Haven't We Dealt With All the Portal Issues Now? - Sarah Robson, Alpha Court Chambers

28/09/15. Many MOJ Portal issues have been resolved, and if you practice in this area of law you probably know the main 'ins and outs' of the Portal. We know it is a tightly bound, stand-alone code, and we know the Protocol is 'King'[1], unlike most other protocols. We know you cannot add to it by outside legal principles such as offer and acceptance[2], waiver and affirmation[3], common law mistake[4], and even that (most of) the CPRs[5] do not apply. We've shaken out principles such as you do not need a judgment to engage CPR 45.24[6], you cannot justify a total failure to use the Portal[7], you cannot change your reason for leaving the Portal to a different one later[8], you cannot consider what happened after a breach[9]. We know the default position on finding a Portal breach is Portal costs[10]. We've seen a whole myriad of what sort of excuses for coming out of the Portal are, and are not, deemed reasonable by the courts, with the general theme that minor technical breaches on their own are not enough to justify leaving the Portal. Despite sorting out all of these issues, twists and turns in the seemingly never-ending Portal saga abound, no less than in the recent case of *Payne v Scott, Birkenhead CC, DDJ Smedley, 13.07.15.*

Under CPR 45.24, if a court finds that a Claimant has elected to leave the Portal process and starts proceedings under Part 7, but considers the Claimant acted unreasonably in removing a case from the Portal or causing a claim to leave the Portal, the court can restrict the Claimant to no more than Portal costs. The key issue in *Payne v Scott* was **whether it was the Claimant who had caused the case to come out of the Portal, in circumstances where the court ordered it out of the Portal process.**

Case Background

The Claimant had brought a claim for loss of earnings, and at the Stage 3 hearing, Claimant's counsel told the court he thought the case had to come out of the Portal process, adding how he could not see how that loss of earnings claim could be assessed in this format (i.e. a Stage 3 hearing). Defence counsel initially weakly objected, but ultimately agreed. The judge ordered the claim out of the Portal and listed it for a Part 7 final hearing. The matter was later settled before that hearing.

Costs went to detailed assessment, where the primary point of dispute was whether the Claimant had acted unreasonably in removing the case from the Portal or causing the claim to leave the Portal. The Claimant, perhaps unsurprisingly, argued that it was not them who had removed the claim from the Portal, but it was a case management decision by the judge. How could they be found to have acted unreasonably in following a court order?

Relevant Case Law

DDJ Smedley considered the relevant cases on point. (Do bear in mind there are still no binding authorities yet on the Portal, hardly surprising given that the Portal – by definition – only deals with low value cases.)

In *Ilahi v Usman, 26.11.12, HHJ Platts, Manchester CC, confirmed LJ (Rupert) Jackson, Court of Appeal 14.01.13* the Claimant argued that they had not removed a case from the Portal, but that it had come out of the Portal automatically – by operation of law. That was because the Portal rules provide that if you withdraw a Portal offer after the end of stage 2, the case automatically falls out of the Portal. They argued they had therefore not elected to leave the Portal. However HHJ Platts held that an election to take a step, where that step had the automatic consequence of the case falling out of the Portal, was an election to take the matter out of the Portal for the purposes of CPR 45.24 (was 45.36 then).

That case was followed by *Doyle v Manchester Audi, DJ Matharu, Manchester CC 25.06.13*. There the Claimant had given both a different name and address at the scene of the accident from those given on the CNF. The Defendant not unreasonably, sought confirmation of the Claimant's identity. The Claimant did not provide this for some time, and thus the Defendant did not admit liability within Stage 1 and the matter automatically dropped out of the Portal. When it came to assessing costs the Claimant argued the claim had dropped out of the Portal automatically, they had not elected to remove it. However the court held that the Claimant's failure to provide proof of identity – notably something not provided for by the Portal rules – was reasonably requested in the circumstances, and unreasonably not provided. The Claimant's failure to provide this was an *omission to act* which

resulted in the case coming out of the Portal, and like the act in *Ilahi,* that omission was an election to leave the Portal within the meaning of CPR 45.24.

How can a Judge's order be a Claimant's Election?

Judge Smedley considered these authorities in *Payne v Scott*, and noted that whilst it was the judge who had removed the case from the Portal, this was done on the request of the Claimant, noting at para 12:

> "She is clearly influenced by Mr Seed's request that it comes out and I cannot interpret that as anything other than a request or an election, as the case may be, by the Claimant to take the matter out of the Portal."

Thus it was the Claimant who had caused the claim to leave the Portal, because it was the Claimant who had invited the court to remove it, like pushing over the first in a line of dominoes.

Was the Exit Unreasonable?

The judge then had to consider whether the Claimant had made that election unreasonably, especially given that the Defendant had agreed to remove the case from the Portal. The Defendant noted that CPR 45.24 did not say 'the Claimant acted unreasonably *and the Defendant did not agree with those actions'*, it was simply a case of whether or not the Claimant had acted unreasonably. The reasonableness of the Defendant's actions was relevant to the Defendant's costs, not the Claimant's costs. Judge Smedley noted that this could have been re-listed for a longer hearing time, or the Claimant could have applied to adduce further evidence under PD8B 7.1. He noted either course would have kept the claim in the Portal and would have been reasonable. DDJ Smedley went on to conclude that the Claimant had acted unreasonably. He restricted the Claimant to Portal costs only and awarded the Defendant their costs.

So what do we learn from this?

A Claimant can no longer hide behind a judge ordering a case out of the Portal as an automatic shield to protect their Part 7 costs. There may well be cases where that is enough, but beware – the court can look deeper. The key test is whether the Claimant has acted reasonably – and this is normally determined by looking at whether the case could have stayed in the Portal.

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Sarah Robson is a barrister at Alpha Court Chambers. She is an expert on the MOJ Portal, and frequently lectures on this. She acts for both Claimants and Defendants, but mainly Defendants. She was instructed by Taylor Rose in Payne v Scott. Copies of the judgments in the cases referred to can be found on her website, www.sarahrobsonbarrister.co.uk.

1 Preamble to the Portal protocol, para C13A-005

2 Purcell v McGarry, 07.12.12, HHJ Gore QC, Liverpool CC

3 Kilby v Brown,10.02.14, DJ Peake, Birkenhead CC

4 Draper v Newport, 03.09.14, DJ Baker, Birkenhead CC

5 Jaykishan Patel v Fortis Insurance Ltd, 05.12.11, Recorder Morgan, Leicester CC

6 Jaykishan Patel (supra) and Brown v Ezeugwa, Tunbridge Wells CC, 23.01.14, HHJ Simpkiss & DJ Lethem

7 Rafiania v All Type Scaffolding Ltd, DDJ Corscadden, 14.01.15, Manchester CC

8 Tennant v Cottrell DJ, 11.12.14, Jenkinson Liverpool CC

9 Tennant (supra) and Raja v Day & MIB, 02.03.15, HHJ Gregory, Liverpool CC

10 Raja v Day (supra)

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