IN THE LEICESTER COUNTY COURT

No. 2YL74291

County & Family Court
Hearing Centre
90 Wellington Street
Leicester

20th January 2015

Before:

HER HONOUR JUDGE HAMPTON

Between:

KETAN MODHWADIA

Claimant

and

MURU MODHWADIA

Defendant

MR. JOSEPH (C) appeared on behalf of the Claimant.

MRS. ROBSON (C) appeared on behalf of the Defendant.

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J U D G M E N T S
(As Approved)

J U D G M E N T

1. JUDGE HAMPTON: This is an appeal against the order of District Judge Atkinson, made on the 29th September 2014 at an oral hearing listed pursuant to CPR Part 47.15, after he had made a provisional assessment of the Appellant's Bill of Costs in a claim which had started life in the protocol which is provided for low-value road traffic claims.

2. The claim arose from a traffic accident which occurred on the 20th November 2011. The Appellant was a front seat passenger, and accordingly it was highly likely that there would be no finding of any contribution from him - he was wearing a seat belt - to the accident. It was highly likely that he would be successful in claiming his damages from whichever driver was the cause of the accident.

3. Accordingly, the claim fell fairly and squarely within those which are required by the Rules to be started in what, to give it its formal name, is the Pre-action Protocol for low-value personal injury claims in Road Traffic Accidents, as it was then in force, commonly known as "The portal".

4. The claim proceeded under the portal for some time, but then the Claimant treated the claim as having, so to speak, dropped out of the portal, and started Part 7 proceedings. Initially, when those Part 7 proceedings were settled on the Claimant's behalf after negotiation between the Claimant and the Defendant, the claim for costs was made, and that was dealt with by way of a provisional assessment by the District Judge. Then within the procedures which apply, the parties requested that there should be an oral hearing on the question of costs.

5. That was what the District Judge was conducting when he made his decision on the 29th January 2014, when counsel who have appeared before me this afternoon, appeared before him.

6. The aims of the portal are stated within the body of that document, and they are to ensure that a Defendant will pay damages and costs using the process set out in the protocol, without the need for the Claimant to start proceedings. Further, that damages are paid within a reasonable time, and the Claimant's legal representative receives fixed costs at the end of each stage of the protocol. The protocol was devised by those who felt that there was, so to speak, a litigation industry arising for low-value claims, where conditional fees were being sought and paid. Costs were disproportionate to the issues involved, and the scheme was devised in order to bring about a swift, efficient and low-cost way of resolving claims where liability was unlikely to be in issue.

7. So that is the background behind the portal. There are three stages to the protocol, or the portal. Stage 1 was completed by the parties and this claim went on to reach Stage 2, the Defendant having admitted liability.

8. Stage 2 was commenced by the Claimant when an offer was made in the sum of £2,200 to settle the claim for general damages, and that was put forward on the 31st May 2012. Once the Stage 2 process has started, then the portal provides that

a Defendant has 15 days to consider the offer that has been made and must, if the Defendant thinks appropriate, make a counter-offer.

9. That part of the procedure is dealt with in 7.2.8 of the portal, which provides a 35-day period for consideration of the Stage 2 settlement pack, which describes the total consideration period. That comprises of period of 15 days for the Defendant to consider the Stage 2 settlement pack and make an offer. The remainder of the consideration period is for further negotiation between the parties.

10. Well, the Defendant at least complied with the time limit provided for in 7.2.8, because on the 12th June 2012, a counter-offer was made for £1,600 by way of settlement of general damages. However, the Defendant, in making that counter-offer, did not comply with the requirements in 7.3.4, which are mandatory.

11. 7.3 provides that, "When making a counter-offer, the Defendant must propose an amount for each head of damages ...", not really very relevant here, it was only general damages that were being claimed. It goes on to say, "The Defendant must also explain in the counter-offer why a particular head of damage has been reduced. The explanation will assist the Claimant when negotiating a settlement and will allow both parties to focus on those areas of the claim that remain in dispute".

12. It is the Claimant's argument before me today and before the learned District Judge in September, that the Defendant, having failed to comply with that part of the portal, or that part of the protocol, this claim automatically dropped out of the portal, pursuant to the provisions of 7.3.2, which I will come back to.

13. Accordingly, as the portal no longer applied, the Claimant was entitled to bring a Part 7 claim and the provisions of the Rule that were used by the District Judge to reduce the amount of the costs that he allowed on the costs hearing, namely 45.2.4, did not apply, as this was not an election by the Claimant to come out of the portal, but an automatic removal from the portal because of the Defendant's failure to comply with 7.3.4.

