Case No: A2/2016/1422

Neutral Citation Number: [2017] EWCA Civ 355

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CARDIFF CIVIL AND FAMILY JUSTICE CENTRE
District Judge T M Phillips
b44ym322

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/05/2017

Before :

LORD JUSTICE MCFARLANE
LORD JUSTICE BRIGGS
and
LORD JUSTICE FLAUX

- -

Between :

J C AND A SOLICITORS LIMITED	**Defendant/ Appellant**
- and -	
(1) ANDEEN IQBAL **(2) EUI LIMITED**	**Claimant/ Respondent**
- and -	
J C AND A SOLICITORS LIMITED	**Defendant/ Appellant**
- and -	
(1) LUCAS LONSDALE SMITH **(2) EUI LIMITED**	**Claimant/ Respondent**
- and -	
J C AND A SOLICITORS LIMITED	**Defendant/ Appellant**
- and -	
(1) HOLLY PITTS **(2) EUI LIMITED**	**Claimant/ Respondent**

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Mr Robert Marven (instructed by **J C and A Solicitors Limited**) for the **Defendant/Appellant**
Mr Simon Browne QC (instructed by **Horwich Farrelly**) for the **Claimant/Respondent EUI**

Hearing dates : 3 May 2017

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JUDGMENT

Lord Justice Briggs :

1. The Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") provides a scheme for the efficient resolution of personal injury claims arising out of road traffic accidents at proportionate cost and, at its early stages, using mainly electronic means of communication between the claimants' solicitors and defendants' insurers. It came into effect in its original form on April 30 2010, and was substantially up-dated and revised with effect from 3l July 2013, in the light of the recommendations made by Jackson LJ in his Review of Civil Litigation Costs. This appeal concerns the RTA Protocol in its original form, which continues to apply to claims submitted between those two dates. All references in this judgment to the RTA Protocol are to the protocol in its original form. Similarly, references to provisions in the Civil Procedure Rules are to the rules in force in the same period, save where stated otherwise.

2. The RTA Protocol seeks to resolve claims within its scope in three stages. Stage 1 is designed to ascertain whether, after notification of a claim, the defendant's insurer admits liability. If it does, then Stage 2 is designed to facilitate a settlement of the claim by an agreement between the parties as to quantum. If no settlement is achieved, Stage 3 provides for the dispute as to quantum to be resolved by the court, by a speedy and cost-effective hearing under CPR Part 8.

3. All three stages of the scheme attract fixed costs, at rates prescribed in Part 45. At the relevant time the fixed costs payable in relation to Stage 1 under the RTA Protocol was £400 + VAT, although it has since been reduced.

4. This appeal arises out of three materially identical RTA claims which began their short lives under the RTA Protocol. In each case, the defendant's insurer admitted liability and paid the claimant the Stage 1 fixed costs. Thereafter, none of the three claimants took any further steps to advance their claims, in the manner prescribed for Stage 2 and they eventually became statute-barred.

5. In each case the defendant's insurers then commenced proceedings in the Small Claims Track of the County Court for recovery of the Stage 1 fixed costs, both from the relevant claimant and from their solicitors, namely the appellant J C and A Solicitors Limited ("JC&A"). The insurers in each case were EUI Limited ("EUI") trading under the Admiral name. The original claimants were Ms Karen Stock, Mr Craig Naylor and Mr Mark Leek ("the Protocol Claimants"). The original defendants were Ms Holly Pitts, Mr Lukas Lonsdale Smith, and Mr Adneen Iqbal ("the Protocol Defendants").

6. Although the Protocol Claimants and Protocol Defendants were all named as parties to the proceedings leading to this appeal, none of them took any active part, and no remedy is sought against any of them.

