Neutral Citation Number: [2019] EWCA Civ 1780

Case No: A2/2019/0212

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM NOTTINGHAM COUNTY COURT
HIS HONOUR JUDGE OWEN QC
D00NG225

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2019

Before :

LORD JUSTICE McCOMBE
LORD JUSTICE COULSON
and
LADY JUSTICE NICOLA DAVIES

- -

Between :

Mr Philip Aldred	**Appellant**
- and -	
Master Tyreese Sulay Alieu Cham	**Respondent**

- -
- -

Roger Mallalieu (instructed by **Taylor Rose Ttkw**) for the **Appellant**
Andrew Granville Stafford (instructed by **Total Legal Solutions True Personal Injury Solicitors**) for the **Respondent**

Hearing date: 8th October 2019

- -

Approved Judgment

Lord Justice Coulson:

1 Introduction

1. The fixed recoverable costs regime, which was originally introduced for RTA claims in 2003[1] and, following the Jackson Review, was significantly expanded in 2013, can be counted a successful innovation. Working in tandem with the new RTA Pre-Action Protocol ("the PAP") it provides a structured system of costs recovery in this high volume, low value area of civil litigation. We were told that over 6 million claims have been started under the PAP since the inception of this new regime.

2. Two inescapable elements of that regime mean that, from time to time, this court is asked to construe the provisions of CPR Part 45 dealing with fixed costs. One such element is the undoubtedly complex nature of the provisions: the need to provide one comprehensive set of rules for so many different sorts of claim with so many potentially different features means that the rules are not always easy to navigate. The other is more basic: the understandable desire on the part of claimants to seek, through the rules setting out the exceptions, to recover from defendants more than the single sum stated in the tables by way of fixed costs, and the equally understandable wish of the defendants, wherever possible, to restrict the claimant's recovery to those fixed costs alone.

3. The issue that arises in the present case concerns the recoverability of the cost of counsel's advice as to the quantum of the proposed settlement of the RTA claim, in a case where the claimant is a child. The question for this court is whether that is a claim for a disbursement which should be allowed (in addition to the fixed recoverable costs) because, in the words of the relevant rule, it was "reasonably incurred due to a particular feature of the dispute". That simple question is then said to raise other issues, some arising out of the use of similar wording in other parts of the fixed recoverable costs regime.

2 The Relevant Facts

4. On 5 September 2015 the claimant (whom I shall hereafter call 'the respondent'), who was then aged seven, was injured in a road traffic accident caused by the appellant. The claim was started on 18 April 2016 using the PAP.

5. On 10 May, the appellant denied liability for the accident. As a result, the claim automatically fell out of the PAP and, in consequence, the relevant rules as to costs was provided by Section IIIA of CPR Part 45 (set out in paragraphs 26-29 below). We were told that, of the 6 million claims noted above, more than 50% fell out of the PAP process and that the most common reason for this was the defendant's denial of liability.

6. On 22 June, following negotiations, the appellant accepted liability. On 11 August, the appellant offered £2,000 in full and final settlement of the respondent's claim. The respondent's solicitors sought the advice of counsel as to the amount of the offer. Such advice was required because:

[1] See The Civil Procedure (Amendment) Rules 2003 (SI 2003/213)

(a) CPR Part 21, which is concerned with Children and Protected Parties, provides at r.21.10 (1):

> "21.10(1) Where a claim is made –
> (a) by or on behalf of a child or protected party; or
> (b) against a child or protected party,
> no settlement, compromise or payment (including any voluntary interim payment) and no acceptance of money paid into court shall be valid, so far as it relates to the claim by, on behalf of or against the child or protected party, without the approval of the court."

(b) Practice Direction 21, at paragraph 5.2, provides that:

> "(1) An opinion on the merits of the settlement or compromise given by counsel or solicitor acting for the child or protected party must, accept in very clear cases, be obtained".

It is not suggested that this was "a very clear case" such that counsel's advice was *not* required. Accordingly, as in most RTA cases involving children, there was a need in the present case to obtain counsel's advice on the merits of the proposed settlement.

7. In a written advice dated 6 September, counsel recommended acceptance of the offer. The fee for that advice was £150. On 20 October, in consequence of the advice, the respondent accepted the appellant's offer. It was then necessary to obtain the court's approval for the settlement. CPR Part 8 proceedings to achieve that end were started on 16 February 2017 and, on 2 July, District Judge Elmer approved the settlement in the sum of £2,000. He ordered the appellant to pay the respondent's costs to be assessed if not agreed.

8. On 27 July, the respondent served a bill of costs. In its response of 17 August, the appellant objected to the fee for counsel's advice, saying that it was outside the fixed costs regime provided by CPR 45 Section IIIA. Following service of the respondent's replies dated 9 January 2018, the matter came before District Judge Hale by way of a provisional assessment. He allowed the recovery of counsel's fee for the advice as a disbursement in addition to the fixed costs. The appellant sought an oral assessment.

