Neutral Citation Number: [2020] EWHC 2176 (QB)

Case No: QA-2019-000349

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/08/2020

Before:

THE HONOURABLE MRS JUSTICE LAMBERT

- -

Between:

Finsbury Food Group PLC	**Appellant/Defendant**
- and -	
Scott Dover	**Respondent/Claimant**

- -
- -

Andrew Roy (instructed by **Taylor Rose TTKW**) for the **Appellant/Defendant**
Roger Mallalieu QC (instructed by **Thompsons Solicitors**) for the **Respondent/Claimant**

Hearing dates: 25 June 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 10:30am on Friday 7 August 2020.

MRS JUSTICE LAMBERT :

1. This appeal from the Order of Master Brown of the Senior Courts Costs Office raises a single and narrow issue: whether CPR 45.29I (2)(c) fixes the quantum of counsel's (or a specialist solicitor's) fee for an advice on valuation of the claim at £150 plus VAT in accordance with CPR 45.23B (read with Table 6A) or whether the fee for such an advice falls outside the fees fixed in CPR 45 and is subject to assessment. As both parties accepted, the issue for my determination is unlocked by the proper statutory interpretation of CPR 45.29I(2)(c) viewed within the context of the fixed costs regime prescribed by CPR 45.

2. For the purposes of this appeal I sat with an assessor, Senior Master Gordon-Saker, to whom I am indebted for his assistance in clarifying the issues. The Defendant/Appellant was represented by Mr Roy and the Claimant/ Respondent by Mr Mallalieu QC. Neither appeared below. I am grateful to them both for their clear and concise submissions and to Mr Roy, in particular, for his practical and sensible approach in narrowing the issues which were before the Master such that only the single issue above remained for my determination.

Background

3. The factual background to the claim can be set out shortly. The claim arose from an injury which the Claimant sustained during the course of his employment by the Defendant. Whilst pouring a bag of flour into a bread-making machine his hand was sucked into the overhead extractor machine causing an injury to his right middle and index fingers. Following multiple surgical procedures and a three-month absence from work, the Claimant was left with a permanently damaged middle finger.

4. Initially, the claim was valued at less than £25,000. As such, it fell to be dealt with by the parties under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the Protocol"). The Protocol at [2.1] "*describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than £25,000 in an employers' liability or in a public liability claim.*" At [3.10) the aim of the Protocol is stated to be to ensure that: *"(1) the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings; (2) damages are paid within a reasonable time; and (3) the claimant's legal representative receives the fixed costs at each appropriate stage."*

5. The Protocol sets out the procedural requirements of the first two, of three, stages in the resolution of low value claims. At Stage 1 of the process, the claim is initiated using an online process, known as the Portal, by means of a Claim Notification Form (or "CNF") to which the defendant must respond within 30 days of the completion and sending of the CNF. Stage 2 of the process makes provision for the (limited) assembling of evidence necessary for the purpose of valuing the claim. It is expected that a single medical expert report will be obtained (but a report from an expert of a different discipline may be obtained, when justified, by the injuries); likewise follow up medical reports may be obtained where justified. Non-medical reports will not be required "*in most cases*" although one may be obtained where reasonably required to value the claim. As for specialist legal advice, the Protocol states at [7.8] *"In most cases under this Protocol, it is expected that the claimant's legal representative will*

be able to value the claim. In some cases with a value of more than £10,000 an additional advice from a specialist solicitor or from counsel may be justified where it is reasonably required to value the claim."

6. If the claim is not compromised at either Stage 1 or Stage 2, then Stage 3 of the process requires the initiation of court proceedings under CPR PD 8B. The Protocol, as a procedural code, extends therefore up to and including Stage 2. If settlement is not reached by that stage however, CPR PD 8B takes over.

7. A claim no longer continues under the Protocol in the circumstances listed in paragraph 6.13 of the Protocol. The circumstances include a non-admission of liability, or an admission coupled with an allegation of contributory negligence, or the defendant failing to send the CNF response. If the claimant notifies the defendant that the claim has been revalued at more than the upper limit, the Protocol automatically ceases to apply: see [4.2]. Paragraph 5.11 makes clear that once the claim falls out of the Protocol, it cannot subsequently re-enter the process. As Mr Mallalieu put it, "once a claim is out, it is out."

