Neutral Citation Number: [2016] EWCA Civ 1096

Case No: A2/2015/1787

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRKENHEAD COUNTY COURT AND FAMILY COURT
District Judge Campbell
A89YJ009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/11/2016

Before :

LADY JUSTICE ARDEN
LORD JUSTICE UNDERHILL
and
LORD JUSTICE BRIGGS
with
MASTER GORDON SAKER (Senior Costs Judge) sitting as an Assessor

- -

Between :

MR TERRANCE BIRD	**Appellant**
- and -	
ACORN GROUP LIMITED	**Respondent**

- -
- -

Mr Steven Turner (instructed by **Taylor Rose TTKW**) for the **Appellant**
Mr Ben Williams QC and Mr Kevin Latham (instructed by **Michael W Halsall Solicitors Limited**) for the **Respondent**

Hearing date: 20 October 2016

- -

Approved Judgment

Lord Justice Briggs :

1. This leapfrog appeal from the Order of District Judge Campbell sitting at the County Court at Birkenhead, made on 16th February 2015, raises a short but important point about the fixed costs regime applicable to personal injury cases commenced under the Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims ("the EL/PL Protocol"). It is a short point because, notwithstanding the breadth of counsel's submissions, it turns upon the special definition of "trial" for the purposes of EL/PL Protocol cases in CPR45.29E(4)(c). An identical definition applies to cases started under the RTA Protocol. This is an important point because the question is whether a disposal hearing listed for the quantification of damages payable after judgment under CPR26 PD12.2(1)(a) is, or is not, a trial within the meaning of rule 45.29E(4)(c). Many EL/PL Protocol cases are dealt with in that way. If the listing of a disposal hearing constitutes listing for trial, then fixed costs are recoverable at a higher rate than would otherwise be the case where there is a settlement between the date of listing and the date fixed for the disposal hearing. The difference is, in absolute terms, a modest one but the cumulative effect of its application to numerous cases is substantial. Authoritative guidance is needed on a question which has generated significant controversy, hence this leapfrog appeal.

2. CPR45.29E headed "Amount of fixed costs – EL/PL Protocol" was introduced in 2013 and provides, so far as is relevant, as follows:

> "45.29E(1) Subject to paragraph (2), the amount of fixed costs is set out –
>
> (a) in respect of employers' liability claims, in Table 6C; and
>
> (b) in respect of public liability claims, in Table 6D.
>
> (2) …
>
> (3) …
>
> (4) In Tables 6C and 6D –
>
> (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) …
>
> (c) a reference to "trial" is a reference to the final contested hearing."

3. This appeal concerns a public liability claim, so that the relevant table is Table 6D, headed "Fixed costs where a claim no longer continues under the EL/PL Protocol – public liability claims". It is divided into four parts, A to D. Part A governs fixed costs arising from a settlement prior to the claimant issuing proceedings under Part 7. Part B provides as follows:

"B. If proceedings are issued under Part 7, but the case settles before trial

Stage at which case is settled	On or after 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 the date of trial
Fixed Costs damages	The total of— (a) £2,450; and (b) 17.5% of the damages	The total of— (a) £3,065; and (b) 22.5% of the damages	The total of— (a) 3,790; and (b) 27.5% of the damages

I will refer to the three columns in part B as columns 1, 2 and 3 respectively. Part C is as follows:

C. If the claim is disposed of at trial	
Fixed costs	The total of— (a) £3,790; (b) 27.5% of the damages agreed or awarded; and (c) the relevant trial advocacy fee

Part D provides graded trial advocacy fees, so as to identify the fee payable under part C(c). They are graded in accordance with the amount of damages agreed or awarded, and range between £500 and £1,705.

4. CPR Part 26 deals with allocation. Generally speaking (and the detail does not matter for present purposes) claims are allocated between the small claims track, the fast track and the multi-track in accordance with criteria which include, but are not limited to, the amount claimed. The vast majority of EL/PL Protocol cases are allocated (if at all) to the fast track. Allocation is a case-management function of the court, carried out after the filing of a defence, so that the case can be appropriately managed and tried, on its way to judgment.

