General Form of Judgment or Order

In the County Court at Leeds	
Claim Number	D85YM401
Date	7 February 2019

MR WAHEED ASHRAF	I St Claimant Ref 103555
MR WILLIAM G SAVAGE	1 st Defendant Ref 00020011/48867

Before Deputy District Judge Nix sitting at the County Court at Leeds, Leeds Combined Court Centre, The Courthouse, 1 Oxford Row, Leeds, LSI 3BG.

Upon hearing parties

IT IS ORDERED THAT

1. Judgment attached.

Dated 16 January 2019

Kaizen Law Solicitors
Falcon Suite
2nd Floor
Bridgeman Court
Salop Street
Bolton
BL2 IDZ

In the County Court at Leeds

Before DDJ Nix

D85YM401

Judgment, relating to the hearing of 16 January 2019

I am to determine the type of costs which are to be awarded in this claim, which resolved in part 7 proceedings on 10 September 2018, just prior to the listed fast track trial on 13 September 2018.

This matter was listed for hearing on 16 January 2019. Judgment was reserved. This is my judgment. It is to be provided to the parties by email.

This was an RTA protocol case in which on 6 July 2017 in stage 2 of the protocol process the claimant gave notice to the defendant under PD8B, 7. 76 that the claim was unsuitable for the protocol. The claim therefore exited the portal and part 7 proceedings were issued on 16 November 2017.

PD8B, 7. 76 provides that where the court considers that the claimant acted unreasonably in giving such notice, rather than costs for the part 7 fast track proceedings in the form of CPR 45.29C costs, and disbursements, it will award just the fixed costs in 45.18 (table 6, fixed costs in relation to the RTA protocol), and 45.19 disbursements. See also CPR 45.24 and CPR 44 (conduct provisions at 44.4(3)). The defendant in the part 7 claim defence invited the court to put the claim back in the portal or restrict the claimant's costs. I need to determine if to restrict costs to the CPR45.18 (which the defendant says are £1260.00 inc VAT. as opposed to £5,668.61 inc VAT under CPR45.29C). The defendant submits that if CPR45.18 costs are awarded, the claimant should be responsible for the defendant's part 7 costs.

This was a claim for personal injury, vehicle damage, storage and recovery and credit hire arising from a road traffic accident on 1 April 2017. The claimant's vehicle was a taxi licensed by Leeds City Council. The claim was pleaded at £ 16,458.19 in the particulars of claim of 26 October 2017. £13,259.65 of this was credit hire. Ultimately, as set out in a consent order lodged at court, the claim was settled for £10,344.24 and the costs issue was listed for hearing on 16 January 2019. The claim value was (as stated in the portal process and in part 7 proceedings) well below the portal value limit. The defendant states the amount in issue was not a particularly significant amount, as PSLA and repairs did not remain in dispute.

The CNF was dated 5 April 2017. Some 37 pages of documentary evidence were sent by the claimant to the defendant. The defendant admitted liability in the portal on 25 April 2017, by which time repair costs had been paid by the defendant. An offer of a replacement vehicle – an intervention offer - had been made by the defendant on 13 April 2017, but not accepted. The claimant maintains that questions raised by them on the offer were not satisfactorily answered by the defendant/those acting for him.

The events which led to the claimant giving notice of removal from the portal, at stage 2, were:

23 June 2017 objections from the defendant on the claim, primarily on the credit hire claim.
26 June 2017 response from the claimant.
4 July 2017 correspondence from the defendant regarding hire and the intervention offer.
5 July 2017 defendant portal offer. PSLA and repairs agreed. Hire disputed. Intervention offer relied upon. Basic hire rate evidence loaded up to the portal.

6 July 2017 claimant's removal notice.

I have heard oral submissions from counsel for each party and considered witness evidence of Kavita Khanna for the claimant and Kaveh Rashid and Sabana Ali for the defendant.

