.N THE COUNTY COURT AT LIVERPOOL CASE No. A57YJ206

APPEAL REF: 98/2014

BETWEEN

STEVEN BUSHELL

Appellant

-and-

MS AMANDA PARRY

Respondent

JUDGMENT

Representation

Counsel for the Claimant / Appellant, **Mr Stephen Seed**, instructed by **Armstrongs**.

Counsel for the Defendant / Respondent, **Mr Brian McCluggage**, instructed by **DWF, Manchester.**

1. The Appellant, Steven Bushell, appeals from a order made by Deputy District Judge McCullagh on 1st August 2014 whereby, at an Allocation Hearing, he entered judgement in favour of the Claimant in respect of general damages (£2,950) and the pre-accident value of his vehicle (£500), remitting the balance of the claim comprising hire charges, recovery and storage charges and miscellaneous expenses to the Small Claims Track.

2. The matter arises out of a Road Traffic Accident which occurred on 20th June 2015. As a result of that accident the Claimant notified a claim to the Defendant's insurers

under the Pre-action Protocol for Low Value Personal Injury claims in Road Traffic Accidents. This claim was brought via the Ministry of Justice portal ("the Portal").

3. The Protocol provides for a three stage procedure. Stage 1 is initiated when the Claimant notifies the insurer and the Defendant of the claim. In the event that liability is admitted the claim proceeds to Stage 2, the purpose of which is to enable the parties to achieve a settlement of the case by negotiation if possible. This involves the Claimant sending to the Defendant, electronically, a "Stage 2 Pack", setting out all the details of the claim and providing documentary evidence in support.

4. The "Stage 2 Pack" includes a section in spreadsheet / tabular form identifying most common heads of general and special damages associated with road traffic claims, with boxes for, respectively, the Claimant to identify the sum in which he is prepared to settle particular heads of claim, and the Defendant to propose their offer in respect of each head of claim so identified.

   Paragraph 7.28 of the Protocol provides for a 35 day period for consideration of the Stage 2 settlement pack by the Defendant ("the total consideration period"). This consists of a period of up to 15 days for the Defendant to consider the Stage 2 settlement pack ("the initial consideration period") and make an offer. The remainder of the total consideration period ("the negotiation period") is for any further negotiation between the parties.

5. By paragraph 7.29, the total consideration period can be extended by the parties agreeing to extend either the initial consideration period or the negotiation period or both. By paragraph 7.36, on receipt of a counter-offer from the Defendant, the Claimant has until the end of the total consideration period, or the further consideration period to accept or decline the counter-offer.

By paragraph 7.39, where a party withdraws an offer made in the Stage 2 Settlement Pack form after the total consideration period, or further consideration period, the claim will no longer continue under the Protocol, will exit the Portal and the Claimant may start proceedings under Part 7 of the CPR.

6. For those cases which are not resolved at the Stage 2 process, but which do not exit the Portal, there is a Stage 3 procedure governed by Practice Direction 8B whereby an application can be made to the court to determine the amount of damages. The damages can be assessed, usually by a District Judge, either on the papers, or at a Stage 3 hearing attended by the parties' representatives. The court will assess the damages by reference to the written evidence filed pursuant to Practice Direction 8BPD.6 and 7.

In the event that the court considers that it is necessary for either party to provide further evidence or the claim is not suitable to continue under the Stage 3 procedure, it will order the claim to continue under Part 7, allocate to track and give directions.

Chronology

6. This claim was submitted to the Defendant's insurers via the Ministry of Justice Portal on a claims notification form dated 3rd July 2013. The Defendant's insurer responded by conceding liability and made an appropriate payment in respect of Stage 1 costs within the requisite timescale.

7. The claim thereafter proceeded to Stage 2. The Stage 2 Settlement Pack with appropriate supporting documentary material was submitted to the Defendant's insurer on 5th December 2015. The Claimant made a global offer of £11,118 and, it is

said with a view to assist in negotiations and to enable the Defendant's insurer to understand how the offer had been calculated, it was broken down as follows:-

a)	Car hire charges	-	£6,900
b)	Pre-accident value	-	£500
c)	Recovery and storage charges	-	£768
d)	General damages	-	£2,950.