9. There was an oral assessment on 10 August 2018. District Judge Hale did not change his view that the cost of the advice was recoverable in addition to the fixed costs. This was principally because the relevant rules (noted in paragraph 6 above) required an advice to be obtained for the purposes of a settlement involving a child. He said at paragraph 34:

> "This is a particular situation where the rules require a particular piece of work to be done. There is no discretion about it. It can be done by solicitor or counsel, but the solicitor is not bound to take one course or the other. It seems to me that the fact the claimant is a child is a particular feature of the dispute which entitles and indeed requires the court to look to the exception to decide whether or not it is recoverable."

10. The appellant appealed. The appeal was heard by HHJ Owen QC at Nottingham County Court on 21 December 2018. Judge Owen came to the same view as District Judge Hale. The heart of his decision is paragraph 21, which was in the following terms:

> "Since an advice on valuation in certain cases is required there must be provision within section 111A which allows for the recovery of such fees. I am not persuaded that it would be permissible to draw the inference, which underpins the Defendant's argument, to the effect that such fees are implicitly provided for within the fixed recoverable costs allowed under this section. I do not consider that rule 45.291(2)(h) refers to a disbursement other than counsel's (or as appropriate, a solicitor's) fee for an advice on valuation. Not all cases under section 111A will concern child claimants. If the claimant is a child, the need to obtain counsel's advice on valuation would constitute a particular feature of the dispute. There is no justification for implying that those fees, when incurred, are already provided for within the fixed recoverable costs. The fact that counsel's fees are expressly provided for under sections II and III in addition to the provision for any other disbursement(s) does not of itself admit to the inference argued for by the defendant. On the contrary, it seems to me that the absence of such express reference within section IIIA to these fees support the District Judge's conclusion. Clearly, where reasonably incurred there must be provision for the recovery of those fees. Since they are not otherwise expressly provided for or referred to it is clear, in my judgment that the provision for "any other disbursement reasonably incurred due to a particular feature of the dispute" under rule 45.291(2)(h) must include the fee in question. There is no need or room within the structure or content of section IIIA to infer that that fee is provided for within the fixed costs identified in Table 6B."

11. Notwithstanding that this was a second appeal, permission to appeal to this court was granted on the basis that the point in dispute was one of wide application.

3. The Background to the Fixed Costs Regime

12. The history of the fixed costs regime is set out in detail at paragraphs 44 – 50 of the judgment of Briggs LJ (as he then was) in *Qader and Ors v Esure Services Ltd* [2016] EWCA Civ 1109; [2017] 1 WLR 1924, and it is unnecessary to repeat it here. A limited regime for fixed recoverable costs arising out of RTA claims was originally introduced in 2003. Those rules are preserved (with some amendments) in Section II of Part 45, encompassing rules 45.9 – 45.15.

13. However, in his *Review of Civil Litigation Costs Final Report* in December 2009, Sir Rupert Jackson proposed a more extensive regime of fixed costs for RTA, Employer's Liability and Public Liability cases. His proposals were set out in chapter 15. They did not make any reference to or differentiate between claims which followed the PAP and claims which left the PAP process because, for example, liability was not admitted.

14. In their consultation paper of March 2011, the Ministry of Justice noted Sir Rupert Jackson's proposals but introduced the idea of different provisions depending on whether the claimant left the PAP process or not. It was that proposal which then found its way into the later set of amendments to the CPR.

15. These extensive amendments were introduced in 2013. Section III of Part 45 (rules 45.16 – 45.29) sets out the fixed costs regime where the claim was begun and continued under

the PAP. Section IIIA (rules 45.29A – 45.29L) sets out the very different regime which applies when the claim was begun under the PAP but no longer continued under it.

4. The Relevant Parts of the CPR

4.1 Introduction

16. I set out below some parts of Section II, Section III, and Section IIIA of CPR Part 45. A good deal of argument during the appeal hearing was directed towards the wording of each of these Sections, even though it was common ground that the applicable Section for this claim was Section IIIA. Both counsel spent time on various 'compare and contrast' exercises ranging across the three separate Sections. For the reasons explained in greater detail in Sections 6 and 7 of this Judgment, I consider that such exercises are generally unhelpful and should be avoided.

4.2 Section II of Part 45

17. As already noted, Section II of Part 45 was the original fixed costs regime for RTA claims. However, it is now of limited utility. That is because, as r.45.9(3)(b) makes plain, Section II does not apply where either Section III or Section IIIA applies, and these now cover the vast majority of RTA claims. Indeed, during the course of argument, the only category of claim which was identified as plainly falling within Section II (as opposed to Section III or Section IIIA) were RTA claims brought by protected parties.

18. Rule 45.10 provides as follows:

> "45.10
> Subject to rule 45.13, the only costs which are to be allowed are –
> (a) fixed recoverable costs calculated in accordance with rule 45.11; and
> (b) disbursements allowed in accordance with rule 45.12.
> (Rule 45.13 provides for where a party issues a claim for more than the fixed recoverable costs.)"

Accordingly, this emphasises that the only costs that are recoverable are either the fixed costs or a permitted disbursement. This stipulation is common to all three Sections of Part 45 to which reference was made during the appeal hearing.

