APIL NORTHERN FORUM

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PROCEDURE UPDATE

Experts

Edwards-Tubb -v- J D Weatherspoon plc [2011] EWCA Civ 136 was an appeal about whether the claimant had to disclosure a report prepared by an expert jointly selected under the Pre-action Protocol for Personal Injury Claims as a condition of gaining permission to rely on the evidence of another expert in the same field of expertise.

The claimant suffered personal injuries in a fall at work, for which the defendant admitted liability.

Whilst, at first, the claimant appeared to have hurt his knees, or perhaps his knees and back, he claimed the injuries had led to chronic whole-body pain having a great effect upon his life.

In a letter of claim sent under the Pre-action Protocol for Personal Injury Claims the claimant's solicitors listed 3 orthopaedic surgeons and invited objection to any by the defendant. There was no such objection.

When proceedings were served the particulars of claim were supported by a report from an orthopaedic surgeon who had not been nominated in the letter of claim.

Meanwhile, the claimant's solicitors had instructed, and obtained a report from, one of the orthopaedic surgeons originally nominated. That report, however, had never been relied upon or disclosed by the claimant.

The defendant made an application for disclosure of the earlier report, not on the basis of an absolute right to disclosure but on the basis such disclosure should be made a condition of permission to rely on the subsequent report.

The deputy district judge granted the defendant an order permitting the claimant to rely on the orthopaedic expert whose evidence was served with the particulars of claim, but conditional on the disclosure of the unused report of the expert originally nominated.

On appeal the circuit judge allowed that appeal on the basis the order of the deputy district judge impermissibly overrode privilege.

The question in the appeal to the Court of Appeal was framed by Hughes LJ as follows:

> "If the claimant has obtained a medical report from expert A, but chooses not to rely on it, and the leave he seeks is to rely on the evidence of expert B in the same field, ought he to be put on terms that before he can rely on B, he must disclose what A has said?"

The Court of Appeal noted the Pre-action Protocol for Personal Injury Claims is designed to facilitate settlement if possible, and expedition and cost-efficiency if not. Whilst designed for fast track cases the court will expect its spirit to be observed in larger value claims, for example agreeing experts.

The protocol does not alter the substantive or procedural law but is relevant to the exercise of the court's powers under Part 3.1 when the court gives case management directions and under Part 33 when deciding questions of costs. Indeed, Hughes LJ noted:

> "In practice, compliance with the protocol is a matter of importance in the case management of personal injuries actions."

In relation to experts the purpose of the protocol is to achieve where possible the instruction of an expert in whom the other side has confidence.

The court does have case management powers to impose conditions: Huscroft -v- P &O Ferries [2010] EWCA Civ 1483.

However, the earlier report was a privileged document. A person in possession of a privileged document cannot be criticised for claiming the privilege and declining to waive it, nor can any adverse inference be drawn against him from his claim: Wentworth v Lloyd (1864) 10 HLC 589 and Sayers -v- Clarke Walker [2002] EWCA Civ 910. In other words it would not be permissible to infer from the claimant's reliance upon privilege the earlier report was unfavourable.

In Carlton -v- Townsend [2001] EWCA Civ 511 the Court of Appeal concluded a report obtained under the protocol was not a joint report, however the question did not arise as to whether the kind of conditional order now sought was appropriate.

In Hajigeorgiou -v- Vasiliou [2005] EWCA Civ 236 case management directions allowed the parties to rely on expert evidence in an identified field of expertise. The Court of Appeal held that, in these circumstances, no permission was required. However, the question of privilege, not explored in Beck -v- Ministry of Defence [2003] EWCA Civ 1043 was considered and the approach in Beck supported on the basis a condition requiring disclosure, where permission was needed, would control the conduct of litigation and also expert shopping.

The Court of Appeal noted Part 35 is concerned only with experts instructed to report "for the purpose of proceedings", so as the notes at 35.2 (1) made clear that creates a distinction between an expert instructed to advise a party privately and one who is instructed to produce a report for the purpose of proceedings.

The Court of Appeal concluded there was no difference in principle between a change of expert instructed for the purpose of proceedings pre-issue and a change of expert post-issue. Both raised the damaging feature of expert shopping.

