In the County Court at Chester
Case number: B00SW430

APPEAL NO 80/2015

BETWEEN

SINEAD MADDOCKS

Appellant/Defendant

and

MANDY LYNE

Respondent/Appellant

Before **His Honour Judge Graham Wood QC**

Mrs Robson (instructed by Keoghs, Solicitors) for the Appellant
Mr. D Rogers (instructed by PR Scully and Co, Solicitors) for the Respondent

Hearing date: 22nd January 2016
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Appeal Judgment

Introduction

1. The issue on this appeal is whether or not a claimant is bound by an agreement indicated in the course of the pre-action protocol for low value RTA personal injury claims at Stage 2 to an item of damages arising out of such a claim at a Stage 3 disposal hearing. It has been the subject of conflicting decisions at first instance/circuit judge appeal. The matter was argued before me at Chester County Court on 22nd January and I reserved my judgment to enable a detailed consideration of the arguments, the cases referred to, and the relevant rules and practice directions.

Background

2. This was a straightforward road traffic accident on 22nd December 2014 in which the Claimant sought damages for modest personal injuries and associated expenses, including physiotherapy and travel. She consulted solicitors, PR Scully and Company from St Helens, and the claim was initiated the following day through the MOJ Portal, by means of the protocol for dealing with low value RTA injury claims (up to £10,000). I will refer to the relevant procedural requirements later.

3. At this stage, no medical evidence was provided, but with an admission of liability for the accident, and the payment of fixed Stage 1 costs, the matter proceeded to Stage 2 to allow quantum to be negotiated. The Claimant's solicitors had obtained a medical report and an invoice for physiotherapy treatment, and included the three claims in the Stage 2 settlement pack and response form, of £50 for travel, £375 for physiotherapy, and £2300 for general damages. This led to an initial proposed settlement figure of £2725. It is referred to in the settlement pack form as the "*Claimant's first offer*" and is dated 12th March 2015.

4. The insurance company then returned the response to settlement pack as they were required to do, providing what is described in the form as an "*initial response*" to the various heads claimed, with a brief explanation as to why. The travel claim was denied on the basis that it appeared to relate to travel to medico-legal appointments and was not recoverable, the physiotherapy claim had insufficient detail of treatment, and the general damages claim was said to be too high, with a counter proposal of £1905. Thus the net value of the offer was said to be £1905 overall. (The Defendant's first offer, dated 2nd April 2014) and in the "amount in dispute" column the figure of £395 was inserted.

5. It was now the Claimant's solicitors turn to respond to the Defendant's offer. As before, this was completed in the appropriate *pro forma* online through the Portal. There was no comment provided by the Claimant to the Defendant's explanations for denying or reducing claims in value. There was simply inserted in relation to the general damages claim the revised sum of £1905. The claims for travel and physiotherapy were continued, and this resulted in a revised net value of £2330.

Clearly when the form is completed online this is an automatic total of the "net value claimed" column. On this occasion the form does not refer to a "*second offer*" but describes the response as a "*reply to insurer*" and is dated 8th April 2015.

6. There was no higher offer from the Defendant insurer, although the second response dated 5th May 2015 seems to refer to the general damages as "*agreed*". (It is not at all clear whether the Claimant was indicating in her reply that this was an agreed sum with the words "*medical report attached – agreed* in the comments column; for the purposes of the issue on this appeal I am taking it as tantamount to the same thing, i.e that the counter proposal of £1905 was not in dispute although I suspect that this may have been a mistake for reasons which I shall elaborate). The difference remained £2330 versus £1905 overall.

7. As she was entitled to, the Claimant proceeded to Stage 3 court proceedings by issuing a Part 8 claim form. This procedure, which is followed in many thousands of cases dealt with throughout the country where settlement has not been reached through the Portal, involves the filing of a court proceedings pack in two parts. The first, Part A, sets out the respective disputes of the parties in tabular form. This made it clear that the claim for travel and physiotherapy in the sums of £50 and £375 respectively remained challenged, whereas the claim for general damages in the sum of £1905 was said to be agreed. (At least in the Defendant's column expressly, but by implication on the part of the Claimant as this was the figure being sought or claimed, which is somewhat surprising considering the initial stance taken, and the fact that the Claimant had little to lose if as has been maintained on her behalf, she was not bound by any concession at Stage 2.)

8. The second, Part B, is a single sheet of paper which describes the Claimant's "final offer", which in this case was said to be £2725, (thus indicating a reversion to the original claimed total) and the Defendant's offer of £1905. There was a space left for the judge's award, and tick boxes to indicate that Stage 1 and Stage 2 fixed costs had been paid. This single sheet of paper was in a sealed envelope, expressing the sum which the parties were prepared to accept in the Stage 3 process and which determined whether or not costs were to be awarded at a certain level (effectively a Part 36 procedure). I understand that this usually (but not invariably) matches the total sum claimed on Part A, but where there is a difference from the Claimant's point of view the Part B offer will be lower.

