Case No: 6LS57043

IN THE LEEDS COUNTY COURT

Leeds Combined Court
The Courthouse
1 Oxford Row
Leeds LS1 3BG

Date: 3rd December 2007

Before :

His Honour Judge S P Grenfell sitting with Regional Costs Judge, District Judge Spencer, and Lay Assessor Mr Geoffrey Swain, solicitor

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Between :

RACHAEL CATHERINE PEEL	**Respondent Claimant**
- and -	
STUART BEASLEY	**Appellant Defendant**

Miss Judith Ayling (instructed by **McCullagh & Co**) for the Appellant/Defendant
Mr Martin Bare (of **Morrish & Co**) for the Respondent/Claimant

Hearing dates : 9th October 2007

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. The finalisation of this Judgment has been delayed because of a failure in recording equipment resulting in the hearing tape being blank. As a result, the Judgment has been prepared from a combination of advocate's notes and recollections.

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His Honour Judge S P Grenfell

His Honour Judge Grenfell:

1. This is an appeal from District Judge Flanagan who gave a decision in the Leeds County Court on 26th February 2007 during a detailed assessment on the Claimant's Part 8 claim for costs.

2. I should say at the outset that following discussion with Counsel for the Appellant Defendant and the solicitor for the Respondent Claimant when the matter first came before me in June it was decided that it would be advantageous for me to sit with the Regional Costs Judge and a Lay Assessor. It was also discussed that as Designated Civil Judge I should communicate with other Designated Civil Judges who might have similar appeals namely His Honour Judge Collins in Central London County Court who was to hear an appeal from Master O'Hare in the case of Wetzel and there were known to be two other appeals to be heard in Liverpool by His Honour Judge Stewart QC, Designated Civil Judge in Liverpool.

3. In the event and after this date of 9th October was fixed, His Honour Judge Stewart QC heard the cases of Kilby v Gawith and Patel v Admiral Insurance and gave his Judgment ex tempore on the 14th August 2007.

4. It is my understanding that there is an application to the Court of Appeal for a second appeal in respect of Judge Stewart's decision.

5. Can I say at once that I have been assisted by the Judgments of Master O'Hare and His Honour Judge Stewart QC. I have also received considerable assistance today from my assessors Regional Costs Judge District Judge Spencer and Mr Geoffrey Swain an experienced Deputy District Judge, both of whom have a wealth of experience in assessing costs and I am extremely grateful for that experience.

6. Although this is an issue of law it has considerable practical connotations.

7. The claim was a low value road traffic accident, settled pre-issue for £2,560.00 and therefore the fixed costs regime set out in Part 45 of CPR applied.

8. The central issue is whether the fixed 12½% success fee is recoverable. District Judge Flanagan found that it was.

9. District Judge Flanagan noted that, as he put it, the whole thinking was

> "To avoid the sort of elongated, expensive and often sterile arguments that there have been in the past about the amount of the success fee that is reasonable and how the Claimant's solicitor has arrived at an appropriate success fee, taking all the factors into account, which should apply to the assessment of that part of the additional liability"

10. In essence his reasoning was clear and concise. At paragraph 8 he said

> "This case falls squarely within the confines of CPR 45.11. I do not see any scope for a Claimant arguing for a success fee that exceeds 12½% or a paying party arguing for a success fee that is less.... Unless I am completely missing the point of CPR 45.11 I cannot see any scope for the paying party having any argument about the success fee. Following the point that Mr Bare has made, I am a bit surprised that the paying party has taken the point, having regard historically to the reasoning behind why this new part of the rules was introduced in the first place"

11. Miss Ayling who appears today for the Appellant Defendant argues that the District Judge was wrong to find that he had no discretion available to him about the allowance of a 12½% success fee in this case.

12. The question therefore is simply this. Whether the Court has a discretion under CPR 45.11 once it is clear that the Claimant has entered into a funding arrangement?

13. The Claimant's funding arrangement was through her Union and therefore was a CCFA. It is common ground that there is no distinction for the purposes of CPR 45.11 between an ordinary CFA and a Collective CFA. In this instance the agreed figure for the success fee is £175.50 subject only to the argument as to whether the Court has a discretion to allow it at all.

14. I say common ground because it was an issue raised before Master O'Hare and His Honour Judge Stewart QC as to the inter-action between CPR Part 45 and Costs Practice Direction section 25A.10. That argument is, in my judgment rightly, no longer pursued. Although that Practice Direction is arguably inconsistent with CPR 45.11 it is equally clear that the Practice Direction pre-dates the CPR and whether that Practice Direction can be brought into line is now a matter for the Rules Committee.