8. The Defendant's insurer responded on 10th January 2014 with a counter offer of £5,152.10 which, in turn, was broken down in accordance with Part 7.34 of the applicable Protocol. The total figure offered by the Defendant included an allowance of £2,950 in respect of general damages for pain, suffering and loss of amenity – the same figure as that contended for by the Claimant in his Stage 2 pack, and lesser allowances in respect of special damages.

9. It is asserted by Mr Warwick, a Litigation Executive at the Claimant's solicitors, in his statement of 31st July 2014 that, during the negotiations at Stage 2 the Defendant's insurers maintained their challenge to the Claimant's claim for credit hire charges raising issues to include intervention services (as per Copley v Lawn [2009] EWCA Civ 580) and also challenged the Claimant's rate of hire.

10. This, it is said, prompted the Claimant to issue a conventional claim via Part 7 rather than making a Part 8 claim under Stage 3 of the Portal process in reliance in Paragraph 7.67 of the Protocol which provides "where the Claimant gives notice to the Defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law in relation to the vehicle related damage) then the claim will no longer continue under this Protocol. However, where the court

considers that the Claimant acted unreasonably in giving such notice it will award no more that the fixed costs in Rule 45.18".

11. On 20th February 2014 the Claimant wrote to the Defendant formally withdrawing all previous offers and intimating that a Part 7 claim would follow. Proceedings were thereafter issued on 5th March 2014.

The Defence

12. On 11th April 2014 the Defendant served a defence which, admitted liability for the accident itself and admitted that the Claimant's losses allegedly sustained in the accident "*...only to the extent set out herein. Where denied the reasons for such denial to are stated. In respect of the remainder the Defendant is unable to admit or deny them and requires them to be proved*".

13. Paragraph 3 recited the Portal history of the claim, the basis put forward by the Claimant for removing the claim from the Portal, the fixed costs recoverable with a Portal claim.

14. The first line of paragraph 4 reads "*As this matter is now issued as a Part 7 claim the Defendant raises a full quantum defence.*"

15. In respect of "Particulars of Injury" at paragraph 5 the Defendant pleads "*The Defendant is unable to admit or deny the alleged or any claim for injury and the Claimant is put to strict proof. The Defendant reserves the right to ask Part 35 questions of the expert.*"

16. A fully pleaded counter schedule of special damage follows thereafter, the defence to the claim for car hire running to 7 sub-paragraphs and seeking extensive disclosure in

support of that aspect of the claim. The defence was endorsed with a statement of truth and signed by Mr Matthew Dickinson, the Defendant's solicitor, who, judging by the paperwork that I have seen, appears to have had conduct of the case on behalf of the Defendant throughout. Each party then completed Directions Questionnaires.

17. On 9th June 2014 the Defendant's solicitor sent a cheque for £2,950 in respect of special damages "as agreed under Stage 2 of the MOJ Portal in this matter". This was, of course, many weeks after any "agreement" that the Defendant may assert had been reached in relation to general damages. Neither had the Stage 2 Portal costs been paid.

18. The matter came before District Judge Jenkinson on 19th June 2014 who timetabled the matter through to an allocation hearing before Deputy District Judge McCullagh on 1st August 2014, the decision the subject of this appeal.

19. It is clear from the transcript of that hearing that Counsel for the Claimant argued, inter alia, that the contents of the defence at paragraph 5 whereby the Claimant was put to strict proof in relation to his claim for general damages was wholly inconsistent with the position put forward on behalf of the Defendant to the effect that the claim for general damages had been compromised.

20. When the Learned Deputy District Judge put this matter to Mr McKeon, who appeared for the Defendant at the hearing, his response was "I'm told by my instructing solicitor that he was in error in drafting that paragraph and his position is as set out in the Allocation Questionnaire on page 31."

This, in turn, prompted the Learned Deputy District Judge to say to Claimant's counsel: "Mr McKeon says it is a drafting error."

It appears to me that the explanation put forward by Mr McKeon is something that the Learned Deputy District Judge took into account.

21. It is also clear from the short (5 paragraph) judgment given by the Learned Deputy District Judge, that he was heavily influenced by the decision of District Judge Vincent in a case called Bewicke-Copley v Ibeh decided in Oxford County Court on 1st May 2014.

The Submissions of the Parties on Appeal

22. The Appellant's grounds of appeal and skeleton argument were both settled by Mr Benjamin Williams, now Benjamin Williams Q.C.

