EXITING THE RTA PROTOCOL: COSTS AND EVIDENTIAL CONSIDERATIONS

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I. INTRODUCTION: THE CIRCUMSTANCES IN WHICH A CLAIM MAY EXIT THE PROTOCOL PROCESS

1. Once a claim exits the Pre-action Protocol for Low Value Personal Injury in Road Traffic Accidents, (**'PAP'**), it cannot subsequently re-enter the process, (paragraph 5.11, PAP). Accordingly, it is important for solicitors, on both sides, to appreciate the consequences of exiting; particularly those relating to costs which should be weighed against any evidential benefits under Part 7. This note considers the costs and evidential implications in particular. It does not deal with the provisions on exiting the PAP where an interim payment is requested although a similar analysis will apply. A summary guide to making a decision whether to accept or oppose exit is given at paragraph 25 below. That section can be read either first or last.

2. A claim will, at Stage 1, ordinarily continue under the PAP process provided the defendant admits liability in full and responds to the Claim Notification Form, (**'CNF'**), without giving notification that either: (1) the CNF is deficient; or (2) the small claims track would be the normal track if a claim were issued, (paragraph 6.15 of PAP).

II. ROUTES TO EXITING THE PROTOCOL

3. The PAP and Practice Direction 8B, (**'PD'**), provide, *inter alia,* for the following further routes to exiting the Protocol at either Stage 2 or 3:

(a) Further evidence is required

4. Paragraph 7.2 of the PD provides that the court must order that a claim will continue under the Part 7 procedure, allocate the claim to a track, and give directions, where the court considers that:

    (1) further evidence must be provided by any party; and

(2) the claim is not suitable to continue under the Stage 3 Procedure.

5. Paragraph 7.3 provides that the court will not award the stage 3 costs in these circumstances.

6. In *Phillips v Willis* [2016] EWCA Civ 401 the Court of Appeal considered whether a decision that the claim should proceed under Part 7 because the personal injury element had dropped out, leaving only a claim for credit hire, was within the judge's discretion. The decision was held to be irrational in that regard, ([31]), it being irrelevant that the claim had been whittled down at Stage 2, ([33]). Lord Justice Jackson found that:

> *'I … come to the conclusion that this case did not fall within the ambit of paragraph 7.2 of PD 8B. The district judge had no power … to direct that the case should proceed under Part 7.' ([34])*

7. By way of *dicta*, Lord Justice Jackson stated:

> *'There has been some debate as to the circumstances in which paragraph 7.2 of PD 8B might apply. We do not need to decide that question toady. I should, however, point out that there can be cases where, … claims are proceeding under the protocol which involve very high car hire charges. Such cases might involve complex issues of law or fact which are not suitable for resolution at a stage 3 hearing. I need not speculate what orders the court might make in those cases. Suffice it to say that the case before us is not such a case.'* ([35]).

8. Paragraph 7.2 of the PD may apply where, for example, the court considers that oral testimony is necessary to properly determine the claim. That might be the case in relation to an allegation of misrepresentation inducing a credit hire agreement, although it is difficult to see why the court would take that approach unless: (1) there was some *prima facie* evidence of the same; or (2) an application was made by one of the parties. The former is unlikely to happen in practice. A defendant wishing to make such an allegation may do better by either contesting liability until a later date or by failing to respond to the CNF, (paragraph 6.15 of the PAP) thereby forcing the matter onto Part 7. Such a defendant might be able to argue against the same constituting unreasonable conduct for costs purposes in the Part 7 proceedings on the basis that it was the only way to raise a *bona fide* allegation, (however, see [22] below on the threshold). It might

also arise where there are complex issues of causation, remoteness, or scope of duty, or an allegation of fundamental dishonesty.

(b) Defendant opposes the claim on the basis of non-compliance with PAP

9. Paragraph 9.1 of the PD provides that the court must dismiss a claim, and the claimant may start part 7 proceedings, where:

    (1) The defendant opposes the claim because the claimant has –

        (a) not followed the procedure set out in the relevant Protocol; or

        (b) filed and served additional or new evidence with the claim form that had not been provided under the relevant Protocol.

10. A defendant may choose to oppose the claim in that way, for example, where the claim is valued in excess of the PAP limit of £25,000.00. It is not clear whether D is entitled to the costs of any stage 3 hearing in this event; unlike paragraph 7.2 of the PD, the provision is silent. There is no explicit separate power that applies. D could argue for such costs, as pre-action costs in any Part 7 proceedings, on the basis of unreasonable conduct depending on track, (see [22] to [24] below). It will, though, likely, be better for a defendant to raise such opposition in writing prior to any hearing so as to avoid such costs.

11. Raising opposition has the advantage of inhibiting C's pursuit of the claim although solicitors will be keen to pursue the claim in their client's interests, and for fear of a professional negligence suit. Accordingly, defendants ought to pursue this course only where: (1) there will be an evidential benefit under Part 7, for example, cross-examination is desired because dishonesty on the part of the claimant, or misrepresentation in relation to a claimed liability, are suspected; and/or (2) the claimant's non-compliance is sufficient to lead to a favourable costs award. The latter is considered further below.

