IN THE CROYDON COUNTY COURT

Claim No. 2YJ08321

The Law Courts
Altyre Road
Croydon
Surrey
CR9 5AB

Wednesday, 20th March 2013

Before:

DISTRICT JUDGE PARKER

Between:

WAHID ULLAH

Claimant

-v-

FAZEL JON

Defendant

Counsel for the Claimant: MR. TOBY SASSE

Counsel for the Defendant: SARAH ROBSON

JUDGMENT APPROVED BY THE COURT

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Number of Folios: 53
Number of Words: 3,835

JUDGMENT

1. THE DISTRICT JUDGE: This is a judgment given in the case of Ullah v Jon. The application before the court dated 14th September 2012 is to amend the defence pursuant to CPR 17.1 and CPR 17.3 to include reliance on admissions made by Mr Ullah via the MOJ Portal. This part of the application is not opposed subject to arguments to be made in future, in respect of costs. The second part of this application is for summary judgment against the claimant. The application does not specify whether they should be under part CPR 24.2(a)(i) or CPR 3.4(2)(a) but it is made on the basis that the claimant has no real prospect of succeeding in the claim in the light of the admissions made by Mr Ullah's insurers via the MOJ process. There is a further application for disclosure dated 18th February 2013 which has not been dealt with and has been adjourned pending the application for summary judgment.

2. Before I deal with some of the issues arising from these applications, I wish to deal with the rules relating to the portal and in particular the editorial notes relating to the pre action protocol for low value PI claims in road traffic accidents, which is contained in the *White Book 2012*. I accept that editorial notes are just what they say they are but they do have persuasive significance. To the note relating to C13A001, it says:

> "In March 2010, by CPR TSO update 52, a further pre action protocol, the Pre Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, ("the RTA Protocol was published." It applies where (1) the claim for damages arises from a road traffic accident occurring on or after April 30th 2010. (2) The claim includes damages in respect of personal injury. (3) The claimant values the claim at not more than £10,000 on a full liability basis, including pecuniary losses but excluding interest and (4) if proceedings were started the small claims track would not be the normal track for the claim. The aim of the RTA Protocol is to ensure that (1) the defendant pays damages and costs using a process set out in the protocol without the need for claimants to start proceedings. (2) The payment of damages is made within a reasonable time and (3) the claimant's legal representative receives the fixed costs at the end of each stage in this Protocol. The RTA Protocol describes in great detail the behaviour the courts will normal expect of parties, of their legal representatives and of their insurers, involved in claims of the type to which it applies. The protocol accepts that and is structured on the basis that in personal injury road accident cases insurers are the real party at interest on the defence side. A striking feature is that in so far as the protocol requires parties, lawyers and insurers to send information one to another, it is expected it will be sent electronically. To facilitate this insurers writing road accident insurance have co-operated in creating an electronic address through which they should be contacted by other parties engaged in RTA Protocol claims."

It carries on later a note at C13A002:

> "Stage 2 of the RTA Protocol process proceeds … on the assumption that the objective is to enable the parties to settle issues of quantum by negotiation. It is a highly prescriptive process. There are detailed provisions about the providing of medical reports and where the Protocol process is stayed about the making

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> of interim payments by the defendant on account of damages claimed by the claimant."

It carries on and looking at the notes to 13A005:

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> "The terms of the RTA Protocol have to be read closely with the terms of the provisions in practice direction 8B supplementing part 8 (see paragraphs 8BPD.0) and in sectionVI of part 45… In the commentaries on these provisions the linkages with provisions in the RTA Protocol (which is set out immediately below) are noted."

It also says:

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> "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 Protocol stage 2 processes and provides special and limited court procedures for the purpose of determining the claim if settlement is not achieved (and for some other purposes) in section II of CPR part 36 (RTA Protocol Offers to Settle) and sectionVI of part 45 (fixed costs) provide the legal framework not only for the stage 2 procedure but for the pre action negotiating processes, in effect, supplementing practice direction 8B and the RTA Protocol."