14. This matter is now listed before me for an application for permission to appeal and the appeal itself. It is perhaps artificial in these circumstances to have two separate hearings, but without the District Judge's transcript before me, when the matter came before me for directions, I was unable to decide whether there was an obvious falling into error which required me to give permission to appeal, or indeed to assess the Claimant's prospects of success in the appeal.

15. Having considered the arguments and the transcript, I have come to the conclusion that there is clearly an arguable point here, so there is some prospect of success. That does not, of course, mean that I will necessarily go on to allow the appeal.

16. This is an area where, despite the best intentions of those who drafted the protocol and those who drafted the Civil Procedure Rules as a whole, there has been a considerable amount of first instance litigation and argument as to how the portal operates and how it is to be construed. However, as yet there is no appellate authority. Accordingly, although I have been provided with a number of earlier decisions made either - one, I think, by a District Judge, one by a Recorder, so

they might be said to be at the same level as the level at which I sit, there are also a number of decisions from District Judges to which my attention has been drawn. These decisions are of interest, because of course the judiciary must seek to be consistent in its approach to the interpretation and operation of the law and procedural Rules, but of course they are not binding upon me.

17. So I have to make my decision in the absence of appellate guidance. It seems to me that it is appropriate for me to give permission to appeal. I go on to consider the merits of the appeal itself.

18. The Claimant argues that the failure to comply with 7.3.4 of the protocol effectively means that there was no response within 7.3.3 which provides, "Where the Defendant does not respond within the initial consideration period ...", that is, the 15-day period, "... the claim will no longer continue under this protocol and the Claimant may start proceedings under Part 7". So there is no question of an election or a decision being made at that stage. If the Defendant does not respond in 15 days, the Claimant can then go on to start a Part 7 claim in the usual way.

19. The Defendant says, "Well, no, there has been a response here, it's just that the response was not compliant with 7.3.4, and 7.3.4 makes no express provision within the protocol for what should happen if there is non-compliance". So that although 7.3.4 and the requirement to provide an explanation as to why a particular head of damage has been reduced is drafted so that it is mandatory, there is no sanction, so to speak, or automatic step that applies if there is non-compliance, as there is with other parts of the protocol.

20. The Claimant says, "Well, that doesn't matter. Under 7.3.3 the response was not a response because it didn't comply with 7.3.4, and accordingly the matter automatically dropped out of the portal". The Defendant has argued with some vigour that the portal being operated physically as it is by a computer programme, the matter remained within the portal during the relevant period. I have been asked by the Claimant to leave such matters out of account. I, for my part, have very little understanding of how the computer programme operates. I operate them when somebody tells me how to, but I do not understand how they will necessarily operate. What was in the mind of those who devised the computer programme is not really of any great assistance in interpreting what the portal actually requires of the parties.

21. What is relevant for my consideration, are other parts of the Civil Procedure Rules and in particular the protocol for pre-action conduct. It is also relevant to consider the further factual background to this case, because although the Claimant argues that the Defendant's response, although in time, did not comply with 7.3.4 and accordingly the protocol no longer applied. That is not how the Claimant actually treated the response from the Defendant, it is not what actually happened.

22. That is because the Claimant made another offer of £2,000, a reduced offer to settle for general damages at that level, right at the very end of the consideration period provided for in Paragraph 7 of the portal provisions. That offer, it seems, was not accepted at the time, and then on the 19th August Part 7 proceedings were issued under a claim form that was in fact drafted, according to the Defendant's

chronology, on the 5th August; it was suggested in argument it was drafted on the 4th August. Nothing much turns on that.

23. So once the reduced offer was made by the Claimant within the provisions of the portal, apparently, although the Claimant now says that the portal had ceased to operate by then, the Claimant lost very little time in starting the Part 7 claim.

24. Of course, the relevance of starting the Part 7 claim, is that the costs will increase very considerably. Of course that is part of the background behind not only this application but the other applications that have been considered by the Courts in the previous first instance decisions that have been made, which have been put before me by the Defendant.

25. Of course, it was something that the District Judge had in mind when he said in Paragraph 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". I remember well the arguments that there were on behalf of the Law Society when the figures that were to be allowed under portal claims were first published and the very low level that was considered to be unreasonable and unfair.

26. The Defendant argues that a decision was made by the Claimant to exit the portal unreasonably, and no doubt the incentive was to try and seek Part 7 costs. The Claimant says that that does not apply at all. There was no decision on the part of the Claimant. The claim automatically came out of the portal because of the Defendant's failure to comply. So the question of reasonableness does not fall to be considered, and the learned District Judge fell into error when he went on to consider the reasonableness of what the District Judge considered to be the Claimant's election to come out of the portal.