5. CPR 26PD headed "Practice Direction 26 - Case Management – Preliminary Stage: Allocation and Re-Allocation", makes further provision beyond Part 26 itself mainly in relation to allocation. Paragraph 12, as its heading states, make provision for determining the amount to be paid under a Judgment or Order. So far as is relevant, its provisions are as follows:

"**12.1 Scope**

(1) In the following paragraphs –

(a) a 'relevant order' means a judgment or order of the court which requires the amount of money to be paid by one party to another to be decided by the court; and

(b) a 'disposal hearing' means a hearing in accordance with paragraph 12.4.

(2) A relevant order may have been obtained:

(a) by a judgment in default under Part 12;

(b) by a judgment on an admission under Part 14;

(c) on the striking out of a statement of case under Part 3;

(d) on a summary judgment application under Part 24;

(e) on the determination of a preliminary issue or on a trial as to liability; or

(f) at trial.

(3) A relevant order includes any order for the amount of a debt, damages or interest to be decided by the court (including an order for the taking of an account or the making of an inquiry as to any sum due, and any similar order), but does not include an order for the assessment of costs.

Directions

12.2 Directions

(1) When the court makes a relevant order it will give directions, which may include –

(a) listing the claim for a disposal hearing;

(b) allocating or re-allocating the claim (but see paragraph 12.3);

(c) …

(d) …

12.3 Allocation

(1) If, when the court makes a relevant order –

> (a) the claim has not previously been allocated to a track; and
>
> (b) the financial value of the claim (determined in accordance with Part 26) is such that the claim would, if defended be allocated to the small claims track,
>
> the court will normally allocate it to that track.
>
> (2) Where paragraph (1)(b) does not apply, the court will not normally allocate the claim to a track (other than the small claims track) unless –
>
> (a) the amount payable appears to be genuinely disputed on substantial grounds; or
>
> (b) the dispute is not suitable to be dealt with at a disposal hearing.
>
> **12.4 Disposal hearings**
>
> (1) A disposal hearing is a hearing –
>
> (a) which will not normally last longer than 30 minutes, and
>
> (b) at which the court will not normally hear oral evidence.
>
> (2) At a disposal hearing the court may –
>
> (a) decide the amount payable under or in consequence of the relevant order and give judgment for that amount; or
>
> (b) give directions as to the future conduct of the proceedings.
>
> (3) …
>
> (4) Rule 32.6 applies to evidence at a disposal hearing unless the court directs otherwise.
>
> (5) Except where the claim has been allocated to the small claims track, the court will not exercise its power under sub-paragraph (2)(a) unless any written evidence on which the claimant relies has been served on the defendant at least 3 days before the disposal hearing."

6. The issue with which this appeal is concerned is not fact-sensitive. It is common ground that whenever an EL/PL Protocol case is listed for a disposal hearing after judgment for damages to be assessed, under Part 26PD 12.2(1)(a), and is then settled before the date listed for that disposal hearing, then either the first or the third column in Table 6D part B must be applicable so as to determine the fixed costs. The second column will not be applicable, since there will not have been a "date of allocation

under Part 26", because listing for disposal is an alternative to allocation to a track. Nonetheless, a brief summary of the facts about Mr Bird's case may serve to illustrate one way in which this issue arises.

7. Mr Bird was a customer of a car garage operated by the appellant Acorn Group Limited ("Acorn"). In August 2013 he was injured while visiting the garage (having just purchased a vehicle from Acorn) when a spanner was dropped onto his hand. The EL/PL Protocol operates through an online portal, and his solicitors entered his claim through that portal on 23rd September 2013.

