Case No: F00YO185

IN THE COUNTY COURT AT BRADFORD

Exchange Square,
Drake Street,
Bradford, B31 1JA

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Before:

HIS HONOUR JUDGE GOSNELL

Between:

OLIVER MASON — **Appellant**
- and -
CRAIG LAING — **Respondent**

MR FLINT (instructed by **Emsleys Solicitors**) for the **Appellant (Claimant)**
MS NOLAN (instructed by **DAC Beachcroft LLP**) for the **Respondent (Defendant)**

Approved Judgment

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HIS HONOUR JUDGE GOSNELL:

1. This appeal is brought against the decision of Deputy District Judge Ellington, who conducted a Stage 3 hearing on Friday, 13th September 2019. At that hearing the claimant was represented by Mr Flint and the defendant was represented by Ms Nolan. Both counsel appear before me today on the appeal, which is helpful.

2. The issue for Deputy District Judge Ellington was a relatively narrow one. The claimant had suffered an accident on 24th November 2017 and had sought advice from solicitors. He received an initial report from a Dr Taylor (I think in February 2017), which reported some soft tissue injuries to the neck, shoulder and back, together with some psychological problems. The claimant did not make a full recovery and the claimant's solicitors then obtained reports from Mr Gollapudi, a consultant orthopaedic surgeon, and a psychologist. These reports, I think, were both obtained in November 2018. They were then uploaded to the portal with Dr Taylor's report on 1st March 2019.

3. The issue which was before the district judge was whether the claimant was entitled to rely on the two subsequent reports from the orthopaedic surgeon and the psychologist because it was said that the claimant had not complied with paragraph 7.8B(2) of the protocol. The protocol in question is the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. Paragraph 7.8B(2) says:

> "A further medical report, whether from the first expert instructed or from an expert in another discipline, will only be justified where -
>
> (a) it is recommended in the first expert's report; and
>
> (b) that report has first been disclosed to the defendant".

He recorded that both parties to the case conceded that the expert in the first report did recommend that a second report be obtained in certain circumstances, but that it was conceded that the first report was not disclosed separately first to the defendants. All three reports were uploaded to the portal on 1st March 2019.

4. What Deputy District Judge Ellington said was:

> "The first report was not disclosed prior to the second reports being obtained. It must follow from that that the two reports which followed the first one are not justified. That is the only meaning of the words that I read. If they are not justified, then they cannot be used. If they cannot be used, then I cannot read them, and I have not read them apart from reading the dates, and I should pay no attention to their content."

He then went on to deal with the Stage 3 hearing by valuing the case in accordance with Dr Taylor's report, but not taking into account the additional information which had been present in the two other reports which he had ruled were not justified. That is the order which is the subject of the appeal.

5. In the grounds of appeal it is argued that the judge was wrong to hold that, on the correct construction of 7.8B(2) of the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, as the claimant did not disclose the first medical report to the defendant prior to the obtaining of further medical reports, the said further medical reports were unable to be relied on.

6. It is also said he was wrong to hold that there was no need to consider the relative prejudice caused to the parties when reaching his decision; that the claimant was unable to rely on such further reports; and that his decision was perverse in that no reasonable judge could reach that conclusion.

7. I have a helpful skeleton argument in which Mr Flint develops those positions. Essentially, he has a first argument that the court had no power to debar the claimant from relying on these two reports; and, secondly, if he did have the power, he chose to exercise it wrongly.

8. The first argument is a rather technical argument, which I hope I can do justice to, based upon the inter-relationship between the Practice Direction to Part 8B of the Civil Procedure Rules and the pre-action protocol that I have referred to. The starting place is the Civil Procedure Rules at paragraph 7.1 of Practice Direction 8B:

> "The parties may not rely upon evidence unless – (1) it has been served in accordance with paragraph 6.4".

Paragraph 6.4 says:

> "The claimant's evidence as set out in paragraph 6.1 must be served on the defendant with the claim form".