8. The Protocol was introduced side by side with the fixed costs regime for such claims which, as Briggs LJ observed in *Sharp v Leeds City Council* [2017] 4 WLR 98 at [13], was enacted largely pursuant to the recommendations of Jackson LJ in his Review of Civil Litigation Costs. The regime made comprehensive provision for the incidence and quantification of fixed recoverable costs for claims which remain within the Protocol in Section III of CPR Pt 45 (rules 45.16 to 45.29), the Stage 3 Procedure being treated as within those Protocols for that purpose. The quantum of those costs is set out in tabulated form at CPR 45.18 at Table 6A: "*Fixed costs in relation to the EL/PL Protocol*," with the level of the fixed costs varying depending upon the stage of settlement and the value of the settlement. Disbursements may be recovered in accordance with CPR 45.19 which states that "*...the court (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) and (3); but will not allow a claim for any other type of disbursement*." Where settlement of a claim which has been issued under Stage 3 has been achieved, then r. 45.23B provides that:

> **45.23B** *Where –*
>
> *(a) the value of the claim for damages is more than £10,000*
> *(b) an additional advice has been obtained from a specialist solicitor or from counsel;*
> *(c) that advice is reasonably required to value the claim,*
> *the fixed costs may include an additional amount equivalent to the Stage 3 Type C fixed costs"*

By reference to Table 6A, those costs are £150 plus VAT.

9. Section IIIA of Part 45 provides, almost equally comprehensively, for fixed recoverable costs in relation to claims which start within the Protocol, but no longer continue under it. The fixed costs are again set out in tabulated form at Table 6C the detail of which is not relevant to this appeal.

10. However, Rule 45.29I deals with disbursements. This provision is central to the appeal. It provides, so far as is material, as follows:

> *(1) ……, the court—*
>
> *(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but*
>
> *(b) will not allow a claim for any other type of disbursement.*
>
> *(2) In a claim started under …. the EL/PL Protocol …, the disbursements referred to in paragraph (1) are—*
>
> *(a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;*
>
> *(b) the cost of any non-medical expert reports as provided for in the relevant Protocol;*
>
> *(c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;*
>
> *(d) court fees;*
>
> *(e) any expert's fee for attending the trial where the court has given permission for the expert to attend;*
>
> *(f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;*
>
> *(g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and,*
>
> *(h) any other disbursement reasonably incurred due to a particular feature of the dispute.*

11. In the present case, in accordance with the Protocol, the CNF was uploaded to the online system on 23 July 2015. However, the Defendant failed to provide a response within the requisite 30 days. In accordance with paragraph 6.13, the claim therefore exited the Protocol on 15 September 2015. Although the Defendant's insurers requested (on two occasions) that the claim should be resubmitted and continue in accordance with the terms of the Protocol, both requests were rejected by the Claimant. Liability was admitted on 29 February 2016 subject to causation. Medical evidence was assembled by the Claimant and a detailed Schedule of Loss prepared. Counsel advised on the value of the claim in conference on 22 March 2017. It is worth noting in passing that the advice was provided after the claim had exited the Protocol. The claim ultimately settled for £70,000 on 19 December 2017.

12. Following settlement, the Claimant submitted a Bill of Costs in which Counsel's fee for the advice in conference was claimed in the sum of £650 plus VAT. In its Points of Dispute, the Defendant disputed any entitlement to payment of Counsel's fee on

the basis that no such fee was payable under the relevant provisions in a claim which had exited the Protocol and when incurred after the claim had left the Protocol as those costs were subsumed within the fixed fees. Alternatively, it was submitted that, if Counsel's advice was a recoverable item of cost, then the costs of such advice were limited to £150 plus VAT. The Costs Officer rejected these arguments holding that the relevant provisions permitted recovery of counsel's fee for advising in conference as a disbursement. He however assessed the costs of counsel's fee down from £650 plus VAT to £500 plus VAT.

13. The Defendant appealed the recovery, alternatively the quantum, of counsel's fees to Master Brown of the Senior Courts Costs Office. The arguments before the Master were different and more wide-ranging than those deployed by Mr Roy before me. They included whether on a proper construction of CPR 45.29I(2)(c) counsel's fees incurred after the claim had left the Protocol were recoverable; whether any fee at all was payable in accordance with CPR 45.23B (in Section III) and Table 6A which sets out the recoverable costs only up to a damages level of £25,000; whether CPR 45.23B (in Section III) restricted Counsel's fee to £150 plus VAT and, finally, whether under CPR 45.29I(2)(h) Counsel's fee was recoverable as a disbursement reasonably incurred due to a particular feature of the dispute.

