IN THE COUNTY COURT AT MAYOR'S AND CITY OF LONDON

Claim No: G00ED857

Courtroom No. 2

Guildhall Buildings
London
EC2V 5AG

Date: 12th January 2021

Before:
HIS HONOUR JUDGE HELLMAN

BETWEEN:-

MR SAID BOUROUS

Appellant (Claimant)

-and-

LONDON BOROUGH OF ISLINGTON

Respondent (Defendant)

Mr Montclare Campbell appeared for the Appellant
Mr Dominic Bright appeared for the Defendant

Hearing date: 17th December 2020

JUDGMENT

In Court

Introduction

1. The Appellant/Claimant, Mr Said Bourous, brought a claim against the Respondent/Defendant, LB Islington, under the process set out in the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents from 31st July 2013 ("the RTA Protocol").

2. It is common ground that Mr Bourous is and was at all material times a licensed taxi driver. He claimed damages for personal injury. His vehicle was damaged in the accident, and he also claimed damages for the cost of storing his vehicle while it was repaired and for hiring a replacement vehicle while his own vehicle was unavailable. The amount claimed for hire charges, which was by far the largest element of his claim, was £11.825.49. The cost of repairs appears to have been agreed.

3. The Defendant admitted liability at Stage 1 of the RTA Protocol process, but the parties could not agree damages at Stage 2. and the matter therefore proceeded to a hearing at Stage 3. Pursuant to Practice Direction 8B, the claim was brought under CPR Part 8. The hearing took place before DDJ Evans on 21st July 2020.

4. The Deputy District Judge gave judgment for the Claimant in the sum of £4,076.00. This covered personal injury and storage. But he dismissed the claim for hire charges, holding on the authority of Hussain v EUI Limited [2019] EWHC 2647 (QB) that as Mr Bourous used his vehicle for profit the proper basis of the claim would have been for loss of profit. As no such claim had been made, the claim for hire charges was dismissed. The Deputy District Judge declined to transfer the claim to CPR Part 7 (as sought by the Claimant in response to the loss of profit point, and as sought by the Defendant in the alternative that the credit hire claim was not dismissed at the Stage 3 hearing).

5. Mr Bourous, with the permission of the Deputy District Judge, appeals against the dismissal of the claim for hire charges. He argues that as the Defendant did not take the loss of profit point at Stage 2 it was not open to them to do so at Stage 3. Had the point been taken when it should have been, then he could have adduced evidence to meet it. That is the nub of the appeal.

Measure of damages

6. In Hussain v EUI Limited at paragraph 16, Pepperall J set out the principles applicable to claims for financial losses suffered by self-employed drivers, such as Mr Bourous, when their vehicles are off the road pending repair or replacement:

"*The stating point is that the professional driver's vehicle is a profit-earning chattel and that the true loss is the loss of profit suffered while the damaged vehicle is off the road pending its repair or replacement … a claimant might choose instead to hire a replacement vehicle in order to be able to continue trading. Properly analysed, this is a claim for expenditure incurred in mitigation of the primary loss. … Accordingly: (a) where a claimant acts reasonably in hiring a replacement vehicle at about the same cost as the avoided loss of profit, the court will not count the pennies and hold the claimant to the hypothetical loss of profit if it turns out to be a little lower; but (b) where the cost of hire significantly exceeds the avoided loss of profit, the court will ordinarily limit damages to the lost profit. Even where the cost of hire significantly exceeds the avoided loss of profit, the claimant may still succeed in establishing that he or she acted reasonably: (a) First, any business must sometimes provide a service at a loss in order to retain important customers or contracts. … (b) Secondly, many professional drivers use their vehicles for both business and private purposes. Where such a claimant proves that he or she needed a replacement vehicle for private and family use, a claim for reasonable hire charges, even in excess of the loss or profit that was avoided by hiring the replacement vehicle, will ordinarily be recoverable in the event that a private motorist would have been entitled to recover such costs. (c) Thirdly, it might be reasonable for a professional driver to hire a replacement vehicle even though the cost of doing so was significantly more than the loss of profit because he simply could not afford not to work. …*"

7. Thus, in order to recover damages for loss of hire, Mr Bourous would have either had to claim for loss of profit or to bring himself within one of the three exceptions identified by Pepperall J.

