Neutral Citation Number: [2017] EWCA Civ 33

Case No: A2/2015/3877

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WAKEFIELD CIVIL AND FAMILY JUSTICE CENTRE
His Honour Judge Saffman
B00WF286

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/02/2017

Before :

LORD JUSTICE JACKSON
LORD JUSTICE BRIGGS
and
LORD JUSTICE IRWIN

- -

Between :

MISS CAREN SHARP	**Appellant**
- and -	
LEEDS CITY COUNCIL	**Respondent**

- -
- -

Alexander Hutton QC and Mr Ian Pennock (instructed by **Emsleys Solicitors**) for the **Appellant**
Nicholas Bacon QC (instructed by **Leeds City Council**) for the **Respondent**

Hearing dates: 24 January 2017

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Judgment Approved

Lord Justice Briggs:

Introduction

1. This second appeal, from the Order of HHJ Saffman made on 2 November 2015 in the County Court at Wakefield raises a short but important point of interpretation of the Civil Procedure Rules, namely whether the regime for fixed costs provided by Section IIIA of Part 45 for claims which started, but no longer continue, under the EL/PL Protocol applies to the costs of an application under Section 52 of County Courts Act 1984 for pre-action disclosure in connection with such a claim. We were informed by counsel that this question has received different answers from different district judges around the country, upon the determination of pre-action disclosure ("PAD") applications of this kind. Some have assumed that the fixed costs regime applies, treating the PAD application as an interim application within the meaning of Part 45.29H. Others have continued to treat the costs of PAD applications as if they were governed by Part 46.1 and, generally, summarily assessed costs on the standard basis. In the present case DJ Heppell awarded costs of a PAD application by the claimant Miss Sharp against the defendant Leeds City Council on the latter basis, summarily assessing them at £1,250.00. On appeal, Judge Saffman concluded that the fixed costs regime applied to the PAD application, with the result that the costs payable were reduced to £305.00. While the difference of a little less than £1,000 may appear modest as the *casus belli* for successive vigorously contested appeals, the issue gives rise to important practical consequences in terms of the cost/benefit of making PAD applications in small personal injuries claims of this kind, so that it is entirely understandable that this question has been pursued by way of a second appeal in order to obtain an authoritative determination of the point.

Pre-Action Disclosure – Jurisdiction and Specific Rules

2. The jurisdiction of the County Court to make PAD orders is to be found in Section 52(2) of the County Courts Act 1984, which provides as follows:

> "On the application, in accordance with rules of court, of a person who appears to the county court to be likely to be a party to subsequent proceedings in that court, the county court shall in such circumstances as may be prescribed, have power to order a person who appears to the court to be likely to be a party to the proceedings and to be a party in the proceedings and to be likely to have or to have had in his possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim –
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> (a) to disclose whether those documents are in his possession, custody or power; and
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> (b) to produce such of those document as are in his possession, custody or power to the applicant or, on such conditions as may be specified in the order –
>
> (i) to the applicant's legal advisers; or

> (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant; or
>
> (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant."

As is apparent from a more general reading of Section 52, this jurisdiction is by no means confined to personal injury cases. It requires that it should appear to the court that both the applicant and the person against whom the application is made are likely to be parties to the same subsequent County Court proceedings. Identical provision is made for PAD applications in relation to High Court proceedings by Section 33 of the Senior Courts Act 1981.

3. Under the heading "Orders for interim remedies" CPR Part 25.1(1)(i) makes provision for the court to grant interim remedies by way of orders under Section 33 of the Senior Courts Act and Section 52 of the County Courts Act. Such an order is described, in parentheses, as an "order for disclosure of documents or inspection of property before a claim has been made".

4. Part 25.2, headed "Time when an order for an interim remedy may be made" provides at sub-rule (1)(a) that an order for any interim remedy (within the broad range described in Part 25.1) may be made at any time, including before proceedings are started. Sub-rule (3) provides, in general terms, that where the court grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced. But sub-rule (4) provides:

> "In particular, the court need not direct that a claim be commenced where the application is made under Section 33 of the Senior Courts Act 1981 or Section 52 of the County Courts Act 1984…"

5. Part 25.4 provides that PAD applications, both in the High Court and the County Court, must be made in accordance with the general rules about applications contained in Part 23. Prior to the coming into force of the CPR, such applications were made by originating summons. Under Part 23 they are made by application notice (see Part 23.3(1)), on notice to the respondent (see Part 23.4(1)) and, in the absence of any existing proceedings to which the application relates, are given a separate distinguishing number.

