Ref. D27SW713

IN THE CIVIL & FAMILY COURT AT LIVERPOOL

35 Vernon Street
Liverpool

Before HIS HONOUR JUDGE PARKER

IN THE MATTER OF

FITTON

-v-

AGEAS

MR GODDARD of counsel appeared on behalf of the claimant
MR SIMMS of counsel appeared on behalf of the defendant

APPROVED JUDGMENT
8th NOVEMBER 2018

JUDGE PARKER:

1. This is an appeal by Ageas insurance limited against a decision of Deputy District Judge Nasser following a hearing on the 13th of June 2018. Appearing before me, on behalf of the appellant defendant, Mr Sims, and on behalf of the claimant respondent, Mr Goddard.

2. The claim made by the claimant, Mr Ryan Fitton, was for damages for personal injury loss and damage, arising out of a road traffic accident. Because of the low value of the claim the matter was referred to the MOJ portal pursuant to the pre-action protocol for low value personal injury claims in road traffic accidents.

2. The claim began by way of a claim notification form, which appears in the appeal bundle at page 98. That was sent by the claimant's solicitor on the 20th of June 2016.

3. The stage two settlement pack was then sent by the claimant on the 17th of February 2017. In that document the claimant identified an initial claimant offer of £4,125 for pain, suffering and loss of amenity, £670 for physiotherapy and £30 for miscellaneous expenses, making a total of £4,825.

4. The defendant's insurance company then sent the stage two settlement pack in response on the 2nd of March 2017. In that document they set out their initial response saying that they could not agree physiotherapy charges and would not consider the miscellaneous expenses. They responded with a figure of £2,500 for pain, suffering and loss of amenity, making a total offer of £2,500.

5. That offer was then put into the box on page 4, which begins, "Agreement reached." I should say something about this box as it caused me some confusion at the start of the hearing due to my lack of knowledge of the workings of the portal system. The layout of the box is as follows. After, "Agreement reached," there are then two boxes, one to indicate yes and the other to indicate no. Underneath agreement reached appears the phrase, "Date of agreement." Underneath that phrase the phrase, "Gross amount," and underneath that appears the phrase less interim payments received. Finally underneath that is the phrase, "Agreed settlement."

6. When counsel for the defendant appellant, Mr Sims, began his submissions he was suggesting to me that that was in fact the appropriate box for the parties to indicate an offer that they were making to settle to the other side. The word offer does not appear anywhere. However, it transpired that an offer is made by inserting a figure alongside gross amount. So it was that the defendant inserted the sum £2,500, as can be seen on page 114 of the appeal bundle. That document was then sent to the claimant.

7. The claimant then sent the claimant's reply to insurer on the 10th of April 2017. In that document they amended the section headed, "Initial claimant offer," reducing the physiotherapy claim to nil pounds because the defendant was providing physiotherapy through Kipouri treatment and also reduced the claim for miscellaneous expenses to nil pounds.

8. The claim for pain, suffering and loss of amenity was reduced to £3,900. On page 4 the sum of £2,500 still appears alongside gross amount. The £2,500 also appears alongside

agreed settlement. There is then a statement of truth completed at the bottom signed by the claimant's legal representative.

9. In fact, contrary to my initial impression that the box had nothing to do with the making of offers, it is now clear to me that it does. First, from the witness statement of Michael John Bryant, the witness for the defendant, who set out how the portal operates in his statement, said in particular at paragraphs 22 through to 26 on the appeal bundle page 127;

"When a user, and in this case the claimant, is making an offer in the portal users are required to press the calculate losses button in order to save the figures entered into the table of individual heads of loss and this calculated the total sum.There is then a second 'calculate offer details' button by the global offer field, which also needs to be pressed in order to update the entry field. This enables the stage two pack to be sent. In order to submit the offer back to the defendant the claimant's solicitor, after reducing the individual heads of losses and selecting calculate losses, which changes the total heads of loss damage claim, must have also pressed the calculate offer button, which is by the global offer field. A warning is given to the claimant in which they are warned, "Are you sure you want to send this counter offer?" and they must click OK. Only after the claimant has pressed calculate offer, seen the warning and pressed OK will the offer be submitted to the defendant."

10. The witness then continued at paragraph 27;

"As a result of the claimant taking the above steps and confirming the offer should be sent following the automatic checks Ageas received the counter offer as per the attachment. Ageas would only have two options available, either to accept the counter offer or provide a new counter offer."

