Neutral Citation Number: [2020] EWHC 288 (QB)

Case No: QA-2019-00227

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ON APPEAL FROM THE SENIOR COURT COSTS OFFICE
(MASTER ROWLEY) CLAIM NO: C20YM169

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/02/2020

Before :

MR JUSTICE STEWART

- -

Between :

Mr Alan Ryan	**Claimant/Respondent**
- and -	
Mr Karl Hackett	**Defendant/Appellant**

- -
- -

Roger Mallalieu (instructed by **Minster Law**) for the **Respondent**
Dan Stacey (instructed by **Clyde & Co Claims LLP**) for the **Appellant**

Hearing dates: 06 February 2020

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Approved Judgment

Mr Justice Stewart:

Introduction

1. This is an appeal against a decision of Master Rowley who gave Judgment on 18 July 2019 after a hearing on 21 June 2019. I gave permission to appeal by order made on 17 December 2019. The Master held that the Claimant was entitled to such reasonable and proportionate costs as he could justify at a detailed assessment on the standard basis. The Defendant's case was that the Claimant's costs should be restricted to fixed costs under CPR 45.18.

Background

2. The Master's judgment helpfully sets out the background facts to this appeal at [3]-[10]. In summary, the Claimant suffered personal injury in a road traffic accident on 15 June 2013. The Claimant instructed solicitors and they submitted a Claim Notification Form ('CNF') in accordance with the Pre–Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the Protocol') via the online Portal. The Defendant admitted liability on 24 June 2013.

3. The Claimant submitted a medical report from Doctor Simpson dated 20 July 2013. This showed an injury to the neck and lower back, together with driving anxiety. All symptoms were expected to resolve within 12 months of the accident. This prognosis was too optimistic. On 27 March 2014 the Claimant saw an orthopaedic surgeon, Mr Cosker. His opinion was that it would take up to 2 years for a full resolution of symptoms. Subsequently, in 2016, Mr Cosker attributed 70% of continuing back problems to the accident for a period of 5 years. He also considered that the claimant was at a significant employment disadvantage as a result. Further, in November 2016, Dr Farrooq reported that the claimant was suffering from an adjustment disorder, prolonged depressive reaction and a phobic anxiety disorder. He recommended CBT and re-examination. The Defendant subsequently served orthopaedic and psychiatric evidence. This disputed causation of any knee symptoms and any psychological/neurological disorder.

4. On 9 April 2015 the Claimant requested an interim payment of £1000. On 24th of April 2015 the Claimant's solicitors notified the Defendant that the claim had exited the Portal. This was on the basis that the interim payment had not been made within 10 days of receiving the Interim Settlement Pack – See Protocol paragraphs 7.13 and 7.18. In fact, the interim payment had been made, and received, within the relevant period. It had been received on 17 April 2015.

5. The Claimant began court proceedings by way of Part 7 claim in June 2016. The limitation period for bringing the claim would have expired on 15 June 2016. The Defendant was served with the proceedings on 6 October 2016. A defence was filed admitting liability, but disputing causation and quantum. The Defendant's directions questionnaire suggested that the case be allocated to the fast track. The Claimant sought a stay pending further medical evidence. At a CMC on 5 April 2017 the case was allocated to the multitrack. Budgets were filed and budget reports were exchanged prior to the CCMC on 11 October 2017. Judgment was entered on that date and a further CCMC was listed for 29 January 2018. On 23 January 2018 the Defendant made an increased Part 36 offer in the sum of £20,000, net of CRU. At the same time the

Defendant served surveillance and medical evidence. The CCMC was vacated. The Claimant accepted the Part 36 offer on 19 February 2018.

The Judgment

6. It was common ground between the parties that two provisions which might, at first sight, have seemed to be applicable, were in fact not so. These were:

(i) Protocol paragraph 7.76 which provides:

> *"Where the Claimant gives notice to the Defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law) then the claim will no longer continue under this Protocol. However, where the court considers that the Claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18*."

The reason why this paragraph was not applicable was because the Claimant did not give notice to the Defendant that the claim was unsuitable for the Protocol.