15. A further issue in the grounds of appeal appears not to have been raised in the application for permission to appeal to DJ Flanagan. That does not mean that the issue was raised as an after-thought because it was clear that it was raised in the course of argument before DJ Flanagan. It is clear that the issue was around before the District Judge and that is whether it was reasonable for the Claimant to obtain funding through her Union CCFA which involves allowing a notional premium under section 30 of the Access to Justice Act 1999. Was it reasonable in such circumstances where the Claimant could have had before the event cover under her motor policy?

16. The amount is agreed at £325.00 if allowable in principle. It is either £325.00 or nothing at all.

17. Of course if the Appellant succeeds in this argument the Appellant argues that it is then a relevant factor in the exercise of the Court's discretion in respect of whether or not a 12½% success fee is recoverable. It is common ground that once allowed it has to be 12½%.

18. I have been assisted, in terms of argument by both Advocates and I have had the advantage of reading the Skeleton Arguments.

19. Although plainly small sums are involved in this one case, it is equally clear that when replicated in a huge number of similar claims, estimated at some 85,000 cases, it is easy to see why it is proportionate for the Defendant to pursue this challenge.

20. It is equally clear that the fixed costs regime was designed broadly to be costs neutral, hence the fixing of 12½% and the other calculations, calculated according to specific matters found in CPR 45.9 in respect of base costs.

21. These figures and indeed the 12½% success fee are known to be the result of the Fenn & Rickman reports commissioned for this very purpose.

22. As the District Judge mentioned one principle reason is to avoid unnecessary litigation in low cost claims.

23. Miss Ayling starts with CPR 44.4(2)[1] and she rightly submits that those principles (the standard basis principles) underline the general rules about costs.

24. Rule 48.3[2] sets out how the court decides the amount of costs payable under a contract.

25. The factors which the court may take into account are set out in Rule 44.5 and what I cannot lose sight of, is whether or not with fixed costs and fixed success fees the Court is actually assessing the costs at all.

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[1] "44.4(1) Where the court to is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs-
(a) on the standard basis; or
(b) on the indemnity basis,
but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount."

[2] "48.3 (2) Where the amount of costs is to be assessed on the standard basis, the court will-
(a) only allow costs which are proportionate to the matters in issue; and
(b) resolve any doubt which it may have as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party."

26. She also looks back at Sarwar v Alam [2001] EWCA Civ 1401 where after reciting the growth of legal expenses insurance at paragraphs 21 and 22, Lord Phillips Master of the Rolls, then under the heading "Appropriateness of BTE Cover" at paragraph 41 said

> "In this case we are concerned only with a relatively small personal injuries claim in a road traffic accident. We are not concerned with claims which look as if they will exceed about £5,000, and we are not concerned with any other type of BTE claim. We have no doubt that if a Claimant possesses pre-existing BTE cover which appears to be satisfactory for a claim of that size, then in the ordinary course of things that Claimant should be referred to the relevant BTE insurer"

27. And in paragraph 42 the Master of the Rolls went on

> "With this type of BTE cover with which this case is concerned (which covers both sides costs, where necessary) the cost of processing the claim is more likely to be proportionate to the value of the claim, since there will be no uplift and no ATE premium and the cost of the BTE premium (if identifiable) is treated as an expense incurred in the past which is irrecoverable"

28. Under the heading "Concerns of ATE/TUC" at paragraph 59 the Master of the Rolls said

> "We have considered carefully the submissions we have received from the ATE Group and the TUC. The former was naturally anxious that we should make no decision which might prejudice development of the fledgling ATE market and drive up ATE premiums which might impede access to justice. APIL also shared this worry. The TUC, for its part, was anxious that we should not imperil the dedicated services Trade Unions and their panel lawyers offer to their members. In the context of these simple small claims with which this Judgment is concerned we do not consider that either of these considerations should impel us to impose on the Defendants and their liability insurers a burden of costs which is disproportionate to both the value and the lack of complexity of the claim. We accept the submissions of the Liability Insurers' Group that it is not in the interests of motorists or the general public that motor liability insurers should have to make unnecessary disbursements which raise premium costs"

29. However although plainly what is stated in Sarwar v Alam is good law for the principles it embodies, it pre-dated the fixed costs regime and did not seek to anticipate a fixed costs regime.

30. The relevant parts of CPR part 45 and the White Book are at pages 1227 to 1229.

31. In view of the fact that there is no dispute that the claim is within the scope of Part 45, I turn to the appropriate fixed recoverable costs at CPR 45.8[3].

32. Rule 45.12 provides for where a party issues a claim for more than the fixed recoverable costs.

33. The amounts of fixed recoverable costs are set out first of all in CPR 45.9. I do not need to recite it but it requires a simple calculation as required by that particular paragraph. It is common ground that it is designed to avoid the intervention of the Court entirely.

