19th October, at which point there had still been no response on liability.

6. The defendant simply has not complied with the pre action protocol. The claimant was entitled to an answer on breach of duty. He was entitled to the documents. It cannot be said that the claimant has acted unreasonably or is running this as a costs building exercise. The protocol clearly would have expired the back end of July. They waited more than two months more before issuing and the point made by Mr Berry in terms of limitation difficulties in relation to industrial deafness cases is, of course, well made. This is not a situation akin from a claim arising from a road traffic accident or a

tripping accident when a claimant's solicitor knows exactly when it had occurred and exactly, accordingly, when there is a limitation problem. In relation to these kind of matters limitation arguments are very often raised in defences and somebody acting for a claimant is going to find himself at the wrong end of a negligence claim if he does not pursue the matter with reasonable vigor.

7. The defendant's performance in this case has frustrated the overriding objective. It has necessitated the bringing of an application before the court under simply CPR 31.16 for pre-action disclosure unnecessarily. Public time and money has been wasted, costs have been increased without need and the overriding objective has been frustrated. That entirely justifies the court awarding the claimant his costs in this situation. It clearly falls within the ambit of 48.1(3) (b).

End of Judgment

(Discussion on costs follows)