8. In the absence of a response by Acorn (through its insurers) Mr Bird's solicitors withdrew his claim from the portal on the 15th October. Liability was however admitted in correspondence in November 2013 by Acorn's insurers. Mr Bird's solicitors submitted medical evidence and details of his special damages to those insurers with a view to settlement. Nothing was agreed, and proceedings were issued on his behalf on 7th April 2014. Acorn failed to acknowledge service and Mr Bird obtained default judgment on 7th May 2014. The proceedings had been handled until that date by the County Court Money Claims Centre at Salford. Following judgment the case was transferred to the County Court at Birkenhead for assessment of damages, being the preferred hearing centre nominated by Mr Bird's solicitors.

9. Birkenhead has a commendably prompt process for the triage of incoming claims. On the same day that the case file reached the hearing centre there, namely 12th May 2014, it was considered on the papers by a District Judge and ordered on that day to be listed for a disposal hearing on 1st September 2014. Written notice to that effect was sent to both parties by the court on 14th May 2014. The operative part of the notice provided as follows:

> "TAKE NOTICE that the Hearing will take place on
>
> 1 September 2014 at 10:00 AM
>
> At the County Court at Birkenhead, 76 Hamilton Street, Birkenhead, Merseyside, CH41 5EN
>
> When you should attend
>
> **Please Note:** This case may be released to another Judge, possibly at a different Court
>
> The time allowed for this hearing is 10 minutes. This is a Disposal Hearing under paragraph 12.4 of the Practice Direction to Part 26 of the Civil Procedure Rules 1988 (CPR). Your attention is drawn to that Direction and to Parts 32.6 and 32.7 of the rules in relation to evidence."

10. The case then settled, and a Tomlin Order was filed with the court on 15th July 2014 recording the terms of settlement. There being no agreement as to costs, Mr Bird's bill was provisionally assessed by District Judge Campbell on 5th December, following which Acorn requested an oral review, confined to the issue with which this appeal is concerned, namely which column within Table 6D part B applied for the

purpose of fixing the costs. District Judge Campbell decided that column 3 applied, taking the view that the listing of a case for a disposal hearing was a listing for trial within the meaning of that phrase in Table 6D.

11. Mr Turner for the appellant submitted that listing for a disposal hearing could not be listing for trial so as to bring the recoverable fixed costs within column 3 from the date of listing for (in summary) the following reasons:

    i) Applying the "final contested hearing" definition in Part 45.29E(4)(c), it could not be said at the date of listing for a disposal hearing whether the hearing would be either final or contested. Bearing in mind the 10 minute time allocation, the court might well use the hearing for the purpose of giving directions, pursuant to 26PD 12.4(2)(b). Where (as here) the listing followed a judgment in default of acknowledgement of service, the hearing might well be non-contested.

    ii) If directions were given at the disposal hearing which included allocation of the quantification of damages to the fast track, pursuant to 26PD 12.2(1)(b), then if mere listing for disposal enabled the claimant to recover fixed costs under column 3, the allocation to the fast track would transfer him back to the less generous column 2, a counter-intuitive result if the three columns were meant to be sequential. The prospect of moving the case to a lower fixed costs band by obtaining allocation directions at the disposal hearing would be a disincentive to settlement by the defendant's insurers.

    iii) This court's decision about a similar question in relation to first hearings of possession claims under CPR55 in *Forcelux Limited v Binnie* [2009] EWCA Civ 854 and 1077 reinforced his analysis.

    iv) Passages in Jackson LJ's Interim Report suggested that the three columns in Table 6D part B were intended to be sequential, so that the third column could not be reached unless there had previously been allocation. He suggested that it was too early in the proceedings for the most generous costs scale to be triggered. Finally, Part 45PD para 4 suggested an assumption in the minds of the Rule Committee that disposal hearings were not trials.

12. In my judgment listing a case for a disposal hearing following judgment, pursuant to Part 26PD12, is listing for trial, for the purposes of triggering column 3 in Table 6D part B where a case which originated in the EL/PL Protocol settles after listing. My reasons follow.