The RTA Protocol scheme

8. To evaluate Mr Bourous' submissions, it will be helpful to set out the RTA Protocol scheme in a little more detail. The account below is simplified and focuses on provisions relevant to this case. The RTA Protocol applies where the claim includes damages for personal injury, ie for pain, suffering and loss of amenity, where the amount claimed for personal injury is more than £1,000.00 and the total damages claimed are no more than £25,000.00. The aims of the RTA Protocol include ensuring that the defendant pays damages and costs using the process set out in the RTA Protocol without the need for the claimant to start proceedings and that damages are paid within a reasonable time.

9. At Stage 1, the claimant must complete and send a CNF (ie a Claim Notification Form) to the defendant's insurer and a Defendant Only CNF to the defendant. The defendant must

complete and return to the claimant the Insurer Response section of the CNF. Where the defendant admits liability and does not allege contributory negligence (other than in relation to the claimant's admitted failure to wear a seatbelt) the claim will proceed to Stage 2.

10. At Stage 2, the claimant must send the Stage 2 Settlement Pack to the defendant. This includes the Stage 2 Settlement Pack Form, in which the claimant must make an offer, and the evidence upon which the claimant relies, eg evidence of pecuniary loss and any witness statements. The defendant has 35 days to consider the Stage 2 Settlement Pack. They have up to 15 days in which they must accept the claimant's offer or make a counter-offer using the Stage 2 Settlement Pack Form. The remainder of the 35 days gives the parties an opportunity to negotiate.

11. Paragraph 7.11 of the RTA Protocol states that in most cases witness statements will not be required, but that one or more statements may be provided where reasonably required to value the claim.

12. Paragraph 7.41 of the RTA Protocol states:

"*When making a counter-offer the defendant must propose an amount for each head of damage and may, in addition, 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.*"

13. Where the parties do not reach an agreement on damages within the specified time-frame, the claimant must send to the defendant the Court Proceedings Pack. For present purposes, the relevant part of the Pack is Part A.

14. Paragraph 7.64 of the RTA Protocol states that this must contain:

"*… the final schedule of the claimant's losses and the defendant's responses comprising only the figures specified in [inter alia the claimant's offer and the defendant's counter-offer] together with supporting comments and evidence from both parties on any disputed heads of damage.*"

15. Paragraph 7.66 of the RTA Protocol states:

"*Comments in the Court Proceedings Pack (Part A) Form must not raise anything that has not been raised in the Stage 2 Settlement Pack Form.*"

16. Paragraph 7.67 of the RTA Protocol states:

"*The defendant should then check that the Court Proceedings Pack (Part A …) Form complies with paragraphs 7.64 to 7.66. If the Defendant considers that the Court Pack (Part A …) Form does not comply it must be returned to the claimant with an explanation as to why it does not comply.*"

17. Paragraph 7.69 of the RTA Protocol states:

"*Where the defendant fails to return the Court Proceedings Pack (Part A …) Form within the period in paragraph 7.67, the claimant should assume that the defendant has no further comment to make.*"

18. The claim then moves to Stage 3. The procedure is set out in Practice Direction 8B. The claim is made under the CPR Part 8 procedure as modified by the Practice Direction. The claimant must file a claim form asking the court to determine the amount of damages. The claim form must state that the claimant has complied with the RTA Protocol; the date when the Court Proceedings Pack (Part A …) Form was sent to the defendant; whether the claimant wants the claim to be determined by the court on the papers or at a Stage 3 hearing; and the value of the claim.

19. The claimant must file with the claim form the Court Proceedings Pack Part A Form; copies of medical reports; evidence of special damages; and evidence of disbursements. Apart from certain specified material relating to a settlement where the claimant is a child, the claimant may only file those documents where they have already been sent to the defendant under the RTA Protocol. The claimant must serve the claim form and the material which they have filed with it on the defendant.

20. The defendant must file and serve an acknowledgment of service not more than 14 days after service of the claim form.

