



Case No: C03SW322
C03SW323

IN THE COUNTY COURT
SITTING AT LIVERPOOL

35 Vernon Street
Liverpool
L2 2BX

Hearing Date: 21st February 2017

Before:

DISTRICT JUDGE BALDWIN

(sitting as a Regional Costs Judge)

Between:

KARLA BATES

Claimant

-and-

DAVID BOURNE

Defendant

And between:

CHRISTOPHER WADE

Claimant

-and-

AARONJIT KANG

Defendant

Mr Brian Dempsey (of Elite Law Cost Drafting Limited) for the Claimant
Mr Chris Allen (instructed by Carpenters Solicitors) for the Defendant

JUDGMENT (Approved)

Single issue – recoverability of Fixed Late Settlement Costs

1. These claims ordered to be heard together comprise the second of two similar hearings heard by me on the same date arising out of the Pre-Action Protocol for Low Value Personal Injury Claims in RTAs (“the protocol”). In such circumstances, I will be forgiven from borrowing at any appropriate juncture from my previously drafted decision arising out of the first hearing.
2. They have been issued by the Claimants as Part 8 Costs only claims, each Claimant seeking £300 fixed late settlement costs pursuant to para. 7.48(2) of the protocol, which permits recovery of the same by applying CPR r. 45.23A. The (potential) right to this amount, it is agreed, arises if the claim does not settle by the end of the total consideration period at Stage 2 but does so after the Court Proceedings Pack (“CPP”) is sent to a Defendant but before Stage 3 proceedings are issued under Part 8. The recoverability of this or any figure is in fact disputed in full by the Defendants in both claims.
3. I have before me a paginated bundle of documents covering both claims to include skeleton arguments from both sides and I have benefited from full oral submissions in addition.
4. The relevant factual matrices of the claims are essentially identical and no issue remains as to the timing of the conclusion of the total consideration period. They are each road traffic accident claims for personal injuries which remained subject to the protocol, otherwise known as being within the portal, see para 5.1 of the protocol.
5. In both cases an unsolicited increased offer from the Defendants by way of telephone call after the end of the total consideration resulted in settlement of both claims.

Defendants' complaint

6. Through Mr Allen the Defendants complain of the Claimants' conduct in these matters. The failure of the Claimants to negotiate or respond to requests for further information within the total consideration period, it is said, is not what is envisaged by the protocol and any lacuna in terms of sanction to be imposed for conduct seen to be against the spirit of the protocol or the conduct positively expected therein can and should be cured by the general exercise of the Court's discretion as to costs under Part 44, which is not specifically excluded.
7. Much store is laid on the interpretation of para. 7.43 of the protocol, which, it is argued, imposes a positive obligation to negotiate in terms of response and counter response within the total consideration period and such a blatant failure to so engage as expected should cause the Court to generate a sanction, namely the disallowance of the costs claimed here. Indeed, says Mr Allen, this Court refused to allow late settlement costs in *Korczynski v Garbrah* (22/4/16 unreported) and thus has already been prepared to express disapproval of the sort of conduct complained of therein. It is thus open to the Court to determine that the total consideration period is not at an end, where there has been no response, and thus the right to late settlement costs has not crystallised.
8. Mr Allen further criticised the drafting of para. 7.48(2) and suggested that it was ambiguous in terms of the relevance or otherwise of conduct, which ambiguity or lacuna should be addressed by this court and that the decision of this court should be designed to avoid forcing disgruntled Defendants to have to resort to a method of attempting to engage consideration of r. 45.24, possibly by withdrawing its offer and engaging para. 7.46 or by means of the operation of PD8B para. 9.1 within stage 3.
9. Further, Mr Allen argues that any attempt by a Defendant to protect itself by emailing additional offers outside the confines of the portal would fall

foul of para. 5.1 of the protocol, which requires such information to be sent via the portal itself.

