SCCO Ref: 2019 BTP 000650

SENIOR COURTS COSTS OFFICE
FROM THE COUNTY COURT MONEY CLAIMS CENTRE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 July 2021

Before:

DEPUTY MASTER FRISTON

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Between:

BRAYAN JIMENEZ — **Claimant**

- and –

ESURE SERVICES LIMITED — **Defendant**

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Ms Amy Philipson (counsel for the Claimant, instructed by **Applebys Solicitors Ltd**)
Mr James Miller (counsel for the Defendant, instructed by **Keoghs Solicitors LLP**)

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Judgment

Deputy Master Friston:

Introduction

1. This judgment follows a provisional assessment of the Claimant's costs carried out on 24 February 2020. Both parties requested a post-provisional oral hearing (albeit in respect of different items); that hearing took place remotely on 9 October 2020. I gave permission for the parties to submit post-hearing Skeleton Arguments; these were written in late October 2020.

2. In essence, I must decide three points: firstly, whether the amount of costs claimed by the Claimant is subject to a compromise; secondly, whether the Claimant acted unreasonably in exiting the Portal (this turning on whether it was open to the Claimant to seek an interim payment); and thirdly, whether the amount of the Claimant's profit

costs should be determined by reference to the damages that are inclusive or exclusive of vehicle-related damages.

3. Before I give my judgment, I would like to thank counsel not only for the the high quality of their submissions, but also for their patience in answering my many queries and questions about the operation of the Portal.

Background

4. The underlying claim arose out of a road traffic collision on 8 March 2018. The Defendant's insured was leaving an underground carpark when he struck the Claimant's car close to the nearside front door. This caused the Claimant to suffer wrenching injuries to his neck and lower back muscles.

5. The claim was submitted to the Portal by way of a Claims Notification Form (CNF) that was completed on 8 March 2018. Liability was admitted shortly thereafter. The Claimant had already obtained an engineer's report dealing with the damage to his car; I understand that the claim for vehicle repairs was short lived (namely, it settled on about 10 April 2018).

6. A consultant in accident and emergency medicine (a Mr Weerasinghe MBBS, MSc, MRCSEd, FRCEM) was instructed to prepare a report on the Claimant's musculoskeletal injuries; his report was written on 14 May 2018. As I understand matters, Mr Weerashinge recommended that a psychological report be obtained.

7. On 13 July 2018, the Claimant requested an interim payment (in the sum of £1,000). I was told (and I accept) that the reason this request was made was because the Claimant wished to fund the obtaining of a psychological report, the fee for which was about £1,250. That request was made at the end of Stage One; no request for a stay had been made pursuant to paragraph 7.12 of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31 July 2013 ('the Protocol'). I was told that the reason the Claimant did not seek a stay was because, at that stage, Stage Two had not commenced, so the Claimant was not under any pressure of time in any event.

8. The Defendant did not respond to the Claimant's request. As a result, the Claimant gave notice that the matter had exited the Portal; this was on about 30 July 2018. As I understand matters, that notice elicited no response (and in particular, no attempt was made to make payment of the monies that had been requested).

9. A clinical psychologist (a Dr Mir Clin Psy D, BSc, HCPC Reg) was then instructed to report on the psychological aspects of the matter. His report became available on about 12 September 2018. In the meantime (namely, on about 24 August 2018) the parties settled the claim for credit hire.

10. On about 10 October 2018, the Claimant served both the medical evidence and details of his special damages. This did not elicit a response, so proceedings were issued. I do

not know when the Defence was served, but I understand that the admission of liability was maintained.

11. On 7 February 2019, the Defendant made a Part 36 offer to settle the matter in the sum of £5,350. On 8 February 2018, the Claimant wrote to say this:

> 'We assume, from the terms of your letter, that our clients [sic] costs will be dealt with on post issue fixed costs basis and reasonable disbursements. If this is not correct then please return to us within the next 3-days.'

The Claimant seeks to characterise this as being a counteroffer (namely, an offer to accept £5,350 plus costs calculated in accordance with CPR, r 45.29C).

12. On 15 February 2018, the Claimant wrote to the Defendant in the following terms:

> 'We are pleased to confirm our client accepts the offer to pay damages of £5,350.00 in full and final settlement of her claim for personal injuries and special damages.
>
> 'This is of course on the basis that our client's post issue fixed costs and reasonable disbursements will be paid in addition.'

The Defendant subsequently sent the Claimant a cheque for the damages.

13. As to the events thereafter, the narrative to the Bill of Costs reads as follows:

> 'The Claimants costs were sent to the Defendants' solicitors and we failed to receive fixed costs, despite several chasers. The Defendants are now trying to argue post fixed costs do not apply. Yet the agreement/settlement was based on post issue fixed costs basis and reasonable disbursements and there [sic] part 36 offer under the rules are clear that post issue fixed costs apply.
>
> 'There is a clear agreement in place.'

14. Notice of Commencement was served on about 17 April 2019. That notice says, in terms, that the authority for an assessment derives from 'a Part 36 offer dated 08.02.2018'. Furthermore, the narrative the Bill of Costs reads as follows:

> 'On 15/02/2018 the offer was accepted by the Claimant and subject to the claimant solicitors post issue fixed costs being paid. A letter is attached … which clearly states that the damages are agreed only on the basis post issues costs are paid.'

15. Fixed costs of £4,385.67 (exclusive of VAT) were claimed, plus £650 for Mr Weerasinghe's report, £1,250 for Dr Mir's report, and £150 for the engineer's report. Once the costs of the drafting the Bill of Costs were included, the total claimed (including VAT) was £8,246.40.

16. Points of Dispute were served on 9 May 2019. I carried out a provisional assessment on 24 February 2020. On 9 March 2020, the Defendant requested a post-provisional review of my decision on Points 2, 4, 7 and 8. During the hearing, I was told that the

Claimant had sought to challenge my decision on Point 3, this being by way of a letter dated 11 March 2020. Neither I nor Mr Miller (who appeared for the Defendant) were aware of this letter, but my enquiries with the SCCO office confirmed that it had, in fact, been received on 13 March 2020. Counsel (very sensibly) agreed that rather than adjourning the matter, I should hear argument on the point and then give counsel the opportunity to make post-hearing written submissions. In the event, it became clear that the arguments that both counsel wished to raise were complex, and as such, both counsel took the opportunity to rehearse their arguments in full in post-hearing Skeleton Arguments.