7. Because, no doubt, of the commonality of Protocol Claimant solicitors and Protocol Defendant insurers in each case, the three claims for repayment of the Stage 1 costs were heard together by District Judge Phillips, sitting in the County Court at Cardiff. Although, because of the changes to the RTA Protocol made in 2013, the issue as to recoverability of Stage 1 costs is largely historical, the judge was told that some four hundred or more cases raised the same issue. The judge was also told by counsel for

EUI that the claim for repayment was not based upon any allegation of improper conduct by JC&A in initiating the relevant claims under the RTA Protocol, or indeed in abandoning those claims after the conclusion of Stage 1. The case for recovery was put purely on the basis that, in fact, none of the claims had been pursued in any way by the Protocol Claimants or by JC&A as their solicitors beyond the conclusion of Stage 1.

8. Before the judge, the claims were advanced primarily upon the basis that the RTA Protocol itself gave rise to an entitlement to repayment in those circumstances. The claims were put in the alternative on the basis of constructive trust, money had and received and unjust enrichment. The judge did not find it necessary to deal with those alternatives and none of them have been pursued by EUI on this appeal.

9. The judge found in favour of EUI's claim for repayment on the basis that, upon its true construction, the RTA Protocol conferred a right of recovery of the Stage 1 fixed costs wherever, for whatever reason, the claim was not thereafter pursued by the claimant. He said, at paragraph 34, that:

> "The whole system is based upon the premise that there will be a claim made for personal injury, and that any claim will proceed from Stage 1 to Stage 2."

He concluded that:

> "It was always the intention that Stage 1 costs would only be paid on the basis that the claim proceeded to Stage 2, …"

10. The judge derived some assistance from the fact that, in 2013, the RTA Protocol was amended so as to provide for a liability to pay Stage 1 costs only after the submission by the claimant of a settlement pack, including a medical report, during Stage 2. He concluded that the general rule that the loser pays the winner, now enshrined in CPR rule 44.2(2)(a) led to the same conclusion because, in the absence of any payment of damages, the claimant could hardly be said to be the winner, even though liability had been admitted.

11. On this appeal, Mr Marven for JC&A challenges the judge's analysis on two main grounds. First he submits that the judge was wrong on his construction of the RTA Protocol. There being no express provision for repayment of the Stage 1 costs in the relevant circumstances, he says that no such right can properly be implied. Secondly he submits that, in any event, there is no basis upon which an obligation to make repayment can be imposed on the Protocol Claimant's solicitors, who will have received the Stage 1 costs pursuant to their contract of retainer with the Protocol Claimant, for work done on the case, the entitlement to Stage 1 costs under the RTA Protocol being that of the Protocol Claimant.

12. Mr Marven's submissions for JC&A were broadly supported in brief by helpful written submissions from the Law Society and from the Association of Personal Injury Lawyers ("APIL"). Mr Simon Browne QC for EUI supported the judge's analysis. I shall refer in more detail to his main submissions in due course.

13. On the central question, namely the interpretation of the RTA Protocol, I have reached the opposite conclusion from the judge. In order to explain my reasoning, I must first set out those provisions of the RTA Protocol (in its 2010 form) which bear most directly upon the issue of construction, while recognising that the answer must of course depend upon a reading of the RTA Protocol as a whole, in its context.

14. Under the heading Definitions, paragraph 1.1(1) provides that, in the Protocol:

> "'Claim' means a claim, prior to the start of proceedings, for payment of damages under the process set out in this Protocol;"

Other parts of the definitions paragraph show that the Protocol is limited to claims for damages for bodily injury caused by, or arising out of, road traffic accidents.

15. Paragraph 1.1(14) provides that:

> "'Admission of liability' means the defendant admits that –
>
> (a) The accident occurred;
>
> (b) The accident was caused by the defendant's breach of duty:
>
> (c) The defendant caused some loss to the claimant, the nature and extent which is not admitted;"

16. Under the heading "Aims", paragraph 3.1 provides that:

> "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 the end of each stage in this Protocol."