13. First, listing a case for "disposal" means exactly what it says. The purpose of doing so is, so far as possible, finally to dispose of the case at first instance. A default or other judgment for damages to be assessed leaves that assessment outstanding, as the last stage in the final disposal of the proceedings. For that purpose it matters not whether the judgment has been obtained by default (as here) or on an application for summary judgment on liability, judgment on admissions, or after a liability only trial: see generally Part 26PD12(2).

14. The fact that it may be impossible to tell, prior to the disposal hearing itself, whether it will prove to be final in that sense, or merely the occasion for giving of directions,

cannot be conclusive against listing of a disposal hearing triggering column 3 of Table 6D part B, because that table is concerned with settlement prior to trial. If the possibility of a disposal hearing being used for the giving only of directions were to be admitted, then it is hard to see how listing could ever be a trigger for the application of column 3 following a settlement. Even the hearing date of a full trial may turn into a hearing for directions if it proves impossible or unjust to do otherwise than permit an adjournment.

15. Secondly, the fact that a disposal hearing might prove to be uncontested is, again, neither here nor there. It is common ground that, even after a judgment in default, the defendant may attend and oppose the claimant's case as to quantification of damages at the disposal hearing. Again, if the possibility that such a hearing might prove to be uncontested were sufficient to prevent its listing being a trigger for the application of column 3, then that possibility exists at all kinds of final hearing, including traditional trials.

16. Thirdly, and as DJ Campbell emphasised, listing for a disposal hearing is the trigger for the claimant (and any other party which wishes to take an active part at that hearing) to prepare and serve the requisite evidence. Addressing the submission that there could be no move to column 3 if there had not previously been allocation to trigger column 2, she said, at paragraph 29 of her judgment:

> "I am supported in this view by Mr Latham's submission that much work is to be done in cases which are heading to a disposal hearing, including the gathering of witness evidence, the preparation and service of written evidence which is specifically required by Practice Direction 26. 12.4(5). Indeed, there are a large number of cases which settle just before the disposal hearing or on the morning of it and I can take judicial notice of that fact as a judge who regularly deals with disposal lists. It cannot be right that those cases attract the same amount of costs as a case that settles after issue but before any allocation by the court which, if I were to accept the defendant's submissions, all those cases which will be months down the line from the listing of the disposal will only attract the costs in column one."

This court is entitled to give weight to these observations from a judge with large experience in this particular field. Furthermore, the appellant gains nothing from the fact that this particular disposal hearing was listed for a 10 minute hearing. The County Court at Birkenhead deals with the quantification of damages in relatively small claims of this kind within ten or fifteen minutes on a regular basis, even if opposed, with counsel on both sides. The cases are routinely disposed of on the papers, without oral evidence, after full pre-reading by the judge, and with the benefit of the most succinct submissions, in every respect proportional to the modest amounts usually at stake.

17. Fourthly, there is a useful pre-history to the formulation "final contested hearing" in Part 45.29E(4)(c). Part 45.15 deals with the success fee percentages applicable in road traffic accident claims. By Part 45.15(6)(b), as it was before April 2013, a reference to "trial" was a reference to the final contested hearing. This rule was

introduced in 2004. *Lamont v Burton* [2007] 1WLR 2814 was about a road traffic accident claim which had concluded at a disposal hearing. It was taken for granted in this court (rather than determined after argument) that the disposal hearing had been a trial for the purposes of Part 45.15. I consider it very likely that, when it adopted the same definition of trial in 2013, for the purposes of fixed costs in EL/PL Protocol cases, the Rule Committee had the analysis in *Lamont v Burton* well in mind.