Points 2 and 4

17. The parties agreed that these two points essentially went to the same costs and that I ought to deal with them together. In essence, Point 2 went to the issue of whether there had been a concluded compromise that fixed the costs to those allowable under CPR, r 45.26C; in particular, the Defendant's objection was to the narrative to the Bill of Costs (which implied that there had been such a compromise). Point 4, on the other hand, was based on the assumption that there was no such compromise (and was therefore in the alternative): it went to the issue of whether the Claimant had acted unreasonably in exiting the Portal. In particular, Point 4 read as follows:

> 'This is a claim which was commenced in accordance with the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the "RTA Protocol") but did not continue in accordance with the RTA Protocol. Instead, the claimant elected to issue Part 7 proceedings. The claim was subsequently settled via Part 36 acceptance. The defendant contends that, in accordance with Rule 45.24, the claimant's costs should be limited to no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19 on the basis that the claimant acted unreasonably by discontinuing the process set out in the RTA Protocol and starting proceedings under Part 7. The claimant purported to discontinue the process set out in the RTA Protocol because the defendant failed to make an interim payment. However, the defendant contends that the claimant was not entitled to request such an interim payment because stay of the protocol had not been agreed. Accordingly, the provisions in paragraphs 7.13 to 7.30 of the RTA Protocol did not apply.
>
> 'Paragraph 7.12 of the RTA Protocol provides that:-
>
> > "Where the claimant needs to obtain a subsequent expert medical report or a non-medical report, the parties should agree to stay the process in this

> Protocol for a suitable period. The claimant may then request an interim payment in accordance with paragraphs 7.13 to 7.16."

'The defendant would aver that the agreement to stay the protocol is a precursor to requesting an interim payment as was found by District Judge Doyle in *Luvin -v- Ageas Insurance Limited* (2015) (Exhibit BM1).

'As such, the claimant was not in a position to trigger the procedure for requesting an interim payment. Accordingly, the defendant was not bound to make an interim payment in accordance with Paragraph 7.19 of the RTA Protocol and the claimant cannot rely on Paragraph 7.29 in order to justify his decision to start proceedings under Part 7 of the CPR.

'It follows that the decision not to proceed with the process set out in the RTA Protocol was one which it was not open to the claimant to make and, consequently, the claimant acted unreasonably by discontinuing the process set out in the RTA Protocol.

'Pursuant to CPR 45.24, if the court finds that the claimant acted unreasonably by discontinuing the process set out in the RTA Protocol, the court may order the defendant to pay no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19.

'The fixed costs to which the claimant would be entitled pursuant to rule 45.18 would be:-

> Stage 1 fixed costs - £200
>
> Stage 2 fixed costs - £300
>
> TOTAL· £500 (plus VAT)

'The claimant would also be able to seek disbursements in accordance with Rule 45.19.

'To conclude, the defendant would submit that the claimant acted unreasonably by discontinuing the process set out in the RTA Protocol, there being no legitimate basis for doing so in circumstances where a stay had not been agreed. As a result, the court is respectfully requested to limit the claimant's costs.'

18. So, in essence, the Defendant said that the Claimant had not been entitled to request an interim payment under paragraph 7.13 of the Protocol as it was a condition to making such a request that a stay be requested under paragraph 7.12. Put otherwise, the Defendant contended that the Claimant had wrongly (and unreasonably) exited the Portal.

19. In the Replies, the Claimant said this:

> 'The Defendants representatives are getting confused with the rule of 7.12. In

respect of a stay this would apply if a stay was required to obtain further medical evidence or non-medical report. However, in this matter was [sic] already at a point of stay for updating medical reports as stage 2 hadn't commenced. The portal case was on stay for medical evidence which is a mutual agreement for the Claimant to obtain medical evidence. An interim therefore can be requested in accordance to the stage it's on the portal. The portal system itself gives the option of an interim request before stage 2 is commenced as its on the stage of stay.

'If it wasn't at that stage then yes a stay would need to be agreed to stay the stage 2 pack. But it wasn't the case. In any event if the request wasn't agreed then the Defendants should have responded. The Defendants choose not to respond at all.

'The Claimant refers to Paragraph 7.19 of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents which states;

"Subject to paragraphs 7.24 and 7.25, where the claimant has requested an interim payment of more than £1,000 the defendant must pay-

(1) the full amount requested less any deductible amount which is payable to the CRU;

(2) the amount of £1,000; or

(3) some other amount of more than £1,000 but less than the amount requested by the claimant,

within 15 days of receiving the Interim Settlement Pack."

'The Claimant refers to Paragraph 7.28 of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents which states;

"Where the defendant does not comply with paragraphs 7.18 or 7.19 the claimant may start proceedings under Part 7 of the CPR …"

'The Claimant refers to Paragraph 7.30 of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents which states;

> "Where paragraph 7.28 or 7.29 applies the claimant must give notice to the defendant that the claim will no longer continue under this Protocol. Unless the claimant's notice is sent to the defendant within 10 days after the expiry of the period in paragraphs 7.18, 7.19 or 7.25 as appropriate, the claim will continue under this Protocol."

'In light of the above, the claim it is clear from the details provided in the bill the claim had correctly been exited from the portal and reasonably as the Defendant failed to comply with the interim request.

'The matter procedurally exited the portal and was timed out (notice from portal attached). The Claimants solicitors provided notice both electronically and letter.

> 'We even disclosed the claimants final medical evidence to the Defendant to make offers pre-issue we didn't even choose the option to commence part 7 straight after the interim was not responded to. We still allowed the Defendants insures to settle the matter pre-issue and they had 21 days to respond even though in accordance to the rules we could issue part 7 straight away, but this didn't take place we wanted to try and settle. But no offers were made.
>
> 'Therefore, procedurally we have correctly complied with the rules. There is possibly nothing else we could have done and followed the rules fully.'