9. It is possible for these Stage 3 hearings to be dealt with as a paper exercise, whereby after the assessment had been made on the papers, the envelope would be opened. That did not happen here.

10. The matter then came for a hearing before District Judge Gray in St Helens on 17th August 2015, who made the order which is the subject of this appeal. He was faced with a preliminary issue as to whether or not an indicated "agreement" on general damages in the Stage 2 settlement pack meant that this issue could not be re-

opened at the hearing. The Defendant by counsel said that it should not, and an agreement should be binding with the hearing limited to those heads in dispute.

11. Counsel for the claimant relied upon a decision of this court (His Honour Judge Gregory - **Bushell v Parry**, March 2015) and submitted that unless all heads were settled at Stage two, no individual agreement was binding.

12. The district judge was persuaded to follow the decision in **Bushell**, and proceeded to assess general damages in the sum of £2500 (which was higher than that originally sought by the Claimant at Stage 2 but close to that sought by counsel at the hearing) allowing the physiotherapy in the sum of £ £350 and the travel in the sum of £50. Thus there was a total award of £2900, and when made aware of the Claimant's offer, (£2725) the district judge awarded 10% interest from the date of issue in the sum of £41, plus fixed costs.

13. Unfortunately, there is no transcribed judgment available of the judge's decision. Counsel has provided a note which contains a brief summary. However, at a hearing which is not normally listed for more than 10 or 15 minutes, I would not have expected the judge to have given a detailed judgment on a matter of this nature, and the summary of his reasoning is sufficiently clear to know why he arrived at the decision he did.

14. The award of general damages is not otherwise appealed, although in addition to the challenge on the preliminary issue, there is a discrete issue of his award for travel, which I shall refer to later in this judgment.

The Protocol

15. The Pre-action Protocol for Low Value Personal Injury Claims in RTAs applies to any road traffic accident after 31st July 2013 (there was an earlier protocol) where there is a claim for damages which includes a claim for personal injuries exceeding £1000, subject to an upper limit of £25,000, and requires the pre-action exchanges to be conducted online through what is known as the "portal". Whilst the provisions of the protocol do not amount to court rules and represented, in effect, a self-contained code which prescribes expected conduct (the words "should" and "may" are used extensively throughout), like any other protocol, failure to adhere is likely to lead to a significant penalty in costs (as apparent from **CPR 45.24**).It is particularly important in relation to these low value RTA claims because a fixed cost regime applies. It is within the knowledge of this court that the vast majority of RTA claims are processed in this way, and very few exit the portal to become fast track or multitrack claims.

16. Stage 1 of the process is dealt with in paragraph **6.1** and following of the Protocol, and involves the completion and forwarding of an online claims notification

form (CNF). If liability is not admitted (and in a number of other prescribed circumstances set out in paragraph **6.15**) the claim exits the portal. If it is admitted, under paragraph **6.18** a claimant becomes entitled to fixed Stage 1 costs, and the matter proceeds to Stage 2, which in the context of this case is the all important stage and the one at which the medical evidence is presented. Sensibly medical evidence is no longer commissioned before liability has been admitted.

17. Paragraph **7.35** gives the defendant an opportunity to consider the claim in the settlement pack that is provided, which is 35 days, which includes an initial 15 days to make an "offer". Interestingly, there is no reference to "offer" prior to this paragraph, and in the material presented by the claimant the only reference to a valuation appears in paragraph **7.10**, which it is assumed refers to the general damages aspect, an item not represented by a liquidated loss. However, paragraph **7.38** implies that in the Stage 2 settlement pack form the claimant will have made an offer, because it enables a defendant to make a counter offer.

18. Paragraph **7.37** deal specifically with the *to and fro* of offers:

> "Where a party makes an offer five days or less before the end of the total consideration period (including any extension to this period under paragraph 7.36) there will be a further period of five days after the end of the total consideration period for the relevant party to consider that offer. During this period ("further consideration period") no further offers can be made by either party."

19. This clearly envisages that within a specified period there will be online negotiation with each party setting out its stall and making clear its bottom-line figure, so to speak. There is no provision for separate offers as such, in relation to specific items, although the form itself adopts a kind of Scott Schedule approach which allows each party to state what it is seeking or conceding. This is not dissimilar to an approach which might be made in a schedule and counter schedule of damages in a more complex personal injury claim.

20. It is summarised in paragraph **7.41**:

> "When making a counter offer, the defendant must propose an amount for each head of damage and may in addition to make an offer that is higher than the total of the amounts proposed for all heads of damage. The defendant must also explain in the counter offer why a particular head of damage has been reduced. The explanation will assist the claimant when negotiating a settlement and will allow both parties to focus on those areas of the claim that remain in dispute."

