Case No: C07YM216
SCCO reference: CL1805771

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
Strand, London WC2A 2LL

Date: 11/06/2019

Before :

MASTER LEONARD

- -

Between :

Claire Hammond	**Claimant**
- and -	
SIG plc & Subsidiary Companie	**Defendant**

- -
- -

Christopher Adams (instructed by **Leigh Day**) for the **Claimant**
Sarah Robson (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing dates: 12 March 2019

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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.

.....

MASTER LEONARD

Master Leonard:

1. This personal injury claim settled on acceptance of a Part 36 offer on 30 March 2017. The issue is whether the costs recoverable by the Claimant, following acceptance of that offer, should be fixed costs governed by Section IIIA of CPR 45, or should be recovered on the standard basis.

2. CPR 45 provides for fixed recoverable costs in various categories of cases, including cases resolved under the Pre-Action Protocol for low value personal injury claims (up to £25,000) in road traffic accidents ("the Protocol").

3. A key component of the Protocol is the Ministry of Justice claims portal ("the Portal"), an online claims processing facility. A Claim under the Portal begins with the claimant uploading a Claim Notification Form ("CNF".) If the defendant or a defendant's insurer is registered on the online Portal the CNF is sent to the defendant or the insurer through the Portal system.

4. To remain within the Portal and the Protocol, liability must be admitted, following which the parties can move to Stage 2, the negotiation stage. If that does not result in a settlement within a given period, Practice Direction 8B set out a modified CPR Part 8 procedure ("the Stage 3 Procedure") for the determination of damages by the court.

5. Section III of CPR 45 prescribes fixed costs for cases that have resolved at stages 1, 2 or 3 of the Protocol. Section IIIA prescribes fixed costs for cases which have exited the Protocol but have not been allocated to the multi-track.

The Development of This Dispute

6. On 6 June 2013, the Claimant was cycling on the Grosvenor Road in London. An employee of the Defendant turned a lorry left across her path, causing a collision which injured the Claimant.

7. The Claimant instructed solicitors to pursue a personal injury claim on her behalf. Initially she instructed Irwin Mitchell, but she changed to Leigh Day at an early stage, when investigations were still under way.

8. Initially, the Defendant could not be identified as the police appeared to have lost the relevant file. A Letter of Claim was, accordingly, sent to the Motor Insurers' Bureau (MIB) on 29 April 2015. However the Defendant and its insurer were subsequently identified and a further Letter of Claim was written to the insurer, AIG Europe Limited, on 5 November 2015. The letter gave brief details of the incident on 6 June 2013 of the injuries sustained by the Claimant and of the reasons for alleging fault on the part of the Defendant's employee. It also said:

> "Please note, we will not be submitting this claim in the Portal due to the potential value of the claim".

9. In a further letter dated 23 November 2015 Leigh Day supplied AIG Europe Limited with the registration number of the vehicle driven by the Defendant's employee.

10. A reply came from claims managers FMG by email on 2 December 2015. It read:

> "We can confirm this is the first notification we have received of this accident and begun making enquiries into involvement and liability… Please provide a copy of the police report… We also request that the claim is submitted on the portal to enable us to progress this matter further. Our portal reference is FMG… "

11. Leigh Day replied by email on 3 December 2015:

> "We believe the claim may well fall outside the new claims process given the injuries sustained, however we will submit the claim via the portal today as requested. However, the date of notification will begin from 23 November 2015…"

12. Leigh Day uploaded a CNF to the Portal the following day, 4 December 2015. The CNF was supported by a statement of truth and the value of the claim was given as "up to £25,000".

13. Mr Ben Hacking, a senior paralegal with Leigh Day, says that he took over the management of the claim on 23 November 2015. He says that the claim was always seen as a multi-track case with the settlement value in excess of the Portal limit of £25,000: before being assigned to him the case had been conducted by Penny Knight, who was assigned to multi-track claims. The Claimant's injuries included a broken right ankle, three broken bones in the foot, tissue damage and the left leg and serious psychological symptoms, in addition to damaged items worth in excess of £4,000 and a large potential loss of earnings claim.