20. Thus, the Claimant said that given the stage the matter had reached (namely, at the end of Stage One but prior to Stage Two), there was no need to request a stay, this being because the Claimant was under no pressure of time to obtain expert evidence. As such, according to the Claimant, paragraph 7.12 of the Protocol had no application, and an interim payment could have been sought by reason of other provisions in the Protocol.

21. My finding on provisional assessment was as follows:

> 'It is difficult to decide this matter without the benefit of oral submissions, but based on the points made in the Points of Dispute and Replies, my provisional view is that the Claimant is right. My mind is very much open on this issue, however.'

The arguments (Points 2 and 4)

22. Mr Miller reminded me that the Protocol is regarded as being a self-contained and highly prescriptive code, and that a claimant who leaves the Portal does so at his or her own risk. He drew my attention to the provisions of paragraph 2.1 of the Protocol, which read as follows:

> '2.1 This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed.

23. He then drew my attention to the wording of paragraph 7.12, which reads as follows:

> '7.12 Where the claimant needs to obtain a subsequent expert medical report or a non-medical report, the parties should agree to stay the process in this Protocol for

> a suitable period. The claimant may then request an interim payment in accordance with paragraphs 7.13 to 7.16.'

24. Mr Miller stressed the word 'then' in the final sentence (the implication being that paragraph 7.12 was the gateway to the subsequent provisions listed therein). He went on to draw my attention to paragraphs 7.13 and 7.18, which read as follows:

> '7.13 Where the claimant requests an interim payment of £1,000, the defendant should make an interim payment to the claimant in accordance with paragraph 7.18.
>
> '7.18 Where paragraph 7.13 applies the defendant must pay £1,000 within 10 days of receiving the Interim Settlement Pack.'

25. Mr Miller stressed that the latter of these two rules referred to the 'Interim Settlement Pack' (rather than that the 'Settlement Pack'). He contended that an Interim Settlement Pack would be required only where a stay is obtained, and it was a pre-requisite to obtaining an interim payment under paragraphs 7.13 or 7.18 that both a stay be obtained under paragraph 7.12 and that an Interim Settlement Pack be submitted.

26. Mr Miller said that on the facts of this case, no stay had been agreed (or even sought), and that as such, neither paragraph 7.13 nor paragraph 7.18 had any application.

27. I interjected say that it could be suggested that the reason no stay had been agreed was because the Defendant did not respond to the Claimant's request for an interim payment; Mr Miller's response to this was that this was an *ex post facto* analysis, and that the real reason that the Claimant exited the Portal was because he (or, in reality, his solicitors) believed that he was entitled to an interim payment where no such entitlement existed. He also reiterated that the Claimant had not sought a stay, but had merely sought an interim payment.

28. Mr Miller went on to say that the Defendant was under no obligation to respond because the Claimant was seeking to do something that was not permissible. In this regard, he stressed the difference between—on the one hand—requesting a stay and subsequently submitting an Interim Settlement Pack (which, he accepted, were permissible steps under the Protocol), and, on the other hand, simply requesting an interim payment at the end of Stage One (which, he said, was not permissible). In this regard, he drew my attention to paragraph 7.70, which provides for a non-settlement payment by the defendant at the end of Stage Two. This, he submitted, was the first entitlement under the Protocol to any sort of interim payment where no stay had been requested.

29. So, in essence, Mr Miller's case was that under the Protocol, where no stay is sought under paragraph 7.12, the first time that any kind of interim payment may be obtained would be under paragraph 7.70, this being at the end of Stage Two (a point which had not been reached on the facts of this case). He stressed that the whole point of the Portal is to deal with cases in a streamlined and efficient way, and that as such, unless there is

a need to obtain a stay for expert evidence, there is no need for any facility whereby an interim payment could be obtained any earlier than this.

30. As to the putative failure of the Defendant to respond to the Claimant's request, Mr Miller stressed that the Portal is not designed for general correspondence, and that it is not easy for correspondence to be entered into if a portal user makes a request that is not permitted. Indeed, I pause here to note that both counsel were, in their own ways, mildly critical of the inflexibility of the Portal from the perspective of a Portal user.

31. I asked Mr Miller what he said the Claimant *should* have done in the light of the Defendant's failure to respond to the request for an interim payment. He said that the claim should not have exited the Portal, and that if damages remained at large that the Claimant ought to have proceeded through Stage Two to a Stage Three hearing. He cautioned against trying to determine what else might have happened, this being because there was a paucity of evidence before the court in this regard.

32. Finally, Mr Miller drew my attention to the following extract from a judgment of District Judge Doyle in *Luvin v Ageas Insurance Ltd* (unreported, the County Court at Birkenhead, 17 September 2015):

> 'I am satisfied that the claimant can request a stay under 7.12, giving their reasons. This will then allow them to apply for an interim payment and the provisions set out in the rules will apply [to] both parties. This interpretation avoids any prejudice to the claimant in having to delay settlement, or being unable to fund recommended treatment, or the need for them to start proceedings, and therefore accords with the aims of the protocol above.
>
> 'I am therefore satisfied that on any reading 7.12 must be a prerequisite of 7.13-17 and that on the evidence before me today the claimant has acted unreasonably in causing this claim to exit the portal because unless they have requested a stay they were not entitled to request an interim payment within the portal.'

33. In his oral submissions, Mr Miller did not deal in detail with the issues in Point 2 of the Points of Dispute (which, in essence, dealt with whether there had been a binding compromise as to the amount of costs), but he drew my attention to the chronology set out in the Points of Dispute, and in doing so, made the point that his case was that there had been no such compromise. He did, however, subsequently make several further points on this issue in his Skeleton Argument, all of which I have taken into account.

34. Ms Philipson (who appeared for the Claimant) began her submissions by clarifying that her case was that, regardless of whether the Defendant was right in its analysis of the Protocol, as a matter of contract, there had been a compromise that costs would be allowed as per CPR, r 46.29C.