The Claimants' contentions

10. Mr Dempsey, as in the first tranches of cases considered by me as above referred to, lays stress on the highly prescriptive and codified nature of the protocol and the framework of fixed costs both within the protocol and at stage 3, if reached. To import any element of discretion, he says, is both anathema to the scheme applicable to such low value claims and also contrary to guidance from the higher courts as to the approach when apparent or potential unfairness collides with certainty.
11. He asks the court to note that the Defendants' increased offers were unsolicited and by email and letter respectively.
12. He points out the usage of "will" and "must" in the protocol and rule as obviously militating against any discretion, as long as the criteria under para. 7.48 are otherwise satisfied.
13. He rejects any contention for a lacuna in the protocol, pointing out that the Defendants have identified two possibly applicable methods of engaging r. 45.24 which militates against describing the creation of a third method as the filling of any lacuna, within its normal meaning.
14. *Lamont v Burton* [2007] EWCA Civ 429 at paras 26 and 28, it is argued, is a clear steer from the Court of Appeal that discretion under CPR Part 44 should not be invoked to circumvent a careful fixed costs structure, in that case the old Part 45 and in this the protocol supplemented by r. 45.23A. Otherwise, a similar unravelling of the intended minimal level of court intervention would be occasioned to low value PI claims of this nature as was envisaged in *Lamont* and as such any perceived unfairness is subsidiary to any mandatory effect of fixed costs rules.

15. A similar theme was identified in *Kirby v Gawith* [2008] EWCA Civ 812 in the context of a collision between allowing fixed success fees in circumstances where BTE insurance would have avoided the need to enter into a CFA under the pre April 2013 system. The *Lamont* reasoning was applied and patently unreasonably incurred costs had to yield to the fixed costs scheme, resulting in both consistency and restricting potentially costly satellite litigation, para 28.
16. In any event, it is said, fairness has to be viewed from a more general standpoint, ie not individual to some cases or approaches, but taken as a whole, *Butt v Nizami* [2006] EWHC 159 (QB) Simon J.
17. The risk inherent in adopting the Defendants' approach is, it is submitted, that the floodgates of microscopic analysis will be opened in terms of the court being regularly invited to give a view on conduct throughout the process to decide whether any of the costs or parts of costs awardable at any stage ought to be disallowed.
18. It is also questioned why, if a general discretion such as that argued for exists, it was not spelled out in similar terms within the protocol at any relevant point.
19. The remedy, suggests Mr Dempsey, lies in the Defendants' hands, whether by adopting a *Straker v Tudor Rose* [2007] EWCA Civ 368 approach in any Defendant making its best offer at the most appropriate juncture or by emailing if the portal method of communication is not available, whether during the total consideration process or even thereafter prior to service of the CPP, at which stage the exposure to late settlement costs has not arisen.

Discussion

20. In the first tranches of cases I came to the conclusion that Mr Dempsey's points are the more persuasive and cogent and that the claim for late

settlement costs should be allowed for each Claimant and Mr Allen's submissions have not altered that view.

21. Whilst it is right that the protocol is aimed at encouraging early settlement between the parties and at relegating court intervention to a last or at least late resort, that encouragement is created by the prescriptive and codified nature of the protocol and the PD8B stage 3 procedure and by sanctions which are specifically set out therein to be applied when non-approved of behaviour occurs or is, in the singled out r. 45.24 situation, found to have occurred.
22. I reject his analysis of the nature of para. 7.43. By way of contrast, it is particularly noteworthy, in my judgment, that non-responsiveness by a Defendant during the initial consideration period results in immediate dropping out of the portal (para 7.40) whereas para. 7.43 is, in its wording, more permissive than mandatory, in terms of affording the Claimant the opportunity of the whole of the total consideration period to accept or decline a Defendant's counter offer. There is no hint of "must" or "shall" and the concept of "declining" is not immediately evocative of an absolute insistence on a further counter offer during that period.
23. My decision in *Korczynski* is also of no assistance to him, in my view, as there was no discretion exercised there. In that case I applied a strict analysis of the protocol to determine that an offer made was in fact within the total 35 day consideration period. Here, the parties are agreed that 35 days had expired and no extension as provided for by the protocol applies. I did, however and on the contrary, express my view at para. 19 of *Korczynski* that Defendants might be advised to be aware of the potential behaviour of Claimants post- counter offer within the total consideration period when considering how to respond initially to a Claimant's stage 2 offer.
24. Similarly, I find myself unable to agree that there is any contended for ambiguity or lacuna arising out of para. 7.48(2), which, to my mind is clarity itself and exemplifies the mandatory and prescriptive nature of the

