

76 Hamilton Street  
Birkenhead  
Merseyside CH41 5EN

Monday, 13th July 2015

Before:

DEPUTY DISTRICT JUDGE SMEDLEY

B E T W E E N :

SHAUN PAYNE

Claimant

- and -

WILLIAM SCOTT

Defendant

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(Official Court Reporters and Audio Transcribers)  
1<sup>st</sup> Floor, Paddington House, New Road, Kidderminster DY10 1AL  
Tel: 01562 60921 Fax: 01562 743235 [info@caterwalsh.co.uk](mailto:info@caterwalsh.co.uk)  
and  
Transcription Suite, 3 Beacon Road, Billinge, Wigan WN5 7HE  
Tel & Fax: 01744 601880 [mel@caterwalsh.co.uk](mailto:mel@caterwalsh.co.uk)

MR JOHN MEEHAN appeared on behalf of the Claimant

MS SARAH ROBSON (instructed by Taylor Rose) appeared on behalf of the  
Defendant

**J U D G M E N T**

(As Approved)

DEPUTY DISTRICT JUDGE SMEDLEY:

- 1 We are dealing today with a detailed assessment of costs arising ultimately out of a road traffic accident that occurred on 4th February 2013. The claimant instructed solicitors, the appropriate claimant notification form was submitted and the matter proceeded in the portal in the usual way.
- 2 Stage two was commenced in June 2013, including a claim of £4,325 for loss of earnings. On 28th June there was a defendant's counter offer that was clearly not acceptable and thereafter there was contact with the claimant's solicitors looking for further documentation regarding loss of earnings. It appears that there was some difficulty in obtaining documentation from the claimant, but on 12th December the solicitors issued stage three.
- 3 There was continuing correspondence trying to get the loss of earnings documentation, but on 3rd March there is a record that the defendant's agents chased the claimant's solicitors again. The claimant's solicitors said as regards loss of earnings they were not going to rely on any further documents.
- 4 On the same day, but presumably after that telephone discussion, the matter had been listed for hearing and was in fact heard by Deputy District Judge Hennessy. From the transcript it appears that the hearing was listed sometime in the afternoon rather than in the morning, which rather supports the suggestion that the final indication that the claimant was not going to rely on further documents was prior to the hearing.
- 5 The effect of that hearing was that the claim exited the portal and directions were given for further witness statements and so on so that the matter could proceed to a disposal under Part 7. That apparently was listed for May 2014, but in the event before that hearing the defendant made an increased offer which the claimant found acceptable and the matter was therefore resolved on that basis.
- 6 The issue arising as point six of the points of dispute is that the case was inappropriately taken out of the portal by the claimant and accordingly the claimant should be restricted to the fixed costs appropriate to the portal rather than the at large Part 7 costs which are actually claimed in the bill.
- 7 The claimant's position is that the claim was taken out of the portal as a result of a case management decision made by the deputy district judge on 3rd March due to some extent to a lack of time for dealing with the matter. The defendant's primary stance is that claimants elected to take the matter out of the

portal and the defendant's position rests to a great extent on what actually happened at the hearing.

- 8 Happily, I have a transcript of that hearing, where it is clear that Mr Seed for the claimant and Mr Thomas for the defendant came into chambers. District Judge Hennessy said: "The first case is Payne and Scott, I think," and Mr Seed then responds: "This one, Ma'am, I think has got to come out of the process." He goes on to explain the significant loss of earnings claim. The defendant's figure was zero at stage two and that they were instructing forensic accountants.
- 9 There is some discussion then about the documents that they have got there and the deputy district judge mentions that her time for this hearing is limited because on this particular occasion she has to leave at four. She goes on to say: "It does appear that it might be fairer," and asks Mr Thomas for his views. Mr Thomas says he was thinking of invoking paragraph 7.1, which would keep it within the protocol, but considers that would not really help and that it would enable some evidence to be served from the claimants but did not take matters much further. So he tended to agree with what Mr Seed had to say.
- 10 Now, that, as I have said, the defendant says in an election by the claimant to take the matter out of the protocol and indeed that is the wording that Mr Seed used: "Has to come out of the process." He is clearly putting forward the proposition that the case cannot continue under the protocol.
- 11 It seems to me that is the critical factor here. I do not accept that the matter came out as a result of a case management decision. Effectively, subject to Mr Thomas' comments, the deputy district judge considered there might be some reason for taking the course that had been suggested, but the suggestion is put forward by the claimant.
- 12 The issue as to time is not, in my view, a matter that has any particular impact on it because it was perfectly open to the deputy district judge on that occasion to say: "Look, this is going to take far longer than the 15 minutes it was originally intended to take. I will adjourn the matter off. It can be listed for half an hour or an hour," and it could still have proceeded under stage three. There is no question of that having been done. In my view that would have been perhaps the sensible way of dealing with it, bearing in mind that at the end of the transcript her suggestion for the final disposal hearing is half an hour. She is clearly influenced by Mr Seed's request that it comes out and I cannot interpret that as anything other than a request or an election, as the case may be, by the claimant to take the matter out of the portal.

- 13 So I turn to what is now Rule 45.24. This rule applies where the claimant (a) does not comply with the process or (b) elects not to continue with that process." I accept entirely Mr Meehan's comment that (a) does not apply. There is no suggestion the claimants have not complied with the process set out in the relevant protocol. In my view what happened on the afternoon of 3rd March 2014 did constitute an election not to continue with the portal process.
- 14 Now, where that is the case subsection 2 becomes effective. It says: "Subject to paragraph 2(a), where a judgment is given in favour of the claimant but the court determines that (a) is not relevant," that is to do with insufficient information in the claim notification form. So (b): "If the court considers that the claimant acted unreasonably (1) by discontinuing with the process and starting proceedings under Part 7; (2) by overvaluing the claim; or (3) in any other way that causes the process to be discontinued, the court may order the defendant to pay no more than the fixed costs in Rule 45.18."
- 15 It seems to me to come down primarily to the question did the election, which I have found took place, was it made unreasonably? There were other options, of course. Either the matter could have proceeded in the portal for a longer period or longer listing, it would have been open to Mr Seed, if he was unsatisfied with the evidence which he had, to invite the court to allow further evidence to be introduced under Clause 7.1 of the practice direction (B) to Part 8. Either of those courses would keep the matter in the protocol and would be considered reasonable.
- 16 Was it reasonable at the time to take it out? I have commented before (inaudible) I have been addressed on the fact that Mr Thomas was asked whether he agreed to the matter coming out. It is he that refers to the paragraph 7.1 point, but he says it does not help very much and says he tends to agree with counsel for the claimant.
- 17 As I said at the outset, I have some difficulty in seeing where there is no vigorous objection to a course by counsel for the defendant how that course can be said to be unreasonable, but in fact I think it was. I say that having regard particularly to the fact that the impression by Mr Seed that he is expecting further evidence, he is not satisfied that the evidence is complete, although the defendant's record show that on that morning, presumably, they were not seeking to introduce further evidence. Given that they were not going to introduce further evidence, I can see no reason why the suggestion was made that it must come out of the portal.

18 I do, therefore, conclude that in fact the election that was made was unreasonable and it is appropriate that the matter should be restricted to portal costs.

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