21. Although there are a number of protocol rules prescribing allowable disbursements, withdrawal and settlement, and "additional damages" pursued by a third party separate from the main claim, the next relevant provision is at **7.64** which deals with the approach to be taken where agreement cannot be reached. This relates to the Stage 3 process and its wording has been scrutinised in the course of argument

7.64
Where the parties do not reach an agreement on

(1) the original damages within the periods specified in paragraphs 7.35 to 7.37; or

(2) the original damages and, where relevant, the additional damages under paragraph 7.51, the claimant must send to the defendant the Court Proceedings Pack (Part A and Part B) Form which must contain—

(a) in Part A, the final schedule of the claimant's losses and the defendant's responses comprising only the figures specified in subparagraphs (1) and (2) above, together with supporting comments and evidence from both parties on any disputed heads of damage; and

(b) in Part B, the final offer and counter offer from the Stage 2 Settlement Pack Form and, where relevant, the offer and any final counter offer made under paragraph 7.53.

22. Reference has been made in the course of argument to the preamble to the protocol. It seems to me that the relevant comments are these set out at paragraph C13 A 001 (of White Book 2015 Vol 1):

Editorial Introduction

Practice Direction (Pre-Action Conduct) …..contains provisions describing "the conduct the court will normally expect of the prospective parties prior to the start of proceedings". The court will expect the parties to have complied with that practice direction "or any relevant pre-action protocol". ….

….. The RTA Protocol describes in great detail the behaviour the court expects of parties, of their legal representatives and of their insurers, involved in claims of the type to which it applies. The Protocol accepts that, and is structured on the basis that, in personal injury road accident cases, insurers are the real party at interest on the defence side…….

Where a claimant does not comply with the RTA Protocol, or elects not to continue with the processes therein, and starts court proceedings under CPR Pt 7 and obtains judgment, the court may order the defendant to pay no more than the fixed costs in r.45.18, and disbursements in accordance with r.45.31(3) (see r.45.36), r.45.19 (see r.45.17). Generally, the sanction in the hands of a claimant faced with a defendant who does not cooperate in working through the RTA Protocol processes properly is that of starting court proceedings in the normal way (under Pt 7), thereby exposing the defendant (in the event of the claimant obtaining judgment) to much greater costs than those that would be payable under the fixed costs regime applicable when cases are disposed of under the Protocol processes, or under the bespoke court procedures to which the Protocol processes lead ……

Rules, practice direction and pre-action protocol

By definition, the processes set out in the several pre-action protocols that have come into being since the CPR came into effect, are not pre-trial procedures; but they imitate them to an extent. The RTA Protocol imitates them more thoroughly than other pre-action protocols. Procedures that would normally apply at the pre-trial Stages in a case where court proceedings are on foot, and the parties are preparing for a trial on quantum of damages, are found in the

> RTA Protocol; particularly in the Stage 2 processes relating to obtaining and exchanging of medical reports, to the making of offers to settle, and to the making of interim payments. Further, during the working through of the Protocol processes, liability for costs may be incurred and costs may become payable. The Protocol sets out an intense, time-sensitive process for defendant insurer and claimant solicitor negotiation. (There is not one mention of mediation in the Protocol.) The Protocol Stage 1 and 2 processes may be seen as a form of "civil diversion", that provide parties with a structure for clarifying their disputes and negotiating a settlement similar to that provided by the normal CPR pre-trial procedures.
>
> Normally, CPR rules are supplemented directly by practice directions and indirectly by pre-action protocols. Here these relationships are reversed. The RTA Protocol is the primary source governing party behaviour in the claims to which it applies; Practice Direction 8B builds on the Protocol Stage 2 processes and provides special and limited court procedures for the purpose of determining the claim if settlement is not achieved (and for some other purposes); and Section II of CPR Pt 36 (RTA Protocol Offers to Settle) and Section VI of Pt 45 (Fixed Costs) provide the legal framework, not only for the Stage 3 procedure but also for the pre-action negotiating processes, in effect supplementing Practice Direction 8B and the RTA Protocol.
>
> The terms of the RTA Protocol have to be read closely with the terms of the provisions in Practice Direction 8B (supplementing Pt 8) ……..in Section II of CPR Pt 36 …… and in Section III of Pt 45 …..In the commentaries on those provisions, the linkages with provisions in the RTA Protocol ……..are noted. These various sources complement (and cannot be divorced from) one another. They constitute an integrated scheme for the disposal of low value personal injury claims arising from road traffic accidents.

23. Whilst the protocol prescribes pre-action conduct, Practice Direction 8B deals with the court procedure involved when settlement cannot be achieved at Stage 2 in the portal process through the issuing of a Part 8 claim. It covers acknowledgement of service, the evidence upon which a party is entitled to rely, and the manner in which the court considers the claim.

