Case No: D00BD701

IN THE COUNTY COURT
AT BRADFORD

Exchange Square, Drake Street
Bradford, BD1 1JA

Date: 18th June 2019
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Before:

HIS HONOUR JUDGE DAVEY QC

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Between:

Mrs. MARGARET HARRIS **Claimant**

- and –

Mr. JOHN BROWNE **Defendant**

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Mr Granville Stafford appeared on behalf of the Claimant
Mr Simms appeared on behalf of the Defendant

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APPROVED JUDGMENT

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JUDGE DAVEY QC:

1. This is my reserved judgment in the case of Margaret Harris and John Browne, case number D00BD701.

2. This is a Claimant's appeal, with permission granted by His Honour Judge Gosnell, against a decision of District Judge Hickinbottom handed down in a reserved judgment on 4th December 2018 after a hearing on 29th October 2018.

3. The issue for the District Judge was whether or not a concluded and binding agreement to settle the case had been reached at the end of stage 2 of the Portal proceedings in respect of the Protocol for Low Value Personal Injury Claims in Road Traffic Accident cases ("The Protocol").

4. There is no appeal against the findings of fact made by the District Judge. The basis of the appeal is whether he correctly applied the law to the facts as he found them to be. In those circumstances, I adopt his summary of the facts as set out in his draft judgment. This appears at tab F of the appeal bundle.

5. Beginning at paragraph 1) :- *"The Claimant's claim arises out of a road traffic accident dated 2nd June 2014.*

6. *Liability was admitted from the outset. Pursuant to the Pre-Action Protocol for low value personal injury claims in road accidents, the claim was negotiated through the MOJ portal. The Defendants contend that by that process a concluded agreement was reached. This judgment will deal solely with the question as to whether or not the claim has been compromised.*

7. *The Claimant notified her claim to the Defendant`s insurers Ageas on the 10th June 2014. Ageas admitted liability thus concluding Stage One of the protocol.*

8. *The Claimant eventually submitted a Stage 2 settlement pack to Ageas on 23rd May 2018. This triggered an exchange of offers and counter-offers.*

9. *The initial offer by the Claimant on 23rd May 2018 was for pain, suffering and loss of amenity, £6,000; care and services, £3,895; physiotherapy, £470; postage and telephones, £60; a cumulative total of £10,425.*

10. *On 24th May 2018 the insurers put a counter-offer of PSLA, £4,000; care, £1,830; physiotherapy, nil; postage, nil; a cumulative total of £5,830. Ageas made a global offer at the same figure.*

11. *On 25th May 2018 the Claimant made an offer identical to her original proposal. The same heads of damage, in the same sums, gave the same cumulative total and a global offer was put forward in that sum.*

12. *This elicited a response from Ageas on 29th May 2018 whereby they added to their original offer by including a figure of £285 for physiotherapy. The cumulative value of the heads of loss was thus increased to £6,115. Ageas made a global offer in that sum.*

13. *A third offer was made by the Claimant on 8th August 2018. Sums claimed for PSLA and postage were adjusted to £4,000 and £30 respectively. The claims for care and medical expenses were maintained at £3,895 and £470 respectively. The cumulative total of the heads of loss was reduced to £8,395. However, the global offer showed in the sum of £6,115.*

14. *Ageas replied on the same date accepting the Claimant's global offer of £6,115.*

15. *Jessica Bastin, a solicitor with True Solicitors, who act for the Claimant, explains her position in 2 witness statements dated 10th August 2018 and 19th September 2018.*

16. *The Claimant's solicitors extended the time within which offers could be made on the Portal by 26 days from the 13th July 2018 i.e. up to the 8th August 2018.*

17. *True Solicitors attempted to offer £8,395 on the 8th August. Ms Bastin states that when making earlier offers on the Portal the A2A system had been adopted. Apparently because the previous file handler had failed to respond to the Defendant's last counter-offer, the Portal had timed out on the A2A system. She therefore attempted to make the offer via the Rapid Settlement website.*

18. *On Ms Bastin's evidence, although she was able to reduce the cumulative figure for the heads of loss to £8,395 by making appropriate reductions to general damages and postage, she was unable to alter the figure in the global offer box for £6,115. That sum represented the amount of the Defendant's last offer. Thus, there was for the first time in the dealings between the parties in this case a difference between the cumulative total and the global offer total.*