Paragraph 6.1 says:

> "The claimant must file with the claim form –
>
> (1) the Court Proceedings Pack (Part A) Form;
>
> (2) the Court Proceedings Pack (Part B) Form …" (which is the parties' final offers);
>
> "(3) copies of medical reports;
>
> (4) evidence of special damages; and
>
> (5) evidence of disbursements".

9. We then move on to the protocol, paragraph 7.32. This, according to Mr Flint, sets out the Stage 2 Settlement Pack contents, which includes "a medical report or reports". Although there is a limitation in 7.32A in relation to the obtaining of a second report from someone where it is not a fixed costs medical report, there are no other limitations on what type of medical reports there are. So Mr Flint's argument is that, if the rule is followed, and the rule should be followed, then the documents which would include any medical reports which should be before the court at the Stage 2 stage, should be admissible before the court at the Stage 3 stage.

10. Against that argument there is rule 6.3, which states:

> "Subject to paragraph 6.5 the claimant must only file those documents in paragraph 6.1 where they have already been sent to the defendant under the relevant Protocol."

It seems to me that "sent under the relevant protocol" must mean sent in accordance with the relevant protocol. I do not think it can mean sent wrongly under the protocol or sent in breach of the rules of the protocol. Also, if I look at paragraph 6.1A of the Practice Direction, it states:

> "(1) In a soft tissue injury claim, the claimant may not proceed unless the medical report is a fixed cost medical report. Where the claimant includes more than one medical report, the first report obtained must be a fixed cost medical report from an accredited medical expert selected via the MedCo Portal … and any further report from an expert in any of the following disciplines must also be a fixed cost medical report".

The disciplines are orthopaedic surgery, Accident and Emergency, a general practitioner or a physiotherapist.

11. It seems that Mr Gollapudi's report would be caught by that provision, and that means that his report had also to be a fixed costs medical report. There is not an issue about that, but the psychologist's report will be caught by paragraph 6.1A(2), which says:

> "The cost of obtaining a further report from an expert not listed in paragraph (1)(a) to (d) is not subject to rule 45.19(2A)(b), but the use of that expert and the cost must be justified."

So there we see the word "justified" which is about to recur later in this judgment. In other words, it seems to me that what that rule is saying - 6.1A(2) - in terms of the psychologist's report is that not only should the cost be justifiable to the court, but also the use of that expert should be justified.

12. Ms Nolan for the defendant says that it is important to remember that, where there is a tension between the protocol and the rule, in connection with this particular protocol the protocol should take precedence, and that is confirmed in the notes to the White Book at page 493 which state as follows:

> "The RTA and ELPL protocols differ from all the 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 PD 8B should be seen as part of the process" and various rules further support the process.

13. Overall, I take the view that the argument that the rules supplement and define the protocol in this example is not correct. It seems to me that the way the rules should be interpreted is that the court should look at the protocol and see if there has been compliance with the protocol, and then the rules help the court resolve the Stage 3

hearing, effectively. It deals with the procedure for the Stage 3 hearing, and so I do not accept the submission that Judge Ellington was bound by this rather complicated trek through the rules and protocol to reach a different conclusion than that which he did. I think there is still a fair argument to determine whether he was right to interpret that particular paragraph of the protocol in the way that he did, but the argument that he had no power to consider that argument I think is not correct.

14. In relation to his interpretation of paragraph 7.8Bof the Protocol, I will read it in full:

> "In a soft tissue injury claim
>
> (1) it is expected that only one medical report will be required;
>
> (2) a further medical report, whether from the first expert instructed or from an expert in another discipline, will only be justified where -
>
> (a) it is recommended in the first expert's report; and
>
> (b) that report has first been disclosed to the defendant; and
>
> (3) where the claimant obtains more than one medical report, the first report must be a fixed cost medical report from an accredited medical expert selected via the MedCo Portal and any further report from an expert in any of the following disciplines must also be a fixed cost medical report -
>
> (a) Consultant Orthopaedic Surgeon;
>
> (b) Consultant in Accident and Emergency Medicine;
>
> (c) General Practitioner registered with the General Medical Council;
>
> (d) Physiotherapist registered with the Health and Care Professions Council."