Mr Seed, who appeared for the Appellant at the hearing, whilst inviting my attention to the written grounds for appeal and skeleton argument, did not slavishly pursue all of the matters adverted to by Mr Williams, (including "mutual release" and "estoppel by convention"), and was realistic enough to acknowledge that District Judges and Deputy District Judges regularly resolved car hire disputes in cases allocated to the Small Claims Track.

23. He submitted that the grounds of appeal set out at paragraph 17(1) and (2) on page 8 of the appeal bundle were, in effect one ground. The language of the Protocol / Portal provided, he submitted, for only a global offer or a global counter offer and the scheme does not provide for compromises of individual heads of damage.

24. He draws support for this proposition from the wording of paragraph 7.31 and 7.36 which refers to the "offer" and "counter-offer" in each case in the singular. This, he

submits, must be construed as a reference, in each case, to a single non-divisible amount.

25. With regard to the pleading point: Mr Seed submits that paragraph 5 of the defence is quite clear in its terms, and it expressly puts the claim for general damages in issue. He urges me to reject the suggestion, put forward for the first time at the hearing in front of Deputy District Judge McCullagh, that what was pleaded at paragraph 5 of the defence was a "mistake".

In any event says Mr Seed, nowhere is there any suggestion of "compromise" pleaded in the defence.

26. For the Respondent Mr McCluggage began his submissions by stating simply that the Protocol / Portal "can't envisage everything". He submitted that the issues were:-

a) Whether the Portal admitted of divisible or indivisible offers

b) Whether the contents of the defence were capable of overriding what he called an "otherwise effective divisible admission"

c) The Learned Deputy District Judge's discretion with regard to the allocation issue.

27. Mr McCluggage took me on an extensive trawl through the CPR identifying the scope of each track, in particular the Fast Track criteria at 26.6(4); the general rule for allocation at 26.7 and at 26.8(2)(a) where the court is to disregard "any amount not in dispute".

28. He also took me to the Practice Direction at 26 BD 7.4(3) with its reference to "any specific sum claimed as a distinct item and which the Defendant admits he is liable to pay is not in dispute".

29. He also took me to Part 14, in particular CPR 14.1A (1) referring to Pre-action Admissions. This is precisely what the Defendant did submitted Mr McCluggage within Stage 2 of the Protocol in its acceptance of the figure put forward by the Claimant in respect of the claim for pain, suffering and loss of amenity.

30. Mr McCluggage submits that the Stage 2 offer must be divisible – such an approach leads to a proportionate manner of dealing with claims.

31. Any admission made during the Protocol process is, Mr McCluggage submits, a pre-action admission for the purposes of Part 14 whereby, the Defendant is stuck with any "Portal admissions" in the course of any Part 7 proceedings begun thereafter.

32. Turning to the wording of the Protocol itself he draws my attention to paragraph 7.34 and its reference to "those areas of the claim that remain in dispute."

33. Mr McCluggage also relied upon the decision of District Judge Vincent in Bewicke-Copley v Ibeh and referred me to an isolated paragraph in Akhtar v Boland where the court, at paragraph 3, identified the essential question as what is meant by "the financial value of the claim" at CPR 26.8(1) (a) and "any amount not in dispute" in CPR26.8(2) (a).

34. The Akhtar v Boland case was, in my view properly, distinguished by His Honour Judge Parker in his order made on 12th November 2014 at paragraph 2(c) where he noted that "the defence filed and served by the Defendant revealed that there was no

compromise in respect of PSLA as none was pleaded; nor (by implication) was there a pleaded admission in respect of that head of damage as in Akhtar v Boland.

35. I have had an opportunity to read the full report of Akhtar v Boland [2014] EWCA Civ 872. In that case there was no claim for general damages for pain, suffering and loss of amenity. Specific claims were advanced in respect of hire charges, recovery charges and storage charges and, in respect of each such head of claim, the Defendant admitted specific amounts in its pleaded defence, the cumulative effect of which admissions brought the global value of the claim within the Small Claims Track.