Hughes LJ concluded:

> "Authority apart, it seems to me that the imposition of a condition of disclosure is as justified in pre-issue as in post-issue cases. I certainly accept that there may be perfectly good reasons for a party to wish to instruct a second expert. Those reasons may not always be that the report of the first expert is disappointingly favourable to the other side, and even when that is the reason the first expert is not necessarily right. That means that it will often, perhaps normally, be proper to allow a party the option, at his own expense, of seeking a second opinion. It would not usually be right simply to deny him permission to rely on expert B and thus force him to rely on expert A, in whom he has, for whatever reason, lost confidence. But that is quite different from the question whether expert A's contribution should be denied to the other party by the fact of who instructed him. An expert who has prepared a report for court is different from another

> witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him. Whatever the reason for subsequent disenchantment with expert A may be, once a party has embarked on the pre-action protocol procedure of co-operation in the selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case, has been accepted by the other party as suitable, and has reported. Thus although the instruction of a medical expert is a matter almost of course in most personal injury cases, it is appropriate for the court to exercise the control afforded by CPR 35.4 in order to maximise the information available to the court and to discourage expert shopping."

That power should usually be exercised where the change of experts comes after the parties have embarked upon the protocol. Where a party has elected to take advice pre-protocol the same justification does not exist. As Brooke LJ observed in Carlson a party is thereby free to take such advice

on the viability of the claim as he wishes. An expert consulted at that time is not instructed to write a report for the court and therefore outside Part 35.

Part 36

Sutherland -v- Turnbull [2010] EWHC 2699 (QB) was an application by the defendant seeking an order costs in relation to what were described as "the issues of liability and causation" be reserved until conclusion of the issue of quantum or, alternatively, for the court to exercise discretion as to such costs under Part 36.10 (2).

The claimant suffered serious injuries in a road traffic accident.

The claimant was being driven home from a party by her husband when they were both very drunk.

Whilst the car was travelling the claimant, on her case, fell or, on the defendant's case, jumped from the vehicle.

The claimant's husband continued along the road but then turned round and flashed the vehicle's headlights towards an oncoming vehicle, travelling in the same direction the claimant had originally been travelling, driven by the defendant.

The defendant, who said flashing the headlights only served to distract him from the road ahead and the presence of the claimant, ran over the claimant.

The defendant's Part 36 offer, ultimately accepted by the claimant, was made on 3 September 2010 containing 2 separate offers:

- The first was to contribute 30% of the damages arising from a specific list of injuries (set out in the offer) sustained in the accident, which importantly did not include the head and facial injuries suffered by the claimant, on the basis these were sustained as a result of the fall into the road on exiting the moving vehicle.

- An offer to settle "the whole of the claimant's claim" for £10,000 (on condition costs would be capped and the defendant would not seek recovery from the claimant's husband).

On 15 September 2010, within the 21 day period, the claimant accepted the first Part 36 offer.

The claimant subsequently sent a draft consent order which included provision for the defendant to pay the claimant's costs on the issue of liability. The defendant objected to that provision for costs and issued the application which was before the court.

The judge held that the essential dispute between the parties was whether the defendant's Part 36 offer related to "part only of the claim " for the purposes of Part 36.10 (2) (a):

- If not the claimant was automatically entitled to the costs of the proceedings up to acceptance under Part 36.10 (1).

- If it did then if at the time of serving notice of acceptance the claimant abandoned the balance of the claim, the claimant would only be entitled to costs if the court did not otherwise order, under Part 36.10 (2).

The first question was, therefore, whether the defendant's offer was a Part 36 offer relating to part only of the claim.

- An objective reading of the first Part 36 offer led to the conclusion it was an offer to settle all outstanding liability issues including, in particular, the issues ordered to be tried as a preliminary issue. Hence the offer was not confined to agreeing a proportion of damages for the injuries specified in the offer, and not compromising the claim in respect of the other injuries, so as to be part of the claim.

- Furthermore, Part 36.11 (3) stipulates that where an offer relating to part only of a claim is accepted the claim will be stayed as to that part only on the terms of the offer, hence there would have been no stay for the claim in respect of the head and shoulder injuries which would have had to proceed to trial. That was clearly not what was intended or contemplated by the offer nor what would have been understood by any reasonable solicitor reading that offer.