I make the following comment/determinations:

1. Firstly, is this a res judicata issue? Has a decision been made by the judge which means I should not now be making a determination on costs? Does the decision by the court in March 2018 to allocate the claim issued under part 7 to fast track and give directions indicate/confirm that the matter was not suitable for the portal, or confirm the reasonableness of /show approval of the claimant solicitor's decision to remove the claim from the portal?

No. I do not accept that referral of the claim, after part 7 proceedings had been issued, to a judge on paper for directions (which he gave without a hearing) is a res judicata situation. Indeed, as the defendant in its defence had suggested alternatives - it invited the court to transfer the claim back into the portal or restrict the claimant to portal costs. I agree with what was said by DJ Revere in Bursuc v EUI(2018) ("rule 45.24 requires that the application is made after judgment has been given...."), which means that the giving of part 7 fast track directions cannot create a res judicata situation; we would not need CPR 45.24 if the judge's allocation decision had created a res judicata situation.

2. Secondly, what does a "reasonable" decision within the meaning of CPR45.24 mean?

There is no definition of "reasonable" given within the rule. I interpret it as being objectively reasonable. Any decision on reasonableness must be assessed by reference to the overriding objective, with particular attention to what is just and proportionate.
I accept that it is for the defendant to prove that the claimant acted unreasonably. The burden of proof will not be met by just showing that a different course of action could have been taken by the claimant.
Whilst it is important to consider on the information at the time what options were available to the claimant, taking into account the portal procedure and how it works, I accept that caution must be exercised in speculating too far about but what could have been.
Equally, I consider that (notwithstanding the fact that all the circumstances of the case are relevant considerations under CPR44.2(4)), caution should be used when looking at what did actually happen after portal exit. It appears that the claim, including the element for credit hire, was robustly defended on a 9 page defence, until less than a week before trial. The claimant may suggest that this supports their position that the claim was not suitable for the portal. I note this submission, but would say to the parties that I consider that a defendant may often adopt a different strategy once a claim is being brought under part 7 compared with when a claim is in the portal, and may decide once in part 7 to no longer take a commercial view but instead pursue the conduct of a full defence, taking all available points, and considering the claimant's witness evidence and any rates evidence in some detail, and perhaps plan to conduct a cross examination of the claimant, but choosing to do so does not of itself mean the claim was unsuitable for the portal. The claimant suggests to robustly defend almost to trial is unreasonable behaviour but once the claimant elected to issue under part 7 I find it difficult on the information available to me, in a compromised (not determined at trial) claim to say that it was unreasonable under CPR44.2(5)b) for the defendant to contest particular allegations.

3. What claims is the portal process for? Was this claim unsuitable for the protocol when notice was given?

The first point to make is that although the original portal was not used a great deal for credit hire, I note that the current protocol allows for a credit hire claim.
I also acknowledge that there is a mechanism to load up evidence to the portal, and that here the defendant used it to load up a basic hire rate evidence, (which the claimant suggested was non-compliant with Stevens v Equity).
Sabana Ali explains the process in the portal until the end of stage 2.
If a portal claim needs to proceed to stage 3, a part 8 claim must be issued by the Claimant and a determination will be made on the stage 3 pack by a judge on paper or at a stage 3 oral hearing. If the latter, there can be submissions made by advocates on quantum, but not oral expert or witness evidence.
I take judicial notice of the fact that such hearings are listed for such period of time as the court case managing the claim considers appropriate. Some courts will allow 15 minutes. Others may allow 30 or 45 minutes. This is not dissimilar to the amount of time for which a disposal hearing is listed, when judgment has been entered for a sum to be assessed by the court (where there will be no consideration of breach or causation). By contrast, a fast track RTA with credit hire may be listed for up to one day and common time estimates suggested by parties at directions stage are 3-6 hours, even when breach is not in issue, to take account of the likely need for oral witness evidence.