14. Following the identification of the Defendant an ATE insurance policy application had been made on the Claimant's behalf by Ms Knight. The policy checklist had confirmed that this was not a Portal claim.

15. Following receipt of FMG's email of 2 December 2015, Mr Hacking spoke to Mr Hargreaves at FMG, who advised that FMG wanted the claim on the Portal, suggesting that it could be pulled out at a later date if need be. Mr Hacking was unsure of the reason for this, but in order to avoid any further delays he agreed to do so. He did not anticipate any adverse consequences from agreeing to Mr Hargreaves' request.

16. Liability was not admitted and the claim exited the Portal on 7 January 2016. Proceedings were issued on 23 May 2016. The Defendant filed and served the defence denying liability and causation. A series of offers and counter offers between £30,000 and £40,000 followed before, on 30 March 2017, the Claimant accepted the Defendant's Part 36 offer of £36,500. The case had not yet been allocated: a Costs and Case Management conference had been listed for 15 April.

17. The Part 36 offer of 30 March, in standard fashion, stated:

> "This offer is intended to have the consequences of section 1 of CPR part 36. If the offer is accepted within 21 days of service of this letter the Defendant will be liable for your client's costs in accordance with CPR rule 36.13/36.20… "

18. The reply stated:

> "Thanks-the Claimant has confirmed she will accept the offer… In addition our costs are payable on standard basis… "

19. Subsequently, the Claimant served a bill of costs prepared on the standard basis and totalling £57,831.90. In its Points of a Dispute the Defendant asserted that, absent a successful application under CPR 45.29J (as set out below) the Claimant could recover only fixed costs under Section IIIA of CPR 45. That is the issue before me.

The Civil Procedure Rules

20. I will set out the relevant parts, for the purposes of this decision, of the rules referred to by the parties.

The Protocol

21. Paragraph 2.1 of the Protocol says:

> "This Protocol 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 the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed."

22. Paragraph 1.2(1) of the Protocol sets the upper limit:

> "The 'Protocol upper limit' is—
>
> (a) £25,000 where the accident occurred on or after 31 July 2013; or
> (b) £10,000 where the accident occurred on or after 30 April 2010 and before 31July 2013,
>
> on a full liability basis including pecuniary losses but excluding interest."

CPR Part 36

23. CPR 36.13(1):

> "Subject… to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.
>
> (Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA … Protocol.) "

24. CPR 36.20:

> "(1) This rule applies where… a claim no longer continues under the RTA… Protocol pursuant to rule 45.29A(1)…

> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs… in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror… "

CPR Rule 45 Section IIIA

25. CPR 45.29A is the first paragraph of Section IIIA of CPR 45, headed

> "Claims Which No Longer Continue Under The RTA… Pre-Action Protocols – Fixed Recoverable Costs… "

26. CPR 45.29A:

> "(1) … this section applies… to a claim started under… the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol')…
>
> where such a claim no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B…
>
> (3) Nothing in this section shall prevent the court making an order under rule 45.24."

27. CPR 45.24 can be found in Section III. Its purpose is to limit the costs recoverable by a successful claimant who has not complied with the Protocol. Recoverable costs and disbursements may be limited to the fixed amount, or disallowed completely, depending upon the default.

28. CPR 45.29B:

> "Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are…(a) the fixed costs in rule 45.29C… (b) disbursements in accordance with rule 45.29I.… "

29. CPR 45.29F, 45.29G and 45.29H have no bearing on the issues before me. CPR 45.29J(1) does:

> "If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.… "

30. I should also mention CPR 45.16, which explains that Section III of CPR 45 sets out the costs recoverable in:

> "claims that have been or should have been started under Part 8 in accordance with Practice Direction 8B ('the Stage 3 Procedure')…"

31. The Claimant's replies to the Defendant's points of Dispute raise an argument based on the wording of CPR 45.16 which does not, as far as I can see, apply to the facts of this particular case, and which was not pursued before me. The wording of the rule does, however, seem to me to have some relevance, for reasons I shall explain.