19. The amounts of fixed recoverable costs under Section II are set out in r.45.11. They are shortly stated (there is no table) and are based on a percentage of the damages recovered, together with a modest lump sum. As will be seen, the models adopted for Section III and, in particular, Section IIIA, are much more detailed.

20. Allowable disbursements in Section II are set out in rule 45.12. This provides as follows:

> "45.12
> (1) The court –
> (a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but
> (b) will not allow a claim for any other type of disbursement.
>
> (2) The disbursements referred to in paragraph (1) are –
> (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;
(b) where they are necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in Part 21 –
(i) fees payable for instructing counsel; or
(ii) court fees payable on an application to the court; or
(c) any other disbursement that has arisen due to a particular feature of the dispute."

21. In this way, r.44.12(2)(b) provides a particular route for the recovery of counsel's fees, over and above the fixed recoverable costs, "where they are necessarily incurred by reason of one or more of the claimants being a child or protected party". There is then what has been called a catch-all[2] at r.45.12(2)(c), in respect of "any other disbursement that has arisen due to a particular feature of the dispute."

4.3 Section III

22. As already noted, this Section deals with the recoverable costs if the claim stays within the PAP. Rule 45.17 provides:

"45.17
The only costs allowed are –
(a) fixed costs in rule 45.18; and
(b) disbursements in accordance with rule 45.19; and
(c) where applicable, fixed costs in accordance with rule 45.23A or 45.23B."

This provides the same emphasis on recovery being limited to fixed costs and specific disbursements at r.45.10 (paragraph 18 above).

23. The amounts of fixed recoverable costs in respect of an RTA claim are set out in rule 45.18 and Table 6 as follows:

"45.18
(1) Subject to paragraph (4), the amount of fixed costs is set out in Tables 6 and 6A.
(2) In Tables 6 and 6A –
'Type A fixed costs' means the legal representative's costs;
'Type B fixed costs' means the advocate's costs; and
'Type C fixed costs' means the costs for the advice on the amount of damages where the claimant is a child.
(3) 'Advocate' has the same meaning as in rule 45.37(2)(a).
(4) Subject to rule 45.24(2) the court will not award more or less than the amounts shown in Tables 6 or 6A.
(5) Where the claimant –

[2] Although see paragraph 33 for a discussion about whether that is an accurate description of the provision.

(a) lives or works in an area set out in Practice Direction 45; and
(b) instructs a legal representative who practises in that area,
the fixed costs will include, in addition to the costs set out in Tables 6 or 6A, an amount equal to 12.5% of the Stage 1 and 2 and Stage 3 Type A fixed costs.
(6) Where appropriate, VAT may be recovered in addition to the amount of fixed costs and any reference in this Section to fixed costs is a reference to those costs net of any such VAT."

TABLE 6

Fixed costs in relation to the RTA Protocol			
Where the value of the claim for damages is not more than £10,000		**Where the value of the claim for damages is more than £10,000, but not more than £25,000**	
Stage 1 fixed costs	£200	Stage 1 fixed costs	£200
Stage 2 fixed costs	£300	Stage 2 fixed costs	£600
Stage 3 - Type A fixed costs	£250	Stage 3 - Type A fixed costs	£250
Stage 3 - Type B fixed costs	£250	Stage 3 - Type B fixed costs	£250
Stage 3 - Type C fixed costs	£150	Stage 3 - Type C fixed costs	£150

24. Accordingly, where the claimant is a child, Table 6 of the fixed recoverable costs regime, applicable when the claim stays within the PAP process, expressly provides that the cost of the advice on the amount of damages is included within Type C fixed recoverable costs, in the sum of £150.

25. The provision in relation to disbursements is set out at rule 45.19. It is necessary only to set out rules 45.19(1) and (2) as follows:

"45.19
(1) Subject to paragraphs (2A) to (2E), 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 to which either the RTA Protocol or EL/PL Protocol applies, the disbursements referred to in paragraph (1) are –
> (a) the cost of obtaining –
> (i) medical records;
> (ii) a medical report or reports or non-medical expert reports as provided for in the relevant Protocol;
> (aa) Driver Vehicle Licensing Authority;
> (bb) Motor Insurance Database;
> (b) court fees as a result of Part 21 being applicable;
> (c) court fees payable where proceedings are started as a result of a limitation period that is about to expire;
> (d) court fees in respect of the Stage 3 Procedure; and
> (e) any other disbursement that has arisen due to a particular feature of the dispute."

It will be noted that the catch-all provision at r.45.19(2)(e) ("any other disbursement that has arisen due to a particular feature of the dispute") has been retained, word-for-word, from the equivalent provision (r.45.12(2)(c)) in Section II. But in contrast to r.45.12(2)(b) of Section II, there is no provision in the list of allowable disbursements for the cost of instructing counsel to advise on settlement where the claimant is a child. That is probably because, as we have seen, the cost of that advice is already included in the fixed costs at Table 6.

4.4 Section IIIA

26. This Section of Part 45 deals with those cases which begin under the PAP but which, for whatever reason, no longer continue thereunder. Rule 45.29B provides, in the same language as before, that with certain exceptions, the only recoverable costs are the table of fixed costs and the permitted disbursements.