(c) Withdrawal of offer at stage 2

12. Paragraph 7.46 of the PAP provides that where a party withdraws an offer made in the Stage 2 Settlement Pack Form after the total consideration period, or further consideration period, the claim will no longer continue under the PAP and the claimant may start Part 7 proceedings.

13. This is another route by which either party could, theoretically, force proceeding onto Part 7. However, there would be a good argument available to the other side that without reasonable explanation, such a withdrawal amounts to unreasonable conduct, particularly if it is evident that the only purpose was to force proceedings onto Part 7.

(d) General discretion at any stage

14. Additionally, the court will retain a general discretion under CPR r8.1(3) to order, at any stage, the claim to continue as if the claimant had not used the Part 8 procedure and, where it does so, to give such directions as it considers appropriate.

15. That discretion applies to the whole of the Part 8 process, not merely the specific PD's and protocols. Part 8 is meant for claims which do not involve a substantial issue of fact. The White Book 2019, Volume 1, states, by way of comment, that in *Phillips v Willis* [2016] EWCA Civ 401 *'it was held that Stage 3 proceedings issued under PD 8B cannot be converted to Pt 7 proceedings under r.8.1(3) as that would incur grossly disproportionate costs to the damages at stake.'* (Commentary at [8.1.3]).

16. However, that is not strictly accurate. The Court of Appeal found that the district judge had not been exercising CPR r8.1(3) but only paragraph 7.2 of the PD. It was stated, *obiter*, that if that were wrong then it would have been impermissible to exercise the discretion in the circumstances of the case. In relation to the general discretion to transfer under CPR r8.1(3), again by way of dictum, Lord Justice Jackson stated:

> *'I am bound to accept that the language of r8.1(3) is wider than the language of paragraph 7.2 of the practice direction. On the other hand, CPR r8.1(3) cannot be used to subvert the protocol process.'* ([37])

17. It remains unclear to what extent r8.1(3) will permit a court to transfer a claim proceeding under the PAP to Part 7. Certainly, the reason will need to be sufficient to make the costs implications proportionate. It will usually be more appropriate for paragraph 7.2 of the PD to be exercised since it is the more specific, (see *Williams v Secretary of State for Business, Energy and Industrial* [2018] EWCA Civ 852 at [44]). Indeed, it is strongly arguable that the PD simply gives further, more specific, effect to the power in r8.1(3) in the context of the PAP process.

III. THE COSTS IMPLICATIONS

(a) Claimant has failed to comply or decided not to continue with the Protocol

18. Where the defendant opposes the claim for non-compliance under paragraph 9.1 of the PD, CPR r45.24 applies. It does so also under the EL/PL Protocol. It provides that a claimant who obtains judgment will only be entitled to recover the PAP fixed costs and disbursements as opposed to those ordinarily available on the relevant track, on the following conditions:

(i) Deficient CNF

(1) The court determines that the defendant did not proceed owing to the claimant's failure to include sufficient information in the CNF. This is, in effect, what would otherwise be a failure to send a compliant pre-action letter, CPR r45.24(2)(a).

(ii) Claimant acted unreasonably in a relevant manner

(2) The court considers that the claimant acted unreasonably in one of the following respects:

(a) by discontinuing the PAP process and starting Part 7 proceedings, (CPR r45.24(2)(b)(i));

(b) by valuing the claim at more than £25,000, so that they did not need to comply, (CPR r45.24(2)(b)(ii));

(c) in any other way that caused the process in the PAP to be discontinued, (CPR r45.24(2)(b)(iii)). This does not include (1) above.

(iii) Complete non-compliance by Claimant

(3) The claimant did not comply with the PAP at all despite the claim falling within it, (CPR r45.24(2)(c)).

19. Each of those conditions, or sets thereof, is a species of the familiar principle that a party who behaves unreasonably at the pre-action stage may expose themselves to an adverse costs order. The difference in respect of paragraph 9.1 of the PD is that the rules prescribe for the costs which would have been available under the Protocol process in case the claimant has acted in non-compliance therewith.

20. That leaves open the cost consequences, for either party, in case they should be responsible for the claim proceeding by way of Part 7 under the other provisions considered above, (paragraph 7.46 of the PAP at [4] above; and paragraph 7.46 of the PD at [12] above). It is strongly arguable that in such cases, to the extent that there is a power to do so, a court ought to have regard to CPR r45.24 in deciding the appropriate costs award. In *Williams v The Secretary of State for Business, Energy & Industrial Strategy* [2018] EWCA Civ 852, Court of Appeal considered a case which would have been commenced under the EL/PL Protocol but for the fact that the claimant initially chose to issue against two defendants. The matter was settled and Part 7 proceedings were never issued so that CPR r45.24 did not apply, ([40]). However, the Court found that:

> *'Rule 45.24 does cover the position if a claim should have been brought under the EL/PL Protocol but was not. It cannot therefore be said that this was an eventuality that the CPR ignored. On the contrary, r.45.24 is a detailed provision dealing with the costs consequences where the claim was either not made or not continued under the EL/PL Protocol.'*

21. The Court concluded that, although words could not be read into CPR r45.24, CPR Part 44, which contains the ordinary rules for the basic assessment of costs would, anyway, provide a similar function:

> *' … Part 44 provides a complete answer to the issues raised on this appeal. In a case not covered by r.45.24, such as this one, a defendant can rely on the Part 44 conduct provisions to argue that only the EL/PL Protocol fixed costs should apply.'* ([61]).

