Neutral Citation Number: [2020] EWCA Civ 17

Case No: B3/2018/2349

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Winchester County Court
HH Judge Iain Hughes QC
DO0AF649

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 January 2020

Before :

LORD JUSTICE HAMBLEN
LORD JUSTICE HOLROYDE
and
LORD JUSTICE BAKER

- -

Between :

WICKES BUILDING SUPPLIES LIMITED	**Appellant**
- and -	
WILLIAM GERARDE BLAIR	**Respondent**
(No.2) (Costs)	

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- -

Grace Cullen and **Paul Hughes** (instructed by **BLM Solicitors**) for the **Appellant**
Sarah Robson (instructed by **Bakers Solicitors**) for the **Respondent**

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Approved Judgment

LORD JUSTICE BAKER :

1. On 12 November 2019, we allowed an appeal by Wickes Building Supplies Ltd ("the appellant") against the decision of HH Judge Hughes QC to allow an appeal against an order made by District Judge James in proceedings brought by the respondent under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the Protocol").

2. Following our decision, the appellant applied for an order that the respondent pay the costs of the appeal and of the hearing before the circuit judge. The parties are agreed that the respondent should pay costs but are not agreed as to the appropriate regime, nor as to the extent to which any order for costs may be enforced.

3. The following issues fall to be determined:

    (1) Do the rules governing fixed costs in CPR r.45.17 to 19 apply to the costs of the appeal?

    (2) If not, does CPR r.52.19 apply?

    (3) If CPR r.52.19 does apply, what order for costs should we make?

    (4) Does the Qualified One-Way Costs Shifting regime in CPR Part 44 apply to the costs of the appeal so as to limit the extent to which any order may be enforced against the respondent?

    Having identified these issues, we adjourned the application to be determined on the basis of further written submissions from the parties. We received two sets of submissions from each party. For the appellant, the first set were prepared by Ms Cullen who appeared at the hearing of the appeal, and the second by Mr Hughes. For the respondent, both submissions were drafted by Ms Robson. We are very grateful to counsel for their extensive inquiries and submissions on the issues.

4. The full background to the case is set out in our earlier judgment, reported at [2019] EWCA Civ 1934. In summary, the respondent sustained injuries as a result of an accident at work whilst in the appellant's employment and subsequently submitted a claim to the appellant's insurers under the Protocol. The appellant admitted liability and, after the parties had failed to agree damages under Stage 2 of the Protocol, the respondent filed a claim in the county court under Stage 3, which is set out in Practice Direction 8B. At the hearing, the district judge ordered the appellants to pay £2000 by way of damages to the respondent, plus costs in the sum of £1080.

5. The respondent filed a notice of appeal on the grounds that the district judge had made a procedural error in allowing the claim to continue under the Protocol after the respondent had served additional evidence. The circuit judge allowed the appeal, holding that the district judge ought to have dismissed the proceedings under the Protocol, leaving the respondent to start fresh proceedings under CPR Part 7. The judge set aside the district judge's order, dismissed the claim under the Protocol, reserved all questions of costs due under the Protocol until the conclusion of the respondent's claim under Part 7, and ordered the appellant to pay the respondent's costs of the appeal. The appellant then appealed the circuit judge's decision to this

court. At the conclusion of the appeal hearing before us, we held that the circuit judge had been wrong to conclude that the district judge should have dismissed proceedings under the Protocol. We therefore set aside the circuit judge's order and reinstated the order made by the district judge.

Relevant statutory provisions, rules of court and case law

6. Under s.51(1) of the Senior Courts Act 1981:

> "Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in
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> (a) the civil division of the Court of Appeal
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> (b) the High Court
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> and
>
> (c) the county court
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> shall be in the discretion of the court."

S.51(3) provides that:

> "The court shall have full power to determine by whom and to what extent the costs are to be paid."

7. CPR Part 44 provides general rules about costs. Section II of Part 44 establishes the regime for Qualified One-Way Costs Shifting ("QOCS"). Rule 44.13(1) provides, so far as relevant to this case:

> "This section applies to proceedings which include a claim for damages (a) for personal injuries …."

Rule 44.14 provides:

> "(1) Subject to rules 44.15 and 44.16, orders for costs made against the claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.
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> (2) Orders for costs made against the claimant may only be enforced after the proceedings have been concluded and the costs been assessed or agreed.
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> (3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record."