21. Paragraph 7.1 provides that the parties may not rely upon evidence unless it has been served as aforesaid; or has been duly filed and falls within a very small class of defined documents, namely the acknowledgment of service and certain certificates; or, where the court considers that it cannot properly determine the claim without it, the court orders otherwise.

22. Paragraph 7.2 provides that where the court considers that further evidence must be provided by any party, *and* that the claim is not suitable to continue under Stage 3, it will order that the claim continue under Part 7, allocate the claim to a track, and give directions.

23. Paragraph 9.1 provides that where the defendant opposes the claim because the claimant has not followed the procedure set out in the RTA Protocol, or has filed and served

additional evidence with the claim form that was not provided under the RTA Protocol, the court will dismiss the claim and the claimant may start proceedings under CPR Part 7.

24. The court will order that damages be assessed on the papers; or at a Stage 3 hearing where the claimant so requests on the claim form, the defendant so requests on the acknowledgment of service, or the court so orders.

Documents

25. In the Court Proceedings Pack (Part A), the Claimant gave his occupation as "*Private Hire*". The documentation submitted with the Pack included a copy of a licence to act as a private hire vehicle driver in London. He claimed £11,825.49 for car hire. He commented that the hire pack was attached. There was no claim for loss of profit. The Defendant's counter-offer was £6,747.84. They commented: "*We can only consider a rate of £153.36 inc VAT per day.*" There was no suggestion that the claim should be disallowed in principle.

26. The claim form, which was issued on 4th June 2020, noted that the Claimant was born on 12th June 1966 and was aged 50 at the time of the accident, which occurred on 17th January 2019, and that as a result of the accident he had sustained injuries and losses. His vehicle was parked when the Defendant's driver, turning right, collided with the front nearside of his vehicle. The claim form noted that the Defendant's insurers admitted liability on 13th March 2019. It stated that the Claimant had followed the procedure set out in the RTA Protocol, and that on 27th December 2019 the Claimant sent the Court Proceedings Pack (Pack A …) Form to the Defendant. The Claimant requested an oral hearing.

27. The Defendant completed a pro forma acknowledgment of service, which was dated 19th July 2020. This contained a number of boxes, and the instruction that the defendant was to tick only one of them. The Defendant did not tick the box stating: "*I intend to contest the amount of damages claimed but not the making of an order for damages*". Instead, they ticked the box stating: "*I object to the use of the Procedure in Practice Direction 8B*". The Defendant explained that the case was unsuitable to proceed under Stage 3 and asked the court to exercise its discretion and transfer the case to CPR Part 7 so that the Defendant could file and serve a defence and evidence in relation to need, period, rates and impecuniosity.

28. It appears from the transcript of the hearing before the Deputy District Judge that the loss of profit point was first taken by the Defendant's solicitors on the day before the hearing, when they emailed the court a copy of Hussain v EUI Limited.

Authorities on taking a new point at Stage 3

29. Mr Campbell, who appeared for the Claimant, wishes to rely upon Mulholland v Hughes, 18th September 2015, unreported. This was a judgment of HHJ Freedman upon four conjoined appeals in the County Court at Newcastle-upon-Tyne. Three of them concerned claims for hire charges. The defendants had successfully argued at Stage 3 that the claimants had failed to prove the need to hire an alternative vehicle, even though this issue had not been raised at Stage 2.

30. Mr Bright, who appeared for the Defendant, drew my attention to the Practice Direction (Citation of Authorities) (Sup Ct) [2001] 1 WLR 1001. This provides in material part:

> "*6.1 A judgment falling into one of the categories referred to in paragraph 6.2 below may not in future be cited before any court unless it clearly indicates that it purports to establish a new principle or to extend the present law. In respect of judgments delivered after the date of this direction, that indication must take the form of an express statement to that effect. ...*
>
> *6.2 Paragraph 6.1 applies to the following categories of judgment*
>
> . . . . .
>
> *County court cases, unless ... (b) cited in a county court in order to demonstrate current authority at that level on an issue in respect of which no decision at a higher level of authority is available.*"

31. HHJ Freedman identified the issues raised on appeal at paragraph 38 of his judgment. They included: "*If a defendant does not put a matter in issue at stage 2, can the point still be taken at a part 8 hearing before a judge?*" The judge did not purport to establish a new principle or extend the present law. The question is therefore whether a decision on that issue at a higher level of authority is available.

