IN THE COUNTY COURT AT LIVERPOOL CLAIM NUMBER G60YJ447

Before Deputy District Judge Raymond Henley

10 September 2021

BETWEEN

Mr HARISH ASHOK SAGAR

Claimant

And

Miss FARHAI ABDI

Defendant

Mr Andrew Hogan (Counsel) for the Claimant

Mr Frederick Lyon (Counsel) for the Defendant

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DEPUTY DISTRICT JUDGE RAYMOND HENLEY

1 This is my Judgment on the Defendant's Application for the Particulars of Claim in this claim to be struck out and the claim to be dismissed. The matter was listed for 90 minutes. In the event some 75 minutes of that period were taken up in argument and, after soliciting the views of both Counsel, I determined that it would be better to reserve judgment rather than deliver an extempore judgment that would necessarily be somewhat truncated in relation to the complex arguments that were made before me.

2 The basic facts of the matter are straightforward. On 15 October 2019 there was a road traffic accident involving the Claimant, who was riding a motorcycle, and the Defendant, who was driving a car. It would appear that the Defendant, or her insurers on her behalf, accepted at an early stage that the accident was her responsibility, and the

matter has proceeded on that basis throughout. The Claimant sustained personal injuries in the accident, and his motorcycle was damaged beyond economic repair and was written off. There were some delays and missteps caused by the fact that the Defendant was driving under a personal insurance policy rather than one issued to the keeper of the car she was driving, but I do not think the details are material so will not enumerate them here.

3 As is often the case, the Claimant entered into a credit hire agreement for the hire of a replacement motorcycle with McAMS; I am told that hire commenced five days after the accident on 20 October 2019 and lasted until 4 December 2019. On 23 October 2019 the Claimant retained Bond Turner, solicitors, in relation, it would appear, only to the property damage to the vehicle and his riding equipment and the credit hire. Importantly, it appears that Bond Turner's retainer never extended to any claim in respect of the Claimant's personal injuries.

4 For reasons that were not clear to me, there being no witness statement from the Claimant to assist, the Claimant chose to instruct other solicitors, namely AMJ Legal Solicitors Limited ('AMJ') to pursue his personal injury claim. There were therefore separate processes running in parallel for claims relating to the Claimant's personal injuries and for his property damage including credit hire of a replacement motorcycle.

5 As far as the personal injury claim was concerned, it was apparently clear that the damages that were likely to be awarded fell within the ambit of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013 ('the Protocol'), and so pursuant to the Protocol AMJ submitted a Claim Notification Form on 22 January 2020. The matter proceeded and on 1 June 2020 AMJ submitted a Stage 2 pack, leading to a settlement on 18 June 2020 between the parties, so that the personal injury claim never came before the Court.

6 Meanwhile, Bond Turner pressed ahead with the claim for credit hire and property damage. They sent the engineer's report on the damage to the claimant's motorcycle to the Defendant's insurer on 4 December 2019, and followed it up with details of the hire charges claimed on 12 December 2019. However, because of the confusion I alluded to earlier, the Defendant's insurer initially rejected these documents on 13 December 2019. It seems that the Defendant's insurer accepted that it was the relevant insurer on 3 March 2020. That acceptance, of course, came after AMJ had submitted the Claim Notification Form on 22 January 2020, but before submission of the Stage 2 pack. Of course, the initial notification by Bond Turner and its erroneous rejection came well before that date.

7 It does seem that between December 2019 and March 2020 both sides of the claim stalled somewhat. Towards the end of March 2020 the Defendant's solicitors wrote to

Bond Turner, but did not receive a response, and Bond Turner wrote twice to AMJ, but again there was no response.

8 It seems to me that, certainly by the end of April 2020, every party and every representative was, or at least should have been, aware of the existence and interest of every other party and representative. I am conscious that this period effectively spans the First Coronavirus Lockdown, which may have caused some delay, but it does seem that this case, at least, was still in everyone's contemplation.

9 The delays eventually resolved and, as I have already mentioned, the personal injury element was resolved through the Portal process at Stage 2. Bond Turner proceeded to issue the present claim for the vehicle damage, credit hire, and recovery and storage by Part 7 Claim Form issued from the County Court Money Claims Centre on 14 August 2020. That Claim Form and the Particulars of Claim were in due course served, a Defence was filed and served, and the matter was provisionally allocated to the Fast Track. The Defendant filed the present application on 14 October 2020 and it is perhaps a sad reflection on the effects of Covid on the Court that it has taken very nearly 11 months to be heard.