6. Part 46.1 makes specific provision (distinct from the general rules about costs) for the costs of PAD applications, both in the High Court and the County Court, departing from the ordinary general rule under Part 44.2, namely that unsuccessful party pays. Part 46.1(2) provides that:

> "The general rule is that the court will award the person against whom the order is sought that person's costs –
>
> (a) of the application; and
>
> (b) of complying with any order made on the applications."

But Part 46.1(3) provides that:

> "The court however may make a different order, having regard to all circumstances, including –
>
> (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and
>
> (b) whether the parties to the application have complied with any relevant pre-action protocols."

PAD Applications in the Personal Injuries Context

7. The present case is concerned with the costs of a PAD application made in connection with a claim for damages for personal injuries. The vast majority of such claims, where the personal injury damages claimed are £25,000 or less, will fall within the purview of one or more pre-action protocols. For present purposes, the relevant protocols are, first, the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol") and secondly, the Pre-action Protocol for Personal Injury Claims ("the Personal Injury Protocol"). At the time of the making of the PAD application to which this appeal relates, in February 2015, the Personal Injury Protocol was in the form set out on pages 2739ff in Volume 1 of 2015 White Book. It has since been substantially revised: see pages 2381ff of Volume 1 of the 2016 White Book. Both versions set out aims which include the early exchange of information about the dispute, better and earlier pre-action investigation by all parties and enabling parties to avoid litigation by agreeing a settlement of the dispute before proceedings are commenced. Both versions of the Personal Injury Protocol require a prospective defendant to respond to letters of claim by making early disclosure of relevant documents, which would be likely to be ordered to be disclosed by the court, either on a PAD application, or on disclosure during the proceedings.

8. As is well known, the EL/PL Protocol (like the more frequently used RTA Protocol) makes provision for the commencement of claims by means of an online process known as the Portal, by means of a Claim Notification Form ("CNF"). Paragraph 1.1(6) provides that :

> "Claim" means a claim prior to the start of proceedings, for payment of damages under the process set out in this Protocol;"

9. The aim of the EL/PL Protocol is set out in paragraph 3.1 as follows:

> "The aim of this Protocol is to ensure that –
>
> (1) the defendant pays damages and costs using the process set out in Protocol without the need for the claimant to start proceedings;
>
> (2) damages are paid within a reasonable time; and
>
> (3) the claimant's legal representative receives the fixed costs at each appropriate stage."

10. Paragraphs 6.9 to 6.11 of the EL/PL Protocol make provision for the defendant's response to a CNF. In summary, the defendant must acknowledge receipt electronically the next day after receipt of the CNF and must complete a substantive response ("the CNF Response") within, in a PL case, 40 days of the sending of the CNF.

11. Where liability is admitted by the defendant the EL/PL Protocol is designed to encourage negotiation and agreement as to quantum, but makes provision for what is called the Stage 3 Procedure for determination of quantum by the court, usually at a very short (and highly efficient) hearing on documentary evidence alone.

12. A claim no longer continues under the EL/PL Protocol in the circumstances specified in paragraph 6.13. Those include a non-admission of liability, the failure to send the CNF response and an opinion by the defendant that the Small Claims Track would be the normal track for the claim. In the present case, the claim started in the EL/PL Protocol but did not continue within it after the defendant did not send a CNF Response within the prescribed time.

Fixed Costs for EL/PL Protocol Claims

13. The EL/PL Protocol was introduced side by side with the fixed costs regime for such claims. That regime was enacted largely pursuant to the recommendations of Jackson LJ in his Review of Civil Litigation Costs. Comprehensive provision is made for the incidence and quantification of fixed recoverable costs for such claims in Sections III and IIIA of CPR Part 45. Broadly speaking, Section III provides for fixed recoverable costs in relation to such claims while they remain in the RTA and EL/PL Protocols, the Stage 3 Procedure being treated as within those Protocols for that purpose. Thus, fixed costs are recoverable where the case settles at any Stage, and where there is a Stage 3 Procedure determination.

