



Neutral Citation Number: [2019] EWHC 3491 (QB)

Case No: D96YM957

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Liverpool Civil and Family Court Centre
35, Vernon Street, Liverpool, L2 2BX

Date: 19/12/2019

Before :

THE HON. MR JUSTICE TURNER

Between :

ARPAD KORE, senior

Claimant

(father of **ARPAD 'PETER' KORE junior, deceased**
on behalf of the estate and dependants of the deceased)

- and -

LEE BROCKLEBANK

Defendant

(sued as personal representative of **BAROSZ**
BORTNICZAK, deceased)

Mr McCluggage (instructed by **R James Hutcheon Solicitors**) for the **Claimant**
Mr Whitehall (instructed by **DAC Beachcroft Limited Solicitors**) for the **Defendant**

Hearing dates: 12 December 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

1. This appeal arises out of a claim brought by Mr Arpad Kore arising out of the tragic death of his son in a road traffic accident which occurred on 16 November 2014. The deceased had been a passenger in a car being negligently driven by one Barosz Bortniczak who also died in the collision and so this claim is brought against his personal representative.
2. For the sake of convenience and consistency of reference, I will refer in this judgment to the appellant and respondent as the claimant and defendant respectively.
3. On 13 January 2016, solicitors acting on behalf of the claimant sent a letter of claim in respect of: dependency, bereavement and funeral costs.
4. On the following day, the defendant’s solicitors admitted liability in an email which stated:

“We invite details of the financial losses to include funeral expenses in order to move this claim towards settlement.”
5. During the course of April and May of the same year, negotiations proceeded with respect to the quantum of funeral expenses.
6. On 12 May, the defendant’s insurers made a Part 36 offer in the sum of £12,185 less £6,685 relating to an interim payment. In the N242A Form, the box for “whole of the claim” was ticked. In the “details of offer” box, a breakdown of the offer was provided against the items relating to funeral expenses.
7. On 10 June, the defendant’s insurers chased the claimant’s solicitor for a response to the Part 36 offer.
8. On 13 June, the claimant’s solicitors sent an email:

“My client has decided to accept the Part 36 offer leaving a balance of £5,500 to pay. Can you please arrange payment without delay.”
9. Later that same day, the claimant’s solicitors sent a further email to the defendant’s insurers (albeit to a mistyped email address) which stated:

“Further to my earlier email, I write to clarify that the acceptance of the Part 36 offer is in relation to the funeral expenses only. The dependency claim will continue. If you are happy to proceed on these terms please pay the cheque to us of the agreed amount as per the last payment.”
10. Notwithstanding the exchange of emails with respect to the Part 36 offer, the claimant now seeks to bring a dependency claim on his own behalf and in respect of the deceased’s mother and two sisters. This claim was defended on the basis that the whole of the claim under the Fatal Accidents Act 1976 had been the subject of a binding contract of compromise. This issue was tried as a preliminary issue on 13 November

2018 before HHJ Sykes. She found that the claimant's claim had been settled by the acceptance of the Part 36 offer as a result of which it was dismissed.

11. The issue now comes before me by way of an appeal with the permission of the single judge.
12. The claimant's case was founded upon the premise that the claims of all dependants, including his own, fell within the scope of the Part 36 offer. On this basis, a number of challenges were raised including, for example, that such an arrangement required the approval of the court because two of the dependants lacked capacity or because an apportionment was required between dependants under CPR 36.11 (3)(c) which would require the court's permission.
13. On appeal, however, a different ground has been advanced based on an alternative interpretation that only the personal claim of the claimant himself and not those of the other alleged dependants fell within the scope of the Part 36 offer. The claimant's pleaded Reply denied that "there was a compromise of the claim as alleged" but did not descend into particulars which spelt out the ground of appeal now pursued.
14. The defendant takes objection to this ground on the basis that the claimant is raising a point not raised below. The notes in the White Book at 52.17.3 summarise the relevant authorities which I do not propose to rehearse within the context of this judgment. In my view, there is force in the defendant's point that this is a new issue and one not satisfactorily particularised in the pleadings. Nevertheless, the question is one which can be resolved on the documents. There is no suggestion that the scope of the Part 36 offer was the subject of any relevant oral discussion between the solicitors and the subjective intention of either of them is not legally material. Accordingly, since this is a matter which can be determined without further evidential investigation, I exercise my discretion in favour of the claimant to consider it on its substantive merits.
15. It is to be noted that the letter of claim dated 13 January 2016 refers to the claimant alone as being the client of his solicitor. The letter states that:

