Julie Belt v Basildon & Thurock NHS Trust [2004] ADR L.R. 02/27

JUDGMENT : MRS JUSTICE COX: QBD. 27th February 2004

1. The appellant, Julie Belt (hereafter referred to as "the claimant"), appeals from the order of His Honour Judge Yelton dated 30 October 2003, setting aside the order of District Judge Skerratt dated 22 August 2003 that *"judgment be entered in favour of the claimant in accordance with the defendant's admission by letter dated 4 June 2001",* and striking out paragraph 5 of the claimant's statement of case. She appeals, after being granted permission on the papers, on one ground only, namely, that Judge Yelton erred in law in construing the letter of 4 June 2001 and an earlier letter of 17 May 2000, both letters from the defendant's insurers to the claimant's solicitors, as letters containing not admissions of liability but offers to settle only. A further ground of appeal alleging a procedural irregularity at the hearing fell at the permission stage and the application for permission to appeal on that ground was not renewed at this hearing.

2. Mr Boora for the claimant contends that, read individually or together, the two letters patently contain admissions of primary liability, leaving only the issue of contributory negligence by the claimant and its extent open to negotiation between the parties. He submits that the court should be wary of allowing a defendant to circumvent the consequences of a prima facie admission of liability, which would defeat the central purpose of the CPR and the Pre-Action Protocol for Personal Injury Claims, namely to enable parties to avoid litigation by agreeing a settlement of the claim before the commencement of proceedings. He accepts that this was a multi-track and potentially high-value claim and that the Protocol did not therefore expressly apply, but he contends that in accordance with paragraph 2.4 it should apply in spirit and that its provisions are relevant to resolving this dispute.

3. Mr Eales for the defendant submits that the letters contained merely offers, not admissions, and that the judge below was right so to construe them. In any event, he contends that the letters were part of negotiations genuinely aimed at settlement of a dispute, were consequently written without prejudice (even though they did not expressly say so), and that they therefore cannot be used to establish an admission or a partial admission. To regard them otherwise would defeat the sound public policy objective of encouraging parties to enter into negotiations in good faith with a view to attempting to settle disputes without resort to litigation.

4. The relevant facts are these and it is fair to point out that the issues in this appeal have been somewhat confused by either errors or misunderstandings on both sides at various stages of the litigation. The claimant was injured after tripping in a pothole at the site of the Basildon Hospital on 15 September 1999. She instructed solicitors. Correspondence subsequently ensued with the defendant's insurers. None of it, at any rate so far as is relevant to this appeal, was headed "without prejudice".

5. On 17 May 2000, the insurers wrote confirming that they had completed their inquiries with regard to liability and stating in the penultimate paragraph: *"We have therefore taken all aspects of this case into consideration and are willing to offer 50 per cent contribution towards liability in this case."*

   The claimant's solicitors replied on 6 June expressing surprise that the insurers sought to attribute 50 per cent of the blame to the claimant and urging them to accept full liability.

6. A considerable period of time then elapsed before the insurers wrote again on 4 June 2001 in which, so far as is relevant, they stated as follows: *"We can confirm we have concluded our inquiries concerning the issue of liability. We [are] able to confirm here that we are prepared to settle your client's claim [for] compensation. Furthermore, we [are] prepared to agree that the claim should be settled on the basis of a 20 per cent contributory negligence."*

   In response the claimant's solicitors, by a letter of 15 June 2001, stated: *"We must inform you that we remain of the view that our client cannot be held to be in any way to blame for this accident."*

   By letter of 20 June 2001 the insurers responded: *"We have explained our position and given our reasons. We feel that our offer made for liability is fair and reasonable and we are not willing to increase."*

7. One year later, on 18 October 2002, the insurers wrote: *"We can confirm that we have reviewed our papers/file and we .... can confirm liability here is denied."*

8. In Particulars of Claim dated 25 February 2003, the claimant pleaded at paragraph 5: *"In correspondence the parties have compromised the issue of liability with primary liability resting with the defendant subject to 20 per cent contributory negligence on the claimant's part. The claimant seeks judgment on the compromise."*

9. In their defence of 19 June 2003 it was expressly denied that the parties had reached a compromise as to liability. In paragraph 5 the defendant pleaded: *"The defendant made an offer of primary liability subject to 20 per cent contributory negligence by the claimant by letter dated 4 June 2001. By letter dated 15 June 2001, the claimant rejected the said offer stating, inter alia, that 'We must inform you that we remain of the view that our client cannot be held to be in any way to blame for this accident'. By reason of this rejection the defendant was entitled to and did withdraw the said offer by letter dated 18 October 2002. Further, and in any event, negotiations between the parties were engaged in to obviate the need for the issue of proceedings which self-evidently has not occurred."*

   Mr Boora concedes that paragraph 5 of the Particulars of Claim was pleaded in error and that in fact no compromise had ever been achieved in this dispute. This was accepted in the Reply served on behalf of the claimant.

10. The claimant still contended, however, that the defendant had admitted liability in the letter of 4 June 2001. On 22 August 2003, District Judge Skerratt agreed and ordered that judgment be entered in favour of the claimant in accordance with the defendant's admission by letter of 4 June 2001.

