Neutral Citation Number: [2021] EWCA Civ 382

Case No: A2/2019/2943

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NORWICH COMBINED COURT CENTRE
Her Honour Judge Walden-Smith
D95YM864

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/03/2021

Before :

LORD JUSTICE LEWISON
LADY JUSTICE ASPLIN
and
LORD JUSTICE MALES

- -

Between :

	Seabrook	**Appellant**
	- and -	
	Adam	**Respondent**

- -
- -

Mr Gordon Exall (instructed by **Atherton Godfrey LLP**) for the **Appellant**
Mr Simon Browne QC and **Mr Anthony Johnson** (instructed by **Keoghs LLP**) for the **Respondent**

Hearing date: Wednesday, 10th March 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 2.00 p.m. on Thursday 18th March 2021.

Lady Justice Asplin:

1. This appeal is concerned with the interpretation and effect of Part 36 offers made in a low value personal injury claim in relation to a road traffic accident. Breach of a duty of care having been admitted and causation denied, Mr Scott Seabrook, who was the Claimant in the action and the Appellant before us, made two Part 36 offers. They were in similar but not identical form. They were to accept 90% of the claim for damages and interest to be assessed, on the basis that liability was admitted. The offers were not accepted. Following a trial, judgment was entered and damages were limited to £1,574.50. Were the Part 36 offers genuine offers to settle, and if they were, did Mr Seabrook better those offers because 100% of the claim for damages was awarded in relation to one of the heads of loss, albeit that nothing was awarded in relation to the other?

2. District Judge Reeves, who dealt with costs, did not consider that to be the case. He concluded that the offers were not genuine offers to settle and awarded costs without taking them into account. His order, dated 22 January 2019, was appealed to Her Honour Judge Walden-Smith. In an ex tempore judgment given on 6 November 2019, she dismissed the appeal. In summary, she held that it was the Defendant and Respondent to this appeal, Mr Jhasen Adam, who had bettered the Part 36 offers because liability was limited to damages for only one of the two alleged injuries.

3. The claim itself was brought by Mr Seabrook as a result of a road traffic collision on 6 December 2014. Mr Adam, who was travelling in the same direction, collided with the rear of Mr Seabrook's vehicle when Mr Seabrook brought his vehicle to a halt.

4. It was alleged that the accident was caused as a result of a breach of duty of care by Mr Adam, that injury was caused as a result and that Mr Seabrook had suffered both a whiplash injury to his neck and a back injury. At paragraph 10 of the Particulars of Claim it was pleaded that Mr Adam had admitted what was described as "primary liability" in a letter written in response to a claim notification form under the terms of the relevant pre-action protocol. In his Defence, Mr Adam admitted that the collision had occurred in the manner pleaded in the Particulars of Claim and that the accident had occurred as a result of a breach of duty on his part. However, causation was denied in the following terms:

> "2. . . causation is denied on the basis that such breach was not causative of the injury, loss and damage alleged to have been sustained by the Claimant. Since damage is the requirement of a claim in negligence, the case is not fit for the entry of judgment for the Claimant (*Blundell v Rimmer [1971] WLR 123*)."

5. Two Part 36 offers were made on 9 March 2018. Although I refer to them below as the "First Offer" and the "Second Offer" I do so merely in order to differentiate between them when necessary. I do not intend to suggest that one was made before or after the other. They were:

> "To accept on condition that liability is admitted by the offeree, 90% of the claim for damages and interest, to be assessed."
>
> (the "First Offer")

and

> "To agree the issue of liability on the basis that the Claimant will accept 90% of the claim for damages and interest, to be assessed."
>
> (the "Second Offer").

It was accepted both before the judge and before us that the offers, whilst being differently worded, amounted to much the same thing. It seems to me that although in general terms they are very similar, it is clear from the natural meaning of the words used and from the way in which the relevant boxes on the respective N242A forms were ticked that the First Offer was framed in respect of the whole claim and that the Second Offer addressed an issue in the claim, being that of liability. I consider the proper interpretation of both offers in more detail below.

6. Following the fast track hearing before Deputy District Judge Buss, judgment was entered in the sum of £1,574.50. It is accepted that that related to the whiplash injury. It is also accepted that causation was not proved in relation to the lower back injury and that none of the damages awarded related to that head of loss. Approximately £10,000 had been claimed in total.

7. Despite the fact that only £1,574.50 was awarded in damages, it was said that had Mr Adam accepted either or both of the Part 36 offers, judgment would have been entered and he would only have had to pay 90% of the damages which were ultimately awarded. In the event, therefore, it is said that Mr Seabrook bettered his own Part 36 offers because he obtained 100% of the damages which were awarded despite the fact that Mr Adam was not found liable in respect of the back injury at all.