32. I was referred to Phillips v Willis [2017] RTR 4 CA. Interestingly, this was an appeal from a decision of HHJ Freedman and counsel for the appellant, Nicholas Bacon QC, also appeared for the appellants in Mulholland v Hughes. It was another case under the RTA Protocol. The claimant had asked for an oral hearing at Stage 3. The only issue remaining between the parties was the hire charges. The claimant had offered £3,486.00 and the defendant had counter-offered £2,334.00. When the claim came on for hearing the District Judge, of his own volition, directed that it should proceed under CPR Part 7, allocated it to the small claims track, and gave directions.

33. The claimant appealed against the District Judge's order to a Circuit Judge. HHJ Freedman dismissed the appeal, on the ground that the District Judge had made a case management decision under paragraph 7.2 of Practice Direction 8B and that an appellate court could not interfere with that decision.

34. The Court of Appeal disagreed. They held that the District Judge's decision that further evidence was necessary was irrational and that, as the case was still suitable to continue under Stage 3, the District Judge had no power under paragraph 7.2 to direct that it should proceed under CPR Part 7. The appeal was allowed.

35. Clearly, therefore, the case did not address the same issue as the relevant issue in Mulholland v Hughes. But the judgment of the Court, given by Jackson LJ, did include some observations which may prove relevant to the present case. At paragraph 10, he said he would refer to the entire process established by the RTA Protocol and Practice Direction 8B as "*the RTA Process*", and at paragraph 11, the provisions of the RTA Protocol, Practice Direction 8B, and CPR Part 8 as modified by Practice Direction 8B, as "*the rules*". He then stated at paragraph 11:

> "*It is important to note that the RTA process has an inexorable character. If a case falls within the parameters of the RTA process, the parties must take the designated steps or accept the consequences. The rules specify what those consequences are.*"

36. At paragraph 35, Jackson LJ noted that, in contrast to the case before him:

> "*... 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.*"

37. I have also considered Blair v Wickes Building Supplies Ltd [2019] 4 WLR 148 CA. This case concerned a Stage 3 claim brought under the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the ELPL Protocol"). The provisions of that Protocol are analogous to the provisions of the RTA Protocol, upon which they were modelled, and Stage 3 of claims originating under both Protocols is governed by the same provisions of Practice Direction 8B.

38. The claimant had at Stage 3 wished to rely on evidence served out of time. The District Judge disallowed the evidence, presumably applying paragraph 7.1 of Practice Direction 8B, and determined damages without it. The claimant appealed to a Circuit Judge. HHJ Hughes QC held that the District Judge should instead have dismissed the claim under paragraph 9.1 of Practice Direction 8B, leaving the claimant to bring a claim under CPR Part 7 if he so chose. The Court of Appeal allowed the defendant's appeal and reinstated the decision of the District Judge.

39. Baker LJ, giving the judgment of the Court, stated at paragraph 36:

"*At a stage 3 hearing of a claim where the parties have followed the Protocol but are unable to agree the amount of damages, they may only rely on evidence as permitted under paragraph 7.1 of the Practice Direction.*"

40. That principle applies equally to a claim originating under the RTA Protocol. However, the issue to which it is addressed is narrower than the issue identified by HHJ Freedman in Mulholland v Hughes. Baker LJ addressed the prohibition on filing fresh evidence, whereas HHJ Freedman addressed the broader issue of whether it was possible to take a new point or matter, even if it did not involve seeking to rely on any new evidence but rather involved, for example, pointing out the inadequacy of evidence which had already been filed by the adverse party.

41. Baker LJ had noted earlier in his judgment at paragraph 26:

"*The Protocol is a tightly drawn and stand-alone code with tight deadlines and draconian sanctions, all of which strongly encourage compliance.*"

42. That observation, too, is also applicable to the RTA Protocol.

43. Neither Phillips v Willis nor Blair v Wickes Building Supplies Ltd dealt with the issue identified by HHJ Freedman in Mulholland v Hughes, and I was not referred to any other case which was purported to do so. I am therefore permitted by the Practice Direction (Citation of Authorities) to consider Mulholland v Hughes in relation to that issue, and that is what I shall do.