"The claimant wishes to pursue a claim for:-

 - (1) Dependency
 - (2) Bereavement
 - (3) Funeral Costs"
16. The defendant seeks to persuade me that the letter is ambiguous as to whether or not the claim is brought in respect of alleged dependants other than the claimant. I am not persuaded that this is the case. On the face of it, only one claimant is identified. In the correspondence which follows, every letter from the claimant solicitor refers only to the claimant in the singular. The defendant's responses refer to "the estate of Arpad Kore (deceased)" but this is not a term subsequently adopted on behalf of the claimant. Indeed, throughout the correspondence, the claimant's solicitor refers to no other alleged dependant.

17. The Part 36 offer to settle purports to identify the name of the claimant as: “Mr Arpad Kore (as Administrator of the Estate of the late Arpad Kore Deceased).” This was an obvious error because the claimant had not, at that time, obtained Letters of Administration. Nor had his solicitor ever claimed that he had. Page 2 of the form invites the defendant to “give details below of the offer you are making...”
18. The details which follow relate entirely to different categories of funeral expenses save for the final sentence which provides:

“As the deceased was 18 at the time of his death with no dependant’s (sic) for the avoidance of doubt bereavement damages are not payable as per the Fatal Accident Act 1976.”
19. The defendant contends that this sentence establishes that the Part 36 offer was intended to be made to all alleged dependants. I disagree. The sentence is competitively obscure but I note the following:
 - (i) It is correct that bereavement damages were not payable but this was because the deceased was 18 at the time of his death and the reference to “dependant’s” in this context is a non sequitur;
 - (ii) It cannot sensibly be argued, particularly bearing in mind that the proffered offer was drafted by the defendant, that, by accepting it, the claimant was effectively warranting that there were no other dependants;
 - (iii) The curious deployment of an apostrophe did nothing to clarify the meaning of the sentence.
20. It is not in dispute that by the operation of section 2(3) of the Fatal Accident Act 1976:

“Not more than one action shall lie for and in respect of the same subject matter of complaint.”
21. Both parties now concede, realistically, that the Act does not apply directly to the circumstances of this appeal because no action had been commenced at the time of the acceptance of the Part 36 offer.
22. Furthermore, the procedural requirements of the Act do not operate so as to undermine the substantive position in law that each dependant has a separate claim. Reference can be made to the authorities of Mullholland v McCrea [1961] NI 135 and Dodds v Dodds [1978] 2 WLR 434 in this regard.
23. Accordingly, it is perfectly open to a defendant to settle claims (or distinct heads of claim) intimated by one or more prospective claimants in respect of losses falling within the scope of the Act before proceedings are commenced or served on behalf of those whose claims have not been so settled.
24. This, in my view, is precisely what happened in this case. The offer was expressed to be in respect of the whole of the claim but the only claim which had been raised in correspondence was that of the claimant himself. It follows that I am satisfied that the

acceptance of the offer was, on the face of the documentation, limited to the claimant's individual claim in its entirety but did not extend to claims which may or may not have followed from other alleged dependants.

25. When, therefore, the claimant attempted thereafter to bring these proceedings, he was not entitled to do so on his own behalf but only in his capacity as administrator of the estate on behalf of other alleged dependants. In consequence, his own claim falls to be struck out on the basis that he accepted the Part 36 offer which, on its face, related to the whole of his claim. The claims of the other dependants, however, remain viable.
26. On the basis of this finding, it is unnecessary for me to identify or resolve the issues raised in the other grounds of appeal. Each of these was based on the premise that the Part 36 offer extended to cover the claims of all potential dependants. Having found this not to be the case, I consider that it would be disproportionate for me to resolve the remaining disputes which have thereby been rendered academic.
27. I should add that my findings should not be taken as an invitation to the remaining members of the family to present their claims for dependency in a way in which seeks to present the claimant's dependency as if it were their own.
28. Furthermore, there are bound to be costs consequences arising out of the fact that the ground upon which the claimant was successful was not adequately articulated at first instance and that, on appeal, a significant proportion of the costs will have been expended upon grounds which were unsuccessful. I would encourage the parties to agree the costs consequences. Should this prove to be impossible, I would hope to be able to resolve this issue and any other ancillary matters following written representations.