Secondly, the defendant would have to show, if the offer related to part of the claim, the claimant was abandoning her claim in respect of the other parts of the claim, namely the head and shoulder injuries. Part 36.10 (2) (b) was held to contemplate a separate distinct act of abandonment carried out at the same time as the act of accepting the Part 36 offer on part of the claim. Here, the claimant was accepting an offer to settle the whole of the liability claim.

Accordingly, it was not necessary to decide whether costs should be deferred or how the discretion under Part 36.10 (2) should be exercised. Rather, the claimant was entitled to the costs of the proceedings up to the date on which notice of acceptance was served under Part 36.10 (1).

C -v- D [2010] EWHC 2940 (Ch) was the hearing of an application by the claimant, in a breach of contract claim, for a declaration an offer purported to have made under Part 36 was no longer and had not already been accepted by the defendant.

A letter from the claimant to the defendant dated 10 December 2009:

- Was headed "Offer to settle under CPR Part 36" and made a number of other references to Part 36.

- The proposal was expressed to be "Open for 21 days from the date of this letter (the "relevant period")."

- The letter stated that if the offer were not accepted and the claimant a judgment equal to or more advantageous than the offer, the claimant would rely on Part 36.14 including costs assessed on the indemnity basis after the end of the relevant period.

The offer was not accepted within the 21 days referred to.

There was then an exchange of emails, the gist of which was that the claimant was willing to allow the defendant some additional time, to 8 January 2010, to respond to the offer.

In the event it was not until 5 November 2010, when the trial of the action was due to commencer on 29 November, the defendant purported to accept the offer.

The issue, therefore, was whether a binding settlement had been achieved or if the trial would need to proceed, that issue turning on whether the defendant had validly accepted the claimant's offer.

The offer was clearly time-limited. Could such an offer be capable of constituting a Part 36 offer at all?

The claimant contended a time-limited offer was capable of being a Part 36 offer, the time-limit simply laying down the period within which the offer must be accepted as well as specifying the "relevant period".

The defendant, however, contended this was an inherent inconsistency and a time-limited offer would not be a Part 36 offer at all.

The court held that Part 36.14 places a potentially severe costs sanction on an offeree, though this does not apply where the Part 36 offer has been withdrawn or where the terms are changed to be less advantageous and the offeree has beaten the less advantageous offer. Accordingly:

> "The policy of Part 36 can thus be identified, under this argument, as being to encourage a defendant to accept a reasonable Part 36 offer from the claimant but so that, if the offer is not kept open, by being withdrawn or changed detrimentally, the
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> sanction ceases to apply. The successful offeror can take the benefit of the provisions only, as the *quid pro quo,* if he has left it open to the offeree to accept the offer is kept open."

The judge concluded:

> "In my judgment, a time-limited offer, as I have described it, is not capable of being a Part 36 offer. I consider that the structure of Part 36 in general and the provisions of rule 36.2(2) and rule 36.14(6) in particular, establish that an offer must be capable of acceptance unless and until withdrawn by service of a notice within rule 36.9(2), although an offer may also be changed; but if its terms are less advantageous, the costs sanctions under rule 36.14(6) do not apply."

The defendant appealed this ruling.

In the Court of Appeal Rix LJ identified the issue for determination in the following terms:

> "The critical issue raised by this appeal is what it means in a purported CPR Part 36 offer to say that the offer is "open for 21 days". On one view it means that the offer is *not* open *after* 21 days. On another view it means, in its context, that the offer will not be *withdrawn* for 21 days."

The Court of Appeal agreed with the judge that a time limited offer could not be a Part 36 offer. Rix LJ explained why:

> "…in my judgment the new Part 36 regime cannot accommodate a time limited offer. The essence of a Part 36 offer is that it lies on the table until formally withdrawn. Only an offer which has not been withdrawn down to the commencement of trial is capable of having the scheme's costs consequences set out in rule 36.14. A Part 36 offer can be accepted at any time unless withdrawn. Therefore the scheme seeks to encourage offers which are not time limited. The scheme nevertheless permits flexibility in permitting offers to be amended and withdrawn. The process however is strictly regulated in the interests of clarity and certainty."

However, the defendant also argued that the offer should not be interpreted as a time limited offer which depended upon what, in the context, "open for 21 days" meant.

The Court of Appeal held this question had to be answered by deciding how a reasonable solicitor would have understood the offer.