18. By contrast the *Forcelux* case, relied on by Mr Turner, was about a first hearing of possession proceedings under Part 55, which occurs at the beginning of a claim, rather than (as here) after judgment. The court may determine the claim summarily or give directions for a trial. This court held that a first hearing of a possession claim was not a trial for the purposes of Part 39.3 which, by sub-rule (5) lays down conditions which must be complied with by a person who seeks to set aside the judgment having failed to attend the trial. Not only is a first hearing under Part 55 very different from a disposal hearing of the type with which this appeal is concerned, but the definition of trial for the purposes of Part 39.3 is the general meaning of the word trial in the CPR, rather than the special meaning given for the purposes of fixed costs tables or the quantification of success fees. The *Forcelux* case is therefore of no assistance to the appellant.

19. Returning directly to Mr Turner's submissions, his biggest difficulty was his inability to submit, with any force, (although he did not completely abandon the point) that a contested disposal hearing in which damages actually were assessed was not itself a trial within the meaning of the "final contested hearing" definition. It is noteworthy that the formula for quantifying fixed costs at a trial in Table 6D part C is exactly the same as that in the third column of the table in part B, where a case settles before trial, save only for the relevant trial advocacy fee. Bearing in mind the experience of the District Judge that many disposal hearings do settle shortly before trial, it seems most unlikely that the Rule Committee can have intended to leave the claimant to the much lower column 1 level of recovery after such a settlement, having done all of the work necessary to achieve finality at the disposal hearing, and being entitled to fixed costs equivalent to column 3, plus the trial advocacy fee, if the matter proceeded all the way to a disposal hearing.

20. Nor do I accept Mr Turner's submission that if column 3 is triggered when a disposal hearing is listed for trial, there will be no incentive for insurers to settle. Settlement saves the insurer its own costs of preparing for a contested hearing, and both its own and the claimant's advocacy fees.

21. Perhaps the most persuasive of Mr Turner's excellent submissions, initially at least, was the apparent back-tracking from column 3 to column 2 which might occur if, at a disposal hearing, the court were to allocate the case and give directions, but not a listing, for a fast track trial. This lay at the heart of Mr Turner's submission that the three columns in Table 6D part B were intended to be sequential. But Mr Williams QC for Mr Bird had what seems to me a complete answer to it. First, he pointed out that, even in a case where there was allocation to the fast track, it was common for there to be no moment in time at which column 2 applied, because Part 28.2(2)(a) provides for County Court hearing centres to allocate to the fast track and list for trial simultaneously. Secondly, and more fundamentally, he submitted that, on Mr Turner's example of a disposal hearing which led to an allocation, there would be no need for a reversion to column 2. The claimant would by then have done all of the

work necessary to obtain finality at the disposal hearing, and incurred costs for which column 3 was a proportionate recompense. There will be no need to force the claimant back to column 2 merely because, as the result of allocation, yet further work had to be done. The three columns were sequential, in the sense that once a particular column beyond the first had been reached, there could be no back-tracking. I found that submission entirely persuasive.

22. I was not persuaded by Mr Turner's submission based on Part 45PD 4. This section of the Practice Direction applies to fast track trial costs, but not where the case starts in the EL/PL Protocol.

23. Finally, there are passages in Jackson LJ's Interim Report, in particular at paragraph 1.12 and following in chapter 22, which suggest that the three columns in what is now Table 6D part B were intended usually to be steps in a ladder. But those general observations do not detract from the interpretation of the definition of trial at which I have arrived. In every case where a claimant obtains judgment for damages to be assessed, followed by a disposal hearing for that assessment, there will be a progression from column 1 (which comes into force when proceedings are issued) to column 3, when the disposal hearing is listed. The fact that column 2 is jumped over because there is no intermediate allocation to the fast track seems to me to be just one of those events which means that the three columns will not always be triggered in succession. But that by no means undermines the good sense of a conclusion that, once there has been a listing for a disposal hearing, column 3 is triggered.

24. For those reasons I would dismiss this appeal. I will conclude by paying tribute to the expert assistance which we received from the Senior Costs Judge Master Gordon Saker, who sat with us on this appeal as an assessor.

Lord Justice Underhill:

25. I agree.

Lady Justice Arden:

26. I also agree.