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3. Bearing these matters in mind, I turn to the case in question. The case involves a road traffic accident which occurred on 24th September 2011 between the vehicles driven by the claimant in this action, Mr Ullah and the defendant, Mr Jon. After the accident occurred, Mr Jon represented by Dar & Co issued a claim against Mr Ullah, the current claimant, through the portal, the pre action protocol for low value PI claims in RTAs, the RTA protocol. The solicitor acting on behalf of Mr Ullah wrote to the insurers acting on behalf of Mr Ullah on 30th September confirming they were instructed and reminding Haven that they were under a duty to avoid prejudicing the claim. Furthermore, Mr Ullah caused to be sent a personal injury protocol letter of claim to Mr Jon's solicitors on 11th October 2011 before any admissions were made in respect of the portal claim. In spite of this there were admissions of liability made by Haven Insurers who were the insurers for Mr Ullah, on 3rd and 18th November 2011. Haven purported to withdraw its admissions by asserting that Mr Jon was responsible for the accidents and seeking reimbursement of costs advanced on 22nd November 2011 and again in correspondence, dated 7th December 2011. In spite of this, Haven proceeded to settle the claim in respect of the losses incurred by Mr Jon and also in respect of his three passengers. All claims were settled at stage 2 of the RTA protocol and were paid in October 2012. It is understood that attempts on behalf of Mr Ullah to resile from the admissions were unsuccessful and as indicated ultimately damages were paid out to the driver and passengers of Mr Jon's vehicle.

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4. On 27th March 2012, part 7 proceedings were issued on behalf of Mr Ullah alleging Mr Jon was responsible for the same accident. Initially the defendant's solicitors in part 7 proceedings were unaware of the portal proceedings. However, on 15th August 2012, they were contacted by Dar & Co, solicitors, who advised them of the portal claim they were bringing in which Mr Ullah's insurance had admitted liability. There was an immediate application to amend the defence to rely on those admissions. It is fair to say that the central issue on the question of liability relating to the road traffic

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accident was which vehicle had wrongly proceeded through a red light and thereby caused the accident.

5. In reaching my decision today I have obviously read the documents contained in the bundle, prepared by Mr Jon's solicitors. I have read three statements of Mr Toulson. The first such statement of Dave Toulson was undated, the second one dated 5th November 2012 and the third statement dated 18th February 2013. I have also read statements on behalf of Mr Ullah from Jessica Berry dated 27th November 2012, and the statement of Mohammed Dar dated 13th September 2012.

6. There are a number of issues that I need to determine in this matter, looking at the skeleton arguments put forward by Mr Ullah's counsel and Mr Jon's counsel. The first such issue is whether Haven (Mr Ullah's insurers) were able to make the admissions on Mr Ullah's behalf. The policy of motor insurance, dated 12th September 2011, which provides for third party cover and the terms and conditions of that insurance policy are exhibited to the witness statement of Dave Toulson of 18th February 2013. Mr Ullah is a taxi driver and perusing the conditions of that policy of insurance, clause 3 of those conditions entitles the insurer to conduct the defence or settle any third party claim on behalf of the insured. 3.3 of the provisions provides as follows, "We may admit liability on your behalf or on behalf of anyone else insured by this policy." Mr Ullah's legal representative asserts the admissions made through the portal were made without authority. Neither party has sought to join Haven Insurers to these proceedings. It does seem apparent that the solicitors acting for Mr Ullah asked Haven Insurers not to do anything which might prejudice Mr Ullah's position and may give rise to a claim against Haven but that does not alter Haven Insurers' right under the contract to make such admission. As I say there may be a claim or a potential claim by Mr Ullah against his then insurers but vis-à-vis third parties, Haven had the actual and ostensible authority to bind Mr Ullah. It was said during the course of proceedings before me that Haven were saying different things to each party's representative. Disclosure of Haven's file has not been sought and there is speculation in the papers, particularly in the statement by Mr Toulson that Mr Ullah may have failed to co-operate with his insurers. It is clear that the accident was reported to Haven by Mr Ullah's solicitors on 30th September 2011 and they asked Haven not to prejudice the claim. There is also evidence to support the fact that Mr Ullah reported the accident to the insurers on 29th September 2011. There is a suggestion made by Mr Toulson in his statements that subsequently Mr Ullah failed to co-operate with the insurers – this is particularly set out at paragraph 5 of Mr Toulson's second statement – but cannot be verified to any great extent. There is, quite frankly, inadequate information to make a finding one way or the other regarding Mr Ullah's subsequent co-operation. I can say that the report of the accident was done promptly and that Mr Ullah's solicitors tried to protect his position with regard to the admission of liability but after that I have very little information to go on.