It is a general principle of construction that words in a document should be understood in a way that the matter is effective rather than ineffective. That supported the defendant's interpretation that the reference to 21 days was an expression of the relevant period. This interpretation was also supported by the language used, purporting to define 21 days for which the offer would remain open as the relevant period.

Accordingly, the judge had been wrong to construe the offer as a time limited, rather than a part 36, offer.

The offer had not subsequently been withdrawn and, accordingly, remained open for acceptance.

On the issue of interpretation Rimer LJ noted:

> "The answer to the critical question still turns on how the reasonable man would read the offer. The relevance, however, of the claimant's expressed intention to make its offer a Part 36 offer is that, if there are any ambiguities in it raising a question as to whether the offer does or does not comply with the requirements of Part 36, the reasonable man will interpret it in a way that is so compliant. That is because, objectively assessed, that is what the offeror can be taken to have intended."

Admissions

Woodland -v- Stopford [2011] EWCA Civ 266 was an appeal by the claimant against a first instance decision allowing the defendant to withdraw an admission of liability.

The claimant's injuries were suffered in an accident that occurred on 5 July 2000, when she was 10 years old.

The claimant's school had arranged with the defendant for swimming lessons at a local swimming pool.

The defendant was not present when the lessons took place but had engaged an instructor and lifeguard who were present, though a dispute had now arisen as to whether these were employees of the defendant or independent contractors.

The claimant was seen to be in distress by fellow pupils, submerged under the water. The claimant was eventually pulled out of the pool but only after suffering a hypoxic brain injury.

In 2001 the claimant's father instructed solicitors who, after initially writing to the council who ran the swimming pool, sent a letter of claim to the defendant which was expressed to be "written pursuant to the Personal Injury Accident Pre-Action Protocol".

The defendant appeared to be a member of the Swimming Teachers Association, who had block insurance cover, to whom the letter of claim was referred and who, in turn, instructed loss adjustors to handle the claim.

In November 2001 the loss adjustors wrote denying liability.

Meanwhile, a report was prepared by the Health & Safety Executive suggesting the claimant had been rescued promptly though making a number of suggestions for future arrangements with group swimming lessons.

The claimant's father, who was not satisfied with the investigation, made further enquiries himself and persuaded the HSE to carry out a further investigation.

In 2003 that further investigation concluded there had been a delay in spotting the claimant in the water and that lifeguarding systems should have been in place.

The claim was eventually resurrected in 2007, on the basis of the further HSE report, resulting in a crucial letter dated 27 November 2007 from the loss adjustors which stated:

> "……we can confirm that liability will be conceded for this claim in full."

In 2008 the claimant changed solicitors and the defendant instructed solicitors. The defendant's solicitors invited the claimant's solicitors to provide some further information "simply to complete our investigation of the case in its entirety" and stating:

> "We are not seeking to go behind the admission of liability, merely to understand the entire case."

The claimant's new solicitors saw no reason to incur costs providing such information when liability had been admitted. They pressed for a substantial interim payment and then, by letter 27 July 2009, the defendant's solicitors wrote stating:

> "The Swimming Teachers Association Ltd hereby now forthwith, and with immediate effect, retracts in full that concession/admission and any other statements or acts that could in any way be construed as any form of admission/concession of liability or responsibility and/or any waiver of rights to alleged contributory negligence and/or to seek a contribution and/or indemnity from any third party."

The claimant then promptly issued proceedings and applications followed:

- The claimant applying for judgment on the basis of the pre-action admission under Part 14.1A (4) (a).

- The defendant applying for permission to withdraw the admission under Part 14.1A (5).

The judge held that whilst he had to consider all the circumstances of the case he must specifically consider seven factors identified in paragraph 7.2 of the Practice Direction to Part 14 CPR:

- (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has come to light which was not available at the time the admission was made;

- (b) the conduct of the parties, including any conduct which led the party making the admission to do so;

- (c) the prejudice that may be caused to any person if the admission is withdrawn;

- (d) the prejudice that may be caused to any person if the application is refused;

- (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;

- (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and

- (g) the interests of the administration of justice."

Specific reference was made in these rules to whether new evidence had come to light but it did not follow a court could not permit a party to withdraw an admission where no new evidence had come to light. This was such a case, where the application was prompted to a careful re-appraisal of what was known.

The judge recognized he had to perform a balancing exercise and whilst there were factors in favour of both sides the interests of justice led to the conclusion the balance, though not by a great margin, came down in favour of the defendant.

