IN THE HIGH COURT OF JUSTICE **Claim No. HQ14P03864**

QUEEN'S BENCH DIVISION

MASTER YOXALL

BETWEEN

MISS HARRIET THOMPSON

Claimant

And

[1] MR SAM JAMES REEVE
[2] THE MOTOR INSURANCE BUREAU
[3] MID ESSEX HOSPITAL SERVICES NHS TRUST

Defendants

JUDGMENT

My judgment will not be tape-recorded. Accordingly, this may be treated as authentic

1. This is the Claimant's application dated 14th March 2017. The application concerns the interaction between CPR 36 and CPR 3.10.

2. Mr, Crowther, of counsel, appeared on behalf of the Claimant and Mr. William Wraight, of counsel appeared on behalf of the Second Defendant. Mr. David Kelly, solicitor, appeared on behalf of the Third Defendant and substantially adopted the submissions made by Mr. Wraight. I am grateful for their written and oral submissions. I should add that the First Defendant plays no part in these proceedings.

3. The underlying claim is a personal injury claim arising out of a RTA in August 2008. The Claimant sustained significant injuries. She was then 14 years old. The claim is complicated by the negligent treatment of her injuries. Judgment has been entered against the Second and Third Defendants. Causation and quantum remain in issue.

4. The Claimant's schedule of loss put the value of the claim at about £347,000.

5. On the 25th August 2016 the Claimant made a Part 36 offer to settle the whole claim against all of the Defendants in the sum of £340,000.

6. On the 28th February 2017 the Claimant's solicitors sent an email to those acting for the Second and Third Defendants withdrawing the said Part 36 offer. Each email attached a letter in the following terms:

"Further to previous correspondence, the Claimant withdraws all previous Part 36 offers to settle this claim, and specifically withdraws the previous offer to settle the claim in the sum of £340,000 in accordance with CPR 36.9(2)."

7. It is no secret that that this withdrawal of the Part 36 offer was prompted by the announcement by the Lord Chancellor on the 27th February 2017 of the reduction in the discount rate to minus 0.75%.[1] With revised multipliers the Claimant's claim is put at about £602,500. The change in the discount rate came into force on 20th March 2017.

8. There was a telephone CMC before me on 2nd March 2017. (The trial of the claim is listed for hearing on 17th May 2017). At that hearing I was told by Mr. Wraight that the Defendants had accepted the Claimant's Part 36 offer and that that the case was effectively stayed.

9. The position is that the Defendants had accepted the Part 36 offer by fax and by DX that very day on the 2nd March 2017. Again, it appears that the acceptance of the offer was prompted by the change to the discount rate.

10. In the circumstances, I adjourned the Claimant's application (in respect of directions) to the 16th March 2017 and directed that any application by the Claimant in respect of the operation of Part 36 was to be issued and returnable on the same date. At the hearing those acting for the Claimant attended with an unissued application but the fee had been paid on it. Given that the fee had been paid on the application and that all parties were able to proceed, I heard the application. No doubt the application will be sealed shortly if that has not already happened.

11. By the application, the Claimant seeks [1] permission to withdraw the Part 36 offer; [2] an order that the Claimant's offer is deemed to have been withdrawn on 28th February 2017; [3] varied directions to trial (assuming [1] or [2] granted).

12. CPR 36.9 deals with withdrawing or changing the terms of a Part 36 offer generally. It states:

> 36.9 (1) A *Part 36* offer can only be withdrawn, or its terms changed, if the offeree has not previously served notice of acceptance.
>
> (2) The offeror withdraws the offer or changes its terms by serving written notice of the withdrawal or change of terms on the offeree.
>
> (*Rule 36.17(7)* deals with the costs consequences following judgment of an offer which is withdrawn.)
>
> (3) Subject to *rule 36.10*, such notice of withdrawal or change of terms takes effect when it is served on the offeree.
>
> (*Rule 36.10* makes provision about when permission is required to withdraw or change the terms of an offer before the expiry of the relevant period.)

[1] That is a reduction in the rate of return referred to in s.1(1) of the Damages Act 1996.

(4) Subject to paragraph (1), after expiry of the relevant period—

(a) the offeror may withdraw the offer or change its terms without the permission of the court; or

(b) the offer may be automatically withdrawn in accordance with its terms.

(5) Where the offeror changes the terms of a *Part 36* offer to make it more advantageous to the offeree—

(a) such improved offer shall be treated, not as the withdrawal of the original offer; but as the making of a new *Part 36* offer on the improved terms; and

(b) subject to *rule 36.5(2)*, the period specified under *rule 36.5(1)(c)* shall be 21 days or such longer period (if any) identified in the written notice referred to in paragraph (2).

13. Section III of CPR Part 6 deals with the service of documents other than the claim form. CPR 6.20(1)(d) permits service by fax or other means of electronic communication in accordance with Practice Direction 6A. The effect of paragraph 4.1(1) of the Practice Direction is that service by email is permitted but only where the receiving party has indicated in writing that they are willing to accept service by email.

14. The Claimant accepts that service of the notice of withdrawal by email was not in accordance with CPR 6.20. However, the Claimant submits that CPR 3.10 may be applied so that service of the notice of withdrawal can be treated as valid.

