IN THE BIRKENHEAD COUNTY COURT | Claim No. A90YJ823

76 Hamilton Street
Birkenhead

Wednesday, 3rd September 2014

Before:

DISTRICT JUDGE BAKER

Between:

PAMELA DRAPER

Claimant

-v-

GEMMA NEWPORT

Defendant

Counsel for the Claimant: MR. DUNN

Counsel for the Defendant: MS ROBSON

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE DISTRICT JUDGE: This is a preliminary issue to be determined between the parties in this case as to whether or not the claimant's claim was settled or compromised within the MOJ protocol for low value personal injury claims. It arises out of a claim being pursued by Pamela Draper, who instructed Michael W. Halsall, solicitors, in respect of an accident on 9th January 2013. It was an accident which lent itself to the low value PI portal and the appropriate steps were taken by her solicitors to upload the claim by means of a claims notification form and then, if one can put it as broadly as this, the normal process took over with offer and indeed counteroffer. What happened when the counteroffer was made by the defendant's solicitors was that that was not an offer which the claimant's solicitors had been instructed to accept but, unfortunately, and it is accepted by the defendant today that this was a mistake within the meaning of law of Mistake, the individual who was charged with dealing with this claim under the portal seems to have clicked "Yes" on at least two occasions in order to accept the sum that was offered by the defendant instead of rejecting the sum. She recognised her error almost immediately and then wrote the same day, within about half an hour or so, to the defendant's insurers indicating that it had been a mistake, the acceptance of the offer. The response was that the insurers were instructing their own solicitors to deal with the matter and eventually it has led to this hearing today. There is an issue, depending on what view I take of the main issue between the parties today about settlement or compromise, as to whether the claimants properly issued proceedings under Part 7 when they should have issued proceedings under Part 8 but I think, depending on the view I take, that that can be resolved fairly straightforwardly in so far as any costs consequences of that are concerned.

2. I have had the assistance of very helpful skeletons from counsel for the claimant, Mr Dunn, and counsel for the defendant, Ms Robson, on this issue, and it is a narrow issue. The issue effectively is this, does the law of mistake apply to portal claims where, as in this circumstance has occurred, a genuine Mistake has been made by one or other party so as to give rise to the common law principle of Mistake then being inserted into the portal scheme? For the claimant it is said this, that, although the portal is a self-contained code, there are elements of the portal which expressly exclude elements of the Civil Procedure Rules and general law. There is nothing in the portal which excludes the reference to mistake in terms of offers and acceptance, and so by analogy it must be right that where there has been a genuine mistake under the common law doctrine that must apply to the portal scheme, otherwise to operate other than that would give rise to injustice, as it is said has occurred here when this particular individual for the claimant's solicitors immediately became aware of her mistake and informed the defendant of that position.

3. For the defendant the position taken is this, that the portal is a self-contained code, that the reason why there is nothing mentioned about Mistake or any reference to common law doctrines in the portal is because there is no need for there to be such a mention because it is a scheme, and a protocol, to deal with low value claims in a proportionate manner, and which provides certainty in terms of costs on both sides and proportionality in terms of the way that courts can then deal with cases so that, for example (and I know this is not alluded to directly in the defendant's skeleton) there is no provision for witness statements generally, save those provided for within the portal scheme. Routinely dealing with these cases, as I do here in Birkenhead, one has little, if any, information from the claimant themselves about the consequences of the accident and so

to say that this is a streamlined process is, I think, putting it mildly, to be quite frank, but that is the process that has been imposed upon the courts, upon the parties as a result of careful negotiations between representatives from claimants' solicitors and the insurance industry to deal with particular problems that were perceived on both sides in terms of the way that these low value claims had been dealt with. From the claimants' point of view, of course, the benefit of this self-contained scheme is that they get paid sooner, although not as much as probably they would wish to have, and there is a constant, one hopes, flow of money, which assists their cashflow and deals with disbursements, etcetera, rather than having to wait until the end. So there is some fairly radical impositions imposed on both sides, not least of which is the electronic method in which these claims are to be commenced and indeed responded to by both parties.