34. The next paragraph is for disbursements and this harks back to CPR 45(8)(b) and reads

> "45.10-(1) The court-
>
> (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but
>
> (b) must not allow a claim for any other type of disbursement.
>
> (2) The disbursements referred to in paragraph (1) are-
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> (a) the cost of obtaining-
>
> (i) medical records;
>
> (ii) a medical report;
>
> (iii) a police report;
>
> (iv) an engineer's report; or
>
> (v) a search of the records of the Driver Vehicle Licensing Authority;
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> (b) the amount of an insurance premium; or, where a membership organisation undertakes to meet liabilities incurred to pay the costs of other parties to proceedings, a sum not exceeding such additional amount of costs as would be allowed

[3] "45.8 Subject to rule 45.12, the only costs which are to be allowed are-
(a) fixed recoverable costs calculated in accordance with rule 45.9;
(b) disbursements allowed in accordance with rule 45.10; and
(c) a success fee allowed in accordance with rule 45.11."

> under section 30 in respect of provision made against the risk of having to meet such liabilities;
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> "membership organisation" is defined in rule 43.2(1)(n))."

35. It is common ground that the premium that the District Judge did allow was in fact such a premium under CPR 45.10(2)(b).

36. It is to be noted that first of all 45.10 starts with the words "The Court" and goes on to say "may" allow and then "must not allow".

37. CPR 45.11 is all important

> "45.11-(1) A claimant may recover a success fee if he has entered into a funding arrangement of a type specified in rule 43.2(k)(i).
>
> (2) The amount of the success fee shall be 12.5% of the fixed recoverable costs calculated in accordance with rule 45.9(1), disregarding any additional amount which may be included in the fixed recoverable costs by virtue of rule 45.9(2)."

38. Rule 43.2(k)(i) defines as funding arrangement as including a conditional fee agreement or collective conditional fee agreement which provides for a success fee.

39. No point is taken on the amount of the success fee having been 12½% once CPR 45.11(1) kicks in.

40. I have mentioned two cases in which this wording has been considered. The case of Wetzel v KBC Fidea by Master O'Hare and Kilby v Gawith and Patel v Admiral Insurance by His Honour Judge Stewart QC.

41. Both answered to the clear effect that there is no discretion in the Court, once the pre-condition has been satisfied that there was a funding arrangement.

42. The arguments before Master O'Hare and His Honour Judge Stewart QC have been recited again today although perhaps in somewhat shortened in form.

43. The important argument against CPR 44.4 is this, that under CPR 45.8 there are different words used and they must have been used differently for a clear purpose. The use of the word "calculated" avoids Court intervention and is plainly mandatory.

44. Under paragraph (c) the word used is "allow". Miss Ayling submits that taken in conjunction with "may" in 45.11(1) this imparts a discretion to the Court.

45. It is clear to me that the mechanism adopted in any assessment of costs where there is a discretion is that the Judge first considers the amounts involved on that assessment then makes his or her decision in allowing a particular item of costs so the Regional Costs Judge suggests there is no magic in the word "allowed".

46. CPR 45.10 plainly, and it is common ground, gives discretion to the Court. It is clear to me, the wording is clear and unambiguous, it is clear that the Court has a discretion to allow a claim for a disbursement and it is easy to anticipate cases where for example the Claimant got an orthopaedic report for a fracture and a psychological report where one was not indicated nor relied upon. The Costs Judge might well disallow the entire costs of the psychological report.

47. The discretion therefore is both as to the amount and as to whether or not the item is to be allowed at all.

48. The amount of the section 30 payment will therefore be a matter for the discretion of the Court but I emphasise that the important words are "The Court..."

49. Before turning to the word "may" in CPR 45.11 it is important to observe that throughout CPR the words "must", "shall" and "may" appear in many different contexts. In very many areas CPR's underlying principle is one of discretion and the overriding interest gives wide powers to the Court seeking to achieve the overriding interest.

50. However there are instances where Rules impose a mandatory provision and indeed CPR 45.10.2(b) is one example with the use of the words "must not".

51. So it is argued that by use of the word "may" in CPR 45.11 the draftsman envisaged giving discretion to the Court.

52. I should say that we, my Assessors and myself, do not necessarily subscribe to the view that CPR 45.11 was carelessly drafted and I think it right to assume that the use of the word "may" has been carefully thought out.

53. I take the view that the answer is to be found that it was the policy not to impose on the Claimant an absolute requirement to claim the success fee. No doubt most Claimants will, but to impose it may be outside the remit of the Court.

54. In paragraph 12 of Master O'Hare's judgment in Wetzel he said

> "I reached that conclusion for these reasons, first of all the construction placed on CPR 45.11 seems to me to be too slight to produce the obviously wasteful and disproportionate enquiries likely to arise if Mr Mallalieu's [Counsel for the Defendant in that case] construction was correct. Although it uses the word "may", "may" does not have to be "may in the Court's discretion". "May" can mean "may if circumstances permit". In other words, the entitlement to a success fee is conditional upon the circumstances and not upon the Court's discretion".