7. Recognition of the role of the insurer is given in the European Communities (Rights Against Insurers) Regulations 2002, which entitles a party with the right to bring an action against the insured to bring an action against the insurer who issues the policy. Furthermore, under the pre action protocol, definition 1.1(3) there is specific reference to defendant meaning insurer of person who is subject to a claim under the protocol. In the editorial notes to the *White Book* at C13A-001 which I have already alluded to, it makes clear that the real party is the insurer. Therefore, it is clear that Haven had the locus and the contractual authority, the ostensible authority to bind Mr Ullah with

these admissions. Mr Ullah may have a claim against Haven Insurance but that is not for me to determine. It has also been said that it was clear the admission was against Mr Ullah's interests, again, although that may be an attractive argument and may go to the issue of claim between Mr Ullah and his insurers, it is not possible for me to make a finding on the information I have. That is because at any time someone can give contrary instructions to their insurers and I do not know whether that happened on this occasion and also the rest of settlement under the protocol are minimal and it might be thought that to resolve the issue as cheaply and quickly as possible would be in Mr Ullah's interests. I do not find that Mr Jon was aware that the settlement was contrary to Mr Ullah's intentions or even if Mr Jon was aware of the attempt to resile from the admissions. Without fuller disclosure, these questions are impossible to answer.

8. I then move to the question of what is the nature of these admissions? Practice direction 8B on portal claims states at 8BPD.0 that an admission made by a party during the RTA protocol process is a pre action admission for the purpose of CPR P14 admissions rule 14.1.B deals with the circumstances in which such admissions may be withdrawn. It seems that admissions made in the protocol process, the RTA protocol process, are admissions for the purpose of the Civil Procedure Rules. In this case, Mr Ullah has subsequently commenced his own proceedings and it seems logical that this is then covered by CPR 14.1A(1) which provides that a person may, by giving notice in writing, admit the truth of any part of another's case before commencing to proceedings, "A pre action admission" and after commencement of proceedings, any party may apply for judgment on the pre action admission and the party who made the pre action admissions may apply to withdraw it, and that is CPR 14.1A(4).

9. Counsel for Mr Ullah argues that these admissions were not made by the claimant but by insurers acting in their own interests and under the RTA protocol. Counsel for Mr Ullah accepts that these admissions were binding in so far as they related to the RTA protocol only and in connection or in the context of a contract of compromise to a specific dispute. In other words, an attempt to ring fence that as a separate compromise, which has no direct bearing on the subject matter of this claim. I remind myself that this is a road traffic accident claim which occurred on 24th September 2011 between vehicles driven by Mr Ullah and Mr Jon. The issue between the parties is quite simply which vehicle crossed a red light and caused the accident. Counsel for Mr Ullah seeks to restrict the ambit of the admissions and the compromise between Mr Ullah's insurance and Mr Jon and his passengers. As I have said, it is in effect endeavouring to ring fence the settlement. Counsel was also trying to draw a distinction between claims falling out of the protocol at stage 3 and the current situation where the party commences proceedings because they disagree with the settlement made by their own insurer. I find that this is an artificial distinction and that the parties are identical and the current claim arises from the same accident, which was compromised by Haven. I also find that CPR 14.1B applies to this situation. This rule applies to a pre action admission made in a case to which the pre action protocol for low value personal injury claims in road traffic accidents applies. I do not find that commencement of proceedings is limited to cases which fall out of the protocol at stage 3 but can encompass the current situation where arising out of the same accident a party institutes quite separate proceedings. Therefore, the provisions of CPR 14.1B(3) apply and as proceedings have commenced any such admission can only be withdrawn with permission from the court. Part 14.1B does not provide the ability to enter judgments as it is not a step envisaged under the protocol. As a matter of common sense, if this were not the case, satellite litigation could follow frequently

where a party does not agree with the settlement brought about by their insurer and once there has been a settlement under the protocol. As counsel for Mr Jon has pointed out, a party's position could well be prejudiced if they fail to carry out any further investigations on the understanding that settlement had been reached and liability had been concluded and indeed, if proceedings were instituted close to the limitation period it could mean that further investigation would almost be impossible. As I have indicated with the extracts from the editorial notes to the protocol, the procedure under the portal is highly prescriptive. One of the central issues in this case is how binding are the admissions or agreements reached by the parties under the protocol. I am advised that there is no case law on the point. The editorial notes in the *White Book* to which I have been referred, suggest that such compromises are indeed binding. I have been referred to the case of *Gibbon v The Manchester City Council & Others*, heard in the Court of Appeal in 2010. This is a case dealing with part 36 offers and how the rules laid down interact with the general principles of common law. At paragraph 4 of that case it is said, relating to part 36 offers, "It contains carefully structured and highly prescriptive set of rules dealing with formal offers to settle proceedings". At paragraph 5, "It is a voluntary procedure under which either party may take the initiative to bring about the consensual resolution of the dispute". Great emphasis was on bringing about the finality of litigation. I find that this is very much on all fours with the current situation whereby the protocol is also a highly prescriptive set of procedures geared to bringing about a speedy resolution of these cases, the purpose of which is to promote settlements by encouraging sensible offers. Again, quoting from paragraph 29 of the same case, it says:

