

APPROVED JUDGMENT

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1. THE DISTRICT JUDGE: This is an application to review a provisional assessment carried out by myself in the early parts of this year.
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2. The decision I took at that time was to the effect that the claimant had satisfied me that the defendant had breached a mandatory provision within the pre-action protocol, that the case had therefore been treated as having exited the portal either automatically or by way of an election, which the claimant was entitled as a right to take, and that that decision was not subject to requirements of reasonableness.
- C
3. The defendant has invited me to review that decision. The issue turns, essentially, upon the lack of an explanation accompanying an offer made through the portal on 12th June of 2012. The protocol requires that where a head of damage is reduced, an explanation is given as to why that reduction has been adopted. It may be that general damages are one of those areas where an explanation is of limited assistance in the sense that it is not a matter of exact calculation. This is an application of guidelines, previous decisions and the like, and is, essentially, a matter for broad negotiation rather than precise calculation.
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4. The offer of 20th July did not include an explanation. It was not therefore within the strict terms of the protocol. Furthermore, the terms of the protocol would suggest that a breach at that stage is a matter which entitles the claimant to take the matter out of the portal.
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5. What is said now on behalf of the defendant is that that is not the end of the story. The decision to exit the portal must be taken reasonably having regard to the intention of the protocol to keep costs down and encourage the expeditious settlement of these cases, either by agreement or through the stage 3 protocol process.
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6. It is very apparent that there is a temptation for those acting for claimants to seek, where possible, to get a case out of the portal if they can because the rewards in costs are very much greater under part 7 than they are within the portal.
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7. After the offer of which the claimant complains, the claimant in fact made a counter offer on 20th July within the portal. Therefore, they did not treat the counter offer of 12th June as having at that stage, taken the matter out of the portal. They let the matter run in the portal until the end of the full discussion period, and then complained about the lack of explanation as a matter which entitled them as of right to take the matter out of the portal. In my judgment, that was a decision that they took which is subject to the requirement of reasonableness in CPR 45.24, as it applied at the time of these matters, which requires the court should consider whether or not the claimant acted unreasonably in discontinuing the process set out in the protocol.
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8. The consequences of unreasonable conduct is that costs would be limited in that event to those that would be payable had the matter not exited the portal. Thus these are decisions which must be subject the requirement of reasonableness, and which in turn means that every technical breach of the provisions of the protocol should not, without more, be regarded as entitling a claimant as of right to take the matter out of the portal. In this case, the lack of an explanation which was not sought and which did not prevent a further offer being made by the claimant does not seem to me to be a matter which ought to allow the claimant to contend that he acted reasonably in exiting the portal at

A the time that he did. In that he matter was not agreed at the end of stage 2; it should have proceeded to stage 3. Instead of that, simply because an explanation which was not sought at the material time, the claimant has sought to treat himself as entitled to issue part 7 proceedings and incur, or at least claim, greatly increased legal costs.

- B 9. Accordingly I accept that the orders I made on the provisional assessment must be varied and the costs will therefore be limited to those that would have applied had the matter remained in the portal throughout.

(End of judgment)

(Discussions follow as to costs)

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