35. Like Mr Miller, Ms Philipson also stressed that the Protocol was a self-contained code. She went on to draw my attention to the fact that on 8 February 2019, the Claimant wrote to say that if the Defendant did not say otherwise within three days, it would be assumed that the Defendant's offer would be to pay post-portal fixed costs (see paragraph 11 above). She said that because the Defendant did not respond within that

period of time, there had been acquiescence in this regard, and that as a result, the Claimant's subsequent acceptance dated 15 February 2019 gave rise to a binding compromise that such costs would be payable.

36. I have to confess that I found this argument to be difficult to follow as I could not see how the Claimant could be said to have accepted what was, in effect, said to be his own counteroffer, but Ms Philipson substantially expanded upon her argument in this regard in her Skeleton Argument. She argued that the letters of 8 and 15 February 2019 amounted to a contractual counteroffer (namely, a counteroffer that was outwith Part 36), and that it was accepted by the Defendant when it paid the damages by sending a cheque for the putatively agreed damages. In this regard, Ms Philipson referred the court to a number of authorities, all of which I have taken into account.

37. Ms Philipson then moved on to deal with Point 4 in the Points of Dispute. She asked me to consider the conduct of the parties in general (the implication being that I should have regard to the fact that the Defendant did not reply to all the Claimant's correspondence).

38. Ms Philipson took me to paragraph 6.1 of the Protocol (which dealt with completing the CNF). She said that this paragraph illustrated a distinction between obligations which were compulsory (where the word 'must' was used), and obligations which were merely advisory (where the word 'should' was often used). She invited me to scan-read the Protocol and to note that the word 'must' features heavily throughout; she then drew my attention to the fact that paragraph 7.12 is *not* couched in mandatory terms. She said that the intention of the framers of the Portal was that paragraph 7.12 would give guidance, rather than to stipulate a mandatory requirement.

39. Ms Philipson went to say that if the Defendant is arguing that the Claimant acted unreasonably, the evidential burden lies with the Defendant to prove this, and in particular, to explain what the Claimant should have done differently in the circumstances in which she found herself.

40. I tended to agree with her on this point, so I asked Mr Miller to clarify precisely what it was that he said that the Claimant had done wrong. He accepted that there was a need for a further medical report (namely, Dr Mir's report), but said that the Claimant's error was in not engaging with paragraph 7.12. He said that if the Claimant had engaged with paragraph 7.12 (and submitted an Interim Settlement Pack), an interim payment would have been paid, and the matter would have remained within the Portal.

41. At this point, Ms Philipson drew my attention to the fact that the Points of Dispute made no mention of Interim Settlement Packs. Mr Miller clarified that his point related to paragraph 7.12, and that any references he had made to Interim Settlement Packs were not stand-alone points but were merely explanations as to what would have happened had the Claimant engaged with paragraph 7.12 and had a stay been agreed as a result.

42. Ms Philipson then went on to place emphasis on her submissions that paragraph 7.12 is not couched in mandatory terms. She went to say that once liability has been admitted (in Stage One), it would be open to a claimant to gather his or her medical evidence

without pressure of time, and that a need to rely on paragraph 7.12 would arise only if there were a need for additional time 'once the clock has started ticking again' (namely, after a Settlement Pack had been submitted). She pointed out that on the facts of this case, the clock had 'not started to tick again' as no Settlement Pack had been submitted. She said that in those circumstances, it was entirely reasonable of the Claimant to request an interim payment without invoking paragraph 7.12, as there was no need to invoke that paragraph.

43. Ms Philipson pointed out that there it was noteworthy that there was no response to the Claimant's request for an interim payment. This, she said, was contrary to the overall spirit of the Protocol. She drew my attention to paragraph 7.18 (the implication being that in order to comply with the spirit of the Protocol, the Defendant should, at the very least, have responded to the Claimant's request for an interim payment).

44. At this point, I pointed out that paragraph 7.18 expressly refers to an Interim Settlement Pack; Ms Philipson responded by reminding me that the issue of the Interim Settlement Pack had not been raised in the Points of Dispute, and that for all she knew, an Interim Settlement Pack may well have been submitted. Having made these points, however, she accepted that paragraph 7.18 would apply only if there an Interim Settlement Pack had in fact been submitted.

45. I asked Mr Philipson to confirm that the Claimant's case was that she was relying on paragraphs 7.13 and 7.18 as being the provisions under which the Claimant was entitled to seek an interim payment. She confirmed that this was so but went on to say that she had no instructions as to whether an Interim Settlement Pack had been submitted (this being because the point had not been raised in the Points of Dispute). I asked her if she agreed that the issue I had to decide distilled down to a point of law, namely, whether engagement with paragraph 7.12 (and obtaining a stay thereunder) was a condition precedent for submitting an Interim Settlement Pack and subsequently requesting an interim payment pursuant to paragraph 7.18. She agreed that this was so (as did Mr Miller).

46. Mr Miller, in his reply, pointed out that there was no evidence as to whether an Interim Settlement Pack had been submitted. As to the nexus between 7.12 and Interim Settlement Packs, he urged me to have regard to the fact that the Protocol is set out in

procedurally chorological terms; put otherwise, he invited me to interpret the Protocol as if it set out the various steps that need to be taken (or may be taken) in order.

47. Ms Philipson submitted that if it were a mandatory requirement that paragraph 7.12 be engaged before a claimant was entitled to an interim payment in accordance with paragraph 7.18, this would be express and made clear in paragraph 7.12.

48. After the hearing, Ms Philipson served a Skeleton Argument which made the following points:

- that the only issue raised in the Points of Dispute related to paragraph 7.12;
- that the Protocol is a self-contained code; and
- that paragraph 7.12 is couched in directory rather than mandatory terms (and that many other parts of the Protocol are couched in terms that are clearly mandatory).