Paragraph 4.5 provides that the fixed costs then set out in CPR 45.29 (now 45.18) apply in relation to a claimant only where the claimant has a legal representative.

17. Prior to 2013, the RTA Protocol applied only to claims for damages in the bracket from £1,000 to £10,000: see paragraph 2.1. The upper limit was increased to £25,000 in 2013, and the government has consulted upon a proposal to raise the lower limit to £5,000.

18. Under the heading 'Claimant's reasonable belief of the value of the claim', paragraph 5.9 provides that:

> "Where the claimant reasonably believes that the claim is valued at between £1,000 and £10,000 but it subsequently becomes apparent that the value of the claim is less than

> £1,000, the claimant is entitled to the Stage 1 and (where relevant) the Stage 2 fixed costs."

This provision addresses the fact that a claim for personal injury damages below £1,000 falls into the Small Claims Track, which makes no provision for costs, apart from court fees and some disbursements, save in narrowly specified circumstances.

19. At the relevant time CPR 45.40 made provision for taking into account Stage 1 fixed costs already paid, in cases coming to court after leaving the RTA Protocol, otherwise than in the Small Claims Track, in the following terms:

> "Where a claim no longer continues under the RTA Protocol the court will, when making any order as to costs including an order for fixed recoverable costs under Section II of this Part, take into account the Stage 1 fixed costs together with any success fee on those costs that have been paid by the defendant."

20. Under the heading Stage 1, paragraph 6 makes comprehensive provision for the Stage 1 procedure, which consists in outline of the submission by the claimant of a claim notification form ("CNF") to the defendant's insurer and a response ("CNF Response") from the defendant's insurer. Paragraph 6.15 makes detailed provision for the circumstances in which, according to the content (or absence) of the defendant's response, the claim will no longer continue under the Protocol. They include:

    1) An admission of liability coupled with an allegation of contributory negligence other than in relation to the claimant's admitted failure to wear a seatbelt.

    2) The failure to complete or send the CNF Response.

    3) A non-admission of liability.

    4) The defendant's assertion that the claimant's CNF contained inadequate information or that, if proceedings were issued, the Small Claims Track would be the normal track for that claim.

Paragraph 6.17 then provides that cases leaving the RTA Protocol then fall within the purview of the Pre-Action Protocol for Personal Injury Claims.

21. The central provision in issue on this appeal is paragraph 6.18, which provides that:

> "Except where the claimant is a child, the defendant must pay the Stage 1 fixed costs in Rule 45.18 (before 2013 Rule 45.29) where –
>
> (1) liability is admitted; or
>
> (2) liability is admitted and contributory negligence is alleged only in relation to the claimant's admitted failure to wear a seat belt,

within 10 days after sending the CNF response to the claimant
as provided in paragraph 6.11 or 6.13."

Paragraph 6.19 gives the Protocol Claimant the right to remove the claim from the RTA Protocol if the defendant fails to pay the Stage 1 fixed costs as provided for in paragraph 6.18, but provides that the claim will continue under the RTA Protocol notwithstanding non-payment unless the Protocol Claimant exercised the right to remove it by notice sent within 10 days after expiry of the prescribed period for payment.

22. Paragraph 7 of the RTA Protocol then makes detailed provision for Stage 2. In bare outline, it requires the Protocol Claimant first to obtain a medical report, if not already obtained, and then to submit the Stage 2 Settlement Pack to the defendant which, in addition to the medical report and evidence of pecuniary losses and disbursements, is to contain a settlement offer by the claimant. Provision is then made for the defendant either to accept the claimant's offer or make a counter-offer. In the event that the claim then settles, paragraph 7.40 requires the defendant to pay, in addition to the agreed damages, any unpaid Stage 1 fixed costs and the Stage 2 fixed costs.