24. The relevant paragraphs are:

> 1.1
> This Practice Direction sets out the procedure ("the Stage 3 Procedure") for a claim where—
>
> (1) the parties—
>
> (a) have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") or the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol"); but
>
> (b) are unable to agree the amount of damages payable at the end of Stage 2 of the relevant Protocol;

and under "Definitions"

> 3.4 *Stage 3 hearing* means a final hearing to determine the amount of damages <u>that remain in dispute between the parties</u>.

The respective arguments

25. On behalf of the appellant insurance company, Mrs Robson of Counsel submits that the portal process is a highly prescriptive and stand-alone code which is self-contained and which precludes common law principles such as offer and acceptance and mistake. It is because of this prescriptive nature that in the absence of any specific provision allowing a party at Stage 3 to "unagree" items previously referred to as agreed in the negotiation stage, a party is bound by "agreed heads of loss".

26. She refers to the specific wording of Practice Direction **8B** at paragraph **3.4** which is set out above (and underlined). This should be read in conjunction with paragraph **7.64 (a)** which also anticipates the evidence will be adduced at the hearing stage only on items which remain in dispute.

27. It is relevant, says Mrs Robson, that under paragraph **7.55** to **7.60** there is specific provision for a procedure to be followed where there has been partial agreement in respect of vehicle related damages, a provision which would be unnecessary if it was open to a party to argue that unless all heads of loss were agreed then all heads of loss became unagreed at Stage 3.

28. Reference is made to the specific design of the portal which allows for heads of loss to be claimed separately and accepted or not accepted as the case may be, which submits Mrs Robson, contemplates a separating out of those items which no longer remain in dispute, and allowing the parties to concentrate on the disputed items.

29. In terms of other cases, acknowledging that there is no authority at higher level, but by way of example, Mrs Robson relies upon the decision of District Judge Vincent in Oxford County Court (1st May 2014), **Bewick-Copley v Ibeh**. This is a case which was referred to before His Honour Judge Gregory in **Bushell v Parry** and was considered by him in that case to be distinguishable, because it concerned an application for a judgment to be entered in relation to previously agreed items in subsequent Part 7 proceedings. She maintains that District Judge Gray was wrong to rely upon **Bushell v Parry** in the present case, and does not appear to have had **Bewick-Copley** brought to his attention. Whilst maintaining that **Bushell** was incorrectly decided by Judge Gregory, Mrs Robson also submits that the result in that case was clearly influenced by the fact that the defence filed in the Part 7 proceedings was totally inconsistent with the position that the general damages had been agreed.

30. In relation to the claim for travel expenses, Mrs Robson reminds the court that there can be no recovery for travel to a medico-legal examiner, as opposed to travel for treatment, and this should be disallowed.

31. In summary, she submits that if the protocol aims are to be met, behind which must lie the overriding objective, it would defy logic if heads of loss could not be agreed and hived off so to speak.

32. On behalf of the claimant respondent, Mr Rogers, who like Mrs Robson did not appear in the court below, emphasises the fact that at no stage was there ever any overall agreement on the value of the claim as evidenced by the fact that the "agreement reached" box was never ticked at Stage 2. Parties can arrive at individual agreement on single heads of loss, but the portal only provides for a global once and for all offer and counter offer and there is no facility within the rules for a binding compromise on discrete issues. He refers to the language of the protocol which is consistently in the singular, particularly where it allows the defendant a period of 15 days to make "an offer" as opposed to separate offers.

33. The language of rule **7.41** which deals with a counter offer, refers to "*an amount for each head of damage*" rather than an offer for those heads, and it would have been open to those who drafted the protocol to state otherwise if individual heads could be compromised. He is supported in this respect by the observations of Judge Gregory at paragraph 37 of his judgment.

34. The reason why reference is made to "*amount in dispute*", is to provide a need for negotiation, in much the same way as a schedule of damages might be met with a counter schedule. An agreement to certain items may often be indicated, without necessarily compromising the overall total. For instance a claimant may choose to acknowledge a figure provided by an insurer defendant on some items in the expectation that others will be higher, and the overall offer ultimately acceptable.

35. As far as the efficacy of any Stage 3 hearing is concerned, the Part 36 offer is key, and a claimant who chooses to continue beyond that Stage 2 does so at his peril.

The "conflicting decisions" and other case law

36. **Bewick-Copley v Ibeh** was a case in which in Part 7 proceedings it was held that individual items could be compromised under the RTA protocol at Stage 2 with the "running total" of the amounts remaining in dispute. The real challenge related to the credit hire and storage of a bicycle, when general damages had been the subject of an agreement within the 15 days initial consideration period. In the judgment, it is said that "*the defendant accepted the claimant's offers for general damages and PAV*

(pre-accident value) but could not agree to the other claims." When further information was requested, the claimant by his solicitors removed the case from the portal because it had become "too complex". It was thought by the district judge that the claimant was attempting to manipulate the MOJ process for increased costs, and the remaining items were reallocated to the small claims track.

