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FOIL UPDATE 4th August 2021

Costs issues arising out of the RTA Portal

Jimenez v Esure Services Limited (2021) EWHC B15 (Costs)

This 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.

The claim was submitted to the RTA Portal by way of a Claims Notification Form (CNF) that was completed on 8 March 2018. Liability was admitted shortly thereafter. The claim for vehicle repairs was short lived (namely, it settled on about 10 April 2018).

A consultant in accident and emergency medicine was instructed to prepare a report on the claimant's musculoskeletal injuries; his report was written on 14 May 2018. He recommended that a psychological report be obtained.

On 13 July 2018, the claimant requested an interim payment (in the sum of £1,000). 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'). 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.

IN BRIEF

A Deputy Master restricted a claimant to fixed RTA Portal costs on the basis that the claim had exited the Portal without good reason.

He also found that vehicle repair costs *could* form part of a claim for costs purposes, but that they had not done so in this case, as they were not included in the Part 36 offer that the claimant had accepted.

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. That notice elicited no response (and in particular, no attempt was made to make payment of the monies that had been requested).

On about 10 October 2018, the claimant served both the clinical psychologist's evidence and details of his special damages. 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 sought to characterise this as being a counteroffer (namely, an offer to accept £5,350 plus costs calculated in accordance with CPR, r 45.29C).

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.

The claimant then claimed fixed costs of £4,385.67 (exclusive of VAT), plus £1,850 for the medical reports and £150 for an engineer's report. Once the costs of the drafting the Bill of Costs were included, the total claimed (including VAT) was £8,246.40.

Following a provisional assessment of the costs, the parties applied for a hearing to enable a Deputy Master to deal with four issues, although, in the event, only three were dealt with. Those were: firstly, whether the amount of costs claimed by the claimant was 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 werre inclusive or exclusive of vehicle-related damages.

Points 2 and 4

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. 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.

The Deputy Master held that there was 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.

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.

Point 2 of the Points of Dispute was thus determined in the defendant's favour and fixed Portal costs totalling £500 were allowed (plus VAT and disbursements).

On Point 4, the claimant acted unreasonably in exiting the Portal. The issue of reasonableness was not to be determined solely by reference to whether the claimant correctly interpreted and applied the Portal, but the reality was that the claimant had advanced no persuasive explanation for why he chose to exit the Portal rather than to proceed to the end of Stage Two.

The claimant suggested that the reason her instructing solicitors requested an interim payment was because she needed the monies to fund the psychologist's report. There was no expectation that a defendant (even a defendant who had admitted liability) would fund a claimant's claim. Indeed, the general rule was a that litigant would bear his or her own costs unless and until a costs order was made.

Point 3

This point did not need to be determined in the light of the above findings, but the Deputy Master did so, having found on his provisional assessment that the vehicle-related damage should be disregarded (this being in reliance on paragraph 4.4 of the Protocol).

The Master held that the correct measure (subject to any other factors) turned on the meaning of the phrase 'agreed damages'. In view of the fact that vehicle-related damages may (or may not) be included within a claim, it must follow that 'agreed damages' were capable of including such damages. The reference to 'agreed damages' must mean the total agreed damages within the claim. However, for vehicle-related damages to be 'agreed damages' within the claim, they must genuinely have been part of the claim.

In this case, the claimant had, as a matter of fact, included vehicle-related damage in her claim, but CPR, r 36.20(10) read as follows:

'*Fixed costs shall be calculated by reference to the amount of the offer which is accepted*.' This case concluded by way of a Part 36 offer being accepted (or, at least, the claimant is estopped from contending otherwise), so that CPR, r 36.20(10) applied by direct application.

Point 1 was not dealt with.

The full report may be found at: Jimenez v Esure Services Ltd [2021] EWHC B15 (Costs) (30 July 2021) (bailii.org)