19. *Faced with this difficulty, at the same time as she submitted the Stage 2 offer, Ms Bastin emailed the insurers in the following terms:*

> *"We have attempted to send a Stage 3 pack on the Portal but have been unable to do so. We have instead sent a counter-offer confirming that your offer of £4,000 for generals can be agreed, so only treatment remains in dispute ahead of the hearing".*

20. *The Defendant insists that the above chronology leads to a settlement of £6,115. The Claimant says not.*

21. *On behalf of the Claimant, it is said there is a unilateral mistake in the formation of what the Defendants describe as a binding agreement".* And then skipping through the rest of that paragraph to paragraph 18:-

22. *"Ms Bastin contends that she was unable to alter the figure contained in the global offer box. She altered the figure for general damages. She believed that the alteration she made would automatically adjust the global offer figures. That was her mistake.*

23. *By an accompanying email she put the Defendant on notice of what she intended. The Defendant did not seek clarification. The figure of £6,115 was accepted, knowing that it was not the intended offer.*

24. *I have no doubt that adopting common law principles, there is no binding agreement. The parties were never ad idem. The apparent agreement is void. In fact, I do not believe that the Defendant argues with that analysis.*

25. *The Defendant's case is that the common law has no part in the Protocol and the Portal. It is a stand-alone statutory creation akin to CPR 36".*

26. Then at paragraph 24:-

> *"I agree that the Protocol and the Portal represent a stand-alone arrangement. It is designed to effect speedy settlement. It is rough and ready. The application of common law principles would result in uncertainty, potential satellite litigation and delay".*

27. Then moving on to paragraph 32:-

> *"I am mindful that the Defendant well knew at the time of acceptance that the Claimant intended to offer more than £6,115. The Solicitors had received the email. It may seem unfair that a settlement be upheld in such circumstances. However, I have concluded that what happens in the Portal is specific to the Portal. The Protocol does not allow for reference to be made to external data".*

28. Finally, at paragraph 35:

> *"In summary, I find there is concluded agreement at £6,115".*

29. So that was District Judge Hickinbottom's judgment. The grounds of appeal appear at tab E of the appeal bundle and read as follows:

> *1. The learned District Judge found that:*
>
> *(A) The parties were not ad idem as to settlement. This was because:*
>
> *(a) C's solicitor had intended to offer £8,395, not £6,115; and:*
>
> *(b) D's solicitor knew that C was not intending to offer £6,115.*
>
> *(B) Nonetheless, D's acceptance of £6,115 was binding on C because it was made through the portal.*
>
> *2. The learned District Judge's decision was wrong and/or unjust due to a serious procedural irregularity;*
>
> *3. The decision was wrong because:*
>
> *(a) The learned District Judge was wrong to find that common law principles of offer and acceptance do not apply when offers are made through the portal.*

> *(b) Having found that the parties were not ad idem as to settlement, and that "the apparent agreement was void", the learned District Judge was wrong to find that there was a binding settlement.*

(c) Having found that D knew that C did not intend to offer £6,115 it was inconsistent for him to then find that the offer appeared on its face to be an offer for £6,115; alternatively, he was wrong to place any weight on what the offer appeared to be on its face having found that both parties fully understood that was not the figure being offered.

> *4. The decision was unjust due to a serious procedural irregularity because:*
>
> *(a) The learned District Judge failed to apply the overriding objective which requires the court to deal with cases justly. Finding that there was a binding agreement in circumstances where one party knew a mistake had occurred and was trying to take advantage of is* (sic) *not just.*
>
> *(b) The learned District Judge was wrong to find that the portal is a stand-alone arrangement which excludes reference to external data.*

There is no decided authority on the point at issue here, which is whether or not the Portal is a stand-alone arrangement which excludes "reference to be made to external data", to quote from paragraph 32 of the judgment.

30. Helpfully, both sides agree that the Overriding Objective applies in respect of this case. Unhelpfully, both sides assert that the application of the Overriding Objective supports their respective cases.

31. There being no decided authority on the point raised by the factual circumstances of this case, learned counsel Mr Granville Stafford, for the Claimant, and Mr Simms, for the Defendant (in reality, the Defendant`s insurers), pointed to a number of authorities from which it was submitted that analogies - or at least helpful approaches - could be derived.