37. **Bushell v Parry** involved an appeal from Deputy District Judge McCullagh at first instance in which he had held the claimant was bound by a portal agreement in relation to general damages when subsequent Part 7 proceedings were pursued for substantial credit hire charges. He agreed that such an aspect of the claim had been compromised, and thus in the Part 7 claim the matter had been incorrectly allocated to the fast track, whereby the claimant was deprived of his costs. The claimant had wanted to include general damages to justify fast track costs which are clearly more substantial in any event than fixed portal costs. His Honour Judge Gregory preferred the argument in principle that heads of loss within the portal will not be divisible enabling them to be compromised separately, but that the wording of the protocol referring to a single offer effectively trumped the phrase "*those areas of the claim that remain in dispute*". However, it is plain from his reasoning that he did not analyse this issue in great detail; the overarching factor was that the defendant had chosen in a defence to the Part 7 proceedings to challenge the quantum of general damages, and not to plead a compromise. Thus if he was wrong in his interpretation of the protocol, Judge Gregory was satisfied that it was open to the claimant to pursue a pain, suffering and loss of amenity claim notwithstanding an earlier indicated agreement, justifying a claim to fast track costs, and making the first instance judge in error.

38. Other cases were briefly touched upon in the submissions, but it was accepted that none were directly on point. It is worth mentioning, however, a case in this court on 7 December 2012 heard before His Honour Judge Gore QC, **Purcell v McGarry**. That was a case involving a claim which had originally proceeded through the portal but when becoming dissatisfied with the final offer from the defendant, the claimant sought to follow the Stage 3 process. Before a disposal hearing, the defendant reconsidered the matter, and communicated a willingness to accept the claimant's Stage 2 offer, thus avoiding full potential Stage 3 fixed costs. The district judge at first instance held that the offer was still open for acceptance in the sense that it had not been withdrawn. Judge Gore agreed, and indicated in his appeal judgment that

> "the ordinary rules of contract to the effect that the making of the counter offer constitutes a rejection of the original offer which thereby lapses have no application in this arena ..."

Discussion

39. I confess that I have not found this an easy matter to resolve. There is a certain opaqueness to the protocol "provisions", not least because they were intended to prescribe expected behaviour pre-action, rather than to impose restrictive rules necessary for court procedures. The reasoning behind this, I am quite sure, is to enable scrutiny of the parties' conduct subsequently in the event that a claimant seeks to

recover more than the fixed costs which the MOJ portal procedure provides for. Yet gaps remain in the provisions.

40. Whilst a more exacting interpretive approach might be required in understanding regulatory provisions, including the CPR and practice directions as opposed to a non-regulatory protocol, nevertheless where an issue such as this arises, it is still necessary to obtain an understanding as to what the drafters expected would happen as the process of resolving these claims pre-action was followed.

41. The clear tension, as indicated by counsel in this and other cases, lies between the references to items *remaining in dispute* (paragraph **7.41** and paragraph **7.64**) and the *singularity* of the overall offer and counter offer apparently identified on several occasions in paragraph **7.37** and following.

42. As a matter of general principle, and in accordance with the overriding objective, a court should not be troubled by matters that are not in issue. However it is important to distinguish, in my judgment, between matters "not in issue", and matters which a party may be prevented from pursuing by reason of any prior agreement, compromise, or procedural rule.

43. In the context of a Stage 3 hearing, it seems to me that the wording of paragraph **7.64** is critical, in that it circumscribes the material which is necessary for the court to consider the claim, and for the parties to affirm their final negotiating positions. There are two documents to be sent to the defendant, only one of which is initially seen by the court, namely part A. That, in effect, is the final schedule of loss with supporting evidence and comments on the individual items.

44. In so far as the paragraph refers to "*supporting comments and evidence from both parties on any disputed heads of damage*" this is a sensible way, in my judgment, of constructing a basis upon which the court can consider the issues to be resolved, at Stage 3, especially if the matter is to be dealt with on paper, and without an oral hearing. Further, in so far as paragraph **7.64** restricts the material to the inclusion of figures arising out of the original damages claimed (or “additional damages” - but that is not relevant here), it is clear that this is intended to prevent new claims being pursued at any Stage 3 hearing. (See also paragraph **7.66**).

45. In the circumstances, however, what would the position be if a party having seemingly adjusted by concession in the negotiation Stage 2, reverted at Stage 3 to the higher (or lower) figure provided respectively before the final offers crystallised? In other words, if this Claimant had inserted £2300 in the relevant part of the schedule in Part A for general damages instead of £1905, would there have been any basis for objection by the Defendant?

46. The submissions of the Defendant in this case appear to carry greater force because Part A of the court proceedings pack completed by the Claimant provides a repeat of the figure which the Claimant had inserted in the *net value claimed* column at Stage 2, after seemingly adjusting downwards from the previous figure, despite the fact that no supporting comments were provided. (It is likely that in the light of the total counter-offer identified in part B, that the figure of £1905 was an error by the Claimants' solicitors, because it makes no sense that the total should now stand at £2725 having previously been £2350 in the Stage 2 settlement pack after negotiation, and this is a matter which I shall refer to again shortly.)

