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| IN THE COUNTY COURT AT BIRKENHEAD | | | | Case No: F23YJ733 |
| B E T W E E N: | |  | | |
|  | MR ELLIS CASTLE | | *Claimant* | |
|  | v | |  | |
|  | ANDREWS &  DICKENS LTD | | *Defendant* | |
|  |  | |  | |
|  | DEFENDANT COUNSEL’S NOTE OF JUDGMENT | |  | |

1. This is an application to set aside a decision by a Legal Advisor allowing the Claimant to amend the claim to include Vehicle Related Damages. I have read a skeleton argument and chronology from the Defendant, and heard detailed argument today from both parties. A number of cases are referred to by Mrs Robson and I accept these are persuasive.
2. The parties were involved in an RTA on 21.09.18 where the Claimant brought a claim for PSLA and physiotherapy in the Portal. This court deals with many hundreds of such cases each year, some 60,000 to date. This court is very experienced in Portal matters.
3. The Claimant valued PSLA at £4000 in their Stage 2 offer. I think I have already said there has been some conflation in the cases in the skeleton argument. There is a difference between a Stage 2 offer and a Protocol offer. A Protocol offer is a formal term with various cost consequences.
4. Also, I take into account that the Protocol is a stand-alone stet of rules. Portal rules not CPRs would prevail. This avoids a lot of satellite litigation.
5. The Defendant did not respond within the Stage 2 initial consideration period and so the claim dropped out per para 7.40 of the Protocol, and the consideration period was at an end. The Claimant then issued Part 7 proceedings on 15.02.19 and vehicle related damages were not included. That was the subject of an application to rectify. On 21.03.19 the Defendant instructed solicitors, then 5 weeks later they purported to accept the Claimant’s Portal offer.
6. The Claimant’s case is that the offer was not capable of acceptance as it did not compromise the whole claim. Their application to amend their statement of case was approved on paper. The Defendant applies for a declaration that the claim has settled.
7. The key question is, was the Stage 2 offer capable of acceptance if not formally withdrawn?
8. Para 6.4 of the Portal Protocol clearly states:

*“A claim for vehicle related damages will ordinarily be dealt with outside the provisions of this Protocol under industry agreements between relevant organisations and insurers. Where there is a claim for vehicle related damages the claimant must—*

*(1) state in the CNF that the claim is being dealt with by a third party; or*

*(2) (a) explain in the CNF that the legal representative is dealing with*

*the recovery of these additional amounts; and*

*(b) attach any relevant invoices and receipts to the CNF or explain*

*when they are likely to be sent to the defendant.”*

The CNF says I am told, that he requires a vehicle. There is some query of the use of vehicle – I have not seen this but ambiguity is a matter for quantum and matters for evidence. It is clear that vehicle hire is contemplated and documents were sent to the Defendant insurer before Part 7 proceedings, so it was clear they were being pursued as part of the claim.

1. Para 7.51/2 of the Portal Protocol says:

*“7.51 Paragraph 7.52 applies where at the end of the relevant period in paragraphs 7.35 to 7.37 the claim (“the original damages”) has not settled and there remain vehicle related damages (“the additional damages”) being dealt with by a third party separate from the claim. The original damages include all elements of the claim in the existing Stage 2 Settlement Pack.*

*7.52 Where paragraph 7.51 applies the claimant must, in relation to the additional damages—*

*(1) notify the defendant that this separate claim is being considered;*

*(2) obtain all relevant information from the third party; and*

*(3) make a separate offer by amending the Stage 2 Settlement Pack Form.”*

It seems to me that is the situation the Claimant found themselves in when the claim dropped out of the Portal. It is contemplated by the rules that where it remains in the Portal then a Claimant must amend a Stage 2 settlement pack. The Stage 2 pack is then amended then crystalises as a Protocol offer at Stage 3.