14. Section IIIA of Part 45 provides almost as comprehensively for fixed recoverable costs in relation to claims which start within one of those Protocols, but no longer continue under them. I say 'almost as comprehensively' because there are a small number of limited exclusions and exceptions from the applicability of the fixed costs regime, to some of which I will refer in due course. With one exception, those exclusions were all expressly made. The exception consists of the very occasional RTA or EL/PL claim which, having ceased to continue under the relevant Protocol, is allocated to the Multi-track. The absence of an express exclusion for such cases was the result of a drafting error which has now been rectified: see *Qader v Esure Services Limited* [2016] EWCA Civ 1109 at paragraphs 44ff, and the Civil Procedure (Amendment) Rules 2017, paragraph 8.

15. For present purposes the relevant provisions of Section IIIA of Part 45 are as follows:

> "45.29A
>
> (1) Subject to paragraph (3), this section applies where a claim is started under—

(a) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'); or

(b) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol'), but no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B.

(2) This section does not apply to a disease claim which is started under the EL/PL Protocol.

45.29D

Subject to rules 45.29F, 45.29H and 45.29J, in a claim started under the EL/PL Protocol the only costs allowed are—

(a) fixed costs in rule 45.29E; and

(b) disbursements in accordance with rule 45.29I."

16. Part 45.29E includes detailed tables providing for fixed costs where the parties settle before the issue of proceedings, after issue but before trial, or at trial. The detail of those tables does not matter.

17. Part 45.29F makes detailed provision for defendant's costs. Generally speaking, paragraphs (2) to (7) make the standard provision for fixed costs, the detail of which does not matter. Paragraphs 8 and 9 each provides for the special costs provisions in Part 36 to override the fixed costs regime in the specific circumstances there stated. Paragraph (10) disapplies fixed costs where, under Parts 44.15 and 16, the qualified one-way costs shifting regime ("QOCS") is disapplied. It is to be noted that Part 44.13(1) also disapplies QOCS in relation to PAD applications in the High Court and the County Court, but no reference to this disapplication is made in Part 45.29F, or anywhere else in Part 45.

18. Part 45.29H makes provision for fixed costs of interim applications in the following terms:

"45.29H

(1) Where the court makes an order for costs of an interim application to be paid by one party in a case to which this Section applies, the order shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6 or 6A.

> (2) Where the party in whose favour the order for costs is made—
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> (a) lives, works or carries on business in an area set out in Practice Direction 45; and
>
> (b) instructs a legal representative who practises in that area, the costs will include, in addition to the costs allowable under paragraph (1), an amount equal to 12.5% of those costs.
>
> (3) If an order for costs is made pursuant to this rule, the party in whose favour the order is made is entitled to disbursements in accordance with rule 45.29I.
>
> (4) …"

19. Part 45.29I deals with disbursements. For present purposes, all that needs to be noted is that the fixed costs regime generally allows court fees as disbursements: see paragraph (2)(d).

20. Part 45.29J makes general provision for recovery of amounts in excess of the fixed recoverable costs in exceptional circumstances, in the following terms:

> "45.29J
>
> (1) 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.
>
> (2) If the court considers such a claim to be appropriate, it may—
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> (a) summarily assess the costs; or
>
> (b) make an order for the costs to be subject to detailed assessment.
>
> (3) If the court does not consider the claim to be appropriate, it will make an order—
>
> (a) if the claim is made by the claimant, for the fixed recoverable costs; or
>
> (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs, and any permitted disbursements only."

This Case – Facts and Proceedings

21. The issue raised by this appeal is not fact-sensitive. Accordingly, I can summarise the underlying facts very briefly.

22. On 26 February 2014 the claimant Miss Sharp tripped and fell when walking along a footpath between Leeds Playhouse and Quarry House, Quarry Hill, Leeds. She suffered injury to her right wrist requiring her to wear a splint. She believed that her accident had been caused by the presence of a broken and therefore defective paving slab on the footpath.

23. On 23 July 2014 the claimant by her solicitors loaded a CNF onto the Portal pursuant to the EL/PL Protocol, alleging breach of statutory duty under the Highways Act 1980 due to the council's alleged failure to maintain the footpath. The council's initial position was that it was not responsible for the footpath, because it was privately owned by Caddick Developments Limited ("Caddick"). After pursuing a claim against Caddick, the claimant ascertained that it had not taken over responsibility for the footpath until one month after her accident. Accordingly she re-directed her claim at the defendant on 28 October 2014, still within the Portal.