Rules 44.15 and 44.16 provide exceptions to QOCS, none relevant to this case.

8. CPR Part 45 sets out rules of court about fixed costs. Section III of Part 45 governs fixed costs in claims brought under the Protocol. CPR r.45.17, so far as relevant to this case, provides that:

> "The only costs allowed are
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> (a) fixed costs in rule 45.18; and
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> (b) disbursements in accordance with rule 45.19 …."

9. CPR Part 52 sets out rules governing appeals to the civil division of the Court of Appeal, the High Court and the county court. Rule 52.19 (previously rule 52.9A) provides:

> "(1) Subject to rule 52.19A [not relevant to this case], in any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.
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> (2) In making such an order the court will have regard to
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> (a) the means of both parties;
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> (b) all the circumstances of the case; and
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> (c) the need to facilitate access to justice.
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> (3) If the appeal raises an issue of principle or practice upon which substantial sums may turn, it may not be appropriate to make an order under paragraph (1).
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> (4) An application for such an order must be made as soon as practicable and will be determined without a hearing unless the court orders otherwise."

CPR Part 45 Section III or CPR 52.19?

10. On behalf of the respondent, Ms Robson submitted that this claim was and had always been a claim under the Protocol and therefore the Part 45 Section III regime applied. She contended that, as the Court of Appeal's discretionary powers to award costs under s.51 of the Senior Courts Act are expressed as being subject to rules of court, the terms of Part 45 Section III take precedence. The provisions of rules 45.16 to 18 are mandatory – the court may not award anything beyond the fixed costs. In support of this proposition, she cited a passage from the judgment of Briggs LJ (as he then was) in *Sharp v Leeds City Council* [2017] EWCA Civ 33:

> "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 pursuant to the EL/PL Protocol (and, for that matter, the RTA Protocol as well) 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. To recognise implied exceptions in relation to such claim-related activity and expenditure would be destructive of

the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of the small or relatively modest types of claim to which that regime currently applies."

11. Ms Robson contrasted the separate fixed costs regimes of both Sections II and IIIA of Part 45, which each include what she described as "escape clauses" permitting the award of costs at a higher level in exceptional circumstances (rules 45.13 and 45.29J respectively), with Section III, which contains no such provision. She cited a number of cases in which this court has stressed the importance of fixed cost regimes while acknowledging that, by favouring certainty, there will occasionally be cases where the outcome may in some respects appear unreasonable: see, for example, *Lamont v Burton* [2007] EWCA Civ 429 per Dyson LJ at paragraph 26. Ms Robson submitted that, were this court, in awarding the costs of the appeal, to depart from the fixed costs regime in Section III of Part 45, it would undermine certainty and encourage satellite litigation with parties inventing more and more ingenious ideas to circumvent the regime.

12. On behalf of the appellant, Ms Cullen submitted that the fixed costs regime under Section III of Part 45 does not cover appeals. The costs of an appeal are entirely separate from any fixed costs regime and are dealt with separately under Part 52. An appeal to this court will involve drafting grounds of appeal and a skeleton argument containing legal submissions. The documents filed will comply with the procedural rules governing appeals. The hearing of the appeal will be of a wholly different character. The process is completely different from that set out in Stage 3 of the Protocol in Practice Direction 8B. The fixed costs regime simply does not apply. Ms Cullen pointed out that, following his successful appeal at the hearing before the circuit judge, the respondent had applied for, and been awarded, costs in the sum of £4,500. It was not suggested on his behalf at that point that the fixed costs regime applied.

13. In supplemental submissions for the appellant, Mr Hughes accepted that the provisions of CPR r.52.19 apply to this appeal. He submitted, however, that the jurisdiction is discretionary and that the starting point for the court is that the appellant is entitled to its costs on an unrestricted basis, save by way of assessment.

The exercise of discretion under CPR 52.19

14. In her supplemental submissions, Ms Robson, whilst not resiling from her primary position, contended that, if rule 52.19 applied, an application of the factors listed in rule 52.19(2) ought to lead the court to the same result, namely to restrict the costs of the appeal to those which would be awarded under the fixed costs regime, for the following reasons:

    (1) In considering the means of the parties, the court should take into account that the respondent is a private individual who was a lorry driver at the time of the accident, was subsequently made redundant and now works for the local authority as a refuse operative. He is a single parent with gross income of £1500 per month. In contrast, the appellant is a large well-known limited company with a turnover in excess of £1 billion. The court should bear in mind the overriding objective which requires that cases be dealt with justly

and at proportionate cost so far as practicable, ensuring that parties are on an equal footing.