27. The fixed costs are set out in rule 45.29C in the following terms:

> "45.29C
> (1) Subject to paragraph (2), the amount of fixed costs is set out in Table 6B.
> (2) Where the claimant—
> (a) lives or works in an area set out in Practice Direction 45; and
> (b) instructs a legal representative who practises in that area,
> the fixed costs will include, in addition to the costs set out in Table 6B, an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in Table 6B.
> (3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT.
> (4) In Table 6B—
> (a) in Part B, 'on or after' means the period beginning on the date on which the court respectively—
> (i) issues the claim;
> (ii) allocates the claim under Part 26; or
> (iii) lists the claim for trial; and

(b) unless stated otherwise, a reference to 'damages' means agreed damages; and
(c) a reference to 'trial' is a reference to the final contested hearing."

TABLE 6B

Fixed costs where a claim no longer continues under the RTA Protocol				
A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7				
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000	
Fixed costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of the damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000	
B. If proceedings are issued under Part 7, but the case settles before trial				
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial	
Fixed costs	The total of— (a) £1,160; and (b) 20% of the damages	The total of— (a) £1,880; and (b) 20% of the damages	The total of— (a) £2,655; and (b) 20% of the damages	
C. If the claim is disposed of at trial				
Fixed costs	The total of— (a) £2,655; and			

	(b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee			
D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

28. Accordingly, the fixed recoverable costs in cases of this sort are a mixture of specified sums and percentages of the damages. The recoverable costs are identified in a more elaborate matrix than we have hitherto seen, because they are broken down by way of both the value of the underlying claim, and the time at which the proceedings are concluded. Understandably, the longer a case goes on before it settles, the higher the amount of fixed recoverable costs.

29. The provisions in respect of disbursements is at rule 45.29I(1) and (2). The rules are as follows:

> "45.29I
> **(1) Subject to paragraphs (2A) to (2E), 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 RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, 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**." (Emphasis supplied)

30. Both District Judge Hale and HHJ Owen QC allowed counsel's fee for the advice on settlement under r.45.29I(2)(h), on the basis that it was a disbursement "reasonably incurred due to a particular feature of the dispute". Although that wording is slightly different to the wording of the catch-all at r.45.12(2)(c) and r.45.19(2)(e) set out above (as Lady Justice Nicola Davies pointed out during the hearing), it does not seem to me that, on analysis, the slight alteration to the wording makes any difference to the issues before this court. The earlier iterations omit the words "reasonably incurred", but a disbursement which had not been reasonably incurred ought not to be allowed by the court in any event.

5. The Issues

31. Although the arguments ranged far and wide over the various Sections of Part 45 which I have identified above, it seems to me that the issues that arise on this appeal can be narrowed down to the following:

    (a) Issue 1: Was counsel's advice "due to a particular feature of the dispute"?

    (b) Issue 2: If the advice was due to a particular feature of the dispute, was the cost thereof a disbursement reasonably incurred which the court should allow, in addition to the fixed recoverable costs?

    I deal with these two issues in turn below.

6. Issue 1:'Particular Feature of the Dispute'

6.1 Authorities

32. There are no reported decisions on the interpretation of this provision. However, we were helpfully referred to two unreported decisions of two experienced first instance judges which, in my view, cast some light on the problem. Both were dealing with the same issue, namely whether a fee for a translator, in a case where the claimant was not an English speaker, could be said to be a fee due as a result of 'a particular feature of the dispute'. The judges in question reached opposing views.

33. In *Olesiej v Maple Industries* (Liverpool County Court) 4 January 2012 (HHJ Graham Wood QC), the judge found that the claimant spoke little or no English and required the services of a translator. However, he refused to allow the cost as an additional disbursement. He said:

> "13. Does such a need qualify in this case for the costs of an interpreter that is recoverable under 45.10(2)(d)? In my judgment, it does not. It seems to me that it arises out of a characteristic of the Claimant and not out of a particular feature of the dispute. The appellant's counsel's contention is that it does in fact arise out of a feature of the dispute which is the quantification of damages. I do not agree with that. It seems to me that medical reports are necessary to resolve quantum issues but there is nothing idiosyncratic in the process. Occasionally one can see how a medical issue might arise on a report which requires counsel's opinion, or the need for a second report.

> 14. One can anticipate situations where there may be an apparent medical complexity in what was thought to be an otherwise straightforward case, and where counsel is instructed; counsel may advise a second report after the medical records are considered, because it looks like the Claimant has had previous accidents. In those circumstances there may well be a valid argument for saying that these are disbursements, (counsel's opinion and the second report), that have arisen due to a particular feature of the dispute, whether or not the quantum is recoverable as pursued by the Claimant in those circumstances. Of course it would be necessary for the court to consider whether it was reasonable and necessary.
>
> 15. In seems to me that this is the correct approach, because otherwise the drafters of the rule have been quite careful in the way that they have defined the recoverability of disbursements. I made it clear to Counsel in the course of exchange that I do not accept that it would be appropriate to describe sub-rule (d) as a catch-all or a sweep up provision... If the Rule Committee had intended that this should be broadly defined, it seems to me the qualification would have been in terms such as *any other disbursement that is not recovered by the above situations.* In other words, an anticipation that the foregoing situations are apparently exclusive of other situations that might arise. Instead the rule drafters chose to use a particular description which this court has had to define and that is whether the disbursement has arisen due to a particular feature of the dispute."