(ii) CPR 45.24 which provides:

> *"1) This rule applies where the Claimant –*
>
> *(a) does not comply with the process set out in the relevant Protocol; or*
>
> *(b) elects not to continue with that process,*
>
> *and starts proceedings under Part 7.*
>
> *(2)……, where a Judgment is given in favour of the 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……*
>
> *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 reason why this rule did not apply was because there was no "judgment" – see *Williams the Secretary of State for Business, Energy and Industrial Strategy* [2018] EWCA Civ 852.

7. The rule which the Master therefore had to consider was CPR 44.11. This rule states:

> "*(1) The court may make an order under this rule where –*
>
> *a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or*
>
> *it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.*
>
> *(2) Where paragraph (1) applies, the court may –*
>
> > *(a) disallow all or part of the costs which are being assessed; or*
> >
> > *(b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.*"

8. The Master found, based on a concession by the Claimant, that the conduct of the Claimant in sending the notification to exit the portal, when he was not entitled to do so, amounted to unreasonable conduct within the meaning of CPR 44.11. The question the Master had to determine was what, if any, sanction should be imposed as a result of that unreasonable conduct. It was accepted by the Claimant that in a typical Protocol case, the Claimant's solicitors' conduct might be sufficient for the court to exercise its discretion so as to allow only the equivalent of fixed costs. However, the Claimant submitted that in the present case there were reasons why that should not be so. After reviewing the submissions and certain authorities, the Master encapsulated his reasons in his judgment at [53]-[61] in this way:

> "53. The Defendant says that if the Claimant had not erred, the case would (or at least might) have stayed within the Protocol and the costs applicable to the Protocol would (or at least might) then have applied. I cannot be certain what would have occurred without indulging in speculation.
>
> 54. What can be said for certain in respect of the chronology of this case is that it became more valuable in terms of damages to the Claimant as it progressed. It is common ground that it appeared to be within the parameters of the Protocol at the outset and so must have been valued at less than £10,000 at that point. But, by the time the case concluded, it was worth at least £26,636 i.e. the settlement figure and possibly more based on the schedule of loss.
>
> 55. This progression in the value of the case would have entitled the Claimant, had the case remained in the Protocol, to have notified the Defendant at some point that the Protocol ceased to apply in accordance with paragraph 4.3.

56. It seems to me to be an inevitable conclusion that the amounts allowed by way of fixed costs and disbursements for Protocol cases have been arrived at on the basis of claims which fit within the parameters of the scheme. Cases which do not fit those parameters are either not included in the Protocol (if it is obvious for example that the value is too high at the outset) or may leave it if the parameters cease to fit the case (where, for example the case increases in value). Where cases remain in the Protocol throughout, it is still possible for the Claimant to argue that he should not be limited to the fixed costs provisions (based on exceptionality, for example see 45.29J).

57. These three methods of avoiding the applicable fixed costs reflect the fact that such cases would almost inevitably incur costs over and above those allowed for dealing with cases which do fit within the parameters of the Protocol.

58. In order to guard against Claimants seeking to leave the costs regime inappropriately, rule 45.24 generally governs the costs consequences of cases which fail to comply with or fail to continue under the Protocol. This provision is only necessary because of the temptation for Claimants to leave the Protocol. The damages recoverable by the Claimant do not change by such a departure. The only change is in relation to the ability to avoid the limitation on costs. It is not a matter of speculation therefore, in my view, to conclude that Claimants and their solicitors, as a whole, are alive to the possibility of exiting the Protocol on various grounds when there is an opportunity to do so. In my Judgment, the Claimant's solicitors here thought that they were able to do so because of the delay in making the interim payment and wasted no time in sending the relevant notification.

59. On this basis, if the errant notification had not been given, then once the Claimant thought that the case was worth more than the Protocol limit, it seems to me inevitable that notification would have been given to the Defendant that the Protocol ceased to apply and subsequently Part 7 proceedings would have been issued. This conclusion is simply based upon what the Claimant solicitors actually did (i.e. seek to exit the Protocol at the first opportunity); the uncontested increase in the value of the case as it progressed; and the fact that the proceedings were indeed subsequently issued.