(2) In considering the circumstances of the case, the court should take into account that the case involved only a low-value claim whereas the costs sought are vastly disproportionate to the sum in issue on appeal.

(3) With regard to the third factor in rule 52.19(2), the need to facilitate access to justice, Ms Robson cited part of the note to the rule in the 2019 White Book (paragraph 52.19.1):

> "In principle it seems right that where it has been seen fit to design a particular first instance jurisdiction so that no costs are recoverable or recoverable costs are restricted, the normal cost shifting rule should not apply to appeals, at least not in its full rigour. Otherwise, the policies justifying costs protection by jurisdictional means (as distinct from protection by bespoke court orders in the form of protective costs orders or costs capping orders in individual cases) could be undermined."

In the event that the court decided to exercise its power under CPR 52.19, Ms Robson invited the court to make an order that the respondent should pay the appellant's costs of the appeals, limited to no more than the costs and disbursements which would have been payable under Section III of CPR Part 45 at a final hearing, to be assessed if not agreed.

15. For the appellant, however, Mr Hughes invited the court not to exercise its discretion under rule 52.19 to limit costs to those which would otherwise be awarded pursuant to Section III of Part 45, for the following reasons:

(1) Both parties are private litigants. The respondent chose to resist the appeal, thereby increasing costs.

(2) It is in the interest of justice for the appellant to be compensated for successfully bringing its appeal before this court. An order depriving it of its full assessed costs would be punitive, as the benefit obtained from bringing the appeal would be more than outweighed by the balance of the recoverable cost.

(3) A limited costs order would serve to encourage unmeritorious arguments before this court.

(4) Access to justice is promoted if parties are required to think carefully about the arguments they put forward and utilise the courts only for the resolution of real disputes.

(5) Given the fact that the respondent sought and was awarded assessed costs of the first appeal, it is wrong for him to seek to invoke the court's discretionary power to limit the costs of the second appeal.

QOCS

16. Ms Robson submitted that, whatever award of costs is made by this court, her client is protected by the QOCS regime so that the appellant cannot recover costs in excess of the £2000 ordered by way of damages by the district judge. Mr Hughes submitted that the QOCS regime does not apply because an appeal is separate and distinct from the trial process.

17. In their submissions on this issue, counsel cited a number of reported cases, but I need only refer to the following three.

18. In *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd and another* [2012] EWCA Civ 987, this court was concerned with the construction of s.29 of the Access to Justice Act 1999, which provides:

> "Where in any proceedings a costs order is made in favour of any party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy."

The court was required to determine whether, in the context of that provision and the facts of the case, a trial and an appeal from that trial were the same proceedings or different proceedings. The majority (Rix and Etherton LJJ, Patten LJ dissenting) held that they were separate proceedings. At paragraph 42, Rix LJ observed:

> "In my judgment, it is possible to conceive that 'proceedings' could either embrace both trial and appeal or else be interpreted as referring separately to trial and appeal. Although it would be perfectly natural to think of an appeal as arising from and being part of the same proceedings as the trial from which the appeal is taken, it is nevertheless clear that trial and appeal have been treated as separate proceedings for the purposes of costs."

At paragraph 58 he concluded:

> "In sum, the broad interpretation of the word 'proceedings' advocated by the respondent is unnecessary to achieve the object of the statute, runs counter to a wellknown distinction, made in the context of costs liability, between costs of trial and costs of appeal where trial and appeal are spoken of as different proceedings, leads to a result which was clearly not contemplated by the ancillary practice directions, and undermines the fairness of the regime."

Etherton LJ agreed, noting (at paragraph 61):

> "The word 'proceedings', in the context of court proceedings, is a word of uncertain meaning. It can sometimes mean part of court proceedings, such as being limited to proceedings at first instance or to appeal proceedings, or it can mean the entire course of proceedings from inception to final conclusion."

At paragraph 63, he concluded:

> "It is, therefore, perfectly possible to give the word 'proceedings' in section 29 a wide or a narrow meaning. The section would make sense and could work whether the appellants' interpretation or the respondent's interpretation were

adopted. I agree with Rix LJ that, in those circumstances, section 29 must be interpreted in a way that will best reflect the legislative purpose."