14. In a detailed and thoughtful judgment, the Master ruled against the Defendant on each of these points. In respect of the argument concerning CPR 45.29I(2)(c) he found that CPR 45.23B and Table 6A did not apply to ex Protocol claims, it being clear from CPR 45.16 and 45.17 that the fixed costs regime in CPR 45 Section III applied only to claims which have been or should have been started under PD 8B, the Stage III procedure or where a party had not complied with the Protocol, and not to claims which had for any reason left the Protocol. He rejected the submission that 45.23B applied by virtue of the Protocol (and the reference in CPR 45.29I to the Protocol). He concluded that paragraph 7.41 of the Protocol was concerned with proceedings under the Protocol and not with claims which had fallen out of the Protocol for any reason. He granted permission to appeal to the High Court on the basis that the argument "*may have the potential to apply to a significant number of cases*" even though, in his view, the meaning of the section was clear and that he doubted that an appeal would have any real prospects of success.

15. As I have already said, Mr Roy cleared the decks of many of the points which had been raised before the Master, focussing his submissions on the construction of CPR 45.29I(2)(c). For the purposes of the appeal he accepted that there was no temporal restriction on the recovery of the fee for specialist advice. Nor did he submit that no fee was payable because the damages exceeded the threshold of £25,000. He submitted only that CPR 45.29I (2)(c) limited the quantum of counsel's fee to £150 plus VAT as set out in Table 6A "Fixed Costs in relation to the EL/PL Protocol."

16. Mr Roy's excellent submissions can be put succinctly. He made the following points:

    i) CPR 45.29I(2)(c) refers to the Protocol ("*the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol.*") The meaning of the sub section can only be understood in conjunction with the terms of the relevant Protocol in mind, in this case the EL/PL Protocol. On a proper construction, it is necessary to follow what Mr Roy candidly accepted to be "*a trail of breadcrumbs*," looking first at paragraph 7.8 of the Protocol,

which permits the obtaining of specialist legal advice where justifiable on the basis that it is reasonably required to value the claim, and, from there, to paragraph 7.41 of the Protocol and paragraph 7.44(4) which both provide that where an additional advice on quantum of damages is justified under paragraph 7.8, a sum equal to the Type C fixed costs to cover the cost of that advice must be paid by the defendant. By means of a cross reference to Table 6A, the cost of the disbursement is £150 plus VAT. On this analysis, rule 45.29I(2)(c) replicates the position under CPR 45.23B, albeit the latter provision relates to claims which have remained within the Protocol but settled at Stage 3 but which likewise fixes the costs of counsel's advice at £150 plus VAT.

ii) Mr Roy accepts that 45.29I(2)(c) does not immediately provide the answer to the quantum of costs to be allowed in respect of counsel's advice. The absence within the provision itself to the fixed quantum of costs allowed is however, he submits, perfectly understandable given that the rules are intended to afford a degree of flexibility. Although he did not put it in this way, Mr Roy submitted that the rules are "future-proofed" and anticipate the introduction of other protocols in due course which may provide for a different fixed fee or indeed no fee at all. One such example is the Pre-Action Protocol for Resolution of Package Travel Claims which does not currently (but which may in the future) provide for counsel's fee. The absence of a reference to the fee allowed in the rule therefore provides flexibility and accommodates the devising of new protocols or changes in existing protocols which can be achieved without the need to amend the rules themselves.

iii) Mr Roy urges a purposive interpretation of CPR 45.29I and of the Protocol which must be read into and alongside CPR 45. He states, uncontroversially, that fixing the costs in lower value litigation confers three distinct advantages: it gives all parties certainty as to the costs which they may recover if successful or their exposure if unsuccessful; it removes the further process of costs assessment or disputes over recoverable costs which can themselves generate further expense and ensures that costs are proportionate. He reminds me that this, underlying, rationale of the scheme has been emphasised in a number of cases. In *Qader v Esure Services ltd* [2017] 1WLR at [55] Briggs LJ described the scheme as one which depends upon its predictability for its contribution towards the proportionate, speedy and effective disposal of civil proceedings. In this context, Briggs LJ commented that the drafters of the scheme would not have carried back to the pre-allocation stage a policy to disapply fixed costs; that: "*to require the parties to guess, or the court to decide whether a case which settled prior to allocation ... was or was not subject to fixed costs would introduce a damaging and unnecessary degree of uncertainty into a scheme which depends upon its predictability for its contribution towards the proportionate, speedy and effective disposal of civil proceedings*." In *Hislop v Perde* [2019] 1 WLR 201 at [51] Coulson LJ also emphasised that the whole point of the regime is to ensure that both sides "*begin and end proceedings with the expectation that fixed costs is all that will be recoverable. The regime provides certainty. It also ensures that, in low value claims, the costs which are incurred are proportionate.*"