60. Against this conclusion lies the Defendant's argument that the Defendant may have offered a figure which the Claimant may have accepted. It is obvious that such an argument relies entirely upon speculation. Indeed, it is the sort of speculation was particularly deprecated by the passage set out above in the *Johnsey Estates* case. It also requires me to conclude either that the Claimant would have accepted an offer of £10,000 i.e. the maximum within the Protocol limit or that if a higher offer, such

> as the one ultimately accepted, was made, this would not trigger the Claimant's solicitors immediately certifying that the case was too valuable to continue within the Protocol. There is no evidence provided by the Defendant in support of either of these propositions. Nor is there anything in the facts of the case which would lend support to them. Consequently, I reject the Defendant's argument in this respect.
>
> 61. Given my conclusion that this case would always have exited the Protocol at some stage, it seems to me that the costs incurred would essentially have been the same as were actually incurred. To the extent that the departure would have been at a different time, I do not consider that to be sufficient to demonstrate any prejudice to the Defendant. In those circumstances, it would be inappropriate to limit the Claimant's costs in the manner contended for by the Defendant under rule 44.11. Instead, the Claimant should be entitled to such reasonable and proportionate costs as he can justify at a detailed assessment on the standard basis."

Authorities on hindsight cited to the Master

9. In *Williams* the Claimant sent a letter of claim to the Defendant notifying an intention to bring a claim for damages for noise induced hearing loss. At the time the letter was sent, the relevant Protocol did not apply because, although the claim was for damages less than £25,000, there were at that stage two Defendants. The Deputy District Judge found that the claim should have been made under the Protocol, but was not. This was because of the finding that the Claimant did not give full instructions to his solicitors and, if he had behaved reasonably, the Claimant would have been made against the Defendant only and therefore would have been within the Protocol. As Master Rowley recorded, the Court of Appeal found that, in order for rule 45.24 to apply there had to be Part 7 proceedings and a Judgment. At [51]-[63] the Court of Appeal considered the provisions in CPR Part 44. They referred to rule 44.3 and 44.4, as well as rule 44.11. They said:

> "52. These provisions contain numerous ways in which a party whose conduct has been unreasonable can be penalised in costs (what I shall call "the Part 44 conduct provisions"). In my view, the Part 44 conduct provisions provide a complete answer to a case like this. They provide ample scope for a district judge or a costs judge, when assessing the costs in a claim which was unreasonably made outside the EL/PL Protocol, to allow only the fixed costs set out in the EL/PL Protocol
>
> …….
>
> 59…… It seems to me that, in a case where a claim was not reasonably made under a Protocol, rule 44.11 (Misconduct) is of equal, if not more, importance. It will very often be because of

> misconduct on the part of the Claimant or the Claimant's legal representatives that a claim was made which unreasonably avoided the relevant Protocol altogether……
>
> 60. Mr Hutton QC accepted that Part 44 provides a mechanism which achieves the result he seeks. His principal complaint was that it was a less certain remedy than the automatic application of the fixed costs regime stop I have already said that that criticism is unrealistic: any dispute about whether or not the EL/PL Protocol should have been used, and whether it's non-use was unreasonable, will inevitably introduce a level of uncertainty which cannot be cured by the CPR, at least until that dispute has been resolved."

10. It is also worth mentioning at this stage what was said at [49], namely

> "49. Finally, I should say that, in my Judgment, the deputy district judge's concerns…… that any result other than the rewriting of rule 45.24 might lead to wholesale avoidance of the EL/PL Protocol, are overstated. It is not likely that large numbers of Claimants will invent bogus secondary or tertiary claims against other employers merely to avoid the EL/PL Protocol. Moreover, for the reasons given in paras 52 – 60 below in respect of CPR Part 44, I do not consider that the creation of bogus secondary claims would provide a successful escape route in any event."

11. In his judgment at [37]–[44], Master Rowley cited a number of authorities which guard against using the benefit of hindsight and speculation when dealing with the assessment of costs. These authorities are *Francis v Francis* [1956] P. 87; *KU v Liverpool City Council* [2005] 1 WLR 2657; *Johnsey Estates (1990) Limited v Secretary of State for the Environment* [2001] EWCA Civ 535; and *MXX v United Lincolnshire NHS Trust* [2019] EWHC 1624 (QB).

12. In *Francis* at page 95, Sachs J said that the correct viewpoint to be adopted by a taxing officer on a legal aid taxation, when considering whether or not an item in a bill of costs is "proper," is that of a sensible solicitor considering what, in the light of his then knowledge, is reasonable in the interests of his late client.