49. Ms Philipson then went on to make the following points (amongst others, all of which I have taken into account):

> 'The reason the same [namely, paragraph 7.12] is advisory is only clear if one has an understanding of how the portal works in reality. It is because the purpose of a stay is to stop the clock running in the online portal system. Once the Claimant submits the claim in stage 1, the clock is running. An agreement is required to stop the clock at that stage. Once liability is admitted, that is the end of Stage 1. The matter is stayed, or 'frozen' as the online portal presents it. That is until, the Claimant submits the stage 2 settlement pack, at which point the clock starts again.
>
> 'It is therefore not mandatory to agree a stay because those interims requested after stage 1 but before the stage 2 settlement pack, do not require a stop/stay of the online portal clock. The claim is already *de facto* stayed/frozen. It is only once that stage 2 settlement pack is sent that the clock starts to run again and a stay would have to be agreed in order to stop the clock ticking. The consequence of not stopping the clock/agreeing a stay in that situation is that the Defendant would be timed out from responding to the stage 2 settlement pack by reason of considering the interim.
>
> 'The Claimants are therefore not in breach of the Protocol because it was not a mandatory requirement to agree a stay before the request. The Claimant was not debarred from seeking an interim. The paragraphs and headings within the protocol on this point are very distinct and clearly not designed to be considered together otherwise they would have fallen under the same subheading. As such it is nonsensical that the Claimant could be deemed unreasonable in his conduct by removing the claim from the portal system when it is not mandatory for him to stay

the proceedings generally or in particular in light of the following circumstances applicable to this case:

a. An additional medical report was required to be paid for in this case. The medical report from a psychological expert as advised by the orthopaedic expert.

b. The Claimant's solicitor sent an interim settlement pack which contained the medical report on the 13th July 2018. The reason that this was not mentioned previously, is as set out earlier in this skeleton, because it was never raised as a point of dispute by the Defendant within the Points of Dispute. The Defendant's only point of dispute on this point was that the Claimant did not seek a stay pursuant to 7.12. To be clear, in order to request the settlement pack on the online portal, the only way to make the request is by completing the online interim settlement pack as part of the request. There is no way to request an interim without completing the pack. To suggest the two are distinct is nonsensical.

c. The request was made on the portal and at no time did the Defendant actually respond to it. The online portal is designed and works in a way that the recipient of an online portal message will receive the request immediately. The Defendant had 10 days to respond.

d. No explanation has been put forward by the Defendant as to why there was no response or any other legitimate reason as to why they would not pay what was otherwise a reasonable request.

e. It appears the Defendant simply attempts to rely upon what it believes is a technical defence to the Claimant's entitlement to an interim payment.

f. The Defendant did not pay the interim within 10 works days as was a mandatory requirement upon him by reason of the use of the word 'must' in the protocol.

g. To this day, the Defendant does not state why it did not pay the interim payment, for which it had received a request.'

Discussion (Points 2 and 4)

50. I deal first with the purported compromise (Point 2 of the Points of Dispute).

51. There was, in my view, no room for the Claimant unilaterally to seek to vary the Defendant's offer by way of either the letter of 8 or that of 15 February 2019; the Defendant's offer was made under Part 36 (which is a self-contained code), and there is no provision within Part 36 for unilateral conditions or qualifications to be attached

to offers, less still is there any provision for such conditions or qualifications to be made by offerees, or to be countenanced by offerors by mere acquiescence.

52. As such, for the Claimant to succeed on this point, he must show that the settlement was a contractual settlement made entirely outwith Part 36. This appears to be the case that is now urged upon me by Ms Philipson in her Skeleton Argument.

53. The difficulty the Claimant has in this regard is that the assessment is predicated on the basis that a deemed costs order has been made pursuant to the acceptance of a Part 36 offer; indeed, both the Notice of Commencement and the narrative to the Bill of Costs say, in terms, that the costs order arose by way of acceptance of a Part 36 offer. In my view, this is estops the Claimant from taking the points that he now seeks to take. In particular, if the Claimant were correct in saying that entitlement to costs arose by way of a contractual compromise, the Claimant would have no order for costs and therefore no right to an assessment. Neither party contended for such an outcome, and I take the view that it is simply not open to the Claimant to contend for such an outcome at this stage in the proceedings.

54. Even if I am wrong on this analysis, and even if it were open to the Claimant to argue that a compromise was created outwith the confines of Part 36 such that the Claimant was entitled to effectively make a counteroffer by way of the letter of 8 February 2019, I cannot see how any compromise could have been reached on this basis. The notion that a counteroffer was accepted by way of the Defendant sending a cheque to the Claimants is, in my view, little short of fanciful in the context of a matter such as this; this was not some 'battle of offers' in a long-running commercial dispute but was a simple short-lived personal injury claim where the Defendant was doing nothing more than paying the monies it had previously offered.

55. In my view, if the Claimant had wanted to make a counteroffer such that he be paid damages plus post-portal fixed costs, he ought to have expressly made it clear that the Defendant's Part 36 offer was not accepted, and he ought to have made a clear and express (non-Part 36) offer setting out the terms that he was prepared to accept. He did not do this. Instead, his solicitors wrote to say (in terms) that 'our client accepts the offer'; it is simply not possible, on the facts of this case, to interpret such a statement as being a counteroffer.

56. For all these reasons, I determine Point 2 of the Points of Dispute in the Defendant's favour. I now move on to Point 4 of the points of Dispute.

57. Firstly, I agree with Mr Miller that the Protocol (in this part at least) is set out in a procedurally chronological way, and that paragraph 7.12 leads on to paragraphs 7.13 to 7.22. This, to my mind, seems to be the natural way in which to interpret the Protocol. I do not regard the fact that paragraph 7.12 has its own heading (namely, 'stay of

process') in any way changes this. In my view, the headings in the Protocol are there as an aid to navigation only, and are, at best, only weak intrinsic aids to interpretation.

58. In any event, paragraph 7.12 reads as follows (emphasis added):

> '7.12 Where the claimant needs to obtain a subsequent expert medical report or a non-medical report, the parties should agree to stay the process in this Protocol for a suitable period. *The claimant may then request an interim payment in accordance with paragraphs 7.13 to 7.16*.'