(a) The effect of the track to which the Part 7 claim is allocated

22. Where a claim is subsequently issued on the multi-track the same will apply. By analogy, it is strongly arguable that the same applies in respect of CPR r27.14(2)(g), which provides for *ultra* fixed-cost awards on the Small Claims track in case of unreasonable conduct. In accordance with *Dammermann v Lanyon Bowdler LLP* [2017] EWCA Civ 269, the test will be: (1) whether C acted in a manner described in CPR r45.24; and (2) if so, whether that conduct, alone or taken with any other conduct, permits of a reasonable explanation, (*Dammermann* at [30]). Given the purposes of the PAP which gives further effect to the overriding objective, the hurdle in respect of (2) is likely to be high. Notably, CPR r45.24(2)(a) and (c) do not include an unreasonableness requirement. It is

arguable therefore that a deficient CNF or complete non-compliance by C are at least *prima facie,* if not automatically, unreasonable under the *Dammermann* test.

23. The oddity will be in claims allocated to the Fast Track where, under CPR Part 45 IIIA, there is no power to depart entirely from the fixed costs regime, but only to award an additional amount in exceptional circumstances, (CPR r45.29J). Although the conditions under CPR r45.29 will be relevant to that test, they are less likely to meet the higher threshold, at least where taken alone. They also could not result in a mirroring of the prescribed costs since the section is contingent on the principle that costs follow the event and allow only an increase for the winning party. Where the winning party was not responsible for exit this might provide a windfall although further unreasonable conduct on the part of the other party is likely to be necessary, (on the exceptional circumstances test see my article on *Hislop v Perde* [2018] EWCA Civ 1726 at [12] to [13], available here).

24. In considering the above, defendants will be particularly keen to consider the effect of the Qualified One-way Costs Shifting provisions, (**'QOCS'**). Those provisions bar a defendant from enforcing a costs order against a claimant where a claim for personal injury remains a part of the claim unless the claimant is found to be fundamentally dishonest. The strength of any allegation of fundamental dishonesty will therefore be key to deciding whether it is advantageous to proceed by way of Part 7 because it determines both whether cross-examination is desirable and whether enforcement of a favourable costs award is possible.

IV. CONCLUSION: A ROUGH GUIDE

25. The following provides a rough guide for the purpose of deciding whether exiting the PAP process is desirable:

    (1) Is there an evidential reason why the claim might be better dealt with under the Part 7 procedure?

    - For defendants, the most common reasons are likely to be because: (1) the defendant wishes to cross-examine on misrepresentation, in respect of a liability claimed as a special damage, such as credit hire; or (2) to assert fundamental dishonesty, perhaps on the basis of a lack of causation.

- For claimants, this might include difficult questions relating to causation, remoteness, or whether a particular loss falls within the scope of the duty. Both parties will need to consider whether the further evidence could be adduced on paper by way of application under paragraph 7.1(3) of the PD as an alternative.

(2) Does the claim still include a claim for personal injuries?

- For defendants, the absence of such a claim will mean that costs might be recoverable on success, giving a further reason in favour of exiting Part 8B. This will be particularly weighty where the claimant's conduct provides the basis for exiting; there may then be the possibility, depending on track, of limiting the claimant's costs in case of a loss. The strength of any allegation of fundamental dishonesty will also impinge on the weight of this consideration since a finding of the same has the same result.

- Claimants will want to weigh up whether the evidential benefits of Part 7 outweigh the additional costs risks in case of either a win or a loss.

(3) Which track will the claim end up on if Part 7 proceedings are issued?

- For defendants, the Small Claims and Multi- tracks provide more scope for recovering costs where the claimant's conduct is the cause of exit. There is scope for arguing on those tracks that only Protocol fixed costs should be recovered by a successful claimant. Where the defendant's conduct is the reason for exit, the converse may hold. In case the defendant should be successful, QOCS will apply unless fundamental dishonesty has been established. On the Fast Track, exit will only be relevant to either party in case the reasons for exit are part of a set of exceptional circumstances which might result in a higher award for the winning party, ([23] above).

- Claimants will want to make the same judgments in the opposite direction.

26. Whatever the reasons for a proposed exit, the above will represent the primary considerations in deciding whether to accept or oppose exit. As might be expected, overall it will be less risky, in costs terms, for cases to remain under the Protocol process. That should be the guiding principle unless there is a good evidential reason for transferring; that might be the case independent of the particular route to exit. In those circumstances, the above factors represent the minimum to be considered in assessing

the merits of exit. Additionally, solicitors will want to keep in mind that some of the procedural points raised here have not been authoritatively determined.

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