10 The basic factual foundation on which this application is built is not in dispute (nor could it be). When AMJ submitted the Claim Notification Form on 22 January 2020, they completed it incorrectly. Section D first asks the question "3.1 Is the claimant claiming damage to their own vehicle?" with tick boxes to answer "yes" or "no". AMJ ticked "no". At that point the Form directs the person completing it, having ticked "no", to pass over Section E and go to Section F. Section E deals with Alternative Vehicle Provision, and Section F with Accident Details. AMJ should have ticked "yes" in answer to question 3.1 and then gone on to question 3.3 to indicate that the claim for vehicle damage was being dealt with by another company, and then completed Section E with at least some details of the claim for credit hire.

11 And that, in short, gives the basis for the Defendant's application. The Defendant says in its defence and in its application that the claimant's entire claim, both in relation to his personal injuries and in relation to the damage to his motorcycle, credit hire and recovery and storage, has been settled at Stage 2 and that therefore this claim should be struck out pursuant to CPR 3.4(2)(b) as an abuse of process (being an attempt to recover damages in excess of the settlement account) and summary judgment should be given in the Defendant's favour. (In passing, it would appear that the Defendant's choice of phrase was inaccurate as, in my understanding, it is not seeking summary judgment pursuant to CPR 24 but rather judgment as a consequence of striking out pursuant to CPR 3.4(3)).

12 Not surprisingly, the Claimant counters that the Stage 2 process did not include the other matters and that there is nothing inherently flawed in this claim. (I should say that in the alternative the Defendant has pleaded various matters relating to the rates and periods of hire, storage and the like as are often seen in defences relating to these matters. These were not put in issue before me and so I make no findings in relation to them.) Both parties relied on Skeleton Arguments supported by voluminous Case Law, Counsel for the Defendant adopting a Skeleton which had been prepared for a previous adjourned hearing by Mr Martin Ferguson of Counsel.

13 The Claims Notification Form and the Stage 2 process are, of course, derived from the Protocol, and it is to the Protocol that I first turn. Paragraphs 2, 3 and 4 of the Protocol set out its aims, purposes and scope:--

> *Preamble*
>
> *2.1 This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed.*
>
> *Aims*
>
> *3.1 The aim of this Protocol is to ensure that—*
>
> *(1) the defendant pays damages and costs using the process set out in the Protocol 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.*
>
> *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.*
>
> *Scope*

4.1 This Protocol applies where—

(1) a claim for damages arises from a road traffic accident occurs on or after 31st May 2021;

(2) the claim includes damages in respect of personal injury;

(3) the claimant values the claim at no more than the Protocol upper limit; and

(4) if proceedings were started the small claims track would not be the normal track for that claim.

(Paragraphs 1.1(18) and 4.4 state the damages that are excluded for the purposes of valuing the claim under paragraph 4.1.)

It is perhaps trite to observe at this point that the Protocol requires that there be some personal injury. A claim for an accident where there is no personal injury must be brought under the usual Practice Direction on Pre-Action Conduct and Protocols and Part 7 (etc) procedure, as indeed such claims regularly are.

14 Turning to the Protocol, paragraph 1.1 (Definitions) sub-paragraph 18 defines "Vehicle Related Damages

'vehicle related damages' means damages for—

(a) the pre-accident value of the vehicle;

(b) vehicle repair;

(c) vehicle insurance excess; and

(d) vehicle hire;

It is clear that the elements of the claim covered by the present action are Vehicle Related Damages within the meaning of the Protocol.

15 Paragraph 6.4 provides that:

A claim for vehicle related damages will ordinarily be dealt with outside the provisions of this Protocol under industry agreements between relevant organisations and insurers. Where there is a claim for vehicle related damages the claimant must—

(1) state in the CNF that the claim is being dealt with by a third party; or

(2)

(a) explain in the CNF that the legal representative is dealing with the recovery of these additional amounts; and

(b) attach any relevant invoices and receipts to the CNF or explain when they are likely to be sent to the defendant.

16 It was common ground between the parties that there was no such industry agreement that applied in this case. What I take from paragraph 6.4 is that where such an agreement exists, vehicle related damages will be dealt with completely outside the Protocol. In that event, it would appear appropriate that a Claims Notification Form should be completed in the way that AMJ did complete the Form in this case.

