The White Book must not be thrown out of the window!

Introduction

Nearly 600,000 personal injury cases valued at less than £25,000 are commenced in the *Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents* (“the PAP”) each year. Many are settled or drop out of the PAP (e.g. because liability is disputed). However, a significant minority are stayed under paras. 5.7 and/or 7.12 of the PAP, using the Part 8 procedure under CPR 8BPD, to stop time running under the Limitation Act 1980 and/or to allow the claimant time to obtain expert reports. Birkenhead County Court alone deals with around 13,000 Stage 3 or stay cases every year. Should the claimant wish to proceed it is necessary to apply to lift the stay. Until recently, authority on how the court should deal with a contested application to lift the stay has been scant. The *White Book (2020)* cites *Lyle v Alliance Insurance plc*, unreported, 21 December 2017, where a Circuit Judge upheld a decision of the District Judge not to lift the stay and to strike it out where the claim had turned out to be worth more than £25,000 and the delay had caused prejudice to the defendant. But that is all. The issue of how to deal with applications to lift stays granted under the PAP, particularly where the case was clearly not appropriate for the PAP, arose starkly in *Cable v London Victoria Insurance Company Limited*. The Court of Appeal has now given guidance.

Facts

The claim arose out of a RTA on 1 September 2014. Three weeks later a claims notification form was submitted through the Ministry of Justice Portal (part of Stage 1 of the PAP). Liability was admitted. A GP’s report followed shortly afterwards. This described a minor whiplash injury but also described symptoms of headache, dizziness and disorientation. The GP recommended the instruction of a neurologist who saw the claimant in April 2015. The report was finalised in January 2016. It was noted that some aspects of the claimant’s condition had deteriorated, that he was struggling with light and high pitched tinnitus and was unable to work. The claimant lost his job in December 2015. At the time of the accident, the claimant had been earning about £130,000 pa albeit he had received considerable pay while off sick. The neurologist thought that the claimant’s condition would improve such that he would become symptom-free and that no lasting damage would arise. None of this was disclosed to the defendant’s insurers. A year after his first report, the neurologist produced a second report. The January 2017 report identified a deterioration in the claimant’s condition and referred, for the first time, to his migraine headaches. Contrary to his earlier optimism, the neurologist now thought that the claimant’s condition, which he described as “a severe neurological state,” had become chronic. By this time, the claimant’s solicitors knew, or should have known, that the case was worth far in excess of £25,000. They still did not disclose the neurologist’s report or respond to the defendant’s insurers repeated requests for updates. Instead, on 25 July 2017, with the primary limitation period fast approaching, a Part 8 claim form was issued seeking a stay *ex parte* on the basis that a stay was

necessary to comply with the PAP. The court duly stayed the claim for 13 months (to 20 August 2018) and directed the claim form be sent to the defendant by 20 August 2017. The claimant did not comply with this order until February 2018. On 17 August 2018 the claimant's solicitors disclosed, for the first time the two reports of the neurologist. On 18 August 2018 the claimant applied, *ex parte*, to lift the stay. On 21 August 2018 the application was granted on terms that the claimant serve an amended claim form and Particulars of Claim by 4 September 2018. This was not done until 26 September 2018. The Schedule pleaded out a claim for over £2.2M. The defendant applied to strike out. The claimant cross-applied for relief from sanction by reason of his failure to comply with the order of 21 August 2018.

The decisions of the courts below

On 17 October 2018 District Judge Campbell set aside the order lifting the stay and struck out the case. She approached the issue as one of whether, in her discretion she should lift the stay and allow the claim to be transferred to the CPR Part 7 process (under CPR r. 8.1(3)). She considered that one factor, amongst others that weighed against the claimant was that his conduct (or rather that of his solicitors) amounted to an abuse of process. She thought that this conduct had prejudiced the defendant. While it was not strictly necessary for her to do so (as she had already struck out the claim) DJ Campbell refused the claimant's application for relief from sanction. When dealing with the third limb of the *Denton* criteria (all the circumstances) DJ Campbell commented that this was the claimant's second breach of a court order and that:

> "[The claimant's solicitors] failed to identify to the defendant's solicitors the potential of this case for some four years. They failed to correspond with the defendants in any meaningful way over four years and, for all those reasons, I find that if I were to accede to a request for relief from sanction in a case set against that background, I might as well just throw the White Book out of the window and say, "anything goes!"

The claimant's appeal to HHJ Wood QC was dismissed albeit the Circuit Judge said he would have allowed the appeal in relation to the relief from sanction application had he not found that the District Judge was right to strike out the claim. The claimant appealed to the Court of Appeal. The defendant cross-appealed against the relief from sanction decision.