13. In *KU* the Court of Appeal held that, in a personal injury claim involving a conditional fee agreement and success fee, the court had no power to determine that, although the level of success fee was reasonable in view of the facts which were, or should have been, known to the legal representative at the time it was set, the claimant was only entitled to recover a different, much lower success fee in respect of some later period when different facts were, or should have been known to him. Brooke LJ said:

> "47… *Once it is clear… that a CFA may only carry one success fee, and that the task of a cost judge is to determine whether that success fee was a reasonable one in the light of the matters that the legal representative knew or should have known when it was made, there is simply no room for a costs judge to substitute*

> *different percentage increases for different items of costs, or for different periods when costs were incurred. He could only do this with the benefit of hindsight, which is prohibited, and the rules and regulations give him no power to remake the party's agreement*."

14. *Johnsey Estates* concerned proceedings in which a landlord claimed damages against a tenant for breach of the tenant's covenant. Under the Judgment the landlord recovered more than the sum of £200,000 which had been first paid into court, but less than the aggregate amount in court following the second payment in. The Defendant's submission was that the landlord should be deprived of all its costs between the dates of the first and second payment in. The argument was that the landlord was, throughout, seeking damages far in excess of the amount to which it was ultimately held entitled; and that it was the landlord's inflated and unrealistic valuation of its claims which had made it impossible to dispose of the action by agreement in 1996. Therefore, it was said, the action continued because the landlord was not interested in any reasonable offer. In those circumstances, the landlord must bear its own costs. The judgment, based on the rules as they then were, was as follows:

> "32. *The submission has some superficial attraction on the facts of the present case; but, for my part, I would reject it. It seems to me that a court should resist invitations to speculate whether offers to settle litigation which were not in fact made might or might not have been accepted if they had been made. There are, I think, at least two reasons why a court should not allow himself to be led down that road. First, the rules of court…… Secondly, speculation is likely to be a most unsatisfactory tool by which to determine questions of costs at the end of the trial. It is not, I think, suggested that each party would be required to disclose, at that stage, what advice it had received, from time to time, as to the strengths and weaknesses of its claim or defence. But without knowing that – and without a detailed knowledge of the financial and other pressures to which each party was subject from time to time – speculation would be hopelessly ill informed. If Mr Gaunt's submission were to be accepted generally, there would, I think, be a serious danger, that at the end of each trial, the court (in order to decide what order for costs it should make) would be led into another, potentially lengthy, enquiry on incomplete material into "what would have happened if…?" I am not persuaded that that would be compatible with the overriding objective to deal with cases justly.*"

15. More recently, in *MXX*, Slade J reversed a finding of Master Rowley as to what was in a district judge's mind when dealing with a costs budget, and thereby holding that the failure to correct the budget prior to the CCMC was in fact of no effect. She said:

> "62….. *In my Judgment Master Rowley erred in engaging in speculation as to what was in District Judge Thomson's mind when he reached his decision on the budget. Since Master Rowley reached his decision on whether the misstatement of Grade A rates in the budget affected deputy judge Thomson's*

> *decision based on speculation rather than evidence it cannot stand*."

The Defendant's Submission

16. The Defendant's submission is, in essence, that Master Rowley gave no weight to the fact that the unilateral actions of the Claimant's solicitors deprived the Defendant of any opportunity to settle the claim within the Portal. It is said that the Master wrongly described this as relying "entirely upon speculation" [60]. The Defendant says that the one thing that is certain, and not speculation, is that the unreasonable conduct by the Claimant's solicitors deprived insurers of any opportunity to seek or reach settlement under the Protocol.

17. It is pointed out that the departure from the Protocol was a matter under the sole control of the Claimant (Protocol paragraph 7.30); Further, the Claimant could not return to the Protocol. There are numerous advantages of the Protocol, summarised from the authorities as:

    (i) a typically prompt and effective settlement of modest value disputes at a modest level of costs;

    (ii) participation in a scheme agreed between all stakeholders under the auspices of the Civil Justice Council;

    (iii) participation in a "highly effective" scheme designed to promote certainty and proportionality;

    (iv) the opportunity to settle within the Protocol, as opposed to facing a Part 7 claim where the costs might quickly outstrip the sums at stake.