55. And I respectfully agree with that approach also as to the interpretation.

56. His Honour Judge Stewart QC in Kilby and Patel said this, effectively dealing with the very arguments Miss Ayling has presented before me today. At paragraph 8 of his Judgment he said

> "However the Respondents submit that once pre-condition (a) has been fulfilled there is no discretion and the Court has to award a 12½% success fee. All the parties submit that the Rules could have been more clearly drafted. CPR 45.11(1) could have put the issue beyond doubt, if for example the word "shall" had been substituted for "may". However the word "may" is often capable of meaning "shall", and particularly so if it follows a pre-condition which has to be fulfilled. It seems to me there is no obstacle in the language to my finding that there is no discretion if that is the proper construction"

57. I see no reason to disagree with that interpretation of "may" either.

58. I am satisfied that "may" is used as a permissive word and that is once a success fee is claimed there is no discretion in the Court other than to allow 12½%.

59. The decisive distinction is between CPR 45.11 "The Claimant" ; and CPR 45.10 "The Court....". If there is any discretion in CPR 45.11 it is as to whether the Claimant claims a success fee.

60. That resolves the first question and leaves the second point as to the amount of the Section 30 premium.

61. The Claimant effectively says, through her solicitor, that it was just as effective in terms of cost to her to go through her Union and there may well be certain other advantages to go through her Union rather than through her motor insurers BTE solicitors.

62. Undoubtedly for the Defendant it would be cheaper for the Defendant for the Claimant to go to BTE. The question is whether that is the right test. Unfortunately we have no means of knowing precisely what the District Judge said as the tape ran out. I do know that he did allow the £325.00 which was arithmetically agreed. It was plainly argued that the District Judge had no discretion but we do not know if he decided the matter on that point or exercised his discretion.

63. It is common ground that the Claimant went to her Union and that the Union Rule Book provided that assistance would be provided by the Union and the Union would instruct solicitors and the Union chose to do so under a CCFA.

64. The premium held to be recoverable of £325.00 is not a premium that anybody had to pay. The Claimant does not have to pay it, but the Union does use the money to finance any other lost cases. CPR 45.10.2(b) shows and anticipates this.

65. In purely financial terms it was equally advantageous to her to use the Union or the before the event insurers.

66. In the broader scheme of things the question is whether it was reasonable to seek assistance of her Union rather than take the BTE route (which would cost the paying party less).

67. In the broader scheme of things it is generally more advantageous that the Claimant should proceed with the assistance of her Union, it can help finance less satisfactory cases; but the point made by Mr Bare is that the use of the Union funded personal injury claims is immensely advantageous to Claimants and has been held to be so since as long ago as the 1920's. Generally speaking the Union funding arrangement is advantageous to a Claimant.

68. I cannot help but notice that a solicitor is supposed to ask if the Claimant is in a Union. Why so, if it is not found to be a most advantageous funding for the Claimant to do?

69. District Judge Flanagan, despite his self effacing remarks is a District Judge of considerable experience in ordinary judicial work and the assessment of costs. He was plainly referred to CPR 45.10 and a clear reading gives a discretion to the Court. I do not find unsurprising in the least that the District Judge allowed the amount that was agreed arithmetically.

70. Should it be discovered later that the District Judge found he had no discretion, then I am driven to substitute my own discretion. I would exercise it in favour of the Claimant. It is entirely reasonable for a Claimant to avail herself of the Union's assistance in this type of case for the simple reason that she was not bound to take too much account of costs to the Defendant and it was reasonable in the first instance for her to seek the assistance of her Union and the solicitors regularly used by the Union.

71. It was, in short, entirely reasonable to take that course. I would find it difficult to envisage any circumstances where a Union member would be regarded as unreasonable to have gone to the Union. Just because it is cheaper to the paying party does not make it the only choice and I have no doubt that the Claimant made a reasonable choice.

72. In conclusion I refer to the observations of Lord Justice Dyson in Lamont v Burton [2007] EWCA Civ 429 where he said at paragraph 26

> "Section III of Part 45 contains a carefully balanced scheme for the award of success fees in road traffic accident cases. The object of the scheme is to provide certainty and avoid litigation over the amount of success fees to be allowed to successful parties"

73. And he continued

> "It is inherent in the scheme that in some individual cases, the success fee will be unreasonably high and in others unreasonably low. But that is the price that has to be paid for achieving certainty and avoiding litigation over the amount of success fees. Rule 44 cannot be invoked to circumvent the careful structure of Rule 45 and to undermine its objective of achieving certainty"

74. The appeal is dismissed.