4. Fourthly, are there any decided cases to assist me with the issue of unreasonable exit?

Yes. There are cases to be considered. There are no decisions on all fours with this case which are binding on me, so far as I am aware. There are many in which unreasonableness has been found for exit notifications for trivial reasons, such as those set out in paragraph 11 of the claimant's skeleton. I have read the Ilari decision and am alive to the fact that there are reasons to manipulate the portal procedure to give the claimant's solicitors benefit in costs. When looking at what the claimant gives as reasons for exit, I need to assess if those are the real reasons and are valid, or whether I consider there is Ilahi type manipulation of the portal. The claimant refers me to Bursuc, another credit hire case where in a County Court decision there were said to be substantial disputes of fact to resolve, making that claim unsuitable for the portal. Having noted that oral evidence cannot be given in the portal/ a Stage 3 claim, I will consider if the claimant's reasons for exit in this claim give rise to such issues. The claimant also refers me to obiter in Phillips v Willis (2016) where reference is made to "very high car hire charges..might involve complex issues of law or fact which are not suitable for resolution in a Stage 3 hearing." This is obiter, but I will consider if the claimant's reasons for exit in this claim give rise to such issues.

5. Fifthly, what are the claimant's reasons for exit from the portal?

In submissions the claimant's advocate suggested that the reasons need not be limited to what is said in the letter giving notice (for the notice letter see KAR3 of Kaveh Rashid's witness statement). I disagree. We must look at what was said in the letter giving notice, albeit alongside correspondence between the parties including the defendant's letter of 23 June 2017 advising of their position on the claim, which appears at KAR2 of Kaveh Rashid's witness statement.

I agree with the defendant that the question of whether the notice to remove was unreasonable is to be judged at the time the notice was given, and so looking at the grounds on which the claim was later defended under part 7 is inappropriate.

The notice letter cites "complex issues of fact and law" and says the following issues are relevant: BHR evidence which is non compliant with Stevens v Equity, and disputing the validity of the intervention offer. The letter does not refer to it, but the defendant had raised

the following issues in the letter of 23 June 2017 as being in issue : on hire - enforceability of hire agreement (including representations made), need, rate, the fact an intervention offer had been made on 13 April 2017, period, and claim for collection and recovery. The need for storage was raised and enquiries made of the factual basis for the recovery claim.

I can see that there were additional points taken by the claimant in the letter than the two stated eg enforceability (on which oral evidence is often heard in part 7 claims), need (although there is a low bar to prove such, although it is not self proving), period etc. I need to determine if the decision to exit was unreasonable however on the two specifically stated issues.

6. Sixth, what is my decision on whether the claimant's stance that the portal was unsuitable was reasonable?

In terms of BHR evidence of the defendant being non compliant with Stevens, I cannot see why this is a good reason for exit. It is not objectively reasonable to so maintain. This is since if the evidence was non compliant, that would/could be stated to a judge at stage 3. That judge, who would doubtless have dealt with many credit hire cases in part 7 proceedings, could decide (as in part 7, within the portal provided time allows in the Stage 3 hearing) if it is compliant and if he/she determined it is non compliant, the judge would decide there is no evidence to "displace" the claimant's credit hire claim figures.

In terms of the intervention offer, although not explicit in the notice letter, it appears that the claimant takes issue with whether the defendant gave sufficient information for the claimant to consider the offer. See paragraph 14 of the statement of Kavita Khanna in which she refers to a letter of 23 May 2017 from the claimant's solicitors to the defendant's insurers. The defendant says that a judge could determine this issue, (the "validity" of the intervention offer), without oral evidence. I disagreeThe defendant's counsel suggested the claimant could have submitted (as evidence within the portal) the claimant solicitor's response to the intervention letter and that may have sufficed, instead of witness evidence. I note the suggestion. If I needed to comment, on the evidence I have, I would say that I disagree but actually, going back to what I said earlier in this judgment, I need to decide if this was a reasonable decision by the claimant, not if there were other steps that could have been considered/ been taken. It is for the defendant to prove that the claimant acted unreasonably. The burden of proof will not be met by just showing that a different course of action could have been taken by the claimant. The defendant has not proven unreasonableness by the claimant.