11. The claimant's witness statement of Andrea Howarth also dealt with this issue at paragraph nine of her statement, appeal bundle page 172;

"It was clear to me that the offer in settlement from the defendants was too low. Their response to the settlement pack demonstrated an offer of £2,500 in the gross settlement box on page 4 of the RTA 5 form."

12. Deputy District Judge Nasser also appears to have proceeded on the basis that a global offer can be made through that section on page 4 of the settlement pack.

13. The defendant, having received the claimant's reply to insurer, dated the 10th of April 2017 then sent a reply to the claimant on the 20th of April 2017 in which they ticked yes on page 4, indicating that an agreement had been reached. They indicated the date of agreement as the 20th of April 2017 and the gross amount of £2,500 and that that was the agreed settlement figure.

14. So it was that the defendant purported to accept the claimant's offer, which the defendant argues was made by the claimant's reply to insurer of the 10th of April 2017.

15. Worthy of note is that the reply to claimant from the defendant's insurance company dated the 20th of April 2017 shows on page 2, appeal bundle page 120, that the initial defendant's response has now been amended to set out the same figures as the amended initial claimant offer sent by the claimant on the 10th of April 2017.

16. It would seem from the statement of Mr Bryant that that is simply an odd quirk of the portal system that clearly requires to be dealt with and change implemented.

17. At paragraph 13 on appeal bundle page 125 he says this;

"It is noted that the figures for the individual heads of loss on the final settlement pack mirror those to the claimant's amended individual heads of claim. Those figures are generated by the portal as a result of the operation of the claims portal rules and were not input by the defendant's handlers or generated by the defendant's case management system."

18. Later at paragraph 15;

"If using an A2A system if the user accepts a global offer the stage two pack is automatically changed by the portal itself to the total of the individual heads of loss for the claim when the recipient accepts that offer."

19. It would seem from an attached newsletter from the claims portal dated the 19th of February 2018 that that is something that is likely to be rectified in the future.

20. Subsequent to all of this, a cheque for £2,500 was sent to the claimant's solicitors. It is, however, clear from the correspondence beginning on the 20th of April 2017 that the claimant's solicitor thought that the matter had been settled in the sum of £3,900.

21. From the statement of Miss Howarth, she appears to have looked at the defendant's reply to claimant of the 20th of April 2017. She appears to have noted the various figures on page 2 and simply assumed that the settlement reached then was in the sum of £3,900 for pain, suffering and loss of amenity and therefore global damages. She does not appear to have considered page 4.

22. Following the correspondence through, she asks at one stage how it can be that the figures are different on page 2 and page 4. For example, from the email sent by Andrea Howarth on the 26th of May 2017 at 2.14 in the afternoon, it is clear from the documentation that the offer of £2,500 sent by Miss Howarth was sent by mistake. However, it is equally clear, in my judgment, from the available evidence that the claimants representative of Miss Howarth has caused an offer of £2,500 to be sent to the defendant on page 4 of the claimant's reply to insurer of the 10th of April 2017. She had done that by pushing the calculate offer button and then by clicking OK when asked whether she was sure that she wanted to send that counter offer. That was a positive action taken by her to generate that counter offer.

23. Therefore, the learned deputy district judge was wrong at paragraph nine of her judgment to find that the offer in this case of £2,500 was never a claimant offer. As a matter of fact, it was an offer that was generated within the portal by positive actions taken by the claimant's legal representative. The learned deputy district judge was also wrong to find that in paragraph 19 of her judgment;

"It cannot be the case that there is a compromise in this particular case where the defendant has effectively accepted its own offer," inferring it has been made by the claimant when it is clear that it has not and the claimant has not ticked the box."

24. Applying the practice and procedure of the portal there was an offer made by the claimant in this case of £2,500 in respect of the claim for damages, which the defendant then accepted.

Is the claimant entitled to rely upon the doctrine of mistake to avoid the compromise?

Legal principles.