15. I do not think there is any issue that the two subsequent reports were not obtained in accordance with that section of the protocol, because Dr Taylor's report was not disclosed before those reports were obtained. The issue really is: what is the effect of that breach? It seems to me that there are three possible interpretations that Deputy District Judge Ellington could have reached.

    a) Firstly, that, because no sanction is expressed in the paragraph of the Protocol , in effect, if there is no sanction then there is no problem. In other words, although the paragraph says what should be done, as there is no sanction set out in it, that would mean that the claimant was still entitled to rely on it and the claimant was still entitled to claim the cost of it, subject to a further paragraph that I intend to mention in a moment.

b) The next argument would be that, where a breach of this paragraph of the protocol occurs, then the report is not justified; and, if it is not justified, it is not allowed to be relied on. That is the interpretation that Deputy District Judge Ellington came to.

c) The third possible interpretation is that, as the reports had been obtained in breach of the paragraph of the protocol, they can be relied on, but the costs may be challenged by the defendant. That was not considered by Deputy District Judge Ellington at the time, but I intend to consider it in this judgment.

16. Dealing with those three alternatives in turn, I think the least likely interpretation is the first that I mentioned, which is basically that, because there is no sanction, there is no problem. It seems to me highly unlikely that that will be a proper interpretation of that paragraph of the protocol. In doing so, I refer to the aims of the protocol, in particular at paragraph 3.1 where one of the aims is to ensure that:

> "3.1 The defendant pays damages and costs using the process set out in the Protocol ..." (and I emphasise those last few words) "... without the need for the claimant to start proceedings; (2) damages are paid within a reasonable time; and (3) the claimant's legal representative receives the fixed costs at each appropriate stage.

Paragraph 3.2:

> "3.2 In soft tissue injury claims, the additional aim of this Protocol is to ensure that -
>
> (1) the use and cost of medical reports is controlled;
>
> (2) in most cases only one medical report is obtained;
>
> (3) the medical expert is normally independent of any medical treatment; and
>
> (4) offers are made only after a fixed cost medical report has been obtained and disclosed."

17. In particular, the aims in 3.2 would suggest that, if the use and costs of medical reports is to be controlled and in most cases only one medical report is to be obtained, then the paragraphs of the Protocol that deal with the selection and disclosure of medical evidence, it seems to me, must have some teeth, and so there must be some effect if the claimant breaches a paragraph of the protocol. So I discard that possible interpretation. Bearing in mind the prescriptive nature of the protocol which has been referred to in other appellate court decisions, it seems to me that, if you breach a paragraph of the protocol, there must be some sort of consequence arising from that.

18. As to (b), the second of my three alternatives, which is the same one that Judge Ellington considered, that is a possible interpretation. It seems to me it is possible to argue that saying that "a report will only be justified where ..." might be a comparison

with permission being required for expert evidence in the Civil Procedure Rules. According to those rules, unless permission is obtained to rely on an expert's report, that report is not admissible before the court. Similarly, before an expert can give oral evidence, permission must be obtained from the court to get oral evidence. So, without that permission, the evidence is not admissible.

19. The word "justified" is one that is not used much in the Civil Procedure Rules, although I did find reference to it in Part 8 earlier in this judgment. It seems to me "justified" would normally mean something like "done for a legitimate reason". So I think it is a reputable interpretation of the rules to say that, if a report is not justified by the rules, it cannot be relied on.