59. To my mind, the words in emphasis establish a clear nexus between paragraph 7.12 and (at the very least) paragraphs 7.13 to 7.16. Ms Philipson confirmed that she was relying on paragraph 7.18 as having afforded her client the power to seek an interim payment; the difficulty she has in this regard is that paragraph 7.18 will apply only where paragraph 7.13 applies, so the requisite nexus is established in any event.

60. In view of this, I prefer the Defendant's analysis, which is that paragraph 7.12 ought to be read in conjunction with paragraph 7.13 onwards, and I reject the Claimant's analysis (which is that the latter paragraphs are free-standing and separate).

61. Furthermore, it seems to me that the words in emphasis would be entirely otiose if a claimant were to invoke paragraph 7.13 onwards independently of paragraph 7.12. This militates against the interpretation contended for by the Claimant. In this regard, I note that whilst the Claimant has been able (correctly, in my view) to point that fact that the Protocol contains certain provision which are mandatory and other provisions which are merely permissive or advisory, the Claimant has not shown that the Protocol contains extensive guidance whose function is merely to draw attention to other provisions. Indeed, the impression I get is that the Protocol (which is an already very lengthy set of rules) has been drafted in such a way as to avoid otiose provisions.

62. Moreover, if Ms Philipson's analysis were correct (namely, that the power to request an interim payment is independent of paragraph 7.12), then it would mean that almost *any* claimant who had the benefit of an admission of liability could request an interim payment for almost any reason. This, in my view, would be a surprising conclusion that would significantly reduce the effectiveness of the Protocol (not least because it would be open to abuse). Indeed, it is such a surprising conclusion that I regard it as being inherently unlikely. If that were the intention of the framers of the Protocol, I would have expected this to be expressly stated (which it is not).

63. Ms Philipson placed great weight on the fact that paragraph 7.12 uses the word 'should' rather than 'must'; in particular, she suggested that the use of the word 'should' gave the Claimant (or would give any claimant) a degree of latitude not to engage with paragraph 7.12. I agree with her on this point; it is, in my view, open to a claimant not to seek a stay if this is what he or she wishes to do. That may be so, but, to my mind, this would say very little about whether it is open to a claimant to seek an interim

payment under paragraph 7.13 and 7.18 if no stay were to be agreed. I take the view that the two concepts are not the same.

64. Ms Philipson also placed reliance on the fact that once liability has been admitted, a claimant would, *de facto*, have the benefit of a stay in event, this being because there are no time limits (other than limitation) acting upon either party prior to a Settlement Pack being submitted; as such, she said, a claimant would be under no obligation to seek a stay under paragraph 7.12. That may be so, but I do not see how that can have any bearing on the issue of whether engagement with paragraph 7.12 is or is not a condition prerequisite to the obtaining of an interim payment under paragraphs 7.13 and 7.18.

65. Furthermore, I note that in order for an interim payment to be made pursuant to paragraphs 7.13 and 7.18, the provisions of the intervening paragraphs (and paragraphs 7.14, 7.14A and 7.16 in particular) clearly envisage that an Interim Settlement Pack is submitted (as, indeed, does the wording of paragraph 7.18 itself). Furthermore, paragraph 7,14 reads as follows:

> '7.14 The claimant must send to the defendant the Interim Settlement Pack and initial medical report(s) (including any recommendation that a subsequent medical report is justified) in order to request the interim payment.'

66. This appears to be a mandatory requirement that in order to justify a request for an interim payment in accordance with paragraphs 7.13 and 7.18, a claimant must send an '*initial* medical report' to the defendant (emphasis added). This strongly implies that the circumstances in which such requests are to be made are limited to those where a further medical report is required; this, to my mind, supports the Defendant's interpretation.

67. Ultimately, I respectfully find myself in agreement with District Judge Doyle (see paragraph 32 above). If a claimant wishes to benefit from the provisions of paragraph 7.13 to 7.22 (and by doing so be paid an interim payment), he or she must obtain a stay under paragraph 7.12. This, to my mind, is the natural reading of the Protocol. It is also entirely understandable why the drafters of the Protocol would wish to restrict a claimant's ability to seek interim payments under paragraphs 7.13 and 7.18 to certain defined circumstances (namely, those that are set out in paragraph 7.12). I appreciate that this may, potentially, cause difficulties for certain claimants in certain circumstances, but (to the extent that a purposive analysis is required) I believe that those difficulties would be far less than the difficulties that would be caused if the Claimant's interpretation were correct and *any* claimant were able to request an interim payment for *any* reason.

68. As such, it must follow that the Claimant wrongly exited the Portal.

69. I find that the Claimant acted unreasonably in this regard. I remind myself that the issue of reasonableness is not to be determined solely by reference to whether the Claimant correctly interpreted and applied the Portal, but the reality is that the Claimant has advanced no persuasive explanation for why he chose to exit the Portal rather than to

proceed to the end of Stage Two. Indeed, during the course of submissions, Ms Philipson accepted that this was 'a very straightforward case … where there has been one medical report for injury and an extra report for psychological damage'. I agree: this was an entirely run-of-the-mill case that ought to have passed effortlessly through the Portal. This invites the obvious question as to why the Claimant's solicitors believed it was appropriate for it to exit the Portal.

70. Ms Philipson suggested that the reason her instructing solicitors requested an interim payment was because the Claimant needed the monies to fund Dr Mir's report. Notwithstanding the fact that there was no evidence of this, I make as a finding of fact that this was so (this being because Dr Mir's invoice stated that payment had to be made within a relatively short period of time). That may be so, but there is a fundamental problem with this line of reasoning, namely, that there is no expectation that a defendant (even a defendant who has admitted liability) will fund a claimant's claim. Indeed, the general rule is a that litigant will bear his or her own costs unless and until a costs order is made. Very occasionally, rules, practice directions or protocols may provide otherwise, and even more rarely, the court may be persuaded to order an opponent to make pre-emptive payment on account of costs, but the difficulty that Ms Philipson has in this regard is that (in so far as second and subsequent medical reports are concerned), the Protocol makes no such provisions. Indeed, the Protocol seems to highlight the fact that if a claimant obtains a second or subsequent report, he or she will bear the risk in so far as the costs of doing so are concerned (see paragraph 7.31).