32. In chronological order, they were:- *Gibbon v Manchester City Council* [2010] EWCA Civ 726, a decision of the Court of Appeal in June 2010; *Rosario v Nadell Patisserie Ltd* [2010] EWHC 1886 QB, a decision of Tugendhat J in July 2010; *C v D* [2011] EWCA Civ 646, a decision of the Court of Appeal; *Purcell v McGarry* [2012], a decision made in Liverpool County Court by His Honour Judge Gore QC; *Draper v Newport*, a decision of the Birkenhead County Court made in 2014 by District Judge Baker; *Phillips v Willis* [2016] EWCA Civ 401, a decision of the Court of Appeal; *Bentley Design Consultants Ltd v Sansom* [2018] EWHC 2238 (TCC), a decision of Jefford J in August 2018; and finally, *Fitton v Ageas*, a decision made by His Honour Judge Parker in Liverpool County Court in November 2018.

33. I note that only two of those cases - that is *Purcell* and *Draper* - were cited to District Judge Hickinbottom. A third case called *Kilby* was mentioned but that case was not referred to in this appeal.

34. Maintaining the chronological order of cases, in *Gibbon* the issue was the interplay between common law rules of offer, acceptance and counter-offer, and the provisions of Part 36 of the CPR. The Defendant relies on paragraph 6 of the judgment which appears in the leading judgment of the Court given by Moore-Bick LJ and reads as follows:

> "Basic concepts of offer and acceptance clearly underpin Part 36, but that is inevitable given that it contains a voluntary procedure under which either party may take the initiative to bring about a consensual resolution of the dispute. Such concepts are part of the landscape in which everyone conducts their daily life. It does not follow, however, that Part 36 should be understood as incorporating all the rules of law governing the formation of contracts, some of which are quite technical in nature. Indeed, it is not desirable that it should do so. Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

35. The Claimant counters that in this case the Court of Appeal was only concerned with whether there was a Rule which governed the situation raised by the facts, and decided that there was.

36. In *Rosario*, Tugendhat J set out the issue at paragraph 1 of his judgment, which reads:

> "The issue before the Court is whether the parties to this claim for damages for personal injuries have settled the action or not, and if so on what terms and with what effect. The issue depends in part upon the true construction of letters exchanged between solicitors for each party, and in part upon the meaning of CPR Part 36."

37. Against that introduction the Claimant points to paragraph 34 of the judgment which reads as follows:

> "The parties agree that the issues are to be determined by applying an objective test to arrive at the meaning of the correspondence. While the provisions of Part 36 are not part of the law of contract, they are made against the background of that law. The need to apply an objective test is one of the rules which apply in both contexts. Under the objective test, a party may be bound if his words or conduct are such as to induce a reasonable person to believe that he intends to be bound, even though he in fact has no such intention. The Editors of Chitty on Contracts, 30th edition, give the example of a solicitor who

> had been instructed by his client to settle a claim for US $155,000 but by mistake offered to settle it for the higher sum of £150,000."

38. In the next case, *C v D*, the issue was the proper construction of a Part 36 offer, in particular what it means in a purported Part 36 offer to say that it is open for 21 days. The Claimant points to paragraph 55 of that judgment, which reads as follows:

> "Another principle or maxim of construction which is applicable in the present circumstances is that words should be understood in such a way that the matter is effective rather than ineffective. *(The appropriate Latin maxim is then quoted.)*
>
> If the words 'open for 21 days' are given the meaning for which the Respondent contends, then the offer, intended to take effect as a Part 36 offer, fails as such. If, however, the words are given the meaning for which the Appellant contends, then the intention of making a Part 36 offer is fulfilled. There are numerous instances of the application of this maxim. This is how Chitty on Contracts, 30th edition…refers to this rule, 'If the words used in an agreement are susceptible of two meanings, one of which would validate the instrument or the particular clause in the instrument, and the other render it void, infective or meaningless, the former sense is to be adopted. This rule is often expressed in the phrase "ut res magis valeat quam pereat". Thus, if by a particular construction the agreement would be rendered ineffectual and the apparent object of the contract would be frustrated, but another construction, though by itself less appropriate looking to the words only, would produce a different effect, the latter interpretation is to be applied, if that is how the agreement would be understood by a reasonable man with a knowledge of the commercial purpose and background of the transaction. So, where the words of a guarantee were capable of expressing either a past or a concurrent consideration, the Court adopted the latter construction, because the former would render the instrument void. If one construction makes the contract lawful and the other unlawful, the former is to be preferred…."

