IN THE COUNTY COURT SITTING AT CLERKENWELL AND SHOREDITCH

Claim No E23YM143

BETWEEN:

MR VEACESLAV BURSUC

Claimant

-and-

EUI LIMITED

Defendant

JUDGMENT ON THE DEFENDANT'S APPLICATION DATED 20 OCTOBER 2017

---

1. This is the reserved judgment on an application heard on 23 April 2018. The application is made by the Defendant prior to the conclusion of proceedings. The Defendant seeks an order restricting the Claimant to costs pursuant to CPR 45 Part III due to unreasonable behaviour under CPR 45.24.

2. This application arises in the context of a road traffic accident claim for damages sustained in an accident on 1 September 2016. The Claimant claims for personal injury to the lower back, vehicle repairs, storage charges and credit hire. The value of the credit hire is said to be £15,329.46. There has not yet been a trial of the claim.

3. The claim started in the Portal for RTA claims. Section III of Part 45 provides for fixed costs for Portal claims. Section IIIA of Part 45 is the costs regime for claims which no longer continue under the RTA pre-action protocol. This section provides for fixed recoverable costs. On 20 March 2017 the Claimant removed the claim from the Portal. Whether the Claimant was justified in doing so is an issue in dispute.

4. The substance of this application brought by the Defendant is that CPR 45.24 allows the court to find that a claim was unreasonably removed from the Portal process and impose a sanction in respect of the Claimant's recoverable costs. The Defendant has made the application pre-trial. The Defendant contends that the application should be

determined and that a finding should be made under CPR 45.24(2) that the Claimant acted unreasonably in removing the claim from the Portal.

5. The Defendant contends that under CPR 45.24 and 7.76 of the Protocol the question of whether the Claimant was reasonable to give notice to exit the Portal must be determined at the time the notice was given.

6. In response to the application the Claimant argues two points: first that pursuant to CPR 45.24 no application for the costs to be fixed under the Protocol can be made prior to judgment, and secondly in any event the Claimant did act reasonably in withdrawing the claim from the Portal.

Issue 1: is the application premature?

7. In my judgment the application is premature. The wording of CPR 45.24 is clear that the giving of a judgment is a prerequisite for an application under this section. I do not accept the Defendant's argument that because liability has been admitted and the Claimant consents to judgment being entered with damages to be assessed, that this brings them within the scope of 45.24. The only reason that this case is proceeding to trial is because there is a dispute about causation and recoverability of not insubstantial credit hire charges. These are the issues in dispute and the reason the claim left the Portal is related to disputes over these issues. There has been no judgment on these issues. The wording of the rule refers to judgment being 'given' thus denoting that it is a decision of the court after a contested hearing rather than a procedural decision to 'enter' judgment and give directions for trial on quantum. The only reason for proceedings being issues was because quantum was in dispute. Entering judgment on liability would have no effect on the course of the litigation. In my judgment the application of CPR 45.24 requires proceedings to have been commenced and pursued to judgment.

8. The issue of the relationship between CPR 45.24 and Part 36 was raised by the parties. The Defendant contended that the effect of a sanction imposed before the conclusion of proceedings under CPR 45.24 limiting costs to the fixed Portal costs meant that the Claimant would not then be able to benefit from making Part 36 offers. It was said by the Defendant that this was part of the costs sanction implicit within CPR 45.24. I do not agree that this is the correct analysis. All costs issues should be determined at the same time at the end of the trial. If it were the case that CPR 45.24 carried a sanction

that excluded the use of Part 36 then it would have expressly stated so. Rules 36.20 and 36.21 make provision in respect of the fixed costs in Sections IIIA of Part 45 which a claimant may recover when the claimant either accepts or fails to beat a defendant's Part 36 offer. Provision is also made with regard to defendants' costs in those circumstances. Given the breadth of the court's discretion on all issues of costs, rule 45.24 requires that the application is made after judgment has been given so that all the circumstances of the case including Part 36 offers can be considered. Although the Defendant is right to assert that assessment of reasonableness must be conducted at the time the decision to exit the Portal was taken, a court may still decide not to allow an application under this section even if unreasonableness is established. One of the reasons a court may decide not to allow an application under this section could include the behaviour of the parties up to trial including the making of Part 36 offers. CPR 45.24 does not exclude the operation of the general discretion on costs contained within CPR 44.2.