24. It is common ground that the claimant's claim then ceased to continue within the EL/PL Protocol, although the precise reasons for that appear to be a matter of dispute. In any event, her claim thereafter fell within the purview of the Personal Injury Protocol, her CNF being treated as a Letter of Claim. The council failed to give the pre-action disclosure pursuant to the Personal Injury Protocol, with the result that the claimant made a PAD application to the County Court at Wakefield on 24 February 2015.

25. By the time that her PAD application came before DJ Heppell (on a telephone hearing) the council had given the necessary disclosure to the claimant. Nonetheless the District Judge awarded her the costs of the PAD application, no doubt because its issue had been necessary in order to obtain the disclosure which ought to have been given earlier pursuant to the Personal Injury Protocol. As I have said, he treated the fixed costs regime as inapplicable to PAD applications but, on appeal (for which he sensibly gave permission), Judge Saffman came to the opposite conclusion.

26. Before leaving the facts and proceedings, it is to be noted that PAD applications by claimants in personal injuries cases arising from failures by defendants to provide pre-action disclosure as required by the Personal Injury Protocol appear to be relatively common. That this is so appears from the unreported judgment of District Judge Ellington in *Kirton v Asda Stores Limited*, also in the County Court at Wakefield in February 2015, in which he said this:

> "9. PAD applications are commonplace. In this court they are listed in blocks of twenty to twenty-five at a time in a 30 minute listing slot. Of those twenty or so cases, agreed draft orders will be filed in all but four or five. Without exception, the agreed orders will have provision for the Defendant to pay the Claimant's costs, whether it is a case of disclosure having already been made, agreed disclosure to be made by an agreed later date, or acknowledgement.

> 10. Of the remaining four or five, one or two will be wholly inactive, one or two may attend for an unopposed order and the remainder will have a dispute which will require an adjudication. Those with a dispute are adjourned to be heard in a 30 minute telephone conference at a later date. Almost without exception, the dispute is over costs and not the principle of disclosure.
>
> 11. It is apparent that these cases, dealt with in such numbers and in such general manner, are those in which Defendants have breached the protocol and recognise the inevitability of a costs order against them. Bearing in mind that the costs awarded to Claimants in these applications tend to be of the order of £400 or £500 in an agreed case and around £800 to £1200 in those where there has been an adjudication, the cost of extended opposition is unlikely to be economic.
>
> 12. This has been the manner in which such applications have been considered in recent years. The change which brings about the consideration today is the extension of the scheme for dealing with low value road traffic cases to include employers liability and public liability cases and the alterations to the costs rules which went with that. The changes have been in effect since July 2013."

27. It is evident from paragraph 11 of District Judge Ellington's judgment that he habitually assessed costs of such PAD applications on the basis that he was not constrained by the fixed costs regime, although it is not clear whether he was just describing a period prior to the coming into force of that regime in July 2013. As he says, costs orders are made in favour of the claimants in such personal injury PAD applications because, in general, the applications are made following a breach by the relevant defendants of their disclosure obligations under the Personal Injury Protocol.

Analysis

28. In his excellent and well-focussed submissions for the appellant, Mr Alexander Hutton QC, supported by Mr Ian Pennock, made the following main points:

    a) Although the relevant Protocols and Rules recognise as a "claim" the pursuit of a cause of action for damages for personal injuries prior to the issue of legal proceedings, a PAD application is not part of such a claim. Rather, it is, and has always been treated as, a separate and self-contained application, with its own separate jurisdiction, procedural rules and costs regime.

    b) Although a PAD application is described in CPR Part 25 as one of a number of applications for interim remedies, it is not to be regarded as an "interim application" within the meaning of Part 45.29H, because it is not made "in a case to which this Section applies" within the meaning of sub-paragraph (1). Rather it is separate from any such case.

c) The regime for defendants' fixed recoverable costs under Part 45.29F is incompatible with the general rule for the costs of PAD applications under Part 46.1, which includes provision not merely for the defendant's costs of the application, but for its costs of complying with any order for disclosure.

d) Since, in the personal injury context, a claimant's PAD application is generally made for the purpose of remedying the defendant's breach of its disclosure obligations under the Personal Injuries Protocol, to confine the claimant to the fixed recoverable costs would be an inadequate sanction for widespread procedural misconduct by defendants.