39. The Defendant points to paragraphs 45 and 68 of the same judgment. Paragraph 45 reads:

> "It follows from my answer to the first issue that there is a necessary inconsistency between an offer being both time limited and a Part 36 offer. An offer may be one or the other, it cannot be both. That is the objective context in which the offer in this case was made by the Claimant's solicitors to the Defendant's solicitors. Both the writer and the reader of that offer must be taken, objectively, to know the legal context."

40. As to Paragraph 68, the Defendant relied upon the opening and (most of the) closing remarks of that paragraph. They are part of the judgment of Rix LJ, giving the leading judgment of the Court. I will begin with his conclusion at paragraph 67. Having said that he would allow the appeal, he goes on to say:

> "The Defendant`s acceptance of the alternative offer, to pay £2 million, on 5th November 2010, only three-and-a-half weeks before trial, was effective, for the Claimant had made a Part 36 offer which it had never withdrawn."

41. And then the opening of paragraph 68:

> "It is said that such an acceptance was opportunistic, for disclosure and the exchange of witness statements had led the Claimant to think that its case had improved."

42. Then the material closing part of Paragraph 68:

> "Ultimately, it is important for the security of the Part 36 scheme, in countless cases, that it should be clearly understood that if a Claimant wishes to make a time limited offer, in the sense that the offer is to lapse of its own accord at the end of a stipulated period, then such an offer cannot be made as a Part 36 offer; that an offer presented as a Part 36 offer and otherwise complying with its form will not readily be interpreted in a way which would prevent it from being a Part 36 offer…."

43. Moving on to the next case, *Purcell*, His Honour Judge Gore QC dismissed an appeal against a District Judge's decision in a low value personal injury claim Protocol case such as this. Liability was admitted but the claim did not settle within stage 2. The Claimant therefore commenced Stage 3 proceedings on 19th January 2012.

44. On 1st February 2012 there was an acknowledgement of service in which the Defendant indicated her intention to contest the amount of damages claimed. The case was listed for hearing before District Judge Peake on 9th May 2012; but on 3rd May the Defendant's representatives wrote to the Claimant's representatives purporting, having reconsidered the matter, to accept the Claimant's Part B offer in the Stage 3 proceedings which mirrored the offer made earlier by the Claimant at stage 2. The issue before District Judge Peake, therefore, was whether that concluded the claim and constituted a settlement.

45. At Paragraph 5, His Honour Judge Gore QC in his judgment said this:

> "That matter was the subject of argument and submission before District Judge Peake and the issue, essentially, was this. Did the offer in the court proceedings pack remain open for acceptance by the time of the letter dated 3rd May 2012 or had it, in effect, lapsed so that it was no longer open for acceptance thereby rendering the letter of 3rd May of no effect at all. In a short judgment he concluded the former, rejecting the Claimant's argument and decided that the offer remained open because it had not been withdrawn at any stage and remaining open as it did it could be and had been accepted by the Defendant, thereby producing a conclusion to these proceedings…."

46. In dismissing the Claimant's appeal, His Honour Judge Gore QC pointed to the particular rules about offer and acceptance within the Protocol and so at paragraph 9, subparagraph E, he said this:

> "So, for example, a stage 2 offer cannot be withdrawn during the consideration period. A stage 3 offer cannot be withdrawn without the permission of the Court."

47. He went on to say this a little later at subparagraph G:

> "What we have here, as with the Part 36 structure, is a free-standing 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."

48. The Defendants rely on this to support the proposition that if an offer is made within the Protocol - even by mistake - and then accepted, that is an end of the matter. The Claimant says that the case is no more than an application of the principle established in *Gibbon*.

49. In *Draper*, District Judge Baker had to deal with another Protocol case. Given its factual background, the Defendant unsurprisingly relies upon it. The District Judge's judgment begins as follows:

> "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 counter-offer. What happened when the counter-offer 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 the 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."

50. Then at paragraph 3, the District Judge said this:

> 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 the 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."

51. In this appeal, the Defendant takes the same position as that set out in *Draper* as being the position taken by the Defendant.

52. The District Judge in that case set out his reasoning and conclusion at paragraphs 4 to 6, which read as follows:

> "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 3 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. *(I pause there to note that this is consistent with the agreement of Counsel at the outset of this appeal that the Overriding Objective applies to the subject matter of this appeal)*. 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 3 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? 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. 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."