44. HHJ Freedman, while acknowledging that the Settlement Pack and Response are not pleadings, considered by way of analogy the rules governing statements of case in CPR Part 16, and schedules of loss in the Practice Direction to Part 16. He stated at paragraph 75:

"*It seems to me that what underpins these rules and practice direction is that it is incumbent upon a defendant to set out, with clarity, the precise nature of his defence: what is agreed, what is disputed and, if disputed, why, as well as indicating those matters upon which the defendant is unable to comment.*"

45. The judge stated that this approach was arguably of even greater application in the context of the RTA Protocol. Upon considering the wording of paragraph 7.41 of the RTA Protocol, he stated at paragraph 77:

"*It follows that it is the intention of the Protocol that if a defendant wishes to raise an issue such as the need for hire, that is to be done at the time of the making of the counter-offer. To allow a defendant to raise the issue of need at Stage 3 runs entirely contrary to the notion that at the end of Stage 2 the parties should have clarity as to what remains in dispute.*"

46. The judge found support for this construction in paragraph 7.11 of the RTA Protocol, which states that in most cases witness statements will not be required. This tended to support the proposition that evidence would only be required to address an issue, whether the need for hire, the need for care, or some other issue, which was formally raised by the defendant at Stage 2.

47. Irrespective of the above, the judge found it inequitable and unfair for a defendant to raise for the first time the issue of need (or by implication any other issue) at the Stage 3 hearing. That was tantamount to trial by ambush and ran contrary to the spirit of the RTA Protocol, "*the behaviour the court expects of the parties*" (RTA Protocol paragraph 2.1), and the intended collaborative approach.

48. The judge concluded:

"*In my judgment, it comes to this: to make an offer in respect of hire charges is not to admit the need for hire but not to challenge the need at Stage 2 is equivalent to saying that the claimant does not need formally to prove it. Such is the binding [effect?] on the Court.*"

The parties' competing arguments

49. Mr Campbell invites the Court to follow Mulholland v Hughes, which he submits is directly on point. Although the case concerned the various defendants' failure to raise the need for hire at Stage 2, the court's reasoning was equally applicable to the Defendant's failure in the present case to object in principle to the claim for hire charges at Stage 2. It was therefore not open to the District Judge to consider Hussain v EUI Limited: it was too late for the Defendant to take the point, and thus the case was irrelevant.

50. Mr Bright disagrees. He submits that, irrespective of what happened at Stage 2, the Claimant was required to prove his case at Stage 3. He failed to do so, as on the evidence before the District Judge he was not entitled to claim damages for vehicle hire and had failed to claim, or evidence, loss of profit. The Defendant had not sought to rely on any new evidence but merely to rely on deficiencies in the Claimant's evidence. Mulholland v Hughes was wrongly decided and was at most only persuasive authority.

51. Mr Bright further submits that a litigant is not obliged to point out their opponent's mistakes. He relies upon Barton v Wright Hassall [2018] 1 WLR 1119 SC, in which the Supreme Court upheld the decision of a District Judge not to validate service of an invalidly served claim form retrospectively under CPR rule 6.15. A litigant in person had purported to serve the claim form on the defendant's solicitors by email on 24th June 2013, which was the last day before the claim form expired. The solicitors did not send a

substantive reply until 4th July 2013, when they wrote to the claimant stating that as they had not confirmed that they would accept service by email it was not a permitted form of service and that, as the claim form had not been served, the action was now statute barred.

52. The claimant complained that the solicitors had been "*playing technical games*". Lord Sumption, giving the judgment of the majority, would have none of it. He stated at paragraph 22 of his judgment:

> "*Even on the assumption that they realised that service was invalid in time to warn him to re-serve properly or begin a fresh claim within the limitation period, they were under no duty to give him advice of this kind. Nor could they properly have done so without taking their client's instructions and advising them that the result might be to deprive them of a limitation defence. It is hardly conceivable that in those circumstances the client would have authorised it.*"

Discussion and decision

53. To recap:

(1) Paragraph 7.41 of the RTA Protocol provides that the defendant must explain in the counter-offer made using the Stage 2 Settlement Pack Form why a particular head of damage has been reduced. The paragraph goes on to explain that this is because 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.