17. The purpose and rationale of the FCR has not only been emphasised but also used as an aid to construction and interpretation in other cases. In construing CPR 45.29I(2)(c) a similar purposive construction should be applied. Mr Roy submits that leaving the quantum of counsel's advice outside the fixed costs regime would be inimical to, and inconsistent with, the purposes of the scheme. It would lead to uncertainty and unpredictability for litigants. It would generate a risk of satellite litigation with thorny practical problems for the costs judge to resolve: solicitors may seek to siphon off work to counsel in order to escape the limitation on their own costs; counsel may be instructed to advise on liability and quantum but the cost of the full advice submitted for payment; issues of credibility may be relevant to both liability and quantum such that it may be difficult or impossible to separate out precisely the cost of the advice on valuation. All of these sorts of problems will not only lead to disputes which require the court's involvement, but in many instances the costs judge involved in the assessment is going to have to review the advice itself in order to arrive at the correct costs assessment.

Discussion/Conclusion

18. I do not set out Mr Mallalieu's submissions separately as they are substantially woven into my conclusions.

19. I start with some general and uncontroversial observations concerning my approach to the interpretation exercise. The objective of any exercise of statutory interpretation is to determine the intention of the legislature and the starting point for that exercise is the natural and ordinary meaning of the words used. In *Pinner v Everett* [1969] 1WLR at 1266, Lord Reid observed: "*In determining the meaning of any word or phrase in a statute, the first question to ask always is what is the natural and ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase."* It follows that where the meaning is clear on the face of the provision in issue, there is no need to resort to other canons of statutory construction unless the construction produces a result which is so startling that it could not have been intended. In considering the natural and ordinary meaning of the words used the court must take into account not just the dictionary definition of each word but also the syntax of the expression used and its context. As Viscount Simonds said in *AG v Prince Ernest Augustus* [1957] AC 436 at 461 "*For words and particularly general words, cannot be read in isolation: their colour and content are derived from their context.*"

20. Against this short and uncontentious introduction, the first question for me therefore is the grammatical meaning of CPR 45.29I(2)(c), taking the provision in context. I accept Mr Mallalieu's submission that viewed linguistically the meaning is clear and unambiguous: the phrase in subsection 2(c): "*as provided for in the relevant Protocol*" is not referring to the cost as provided for in the relevant protocol, but is referring to the type of disbursement there provided. The reason for this is simple: subsection 2(c) must be read in conjunction with subsections (1)(a) and (b). Those earlier paragraphs permit the court to allow a claim for a disbursement "*of the type mentioned in paragraphs 2 or 3*" but prohibit a claim for a disbursement of a type which is not there mentioned. The function of subparagraph 2 is therefore, as set out in its opening sentence, to list those types of disbursement "*referred to in paragraph*

1" in respect of which the court will allow a claim and, if not mentioned, the type of disbursement in respect of which there can be no claim. This meaning is plain from a straightforward and natural construction of the paragraph as a whole.

21. Not only does this construction make grammatical sense, it is also the only logical construction of r. 45.29I. As Mr Roy accepted, neither the Protocol nor the rules fix the cost of obtaining medical records or of obtaining an expert medical report, nor fix the cost of other disbursements referred to in (2), save for subparagraph (g) where the upper limit of the claim is expressly set out. Mr Roy's trail of breadcrumbs would not, when applied to other sub-paragraphs of the same provision, lead him anywhere. Mr Roy seeks to defend his approach to the construction of this provision on the basis that, whilst there may be vigorous debate over the level of counsel's fees (justifying them being fixed) no such vigorous objection is likely to be taken to, say, the cost of obtaining an expert medical report. I cannot accept this. No evidence was before me concerning the range of fees charged by experts for providing medical or non-medical reports which would enable me to conclude that Mr Roy's anomalous construction of 2(c) is justified on such a basis. Nor is it a matter of common sense that experts charge such uniformly low rates that no objection would be taken by the defendant.