53. In our case, the Defendant submits that *Draper* is directly analogous to this case in any event, and further points to the risk of satellite litigation if the Claimant is allowed to import common law principles of Mistake into what is intended to be a self-contained scheme.

54. The Claimant submits that even if common law principles are excluded, there is no real risk of satellite litigation were the facts of this case to recur, and in any event the judgment shows that regard must be had to the Overriding Objective.

55. In *Phillips*, the issue was whether or not, at a Protocol Stage 3 hearing, the District Judge had power (which he purported to exercise of his own motion) to transfer the case out of Part 8 and into Part 7 with the action proceeding on the small claims track. The Claimant appealed to the Circuit Judge who dismissed the appeal. The Claimant further appealed to the Court of Appeal, who allowed the appeal in a judgment delivered by Jackson LJ upon which the Defendant insurers in this appeal rely as pointing to the primacy of the Protocol. They point to paragraph 9 of the judgment in which Jackson LJ, having described how a case proceeds to stage 3, which is litigation, says this:

> "At this point, Practice Direction 8B takes centre stage. PD 8B requires the Claimant to issue proceedings in the county court under CPR Part 8. 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 the sums in issue are usually small, and it is not appropriate to hold a full-blown trial."

56. The Defendant in our case submits that there is there judicial approval of the sort of justice the roughness of which the Claimant in our case suffered.

57. At paragraph 11 of the same judgment Jackson LJ said:

> "It is important to note that the RTA process has an inexorable character. If the 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."

58. The Defendant in our case further points to paragraphs 36 to 38 of that judgment as indicating the primacy of the Protocol. They read as follows:

> "Mr Turner *(my note – Counsel for the Respondent)* has drawn our attention to CPR 8.1(3). This provides: 'The Court may at any stage order the claim to continue as if the Claimant had not used the Part 8 procedure and, if it does so, the Court may give any directions it considers appropriate'. Mr Turner submits that Rule 8.1(3) enables the Court to transfer a protocol case to Part 7 even if paragraph 7.2 of the practice direction does not apply. I am bound to accept that the language of Rule 8.1(3) is wider than the language of paragraph 7.2 of the practice direction. On the other hand, CPR 8.1(3) cannot be used to subvert the protocol process.
>
> In the present case, I do not think that the District Judge was relying upon Rule 8.1(3). Like the Circuit Judge, I believe that the District Judge was relying upon paragraph 7.2 of the practice direction. If I am wrong, however, then in my view it would have been an impermissible exercise of the power under CPR Rule 8.1(3) to transfer the present case out of Part 8 and into Part 7 of the CPR."

59. In *Bentley*, the issue was the proper construction of a Part 36 offer. In that case, Jefford J simply applied the Court of Appeal's decisions in *Gibbon v Manchester City Council* and in the case of *C v D*; but in our case the Claimant points to the emphasis given to the importance (see paragraph 49 of the judgment) of identifying the objective context of the offer.

60. Finally in *Fitton*, His Honour Judge Parker allowed an appeal against a decision of a Deputy District Judge in a Protocol case. At Stage 2, the Claimant made an offer. The Defendant made a counter-offer. The Claimant intended to respond with a counter-offer but accidentally repeated the Defendant's offer back to the Defendant, who accepted it. It was sent by mistake but, from the Defendant's point of view, they had received a bona fide offer and they accepted it.

61. The Deputy District Judge found that that offer was never a Claimant offer. His Honour Judge Parker held that the Deputy District Judge was wrong to do so. Having described (at paragraph 22) how the Claimant's solicitor had taken positive action to generate the counter-offer, he said at paragraph 23:

> "Therefore, the learned Deputy District Judge was wrong at paragraph 9 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.`

62. Paragraph 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."

63. The Judge then immediately went on to pose the question:

> "Is the Claimant entitled to rely upon the doctrine of mistake to avoid the compromise?"

64. In answering this question he referred to a number of cases, including *Phillips* and *Purcell*. He also referred to sections of the White Book upon which same sections the Defendant relies in our case. There is, at page 487 of the 2018 edition of the White Book the editorial introduction to practice direction 8B, the relevant extract of which is relied upon by the Defendant as follows:

> "The RTA and EL/PL 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 PD 8B should be seen as part of the process."