18. The damages in the present case were £20,000 (net of £6,636 CRU) and the costs claimed in the Part 7 proceedings bill of costs, some £96,000 inclusive of disbursements and VAT.

19. The Defendant submits that the Master was wrong to decide that "… if the errant notification had not been given, then once the Claimant thought that the case was worth more than the Protocol limit, it seems to me inevitable that notification would have been given to the Defendant that the Protocol ceased to apply and subsequently Part 7 proceedings would have been issued." [59]. It is said that settlement within the Protocol might well have been achieved. Further, the Master was wrong to elide the Claimant and his solicitors when he said at [58]: "… It is not a matter of speculation… To conclude that Claimants and their solicitors, as a whole, are alive to the possibility of exiting the Protocol on various grounds when there is an opportunity to do so." The submission is that the Claimant, properly advised, may well not have exited the Protocol, or at the very least it is speculative to conclude that he would not have stayed in the Protocol, given that:

    (i) The reason for exiting the Protocol was not a decision by the Claimant, but an error by his solicitors.

(ii) The Stage 2 settlement pack having already been sent by the Claimant to the Defendant, it is highly likely that a settlement offer would have been made by the Defendant.

(iii) It is not clear that the dispute on medical causation would have arisen, and whether it would have arisen at Stage 3, at which time the Claimant may have wished to remain in, rather than exit, the Protocol.

(iv) Insurers might well have made an offer above that of the Protocol limit in order to avoid exiting the Protocol. The Claimant may have preferred an earlier payment of damages (perhaps in 2015) rather than a later payment which occurred in 2017.

(v) The dispute as to the Claimant's credibility may have led to concern on his part as to a "fundamental dishonesty" finding, and therefore a wish to remain in the Protocol. A Defendant cannot recover its costs incurred within the Protocol. However, it could recover costs within a Part 7 claim if fundamental dishonesty were shown – the claim being governed by the QOCS provisions

20. It is accepted by the Defendant that Master Rowley's decision was an exercise of discretion. In fact, it was an evaluative decision on the facts, followed by the exercise of a discretion. As to an appeal against the exercise of a discretion, the court may only interfere:

(i) *If it considers "that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible*."

Lord Fraser in *G v G (Minors: Custody Appeal)* [1985] 1 WLR 647@652

(ii) If it is shown *"... That the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."*

Lord Woolf MR in *AEI Rediffusion Music v Phonographic Performance Ltd* [1999] 1 WLR 1507 at 1523.

Discussion

21. In his skeleton argument, counsel for the appellant (who was not counsel in the court below) submitted that the decision of the claimant's solicitors to send a letter exiting the Protocol, and despite enquiry from insurers, to persist in remaining outside the Protocol was not a mere "error", or it would have been remedied upon hearing from the insurers. It is said that there was no evidence provided as to the reason for the alleged error and why, when notified of the error, no attempt was made to rescind the notification and abide by the Protocol. This point does not appear in the Master's judgement. This is because the point was not raised before the Master. Although the Master found that the solicitors' conduct was unreasonable, he did not find that they were guilty of anything other than an error. Further, once the Protocol had been

erroneously exited, it was not possible to return. I therefore do not take this submission into account. It appears from the Claimant's solicitors' letter dated 24 April 2015, exiting the Protocol, that this was a standard form letter triggering exit if an interim payment was not made in time. The Defendants insurer then rang the solicitor, informing him of the error, and saying that they would deal with the case "as per Moj (cost)", presumably a reference to Portal costs.

22. The appellant also submitted that there was no evidence provided from the claimant as to what his stance would have been personally. From this, it is said, that adverse inferences can be drawn in line with the observations of the Court of Appeal in *Wisniewski v Central Manchester HA* [1998] EWCA Civ 596. Again, this point was not raised before the Master. It is too late to raise it on appeal. I therefore do not need to deal with it, though I will add that in my judgment, in the circumstances of this case, I would be surprised if the Master had drawn an adverse inference given the four principles summarised in *Wisniewski*; in particular the requirements that the claimant might have been expected to give material evidence in the costs hearing. Nothing in the Points of Dispute raised a case to answer that the claimant might have acted differently from the way his solicitors might have been expected to advise.