27. The portal, of course, is a free-standing procedure provided for within the CPR. It stands alone and it does not operate in the same way as the Civil Procedure Rules do. However, it is provided for in the Civil Procedure Rules and it is under the modern context in which litigation is conducted that the portal has been devised.

28. It has been suggested on the part of the Claimant that matters coming out of the portal automatically did so very much along the same lines as the arguments that were applied in the litigation under the old County Court Rules, long gone but not lamented, where there was an automatic strike-out. Where a Claimant had not taken a particular step in the proceedings, parties carried on blithely unaware of that, and whether or not they had continued to treat the proceedings as ongoing, the relevant Rule meant that the matter had been automatically struck out, whether they liked it or not.

29. The Claimant argues that the provision in the portal requiring certain steps to be taken, in default of which the portal does not apply, is very much in a similar vein. Accordingly, the Claimant's apparent election, or certainly the further offer that was made after the non-compliant offer from the Defendant, was very much in the same vein. It did not mean that the Claimant was electing to treat the portal procedure as continuing.

30. However, the manner in which litigation was conducted in the past under the old County Court Rules, it seems to me to be of no assistance when one sets that against the background of modern litigation. In particular, CPR 1.4.2(a) encourages the parties to co-operate with each other. At no point in this case was it pointed out by the Claimant to the Defendant that the Defendant's offer failed to comply with 7.3.4. The Claimant argues, well, why should the Claimant point that out? It is for the Defendant to comply, and in any event, that makes no difference because the dropping out of the portal was automatic.

31. Also relevant in this context, it seems to me, is the Practice Direction relating to pre-action conduct, provided for with the Civil Procedure Rules, and in particular Paragraph 4. Under the heading, "The approach of the Courts" and the heading "Compliance", 4.3 provides that "When considering compliance, the Court will be concerned about whether the parties have complied in substance with the relevant principles and requirements and is not likely to be concerned with minor or technical shortcomings. The Court will also consider the proportionality of the steps taken compared to the size and importance of the matter".

32. And then "Urgency", 4.3.3, not being particularly relevant in this matter, it is also relevant to consider 4.4, where it is provided that "The Court may decide that there has been a failure of compliance by a party, because for example, that party has not provided sufficient information to enable the other party to understand the issues".

33. Of course, one comes back to the words of the portal itself, and in particular 7.3.4, where it is provided that, "The explanation that the Defendant must give when making a counter-offer where the head of damage has been reduced, will assist the Claimant when negotiating a settlement and allow both parties to focus on the areas of the claim that remain in dispute".

34. The Defendant says that the failure to give an explanation was in effect a technical breach, and that the Claimant's continuation with using the portal, by making a further offer, meant that it was quite clear the Claimant was not treating that breach as bringing the portal procedure to an end. That in any event, as the Defendants did not accept the counter-offer, the claim should then have gone on to Stage 3 of the portal procedure.

35. The fact that the Claimant made another offer was plainly considered to be relevant by the District Judge, who said in Paragraph 7, after the offer of which the Claimant complains, "The Claimant in fact made a counter-offer on the 20th July, within the portal, therefore they did not treat the counter-offer of the 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".

36. The learned District Judge went on to say that that was a decision that they took, it being a decision or, to use the words of the relevant Rule, an election. The provision then required the District Judge to consider reasonableness when making an assessment as to costs applied. Again, the Claimant says this was not a decision, it happened automatically within the provisions of the portal. There was

no election, and accordingly the question of reasonableness does not arise. The argument turns on CPR Part 45.2.4, as it is now, I think the relevant Rule in 2012 was 45.3.6, but in effect, the Rules provide exactly the same thing. It is just those that draft these Rules, just to keep us on our toes, decided to change the numbering.

37. I find that the learned District Judge's reasoning in this context was correct. The portal is a tightly-drawn code. There are examples within the portal where express provision is made for a failure of one party or the other to comply with the provisions of the code.

38. An example can be found in Paragraph 6, at 6.10 and 6.11, as to what happens if there is a failure to comply with 6.10 and 6.11. This deals with the response from the insurer after the original claims notification form is sent. 6.10 requires the Defendant to send the Claimant an electric acknowledgement the next day after receipt of the CNF. 6.11 then goes on to provide, "The Defendant must complete the insurer response section of the CNF and send it to the Claimant within 15 days".