22. There are two further problems associated with Mr Roy's submission. First, his trail of breadcrumbs takes him to paragraph 7.44 of the Protocol. It is this paragraph which refers to "*a sum equal to the Type C fixed costs to cover the cost of the advice*." From here, by cross reference to Table 6A, he arrives at his figure of £150 plus VAT. However, paragraph 7.44 is concerned with costs recovery in a claim which has settled at Stage 2 of the Protocol, not a claim which has fallen out of the Protocol for some reason. Paragraph 7.44 falls within a section of paragraphs concerning Stage 2, including the obtaining of evidence, interim payments and submission of the Stage 2 settlement pack. The subheading of paragraph 7.44 is "settlement" obviously referring to settlement at Stage 2 and providing for the defendant paying any unpaid Stage 1 fixed costs under 45.18 [7.44(2)] and the Stage 2 fixed costs under 45.18 [7.44(3)]. As Mr Mallalieu observed, paragraph 7.44 of the Protocol is therefore inapt when considering a claim which has fallen out of the Protocol.

23. Second, Mr Mallalieu makes the point that Part 45 expressly fixes the cost of the disbursement when counsel's advice is obtained in a claim which remains within the Protocol and settles at Stage 3. Section III of rule 45 includes 45.23B which fixes the cost at an amount equivalent to Stage 3, Type C fixed costs, that is, £150 plus VAT. No such similar provision exists in Section IIIA for claims outside the Protocol. Likewise, CPR 45.29I(2A), which relates to whiplash claims, started under a different protocol (the road traffic accident protocol) fixes the costs of various medical reports. Mr Mallalieu's short but important point here (which I accept) is that, had the drafter intended to fix the costs of legal advice for a claim outside the Protocol, then the drafter could easily have included a similar provision.

24. Having therefore dealt with the grammatical (plain wording) meaning of the provision, I then go on to consider whether the meaning leads to an absurd outcome or an outcome which the drafter could not reasonably have intended. Again, and notwithstanding Mr Roy's careful submissions, I do not accept that leaving the legal costs of valuing a claim which has fallen outside the Protocol unfixed and subject to assessment in the usual way, is an absurd outcome.

25. I accept all that Mr Roy says concerning the impetus for the fixed costs regime and the underlying rationale of certainty and proportionality. However, claims which have fallen out of the Protocol are a mixed bag. Some small straightforward claims may fall out of the Protocol as a result of the failure by the defendant to respond to the CNF. But there are other reasons for a claim falling out of the Protocol including notification by the claimant that the claim has been revalued at more than the upper limit; where liability remains in dispute and where contributory negligence is alleged. As Stewart J recognised in *Ferri v Gill* [2019] Costs LR 367, these factors are likely to be associated with a much greater level of complexity, so making quantification of the claim all the more difficult. I see nothing absurd in the costs of such an advice on valuation not being fixed in those circumstances. Indeed, it might be said that the converse is true. It would be odd if the same fixed fee were to be recovered for valuing a straightforward claim worth £15,000 as for a claim which, as it turns out, includes a high claim for loss of earnings or handicap on the labour market the quantification of which may involve considerable skill and expertise. Further, the costs allowed will not be unchecked. Just as in this case, they are subject to assessment and may be reduced on assessment.

26. I accept Mr Roy's submission that leaving costs to the discretion of the court may lead to costs bills being subject to detailed assessment. However, as Mr Mallalieu points out, the fact that 45.23B fixes the level of fees for claims which settle at Stage 3, does not mean automatically that the fee will be recovered. That provision makes plain that the fee will only be recovered where the advice is reasonably required to value the claim and so, even within the fixed costs regime of Section III, there is a basis for challenge which may require resolution by the costs judge. I also accept Mr Mallalieu's point that the drafting of Part IIIA suggests a greater degree of flexibility generally to costs in claims which have fallen out of the Protocol: Rule 45.29J permits claims for an amount of costs exceeding fixed recoverable costs where there are "*exceptional circumstances*." Even though Stewart J established that the bar to recovery under 45.29J is set high, the fact that the provision exists in relation to claims which have fallen out of the Protocol, but no similar provision exists in relation to those which are resolved under the Protocol or at Stage 3, suggests a different and more flexible policy generally to claims which have fallen out of the Protocol.

27. For these reasons, I reject Mr Roy's approach to the construction of the provision and reject his conclusion. I turn back briefly therefore to the judgment of Master Brown. Although the argument was deployed before him in a rather different way, he reached a similar conclusion for similar reasons. He concluded that CPR 45.23B and Table 6A applied to claims which settled at Stage 3 under PD 8B, and as such had no application to claims which had exited the Protocol. He concluded that the Protocol did not expressly incorporate CPR 45.23B nor was it implicitly incorporated by CPR 45.29I. He found that paragraph 7.41 and 7.44 of the Protocol were referring to claims which settled at Stage 2 and had no application to claims which were outside the Protocol. I agree with all of these conclusions; none were, in my judgement, wrong.

28. Accordingly, this appeal is dismissed.