25. The editorial introduction to the protocol for low value personal injury claims in road traffic accidents, which describes stage two of the RTA protocol as "a highly prescriptive" process, appearing in the white book 2018, volume one, at C13A001 says this at page 2677; "Rules, practice direction and pre-action protocol. By definition the process as set out in the several pre-action protocols that have come into being since the CPR came into effect, are not pre-trial procedures, but they imitate them to an extent. The RTA protocol imitates them more thorough than other pre-action protocols. Procedures that would normally apply at the pre-trial stages in a case where court proceedings are on foot and the parties are preparing for a trial on quantum of damages are found in the RTA protocol, particularly in the stage two processes relating to obtaining and exchanging of medical reports, to the making of offers to settle and to the making of interim payments. Further, during the working through of the protocol processes, liability for costs may be incurred and costs may become payable. The protocol sets out an intense time-sensitive process for defendant's insurer and claimant's solicitor

Negotiation. There is not one mention of mediation in the protocol. The protocol stage one and stage two processes may be seen as a form of civil diversion that provide parties with a structure for clarifying their disputes and negotiating a settlement similar to that provided by the normal CPR pre-trial procedures.

Normally CPR rules are supplemented directly by practice directions and indirectly by pre-action protocols. Here these relationships are reversed. The RTA protocol is the primary source governing party behaviour in the claims to which it applies.

Practice direction 8b builds on the protocol stage two processes and provides special and limited court procedures for the purpose of determining a claim if settlement is not achieved and for some other purposes."

26. The editorial introduction to practice direction 8B, set out in the white book for 2018 volume one at 8BPD0 states at page 487;

"The RTA and ELPL protocols differ from all other pre-action protocols. Normally the rules themselves are paramount and are supplemented by practice directions and pre-issue by protocols. But here the process is reversed. The protocols are paramount and PD8B should be seen as part of the process."

27. The editorial introduction to the protocol for low value personal injury, employer's liability and public liability claims set out in the white book 2018, volume one at C15A001 at page 2704 states;

"The status of the protocol. This protocol and the similar RTA protocol are in reality the only two pre-action protocols with real teeth. Whereas normally the rules of court ranked

first and the protocols last, here the process is reversed. The protocol is most important. The rules and practice directions exist to support the protocol rather than the other way round.

28. In *Phillips* against *Willis* reported in the law reports of England and Wales, Court of Appeal Civil Division for 2016 EWCA Civ 401, Lord Justice Jackson said at paragraph nine, appeal bundle page 216;

"Practice direction 8B requires the claimant to issue proceedings in the County Court under CPR8. 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 of 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 three is limited to that which is contained in the court proceedings pack. A court assesses the items of damage which remain in dispute, either on paper or at a single stage three hearing."

29. Then at paragraph 11;

"For present purposes I shall refer collectively to the provisions of the RTA protocol, PD8B and CPR part 8 as modified by PD8B 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."

30. In a decision of His Honour Judge Gore QC the then designated civil judge for Merseyside in *Purcell* v *McGarry* Friday 7th of December 2012, appearing in the appeal bundle at page 225 the learned judge said this;

"Speaking of the RTA protocol, what we have here, as with the part 36 structure, is a freestanding structure to regulate the making of offers and the giving of acceptances in the negotiated settlement of pre-action protocol low value personal injury claims where liability is admitted and, therefore, that the ordinary rules of contract, to the effect that the making of the counter offer constitutes a rejection of the original offer, which thereby lapses, has no application in this arena."

31. It is also helpful, in my judgment, to draw an analogy with the procedural code provided by CPR36. CPR36.1 states;

"This part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this part."

32. In the decision of *Mahmood* v *Elmy*, reported 2010 EWHC, QBD 1933 Mr Justice Cox stated at paragraph 47 and 48, appeal bundle page 304;

"Thus CPR36.92 provides that an offer can be accepted at any time unless the offer or serge notice are withdrawn. The position under this regime is to be contrasted with the law of contract, pursuant to which a counter offer would amount to an implied rejection of the original offer, such that the offer of October 1st would no longer be open for acceptance. However, the negotiations in this case took place expressly under part 36, which the parties opted to use for the purpose of their settlement negotiations."

33. In referring to the decision of Mr Justice Coulson in *Santler* v *Rushmoore* reported in 2008 EWHC (QBD) 2616 he said this at paragraph 57;

"Pointing out that the effect of CPR36.92 is that an offeree can accept an offer at any time, even if his original response had been to make a counter offer, Mr Justice Coulson observed that that, "Is the direct opposite of the positioning contract, where a counter offer kills an offer just as completely as an expressed rejection."

In other words, the procedural code trumped the law of contract.

34. In the skeleton argument described as respondent's response, the claimant respondent takes the following point.

(a) The defendant appellant is estopped from raising the point that compromise had been reached between the parties during stage two. I will deal with that later in this judgment.

