Case No: C61YJ138

IN THE COUNTY COURT AT BIRKENHEAD

76 Hamilton Street
Birkenhead
Merseyside
CH41 5EN

BEFORE:

DISTRICT JUDGE CAMPBELL

BETWEEN:

Miss Nicole Smith	**Claimant**
- and -	
Miss Deborah Owen	**Defendant**

Miss Brookfield of counsel on behalf of the **Claimant**

Mr Conway of counsel on behalf of the **Defendant**

Judgment date: 30th November 2016

Judgment approved by the Court

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District Judge Campbell:

1. The matter comes before me this morning for a disposal hearing and also another issue that I will move on to shortly, which is whether the case unreasonably exited the MOJ portal scheme.

2. The matter arises out of a road traffic accident which occurred on the 28th April 2015 when Miss Nicole Smith was travelling on a bus that was involved in an accident where the Defendant drove her vehicle into the side of a bus. The Claimant was not wearing a seat belt on the bus because there were no seat belts fitted. She was jerked forward and sideways, struck her leg on a bar, presumably on the seat in front and suffered a soft tissue injury to her neck radiating into her shoulders, and a soft tissue injury to her shin.

3. The claim form was issued in the 18th March 2016. A defence was submitted which admitted negligence and some damage to the Claimant and then set out the issue in relation to unreasonable exit. On the basis of that defence, considered by a judge in this court, interlocutory judgment was entered on 14th June and the matter listed for a disposal on the 30th August 2016. At that disposal hearing, directions were given for a longer disposal hearing to include the opportunity for the parties to raise issues about the reasonableness or otherwise, of the exit from the MOJ portal so that the court could deal with all of those aspects at the same time.

4. I have seen a bundle today, which has been put together to assist the Court to deal with the assessment. The Claimant relies on a medical report from Dr Arthur dated 11th August 2015. So she was seen approximately three and a half months post-accident. The Court has also seen a physiotherapy invoice in support of the claim for physiotherapy and the Claimant's witness statement of the 4th August 2016, which sets out details of her other special damage and the effects of the accident upon her.

5. I have read the Claimant's statement and the report of Dr Arthur and I have been taken through those by Miss Brookfield, counsel for the Claimant and submissions have also been made by Mr Conway, counsel for the Defendant.

6. Just to summarise then, the extent of the Claimant's injuries; she suffered a soft tissue injury described as a moderate sprain, so moderate at worst, to the neck radiating into the shoulders, fully settling at eight months post-accident. She sustained an injury to her lower leg which is a moderate contusion to the left lower leg described as fat necrosis, where an indentation has been left with bruising to the front shin and it is expected that that indentation will take about a year to settle. No suggestion that the skin has been broken, but I can clearly see on the photographs that the Claimant has been left with a darker visible mark described as the size of a ten pence piece.

7. The Claimant attended A&E twice and saw her GP twice. Her initial symptoms were clearly causing her some difficulty, but the neck injury was described in the medical report as moderate at worst and the same with the lower leg. It is telling that she only took over the counter medication, paracetamol and ibuprofen, for a two week period and she has had some physiotherapy. She describes her neck as

being at its worst for six weeks, but improvement thereafter and mild to moderate on a constant basis. The leg was described as at its worst for two weeks, improved and now mild on an intermittent basis. So at three and a half months into the recovery period of one year for the leg, her symptoms are intermittent at that stage. She was upset and shocked and shaking lasting for a period of two weeks.

8. In terms of loss of amenity, heavy domestic chores and cleaning she found to be incapable of for a period of four weeks and then restricted in that activity for four further weeks before returning to its pre accident state. There does not appear to be any other loss of amenity.

9. On examination her neck shows signs of slight restriction by ten degrees on extension and she is tender in both trapezius muscles. In relation to the leg examination she has a slight depression of the shin of approximately 2mm. The scarring is described as ten pence sized, but it is more of a shadow, a discolouration on the photographs than an actual scar. As I have said, fully settling; the neck at 8 months, leg at 12 months.