19. In *Wagenaar v Weekend Travel Ltd* [2014]EWCA Civ 1105, this court held that a Part 20 claim brought by a defendant to a QOCS claim to shift or share the burden of any judgment in favour of the claimant is not a claim to which the QOCS regime applies. At paragraph 38 of his judgment, Vos LJ stated:

> "In my judgment, the proper meaning of the word "proceedings" in CPR Part 44.13 has to be divined primarily from the rules on QOCS themselves. …."

20. In *Parker v Butler* [2016] EWHC 1251 (QB), Edis J had to consider substantially the same point as arises in the present case. In paragraph 1 of his judgment he formulated the question he had to determine in these terms:

> "In a case where a claimant has the benefit of Qualified One Way Costs Shifting (QOCS) at trial, is he subject to the ordinary rules as to costs on a first appeal to an appeal court at least where no other order is made under CPR 52.9A?"

21. Edis J set out the principles behind the QOCS regime in paragraphs 3 and 4:

> "3. If (as is likely to be the case here) the claimant's access to justice is dependent on the benefit of QOCS, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. The effect of QOCS is that his liability to meet any adverse order for costs is limited to the value of sums recovered in the proceedings by way of damages except in certain circumstances. In other words, except in those circumstances, he cannot be worse off as a result of bringing his claim. If he has the benefit of a Conditional Fee Agreement he will not be liable for his own costs and QOCS restricts his liability to the sums recovered in the proceedings. The risk that a failure in litigation may result in the loss of existing assets is a substantial inhibition on access to justice and that is an important part of the reason why QOCS was established.
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> 4. The power to make enforceable orders for costs is designed to compensate successful parties for their expense in bringing or resisting claims, but it also has an effect of deterring people from bringing or resisting claims unsuccessfully. It is an incentive to resolve disputes and serves a public as well as a private interest. That consideration is in tension with access to justice. In appellate civil proceedings in QOCS cases permission to appeal is always required. That filter affords some protection for the civil justice system and the other parties against unmeritorious appeals. The costs disincentive is not rendered irrelevant by this fact, but in resolving the tension between access to justice and other considerations it is reasonable to start from the proposition that the issue only concerns the claimant's ability to bring an appeal which a judge has held to have a realistic prospect of success or that there is some other compelling reason for it, or to resist an appeal where a judge has made the order which is challenged. Therefore, in either case the stance of the claimant has a measure of judicial approval at a

very early stage in any appeal proceedings. In these circumstances a claimant's right to access to justice deserves particular weight."

22. Having considered the decisions in ***Hawkesford*** and ***Wagenaar***, Edis J reached this conclusion:

> "17. An appeal by a claimant against the dismissal of his claim for personal injuries is a means of pursuing that claim against the defendant or defendants who succeeded in defeating that claim at trial. There is no difference between the parties or the relief sought as there is between the original claim and the Part 20 claim. Most importantly, to my mind there is no difference between the nature of the claimant at trial and the appellant on appeal. He is the same person, and the QOCS regime exists for his benefit as the best way to protect his access to justice to pursue a personal injury claim. To construe the word 'proceedings' as excluding an appeal which was necessary if you were to succeed in establishing the claim which had earlier attracted QOCS protection would do nothing to serve the purpose of the QOCS regime. The other construction, which holds that for the purpose of CPR Part 44.13 an appeal between the claimant and the defendant in a personal injury claim is part of the proceedings which include a claim for personal injuries is open to me, following ***Hawksford v Trustees Jersey Ltd***, and should be preferred because it more justly achieves what is plainly the purpose of the regime as divined from the Rules.
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> 18. … In my judgment for the purposes of the QOCS regime any appeal which concerns the outcome of the claim for damages for personal injuries or the procedure by which it is to be determined is part of the proceedings as defined in CPR 44.13. Therefore an order for costs against the claimant in favour of a defendant will only be enforceable to the extent permitted by the QOCS regime.
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> 19. I do not accept that this construction is affected by CPR 52.9A [now CPR 52.19]. This allows the court to make an order (generally at a very early stage of the appeal proceedings) to alter the consequences of the general scheme for costs in civil appeals in cases where other rules applied to the proceedings which resulted in the decision against which the appeal is brought. This covers cases where there are no special rules governing the costs in the appeal court, but there are in the proceedings below. This does not apply to cases where, on a proper construction of the rules, the same regime applies to the proceedings at first instance and on appeal. The fact that the court has a discretion to limit the costs orders which may be made protectively in a variety of situations is simply irrelevant to the present issue.
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> 20. For these reasons the costs order which I have made will not be enforceable …."

