Case No. 3YM66264

IN THE BIRKENHEAD COUNTY COURT

76 Hamilton Street
Birkenhead
CH41 5EN

2 March 2015

Before:

HIS HONOUR JUDGE P. GREGORY

Between:

LIAQAT RAJA

Claimant (Respondent)

and

MR KANE DAY

1st Defendant

MOTOR INSURERS' BUREAU

2nd Defendant (Appellant)

MR FISHER appeared on behalf the Respondent

MRS ROBSON appeared on behalf of the Appellant

JUDGMENT ON APPEAL

APPROVED

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2 March 2015

J U D G M E N T

JUDGE GREGORY:

1. This is an appeal from a decision of District Judge Peake given on 29 September 2014. The matter arises out of a road traffic accident that occurred on 24 April 2012. The point about the appeal is that the matter gave rise to a claim that should, it is accepted by both parties, have been piloted through via the Ministry of Justice low value road traffic claims portal.

2. It is clear from the background to District Judge Peake's judgment and the chronology and matters set out in the claimant's bill of costs that attempts were made to introduce and pilot the claim through the portal, with a number of potential defendants: Markerstudy, who were thought to be the insurers of the vehicle concerned; a Mr Epsom; a Mr Shane Tyler, and eventually Mr Kane Day, who it seems was the uninsured driver of the vehicle who was in control of it at the time of the accident. There has been, to that degree, as part of the background of the case and proceedings, confusion as to the identity of the appropriate insurer and the appropriate first defendant.

3. Although, as I say, attempts were made to take the case through the portal, that only happened in relation to those persons (Markerstudy, Mr Epsom, Mr Tyler and Mr Kane Day) and a portal claim was not served on the MIB, who are the organisation who eventually ended up settling the claim and providing compensation to Mr Raja, the claimant.

4. The complaint made on behalf of the MIB, who are the appellant in this case, is that at all material times proceedings should have been served on the MIB through the portal process, as opposed to the normal or routine Part 7 proceedings under the Civil Procedure Rules.

5. The claim was presented to the MIB on 30 July 2013 and a sum was intimated by way of claim for general damages, insurance excess, a significant amount of money in respect of vehicle hire (£14,400), and the totality of the claim was expressed to be not exceeding £25,000.

6. Matters proceeded to a resolution via the Part 36 procedure under the Civil Procedure Rules, and on 31 October 2013 the matter was compromised by the acceptance by the claimant of a Part 36 offer in the total sum of £17,544. It was only on the presentation of the bill of costs that the MIB were driven to, or decided to take the point that the matter had been, unreasonably, not piloted through the RTA protocol or had unreasonably been removed from the low value RTA protocol.

7. The matter came before District Judge Peake, who made a provisional assessment of costs, and thereafter it was pursued before District Judge Peake by way of an oral hearing. I have been taken to the judgment from that oral hearing and indeed some of the arguments of counsel. They are all set out in transcript form in the Appeal Bundle behind tabs 7 and 8.

8. It is clear to me, and indeed both parties before me today accept, that District Judge Peake made a fundamental error in that he considered that this was

a claim that, due to its stated value, was destined to exit the portal process in any event. Turning to his judgment on page 42 of the appeal bundle, District Judge Peake expressed himself in this way. At paragraph 6 he said:

"A claim was subsequently redirected to the MIB but not via the MoJ portal, and it is the defendant's contention that, upon establishing to whom to redirect the claim, the claimant's solicitors should have redirected the CNF [claims notification form] via the Road Traffic Act claims portal process to the MIB and allowed the relevant time period for the liability investigations and response to have been dealt with. If I find that the claimant did not comply with the protocol and/or unreasonably exited, then it is within my discretion to limit their costs to the fixed costs that would apply if the claim had remained within the portal."

9. Then he went on to say this:

"The bizarre situation that we have in this case is that if this claim had been commenced against the MIB under a claims notification form (which would inevitably have been submitted pre-April 2013), it would have been submitted in respect of a claim that would have had to exit the portal because the value of the claim was in excess of £10,000. I take that fact into account."

10. He continued at paragraph 8, distinguishing the case of *Straker v Tudor Rose*:

"There was a ceiling above which a claim could not remain within the portal and, once that ceiling was breached, the claim had to exit" (that being

a reference to this claim).

11. He went on to state at paragraph 14, as follows:

"Let me now deal with the cruxes in this case. If I find that this case, had a CNF been submitted (as it would or should have been sometime in 2012 or certainly before April 2013), would have exited the portal in any event because of the value of the claim, and there is no argument that it settled for over £17,000."

12. At paragraph 15 he said:

"Second, I find that there has been a breach of the protocol. If one goes to Rule 45.24, it is quite clear that this rule applies where the claimant does not comply with the process set out, or elects not to continue, and in this particular case it seems to me that it is a combination of both. This claimant did not comply with the process set out in the relevant protocol because no CNF was sent to the MIB."

13. So quite clearly the misapprehension on the part of District Judge Peake, that the matter would have exited the portal process in any event, was something fundamental to his judgment: a matter that he underlined, as I say, on more than one occasion during the passages of his judgment I have referred to.

14. Having found that there was a breach of the protocol, he went on to find that the claimant's solicitors in this case behaved reasonably. However, he did not identify in any part of his judgment the factual basis upon which he found the

claimant's solicitors to have behaved reasonably, or explain at all why he did find that they had behaved reasonably.