8. The judge rejected that analysis. She stated that: "Had the Defendant accepted the offer and accepted liability, then that would have meant that it was admitting liability for the injuries that the Claimant alleged it sustained in this road accident; that is, both a neck and back injury." See judgment at [25]. She went on:

> "26. The total amount that was being sought was £10,000. Whilst it is clear that *Lovell* and *Singh*, (*sic*) which was being referred to in the course of submission before me, makes clear that parties are entitled to argue all points so long as it does not contradict the judgment that is being entered, it would not have been open to the Defendant to argue that the Defendant's actions were not causative of any back injury.
>
> 27. With an admission, the Claimant would still have been required to establish the existence of a back injury and would have been required to establish the appropriate quantum for any back injury which would have involved the extent of the injury and the time that that injury lasted. All those matters would have remained open to challenge. However, having established a loss – and, as I say, that is a constituted part of the negligence – the Defendant, having admitted causation, could not have continued to argue that point. In this case that would have been highly significant as the Defendant did in fact succeed in establishing that he was not causative of the back injury, as it is clear that no damages were awarded for a back injury.

> 28. In the circumstances, therefore, as it is abundantly clear that the Deputy District Judge did not find that this injury to the back alleged by the Claimant was caused by the road accident, the Defendant did better what was offered within the Part 36 offer letter because liability remained limited to damages for the neck injury.
>
> 29. In effect, this offer, which was a means by which the Claimant was seeking to be able to enter judgment against the Defendant, would, if construed in the way argued for by the Claimant, mean that in any case where the Defendant was seeking to contest causation of an injury, the Claimant will be in a position to make an offer to effectively discount any damages that might otherwise be awarded in order to ensure that liability was entered and that causation could no longer be argued.
>
> 30. . . . Part 36 is not designed to deny any realistic possibility of a party arguing fundamental principles with regard to liability. That would be an affront to the right to a fair trial. A Defendant would be placed in an impossible situation of being required to accept an offer because, inevitably, they are never going to better a discount because whatever damages are awarded, those damages will also be 100% and any discount will always be more favourable."

9. Before turning to the meaning and effect of the Part 36 offers, it is important to have the relevant parts of CPR Part 36 in mind. As Mr Browne QC, on behalf of Mr Adam, pointed out, CPR 36.1(1) makes clear that Part 36 is a self-contained procedural code. Furthermore, an offer must satisfy rule 36.5 if it is to attract the consequences specified in Section 1 of the Part: CPR 36.2(2). CPR 36.5(1) is directly relevant here. It provides as follows:

> "36.5.— Form and content of a Part 36 offer
>
> (1) A Part 36 offer must—
>
> (a) be in writing;
>
> (b) make clear that it is made pursuant to Part 36;
>
> (c) specify a period of not less than 21 days within which the defendant will be liable for the claimant's costs in accordance with rule 36.13 or 36.20 if the offer is accepted;
>
> (d) state whether it relates to the whole of the claim or to part of it or to an issue that arises in it and if so to which part or issue; and
>
> (e) state whether it takes into account any counterclaim."

10. As Mr Browne also pointed out, one of the effects of accepting a Part 36 offer is that if the offer relates to the whole claim it will be stayed and if it relates to part only, the claim will be stayed as to that part: CPR 36.14(2) and (3). CPR 36.14 does not make express mention of offers relating to an issue arising in a claim. In any event, the costs

consequences of having made a Part 36 offer, following judgment, are set out at CPR 36.17 as follows:

> **"36.17. Costs consequences following judgment**
>
> (1) Subject to rule 36.21, this rule applies where upon judgment being entered—
>
> (a) a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
>
> . . .
>
> (2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, *"more advantageous"* means better in money terms by any amount, however small, and *"at least as advantageous"* shall be construed accordingly.
>
> . . .
>
> (4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired; [and]
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; …"

Mr Seabrook seeks to take advantage of these consequences.

11. It is trite law that a claim in negligence has a number of necessary constituent parts. Put simply, the defendant must owe the claimant a duty of care, that duty must have been breached and the breach must have caused damage of a kind which is recoverable. Once those constituent parts have been proved, the court determines the appropriate remedy or it is agreed by the parties. As Lord Hoffman explained in *Harding v Wealands* [2007] 2 AC 1 at [24] when applying the distinction between a cause of action and the remedy to actions in tort:

> ". . . the courts have distinguished between the kind of damage which constitutes an actionable injury and the assessment of compensation (ie damages) for the injury which has been held to be actionable. The identification of actionable damage is an integral part of the rules which determine liability. As I have previously had occasion to say, it makes no sense simply to say that someone is liable in tort. He must be liable for something and the rules which determine what he is liable for are inseparable from the rules which determine the conduct which gives rise

> to liability. Thus the rules which exclude damage from the scope of liability on the grounds that it does not fall within the ambit of the liability rule or does not have the prescribed causal connection with the wrongful act, or which require that the damage should have been reasonably foreseeable, are all rules which determine whether there is liability for the damage in question. On the other hand, whether the claimant is awarded money damages (and if so, how much) or, for example, restitution in kind, is a question of remedy…"

That was a case in which a road accident had occurred in New South Wales in which the claimant had suffered serious injuries. He sued the driver of the car in England. The issue was whether damages for personal injury caused by negligent driving should be calculated according to the applicable law which had been held to be the law of New South Wales or whether it was a question of procedure which fell to be determined in accordance with English law. The House of Lords held that English law applied.