10. Doing the best I can on the basis of that report and I agree that the leg could fit in to any number of areas, including the last paragraph of leg injuries, the scarring chapter and the minor injuries chapter, I do have regard to those areas of the J C Guidelines. I also have regard specifically to the minor injuries section of neck and to the bullet points set out therein and the presence of any radiation into her shoulders in relation to the neck pain.

11. There are no aggravating features, such as headaches, here. She did not take any time off work because she was not working at the time of the accident. Her loss of amenity appears to be fairly limited. So doing the best that I can as I say on the report, on the J C Guidelines and other awards that this court frequently makes for very similar injuries, it is my view that the appropriate award for general damages is one of £3,700. That is what I am going to allow her.

12. Turning to the claim for physiotherapy, that is supported by the witness statement and the medical report more importantly and I am satisfied on the balance of probabilities that it is made out. I have no difficulty with the initial assessment figure or the five treatment sessions, and indeed they are a bit lower than the court often sees, and I am aware of the initial assessment requiring an examination and a detailed history being taken from the Claimant. So I award those in full at £348.

13. In terms of the miscellaneous, I have to say in this day and age where she is probably on a phone contract of some description which may well give her unlimited calls and her solicitors perhaps corresponding with her by email, if she is on the internet, sending of emails maybe cost neutral and/or her solicitors may be providing her with stamped addressed envelopes to return any documentation to them. So I am of the view that certainly it is not going to be £30 for miscellaneous expenses, but I accept there is some administrative burden of having to deal with additional companies, parties, firms of solicitors. So I allow her £10 for that head of loss.

14. Turning to the travel, it is clear that she does not drive, she says she does not have a driving licence so for all the trips to the GP, A&E and physiotherapy, she would

have had to use public transport. That potentially does involve an additional cost to her but I allow her the sum of £40 for that which I consider to be a reasonable sum.

(proceedings continue – discussions on interest and total judgment sum)

15. So judgment for the Claimant in the sum of £4,105.08.

(proceedings continue)

16. I am now dealing with the second limb of this morning's hearing which is whether or not the Claimant unreasonably exited the portal process and unreasonably commenced Part 7 proceedings.

17. In support of the arguments, there has been some evidence filed. I will deal firstly with what I have seen and read. On behalf of the Claimant, a statement from Mr Gerard Jones has been filed, dated the 30th September 2016, with three exhibits attached. In response there is a statement from Anita Belkovic dated the 20th October 2016. I have also seen and read a skeleton argument from Miss Brookfield for the Claimant and a skeleton argument from Mr Conway for the Defendant. I have been passed a bundle of authorities by the Defendant and two authorities accompany the Claimant's skeleton argument.

18. Dealing with the chronology next, the CNF for this claim was submitted on the 15th May 2015. Liability was admitted on the 5th June 2015 and a Stage 2 pack was submitted on the 29th November 2015. Quantum had not been agreed and a Court proceedings pack was sent via the portal on the 5th February 2016. On the 8th February 2016 the Defendant responded to the Court proceedings pack and agreed to pay the £2.50 DVLA fee and alleged that no photographs had been received of the scarring and clearly stated that in the Defendant's responses and offered a sum of zero for amount paid.

19. In relation to the DVLA fee, although the box has also been completed zero, it is clear that that sum has been agreed by the Defendant. As a result the Claimant says, of the Defendant's failure to pay both the DVLA fee and the photographs fee, the case was dropped out of the portal on the 7th March 2016. Indeed I think I have seen a letter at J3 attached to Mr Jones's statement, which is the letter of the 7th March giving notice of the case leaving the MOJ portal on the basis that, I quote:

> **"You have failed to make payment of disbursements (DVLA fee - agreed - and photographs of scarring) within the required period following submission of the Court proceedings pack by us on the 5th February 2016."**

So the Claimant gives two reasons for leaving the process.

20. Let me just deal firstly with the issue about the photograph fee before I move on. It is absolutely clear in my view from the response pack that is completed that the Defendant gives a reason why they are not prepared to pay, in full, for the

photographs, their reason being no photographs have been provided, and they say amount paid zero.

21. It is clear from that response that that is a disbursement very clearly an issue. At that time they have elected to pay zero, saying that they have not seen any photographs.