Submissions

32. I am grateful to both parties for their thorough written and oral submissions. Although I will not mention specifically all of the many judgments (some binding upon me, some not) to which I have been referred, I have attempted to attach appropriate weight to all of them.

33. Mr Adams for the Claimant argues that the costs of her claim are recoverable on the standard basis. CPR 45.29A expressly applies to claims that have started under the Protocol. Mr Adams refers to the Oxford English Dictionary definition of "to start" as meaning

> "Begin or be reckoned from a particular point in time or space: come into being".

34. This claim did not, by that definition, start with the CNF but with a Letter of Claim. Only if the first notification of a claim is submitted by way of a CNF to the party against whom the claim is being made, has the claim "started" under the Protocol.

35. Further, he says, it follows from the wording of paragraph 2.1 and 1.2(1) of the Protocol that if a claimant reasonably values damages for personal injury at more than the specified upper limit, the Protocol does not apply. In this case, the accident occurred in June 2013, so that the applicable upper limit was £10,000. The Protocol has no application.

36. There is then the intention of the parties, as to which only the Claimant has given evidence. Mr Adams argues that from the outset it was the Claimant's intention to pursue the claim outside the Portal. When, at the Defendant's request, the claim was added to the Portal, that was expressly subject to the caveat that the date of notification would be 23 November 2015. The Defendant did not object to that and the parties proceeded accordingly.

37. In the proceedings subsequently commenced under CPR Part 7, the Claimant indicated in the Directions Questionnaire that the matter should be allocated to the multi-track and the court listed the matter for case management accordingly. The Claimant had, by the time it settled, filed and served a Costs Budget.

38. As the Claimant made clear on accepting the Defendant's Part 36 offer, acceptance was, expressly, on the understanding that the Claimant's reasonable costs would be payable in accordance with CPR Part 36.13. Mr Adams characterises that as an express term of acceptance. At no point, until Points of Dispute were served, did the Defendant indicate any objection to the recovery of standard basis costs. Had there been any objection, it should have been made before the Defendant ratified the settlement terms by paying the agreed sum in damages.

39. CPR 45.24 demonstrates, he says, the importance of the suitability of the case for the Portal and the conduct of the parties. In this case, the Claimant made it clear from the outset that that the case was not suitable for the Portal and only adopted the Portal procedure at the Defendant's insistence. There was no option, on the CNF, to certify a value in excess of £25,000.

40. The Points of Dispute put this argument in fairly stark terms, asserting that the Defendant refused to consider the matter unless a Portal submission was made, so the claim could not make any progress unless the Claimant made the Defendant's demands.

41. It was never the intention of the parties, says Mr Adams, to limit the costs recoverable by the Claimant. In seeking to do so now, the Defendant is using the Portal for tactical advantage, contrary to paragraph 4 of the Practice Direction on Pre-Action Conduct and Protocols. The case can properly be treated as exceptional, as it is not one of those for which the Portal was ever intended. It is, by definition, not a typical Portal case.

42. All that aside, Mr Adam submits that this case is exceptional within the meaning of CPR 45.29J, "exceptional" meaning, by the Oxford English Dictionary definition,

> "Unusual: not typical".

43. The Protocol, and consequently CPR 45 Section IIIA were never intended to be applicable to any case were damages had been valued above the specified upper limit. Any case in which damages have been valued above that limit are, by definition, exceptional, especially where the settlement sum exceeds the specified limit to the degree it does in this case.