11. By application notice dated 11 September 2003 the defendant applied for permission "to withdraw the admission by letter dated 4 June 2001" and for the judgment dated 22 August 2003 to be set aside. In support of this application the defendant was then contending that it did not admit liability within the three-month period provided for in paragraph 3.7 of the Protocol and that the letter of 4 June 2001 sent outside the scope of the Protocol was not an admission by notice in writing within the meaning of CPR 14.3.

12. However, by the time of the hearing before Judge Yelton the defendant had changed position and was arguing that the letters of 17 May 2000 and 4 June 2001 did not in fact amount to an admission of liability, but contained only offers to settle the case. Even if they did amount to an admission, it was contended that the letters could not in any event be adduced and relied upon to secure judgment as they formed part of without prejudice negotiations genuinely aimed at settlement. Judge Yelton concluded that the letters amounted only to an offer to settle which, ultimately, was rejected because the claimant wanted the defendant to accept 100 per cent liability. He did not find it necessary to decide whether these were without prejudice negotiations. He set aside the District Judge's order and struck out paragraph 5 of the Particulars of Claim.

13. Mr Boora submits that, since the CPR came into being, a defendant to a personal injury claim is now expected to give a clear indication as to his position on liability at an early stage. He does not have to use the precise words "I am admitting liability" so long as it is clear from the words used that he is. In this case he submits that the words used in the letter of 17 May, repeated in the letter of 4 June a year later, show that this defendant's insurers were setting out their position on primary liability. This being a claim of some considerable potential value, the Personal Injury Protocol did not apply expressly but should be applied in spirit (paragraph 2.4). The letter of 17 May was sent during the Protocol period of 3 months. Since the defendant did not expressly deny liability and disclose any documents in accordance with paragraphs 3.7, 3.9 and 3.10 of the Protocol, the correct construction of the correspondence is that primary liability was being admitted and the word "offer" was being used in relation only to the extent of the claimant's contributory negligence and not to primary liability. Mr Boora contends that the parties then engaged in negotiations for a considerable period, which proceeded in relation to quantum matters only, as the correspondence shows, until the letter of 18 October 2002 from the defendant's insurers, in which liability was denied. Mr Boora developed these submissions in oral argument, taking me through a number of relevant rules and paragraphs in the Protocol.

14. However, there is no need for me to refer to these in detail because, having considered the correspondence, I find myself in agreement with Judge Yelton. In my judgment the letters relied upon, correctly construed, contain not admissions of liability but only offers to settle the claim. Nothing in the CPR or in the Protocol affects what I regard as clear as a matter of construction. To submit, as Mr Boora did, that if in the 17th May letter the words "admit", "concede" or "accept" had been used instead of the word "offer" there would have been no argument, fairly makes the point, although not in Mr Boora's favour. The point is that the word "offer" was used and the wording, in my judgment, shows that on 17 May the defendant's insurers were doing no more than offering, in the course of negotiations, to settle the case on a 50/50 basis. On 4 June they were indicating again that they were prepared to settle the case, though offering to do so then on a basis which was more generous to the claimant. It is clear that both offers were rejected.

15. That conclusion is sufficient to dispose of this appeal. However, in view of the importance of the "without prejudice" point, and in deference to the arguments of counsel, I have gone on to consider this aspect, though more shortly than would otherwise be necessary. My attention was drawn to the (unreported) decision of the Court of Appeal in **Sampson v John Boddy Timber Ltd** [1995] CAT 552. In this case the claimant had suffered injuries in an accident at work and, having instructed solicitors, indicated that there was a viable claim against the defendant. The claimant's solicitors wrote to the defendant's insurers asking them if they were prepared to deal with the matter, informing them that, if they were not, an application for legal aid would be made. The defendant's insurers wrote back in the following terms:
"We have now completed our investigations into the circumstances of your client's accident and confirm that we are prepared to negotiate a settlement on a compromise basis, arguing that your client ought not to have used the platform as a means of access."

In fact, no agreement was reached between the parties. At trial, at which liability was in issue, the claimant's counsel sought to rely upon the initial letter as an admission of liability, subject to an argument about contributory negligence. The Court of Appeal held that the letter was to be regarded as being without prejudice, even though it was not marked as such. Sir Thomas Bingham MR held (page 12 of the transcript):
"It was plainly, as I think, an offer to compromise since the effect of the letter was to offer settlement on the basis of a reduction to reflect the plaintiff's own negligence. It seems to me clear that the letter was a bona fide offer by the insurers to explore the possibilities of settlement on a compromise basis and the rule is clear that unless a party makes plain its intention that such an offer should be treated as an open offer it is covered for public policy reasons by the cloak of privilege."