22. It is my view, for the reasons that I will come on to when I talk about the interpretation of 7.70(4) of the Pre-action Protocol for Low Value PI Claims in RTAs, which is the MOJ portal, that the obligation on the Defendant is to pay those disbursements that have been agreed. That very clearly is a disbursement that has not been agreed and therefore it is my view that there is no obligation on the Defendant to hand over any money for the photographs at that stage. So the photograph issue really is a bit of a red herring within the context of this issue because it is clear that there is no agreement to pay any amount for that.

23. That leaves me very clearly with the DVLA fee which indeed is where counsel have concentrated their submissions. Let us just pause then at this point to have a look at what the rules say. 7.70 says:

> "Except where the Claimant is a child the defendant must pay to the claimant--
>
> (1) the final offer of damages made by the defendant in the Court Proceedings Pack (Part A and Part B) Form less any--
>
> (a) deductible amount which is payable to the CRU; and
>
> (b) previous interim payment;
>
> (2) any unpaid Stage 1 fixed costs in rule 45.18;
>
> (3) the Stage 2 fixed costs in rule 45.18; and
>
> (4) the disbursements in rule 45.19(2) that have been agreed including any disbursements fixed under rule 45.19(2A)."

So it is clear that these are the disbursements that have been agreed.

24. Moving on, at 7.72 it says:

> "…the defendant must pay the amounts in paragraph 7.70 and 7.71 within 15 days of receiving the Court Proceedings Pack (Part A and Part B) Form from the claimant."

25. At 7.75 it says:

> "Where the defendant does not comply with paragraphs 7.72 [that is the payment within 15 days] … the claimant may give written notice that

> the claim will no longer continue under this Protocol and start proceedings under Part 7 of the CPR."

Now the literal interpretation of the word 'may' there is that the Claimant has an option to elect to remove the case from Part 8 and start proceedings under Part 7. He does not have to, but he may do so. It is not mandatory.

26. Moving on to 7.76:

> "Where the claimant gives notice to the defendant that the claim is unsuitable for this Protocol … then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18."

So where a Claimant gives written notice and elects to do that under 7.75, he, she or it is not obliged to do that, there is still an opportunity open for the Court to look at whether the Claimant giving that written notice was reasonable or unreasonable. That is absolutely clear from the reading of rule 7.75 and 7.76, and indeed that is the interpretation given by so many arguments that this Court deals with on unreasonable exit from the portal. There is still an opportunity for the Court to look at whether the election of removing from the portal was a reasonable step to take.

27. I do not agree with the Claimant's submission that they have to take that step. They could have easily allowed the case to proceed to a Stage 3 hearing and not elected to remove it. The issue about the non-payment of the DVLA fee, which is the only real issue on which they can make that election to remove it from the portal, is something that could be "scooped up", as I have put it, when the Court deals with the costs at the end of Stage 3. They did not have to remove the case from the portal but they have made that decision and they have to accept that they are open to scrutiny on whether that election was reasonable or not. That is my interpretation, of those rules.

28. Let us just look at what is said on behalf of the Defendant and the Claimant.

29. It is said by the Defendant that the overriding objective and the need to act reasonably and proportionately still attaches to this decision to remove the case from the portal. That is enshrined in the first instance decision in Kilby -v- Brown. There has to be a reasonable approach to litigation.

30. It is also submitted that there is no reference in the Claimant's witness statement to the Claimant suffering a detriment by the non-payment of the £2.50 DVLA fee. It is also submitted that there was no effort by the Claimant, and indeed a failure by the Claimant's solicitors, to make enquiries with the Defendant insurers about why the £2.50 had not been paid.

31. It is said that that is a very important consideration for the Court and is apparent in the cases of Kilby, Patel, Eduardia and Cogan. But in all of those cases the judges have considered that there should have been a professional approach by the solicitors, doing a professional job in contacting the Defendant to find out why a

portion of the money was missing. It is said by the Defendant that the Claimant solicitors ought to be acting pursuant to the overriding objective; that these rules are enshrined within a code of practice that is over pinned by the overriding objective.