36. With regard to Bewicke-Copley v Ibeh, I am surprised that the Learned Deputy District Judge at paragraph 2 of his Judgment stated "I can see absolutely no distinction whatsoever between (that) case and the current case". It seems that the Learned Deputy District Judge relied on the synopsis of the case provided to him by Mr McKeon, and perhaps the available time was not sufficient for Deputy District Judge McCullagh to read it in detail himself. However, in my view, Bewicke-Copley v Ibeh can be distinguished from the instant case in two important respects: firstly, there was no defence served in that case putting in issue matters that the Defendant had sought to agree in its counter offer; secondly, it is clear from paragraph 23 of the Judgment that the Defendant had asked the court to enter judgment for the damages and appropriate Portal related costs. No such application was made in this case.

Conclusion

37. In my view Mr Seed is correct in his assertion that the scheme of the Protocol as evidenced, in particular, by the language of paragraph 7.31 and 7.36 envisages the parties, respectively, putting forward a single, composite global offer or counter-offer as the case may be, at the Stage 2 process. The scheme provides for a period of negotiation thereafter which, if it does not result in settlement, allows the matter to

proceed to Stage 3 for the damages to be assessed at court by the District Judge, or exit the Protocol and proceed as a Part 7 claim. The scheme as drafted does not provide for the agreement of discrete heads of claim.

38. If however I am wrong in my interpretation of the Protocol as a scheme which does not facilitate compromise of individual head of loss then, in any event, there are particular features of this specific case which, having regard to how the Defendant in particular has conducted proceedings, makes it difficult for the Defendant to assert that the claim in relation to pain, suffering and loss of amenity has been compromised.

39. It is clear from the terms in which the defence was drafted that the Defendant did not feel in any way circumscribed in pleading its defence, the action having exited the portal. Specifically, the Defendant did not appear in any way inhibited from putting in issue the claim for general damages for pain, suffering and loss of amenity and, moreover, intimated the possibility of serving Part 35 questions of the Claimant's expert.

40. The defence reads as if everything in terms of damages remained in issue. It was open to the Defendant to plead that the claim for general damages had been compromised. It was open to the Defendant to admit the claim for pain, suffering and loss of amenity in the defence. It was open to the Defendant to plead specifically an amount accepted or agreed in terms of the value of the claim for pain, suffering and loss of amenity. The defence did none of those things.

41. What sets this case apart from Bewicke-Copley v Ibeh and Akhtar v Boland is the fact that the Defendant has entered a full defence to the Part 7 claim, not alleging

compromise, and putting the Claimant to strict proof in relation to each head of loss claimed – whether general or special damages.

42. Whilst I have no doubt whatever that Mr McKeon faithfully relayed to Deputy District Judge McCullagh his instructing solicitor's explanation of paragraph 5 of the defence as a "drafting error", there is no proper evidential basis for that. The defence, drafted by Mr Dickinson, is dated 11th April 2014. Paragraph 3 of the defence makes it clear that at the time it was drafted Mr Dickinson was alive to the fact that the claim had exited the Portal. Paragraph 4 of the defence refers to the document as a "full quantum defence": it is indeed a comprehensive pleading that addresses each head of claim with particularity and, as noted before, is signed by Mr Dickinson, who appears to have had conduct of the case on behalf of the Defendant throughout, and features the appropriate "Statement of Truth". No application was ever made to amend the defence; there is no suggestion in the Defendant's Directions Questionnaire completed on 4th June 2014 that the defence was mistaken in any material particular, and there was no witness statement before the court to explain the nature and extent of any "mistake" or when it had come to light.

43. In answer to Mr McCluggage's specific points raised under CPR 26.8(2) (a) and Practice Direction 26PD 7.4(3), where the court is required to disregard "any amount not in dispute": the Defendant's own pleading makes it plain that the claim for general damages remains in dispute.

44. As for the point he raised in relation to CPR 14.1A: I do not regard that without more as disentitling a party from serving a defence in the terms in which it was done in this claim. I note that neither party made application pursuant to CPR 14.1A (4) (a) to enter judgment on any pre-action admission."

15. For the reasons set out above, my view is that the decision of Deputy District Judge McCullagh was wrong insofar as he held that the claim for general damages had been compromised and was no longer in issue. That being so, the value of the claim, including the claim for general damages, took it above the Small Claims Track limit.

46. In the circumstances I would set aside the order that he made and reallocate this claim to the Fast Track.

47. I will leave the parties to agree an appropriate order for the costs of and incidental to this Appeal. In default of agreement the matter can be relisted on the first open date after 5 May 2015, with an agreed time estimate.

Peter Gregory

27 March 2015