34. *Olesiej* was cited to Master Campbell in the Senior Courts Costs Office in *Madej v Maciszyn* [2013] Lexis Citation 143. However, Master Campbell came to a different view. He said:

> "19. I agree with Mr Williams. In the first place, if the regime were truly fixed there would be no need for sub-section (2)(c) of CPR 45.12. Its very existence pre-supposes that the Rule Committee envisaged there might be occasions when a disbursement would be incurred which should be recoverable, notwithstanding that it did not fall within sub-paragraphs (2)(a) and (b). Therefore, I consider the jurisdiction of the Court to go outside the fixed boundaries is not as literal as Mr Eastwood contends. In my judgment, a sweep up clause is precisely what sub-paragraph (2)(c) is intended to be, so that where there is a feature present in a dispute which would not arise in every case, here lack of English, a reasonably incurred disbursement can be recovered. It follows that I consider that a Claimant's personal characteristic is capable of being a feature to which sub-paragraph (2)(c) can relate. As Mr Williams observes, that will not be so in every case (see his example of a six foot six man with red hair *ante* paragraph 12) but in circumstances where the Claimant might have a mobility problem and require a carer to accompany him or her to Court, or, as here, is a monoglot, such characteristics, would, in my view, be a particular feature within CPR 45.12 (2)(c).
>
> 20. That deals with "feature". What of "dispute"? The case advanced by Mr Eastwood is that it is not a contentious issue whether the Claimant speaks English so there is no dispute. I do not agree. The parties may be *ad idem* about the need for an interpreter, but that is to miss the point. In my

> judgment what is meant by "dispute" in the present case is the putative claim for damages arising out of the road traffic accident which was resolved without a claim in court being issued. Mr Eastwood's riposte about the meaning of "dispute" is that the particular feature must relate to a dispute in issue such as the *locus* of the accident, or to the quantum or damages or whether the Defendant was driving whilst disqualified so that, for example, a criminal records check might be required. He argues that these can be contrasted with the situation which pertains where a matter is not disputed, such as the need for a translator's fee, in which case it is not a feature of the dispute
>
> 21. In my view, the examples given by Mr Eastwood are of pre-existing matters which arise in the same way as not being able to understand or speak English. Simply because a particular disbursement might relate to quantum and another to the inability of the client to advance his case via his medical evidence unless he has an interpreter, to my mind has no distinction. There is no blanket exclusion for the recovery of disbursements for either. On the contrary, the presence of sub-paragraph (2)(c) of CPR 45.12 contemplates that situations might arise where all such disbursements would be recoverable."

6.2 Discussion

35. Having considered these careful judgments, I prefer the approach of HHJ Wood QC. The fact that, in a particular case, a claimant is a child, or someone who cannot speak English, or who requires an intermediary, is nothing whatever to do with the dispute itself. Age, linguistic ability and mental wellbeing are all characteristics of the claimant regardless of the dispute. They are not generated by or linked in any way to the dispute itself and cannot therefore be said to be a particular feature of that dispute.

36. The particular features of the dispute in an RTA claim will commonly be matters such as: how the accident happened, whether the defendant was to blame for the accident, the nature, scope and extent of the injuries and their consequences, and other matters of that kind. For example, the particular circumstances of the accident may be sufficiently unusual to require an accident reconstruction expert, or the injuries may be so complex that they require a number of different experts' reports. Such additional involvement of experts may also require specific advice from counsel. Depending always on the facts, such costs may be said to be a disbursement properly incurred as a result of a particular feature of the dispute.

37. In contrast, the cost of counsel's advice in the present case was not necessitated by any particular feature of the dispute, and was instead required because it is an almost mandatory requirement in all RTA cases where the claimant is a child. It was therefore caused by a characteristic of the claimant himself and does not fall within the exception.

38. I reach that conclusion based on the plain words of r.45.29I(2)(h). I do not derive any particular assistance in that interpretation from the similar words used in r.45.12(3)(b) and r.45.19(2)(e), in Sections II and III of Part 45 respectively. However, I do consider that my reading of these words, which would limit recoverability of sums over and above the fixed costs to disbursements due to specific features of the dispute which has arisen between the parties, is consistent with the overall purpose of the fixed recoverable costs

regime, and in particular its aim of ensuring that, save for express exceptions, the amount recoverable is limited to the sums set out in the tables by way of fixed recoverable costs. I come back to that topic again, in a slightly different context, in the next section of this judgment.

6.3 Conclusion on Issue 1

39. Accordingly, I do not consider that the fact that the respondent was a child was a particular feature of the RTA dispute between the respondent and the appellant. In those circumstances, I do not consider that the fee for the advice fell within the rubric of r.45.29I(2)(h). That is sufficient, if my lord and lady agree, to allow this appeal.