20. The other alternative is that, although the report is not justified, the claimant can rely on it, but then the defendant may complain about that when it comes to paying for the cost. It seems to me however, that there is a paragraph in the protocol already drafted to deal with that aspect, which is "Costs of expert medical and non-medical reports and specialist legal advice obtained" at paragraph 7.31:

> "(1) Where the claimant obtains more than one expert report or an advice from a specialist solicitor or counsel -
>
> (a) the defendant at the end of Stage 2 may refuse to pay; or
>
> (b) the court at Stage 3 may refuse to allow,
>
> the costs of any report or advice not reasonably required."

It then goes on to say that in this Stage 2 settlement pack the claimant should try to justify why the report was obtained, and the defendant in their response should explain why they considered it not reasonably required.

21. This paragraph of the protocol deals with reports which perhaps were obtained in compliance with the protocol paragraphs, but where the defendant seeks to argue that it was not reasonably required, notwithstanding that the protocol was complied with. I was trying to think of an example of this, and perhaps one might be where the claimant gets an early report about a soft tissue injury where the first expert says that, if the claimant still suffers symptoms after six months, then a report should be obtained from a consultant orthopaedic surgeon. In my hypothetical example, the claimant recovers after seven months, but the claimant still gets an orthopaedic surgeon's report about 12 months after the accident. Although it seems to me the defendant would be entitled to complain about the additional cost of that report, the judge would be entitled to rule on whether the report was reasonably required, bearing in mind the claimant had made a full recovery by the time the report was commissioned.

21. There will be situations where the claimant says they have technically complied with the protocol, but the defendant still says they should not pay for the cost. I am not convinced that rule 7.8B is intended to deal with that circumstance. It think that there is a different description of the hurdle required - which is "justified" - which suggests permitted by rule, I suspect, or permitted by the procedure, rather than whether, with

the benefit of hindsight, it was reasonably required, which is what paragraph 7.31 is about.

22. There is no authority on this topic, as far as I am aware, from any higher court. I can only grant an appeal if I find that Deputy District Judge Ellington was wrong. Of the three alternative interpretations of the rule that I have outlined, I think that the interpretation put forward by Deputy District Judge Ellington is indeed the most likely explanation on the basis that, if the obtaining of the report is not justified by the particular paragraph of the protocol that deals with the obtaining of such reports, then it should not be admissible before the court and it should not form part of the court's consideration.

23. If I am right about that, then I think that the argument about whether the judge exercised his discretion correctly is irrelevant, because I would agree with him that this is a technical point that either the claimant has complied with the protocol or he has not. If he has not complied with the protocol, there is no provision in the protocol, as far as I am aware, where a party can seek relief from sanctions and ask the court to exercise the type of discretion as is utilised under Civil Procedure Rule 3.9 pursuant to the judgment of the Court of Appeal in *Denton v. White*. There does not seem to be a comparable situation in the protocol.

24. Certainly other rules in the protocol are applied strictly, such as the time limit for responding to the Claims Notification Form, and there does not seem to be, for example, a general provision in the protocol for one party or the other to seek an extension of time, or for one party or the other to put right a mistake that they made during the course of the protocol procedure. The usual situation is that, if a party makes an error in the procedure, then, unfortunately for them, the protocol is applied strictly and prescriptively and, that being the case, I agree with Deputy District Judge Ellington that he had no discretion, having interpreted the rule in the way that he did, to in some way look at the comparative prejudice to both parties and make some sort of generalised decision in accordance with the overriding objective.

25. So for those reasons I intend to dismiss the appeal.

(Submissions Followed)

26. It may seem somewhat harsh because I have applied the rules strictly as against the claimant, but we are now back in the Civil Procedure Rules where a much broader discretion is available to me. It is a straightforward issue. The successful defendant should have filed and served a costs schedule. Again, I think I probably have two or three options: one is to do what Mr Flint says and award them no costs; another would be to adjourn and have a summary assessment of the costs on another date with costs consequences; and a third would be to do my best with the material I have available to me today. I intend to do the third because I think that is the fairest in the circumstances. I will award £1,500 plus VAT, which I think is a reasonable brief fee for an appeal of this nature.

This Judgment has been approved by the Judge.