4. So we come to this situation, which has not been dealt with before, as to whether the errors made by Mrs Rowbotham for the claimant's solicitors on behalf of Miss Draper, properly conceded by the defendants amounting to Mistake within the common law doctrine of Mistake, whether those enable the claimant to effectively escape the consequences of the acceptance of the defendant's offer by moving on to stage three when the portal provided for the matter to have been concluded on the basis of that acceptance. Both parties have made reference to the overriding objective and it seems that that is of some assistance in coming to a view about the position in which the parties find themselves because the overriding objective clearly does apply to the portal, in my view. It requires the court to deal with the case justly and at proportionate cost, which includes, so far as is practicable, ensuring that the parties are on an equal footing. Here we have a rules-based scheme which is prescriptive in terms of what is required from both parties and so both parties, experienced as they are in dealing with the scheme, are on an equal footing. Saving expense; the whole point of the protocol is to save expense and to provide, one would think, as much certainty as possible because certainty reduces uncertainty or eliminates uncertainty, and uncertainty is what causes expense, in terms of having matters clarified by the courts. Dealing with the case in ways which are proportionate, first of all to the amount of money involved; this by its very nature is a low value claim on behalf of the claimant. The importance of the case; there is a degree of importance in so far as this is an issue which has not been determined before but in terms of the importance between the parties themselves it is not of any great importance. The complexity of the issues; not particularly complex. Certainly the factual matrix is not complex but the difficulty which arises from it has a degree of complexity but not very great. Then the financial position of each party; both are backed by insurers. To ensure it is dealt with expeditiously and fairly; it has been listed for a preliminary hearing today. Allotting to it an appropriate share of the court's resources whilst taking into account the need to allot resources to other cases; this is a case which would normally have proceeded to stage three and given 15 minutes. It has been given an hour and a half today, quite properly, because of the issues which arise from it. Finally, to enforce compliance with rules, practice directions and orders; what one is left with then, it seems to me, is a scheme which has been devised by lawyers for lawyers and which creates a number of strictures on both sides in terms of the extent of the correspondence which can be entered into, the information which can be provided, the way in which that information is provided and the way in which it can be challenged, and all provided for electronically to reduce cost, increase certainty and perhaps increase speed as well. So where then does the law of Mistake come into that?

5. It seems to me there is a real risk if one imports the common law doctrine of mistake into a rules-based scheme such as this, there will come an awful lot of satellite litigation.

There is a real risk that many statements will be provided on behalf of errant claimants and indeed defendants who complain of having pressed button B instead of button A, and who is to gainsay that that was not a genuine mistake? Who is to gainsay what is the appropriate length of time for them to notify the other side of what the mistake was? Is it when they get a complaint from a client an hour later, two hours later, a day later, where the supervisor, as there seem to be in these firms these days, does not agree with the view taken by the operator and then puts together some form of argument along the lines of mistake rather than a failure to properly appreciate what the issues properly were between the parties. So I am very very reluctant to open up this particular and detailed scheme of rules to exposure to common law doctrines unless it is absolutely necessary, and in this case I do not find that it is because in this case, having regard to the overriding objective and notwithstanding the difficulties that Mrs Rowbotham found herself in on behalf of her client, the solution to that was, quite frankly, to be simply more careful in the way that she operated the system, and for one to extend and to allow the operation of the law of mistake into this self-contained rules-based scheme, notwithstanding that it is not specifically provided against so far as the claimant is concerned, would seem to me to be a step too far and one which is not appropriate having regard to the overriding objective and having regard to the scheme and the way that it should operate. It would have a real risk of undermining the certainty, speed and cost which are all elements which this scheme is designed to deal with, and to deal with in a way which ensures the parties have their cases dealt with justly and at proportionate cost.

6. Therefore, I find that the claim was settled within the MOJ portal and that the doctrine of mistake cannot be and should not be imported into the rules-based scheme which is the low value personal injury protocol and accordingly I find against the claimant in respect of the claim.

(End of Judgment)

(Discussions/proceedings follow relating to form of order, costs, etc.)

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