15. Rule 3.10 states:

3.10 General power of the court to rectify matters where there has been an error of procedure

Where there has been an error of procedure such as a failure to comply with a rule or practice direction—

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.

16. The Claimant submits that Rule 3.10 is of wide application and relies on *Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm)*, Popplewell J. The case may be summarised as follows:

Integral Petroleum SA v SCU-Finanz AG [2014] EWHC 702 (Comm), Popplewell J., on an application to set aside a default judgment, it was held that the claimant's error of procedure in serving particulars of claim by e-mail was "a failure to comply with a rule or practice direction" under r.3.10. Accordingly, under r.3.10(a), service was to

be treated as valid. The judge indicated that a narrower approach to r.3.10 would be justified in relation to originating documents. It was said that *Phillips v Nussberger* (reported sub nom *Phillips & Another v Symes & Others (No 3)* establishes that r.3.10 is to be construed as of wide effect so as to be available to be used beneficially wherever the defect has had no prejudicial effect on the other party.[2]

17. The Claimant referred to the commentary in the White Book under Rule 3.10. Two Court of Appeal cases are of particular interest.

> In *Vinos v Marks & Spencer plc [2001] 3 All ER 784:* dealing with r.7.6(3) (which stipulates a strict code re service of claim form), it was held that the Claimant could not use r.3.10 as this would have the effect giving an extension of time which was not permitted under r.7.6(3).
>
> Cf. *Steele v Mooney [2005] EWCA (Civ) 96, [2005] 1 WLR 2819* ; there the claim form was not served within 4 months, but before the 4 months expired the claimant's solicitors issued an application for extension of time. However, the application, by error, sought an extension only as regards the particulars of claim and supporting documentation. It omitted to seek an extension of time for the claim form. Held 3.10 could be used.

18. Against this, the Defendants make the point that Part 36 is a self-contained code as is asserted in Rule 36.1(1). It is submitted that Rule 3.10 cannot be used in the context of Part 36.

19. The Defendants rely on *Sutton Jigsaw Transport Limited v Croydon London Borough Council* [2013] EWHC 874 (QB) HHJ McKenna. This case concerned an application by the claimant pursuant to CPR 36(9)(3) for permission to accept the defendant's Part 36 offer made shortly before start of the trial. During the course of the trial, the claimant's counsel gave the defendant's counsel a written note accepting the defendant's Part 36 offer. Shortly afterwards, the defendant withdrew its Part 36 offer. The question therefore arose has to the validity of the service. It was held that the notice of acceptance had not been validly served as it was not sent to the defendant's address for service.

The claimant sought to circumvent the difficulty with service by inviting the court to dispense with service or to permit, retrospectively, substituted service.

> The judge said at [9]:
>
> I have given consideration to the issue of whether, given that the parties' representatives, solicitors and counsel were at court, it would be overly legalistic not to accede to the claimant's application. But it does seem to me, on analysis, that CPR 36 does provide clear rules and the parties should be on a level playing field; both should be taken to know the rules and should comply with them if they wish to obtain

[2] Taken from White Book 2016; para 3.10.3

> the benefits which CPR 36 provides. To permit the claimant's application either by means of the dispensation with service or by ordering substituted service retrospectively, would, as it seems to me, be to give the party, who did not comply with the rules provided for service or acceptance of the Part 36 offer, with an unfair advantage compared with the party that did comply with the rules.

20. On balance, I prefer the submissions made on behalf of the Claimant. Bearing in mind the *Integral* case and the *Steele* case, I consider that Rule 3.10 has a wide effect and can be applied in the present circumstances. I accept that it has no application in certain circumstances, e.g., r.7.6(3) which specifically describes the only circumstances in which the time for service of the claim form can be extended. Likewise, I accept that Rule 3.10 cannot be invoked to extend a statutory time limit or to avoid service of a document required by statute.

21. In the present case, the Claimant gave notice in writing of the withdrawal. It is not disputed that the notice was actually received. The notice provided the Defendants with all the information necessary. As stated above, it is the method of service which is defective. In my judgement r.3.10 can be invoked to cure the defect.

22. As far as the *Sutton Jigsaw* case is concerned, I note that r.3.10 was not relied upon and is not referred to in the judgment. It follows that no authorities on r.3.10 were cited, in particular, the *Steele* case. Accordingly, I do not regard myself as bound by *Sutton Jigsaw*.

23. The Defendants submit that Part 36 is a self-contained code. I accept that it is - but it is not completely freestanding. Indeed, the Defendants themselves rely on an outside rule, r.6.20, to submit that service was irregular.

24. The court has jurisdiction to make an order under r.3.10. The final question is whether or not the court should exercise its discretion to do so. In the circumstances, I consider that it would be just to make an order that pursuant to r.3.10 the date of service of the Claimant's notice of withdrawal shall be treated as 28th February 2017; i.e., that the error of serving by email is remedied. In my view, it would not be just or consistent with the overriding objective that a technical breach of the rules should impede the proper the assessment of damages in this case.

Dated the 20th March 2017