23. An authority not cited to the Master was *Surrey v Barnet and Chase Farm Hospitals NHS Trust* [2018] 1 WLR 5831; [2018] EWCA Civ 451. There were three cases. In each of them the claimant pursued a clinical negligence claim supported by legal aid. After liability was admitted, the claimants' solicitors switched funding to conditional fee agreements. The claimants were not advised that, by entering into a conditional fee agreement, they would lose a 10% increase in general damages to which they would otherwise be entitled if successful in the litigation. In the costs proceedings the costs judges disallowed the success fee and the after the event insurance premium, finding that they had been unreasonably incurred for the purposes of CPR r 44.4. The judge allowed the appeals, finding that no reasonable claimant would have decided against changing to a conditional fee agreement because of the possibility of obtaining an additional 10% damages. The Court of Appeal reversed the judge's decision. The costs judges all essentially decided that on the facts of the cases before them there was a doubt whether the claimant, properly advised, would have agreed to switch funding. Lewison LJ criticised the appeal judge's decision on these bases:

    (i) The Judge overturned the decisions of the costs judges on the basis that they placed too much weight on an analogy. In doing this he failed to apply the correct test to his appellate role. He was not *"entitled to interfere with the evaluative judgement of the three costs judges."* [53]

    (ii) Two of the costs judges said that they did not know whether the omission to give the correct advice *would* have changed the claimant's decision; but it *could* have done so. The Judge posed the question whether the omission "would" have made any difference. *"The judge's approach casts on the receiving party the burden of showing that the decision would have been the same. Since not only does the burden of proof rest on the receiving party, but also any doubt is to be resolved in favour of the paying party, I consider that the costs judges' approach was right, and the judge's was wrong."* [68].

24. Master Rowley evaluated the position on the facts before him in his judgement at [59]-[61]. I have set these paragraphs out in full above but, in short, as a starting point the

Master considered it "inevitable" that once the claimant thought that the case was worth more than the Protocol limit, the Protocol would have been exited. He gave his reasons for this, namely, what the claimant's solicitors actually did (albeit erroneously) in exiting at the first opportunity; the uncontested increase in the value of the case as it progressed; and the fact that proceedings were indeed subsequently issued. Having come to the preliminary conclusion that it was inevitable that the Protocol would have been exited, he then considered in the balance, and rejected, the defence argument that the defendant may have offered a figure which the claimant may have accepted. He described this as "speculation".

25. I have to ask whether the Master was not entitled to reach the decision which he did. I now address the defendant's arguments on this point.

26. There was discussion as to the use of the Master's term "inevitable". The defendant submitted that (a) this was an erroneous finding and (b) that the Master took into account this inevitability, not only in evaluating whether the case would in any event have exited the Portal, but also as a "trump" point in exercising his discretion. I do not accept this because, as I have already explained, this inevitability, was the preliminary finding subject to them weighing the defendant's counter argument in the balance at [61]. Further, or alternatively, having considered the defendant's points, he still considered it to be inevitable since he rejected these points as being without any real merit.

27. The defendant suggests that the Master did not (at [60]) take into account the point made that the defendant had been deprived of the opportunity of settling the claim within the Portal. Although the defendant says that exiting the Portal deprived it of any opportunity to settle under the Protocol, the Master, when weighing the information before him, was entitled to say that it was speculation that the defendant may have offered a figure which the claimant may have accepted. In other words, on the facts he regarded any such opportunity as being merely theoretical rather than of any substance.

28. The defendant criticised the Master's statement at [60] that if a higher offer such as the one ultimately accepted by the claimant had been made there was no reason to conclude that "this would not trigger the claimant's solicitors immediately certifying that the case was too valuable to continue within the Protocol." However, the Master had already found that it was pure speculation that any such offer might realistically have been made. Therefore, even if the later section of [60] is capable of criticism, it is irrelevant since it was in essence a point made in the alternative to the primary finding.

29. The Master did not specifically address the burden of proof, or the fact that any doubt is to be resolved in favour of the paying party, in accordance with what was said in *Surrey*. In fact, nor did the claimant's/appellant's skeleton. Nevertheless, it is clear from the Master's terminology that, that burden and standard of proof were fully satisfied.