12. It is not in dispute that denial of causation of loss prevents judgment being entered in a claim of this sort. Mr Exall, on behalf of Mr Seabrook says that when met with a denial of causation, a claimant is entitled to make offers of the kind which were made in this case and that the Part 36 offers were genuine offers to settle. He says that their effect was that in return for an admission that some damage had been caused by Mr Adam's breach of duty, Mr Adam would benefit by receiving a 10% discount on the damages he had to pay.

13. He also submits that having accepted either of the Part 36 offers, judgment having been entered, Mr Adam would still have been able to argue issues of causation on an assessment of damages and, therefore, could still have disputed causation in relation to the lower back injury. He says that Mr Adam would have been in no different position in relation to causation than if judgment had been entered in default. In this regard, he referred us to *Lunnun v Singh* [1999] 7WLUK 5 and *John Turner v P.E. Toleman* (1999) *unrep*. Those cases are authority for the proposition that a defendant can contest the extent of causation after a default judgment or summary judgment has been entered only in so far as they do not seek to go behind the issues that the judgment is taken to have determined.

14. It seems to me that the real question here is how these Part 36 offers should be construed. They must be interpreted in the light of the pleadings and, in particular, in the light of the fact that Mr Adam had admitted breach of duty which had been referred to as "primary liability" but had disputed causation in relation to both heads of damage.

15. With that context in mind, it seems quite clear that the reasonable reader would have understood both offers to be addressing liability and causation and to relate to both heads of damage.

16. First, as the judge pointed out, it would make no sense if the references in the offers to liability were construed to mean liability, in the sense of a breach of a duty of care, rather than liability and causation. A breach of a duty of care had already been conceded. This is all the more so, with regard to the First Offer, for the reasons set out below. Further, as District Judge Reeves pointed out, if the offers were concerned only with liability in the sense of the breach of duty which had already been conceded, they could not have been genuine attempts to settle.

17. Secondly, both offers were framed in terms of a discount on the "the claim for damages and interest, to be assessed". They contain no reference to the separate heads of damage in relation to the neck and back injuries. It seems to me that the reasonable reader, taking into account all the relevant context, would construe the reference to "the claim for damages" to mean the claim in its entirety and to construe the offers as a whole to mean that a concession as to liability and causation was required in relation to both injuries. That is the natural meaning of the words. That is what Mr Adam was being asked to concede. As Lord Hoffmann put it in the *Harding* case, it makes no sense simply to say that someone is liable in tort. He must be liable for something.

18. Furthermore, with the relevant context in mind, it seems quite clear that although the Second Offer is confined expressly to the "issue of liability", the reasonable reader would have understood the First Offer to be addressing the entire claim. It is an offer to accept 90% of "the claim for damages and interest, to be assessed" on condition that liability is conceded. It leaves no room for any argument about whether Mr Adam's breach of duty caused a particular head of loss. It is quite plainly concerned with the damages claimed in relation to both injuries and the claim as a whole. In that context, the ordinary and natural meaning of "liability" inevitably includes causation. Otherwise, the First Offer would be self-contradictory and meaningless.

19. It seems to me, therefore, that it is not open to Mr Exall now to suggest that Mr Adam was only being asked to accept that "some damage" had been caused. That is not what either of the Part 36 offers say and is contrary to their natural and ordinary meaning. Nor is it right to say that there was room to accept either Part 36 offer but still to dispute causation in relation to either or both of the alleged injuries. As I have already mentioned, the First Offer related to the entire claim and the Second Offer, whilst being framed in terms of an issue in the action, nevertheless required acceptance of causation and was made by reference to the damages claimed, which the reasonable reader would understand to refer to both heads of loss.

20. Although it is unnecessary to consider them in any detail, I should add that, in any event, it seems to me that the *Lunnun* and *Symes* lines of authority do not assist Mr Exall. Those cases do not establish that it is always open to a party to contest causation having admitted liability. They depended on their facts and precisely what had been pleaded just as in this case, the question turns upon the proper construction of the Part 36 offers having taken account of their relevant background.

21. It seems to me therefore, that the judge was right to conclude as she did. Had Mr Adam accepted either of the Part 36 offers, it would have meant that he had admitted liability for both the neck and the back injuries and he would not have been able to argue, subsequently, that he had not caused the back injury at all. It follows that as he was only found liable in relation to the neck injury, he bettered both Part 36 offers.

22. Cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which has arisen here, especially in a low value claim, it is important to make express reference in the Part 36 offer to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates, in accordance with CPR 36.5(1)(d). In particular, if the issue to be settled is "liability", it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended

to go further, what damage the defendant is being invited to accept was caused by the breach of duty.

23. For all the reasons set out above, I would dismiss the appeal.

Lord Justice Males:

24. I agree.

Lord Justice Lewison:

25. I also agree.