23. Paragraph 7.53 makes similar provision upon settlement after a claim for additional damages. Where there is no settlement as a result of the Stage 2 process, paragraph 7.61 requires the defendant to pay to the claimant (save where the claimant is a child) the defendant's final Stage 2 offer of damages, together with any unpaid Stage 1 fixed costs and the Stage 2 fixed costs.

24. Paragraph 7 also makes provision, as part of the Stage 2 procedure for the seeking and making of interim payments on account of damages. Nothing turns on the detail of those provisions.

25. Finally, under the heading Stage 3, the RTA Protocol refers the reader to Practice Direction 8B, as containing all the relevant procedural rules for the determination by the court of any issue as to the quantum of damages, a process which has its own fixed costs regime.

26. It is readily apparent from the above summary of the relevant provisions that neither the Pre-Action Protocol nor the CPR make any express provision for a right to repayment of Stage 1 fixed costs in circumstances where the Protocol Claimant takes no further steps to pursue the claim after the conclusion of Stage 1. The question whether there is such a right, conferred by the RTA Protocol or the CPR, must therefore depend upon whether such a right can be implied. Mr Browne relied upon paragraph 5.9 and upon Rule 45.40 as indicators that a Protocol Claimant did not have an unqualified right to receive and retain Stage 1 costs. In my judgment both those provisions tend to point the other way, save only for a case where it is alleged that the claimant pursued a claim under the RTA Protocol without a reasonable belief that it should be valued at least £1,000. Since claims qualifying for fixed costs may only be pursued within the RTA Protocol through legal representatives, and since paragraph 6.6 (and the terms of the CNF itself) require the CNF to be supported by a statement of truth, that belief will, in my view, generally be presumed, in the absence of proof to the contrary. To make the entitlement to Stage 1 fixed costs of £400 dependent upon the claimant coming to court and proving that reasonable belief would be a bizarre construction of paragraph 5.9, forming as it does part of a scheme designed to avoid

modest claims having to be dealt with in court at all. The real purpose of paragraph 5.9 is, in my judgment, and contrary to Mr Browne's submissions, simply to make it clear that a Protocol Claimant's entitlement to Stage 1 fixed costs is not lost merely because it turns out that the claim for damages was worth less than £1,000.

27. As for Rule 45.40, I consider that it merely provides that Stage 1 fixed costs already received must be taken into account if and when the court makes an order for costs of the proceedings generally, so as to avoid double recovery in respect of the work done for which the Stage 1 fixed costs constitute payment. It comes nowhere near treating the entitlement to Stage 1 costs under paragraph 6.18 as an entitlement merely to an interim payment on account.

28. Rule 45.40 made no provision for repayment of Stage 1 costs. In my view it implicitly treated them as costs to which the Protocol Claimant is entitled outright.

29. Mr Browne sought to support his central submission that paragraph 6.18 conferred only a right to an interim payment of costs on account, or to a conditional payment, by reference to the separate provision made in relation to Protocol claims made by or on behalf of children. It is common ground that the combined effect of the exclusion of child claimants from a right to receive Stage 1 costs at the end of Stage 1 and the general provisions of the Rules relating to child claimants is that they will only receive their Stage 1 fixed costs at trial or when the court considers whether to approve a proposed settlement on their behalf. It would, said Mr Browne, be curious if adult claimants had an earlier right to Stage 1 costs otherwise than on an interim or conditional basis. I disagree. Separate provision is made in relation to children's claims because of the general principles which require the determination of such claims either to be made by the court, or made the subject of a court-approved settlement. Whatever may be the precise reason for deferring a child claimant's solicitors' receipt of Stage 1 costs until that later stage, it says nothing of relevance about the basis of an adult claimant's entitlement.

30. Looking at the matter more generally, I consider that there are powerful reasons for concluding, contrary to the reasoning of the judge, that no obligation to repay Stage 1 costs once received is imposed by the RTA Protocol or by the CPR upon Protocol Claimants merely because, after the conclusion of Stage 1, they take no steps to pursue their claim under Stage 2.