71. Furthermore, I am wholly unpersuaded that it would have been reasonable to seek an interim payment for the purposes of funding a single psychological report in any event. This court is able to take judicial notice of the fact that there were many ways in which such a modest fee could have been funded, ranging from taking out a disbursements funding loan through to instructing an expert who was prepared to defer enforcing payment of his or her fees until the conclusion of the matter. In this regard, I remind myself that this was an entirely unexceptional and (foreseeably) relatively short-lived claim. It seems to me that the Claimant acted unreasonably in taking steps that ultimately would lead to the matter being taken out of the Portal; indeed, I would probably have come to this conclusion even if the power to seek an interim payment under paragraph 7.13 and 7.18 had been freestanding. My view may have been different if, for example, the Claimant had needed an interim payment in order to pay for costly therapeutic sessions with a psychologist, but those were not the facts.

72. In any event, I agree with Mr Miller's submissions that interim payments under paragraphs 7.13 and 7.18 of the Protocol are intended to be for damages, not costs. If the Protocol permitted claimants to seek interim awards of costs for additional medical reports, I would have expected this to be clearly and explicitly set out (either in paragraph 7.31, which deals with the costs of expert medical and non-medical reports, or elsewhere). This is does not do.

73. In view of the above, contrary my findings on the provisional assessment, I determine Point 4 of the Points of Dispute in the Defendant's favour. There is, however, one point in respect of which I do not agree with Mr Miller. This is where he says, in his Skeleton Argument, that the Claimant had been playing a 'tactical game'. Whilst I am firmly of

the view that the Claimant has acted unreasonably and has exercised poor judgement, I do not believe that this was for the purposes of tactical gamesmanship (which would imply an absence of good faith). In my view, the Claimant has simply misunderstood the rules and then tried to take what he—or, in reality, his solicitors—believed to be full advantage of those rules. In particular, I accept the case urged upon me by Ms Philipson that the Claimant's motive was simply to secure funding for Dr Mir's report.

Point 3

74. The issue here is whether vehicle-related damages should be included for the purposes of calculating the Claimant's costs pursuant to CPR, r 45.29C. This was the Claimant's challenge, this being because on my provisional assessment I had found that vehicle-related damage should be disregarded (this being in reliance on paragraph 4.4 of the Protocol). In view of my findings on Points 2 and 4 of the Points of Dispute I do not need to decide this point, but as it has been fully argued (and as my decision on those points may be subject to appeal), I will decide the point anyway.

75. In her Skeleton Argument, Ms Philipson had the following to say:

> '17. The Claimant raises this challenge to the provisional cost decision. The decision was wrong in its interpretation of paragraph 4.4 of the protocol. It is clear that paragraph 4.4 is to be read only in relation to paragraph 4.1. Paragraph 4.1 simply addresses the mechanism by which a case should be valued for the purpose of tracking the claim. It has no bearing on costs and is not relevant when it comes to determining costs. There is no reference to costs within the protocol linking paragraph 4.4 to the costs provisions of CPR 45.29. The assessment of costs is governed by CPR. 45.29. The two are separate and distinct.'

76. Thus, on the Claimant's analysis, paragraph 4.4 of the Protocol has no bearing on the amount of damages but goes simply to whether or not a claim is suitable for the Protocol. On reflection, I agree with Ms Philipson on this point. I also note that the Protocol appears to be drafted in such a way as to allow a claimant to elect whether or not to include vehicle-related damages within a claim.

77. Ms Philipson goes on to say this:

> '18. The mechanism covering the assessment of costs for cases exiting the pre-action protocol is governed by CPR Part 45.29.
>
> a. Part 45.29(B) provides that the only costs allowed to be recovered are the fixed costs in accordance with Rule 45.29(C) and disbursements in accordance with Rule 45.29(i).
>
> b. The fixed costs recoverable under 45.29(C) are those set out in Table 6B under the part of the table that says: "if proceedings are issued under part 7 but the claim settled before trial and are applicable at that stage" on or after

the issue but prior to the date of allocation" then the fixed costs are the total of £1,160 and 20% of the damages.

c. 45.29(C)(4)(b) states that: "Unless stated otherwise, a reference to damages means agreed damages"

78. Again, I agree with this in the sense that the correct measure (subject to any other factors) turns on the meaning of the phrase 'agreed damages'. I also note that CPR, r 45.29C(4)(b) says that 'unless stated otherwise, a reference to "damages" means agreed damages'. In view of the fact that vehicle-related damages may (or may not) be included within a claim, I take the view that it must follow that 'agreed damages' are capable including such damages.

79. Ms Philipson's Skeleton Argument then says this:

'19. What is meant by 'agreed damages' is confirmed in the following two authorities: The first is that of *Jones -v- Jones*, 10th November 2016, North Shields County Court (unreported – attached) whereby District Judge Temple states at paragraph 13 in relation to vehicle related damages settled pre-issue

a. "Agreed damages" if given its clear and obvious meaning must mean all damages that are agreed to be paid by the Defendant to the Claimant in respect of the claim which has been intimated. I cannot see that there is any other interpretation of that wording".

b. Paragraph 14G goes on to say that "…that to find otherwise would lead to the absurd result that if parties were able to settle matters pre-issue and settle the heads of claim pre-issue by other means, that to exclude those sums from the work for which the solicitor should be compensated would be, in my view, unfair and inappropriate and contrary to the aims and principles of policies of the protocols and the rules."

c. Paragraph 15 "In relation to the argument as to whether or not the pre-accident value claims falls within the protocol and laws are compromised, my view is that the letter of the 10th March 2014 was an invitation to payment of £1,800. The £1,800 cheque was an offer which was accepted by it being bound and there was a contract of compromise, in my view, in respect of that head of claim. It would have been entirely inappropriate for the claimant to have then subsequently have sought to recover that within proceedings. However, it was clearly part of the damages that were agreed to be paid by the defendant to the claimant and the fact that it was paid other than by way of a Part 36 offer does not stop it being part of the agreed damages. As far as the argument that this is a matter that does not fall within the protocol, although I accept that pre-accident values are usually dealt with through industry agreements, the protocol recognises that that does not always have to be the case, that it can fall within the protocol and damages can be payable under the auspices of the Part 45. If this pre-accident value was not paid pre-action and had been included in the particulars of claim and any part 36 offer

> subsequently, it would obviously, in my view, have been included as part of the damages to which the 20% applied."