Decision

The Court of Appeal allowed the appeal. It held that the courts below had erred in not applying a twofold test: (1) was the claimant's conduct an abuse of process; and, if it was an abuse, (2) was it proportionate to strike out the claim? The approach in *Lyle v Allianz* was wrong. No matter the mechanism by which the debate comes before the court, the judge must grapple with the central dispute: should the claim be allowed to proceed or should it be struck out? That issue will be informed, but not decided by, the answer to the prior question: has there been an abuse of the process? Further, DJ Campbell had proceeded on the erroneous basis that an abuse of process would, at the very least, give rise to a *prima facie* right to strike out the claim. By treating the issue of strike out as determined by her prior decision not to transfer the claim to the Part 7 procedure, DJ Campbell had reduced the striking out of the claim to "an administrative afterthought." It was wrong to regard the striking out of the claim as an act of kindness, putting useless proceedings (because the stay had not been lifted) out of their misery.

On the first issue, the Court of Appeal found that the claimant's solicitors had abused the court's process in three respects: (a) when they issued the Part 8 claim form they knew, or ought to have known, that this was not a Part 8 claim. They should have issued under Part 7; (b) they sought a stay to comply with Stage 2 of the PAP when the knew, or ought to have known, that the PAP was inapplicable to the claim; and, (c) they did not intend to, and did not in fact, use the stay of proceedings for the purpose for which it was sought and granted. The appeal against this aspect of DJ Campbell's judgment failed.

On the second issue, the Court of Appeal held that the District Judge had gone wrong. This was because the District Judge: (a) had downplayed the proportionality of bringing the claim to an end; (b) had wrongly assumed that striking out the claim was the primary solution; (c) had made findings as to the prejudice suffered by the respondent which were not in evidence and which were unjustified; and, (d) failed to give any proper weight to the consequences of striking out the claim and depriving the claimant of his Article 6 rights. The delay had principally occurred within the limitation period. Had the claimant followed the correct procedure and issued a Part 7 claim in the summer/autumn of 2017, the defendant could have agreed to stay the claim to allow the full Personal Injury Pre-Action Protocol process (for multi-track cases) to be followed. The delay of one year would not cause the case to be case managed differently. There was no evidence that the absence of this one year delay would have made any difference to the claimant's medical treatment. There was no loss of any limitation defence. There was no evidence to support the DJ's finding that the insurer was prejudiced by not being able to set an accurate reserve at an early stage. On the other hand, the claimant was not personally responsible for the catalogue of errors made by his solicitors. His claim form was issued within the limitation period. If that claim was struck out, he would have to start all over again, this time with a professional negligence claim against his current solicitors, with all the risk and uncertainty, not to say cost, that such a claim would involve. Moreover, that would be a loss of a chance claim, which is inevitably an inferior type of satellite claim, compared to the personal injury claim against a defendant who had admitted liability. Lesser sanctions were appropriate.

On the respondent's notice, the Court of Appeal held that the District Judge had also erred in refusing to grant relief from sanction. Both the claimant's defaults in progressing the claim and the further 3 weeks delay in serving an amended claim form and amended particulars of claim "could be met by sanctions from within the *White Book* rather than by its defenestration." Liability had been admitted and the claimant had provided "the heart" of his amended claim when his solicitors served the two reports from the neurologist in August 2018.

Accordingly, the appeal would be allowed on terms that the claimant must pay the defendant's costs up to, and including, the hearing before DJ Campbell. Interest on special damage to the same date would be disallowed. The claim should continue under CPR Part 7.

Practice Points

1. The PAP procedure should be used only for cases within the £25,000 limit.

2. Where fresh medical evidence shows that the claim is worth more than £25,000, or is otherwise unsuitable for the PAP procedure, the claim should be taken out of the PAP (under rule 7.76) and taken out timeously.

3. Where limitation is due to expire or a stay is otherwise required, care must be taken to accurately value the claim to ensure it really is suitable for the CPR 8BPD procedure before

the statement of value is completed and verified by a statement of truth. An inaccurate statement of value may result in a finding that the court's process has been abused, as well as, possibly, professional conduct issues.

4. Where the claimant runs into difficulty obtaining medical evidence it is important to communicate those difficulties to the defendant.

5. Where a stay is obtained, the claimant must get on with acquiring the relevant expert evidence timeously, ideally keeping the defendant informed of progress.

6. Prolonged periods of delay may result in the defendant applying to strike out.

7. Where the defendant relies on the delay as causing prejudice, the precise prejudice relied on should be addressed in the evidence in support.

8. The claimant's evidence should clearly explain the reasons for any delay.

9. Any application to strike out should be determined following the twofold test: (1) was the claimant's conduct an abuse of process; and, if it was an abuse, (2) was it proportionate to strike out the claim?