protocol. The means by which any points as to inappropriate conduct by a Claimant within the protocol fall to be considered are by means of engaging r. 45.24 (see also para. 7.76 of the protocol), in my judgment, and not otherwise.

25. Although it is suggested that it would be contrary to the spirit of the protocol to force a Defendant to take such an approach in the light of apparent unfairness arising out of any Claimant's conduct, as set out in my judgment in the other matters in my view the Defendant is perhaps not as powerless as might be suggested to encourage a swift negotiated settlement. Although the cat and mouse repeated offer and counter offer approach might recommend itself to high value high cost and in some respects therefore high risk litigation, sensible initial counter offers, which give Claimants pause for consideration as to whether they might actual be at risk in rejecting, would afford a degree of protection. Indeed the protocol allows for offers to be made in excess of that actually claimed (para. 23) which perhaps envisages a more front-loaded approach to making counter offers and is not inconsistent with the approach approved of by the Court of Appeal in *Straker v Tudor Rose* [2007] EWCA Civ 368 at para. 36.

26. Alternatively, it seems to me, even if the portal mechanism will not co-operate in terms of physically allowing a Defendant to reconsider its position within the Stage 2 settlement pack, in the face of apparent endless silence from a Claimant, then email can be and in fact is used for such purposes. In this regard I reject Mr Allen's analysis of para. 5.1 of the protocol, which, it seems to me, is specifically directed to situations "where the Protocol requires information to be sent", ie where there is:-

- (i) A positive requirement;
- (ii) In relation to the provision of information; and
- (iii) Such information is to be "sent",

see for example:-

- (i) para. 6.1(1) – “must complete and send”;
- (ii) para. 6.10 – “defendant must send”;
- (iii) para. 6.11 – “defendant must complete...and send”
- (iv) para 7.64 – “claimant must send”

27. Accordingly, I do not equate the making of a further counter offer in the circumstances complained of with the provision of information which is required to be sent by the protocol, once again noting the plain reading of para. 7.43 and lack of sanction attached.
28. The Defendants seemingly needed no encouragement to increase their offers post- total consideration period and I have thus seen no legitimate reason why the Defendants could not have communicated their best and final offers at stage 2 in that way in this case, so that it would have featured as (part of) the Defendant response in Part A of the CPP or at worst prior to the sending of the CPP, such that para. 7.48 was not engaged at all.
29. In any event, I am satisfied that the discretionary approach advocated by the Defendants is clearly contrary to the need to maintain the certainty of a fixed costs regime, which theme remains relevantly expressed by the Court of Appeal in *Lamont* and *Kilby* and thus applicable to a situation such as under consideration here. The scheme, as a whole, can be seen as providing each side with a fair opportunity of reaching a swift payment of consensual damages and a relatively low level of fixed costs and to import an element of discretion which is not specifically provided for within the protocol, PD8B, where relevant, or Part 45 would be, in my view, to be to encourage rather than dissuade from litigation and to generate a whole level of costs inconsistent with the aims of the Protocol, see para. 3.1(1).

Conclusion

30. Each Claimant is entitled to judgment in the inclusive sum of £300 together with the costs of the Part 8 proceedings.

31. The parties shall be excused from the hearing to be listed for formal handing down, which shall be by telephone unless otherwise ordered, upon filing of an appropriate consent order.

John Baldwin

Regional Costs Judge

27th February 2017