44. One should also consider proportionality. Both parties relied upon expert evidence from an orthopaedic expert and a psychiatric expert with the aid of multiple medical records, x-rays and even a CT scan. Liability and causation were both in issue. Under the fixed costs regime, the claimant would recover £8,460, which cannot possibly be said to represent a proportionate figure for the costs recoverable by the Claimant.

45. It will be evident from my conclusions that I have accepted Ms Robson's key submissions, so I do not need to repeat them here.

Conclusions

46. As a preamble to my conclusions, I should say that in so far as I am called upon to interpret the Civil Procedure Rules I seek to do so, in accordance with CPR 1.2, in a way that gives effect to the overriding objective.

47. As to when a claim can be said to "start", Ms Robson rightly points out, offering many examples, that the wording of the Civil Procedure Rules and the accompanying practice directions tend to support the view that a claim starts when proceedings are issued. Mr Adams, equally, points out that we are not considering whether a claim started under the Civil Procedure Rules, but under the Protocol.

48. Ms Robson refers to the heading of CPR 45 Section IIIA, which applies fixed costs to cases which "no longer continue" under the Protocol, with no mention of where they started. Perhaps more pertinently so does CPR 36.20, although as it adds the words

"pursuant to rule 45.29A(1)", that brings us back to what CPR 45.29A itself means. I accept however that both provisions offer some assistance as to the proper interpretation of CPR 45.29A.

49. I do not lose sight of Mr Adams' reference to paragraph 20 of the judgment of Lord Sumption in *Plevin v Paragon Personal Finance Ltd and another* [2017] UKSC 23:

> "The starting point is that as a matter of ordinary language one would say that the proceedings were brought in support of a claim.… "

50. In other words, one must not simply equate a "claim" with court proceedings. That does not seem to me, however, to be quite to the point. As CPR 45.16, for example, makes expressly clear, a claim may properly be understood, for a particular purpose, to have "started" (in that example, in proceedings under CPR Part 8) notwithstanding that it has previously "started" in another context (in that example, under the Portal).

51. My conclusion is that whether a claim has "started" will depend upon the particular purpose for which the word is employed. That in turn will depend upon the context in which it as used, as well as the application of any relevant statutory provisions. So, for example, a Letter of Claim may properly be said to start a claim for the purposes of a process of negotiation and settlement in correspondence but not to do so for the purposes of the Civil Procedure Rules or the Limitation Act. Nor, in my view, can it start the claim for the purposes of the Protocol, which (paragraph 6.1) requires the claim to start with a CNF.

52. The question, in consequence, is whether this claim started under the Protocol, not whether, arguably, it had previously "started" in another context. Quite evidently it did. As Ms Robson puts it, a claim cannot exit the Protocol (as it undisputedly has) unless it has started under the Protocol.

53. Were the Claimant's interpretation of the rules to be correct, it seems to me that any Claimant could avoid the provisions of Section IIIA by sending a Letter of Claim before following the Protocol procedure. Such an interpretation would be contrary to the purpose of and the policy behind the Protocol, Section IIIA of CPR 45 and the overriding objective.

54. It would also be inconsistent with the judgment of Briggs LJ in *Sharp v Leeds City Council* [2017] EWCA Civ 33. The court found that the Protocol's fixed costs regime applied to the costs of an application for pre-action disclosure by a claimant notwithstanding that the claim, which had started off under the Protocol, was no longer continuing under it when the application was made. Briggs LJ, at paragraph 31, observed:

> "The starting point is that the plain object and intent of the fixed costs regime in relation to claims of this kind is that, *from the moment of entry into the Portal*…" (my emphasis) "… recovery of the costs of pursuing or defending that claim at all subsequent stages is intended to be limited to the fixed rates of recoverable costs, subject only to a very small category of clearly stated exceptions."

55. Jackson LJ made a similar observation at paragraph 4 of *Phillips -v- Willis* [2016] EWCA Civ 401, albeit without the same emphasis on the "moment of entry".