> "Part 36 is a self-contained code which provides expressly for the manner in which offers may be made, modified and withdrawn and that as such it displaces the ordinary rules of common law".

I find that this is the situation with the rules and provisions under the protocol.

10. I then move to the question of whether Mr Ullah should be entitled to withdraw the admissions. This is an unusual case in that the admissions were acted upon and final damages paid to Mr Jon and his passengers. This is not a case where fraud or any improper behaviour is alleged against Mr Jon and these people would have an expectation that negotiations having been facilitated by the portal procedure would bring finality to the dispute. It is probably fair to say that in some situations there may be grounds for applying to withdraw these admissions and I can only deal with the facts of the present case. Guidance on the withdrawal of admissions is given in the case of *Braybrook v Basildon & Thurrock University NHS Trust*. One has to look at all the circumstances of the case to give effect to the overriding objective. Looking at the reasons and justifications for the application to resile from the admissions, it is in effect because Mr Ullah disagrees with the compromise the insurers made on his behalf, under the protocol. It is admission or admissions which he specifically authorised them to make under the terms of his insurance policy. Mr Ullah has not sought to join the insurers to the current dispute and therefore full disclosure of the papers has not been forthcoming.

11. As far as the balance of prejudice to parties is concerned, if I refuse the application to resile from the admissions, Mr Ullah loses his right or has the potential of losing his right to make a direct claim against Mr Jon. He may have a claim against his insurers but this is obviously a lot of chance and may be less remunerative. But again it has to

be borne in mind that he chose to give his insurers the contractual right to make these admissions on his behalf.

12. Looking at the position of Mr Jon, he has proceeded on the basis that the matter was concluded. It is not clear what arguments might be put forward for the return of damages, if the matter is re-litigated. The question might be would Mr Jon's witnesses or their witness evidence be tainted, as it might be alleged that they could give any sort of impartial evidence, particularly if the consequences might be that they would have to repay damages which they may have spent. There is uncertainty and certainly some prejudice to Mr Jon, if Mr Ullah is allowed to resile from his admissions.

13. Looking at whether a party is the author of the damage they suffer, again it comes back to the fact that this problem arose because Mr Ullah chose to give his insurers the right to compromise the claim on his behalf. As far as prospects of success are concerned, that has to be completely even. In any road traffic accident one would say that this was a 50:50 chance of success. Then looking at public interests, there has to be a public interest in bringing finality to proceedings, particularly where a rigorous and tightly drawn set of rules and regulations have been set up to enable quick and relatively cheap way of resolving these issues has been set up and I find that this is an important element of this case and none of the factors which I have looked at under *Braybrook v Basildon & Thurrock University NHS*, particularly looking at the comments of *Gibbon v Manchester City Council*, to my mind outweigh this. In these circumstances, and on the facts of this particular case, I will not allow the pre action admissions made on Mr Ullah's behalf by Haven Insurers to be withdrawn.

14. Then finally, whether summary judgment should be given for the defendant. The report form relating to the accident, the index accident, makes clear that the accident and the circumstances of the accident were an issue and a report on the circumstances of the accident is required by the insurers. As I have already indicated, the factual dispute between Mr Ullah and Mr Jon was who had crossed a red traffic light and caused the accident. If Mr Ullah's admission of liability by Haven stands it logically follows that he accepts responsibility for crossing a red light. In this case, not only was an admission made but damages paid to Mr Jon and his passengers. I believe that a trial judge would give considerable weight to that admission and in the circumstances, I consider that there is no reasonable prospect of success if the matter were to proceed to trial, with the admissions standing. I would therefore enter summary judgment pursuant to part 3 of the Civil Procedure Rules and that is my judgment.

End of judgment