32. The case of Chisanga is a first instance decision that comes out of this Court and indeed comes out of this Court on the very same fact, which is the non-payment of the £2.50 DVLA fee - it is said by Mr Conway for the Defendant that that decision is fundamentally wrong because the Deputy District Judge overlooked the word 'may' in her judgment, and in essence in her judgment turned a discretionary rule, 7.75, into a mandatory rule and her judgment therefore does not follow the rules as they are written.

33. He says it is for the Claimant's solicitors to exercise a degree of caution in exiting. He also asks the Court to have in its mind the very well-known decision in Denton. I have to say in all the applications I have had to deal with for unreasonable exit I have not had Denton referred to me in this way. But he says the Court should be more ready to penalise opportunism coming in the essence of the Claimant's solicitors saying, "Ah hah, here is a reason why you can get out of Part 8 and get into the more lucrative ambit of Part 7".

34. On behalf of the Claimant, Miss Brookfield submits that it is important for the Court to consider the preamble and the aims of the Pre Action Protocol. She refers me to page 2476 of the White Book, paragraph 3.1(1), that costs and damages should be paid without the need for the Claimant to issue proceedings. That is the aim of the protocol.

35. She says 7.70(4) is a mandatory rule and I agree with her, it is a mandatory rule. Disbursements that are agreed must be paid to the Claimant. Under 7.75, which I have discussed at the beginning of this judgment, she says that the 'may', the use of the word 'may' in 7.75 gives the Claimant a right to give notice and that means that the Claimant is entitled to give written notice to remove the case from the portal. She says that it is a bad distinction drawn by Mr Conway that you can compare 7.75 to a mandatory removal from the portal, for example there being no response to the CNF.

36. She says the distinction does not mean that the Claimant has to take a view about whether the exit is reasonable. Well, I disagree with her on that. I think there is an obligation on the Claimant's solicitors under 7.75 to make a proper, sensible decision at that point about whether to give written notice to remove the case from the portal. The risk is clear from 7.76 that that decision to give notice and the facts surrounding that decision could well be open to argument about it being unreasonable and open to scrutiny of the Court.

37. She says that it was reasonable for Mr Jones in this case to take that decision because he was basing it on authority that has come out of this Court in the Chisanga case where Deputy District Judge Powell determined that non-payment of a DVLA fee did not render it unreasonable to exit. And she says that it cannot be held that the conduct of the Claimant's solicitor today in this case is unreasonable when they have relied on the authority of this Court to say it is not unreasonable to exit where

a DVLA fee has not been paid. She said it would be unduly harsh if I was to find that it was unreasonable in circumstances where another judge sitting in this Court has said that it was reasonable.

38. Of the failure to make enquiries of the Defendant's solicitor or insurer as to why the £2.50 was missing, she says the rules are clear. There is no suggestion in the rules that if non-payment of an agreed disbursement is made the Claimant's solicitors must chase that up, and I agree with her. There is no reference in the rules which says if those disbursements have not been received, the next step is for the Claimant's solicitors to start chasing the Defendant's solicitors. I agree, there is no rule in the portal that provides any obligation on the Claimant to start chasing the Defendant about monies that have not been paid.

39. She says the rules are there to provide certainty. It is clear what the Defendant must do to comply and the only reason the costs have increased in this case is because the Defendant did not pay what it should have paid. If, she says, I allow discretion to creep in to rule 7.70, that is going to lead to an increase in costs and an increase in uncertainty.

40. She submits that the Pre Action Protocol for portal claims is a standalone set of rules, the aim and scope and the preamble indicate precisely what is expected of the parties. There is no excuse for noncompliance and this must be treated differently from the overriding objective. The portal is separate from the balance of the general Court proceedings.

41. I put it to Miss Brookfield that many times in the voluminous Stage 3 lists that this Court deals with, the DVLA fee is outstanding at the end of the case and is scooped up in the figure that is included for costs on the order. She says, yes, that is the case, but it will turn on what was put on the response pack. It may be that that is a disbursement that was always in dispute but is conceded at the very end and that is a valid point that she makes.