23. On behalf of the respondent, Ms Robson invited the court to endorse the decision in ***Parker v Butler***. On behalf of the appellant, however, Mr Hughes invited the court to apply the construction of the word "proceedings" adopted in ***Hawksford*** and not follow the reasoning of Edis J in ***Parker v Butler***.

Conclusion

24. S.51 of the Senior Courts Act 1981 provides that the costs of proceedings in the civil division of the Court of Appeal, the High Court and the county court shall be in the general discretion of the court, subject to rules of court. The rules governing appeals to those courts are set out in CPR Part 52. Rule 52.19(1) gives an appeal court a specific discretion to make an order limiting the recoverable costs of the appeal in "any proceedings in which costs recovery is normally limited or excluded at first instance". Proceedings at first instance under the Protocol plainly fall into that category. It follows that the fixed costs regime applicable to proceedings at first instance under the Protocol does not apply to the costs of an appeal. Instead, the appellate court has a discretion in such cases to limit the costs recoverable.

25. In the circumstances of this case, however, I am not persuaded that the court should exercise its discretion under rule 52.19. The respondent made a claim under the Protocol and the appellant properly complied with all the procedural requirements up to and including the hearing before the district judge. The respondent then filed an appeal notice seeking to overturn the order he had obtained from the district judge, relying on his own failure to comply with the procedural requirements of the Protocol. That appeal was, in my judgment, wholly unmeritorious and led the appellant to incur unnecessary additional costs. In those circumstances, I conclude that the appellant is entitled to its costs of both appeals. I do not consider that the inequality in the parties' financial circumstances justifies any departure from that outcome, nor do I consider that wider principles of access to justice have any relevance to the decision on this issue.

26. Furthermore, this appeal raised a point of practice. Had the interpretation of Practice Direction 8B advanced on behalf of the respondent been accepted by this court, it is likely that a significant number of cases would automatically have fallen out of the Protocol and claimants in those cases would have incurred additional costs. It is therefore at least arguable that this appeal comes within rule 52.19(3).

27. For these reasons, I would make an order that the respondent pay the appellant's costs of the appeal to the circuit judge and of the further appeal to this court, to be assessed if not agreed.

28. In my judgment, however, enforcement of the costs order is subject to the QOCS regime. I agree with the interpretation of the rules set out by Edis J in ***Parker v Butler***. Having regard to the purpose of the QOCS regime, I interpret the word "proceedings" in CPR r.44.13 as including both the first instance proceedings and any subsequent appeal.

29. I do not read the decisions in ***Hawksford*** and ***Wagenaar*** as being in conflict. In each case, this court held that the word "proceedings" had to be interpreted to reflect the legislative purpose. The purpose of the QOCS regime is to facilitate access to justice for those of limited means. As Edis J observed at paragraph 3 of his judgment in ***Parker v Butler***, if a claimant's access to justice is dependent on the availability of the QOCS regime, that access will be significantly reduced if he is exposed to a risk as to the costs of any unsuccessful appeal which he may bring or any successful appeal a defendant may bring against him. It follows that, as Edis J noted at paragraph 17 of his judgment, to construe the word "proceedings" as excluding an appeal would do

nothing to serve the purpose of the QOCS regime. I therefore conclude that any appeal which concerns the outcome of the claim for damages for personal injuries, or the procedure by which such a claim is to be determined, is part of the "proceedings" under CPR r.44.13. This interpretation applies even where, as here, (a) the court is dealing with a second appeal, (b) the appeal is brought by the defendant to the original claim, and (c) the court has declined to exercise its discretionary powers to limit recoverable costs under CPR 52.19.

30. It follows that the costs order I would propose making for the reasons set out above is not enforceable against the respondent. For the avoidance of doubt, the order made as a result of this judgment should include a recital to that effect.

LORD JUSTICE HOLROYDE

31. I agree.

LORD JUSTICE HAMBLEN

32. I also agree.

[Note – prior to handing down of this judgment, the parties submitted an agreed order as to costs which the court approved.]