The Claimant appealed.

The Court of Appeal noted the circuit judge had "handed down a thoroughly and carefully considered judgment".

The claimant's main attack on the judgment was a failure to give proper weight to the absence of new evidence prompting the withdrawal of the admission, which resulted simply from a re-appraisal of the facts.

However, the judge had been correct to conclude a party was not prevented from withdrawing an admission where no new evidence had come to light, although the absence of any new evidence was a relevant factor.

The judge also, properly, had to bear in mind prejudice to the parties, the overall interests in the administration of justice and the need to strike a balance. That was exactly what he did.

The Court of appeal held that the judge was fully entitled to come to the conclusion he did. Ward LJ concluded:

> "It hardly needs to be said that for this Court to interfere with an exercise of discretion, especially one made in the exercise of the judge's case management powers, he must be shown to have taken into account some matter which he ought not to have borne in mind or had regard to some factor which he ought

not to have held to be material. Failing that and failing an error of principle, which is not asserted in this case, the challenge to the exercise of discretion depends upon the judge having exceeded the generous ambit within which there is room for reasonable disagreement."

Accordingly, the appeal was dismissed.

Fraud

Zurich Insurance Company Plc -v- Hayward [2011] EWCA Civ 641 was an appeal, by the insurer against an order striking out a second action, brought against the claimant in the original action.

The defendant (original claimant) suffered injuries in an accident at work in 1998. The claimant was the insurers of the defendant's employer.

The claimant was suspicious of the defendant and so, in 1999, undertook surveillance by enquiry agents.

The defendant commenced proceedings in 2001 alleging continuing disabilities and with a schedule of loss seeking damages just under £420,000.

The defence, in the light of the surveillance evidence, alleged exaggeration for financial gain.

In 2002 liability was agreed on the basis of a 20% reduction for contributory negligence.

In 2003 terms to settle the whole claim were agreed under which the defendant accepted an offer of just under £135,000.

The settlement was embodied in an order which was in the form of a Tomlin order, the schedule being set out as part of that order.

In 2005 the defendant's former neighbours approached his employers suggesting that the defendant had been pretending to be as injured as he claimed. This information was referred on to the claimant to whom the neighbours made statements confirming what they had told the employers. Essentially, they suggested the defendant had made a complete recovery from his injuries by 2002, over a year before settlement of the claim.

In 2009 the claimant commenced this action alleging settlement of the claim had been obtained by false representations arguing at least £72,000 additional damages had been paid as a result of those representations.

The defendant defended the claim on the basis that:

- There was no cause of action because of the compromise embodied in the Tomlin order.
- Fresh evidence would have to satisfy the rules in Ladd -v- Marshall [1954] 1 WLR 1489.
- In any event the defendant denied misleading the claimant.

The defendant applied to strike out the claim under Part 3.4.

The application was heard by a deputy district judge who concluded the correct approach was for the claimant to apply for the Tomlin order to be set aside on the ground of fraud. The claimant was allowed to amend the claim accordingly and the action not struck out.

The claimant appealed, to the circuit judge, who allowed that appeal and struck the claim out.

The claimant now appealed, to the Court of Appeal.

The first question for the court was whether compromise of the first action created an estoppel which would prevent the second action.

There will not be an estoppel simply because there was an allegation of fraud in the first action. Rather, there needs to be a "congruence" between the allegation of fraud, compromised in the first action and the allegation of fraud made in the second action, in other words they must be essentially the same. That requires a specifically identifiable allegation of fraud with an attempt to repeat that very allegation.

Whilst the allegation in the first action, that a disability was being exaggerated for gain, amounted to an allegation of fraud and was similar to the allegation now made it was not the same allegation nor was it clear exactly what was compromised in the first action. Accordingly, there was no estoppel.

That left the question whether the claim was an attempt to re-litigate a matter which could have been raised before, even if not res judicata. However, the second action was not held to be such an abuse of process.

Smith LJ considered there was no difference between a consent order and an agreement in the form of a Tomlin order. Moore-Bick LJ, however, did not think a Tomlin order would give rise to estoppel by res judicata, although a consent order might amount to estoppel by record. Maurice Kay LJ did not think it necessary to resolve those different views, for the purposes of determining the appeal.

Accordingly, the appeal was allowed.