29. Mr Hutton's submissions were all the more effective because of his readiness to make sensible concessions. These included the following:

a) That a claim for damages for personal injuries could, from the moment of the loading of the claimant's CNF on to the Portal, properly be regarded as a pending claim, even though no proceedings had yet been issued.

b) That a PAD application by a claimant in a claim to which the Personal Injuries Protocol applied could properly and generally be regarded as a response to a default by the defendant in the conduct of its response to that claim.

c) That such a PAD application could properly be described as being in furtherance of that claim.

d) That the court's order for disclosure pursuant to the PAD application could properly be described as designed to put the claimant into the same position in relation to that claim as if the defendant had complied with its obligations under the Personal Injury Protocol.

I regard those concessions as sensibly made, and inevitable.

30. In my judgment the fixed costs regime plainly applies to the costs of a PAD application made by a claimant who is pursuing a claim for damages for personal injuries which began with the issue of a CNF in the Portal pursuant to the EL/PL Protocol but which, at the time of the PAD application, is no longer continuing under that Protocol. My reasons follow.

31. 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.

32. That conclusion is, in my view, expressly prescribed by the clear words of Part 45.29A(1) and 45.29D. In particular, paragraph D provides that the fixed costs and

disbursements prescribed by the regime (in paragraphs 29E and I respectively) are "the only costs allowed". Although this is subject to paragraphs F, H and J, they are each part of the fixed costs regime, even though they permit different or enlarged recovery in certain precisely defined circumstances.

33. That this is what Section IIIA of Part 45 is clearly designed to achieve is powerfully reinforced by its context, namely those other provisions in Part 45 (already described) which ensure that a case which starts under the EL/PL Protocol and continues within it to settlement or Stage 3 determination is also subject to the fixed costs regime throughout, as I have described. Furthermore, the fixed costs regime plainly applies to cases which no longer continue under the EL/PL Protocol but which never reach the stage when court proceedings are issued. This is what is provided by Part 45.29E and Part A of Table 6C in particular. The same applies to RTA Protocol cases: see Part 45.29C, and Part A of Table 6B.

34. I agree with Mr Hutton that a PAD application is, in certain respects, both self-contained and separate from the claim (whether or not for personal injury) to which it relates. But in the personal injury context, or at least that part of it to which the EL/PL Protocol and the Personal Injuries Protocol both apply, the connections between the PAD application and the claim for personal injury damages to which it relates are particularly close, as is reflected in Mr Hutton's sensible concessions. The PAD application both responds to a defendant's default in compliance with its disclosure obligations under the Personal Injury Protocol and operates in furtherance of the damages claim by assisting the claimant in its preparation. It also operates as a means whereby the procedural advantages intended to be conferred on claimants by the Personal Injury Protocol are made good by the court. Above all, the provision of pre-action disclosure powerfully contributes to early settlement, before the issue of proceedings, which is a stated aim of the Protocol.

35. For those reasons it seems to me entirely apposite for a PAD application to fall within the description of interim applications in Part 45.29H, as being "an interim application … in a case to which this Section applies". The "case" in which the application is made is, in my view, the claim for damages for personal injury, during and in the pursuit of which the PAD application is made. It is plainly an application for an interim remedy within the meaning of Part 25, and it is in my view "interim" in the fullest sense, because it follows the institution of the "claim" by the uploading of a CNF on the Portal, even though no proceedings under Part 7 have yet been issued, and precedes the resolution of the claim by settlement or final judgment.

36. I agree with Mr Hutton that it would be hard to fit the provision in Part 46.1 whereby the court may award the respondent to a PAD application its costs of complying with an order made pursuant to it, within the straitjacket of Part 45.29F and H. Nonetheless a defendant (in the Personal Injury Protocol context) which successfully resisted a PAD application would stand to recover fixed costs under Part 45.29F, albeit no doubt in most cases in an amount very much less than the expenditure actually incurred.

37. Furthermore, Mr Hutton's point about a supposed incompatibility between Part 46.1 and the fixed costs regime is in my view a double-edged sword. If there is such an incompatibility, it is of no account because, if the fixed costs regime applies, then provisions elsewhere in the CPR for more generous costs recovery, including but not

limited to Part 46.1, are simply displaced. Furthermore, in the context of the Personal Injury Protocol, it is hard to conceive of a case in which the court would make an order for disclosure on a PAD application for compliance with which the defendant ought to be paid its costs. District Judge Ellington could not, in *Kirton v Asda,* remember a single PAD application in which the defendant, rather than the claimant, obtained its costs. Those PAD applications were cases arising from the defendants' breach of their protocol disclosure obligations. It follows that Mr Hutton's supposed incompatibility is more apparent than real, in the personal injury context.