56. The position seems to me to be tolerably clear. From the moment of entry of any claim into the Portal the CPR 45 fixed costs regime will apply, unless the case can be shown to fall within one of the specified exceptions. The fact that a Letter of Claim may have been written beforehand is immaterial.

57. The question is not whether, as Mr Adams puts it, the Protocol "applies" to this claim. The Protocol sets out the circumstances in which a claimant is expected to use it, but it will only ever "apply" to the extent that the claimant chooses to do so. CPR 45, at Sections III and IIIA, sets out the costs consequences of the choices made.

58. I turn to Mr Adams' submissions on the intentions and the conduct of the parties. Before considering the principles, I have to say that I have seen nothing in the correspondence to indicate any common understanding that the Claimant had preserved her right to recover costs on the standard basis. Neither party is in a position to give evidence as to the intentions of the other, but even if subjective intentions were to the point (which, for reasons I shall explain, I do not think they can be) the only conclusion one can draw is that the issue was not really addressed by either party.

59. On receipt of a Letter of Claim, the Defendant's insurer's agent pressed for the matter to be submitted to the Portal. The Claimant's solicitors, on their own evidence, agreed to that without considering the consequences. The tone of their correspondence, in particular the suggestion that the claim "may well fall outside" the Protocol limit suggests that they were less confident about the point than they are now, or at least that they had not thought the point through.

60. I can find nothing to support the suggestion that the Claimant was in some way coerced into submitting the claim to the Portal, or that the Defendant was in some way unfairly taking advantage. The FMG's reference to "progress" evidences nothing more than an invitation to move the matter on in a particular way. Evidently they wanted the Claimant to use the Portal, but they were not in a position to insist on it.

61. Whether to pursue the claim under the Protocol was a matter for Leigh Day's judgment. It was entirely open to them to advise the Claimant to refuse to do so and instead to pursue the matter under CPR Part 7. The argument made in the Points of Dispute, that the claim could make no progress outside of the Portal process, seems to me to have no substance.

62. Nor can I see that the Claimant's insistence upon treating the notification date as 23 November 2015 has any real bearing. Insofar as one can identify any common intention at all, it is that the claim should be pursued, at least initially, through the Protocol. Nothing was said about costs.

63. As for the Part 36 correspondence, the Defendant's solicitors made it clear that they believed that fixed costs would be payable on acceptance of the Defendant's Part 36 offer: hence their express reference to the fixed costs provisions of CPR 36.20.

64. The fact that the Claimant's acceptance of the Part 36 offer was accompanied by a statement to the effect that costs would, in consequence, be payable on the standard

basis would not seem to me to have any bearing on the matter even if contractual principles could alter the effect of acceptance. If one were attempting to apply contractual principles to a Part 36 offer and acceptance, the proper conclusion would be either that the parties had agreed the level of damages, but not the costs consequences, or that (being at cross-purposes) they had not reached any binding agreement at all.

65. Contractual principles do not, however, apply. That is because, as Ms Robson submits, Part 36 is a self-contained code which is not amenable to adjustment by reference to principles of contract (much less subjective intentions).

66. Similarly, there would be no room for me to reinterpret the fixed costs provisions of CPR 45 in the light of the parties' alleged conduct or intentions. That would be the case even if I could accept the Claimant's submissions in that respect, and (for the reasons I have given) I cannot.

67. My approach is I believe consistent with a number of judgments relied upon by Ms Robson in which courts have refused to apply to fixed-cost cases principles of contract and the doctrines of waiver, affirmation and mistake. Although they are not binding on me, they are persuasive. In any event, I agree with them.

68. For the same reason, it seems to me that Mr Adams' argument on proportionality is not well founded. I should say that I do not quite understand his figures, given that the Defendant has, in the Points of Dispute, made a fixed costs offer totalling £15,648. More to the point however is that one cannot disapply CPR 45 by reference to the proportionality provisions of CPR 44.