15. Mr Fisher, who seeks to uphold the judgment of the learned District Judge, submits that the two findings by the learned District Judge should be looked at separately. He does not accept that the finding by District Judge Peake that the matter would have exited the portal and attracted Part 7 costs in any event in any way fed into the decision that the claimant's solicitors had behaved reasonably.

16. But what are the costs and the costs consequences of exiting the portal when there should have been no exit from the portal? The relevant provisions are set out on page 1457 of the White Book, paragraph 45.24(2):

"Where a judgment is given in favour of a claimant but -

(b) the court considers that the claimant acted unreasonably -

(i) by discontinuing the process set out in the relevant Protocol and starting proceedings under Part 7; ... or

(iii) ... in any other way that caused the process in the relevant Protocol to be discontinued; or

(c) the claimant did not comply with the relevant Protocol at all, despite the claim falling within the scope of the relevant 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."

17. Counsel who appear before me today agree that where a breach has been found either of 45(2)(b) or 45(2)(c), the normal position would be that the claimant would be restricted to recovering the equivalent costs had the matter proceeded through the portal.

18. The question for me is whether the learned District Judge, in deciding that the claimant's solicitors had acted reasonably, made a decision that was within the generous ambit of his discretion, given the matter that he has a discretion to exercise in relation to costs having regard to the various rules, and in particular Rule 45.24. As Mr Fisher points out at paragraph 5 of his skeleton argument:

"The approach of the appellate court in relation to costs is clear. The appellate court may only interfere with the trial judge's decision (for these purposes, District Judge Peake) on costs if it is wrong in principle or has taken into account a matter which should not have been considered or is plainly unsustainable".

19. It appears to me, having read and re-read the entirety of the transcript of the judgment of District Judge Peake (which was given ex tempore, presumably in the course of a busy list), that a significant feature that fed into the exercise of his discretion was his misapprehension that in any event this was a claim that was destined to exit the portal and would have had to have been compromised

by way of proceedings begun under Part 7: in other words, that the claimant's solicitors would have been in a position to recover the substantive costs associated with Part 7 proceedings in any event.

20. In my judgment, and having digested the totality of District Judge Peake's written judgment, it seems clear to me that the "would have exited in any event" feature of the case was fundamental to the exercise of his discretion, and that is a reason, and a significant reason, why he exercised the discretion in favour of the claimant's solicitors, because he does not in fact at any stage of his judgment articulate precisely why he felt that the claimant's solicitors had in that case behaved reasonably.

21. And I come back to the default position: it was clearly a case that ought to have been brought within the portal. That fact was recognised by the claimant's solicitors in their attempts to bring the case within the portal against a defendant that they could not successfully proceed against. Quite clearly it was a case that ought to have been brought against the Motor Insurers' Bureau within the portal. It was not brought within the portal, it was a clear breach of the protocol, and there is nothing in the reasoning of the learned District Judge that explains why he felt the claimant's solicitors to have acted reasonably in the circumstances. The only explanation that occurs to me is that which has been mentioned before: namely, that the learned District Judge wrongly thought that in any event the matter would have exited the portal and Part 7 costs recovered via the claimant at the conclusion of proceedings.

22. Other points were taken by Mr Fisher about the timing of the objection to the

matter not proceeding within the portal, and for the reasons canvassed in argument, and highlighted by Mrs Robson in her reference to page 2805 of the White Book to the appropriate juncture at which points of that nature are considered proper to raise: namely at the directions questionnaire/allocation questionnaire stage (a stage of these proceedings that was not reached), I am not persuaded that there is anything in the point raised by Mr Fisher. I am fortified in that to a degree by the decision of His Honour Judge Simkiss (at page 129 of the appeal bundle) in the case of *Brown v Joseph Ezeguwa*, where he in turn draws on the judgment of Lord Justice Moore-Bick (I am looking at paragraph 26 of that report, and paragraph 20 of the judgment itself) where the claimant has complained that the defendant did not alert the claimant to the possibility that a point was being taken in relation to the appropriate basis of costs at an earlier stage.

23. In the context of this case and the timing, raised as it was on the points of dispute in relation to the bill of costs served, in the circumstances of this particular case (no directions questionnaire/allocation questionnaire stage having been reached), I do not think there is any merit or mileage in Mr Fisher's complaint that the point should have been aired at an earlier stage.

24. For those reasons, in my view, notwithstanding the District Judge has a generous ambit of discretion, it seems to me that he exercised that discretion having taken into account a matter which should not have been taken into account, namely his erroneous belief that the claim would have exited the portal in any event, and that formed quite clearly a significant element of his

ex tempore judgment and certainly, in my view, reading the report in its totality, affected his evaluation as to whether or not the claimant's solicitors had acted reasonably.

25. Further, looking at the terms of the Rule 45.24(2)(b) and (c), the appropriate default position would be for the court to consider awarding the claimant only protocol costs. In my judgment, having read the ex tempore judgment of District Judge Peake, he does not identify any reasonable basis to depart from that default position and, as I say, his exercise of discretion was clearly influenced by and governed by a matter that he should not have taken into consideration, namely his erroneous belief that the case would have exited the portal in any event.

26. For those reasons, I propose to allow the appeal and will hear counsel on the basis of the appropriate order to make in relation to costs.