17 Though no examples of such industry agreements were put in evidence to me, it seems to me that even where there is an industry agreement as to the procedure that is to be adopted, there must be some dispute resolution procedure within that agreement for situations where the parties cannot agree on the appropriate level of quantum (or perhaps cannot even agree on liability). Conceivably, such dispute resolution procedure might take the form of arbitration or expert determination, but in so far as such dispute resolution procedure may be recourse to Court, it would have to be brought under the Part 7 (etc) procedure used for the majority of claims.

18 The Defendant's Skeleton asserts that the claim should be struck out under CPR 3.4(2)(a) and/or (c) on the basis that it is has no real prospect of success or is an abuse of process. In detail, the Skeleton asserts four grounds for striking out, which I have reworded for clarity:

(a) The Claimant's representations in the CNF and Stage 2 pack, prior to the compromise [of the personal injury claim] at Stage 2, that there were no claims for vehicle related damages;

(b) The rule in *Henderson v Henderson* (1843) 3 Hare 100;

(c) The compromise was not simply of the personal injury claim but included the claims for property damage and credit hire; and

(d) Costs should not be obtainable twice

19 Claimant's Counsel puts things slightly differently in his Skeleton, but in the process adds a further nuance, namely that even if the Defendant establishes one or more of her grounds, a full striking-out would be an excessive remedy.

5 The issues are three-fold

(a) Whether a contract of compromise has been made between these parties in full and final settlement of all and every cause of action and claim arising from the accident on [sic]

(b) Further and additionally whether these proceedings are an abuse of process.

(c) *Further and additionally whether even if these proceedings are an abuse of process that a strikeout is a proportionate sanction to apply.*

20 In the circumstances I shall largely follow the Defendant's framework, returning to the Claimant's wherever necessary.

21 I am conscious that I have been referred by both parties to a number of decisions of Deputy District Judges, District Judges and Circuit Judges and am aware that (a) these are not binding upon me and (b) of the general principle that such decisions should not be cited unless there is no relevant higher authority. It seems to me from what has been put before me that there is little such higher authority, but I tread carefully.

22 The essence of the Defendant's argument in relation to her first ground is set out in paragraph 9 of the Skeleton Argument filed on her behalf:

9 The Claimant is responsible for his own claim. The Defendant is entitled to rely upon the representations made, and signed with a Statement of Truth. It is not for the Defendant to check whether the Claimant intends to subsequently pursue separate claims for credit hire, repair, or other losses that he has either actively dismissed or failed to bring into line with the mandatory requirements of the portal. That would be disproportionate, and displace the equal footing of the parties, contrary to the overriding objective.

23 I pause to remind myself of the current version of the Overriding Objective:

The overriding objective

1.1

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses can give their best evidence;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

24 The Defendant primarily relies on the decision of DDJ Shedden (as she then was) in *Hillier v Southern Rock* (County Court at Northampton 3 October 2019), which was upheld by HHJ Murdoch QC (County Court at Northampton 16 December 2019). Neither, of course, is formally reported, but I was supplied with the transcript of Judge Shedden's judgment as an exhibit to the Defendant's witness statement and the transcript of HHJ Murdoch QC's judgment circulates on the internet for the benefit of those with an interest in this area. I have read both. The Defendant's Skeleton informs me that permission to further appeal to the Court of Appeal was refused by Floyd LJ, but does not say on what grounds. I think the Defendant seeks to imply that the Court of Appeal refused permission on the grounds that there was nothing arguably wrong with DDJ Shedden's decision, and that this should be construed as giving some Court of Appeal authority to that decision, but on the limited information before me I think that that inference may be a step too far.

25 In *Hillier* the facts were similar, though not identical, to the facts here. The claimant there did intimate that a claim for credit hire etc was to be brought by another in the CNF, but it was then omitted from the Stage 2 pack on which settlement was later based. DDJ Shedden said:

21 The document is signed by a statement of truth and that is significant, of course. I think that the fundamental principle that when parties are negotiating settlement of matters such as this, they should be entitled to rely on pleadings when they are submitted and signed by a statement of truth as being a complete overview of the case that is being put against them, is a really important one.