If I have been too restrictive when I say the reasons for exit to be considered should be limited to the two issues stated in the notice letter, I would also say that enforceability would be another reason the portal was unsuitable, being an issue on which oral evidence would be needed and that would have been impossible in the portal, and made the portal unsuitable. If accepted as being a reason for the claimant to serve notice, I would find that to be objectively reasonable. In weighing up what is objectively reasonable, for the avoidance of doubt I will say that I do not consider that written evidence would have been sufficient on either issue (as the defendant's counsel drew to my attention the ability to submit written oral evidence, and I accept that whilst not needed in most cases, written witness evidence can be submitted, to view alongside the 37 pages of documentation the claimant at an early stage loaded to the portal).

Stage 3 portal hearings are for quantum assessments (as are disposal hearings). The process is not appropriate for all claims, which is why there is the ability to leave the portal. The time allocated for such hearings and the evidence is limited. In the portal, a Judge at stage 3 will have limited evidence on which to make a determination.

Claims must be dealt with proportionately. The claimant says removal of the claim at the time the notice was served was not only reasonable but also a proportionate step. I agree. I agree that it was reasonable, against the backdrop of the overriding objective. The CPR of course states that the court must seek to give effect to the overriding objective of enabling the court to deal with cases justly and at proportionate cost, and that:

“2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –
(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate –
(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv) to the financial position of each party;
(d) ensuring that it is dealt with expeditiously and fairly;
(e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases; and
(f) enforcing compliance with rules, practice directions and orders.”

It may be said by the defendant that use of the portal saves expense and is proportionate to the amount of money involved, and that the court should be minded to consider especially (d) and (e) when considering the reasonableness of the claimant’s decision to exit the portal, but the overriding objective requires examination of justice also, and so far as practicable ensuring the parties are on an equal footing, and considering proportionality by reference to complexity (and I do consider there is some complexity here as in Phillips v Willis (2016), and dealing with a case fairly (and without oral evidence, in a stage 3 hearing I do not consider the claimant’s case would have been dealt with fairly).

For the avoidance of doubt, I accept that the RTA protocol came into being to streamline the handling of claims and to reduce overall costs. The courts are clear that attempts to circumvent the protocol to maximise costs will not be tolerated, but I do not consider the claimant solicitors have done so here. I do not find there to be Ilahi type manipulation of the portal.

7. In conclusion, PD8B, 7.76 provides that where the court considers that the claimant acted unreasonably in giving notice to leave the protocol, rather than as costs for the part 7 fast track proceedings in the form of CPR 45.29C costs, and disbursements, it will award just the fixed costs in 45.18 (table 6, fixed costs in relation to the RTA protocol), and 45.19 disbursements. Having considered this provision and also CPR 45. 24 and CPR 44 (conduct provisions at 44.4(3)) and evidence and counsels’ submissions I do not consider the claimant acted unreasonably. The defendant is to pay to the claimant the claimant’s costs for the part 7 fast track proceedings in the form of CPR 45.29C costs, and disbursements. The defendant’s suggestion that the claimant should be responsible for the defendant’s part 7 costs is rejected.

In relation to the costs of the hearing of 16 January 2019, the costs are reserved to me, DDJ Nix.

Arising from this decision, if either party wishes to address the court on costs, submissions (and copies of any relevant costs schedules filed prior to the hearing of 16 January 2019) and a draft proposed order (if applicable) are to be filed and served by 4pm on 6 February 2019.

This judgment is being emailed to counsel for the claimant and to the solicitor for the defendant today, 23 January 2019, with a draft of the order that I will be asking the court to draw and serve. The order will be served by the court when the court staff have processed it.

DDJ Nix
23 January 2019