(b) Whilst the MOJ portal claims are subject to their certain rules, as set out in CPRPD8B it is not a set of rules in a vacuum which is not governed by common law principles such as compromise and law of mistake. Indeed the only modification to the general rules under the CPR are set out at 8BPD17, which states that part 26 to 29 do not apply, i.e. case management, small claims track, fast track and multi-track. It is argued that clearly all other rules do apply, not only the overriding objective in CPR1 but the court's management powers under CPR3 and the court's ability to rectify mistakes and give relief from sanctions.

Discussion.

35. In my judgment the protocol for low value personal injury claims in road traffic accidents was introduced to streamline and simplify these sorts of claims of low value. It provides a self-contained code to enable parties to negotiate a settlement of sums for damages of such low value in these cases.

36. The process has the potential to deliver what might be called fairly rough justice on occasion, but generally is a proportionate and cost-effective way to achieve settlement. Insofar as one party may make a mistake in dealing with the process from time to time, over all, the benefits of the system far outweigh the negatives.

37. There is very good reason for the protocol to be self-contained, to the exclusion of normal principles of contact and, for example, the doctrine of mistake- because of the risk that the objective sought by the protocol is thwarted by disproportionate satellite litigation. The protocol has been designed with the deliberate intention to avoid low value personal injury claims arising out of road traffic accidents, spiralling into unnecessary and costly litigation. It is a self-contained code and its operation is to the exclusion of normal principles of contract in a way that is similar to the operation of part 36.

38. To find otherwise would carry a risk of undermining the certainty, speed and restriction of cost which are all elements which the scheme is designed to provide and to render the claim disproportionate

39. This case is a case in point. Already the case has been subject to Part 8 proceedings, a first instance decision by a deputy district judge and now appeal hearing before a circuit judge. The difference between the parties at stage two of the protocol was £1,400

40. The costs incurred in relation to the appeal alone exceed £10,000. Insofar as Deputy District Judge Nasser found at paragraph 18;

"My findings are that there was no offer from the defendants that was acceptable to the claimant and, therefore there was no agreement, there was no meeting of minds, it is only when an offer from a defendant is acceptable to a claimant that an agreement will ensue. The offer of £2,500 was not acceptable and never was acceptable to the claimant. There was no meeting of minds between the parties and the claimants specifically did not tick the box the claimant is required to tick in order to accept the defendant's offer,"

She was, in my judgment, wrong. The offer had been made by the claimant, albeit mistakenly and the offer was accepted by the defendant, as the defendant was entitled so to do. Whether there was a meeting of minds between the parties or not did not matter. There was an offer within the protocol made by the claimant and there was an acceptance within the protocol made by the defendant. The matter was thereby compromised.

41. Settlement within the meaning of the protocol was thereby reached.

The claimant respondent's case on estoppel.

42. The claimant respondent relies upon a letter from the defendant's insurance company to the claimant's solicitors dated the 12th of June 2017, in which the defendant's insurance company said this;

"We note that you accepted the £3,900, which shows in the valuation box on page 2 of the claim notification form. On the documents you sent to us it shows that on page 4 the settlement figure is actually £2,500, which is what came through our side of the portal. In the absence of agreement between the two parties we believe it fair and reasonable that we return to a period of negotiation. Clearly there has been no meeting of minds between us both."

43. Reference is made to Halsbury's laws and the definition of estoppel;

"Where a person has, by words or conduct, made clear and unequivocal representation of fact to another, even knowing of its falsehood or with the intention that it should be acted upon, or having conducted himself so that another would as a reasonable person understand that a certain representation of fact was intended to be acted upon and the other person has acted upon such representation and thereby altered his position and estoppel arises against the party who made the representation and he is not allowed to state that the fact is otherwise than he represented it to be."

44. In fact after that letter was sent it is clear from the correspondence that all that happened was that each side maintained that the case had been compromised at the figures that each contended for, £3,900 claimant, £2,500 defendant.

45. In those circumstances there is no evidence to suggest that the claimant acted upon the defendant's representation and thereby altered his position. There is, in my judgment, no estoppel. The defendant has not effectively waived its right to raise the argument that the claimant being compromised in the sum of £2,500 by sending the letter referred to.

46. Therefore in conclusion, I allow this appeal.

This transcript has been approved by the Judge