47. In my judgment, Stage 3 of the protocol does not anticipate parties revising their “agreed” figures, even if there may be nothing in the prescriptive provisions preventing this. This would undermine the efficacy of a negotiating process which is designed to reduce issues for simple determination. Of course a party may have a number of reasons for indicating provisional agreement to a figure for a head of loss even though it is less than that head may be worth, perhaps where a defendant insurer is offering more in relation to another head of loss. However, whilst not dissimilar to the exchanges which might take place at a joint settlement meeting with give and take to arrive at a final total, this is a system which is designed to allow the parties to resolve heads of claim on a step-by-step basis. If and insofar as a claimant elects to remain in the portal, then it is not unreasonable, when proceeding to a Stage 3 assessment, that there is some certainty to the items remaining in dispute. This, as will be seen in the following analysis, does not mean that a claimant is bound as a matter of law to an indicated agreement.

48. For this reason, I believe that the words "*any disputed heads of damage*" have significant prescriptive force as to the manner in which the Stage 3 process is to take place. Whilst it is open to a claimant (or defendant for that matter) to make a higher (or lower) offer than the total sum of the individual items, it is relevant that by the time the Part 8 proceedings are commenced, the defendant in making its final offer will have assessed the claim on the basis of the sums pursued after negotiation, and if the defendant has been led to believe that certain items are conceded, the final offer will undoubtedly take this into account. A claimant who chooses to revert to higher figures in the Part A schedule at Stage 3 on already conceded items to boost the claim for assessment by the court will have misled a defendant, potentially prejudicing the defendant on the costs protection in the final offer.

49. Furthermore, not only does the language of the protocol anticipate that the parties will have narrowed the issues by the time a Stage 3 hearing is required, so to does the Practice Direction, with the definition set out in paragraph 3.4, of the determination relating to the amount of damages "*remaining in dispute*". The only sensible meaning which could be attributable to this, in my judgment, is that up to this point within the negotiating process the parties have narrowed the issues and included only those matters upon which they cannot agree.

50. Therefore to answer the question posed at paragraph 45 above, in my judgment, if and insofar as the claim remains within the protocol and proceeds to a

Stage 3 hearing, the agreed or adjusted figures, and not those originally pursued, should be included in Part A. If the original higher figure is included, it is open to a defendant, pursuant to paragraph **7.67** of the protocol to object on the basis that a non-disputed item is included and to return the court proceedings pack. If the Claimant wishes to revert to the sum originally claimed he will then be able to elect whether to exit the protocol and commence Part 7 proceedings (see paragraph **7.46**) or if not, to stand by his stage 2 "agreed" adjustment to the general damages claimed. The corollary of this may be that a defendant who does not object or return the form is accepting that the dispute on general damages remains live. In my judgment this is the only way that the protocol can be effective, because the alternative would be that the process up to that point had been rendered nugatory.

51. 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. Paragraph **7.46** does not restrict entitlement to withdraw to a defendant only, and the claimant who believes that he has made an unreasonable concession after the end of the consideration period may decide that he would do better to take his chance within Part 7 proceedings. Within those Part 7 proceedings he could not be bound by any concession on an individual item made within the portal. Even then, a claimant does so at peril that he has acted unreasonably in exiting the portal, and pursuant to **CPR 45.24**, he may recover only fixed costs. It seems to me that this situation is likely to arise only in rare circumstances but it is possible to envisage a case where there has been a significant undervalue of a particular item agreed in the course of the negotiation by which a claimant no longer wishes to stand. If he has left the portal, there is no reason why he should be so bound, subject of course to the scrutiny of his conduct in leaving, and the risk of fixed costs.

52. 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.)

53. In conclusion, in my judgment, to accede to an interpretation that the singularity of any global offer for acceptance which is not agreed at the end of Stage 2 renders nugatory any compromised figure on an item by item basis, so that "*all bets are off*" for a Stage 3 hearing would be contrary to the intended purpose of the protocol which is to arrive at an ever narrower scope for dispute at that brief Stage 3 hearing, or on the papers. Thus, if and in so far as the claim remains within the portal, the Part A schedule in the court proceedings pack should reflect the scope of the Stage 2 agreement and not seek to revert to the original claims. This is not the same thing as saying that the claimant is bound as a matter of law by such individual agreements.

54. This understanding of the protocol process would have its working out as indicated in the following scenarios:

Scenario A

The claimant claims £2500 for general damages amongst other items in the settlement pack. The defendant offers £2000 and challenges the other items. The claimant replies by conceding £2000 but continues with the other items. The final offer is not agreed and a decision is made to proceed to stage 3. The court proceedings pack should identify a dispute on the other items, but not general damages. If the claimant chooses to withdraw his final offer and exit the portal he is not bound by the concession on general damages, but will be subject to conduct scrutiny in any part 7 proceedings.