39. Then one looks to 6.15, which makes provision, as it says, "Contributory negligence, liability not admitted or failure to respond". That is in the heading. 6.15 provides that "The claim will no longer continue under this protocol where the Defendant, within the period in Paragraph 6.11 or 6.13 ..." - that applies to the Motor Insurers' Bureau and is not relevant - "... makes an admission but alleges contributory negligence, does not complete and send the CNF response, does not admit liability ...", and then there are other provisions in Paragraph 4.

40. There is no provision in 6.15 for the claim no longer continuing under the protocol where there has been no acknowledgement under 6.10. Similarly, with 7.3.3 and 7.4.4. 7.3.3 expressly provides that "Where the Defendant does not respond within the initial consideration period, the claim will no longer continue". 7.3.4, although making it mandatory that the Defendant must explain its decision in the counter-offer, it does not, as 7.3.3 does, make express provision that if the Defendant does not explain why a particular head of damage has been reduced, then the claim will no longer continue under the protocol.

41. Those who devised this scheme did so with very great care and after a great deal of consultation. I find accordingly that had it been the intention that if there was a lack of explanation under 7.3.4 and that that would then take the matter out of the portal, then those who devised these provisions would have said so.

42. If there has been no explanation, the parties can, and in this case I find did, make a decision to continue with the provisions of the protocol. The Claimant went on to make a counter-offer under 7.3.6, taking, as he was entitled to do, until the end of the total consideration period in order to decide whether to accept or decline the counter-offer. Obviously, the Claimant did decline the counter-offer by making a further offer.

43. Having done so, I have come to the conclusion that of course, the Claimant's further offer not being as low as the Defendant's original counter-offer, 7.5.5 should have applied so that the parties were then in a situation where the parties

did not reach agreement on the original damages within the period specified in 7.2.8 to 7.3.0, and accordingly Stage 3 should then have applied and the Claimant should have sent to the Defendant the Court proceedings pack. The Claimant did not do so, but elected to commence Part 7 proceedings.

44. The learned District Judge found in Paragraph 7 that that was a decision, in effect an election pursuant to Part 45, and accordingly, the learned District Judge could then go on to consider whether under Part 45.3.6(2)(b)(i), which applied in 2012, the Claimant had acted unreasonably by discontinuing the process set out in the RTA protocol and starting proceedings under Part 7.

45. The learned District Judge came to the conclusion that the Claimant had acted unreasonably. The question of reasonableness is a matter that can encompass a great many different types of behaviour. Inevitably District Judges have a great deal more experience of the conduct to this portal and the pre-action protocols than Circuit Judges have.

46. A District Judge's decision as to whether or not a Claimant has acted unreasonably in starting a Part 7 claim should be treated with considerable respect, particularly an experienced District Judge such as Judge Atkinson who dealt with the present case. He came to the conclusion that it was unreasonable for the Claimant to consider that the portal process had come to an end and that there was indeed a decision to take the matter out of the portal. That decision was subject to the requirement of reasonableness which required the Court to consider whether or not the Claimant acted unreasonably in discontinuing the process.

47. He then went on to find that 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 the time that he did". The learned District Judge went on to observe that the matter should have proceeded to Stage 3.

48. It may be relevant to his decision that he said that in terms of general damages, an explanation as required by 7.3.4 may be of limited assistance. There are cases in which an explanation for reducing the amount of general damages may be highly relevant where there has, for example, been a pre-existing injury or a supervening event, which the Defendant may contend is relevant. However, having looked at the medical report, that does not apply in the present case. It is simply a question of the parties making an assessment on the basis of an agreed medical report that has been put forward in the portal, and an explanation would have added very little to the protocol procedure in this case.

49. Accordingly, having considered the matters in that way, I find that the learned District Judge was correct to reach the decision that he did. That the Claimant had not established that he had acted reasonably in exiting the portal, and accordingly, when the learned District Judge went on to deal with the assessment of the costs, he did so on a proper basis.

50. It follows, therefore, that although I have given permission to appeal, the appeal is dismissed.

(Later)

JUDGE HAMPTON: I am now faced with the embarrassment of having to consider appropriate fees for counsel, neither of them having had them confirmed and put before me on the schedule of costs.

Having considered the matter, bearing in mind that this is a fast track matter - and I think the total amount certainly of the District Judge's award was between £8,000 and £9,000. However, of course, this has not been a straightforward trial, as the brief fees that are permitted under 45.4.8 envisage. The appropriate level of fee for this type of appeal where the Judge has been considerably assisted by counsel for both parties, should be £1,750, and that is what I allow. There being no other objection to the Defendant's fees, then I award costs summarily, with that in mind, and I would be grateful if counsel can do the calculations.