69. This brings me to the question of whether the case can be said to be exceptional within the meaning of CPR 45.29J. In this context I must refer to the judgment of the Court of Appeal in *Qader v Esure Services Ltd* [2016] EWCA Civ 1109. The court, in that case, was considering the effect of CPR 45.29B before the words "and for as long as the case is not allocated to the multi-track" were inserted.

70. The court addressed a difficulty (since remedied) arising from the fact that the fixed costs regime, on the rule as then worded, appeared to apply to cases that had started under the Portal even after they had been allocated to the multi-track, so that fixed costs were self-evidently inappropriate. The court addressed the problem by, in effect, inserting into CPR 45.29B the words which now do form part of the rule.

71. Briggs LJ, in identifying that as the solution, made the following observations:

> "… I do not consider that the Rule Committee would have carried back to a pre-allocation stage a policy to disapply fixed costs, merely because a claim properly started in the Protocols had grown in value beyond £25,000, or had become the subject of a pleaded defence of fraud or dishonesty. As I have said, it by no means follows that every such case would be inappropriate for management and determination in the fast track. 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."

72. Ms Robson reminds me that this is one of a number of authorities which recognise the importance of certainty where costs have been fixed by the rules: she cites, for example, *Butt v Nizami* [2006] EWHC 159 (QB), *Lamont v Burton* [2007] EWCA Civ 429 (Dyson LJ at paragraph 26), *Solomon v Cromwell Group Plc* [2011] EWCA Civ 1584 (Moore-Bick LJ at paragraph 19) and *Kilby v Gawith* [2008] EWCA Civ 812 (Sir Anthony Clark MR at paragraph 27 et seq).

73. Mr Adams points out that in *Qader*, both the claims that were the subject of the appeal properly started, by reference to value, in the Protocol (they were allocated to the multi-track because of allegations of dishonesty). In fact the court made it clear that the Protocol was designed for cases with a maximum value of £25,000, that would, in the course of proceedings, be allocated to the fast track.

74. I accept that, but it seems to me that the more fundamental point is that, as the passage I have cited from the judgment of Briggs LJ shows, the Court of Appeal chose the point of allocation to the multi-track as the point of escape from the fixed costs regime precisely in order to avoid the uncertainty attendant on disapplying the regime to any case which ultimately settled for more than £25,000. I have to bear that in mind when considering whether this case can properly be treated as an exceptional case falling within CPR 45.29J.

75. The only finding of exceptional circumstances produced by either party, notwithstanding (as Ms Robson points out) the very substantial number of cases that are taken through the Portal each year, was produced by the Defendant. That was *Jackson v Barfoot Farms*, an unreported decision of DJ Jackson in the County Court at Canterbury on 29 November 2017, and which is helpful if only as a contrast to the case before me. That particular case proved (as the Judge found) to be very complicated and settled for some £350,000. I would respectfully agree with DJ Jackson that that case was indeed exceptional, but none of those considerations apply here.

76. The difficulty with this particular case is that having decided that the claim should be submitted to the Portal and pursued (initially) under the Protocol, the Claimant now seeks to remedy that by arguing that it was always unsuitable for the Protocol and should, in consequence, be seen as exceptional. The potential for satellite litigation, were such an argument to be acceptable in principle, seems to me to be considerable. It would create exactly the sort of uncertainty that the Court of Appeal sought to avoid in *Qader v Esure*.

77. For those reasons, my finding is that the Claimant's recoverable costs are limited to those provided for at CPR 45 Section IIIA.

78. As a postscript, I should refer to the judgment of Mr Justice Stewart in *Ferri v Gill* [2019] EWHC 952 (QB), which was handed down after the hearing before me. The essence of that judgment is that the test of exceptionality for cases falling under the fixed costs regime in CPR Pt 45 Section IIIA is a high one, requiring a strict approach. As that judgment appears to me to support the conclusions to which I had already come, I found no need, on reviewing it, to ask for further submissions from either party.