40. However, in deference to the detailed submissions that we heard, I would wish to go on and express my view as to the wider argument about the recoverability of this fee as a disbursement within the fixed recoverable costs regime as a whole. I do that therefore on the basis that I am wrong on Issue 1 and that the respondent's age was a particular feature of the dispute.

7. Issue 2: Was The Fee Recoverable From The Appellant?

7.1 The Parties' Submissions

41. On behalf of the appellant, Mr Mallalieu argued that the exceptions in r.45.29I in relation to disbursements should be construed narrowly, because otherwise it would make a nonsense of the whole fixed recoverable costs regime. He argued that the exception at r.45.29I(2)(h) was always intended to be of limited scope and he pointed out that, in *Dockerill v Tullett* [2012] I WLR 2092, a case where the claimant was a child, it was not even contended that counsel's fee was recoverable under this (or more properly its predecessor) provision.

42. Mr Mallalieu also had a point about disbursements generally. He pointed out that the rules provided that the advice required for a child claimant could be provided by either counsel or solicitor. If it was provided by a solicitor it would not be a disbursement, so it could not be recovered in addition to the fixed costs under r.45.29I(2)(h). Thus he said that, unless this appeal was allowed, it would encourage solicitors not to do any of the relevant work themselves, but still claim the fixed recoverable costs, and then seek to recover in addition the cost of the actual work done by way of disbursements for counsel's fees. He fairly accepted that this was something of a jury point.

43. Mr Granville Stafford contended that, since an advice was required, and since the provision of that advice was not expressly provided for in the fixed costs table under Section IIIA (although of course it was provided for in Section III), it must be recoverable as a disbursement. Otherwise there would be an anomaly.

44. Like Mr Mallalieu, he too had a jury point. He said that it would be wholly inequitable if, on the one hand, Practice Direction 21 (paragraph 6 above) required the provision of an advice, but the fixed cost regime was interpreted as permitting no possibility of the recovery of the cost of that advice.

45. Perhaps unsurprisingly, I consider that the answer to Issue 2 can be found somewhere between these two extreme positions.

7.2 Discussion in respect of Section IIIA

46. A disbursement is a *"cost payable in discharge of a liability properly incurred by [a solicitor] on behalf of the party to be charged with the bill (including counsel's fees)*" (see section 67 of the Solicitors Act 1974). There can be no doubt that counsel's fee for this advice was a disbursement within this definition and, given the absence of any different definition for the purposes of CPR 45 (indeed there is no definition of 'disbursement' at all in these rules), that must mean that the fee was a disbursement within r.45.29I.

47. Of course, in the light of that, it might be said that every item of counsel's fees would be a disbursement and therefore at least arguably recoverable, in addition to the fixed recoverable costs, under r.45.29I(2)(h). The fee payable for an advice on evidence, for example, or the brief fee itself, would be disbursements. If it was found that the fees for that work had been reasonably incurred, why would they too not be recoverable under this provision?

48. The straightforward answer is that, in the vast majority of cases, counsel's fees, although properly described as a disbursement, and although doubtless reasonably incurred, would not be allowed by the court under r.45.29I(1)(a). That is because the work that is the subject of the disbursement has already been allowed for in the fixed recoverable costs (Table 6B). Thus in *Mendes v Hochtief (UK) Construction Ltd* [2016] EWHC 976(QB) the trial advocacy fee under Stage D of Table 6B was recoverable because the case settled at court on the day listed for trial. There was no suggestion that the fee was somehow due as a disbursement regardless of the operation of the fixed costs in Table 6B.

49. The scope for argument about overlap between what is recoverable under the umbrella of fixed costs, on the one hand, and what might be recoverable as a disbursement on the other, arises out of the fact that the fixed recoverable costs regime in r.45.29C and Table 6B is based, in the main, on temporal considerations: the amount recoverable is dictated by when the case settles or is otherwise resolved. In order to make it workable, Table 6B cannot set out in grinding detail each and every one of the work items deemed to be included within the fixed recoverable cost at each stage: if it did, it would run to scores of pages and the disputes about any items that may have been inadvertently forgotten would be numerous. Instead it operates on the premise that all the costs which might ordinarily be expected to be incurred up to a particular stage of the case will be deemed to be included in the amount stated by way of fixed recoverable costs.

50. Disbursements, on the other hand, are one-off items which are for specific items of work. They are not easily addressed by reference to the same general considerations noted above, because the need for them will depend on the particular circumstances of the case. Accordingly, the rules simply provide that where such disbursements fall into one of the categories in r.45.29I(2) they will be recoverable in addition to the fixed costs.

51. Applying a modicum of common sense, it seems to me that the two different concepts have been melded together in a robust and workable fashion in Section IIIA of Part 45. If an item of work is deemed (or can be said implicitly) to be within the fixed recoverable costs in Table 6B, then it will not be separately recoverable as a disbursement. The brief fee is the most obvious example of that analysis.