31. First and foremost, the RTA Protocol is a clear, detailed and precise code, negotiated between sophisticated stakeholder groups under the auspices of the Civil Justice Council, into which the court should be slow to imply terms, all the more so where, as here, the drafters have demonstrated an awareness of the concept of interim payments on account of entitlement to damages, and made no similar provision about interim payments on account of an entitlement to costs.

32. Secondly, it is an express aim of the RTA Protocol, reflected in paragraph 3.1(3), that the claimant's legal representative should receive the relevant fixed costs at the end of each stage, i.e. regardless of what, if anything, happens at a later stage. That aim will be achieved only if the solicitors are able to contract with their clients for a right, as against them, to receive the Stage 1 costs at the end of Stage 1. In practice that is a term of the typical retainer and that is why the Stage 1 costs are paid directly by the insurers to the Protocol Claimant's solicitors.

33. In that context I accept the Law Society's submission that the underlying objective is to ensure that those who provide legal assistance to RTA claimants receive payment for the work done during each stage, at the end of that stage, rather than at the end of the claim. Furthermore a Stage 1 costs entitlement will only arise once there has been an admission of liability on behalf of the defendant, so that something solid will have been achieved for the Protocol Claimant by the time when the Stage 1 payment becomes due.

34. The judge appears to have considered that £400 was a rather generous payment for the work typically done at Stage 1. It was, in 2013, later reduced to £200. But a fixed costs regime inevitably involves what are generally called swings and roundabouts, in which the benefits of certainty are perceived usually to outweigh the disadvantages and disproportionality inherent in having costs payable for such work assessed, either summarily or in detail. Furthermore, and not least because of the requirement for a statement of truth on the CNF, a Protocol Claimant's solicitors may have to do considerably more than merely complete and submit the CNF. They may need to enquire of their client sufficient information about the circumstances of the accident in order to identify the appropriate defendant, to ascertain whether there is a sufficient prospect that the defendant was at fault, and that the Protocol Claimant suffered some significant injury sufficient to justify proceeding under the RTA Protocol, rather than merely in the Small Claims Track.

35. Thirdly, it is very difficult to understand how a Stage 1 costs payment can sensibly be regarded as an interim payment on account, or as a conditional payment, in any relevant sense. Stages 1 and 2 of the RTA Protocol are pursued in advance of the institution of any court proceedings which might give rise to a power or discretion in the court to assess costs, or even to decide whether fixed costs should or should not be paid. The main purpose of the RTA Protocol is to resolve such claims without them coming to court at all. Even when such claims do come to court, save in the tiny minority which proceed in the multi-track, they will generally be subject to a fixed costs jurisdiction, whether they proceed under Part 8, at Stage 3 of the RTA Protocol, or in the fast-track, which was during the relevant period the normal track for personal injury claims between £1,000 and £10,000 where liability was in dispute.

36. Fourthly, there are a raft of reasons why, after the conclusion of Stage 1, a claim may not continue under the RTA Protocol, without necessarily becoming the subject of subsequent court proceedings. The claimant may recover more quickly than expected from a perceived injury. They may decide to devote their time and energies elsewhere than in the pursuit of a claim. They may conclude Stage 1 (at least before 2013) and receive Stage 1 costs before receiving a medical report which casts real doubt on their own perception of their injury. They may receive sufficient compensation from another source, such as their own insurers or from another person alleged also to be liable. Claims may therefore be discontinued for good reasons or bad reasons, and it would be contrary to the overall purpose of the RTA Protocol to construe it in a way which encouraged the parties to come to court to resolve a dispute as to the continued entitlement to a sum as small as £400, in circumstances where the court would not otherwise be troubled with the claim at all.