9. The Claimant resists the application and prays in aid the pre-amble to the Portal Protocol at paragraph C13A-007 which suggests that the issue of whether the costs should be ordered for unreasonable exit under rule 45.24 should be reserved to the trial judge. The reference to the trial judge is consistent with the reference in the rule to judgment being 'given'. Presumably the reason it is suggested in the protocol that the issue of whether an application is going to be made is raised in the directions questionnaire is to allow for the trial to have sufficient time. Therefore this application is premature.

Issue 2: was the decision to remove the case from the Portal unreasonable?

10. If I am wrong in relation to issue 1, in my judgment the decision of the Claimant to remove the claim from the Portal was not unreasonable within the meaning of CPR 45.24. I have considered the witness statement of Clare O'Connor-Gunston which was exhibited to the application notice. It is said that the Defendant was only seeking full disclosure in relation to the issue of impecuniosity and that when the Claimant was asked for complete disclosure, he withdrew the claim from the Portal. It is said that credit hire claims are suitable for conclusion within the Portal process. It is said that the Claimant used exit from the Portal as a threat against the Defendant to avoid giving full disclosure and pressure the Defendant into increasing its offer.

11. The Defendant asserts that the Claimant has behaved unreasonably and the burden of proof is on the Defendant to prove that.

12. The Claimant states that he supplied more than 50 pages of evidence within the Portal at the specific request of the Defendant. The Claimant states that the alleged threat to remove the claim from the Portal was not a threat but a reasonable warning that if the Defendant continued to dispute the claim it would be at risk of making it too complex for the Portal .

13. In my judgment this is a claim with a significant claim for credit hire which was robustly defended by the Defendant. This is not a case where the issues were being whittled down and narrowed. There were very real disputes about whether the Claimant could prove the recoverability of these alleged loses. The Defendant wished to dispute impecuniosity. Although in theory it is possible to do this through the Portal, in most cases detailed disclosure of financial records and bank statements is ordered and oral evidence and cross-examination takes place at trial. If the Claimant fails to prove impecuniosity then evidence is adduced as to spot hire rates. Credit hire claims of significant value are likely to leave the Portal as a matter of routine due to these factors. At a Stage 3 oral hearing there is usually no live witness evidence, no statements and no expert reports. The hearings are usually appropriate where the remaining dispute is about the quantum of general damages based on the medical report and whether items of special damage are properly evidenced or proved. It is clear from the Defendant's own evidence that the direction the case was going was not simply a question of narrowing issues but that there were substantial disputes of fact to be resolved. The Protocol process was therefore not suitable. The Defendant contends that a detailed witness statement and spot hire rate evidence could have been uploaded into the Portal. Although this may be technically possible, it is not the usual way in which the Protocol operates. The fact that Stage 3 hearings are allocated 30 minutes time listings demonstrates that there is no provision in the procedure for factual challenge to evidence. It is not known what the Defendant's response would have been had the information been uploaded as the Defendant says it should have been. The Defendant may have been in a better position to comment on this had the application been made at the conclusion of the trial. Although presumably then the fact that the case had proceeded to trial would support the Claimant's contention that the facts would have been disputed requiring oral evidence in any event. I agree with the Claimant's

contention that the suggestion by the Defendant that detailed witness statements should have been uploaded onto the Portal is itself an indication that the case was too complex for the Portal. The Defence as it stood at the date of the application disputed many issues including credit hire, storage and repairs. The Defendant in its DQ sought detailed directions again suggesting that the case was likely to substantively disputed.

14. For the reasons given I am satisfied that the Claimant's reasons for exiting the Portal were valid and substantial. This was a case where there was a substantial credit hire claim where impecuniosity was disputed and other heads of loss were also disputed. It was clearly unsuitable to continue in the Portal. The reason for exiting the Portal was not for a trivial breach of the Protocol or that only a small dispute between the parties remained.

15. I therefore dismiss the application on both grounds.

16. The Defendant do pay the Claimant's costs of the application to be assessed by the Trial judge if not agreed.

DISTRICT JUDGE REVERE

30 MAY 2018