22. The representation, it seems to me, through the settlement pack was that there was no claim for credit hire being pursued. That may have been an oversight as stated in the reply to defence, but nonetheless that is what it would suggest to an ordinary reader of that document …

26 The Defendant also puts forward the cases of *Smikle v Global Logistics* (DJ McQueen) and *Reardon v Mange Engineering Services* (DDJ Slaney). I do not a have full transcript, but the Defendant's Skeleton contains an extract from *Smikle* which appears to show that DJ McQueen decided to dismiss the credit hire etc claim as an abuse of

process on the basis that the defendant in that case was entitled to rely on the Statements of Truth that form part of the CNF and Stage 2 pack. It does seem that DJ McQueen also relied, in part, on the fact that there was no witness statement provided in that case by either the claimant or the solicitors instructed to make the credit hire claim. In *Reardon*, similarly, DDJ Slaney appears not to have had such a statement. DDJ Slaney also considered that the passage of time was significant in the decision.

27 In opposition, the Claimant offers the case of *Poku v Abedin* (HHJ Backhouse Central London County Court 8th October 2020). That was a decision on appeal in which HHJ Backhouse set aside a first instance DDJ decision, and, rather than remit back for rehearing, decided

> *55. As I have said, each case has to be decided on its own facts. It is obviously important that parties should comply with the Protocol but in the context of the circumstances of this case, with the correspondence and the invitation to deal with the credit hire claim between Auxillis and Validus, I do not consider that it was an abuse of process to bring this claim, notwithstanding the failure to tick the right boxes on the CNF and in the stage two settlement pack.*
>
> *56. But if I am wrong and bringing the claim did amount to an abuse of process, it would not in my judgment be proportionate to strike it out. The Defendant has not been misled. It might have hoped to have obtained a windfall, but it does not seem to me that in this case that is in accordance with the overriding objective.*

28 I find myself in agreement with HHJ Backhouse rather than DDJ Shedden. As I reminded myself earlier, the overriding objective is for the court to deal with cases justly and at proportionate cost. While I appreciate that the point was not particularly argued before me, when all is said and done this is a case in which it is an admitted fact that the Defendant's negligent driving caused an accident in which the Claimant was injured, his motorcycle was damaged and he hired a replacement. The justice of the situation is that the Defendant should pay appropriate damages for the consequences of her negligence, to be determined in accordance with the law relating to negligence. It is for that purpose that the Defendant was required by law to have, and apparently did have, appropriate insurance under the Road Traffic Acts. For present purposes, the point not having been dealt with by evidence and argument, I will assume that the Claimant is contractually obliged to pay the hire charges that he is said to have incurred. If the Claimant is unable to recover these from the Defendant, he may possibly have a claim in professional negligence against AMJ, but whether or not the Claimant succeeds in such a claim, there will be significantly more costs expended and the Defendant (or her insurers) will evade the proper consequences of her negligence. While CPR 1.1(2)(f) requires compliance with rules, practice directions and orders, that

requirement is stated expressly to be as far as practicable and, it seems to me, must be a subordinate aspect of the overriding objective. Where I differ, with respect, from the learned Judges in *Hillier* and *Smikle* is that, it seems to me, their approach places compliance with the rules over the justice of the situation. *Reardon* appears closer to the facts of the present case, but DDJ Slaney placed a strong emphasis on *res judicata* and this was doubted on appeal in a short judgment by HHJ Yelton, though the appeal was dismissed on other grounds

29 In any event, it seems to me that the factual matrix here is closer to that set out in *Poku* rather than *Hillier* or *Smikle*; the Defendant's insurers knew, or should have known, from Bond Turner that Bond Turner were dealing with the vehicle -related claim at least one month before AMJ submitted the CNF, and they made enquires of Bond Turner as to whether Bond Turner were still acting on 26 March 2020. Although it is true that they received no reply from Bond Turner, I think it is safe for me to take judicial notice of the fact that 26 March 2020 was the day on which the First Coronavirus Lockdown came into force, and while (along with many other sectors in the economy) the legal professions made strenuous efforts to maintain 'business as usual' while urgently restructuring many of their working processes, in the circumstances it is not entirely surprising that various matters which would otherwise have been dealt with speedily and efficiently were delayed or even overlooked.

30 Even if I am wrong in that, there was little argument before me as to what might be the test for the threshold between an abuse of process which would justify the striking out of a claim under CPR 3.4(2)(b) on the one hand and a mere error which might expect to attract a simple sanction in costs or in evidence that might be allowed, or even rectified under CPR 3.10, on the other. While, conscious of the length that this judgment has already reached, I do not propose to provide a detailed explanation, and recognising that the categories of abuse are not closed and that ultimately each case turns on its own merits, I have considered the commentary at *White Book 2021* 3.4.1 to 3.4.17 and the analysis in the recent case of *Cable v Liverpool Victoria Insurance Co Ltd* [2020] EWCA Civ 105 and it seems to me that this case does not sit comfortably in any of the recognised categories of abuse, not least because it seems to me that the majority of instances where the courts have found abuse to take place involve some deliberate subvention of the proper processes, whereas here it seems most likely that, as I have already considered, the situation stems from a mistake by AMJ in relation to an issue in which they were not actually instructed.