Scenario B

As above, but in the court proceedings pack Part A the claimant now seeks to recover £2500 as originally sought despite the concession. It is open to the defendant to return the court proceedings pack (**7.67**), both Part A and Part B. If he does object in this way, the claim is likely to exit the portal/protocol leading to Part 7 proceedings and of course the claimant must take his chances on costs. If he does not, and the matter proceeds to a Stage 3 hearing, the judge has case management discretion as to whether the general damages claim is now in issue. It is suggested that a good reason will have to be demonstrated for departing in the Part A schedule from a previously compromised figure if the matter remains within the protocol; further, in only the most exceptional of cases is a judge likely to allow a party to go behind a compromised figure which is actually included in the Part A schedule.

Scenario C

The claimant makes no concession in relation to the net general damages value claimed which remains at £2500, the defendant's figure being £2000. There

are also disputes about other items and the matter proceeds to Stage 3. The claimant's figure in part A is £2500, but insofar as this remains a disputed item, in principle at least general damages are at large, and could result in an award higher than this.

Scenario D

The claimant has left the portal. However, at stage 2, after negotiation, he had agreed a figure of £2000 for general damages having claimed £2500. There was a disputed credit hire claim. The overall offer was not accepted. In the Part 7 proceedings the claimant renews his original general damages claim. He is not estopped from doing this, as there was no binding agreement, but any such compromise will be scrutinised closely under CPR 45.24, even if he recovers damages in excess of the originally compromised figure.

55. I should make reference to **Bewicke Copley v Ibeh** because significant reliance has been placed upon it. As indicated, I am in broad agreement with the approach taken by District Judge Vincent in relation to the practical effect of the stepped negotiation process in stage 2 and the restriction of items in dispute. The most obvious point of note is that the judge was dealing with a Part 7 claim in which the claimant had deliberately left the portal, and the fixed costs regime, to pursue items of damage which would normally be dealt with in the small claims track if there was no subsisting claim for general damages in relation to pain, suffering and loss of amenity. (Scenario D above). However I disagree with District Judge Vincent that the absence of any reference to "*without prejudice*" in the protocol provisions implies that there must be a binding effect on an item by item basis agreement.

56. Whilst I believe that the provisions of the protocol do not allow for the binding compromise of individual elements, nevertheless as a matter of principle a court in a Part 7 claim should be entitled to consider whether general damages for PSLA was compromised for all intents and purposes within the portal process. This is an essential analysis to determine whether or not a party was reasonable to exit the portal, and to avoid the common abuse of avoiding fixed costs in the hope of recovering the more remunerative fast track costs available.

57. In **Bushell v Parry,** again Judge Gregory was dealing with the issue in Part 7 proceedings. His decision was clearly influenced by the major factor that the defence had challenged quantum. However his brief discussion relating to the absence of any binding effect of individual item agreement at the Stage 2 process is entirely consistent with my interpretation. It was never argued before him as to the effect which such "agreement" would have had on a Stage 3 hearing, which is the issue with which I have been primarily concerned.

Summary

58. In my judgment, these are the principles which can be established:

(a) Stage 2 of the portal process is designed to achieve a negotiated settlement on quantum;

(b) There is nothing in the provisions of the protocol which prescribe the creation of a binding agreement in relation to individual items;

(c) For the purposes of acceptance, and thus the conclusion of a negotiated agreement, there is one single final offer and counter-offer;

(d) Parties should be free to make concessions at Stage 2 in order to arrive at a settlement without prejudice to their original claims or disputes being advanced at a later stage if the claim exits the portal. Such concessions should be made carefully and in a considered fashion because they will restrict the ambit of any dispute in the event that the matter proceeds to a Stage 3 disposal hearing;

(e) The Stage 3 court pack Part A schedule should clearly state those items that are in dispute after the Stage 2 negotiation process; a party who "pleads" a compromise figure will find a court unwilling to go behind such a figure and proceed to an assessment, exercising its case management responsibilities, save in the rarest of circumstances;

(f) If the claimant exits the portal, having manifested a clear agreement on general damages, but subsequently wishes to claim these as an integral part of a Part 7 claim to justify other than fixed costs, that earlier portal agreement will become relevant and should have a significant bearing on the issue of costs. Thus an indicated compromise or agreement on a specific item at Stage 2 is not without significance outside the portal.

(Since handing down my judgment in draft form, counsel for the Defendant has pointed out through her instructing solicitors that the court did not hear argument on what would happen if the claim left the portal. Whilst this is correct, and the argument was focussed on the effect of individually “agreed” items in Stage 3 hearings, it is neither proportionate nor necessary to invite further submissions on this point as it is not central to the appeal. My interpretation of the procedures is based upon an understanding of their intended purpose and in this regard my comments should be viewed as obiter: if they are wrong, it open to another court to take a different view.)