42. I simply make the point that the DVLA fee can often be something that is scooped up at the end and I have no idea from all of those cases where that arises whether that is a disbursement that has been agreed previously but not paid, or not agreed previously. So I place no emphasis on that, I just make the observation that it is often something that is scooped up at the conclusion of the Stage 3 process. What I have to look at here is whether it was reasonable for the Claimant's solicitor to give written notice to exit the portal in circumstances where the Defendant had agreed to pay the £2.50 but had failed to pay it.

43. I cannot see in what circumstances this set of rules sits in a vacuum outside the obligations of parties to follow and comply with the overriding objective. The very fact that the wording in 7.75 and 7.76 uses language like 'may' and 'reasonably' means that the decision to exit the portal is going to be open to scrutiny by the Court. When the Court looks at whether that decision was taken reasonably or unreasonably it has to base the conduct of the Claimant's solicitors on some principles, some reference to conduct, proportionality and behaviour.

44. The only way in which the Court can interpret whether that election under 7.75 was done reasonably or unreasonably is, in my view, by reference to issues such as the overriding objective, the obligation on the parties to cooperate, the fundamental principle in the Pre Action Protocol for Personal Injury Claims that proceedings will be a last resort for there to be some eye on the question of proportionality.

45. I do not agree with Deputy District Judge Powell's decision in Chisanga that the rule is the rule and she interprets 7.75 as a mandatory exit in circumstances where the DVLA was not paid. I was a solicitor in practice for 20 years and I would be appalled if any of the solicitors who worked in my team decided that it was a sensible decision to start a ball rolling for Part 7 proceedings because £2.50 had not been paid for a disbursement in circumstances where it was clear from the Court proceedings pack that that disbursement was in fact agreed. So Mr Jones must have been alive to the fact that he would be getting his £2.50 at the conclusion of the Stage 3 process.

46. This case could easily have properly concluded within Stage 3. It did not have to exit for the non-payment of that £2.50. By electing to come out for the non-payment of the £2.50 meant that Part 7 proceedings were started very swiftly after notice was given. He gave notice on the 7th March, he sent the Court proceedings to Salford on the 9th March, there was not even an opportunity having exited the portal for the parties to try one more time under the Pre Action Protocol for Personal Injury Claims (as distinct from the low value PI protocol for RTAs) for the parties to try and compromise the claim. He went straight ahead and issued Part 7 proceedings.

47. Whilst there is no obligation under the rules on him to check with the Defendant why the money was £2.50 light, or ask for the £2.50, it is incumbent on any solicitor acting reasonably in furtherance of the overriding objective, having an eye on proportionality, it would have taken him probably less than a minute to send an email to the Defendant insurer querying where the £2.50 was. But he did not do that, he went straight ahead and issues Part 7.

48. So whilst I say there is no obligation on him under the rules to chase the Defendant, there is an obligation on him pursuant to the overriding objective, pursuant to the whole approach to litigation which is so clearly enshrined in the overriding objective and in the Denton decision which makes it clear how the Court should look at the conduct of the parties. He should be aware of that and he should have taken a step to just pause and think, is it reasonable for me to move within 48 hours of giving notice to issue Part 7 proceedings for £2.50?

49. It is my view for the reasons so expressed by District Judge Peake in Kilby where the sum in issue was £15 and he is right when he says, "what would the Daily Mail make, particularly in the current climate when the Ministry of Justice are looking so closely at this whole industry of RTA litigation, what would the Daily Mail say?" The Claimant's solicitor racks up £4,000 worth of costs for non-payment of a £2.50 fee. That is simply not proportionate, not reasonable and not in the spirit of the overriding objective and in the spirit of post Woolf, post Jackson and in the landscape of litigation in which we all are involved in this day and age.

50. So for all of those reasons, notwithstanding that one of my colleagues in my Court find that it was a reasonable exit for £2.50, and I have to say having looked at her judgment that she does, in my view, give a slightly different interpretation to the rules that I give, I make no criticism of her, but I simply say that I am applying my consideration to the facts of this case, my interpretation of the conduct of the Claimant's solicitors in this case and the whole spirit and tenor of litigation under modern case law and the overriding objective. I therefore say for all of those reasons it was unreasonable for the Claimant to exit in these facts and in these circumstances.