65. Then this appears at page 2677 in the White Book commentary under Section C13A-005, being an extract upon which the Defendant relies:

> "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."

66. Returning to the judgment of His Honour Judge Parker in the case of *Fitton*, his discussion and conclusion appear at paragraphs 35 to 41 and read as follows:

> "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. 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. In so far as one party may make a mistake in dealing with the process from time to time, overall, the benefits of the system far outweigh the negatives.
>
> There is very good reason for the protocol to be self-contained, to the exclusion of normal principles of contract 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 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. 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. 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 2 of the protocol was £1,400. The costs incurred in relation to the appeal alone exceed £10,000. In so far 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 Claimant 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. Settlement within the meaning of the protocol was thereby reached."

67. On the face of it, that would seem to cover the facts of our case pretty well and it is no wonder that the Defendants rely upon it. But the Claimant points out that there was a significant factual difference from our case, which is that in our case the Defendants *knew* that the Claimant had mistakenly made an unintended offer before they accepted it. I observe another difference as well, which is that it is apparent from the judgment that the applicability of the Overriding Objective was never argued.

68. Having reviewed the case-law, the Protocol, Practice Direction 8B and CPR Part 8 as modified by practice direction 8B - to which collectively, like Jackson LJ, I refer as the Rules - I have no doubt that the Claimant's first ground of appeal, i.e. that the District Judge's decision was wrong, must fail. The language of the Rules, the White Book editorial commentary upon them, decided cases on the Protocol and decided cases on Part 36, where analogous, make it clear to my mind that the Protocol is designed to be a self-contained system specifically intended to displace the common law rules.

69. It will be recalled that Moore-Bick LJ, in the case of *Gibbon*, said at paragraph 6:

> "In my view, Part 36 was drafted with these considerations in mind and is to be read and understood according to its terms without importing other rules derived from the general law, save where that was clearly intended."

70. Given the prominent position within the Rules accorded to the Protocol, the same must be true of the Protocol with at least equal force and I can find no basis for saying that the framers of the Rules "clearly intended" the importation of common law rules. And so, in my judgment, the District Judge was right to hold that the Protocol does not allow for reference to be made to external data even such as the compelling evidence that the Portal offer, which was accepted, was unintended and made by mistake. He was, therefore, right to hold that, within the self-contained terms of the operation of the Portal, there was a concluded agreement at £6,115.

71. But that, as I have said, was a concluded agreement within the self-contained terms of the operation of the Portal, to whose operation both sides correctly agree that the Overriding Objective applies, as, for example, District Judge Baker specifically held in the case of *Draper*.

72. That leads me to the second ground of appeal, which is that the District Judge's decision was unjust because he failed to apply the Overriding Objective. Here, the Claimant in my view is on firmer ground. Despite the extensive trawl of case-law by Mr Granville Stafford and Mr Simms (neither of whom appeared in front of the District Judge) nobody has been able to find a case with a factual matrix such as ours, where the undisputed fact is that the Defendants purported to accept an offer *knowing* that it was not an intended offer and, one might add, knowing that it was substantially lower than what was the intended offer. It is this aspect of our case which, in my view, distinguishes is from *Fitton* and, indeed, from *Draper* and which engages the Overriding Objective.

73. In my judgment, a case cannot be dealt with justly in a case such as ours where, before acceptance, one party knows that the other party has mistakenly put forward an offer undervaluing its intended offer by more than one third.

74. I am not attracted to the Defendant`s argument that if I were to allow the appeal, I would be opening the door to the very satellite litigation which a rules-based scheme is intended to avoid because, given the inability to find any case factually similar to ours, I regard the chances of satellite litigation in respect of a set of facts such as we have in our case as being in any event vanishingly small.

75. The Defendants however attempt to point to our case as an example of one which has engendered the sort of satellite litigation which is to be avoided; but it seems to me that the answer to that is that it was the Defendants who engendered it, not the Claimant. If the Defendants really had wanted to avoid satellite litigation, they could easily have done so: for example, by making a counter-offer and putting the ball back into the Claimant's court to try again rather than, as they did, try to take advantage of what they knew was going to be a windfall.

76. I entirely accept, as appears from the case-law that I have rehearsed, that in low value cases such as those for which the Portal is designed, an element of rough justice will, or may be, involved; but that, in my view, cannot be used as a licence for

the deliberate infliction of any degree of injustice. Mr Simms is right to point to the commentary in the White Book, to which I have already referred, that:

> "The RTA Protocol is the primary source governing party behaviour in the claims to which it applies."