Application to the present case

59. Applying the above discussion to the facts of this case, the Claimant, for reasons which are not entirely understood, had chosen not to resile from the concession made in respect of general damages in the sum of £1905 but instead proceeded to Stage 3 in her Part A schedule giving the impression that this aspect has

been compromised, and was no longer in dispute, despite the fact that her Part B final offer was presented on the basis that the original sum of £2300 was being pursued, and thus included in the total of £2725.

60. As referred to above, I believe mistake is the only possible explanation for this. However that was not a matter which was raised before the district judge. Accordingly, if the disposal had proceeded as a paper exercise only, the judge would have been entitled to regard general damages as "*no longer in dispute*" and the only issues arising in relation to the physiotherapy charges and travelling expenses.

61. Nevertheless it did not. Undoubtedly affronted by the fact that the Claimant, despite completing Part A of the court proceedings pack in this manner, now wanted to open up the question of general damages, the Defendant sought to challenge her entitlement so to do at the hearing by arguing that the matter had been compromised at Stage 2 and that she was bound by her acceptance of the Defendant's figure. For reasons which I hope I have made clear, the appropriate argument available to the Defendant, who it is presumed would have carried out its check of the court proceedings pack pursuant to paragraph **7.67** when it was first forwarded, would have been that it was now too late to raise this as an issue having sought only £1905 in Part A.

62. It is slightly artificial to interpret the exchanges with the judge at first instance as amounting to an application to exclude the general damages issue on the basis that the Defendant had been misled by the claim presented in Part A, and that general damages were no longer disputed, because the objection was specifically on the basis that there had been a binding compromise. However, if this was deemed to be the approach invited on the court, as I have indicated allowing the Claimant to reopen this issue was a matter within the discretion of the district judge (**CPR 3.1(k)**) but one which could have only been exercised in exceptional circumstances. A case based on mistake was never advanced, and of course the district judge would not have had sight of the offer in the sealed envelope. It does not matter that the compromised figure for general damages was very much on the low side; it would have been difficult, in my judgment, if there had been such an application to conclude that there was anything exceptional to permit the Claimant to depart from what was effectively her claimed figure in the schedule.

63. However, in my judgment it is inappropriate to interfere with result of the assessment, for several reasons. First, as I say, he was never asked to approach the matter on this basis. Second, if he had been, the Claimant, albeit at risk, might have had the opportunity to exit the portal. Third, the eventual assessment whilst possibly a little generous was probably closer to the true value than the "compromise" figure. Fourth, there was a disparity between the Claimant's final offer and the total of her Part A figures which is highly suggestive of an error. It seems to me that whilst this judgment lays down principles which might have led to a different approach, it would be unfair to deprive the Claimant of general damages otherwise correctly assessed.

Dispute over travel claim

64. This was very much an adjunct to the main appeal issue. It is simply resolved, in my judgment. The claim had always been presented on the basis that the travel was to "medical and physio appointments" as opposed to medico-legal appointments. There is no indication that the judge was unaware of the restriction on recovery for the latter, and in the brief note in which he confirms that he is "*allowing travel in full*", it cannot be inferred that he is awarding an impermissible item. In my judgment this additional ground of appeal is misconceived and in any event *de minimis*.

Conclusion

65. This appeal is allowed in part. The principle of restricting a claimant who remains within the portal to contest only those figures which are not compromised (save in exceptional circumstances) is accepted, even though I have otherwise declined to interfere with the decision.

66. This judgment has been fuller and more detailed than I had intended. Having given the issue careful consideration, and in particular on review of the way in which these disposals are normally handled, it became apparent that some uncertainty had developed arising out of these conflicting decisions. I am conscious that one of the court centres in this region for which I am responsible as Designated Civil Judge deals highly efficiently with many thousands of Stage 3 disposals every year, and is rightly the chosen court of issue for many local and national practitioners.

67. Local practices do develop often by default, but aided by the experience of the judges handling the claims. It is hoped that the guidance given in this judgment will be of assistance in ensuring the continued streamlining of Stage 3 disposals with consistency of approach. Practitioners should also be aware that the portal process is designed to achieve resolution in the vast majority of low value RTA claims, and courts will be assiduous to ensure that there is no manipulation of the system to avoid the fixed costs regime. A purported compromise of general damages is likely to be intensely scrutinized on any exit of the portal.

68. I invite the parties to agree any consequential order arising out of this judgment. If agreement cannot be reached I am content to receive brief written submissions or to deal with the matter in a short telephone hearing. My initial view is that no order for costs would be appropriate, insofar as the Defendant has succeeded substantially on the legal interpretation, whereas the Claimant has preserved her award. However I remain open to alterative order suggestions.

HHJ GWQC