38. There is, by contrast, some real force in Mr Hutton's submission that limiting costs recovery to claimants who succeed in PAD applications in the context of the Personal Injury Protocol to the fixed costs regime will largely deprive such applications of their value as a spur to proper compliance by insurance-backed defendants with their protocol disclosure obligations. It is plain that the fixed costs recovery will refund only a small part of the likely outlay to be incurred by those acting for the claimant in making a PAD application. They are self-contained applications, requiring it to be demonstrated that the defendant both has, and has failed to produce, relevant documents, and requiring a sufficient explanation of the nature and merits of the claimant's case, in the absence of existing pleadings, to which reference might otherwise conveniently be made. Furthermore, although in an opposed PAD application a defendant might be put to trouble and expense beyond the very limited costs liability provided for by the fixed costs regime, there would be nothing to prevent recalcitrant defendants from simply failing in their disclosure obligations, waiting to see if the claimant was prepared to incur the uneconomic expense of a PAD application, and then simply complying with any order made by doing precisely that which, under the Protocols, the defendant ought to have done in the first place.

39. But in my judgment the answer to this submission lies not in subjecting the fixed costs regime to an implied exception for PAD applications which exposed recalcitrant defendants to an altogether higher but variable level of recoverable costs liability, to be determined by assessment. Rather, the answer lies in the availability of an application under Part 45.29J, if exceptional circumstances can be shown or, for the future, in a recognition by the Rule Committee that the fixed costs regime needs to be kept under review, and defects in it remedied by adjustment of the fixed allowances where that can be shown to be justified.

40. It may well be that the frequency with which defendants fail to comply with their Protocol disclosure obligations may make it difficult to pass the exceptional circumstances hurdle in Part 45.29J, although I would not regard deliberate disregard of those obligations as unexceptional merely because it was frequently encountered. It may be that the very limited recovery of expenditure on a PAD application under the fixed costs regime means that such applications are not as effective as a means of sanctioning breach of Protocol disclosure obligations as they should be. If that is made good by appropriate evidence, then it seems to me that some consideration by way of review to the establishment of a more generous, but still fixed, recovery of costs of such applications would be justified.

41. By contrast, to throw open PAD applications generally to the recovery of assessed costs would in my view be to risk giving rise to an undesirable form of satellite litigation in which there would be likely to be incentives for the incurring of disproportionate expense, which is precisely what the fixed costs regime, viewed as a

whole, is designed to avoid. The fixed costs regime inevitably contains swings and roundabouts, and lawyers who assist claimants by participating in it are accustomed to taking the rough with the smooth, in pursuing legal business which is profitable overall.

42. I must finally mention a detailed submission made by Mr Hutton about the inter-relationship between Part 45.29F and the QOCS regime. He pointed to the fact that Part 45.29F(1)(b) and (10) disapplied the fixed costs regime to a claim for defendants' costs where the QOCS regime was itself disapplied by Part 45.15 and 16. Those are, in summary, where proceedings have been found to disclose no reasonable grounds for claim or otherwise an abuse of process, where the claim has been found to have been fundamentally dishonest, or other precisely defined circumstances. By contrast, Part 44.13(1) expressly disapplies QOCS in relation to any PAD application, but that disapplication of QOCS is not then picked up in Part 45.29F, for the separate purpose of disapplying the fixed costs regime. Mr Hutton submitted that this was because the drafter never thought that fixed costs applied to PAD applications. In my view that is a speculative submission. It is just as likely that, whereas the drafter was at pains to disapply the fixed costs regime in certain instances where QOCS was itself disapplied, the drafter carefully decided not to do so in relation to PAD applications. The result is that, in my view, that submission goes nowhere.

Conclusion

43. The result of this necessarily detailed analysis is that, notwithstanding Mr Hutton's well-crafted submissions, Judge Saffman was right in his overall conclusion, and I would therefore dismiss this appeal.

Lord Justice Irwin:

44. I agree.

Lord Justice Jackson:

45. I also agree.