37. Fifthly, I consider that the reliance by the judge upon the general rule about costs in what is now CPR rule 44.2 is misplaced, as is Mr Browne's reliance upon the rules about discontinuance of claims. Stage 1 and, for that matter, Stage 2 of the RTA

Protocol operate prior to, and with a view to the avoidance of, proceedings in court at a time when there are not litigation winners or losers, still less a pending claim which is then discontinued. Rather, the parties are seeking to resolve their dispute by a process designed to avoid court proceedings altogether.

38. I must deal briefly with what has come to be called the “400 Club” point. It is suggested that a construction of the pre 2013 RTA Protocol which treated Stage 1 costs as an entitlement regardless whether the claim was thereafter pursued might encourage unscrupulous lawyers to seek authority from claimants to commence a Protocol claim simply for the purpose of obtaining £400 + VAT, without any genuine intention of advancing to Stage 2, even in the event of an admission by the defendant’s insurers. This theoretical opportunity has been closed off since the 2013 amendments, since Stage 1 costs are only payable after the submission by the claimant (where liability is admitted) of a Stage 2 Settlement Pack including a medical report. It may be that the perceived risk of the abusive practice which I have described played a part in the negotiation of that amendment. But there is no evidence that any such practice did develop and it is not suggested that JC&A were guilty of any such practice in any of the cases under appeal. There is now no risk that such a practice might develop and it would be wrong to construe the plain words of the RTA Protocol by reference to a purely theoretical risk of abuse.

39. The fact that even this theoretical risk was (as appears to be common ground) satisfactorily addressed by postponing entitlement to Stage 1 costs until the submission of a Stage 2 Settlement Pack illustrates how difficult it is to define any term to be implied in the pre 2013 RTA Protocol which would render the entitlement to Stage 1 costs either interim or in some way conditional. I have explained why it cannot realistically be construed as merely an interim payment, in the absence of any clear procedure for a later assessment. If it were to be construed as conditional, the reader (uninformed by the 2013 amendment) would be left in a state of complete uncertainty as to what that implied condition was. Would it be necessary simply for the Protocol Claimant to embark upon Stage 2? Would the Claimant have to achieve a satisfactory settlement or a success in relation to a dispute as to quantum under Stage 3? The general law as to implied terms is that the court must be satisfied not merely that there is a lacuna in the express terms, but it must be confident as to the method by which that lacuna was intended to be filled. For this purpose, a subsequent amendment of the RTA Protocol in 2013 is of course entirely inadmissible.

40. Some reference was made to other cases on the interpretation of fixed costs provisions, in particular *Nizami v Butt* [2006] 1 WLR 3307, *Lamont v Burton* [2007] 1 WLR 2814 and *Kilby v Gawith* [2009] 1 WLR 853. In general terms they tend to support the view that fixed costs regimes are designed to promote certainty and proportionality, if necessary at the expense of the occasionally rough justice inherent in a swings and roundabouts approach. But they are all about different fixed costs regimes than the RTA Protocol and, for that reason, afford little persuasive weight in the resolution of the issue of construction which is the subject of this appeal.

41. The above analysis leads to my conclusion that this appeal should be allowed on the first of Mr Marven’s grounds. That makes it unnecessary for me to address his second ground, namely that in no circumstances could the solicitors rather than the Protocol Claimant be liable for repayment. I would only say that my initial reaction that this ground looked very persuasive as well is a little tempered by the holding of

this court in *Gavin Edmond Solicitors v Haven Insurance Co. Ltd* [2016] 1 WLR 1385, to the effect that solicitors might have their own claim to recover fixed costs under the RTA Protocol, rather than simply a right to bring proceedings in the name of their clients to recover fixed costs due but unpaid. That conclusion appears to have been one of two alternative solutions to the unusual problem which occurred in that case, between which the court did not have to decide: see per Lloyd Jones LJ at paragraph 32. The point is by no means straightforward and I would in those circumstances prefer to say nothing about it.

42. For those reasons I would allow this appeal.

Flaux LJ:

43. I agree.

McFarlane LJ :

44. I also agree.