16. In **Rush and Tompkins Limited v GLC** [1989] 1 AC 1280 the House of Lords had already made it clear that genuine negotiations with a view to settlement are protected from disclosure, whether or not they have been expressly described as being "without prejudice". In the well-known extract from his speech Lord Griffiths said at page 1299:
*"The 'without prejudice' rule is a rule governing the admissibility of evidence and is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish. It is nowhere more clearly expressed than in the judgment of Oliver LJ in **Cutts v Head** (1984) Ch 290, 306:*

> *'That the rule rests, at least in part, upon public policy is clear from many authorities, and the convenient starting point of the inquiry is the nature of the underlying policy. It is that parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations (and that includes, of course, as much the failure to reply to an offer as an actual reply) may be used to their prejudice in the course of the proceedings. They should, as was expressed by Clauson J in **Scott Paper Co v Drayton Paper Works Ltd** .... be encouraged fully and frankly to put their cards on the table.... The public policy justification, in truth, essentially rests on the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'*

The rule applies to exclude all negotiations genuinely aimed at settlement whether oral or in writing from being given in evidence. A competent solicitor will always head any negotiating correspondence 'without prejudice' to make clear beyond doubt that in the event of the negotiations being unsuccessful they are not to be referred to at the subsequent trial. However, the application of the rule is not dependent upon the use of the phrase 'without prejudice' and if it is clear from the surrounding circumstances that the parties were seeking to compromise the action, evidence of the content of those negotiations will, as a general rule, not be admissible at the trial and cannot be used to establish an admission or partial admission. I cannot therefore agree with the Court of Appeal that the problem in the present case should be resolved by a linguistic approach to the meaning of the phrase 'without prejudice'. I believe that the question has to be looked at more broadly and resolved by balancing two different public interests namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation. Nearly all the cases in which the scope of the 'without prejudice' rule has been considered concern the admissibility of evidence at trial after negotiations have failed. In such circumstances no question of discovery arises because the parties are well aware of what passed between them in the negotiations. These cases show that the rule is not absolute and resort may be had to the 'without prejudice' material for a variety of reasons when the justice of the case requires it. It is unnecessary to make any deep examination of these authorities to resolve the present appeal but they all illustrate the underlying purpose of the rule which is to protect a litigant from being embarrassed by any admission made purely in an attempt to achieve a settlement."

17. Assistance is also to be derived from various passages in The Law and Practice of Compromise (fifth edition) by David Foskett QC, to which my attention was drawn by Mr Eales. He referred in particular to passages at paragraphs 27-39 where the author was referring to the recent decision of the Court of Appeal in **Unilever Plc v The Proctor and Gamble Co** [2000] 1 WLR 2436. The author stated:
"Apart from its importance in the particular field of litigation to which it related, the Unilever case is important for the emphasis it places on the utility of the 'without prejudice' privilege in encouraging full and frank exchanges between the parties. Robert Walker LJ drew attention to the way in which practitioners treated the 'without prejudice rule', particularly in the context of meetings set up to discuss settlement. He said this:

> *'I have no doubt that busy practitioners are acting prudently in making the general working assumption that the rule, if not sacred, ... has a wide and compelling effect. That is particularly true where the "without prejudice" communications in question consist not of letters or other written documents, but of wide-ranging unscripted discussions during a meeting which may have lasted several hours. At a meeting of that sort the discussions between the parties' representatives may contain a mixture of admissions and half-admissions against a party's interest, more or less confident assertions of a party's case, offers, counter-offers and statements (which might be characterised as threats or as thinking aloud) about future plans and possibilities.'*

His general conclusions are also of importance in what might be termed this "post-Woolf" culture. Having reviewed the early authorities he said this:

> *'They show that the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties, in the words of Lords Griffiths in the Rush and Tompkins case, to speak freely about all issues in the litigation, both factual and legal, when seeking compromise and for the purpose of establishing a basis of compromise submitting certain facts. Parties cannot speak freely at a without prejudice meeting if they must constantly monitor every sentence with lawyers .... sitting at their shoulders as minders.'*

He continued by saying that the expansion of exceptions should not be encouraged when an important ingredient of Lord Woolf's reforms of civil justice is to encourage those who are in dispute to engage in frank discussions before they resort to litigation."

Thus, even after the arrival of the CPR and the Protocol it was being made clear that exceptions to the "without prejudice" rule should not be expanded and that there are sound public policy reasons why that is so.

18. I do not therefore accept Mr Boora's broad submission that the CPR and the Pre-Action Protocol require that an admission or partial admission made in the course of genuine, "without prejudice" negotiations aimed at settling a personal injury claim should automatically lose the cloak of privilege. In any event the approach being suggested by the claimant in this case, it seems to me, would have the effect of deterring parties from genuine attempts to settle claims, which would run completely contrary to the aims of the CPR and the Protocol.

19. In conclusion, it seems clear to me on the facts of this case that before the issue of proceedings it was at no time suggested by the claimant in correspondence that primary liability was not in issue. Indeed, in the Particulars of Claim the parties were (erroneously) said to have achieved a compromise. There were in this case negotiations in correspondence between the parties as to issues of apportionment but there was at no stage an admission of primary liability. When liability was denied in October 2002, the negotiations had broken down. In any event it seems to me these were clearly "without prejudice" negotiations and as such the correspondence could not be referred to in any event in subsequent litigation. It follows that in my judgment the judge below was right and this appeal must be dismissed.