52. In this way, it seems to me that Mr Mallalieu's concern about treating counsel's fees as disbursements within the fixed costs regime are, in large measure, groundless. Counsel's fees are a disbursement but, if the item of work to which they relate is deemed to be within the fixed costs regime at Table 6B, they will not be recoverable in addition to those fixed recoverable costs. That will cover the vast majority of counsel's fees unless, of course, it can be shown that such fees arise within the particular exceptions at r.45.29I(2), including the catch-all at r.45.29I(2)(h).

53. That also addresses the separate point about the alleged anomaly between counsel being paid for an item of work by way of a disbursement, in circumstances where a solicitor could not claim as a disbursement his own costs for carrying out the same piece of work himself[3]. If I am right that the vast majority of fees chargeable by counsel as disbursements are likely to be within the relevant table of fixed recoverable costs, the point will only arise infrequently. And if it does, it will be because r.45.29I(2) allows the disbursement to be recovered, regardless of any hypothetical comparison with a solicitor. In this way, Mr Mallalieu's spectre of the solicitor charging the full amount of the fixed costs for doing nothing is not a realistic scenario.

54. In the present case, assuming against my conclusion on Issue 1 that the fee for the advice was referable to a particular feature of the dispute, then it was a disbursement. It has been found to have been reasonably incurred and Mr Mallalieu expressly accepted that. So the question is whether it is capable of being allowed by the court under r.45.29I(1)(a). It will be separately recoverable only if it is not deemed to be within the fixed recoverable costs in Table 6B.

55. In my view, this item of work must be deemed to be within the fixed costs in Table 6B. It is an item of work that arises in the thousands of RTA claims under Section IIIA where the claimant is a child. It is a routine step that has to be taken prior to the settlement of such a claim. It must therefore be deemed to be included within Table 6B.

56. In reaching that conclusion, I bear in mind, as Mr Mallalieu urged me to do, the observations of Briggs LJ (as he then was) in *Sharpe v Leeds City Council* [2017] 4 WLR 98, in which he stressed the comprehensive nature of the fixed costs regime, the small category of exceptions, and the fact that there will inevitably be swings and roundabouts as there are in any regime designed to deal with high bulk, low value claims. The fact that this additional cost will be necessary in some claims but not in many other claims is simply another example of that process.

57. Another argument which also supports the conclusion that r.29I(2)(h) did not encompass this fee arose by reference to another express disbursement, namely that at r.45.29I(2)(c) ("the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol"). The PAP expressly provides for specialist legal advice. Paragraph 7.10 of the PAP states:

> "In most cases under this Protocol, it is expected that the claimant's legal representative would be able to value the claim. In some cases with a value of

[3] A solicitor's own fees cannot be charged as a disbursement because that would not accord with the statutory definition of a disbursement. HHJ Owen QC was wrong to suggest otherwise in the passage of his judgment set out at paragraph 10 above.

> more than £10,000 (excluding vehicle related damages), an additional advice from a specialist solicitor or from counsel may be justified where it is reasonably required to value the claim."

58. Accordingly, there is force in Mr Mallalieu's argument that, where the cost of any advice is recoverable in addition to those fixed costs, that may be because it is separately identified – as here - in both the PAP and the disbursements provisions of the rules. I do not say that this correlation will always be required to allow recovery under r.45.29I(2), but it certainly supports my view that the rule at r.45.29I(2)(h), even if it can properly be described as a catch-all, needs to be carefully and narrowly interpreted by reference to Section IIIA as a whole.

59. In arriving at my interpretation of the relevant rule, it has been unnecessary for me to have regard to anything other than the applicable part of the fixed costs regime, namely Section IIIA. As I have already indicated, I am not persuaded by the utility of the 'compare and contrast' exercises to which the court was treated by both counsel. It is not appropriate to expect a busy district judge, working through a series of stand-alone cost disputes of very low value, to perform such an analysis. In my view, the parties should focus on the rules that cover their particular dispute: it is neither practicable nor necessary to argue about the recoverability of an item of cost worth £150 by reference to lengthy Sections of the CPR which, on any view, apply at best tangentially to the dispute that has arisen.

60. However, I should say that, for completeness, my analysis of the other Sections does not provide any real assistance anyway. It certainly does not lead me to alter my interpretation of the interplay between r.45.29I(2)(h) and Table 6B.

7.3 Relevance of Sections II and III

61. The rules and Table 6 within Section III (set out at paragraph 23 above) expressly identify the advice for a child settlement as being within the fixed costs for claims which stay within the PAP. But where does that take us? Mr Granville Stafford argued that, because that express provision is not included within Section IIIA, the fee must instead be recoverable by way of a disbursement, whilst Mr Mallalieu said that, since Table 6 is very different in form and content to Table 6B, and the amounts by way of fixed recoverable costs are so much lower in Table 6, the comparison cannot prevent the conclusion that, for Table 6B, the cost of a child settlement advice is included in the stated fixed costs.