30. The reality is that an experienced Master, taking into account the fact that there would have been a perfectly valid reason for the claimant to exit the Protocol, and the fact that the claimant's solicitors did in fact exit as soon as (they thought it was) possible, concluded that it would in any event have been exited in due course. The structure of the judgment is important. Though I will not quote all relevant paragraphs, the Master identified the 6 factors relied upon by the claimant as to why the claim would have

exited the Portal in any event [26]–[27]; he warned himself against speculation [43]–[44]; he referred to and based his findings on the uncontested facts in the Bill of Costs/Replies and skeleton arguments [46].

31. Insofar as the Master relied on the fact that the claimant's solicitors exited the Portal at the first (though erroneous) opportunity [58], it is of importance to note (a) that delay in making an interim payment permits exiting the Portal, (b) the solicitors exited presumably with the claimant's instructions.

32. There was therefore ample basis for the Master's conclusions. I would add that there was no evidential basis for suggesting that the defendant would have made other, substantial offers within the Portal. The Stage 2 window is only 35 days. Although it can be extended by agreement, there is nothing to suggest that the claimant's solicitors would have agreed to an extension. The only other offer made by the defendant was in January 2017 in the sum of £10,000. This was after the expiry of the limitation period and after Part 7 proceedings had commenced – at that stage limited to £15,000. Nor was there any evidence of correspondence from the defendant seeking to compromise the claim at anything approaching the amount of the eventual settlement.

33. As to the defendant's point that the Master wrongly elided the claimant with his solicitors, distinguishing between the two was not something which was argued before him. In any event, the Master would have been entitled not to distinguish between them in the circumstances of this case. There was no particular disadvantage to the claimant himself in exiting the Portal and starting Part 7 proceedings. This was not in any way analogous to the situation in *Surrey*. There was no obvious disparity between the interests of the Claimant and his solicitors. As already stated, when the solicitors did exit they seemingly had instructions to do so. The defendant suggests that in exiting the Portal the claimant became at risk as to costs if the defendant demonstrated fundamental dishonesty. This was not argued before the Master, there has been no properly particularised dishonesty claim and, as Mr Mallalieu said, had the defendant wished to seek such a finding, he should have set out a proper case and pursued the point – possibly by seeking to have the claim struck out.

34. Nor, as far as anyone could tell, was it put to the Master for his consideration that an advantage for a Claimant in staying in the Protocol is that any Stage 2 offer, if rejected, has to be paid to the Claimant in any event.

35. The defendant further says that it is not irrelevant that he decided at an early stage under the Protocol (Stage 1) to admit liability. There is a significant incentive to admit liability in order to achieve a resolution. Further, that the claimant has obtained the significant advantage of a liability admission which might not have been made under Part 7. I do not accept this argument. If, as the Master found, the claimant would have validly exited the Protocol, then any such advantage would have been obtained in any event. Also, the defendant could have denied liability in the Part 7 proceedings; alternatively, sought to resile from the earlier admission.

36. The Master was referred to two county court decisions, *Day v MIB* (2 March 2015, Birkenhead County Court, HHJ Gregory) and *Dawrant v Part & Parcel Network* (26 April 2016, Liverpool County Court, HHJ Parker). I do not propose to deal with these in this judgement. Although of interest in considering the position, they add nothing authoritative to what I have taken into account.

37. Finally, the defendant submits that the Master's decision opens the door to widespread flouting of the Protocol and might provide incentives to increase the perceived value of the claim in order to justify avoidance of fixed costs. Additionally, that it fails to ensure that one of the important aspects of the CPR, the importance of rule-compliance, is encouraged and that non-compliance is visited with a proper sanction. As to the first point, I respectfully adopt, with the necessary modifications, the passage cited above from *Williams* at [49]. It is very unlikely that solicitors will feign error so as to exit the Protocol in the hope that circumstances will validly arise which would authorise them to exit in accordance with the Protocol rules themselves. As to the second point, rule 44.11 gives the court a discretion to be exercised judicially on the facts of the case before it. It is up to the Master to make the appropriate decision on the facts and arguments raised.

Summary

38. For the reasons set out above, this appeal must be dismissed.