31 If I consider the well-known *Denton* criteria which the court would apply in a relief from sanction, it seems to me that the error by AMJ is serious and significant and there is no good explanation for it. Looking wider at all the circumstances of the case,

though, I think that, for the reasons I have already outlined, relief from sanction would be given.

32 Accordingly, I find that the inaccurate completion of the CNF and Stage 2 pack by AMJ does not constitute a representation on which the Defendant is entitled to rely..

33 If I am wrong in that then the Claimant submits that striking out is in any event disproportionate. It seems to me that any additional expenditure the Defendant might be put to can be compensated in costs, and in the light of *Cable* and the Defendant's admission of liability I agree that striking out is not appropriate.

34 The Defendant's second line of argument is based on the well-known Rule in *Henderson v Henderson.* That is a specific variety of abuse of process, where a claimant brings a claim in respect of a matter which could have been placed before a court as part of an earlier claim, but was not. It has been accepted by the House of Lords in *Johnson v Gore Wood* [2000] UKHL 65 that this can extend to litigating a matter which could have been included in an earlier settlement, but was not. The Defendant's third line is that the claim for credit hire etc. was in fact settled at Stage 2. It seems to me that these are, to some extent, different sides of the same coin and I will consider them together.

35 At this point I have to return to detailed consideration of the Protocol. There are a number of potential pathways through the Protocol and I will take the one that seems to me to be closest to what has or should have happened in this case.

36 Had AMJ completed the CNF correctly, nominating Bond Turner or those instructing them under subrogation as handling the credit hire etc claim, then the Stage 2 pack they submitted on 1 June 2020 under Protocol paragraph 7.47 would not have included the credit hire claim in any event. That is because Protocol paragraphs 7.51 to 7.54 provide for the Stage 2 pack to be amended to include vehicle related damages if the claim does not settle within the Consideration Period defined in paragraphs 7.35 to 7.37. It did settle on 18 June, which was comfortably within the Period. It seems to me that that then would trigger paragraph 7.60 which permits the claimant to start Part 7 proceedings for the vehicle related damages. That, of course, is very close to what has happened in this case. Had that been so, the operation of the Protocol would mean that the Defendant would or should have been aware of the fact that it had only settled the personal injury claim and might still have to face a Part 7 claim for the vehicle related damages, and so neither the question of *Henderson* abuse nor that of whether the settlement included the vehicle related damages could have arisen.

37 For the reasons that I have previously stated, the Defendant knew, or ought to have known, or at the very least have been put on enquiry, that AMJ were not instructed in

relation to the credit hire etc. claim. While Bond Turner did not reply to a reply made on the 26 March 2020, for the reasons which I have already explained and whatever inference might be drawn in more ordinary times, I do not think the Defendant could reasonably have concluded that the credit hire etc. claim had been abandoned.

38 For those reasons I conclude that the credit hire etc. claim was not included in the settlement.

39 While the situation where a claimant instructs different solicitors to bring separate claims in relation to different elements of the same underlying loss is an unusual one, it seems to me that such a situation is clearly within the scheme allowed by the Protocol. The Protocol must, within its ambit, take precedence over (or be considered an exception to) the Rule in *Henderson*. The issue then is whether a clear mistake in the operation of the Protocol should bring the situation back within that Rule. In my view it does not, and so the bringing of the present proceedings is not contrary to the Rule in *Henderson*.

40 The Defendant's final argument is that allowing this claim to continue puts her (or, in reality, her insurers) at the risk of paying 'double' costs. This is, of course a Part 7 claim for non-personal injury damages with a pleaded value lying between £10,000 and £25,000. Without wishing to be seen in any way as prejudging the matter, should the Claimant succeed in full, this is a claim which is put within the Fast Track valuation band and to which Qualified One-Way Costs Shifting does not appear to apply. The court has more than adequate powers under the Costs Rules to make appropriate costs orders to reflect what it sees as the justice of the case, and, if it sees fit, to examine the conduct of AMJ and the claimant in this matter in detail.

41 I therefore dismiss the Defendant's Application.