But by definition, if it is the primary source, it is not the only source, and the Overriding Objective is not shut out of consideration. That, too, is a source governing party behaviour.

77. Mr Simms submits that paragraph 68 of the judgment in *C v D* shows that the Court of Appeal allowed an opportunistic acceptance of the Part 36 offer in that case, the inference presumably being that there would be nothing wrong with me allowing the Defendant in our case to make what may be regarded as an opportunistic acceptance of the Claimant`s offer. But it rather stretches what Rix LJ actually said. Although I have already rehearsed the opening and closing remarks of Rix LJ at paragraph 68, in this context it is now important to fill in the section in between. Paragraph 68 begins:

> "It is said that such an acceptance was opportunistic, for disclosure and exchange of witness statements had led the Claimant to think that its case had improved."

78. But then Rix LJ carried on:

> "However, whether that view is correct or not would have been revealed, if at all, at trial and has not been debated in these interlocutory proceedings. It is said that the offer had become less advantageous to the Claimant, because it has continued to suffer additional holding costs of the property in the form of security and insurance costs. That may be, but such variables will always arise, as Moore-Bick LJ explained in *Gibbon* at [16]. It is suggested that the Defendant's case with regard to the offer lacks merits, but a similar suggestion failed to reflect the result in *Gibbon.*"

79. That puts the submission based on paragraph 68 in its proper context: there is no implicit encouragement from the Court of Appeal to endorse opportunistic behaviour. Furthermore, the submission made by the Defence in my view fails to grapple with the type of opportunism displayed in our case, i.e. deliberately accepting what was known to be a mistake and a substantial under-offer.

80. Mr Simms was constrained to accept that the logic of his argument meant that no matter how objectively unfair to one party a set of circumstances was which resulted in an apparent agreement being concluded within the Protocol, the very fact that what was happening *was* all happening within the Protocol by definition meant that the outcome would be "just" within the meaning of the Overriding Objective. I cannot accept that. Rough justice there may be but, on a continuum of roughness, moving through rougher justice and roughest justice, there must eventually come a point where the justice is so rough that it becomes injustice - and that point, in my view, has been reached on the unique facts of this particular case.

81. Mr Simms suggested that the District Judge in our case did, in fact, have the Overriding Objective in mind, and in that context he points to paragraph 32 of the judgment where the District Judge said:

> "It may seem unfair that a settlement be upheld in such circumstances."

82. In order to provide context, I remind myself of the whole of paragraph 32, which reads as follows:

> "I am mindful that the Defendant well knew at the time of acceptance that the Claimant intended to offer more than £6,115. The Solicitors had received the email. It may seem unfair that a settlement be upheld in such circumstances. However, I have concluded that what happens in the Portal is specific to the Portal. The protocol does not allow for reference to be made to external data."

83. In fact, I am sure that the use of the word "unfair" was not a reference to the Overriding Objective at all. I say that because I have read the transcript of the whole of the proceedings before District Judge Hickinbottom on 29th October 2018 and nowhere is there even any reference - by anyone - to the Overriding Objective, let alone any argument in respect of it. That is consistent with the Claimant's skeleton argument for that hearing, which also made no reference to the Overriding Objective and concentrated purely upon whether or not the claim was compromised during Stage 2.

84. The reference to "unfairness" in paragraph 32 of District Judge Hickinbottom's judgment appears to be a throwaway remark. In the circumstances that I have rehearsed, I am satisfied that it does so because it *was* a throwaway remark. It is plain that neither party at that hearing even thought about the Overriding Objective.

85. I am absolutely not attempting to lay down any principle in this case. I simply deal with it on its own unique facts. In my judgment, on the unique facts of this case, the Overriding Objective demands that external data can, and should, be considered when deciding if the Overriding Objective has been fulfilled. When it is, in particular the Defendant's knowledge of the Claimant's mistake *before* purporting to accept the Claimant's offer, armed with which knowledge they sought to take advantage of the Claimant in circumstances which they must have known were unconscionable, then dealing with the case justly requires a finding that the agreement apparently reached in this case cannot be allowed to conclude the action at Stage 2.

86. Accordingly, the appeal is allowed and the action will move to Stage 3.