80. Again, in general terms, I agree with this: to my mind, the reference to 'agreed damages' must mean the total agreed damages within the claim. In my view, however, for vehicle-related damages to be 'agreed damages' within the claim, they must genuinely have been part of the claim. For the avoidance of doubt, however, I take the view that the fact that damages may be agreed in stages does not prevent the court from summating those damages, where appropriate.

81. Ms Philipson's Skeleton Argument goes on to say this:

> 20. The second case is the first instance appeal decision of *Kular -v- Harris*, 18th February 2019, Chester Civil Justice Centre (unreported), before His Honour Judge Sykes who stated in respect of the pre-accident value claim which settled pre-issue, when allowing the Claimant's appeal:
>
> a. "Third, she (the first instance judge) applied the old rules to consider heads or items of damage which were and were not in dispute and nowhere is that distinction contained within 45.29C. What is contained and is in my judgment, very clear, is both the definition under 45.29 (C)(4) (b) and the clear wording in part C: 20% of the damages agreed or awarded. There is no attempt there within this self-contained procedural rule to siphon off pre-part 7 damages and, in my judgment, to do so would, in any event, discourage settlement affording clear policy reasons as to why that cannot, in my judgment, be a correct interpretation of the rules and so in all the circumstances the appeal is allowed."

82. The transcript of Judge Sykes's is brief, but she appears to have been dealing with the issue of what the appropriate measure is when a claim is disposed of at trial. This seems to be a different situation to what happened in this case, so I make no comment about it. I note, however, that Judge Sykes has suggested that there should be no 'syphoning off' of damages simply because heads of damages have been agreed; on that point, I would respectfully agree, this being for the reasons already given (at paragraph 80 above).

83. Ms Philipson's Skeleton Argument concludes by making the following points:

> '21. In this case, the Claimant made clear within the CNF that there was a repair claim and shortly after the stage 1 pack (and before exiting the portal) that there was a credit hire claim. It is not disputed that there was no reference to the credit hire claim within the CNF. This is irrelevant, because there is then no dispute that a claim was then initiated and a settlement reached whereby the Defendant paid the Claimant, through the Claimant's solicitors, an agreed amount for both the vehicle repairs and credit hire. The question for the court, pursuant to CPR 45.29(C)(4)(b),

> is whether there were agreed damages. In this case there were, pre-issue, for which the Claimant is entitled to recover costs.'

84. As I understand his case, Mr Miller did not dispute the principles as set out above. Instead, he made two points. The first is that he queried whether the Claimant had, as a matter of fact, included vehicle-related damage in her claim. I find against him on that point, this being because if that were the argument that the Defendant intended to take in the Point of Dispute, it ought to have been supported by evidence.

85. His second point, however, is a point of law, namely, that CPR, r 36.20(10) reads as follows:

> 'Fixed costs shall be calculated by reference to the amount of the offer which is accepted.'

86. In this regard, I note that Judge Sykes had the following to say about this (in *Kular* at [8]):

> 'I am asked to consider by analogy the provisions in Part 36.20(10) where it is stated that where section IIIA of Part 45 applies and a Part 36 offer has been accepted, fixed costs should be calculated by reference to the amount of the offer which is accepted and therefore it follows that under 45.29C fixed costs should be calculated by reference to the amount of damages assessed. Part 36 is again a self-contained procedural code. That wording appears right at the beginning of Part 36 in 36.1 (1), and therefore the provisions of 36.20 (10) are referable only to Part 36 and cannot, in my judgment, be taken by analogy to explain Part 45.29C.'

87. Those comments were made in the context of damages having been assessed rather than agreed (which is why CPR, r 36.20(10) would have applied only 'by analogy'), but what I note is that nowhere has Judge Sykes suggested that CPR, r 36.20(10) means anything other than what it says, namely, that were a claim comes to an end by way of a Part 36 offer being accepted, the appropriate measure is the amount of that offer.

88. For the reasons set out above, I have already found that this case concluded by way of a Part 36 offer being accepted (or, at least, the Claimant is estopped from contending otherwise), so I am forced to the conclusion that CPR, r 36.20(10) applies by direct application. In view of this, I conclude that the appropriate figure for damages is the amount stated in the offer, which, I am told, was £ 5,350.

89. I come this conclusion reluctantly as I can see that well-meaning claimants who very much have the overriding objective in mind may well accept offers after having previously settled the claim for vehicle-related damages. If they do this (and if, the final Part 36 offer is only in respect of the outstanding disputed damages), I can see that that this would leave that claimant (or, in reality, his or her solicitors) out of pocket. This, to my mind, is difficult to square with the aims of the Protocol and may well lead to offers not being accepted where they would otherwise have been accepted. Given the fact that the entitlement to costs in this case arises under Part 36, and given the very

clear wording of CPR, r 36.20(10), I am, however, driven to the conclusion I have reached.

90. In view of the above, I (reluctantly) determine Point 3 in the Defendant's favour. That being said, on the facts of this case it makes no difference, as I have already determined Points 2 and 4 in the Defendant's favour.

Conclusion

91. For the reasons set out above, I determine Points 2, 3 and 4 in the Defendant's favour.

92. Following circulation of a draft of this judgment, the parties have helpfully agreed the amount that I have allowed, that being £1,776-00 (inclusive of VAT).

93. Having liaised with the parties by email, I have heard submission on costs. In my view, the Defendant is entitled to costs. The only substantial objection to those costs is to the costs of the post-hearing skeleton argument; I allow those costs, not only because both parties elected to serve post-hearing skeleton arguments, but also because the skeleton arguments were of considerable assistance to the court. I allow £2,408-04 (inclusive of VAT).