1. Paragraph 7.59 says if the claim stayed in the Portal and the original damages settled and the additional damages do not settle, the Claimant may start Part 7 proceedings, per para 7.60(2). So, it is clear that the Claimant’s valuation for damages is completely separate from the credit hire.
2. The Defendant’s case is that the original offer is for the entirety of the claim. It is clear to me in the rules it is not.
3. The next question is whether the offer is open for acceptance. The offer crystalises at Stage 3 and parties need permission to withdraw. Mrs Robson says if a claim is not formally withdrawn it is open for acceptance. There is a gap here.
4. There is only one binding case here, *Mahmood v Elmi [2010] EWHC 1993 (QB)*. However, that concerns a Part 36 offer. This is not.
5. Various references to CPR 36.20 convert a Defendant’s Stage 2 offer to a Protocol offer, but there is no reference to a Claimant’s Stage 2 offer converting to a Protocol offer – it would say so if it did. The reason the Claimant says this is, is because a Stage 2 offer is capable of amendment and only crystalises at Stage 3.
6. The cases I have been referred to are all distinguished. The offer was clearly not for the whole claim. *Akinrodoye v Esure Services Ltd, DJ Goodchild, Romford CC, 16.02.15* is the closest, but it is not binding on me as a decision of a DJ in another court, and this is not the whole of claim. It conflates these two rules.
7. I find some assistance from the case of *Maddocks v Lyne HHJ Wood QC, Chester CC, 22.01.16*, I refer to paragraphs 51 and 52. The issue he had to decide was if parties agreed at Stage 2, could this be reopened at Stage 3. He said uncertainty has arisen due to different decisions and he felt it appropriate to give guidance. So, whilst *obiter*, it was designed to give guidance. Paragraph 51 says:
8. *“However, this does not mean that if a claimant within the stage 2 negotiating process agrees a defendant’s figure, say in relation to general damages, it should follow that a binding agreement is thereby created, preventing the claimant from pursuing a higher award for general damages outside the portal. There is nothing in the language of the protocol which suggests that anything other than the agreement of the final overall offer creates a lawfully enforceable compromise. In my judgment, this would be inconsistent with the existence of a procedure allowing a party to withdraw a Stage 2 offer, whereby the claim no longer continues under the protocol, and Part 7 proceedings can be commenced by the claimant.*
9. *I am fortified in this conclusion that the portal does not create binding agreements on individual items by the language of the Stage 2 settlement pack which refers to the presentation of offers and counter-offers. It is only when an offer from a defendant is acceptable that an agreement will ensue, and “the offer” is clearly couched in terms of it being an overall offer in the singular. This is not inconsistent with a process which allows for the scope of any dispute to be narrowed, leaving only those items which have not been agreed to be determined at a stage 3 hearing, and is not tantamount to enforcing a binding agreement, because having chosen to proceed to a Stage 3 hearing and to remain within the protocol, a claimant in effect, is saying that he is happy to stand by the adjusted figure. (It is also entirely consistent with the exercise by the court of its case management powers under* ***CPR 3.1(k)*** *excluding an issue from consideration, effectively because it is not in dispute. Equally, it must be open to the court to allow all items to be claimed, despite earlier individual item agreement pursuant to the same case management powers, but it is not expected that with a Stage 3 Part process permission will be given except in the rarest of circumstances.)”*

His conclusion was that if agreement was reached in Stage 2 it is binding in Stage 3, but if whole agreement is not reached in Stage 2, then any part accepted in Stage 2 is not binding in Part 7 proceedings. Therefore, where the Defendant fails to deal with a Stage 2 offer that cannot be intended that the Claimant loses the ability to subsequently bring in Vehicle Related Damages simply because of the Defendant’s default.

1. It was argued in the alternative that partial settlement could be *Henderson v Henderson* – but what we need is certainty. Although there is a gap – if a Stage 2 offer is made and a claim falls out and so is at an end. The Portal is not clear when a claim falls out when leave the Portal, otherwise a Defendant could accept an original offer.
2. I have been asked to elaborate on whether this applies also to the EL/PL Protocol, but the only case I’ve been asked to deal with today is on the RTA Protocol. That is the issue I’ve been asked to rule on today.