(2) Paragraph 7.66 of the RTA Protocol states that comments in the Court Proceedings Pack (Part A) Form must not raise anything that has not been raised in the Stage 2 Settlement Pack Form.

(3) Practice Direction 8B provides that the Court Proceedings Pack (Part A) Form must be served with the claim form.

(4) At Stage 3 the court will determine the claim based on the Court Proceedings Pack (Part A) Form and the evidence filed with the claim form in accordance with Practice Direction 8B, which, apart from the acknowledgment of service (which is not strictly speaking evidence) and certain certificates, must have been served at stage 2.

54. In my judgment it is clear from these provisions that a defendant cannot object to a claim under a particular head of damage raised by the claimant at Stage 3 except on grounds

raised at Stage 2. In so finding, I am interpreting the provisions so as to give effect both to the literal meaning of the words and to their spirit and intendment.

55. In Phillips v Willis LJ Jackson referred to the "*inexorable character*" of "*the RTA process*", and in Blair v Wickes Building Supplies Ltd Baker LJ described the ELPL Protocol, which is closely analogous to the RTA Protocol, as "*a tightly drawn and stand-alone code with tight deadlines and draconian sanctions, all of which strongly encourage compliance*". It is clear from the strong language of the Court of Appeal that defendants must comply with the clearly expressed requirements of the Protocol and that they will not be permitted to gain any forensic advantage from their failure to do so. There is nothing in Barton v Wright Hassall, which concerned a very different set of facts, which would justify the court in derogating from this principle.

56. In the present case, the Defendant did not object to the claim for car hire at Stage 2 on the ground that the claim was disallowable in principle because the Claimant was a taxi-driver who used his vehicle for commercial hire, but objected only on the ground that the amount claimed was too high. It was therefore too late for the Defendant to object to the claim for car hire in principle at Stage 3. The Deputy District Judge ought not to have considered the issue as it was not properly before him. Had the issue been before him, Hussain v EUI Limited would have been the governing authority, but as the issue was not before him, that case was irrelevant.

57. I reach this conclusion independently of Mulholland v Hughes, albeit through a similar chain of reasoning, and it will be evident that I agree with the reasoning and conclusion of HHJ Freedman in that case on the issue stated at paragraph 38 of his judgment.

58. On a subsidiary point, at the Stage 3 hearing the Defendant contested the amount of damages claimed. This was inconsistent with the relief claimed in the acknowledgment of service. I was not addressed about what consequences, if any, should have flowed from that discrepancy, and given my findings, I need not consider the point any further.

59. The appeal is allowed and the decision of the District Judge is quashed.

60. As, under CPR rule 52.20, I have all the powers of the District Judge, I shall consider the Defendant's application in the acknowledgment of service to transfer the case to Part 7 to allow the Defendant to file and serve a defence and evidence in relation to need, period, rates and impecuniosity. With the exception of rates, none of those issues was raised at Stage 2. It is too late to raise them now. As to rates, the Defendant had the opportunity at Stage 2 to file any evidence that they wished. Although this is quite a high claim for car hire, on the material before the Court it does not involve any complex issues of law or

fact which are not suitable for resolution at a Stage 3 hearing. The application to transfer the case to Part 7 is therefore dismissed.

61. I remit the claim to be heard at a Stage 3 hearing before a different District Judge. Their task will be to determine the amount to be awarded for car hire on the basis of the issues, and only the issues, raised in the Court Proceedings Pack (Part A).

62. I shall hear the parties as to costs, both of the appeal and of the Stage 3 hearing before DDJ Evans. I should be grateful if the Claimant's solicitors would liaise with the Defendant's solicitors and notify my clerk within 7 days after the date of this judgment whether either party would like an oral hearing, in which case they shall have one. This may take place remotely if that would be more convenient. Otherwise, I shall deal with costs on the basis of written submissions, to be sent to my clerk within 14 days after the date of this judgment.

Dated 12th January 2021

HHJ HELLMAN