62. I agree with Mr Mallalieu. In my view, these two tables (and their genesis) are so different that any comparison between them is unhelpful. The mere fact that Table 6B does not expressly include the cost of the advice in a case where the claimant is a child does not mean that it is not within the fixed recoverable cost figures set out there. The only small point which might be made from any comparison between Sections III and IIIA is by reference to disbursements: under Section III, because of its inclusion in Table 6, the cost of the advice on settlement in a child case could never be recoverable in addition as a disbursement under the catch-all at r.45.19(2)(e). It is difficult therefore to support Mr Granville Stafford's argument that the very similar words of the catch-all at r.45.29I(2)(h) should be given a radically different meaning to that which must operate for r.45.19(2)(e), so as to allow the recovery of such a fee as a disbursement under Section IIIA.

63. In my view, comparison with the provisions in Section II is equally unproductive. There, the fee for an advice in a case where the claimant is a child is expressly identified as a separate recoverable disbursement. That might tend to support Mr Mallalieu's argument that, by reference to Section IIIA, that express provision has been excised because it is deemed to be within the fixed recoverable costs. But again, since the fixed costs regime is so different in any event, it might be better said that the comparison is not of any real assistance.

64. I have already noted Mr Mallalieu's reliance on *Dockerill v Tullett*. That was a case under what is now Section II, before Sections III and IIIA were added. The argument there was about whether counsel's fee for attending the settlement hearing was recoverable under what is now r.45.12.(2)(b). Mr Mallalieu relied on the fact that there was no alternative argument in *Dockerill* that the fee was recoverable under the catch-all provision at r.45.12(2)(c) ("any other disbursement that has arisen due to a particular feature of the dispute") of the kind now advanced by Mr Granville Stafford. However, the absence of such an alternative argument in that case is unsurprising, given that there was always a stronger claim to recover the fee under what is now r.45.12(2)(b), because that did at least identify the circumstance of the claimant being a child. I therefore did not derive any assistance from that authority either.

7.4 Conclusion

65. For the reasons set out above, even if I am wrong on Issue 1, and the fact that the respondent was a child was a "particular feature" of the dispute, I do not consider that the fee for the advice was recoverable under r.45.29I(2)(h). Taking Section IIIA in the round, I consider that any fee for that advice must be deemed to be included within the fixed recoverable costs in Table 6B.

66. I have reached that view primarily by reference to Section IIIA alone. I do not consider that the other Sections provide any real assistance in interpreting the relevant rule in this case. They certainly do not cause me to alter or modify my conclusion. To the extent that it matters, therefore, I would also allow the appeal on Issue 2.

Lady Justice Nicola Davies

67. I have read (in draft) the judgments of Coulson LJ and McCombe LJ. As to Issue 1, I agree with the analysis of Coulson LJ and would allow this appeal.

68. As to Issue 2, I share the concern of McCombe LJ expressed at paragraph 72 of his judgment, that in matters affecting the proper construction and meaning of the CPR it may well be necessary to construe the relevant sections of the Rules as a coherent whole. I too found the "trawl" through the provisions of various sections of Part 45 to be of assistance, notwithstanding the fact that it added to the length of the hearing.

69. I would allow the appeal upon Issue 1. I agree with the reservations expressed by McCombe LJ in respect of Issue 2.

Lord Justice McCombe

70. Coulson LJ's judgment (which I have read in draft) leads to the conclusion that the appeal should be allowed, a result with which I agree, largely for the reasons that he has given.

71. I add only a few lines of my own to reflect a very slight nuance between my reasons and those given by my Lord. I agree entirely with what he has said about Issue 1 and that would be determinative of this appeal, as he says in paragraph 39 above. However, with respect, I disagree with my Lord's view of the assistance offered by Issue 2 in deciding the proper construction of the relevant rule in this case.

72. It seems to me that in matters affecting the proper construction and meaning of the CPR (as of any other enactment), it is impossible to approach the matter in discrete compartments. It is necessary to construe any such instrument as a whole. I do not think that comparisons between the wording of the various sections of Part 45 of the Rules will always be avoidable. Nor do I think that such comparisons are unhelpful. It is necessary that the CPR and, even more so, particular Parts of them are approached and interpreted as a coherent whole. The fixed costs rules should not be allowed to hold within their various Sections different meanings for essentially similar words.

73. As Coulson LJ notes in paragraph 62, r.45.19(2)(e) and r.45.29I(2)(h) contain essentially similar wording and it would be undesirable to accept Mr Granville Stafford's submission that they should be given radically different meanings within the two Sections of the fixed costs regime. To my mind, Mr Mallalieu convincingly demonstrated that this would be the undesirable consequence of his opponent's submission. I do not consider that this to be only a "small point" in arriving at a correct construction of the rule in question here.

74. While the trawl through the complicated provisions of the various Sections Part 45 was not entirely entertaining or easy, I consider that it was a necessary exercise in this case to ensure that the rules were applied as a coherent and consistent whole. I found myself in agreement with Mr Mallalieu's submissions on this Issue. In my judgment, the exercise was unfortunately necessary, and I did find it of "real assistance" in interpreting the relevant rule in this case.

75. All that said, I am grateful to Coulson LJ for his comprehensive and pellucid analysis of the rules and his explanation of the legislative background to them. As I have said, largely for the reasons he gives, I would allow this appeal.