In the County Court at Liverpool
Case number F08LV675
On Appeal from District Judge Baldwin sitting on 3rd December 2019 (Appeal No 106 of 2019):

BETWEEN

ANTHONY MICHAEL WEST
(Executor of the Estate of Kenneth Morriss deceased)
Respondent/Claimant

and

MR PETER BURTON
Appellant/Defendant

Before **His Honour Judge Graham Wood QC**

Mr Roger Mallalieu QC and Ms Sofia Ashraf (instructed by DWF Solicitors) for the Appellant
Mr Benjamin Williams QC (PM Law Ltd Solicitors) for the Respondent

Hearing date: 24th September 2020

APPROVED JUDGMENT

His Honour Judge Graham Wood QC

Introduction

1. The issue on this appeal has been defined in straightforward terms in the skeleton argument of Mr Mallalieu QC and Ms Ashraf as follows: "*where a person commences a claim within the RTA protocol, but dies before that claim's conclusion, and his estate pursues the same cause of action under the LRMPA to settlement without the issue of proceedings, are the costs payable to the claimant payable under CPR 45 II or CPR 45 IIIA?"*

2. However, with no clear authority on the point, and comprehensive oral and written submissions from leading counsel on both sides, the resolution of the issue is anything but straightforward.

3. The matter arises from the decision of District Judge Baldwin in a judgment given on 3rd December 2019 in this modest claim for RTA damages, and for which the court has given the Defendant permission to appeal. The appeal was heard remotely by Microsoft Teams before me on 24th September 2020 and because of the intricacy of the argument, I indicated that I would reserve my judgment, which is now provided.

Background

4. The circumstances giving rise to the claim, and the procedural background can be stated quite briefly. The late Mr Morriss was involved in a road traffic accident in April 2016, and within a short while had consulted solicitors who pursued a claim for him against the Defendant's insurers by issuing a Claims Notification Form (CNF). This involved the Protocol for Low Value PI claims in RTAs and was brought within what is known as the portal ("portal claim"), and to all intents and purposes, because Mr Morris was not to blame for the accident, like hundreds of thousands of other claims pursued through the portal, it was likely to be resolved simply, either by a negotiated settlement, or through what is known as a Stage 3 hearing on the issue of Part 8 proceedings if the value could not be agreed. Because there was no admission of liability when causation was challenged, the claim exited the portal after only a few weeks on 8th July 2016, and accordingly the protocol provisions no longer applied.

5. Sadly, just under a week after this occurred, Mr Morriss passed away on 14th July 2016 through causes unrelated to his road traffic accident some three months earlier.

6. Thereafter, whilst any claim which the deceased may have had prior to his death was now vested in his estate within section 1 of the Law Reform (Miscellaneous Provisions) Act 1934, little happened in the pursuit of that claim for over 2 ½ years for reasons which have not been explained, but which are most likely attributable to delays in instruction, the obtaining of probate, and so on. At some point in early 2019 the Defendant's insurer became engaged with the deceased's solicitor once more, now acting on behalf of the estate, and after

a Part 36 offer was made in the sum of £1375 this was accepted on 19th March 2019. The Defendant agreed to pay costs and that should have been the end of the matter, because there was consensus that the costs payable would be under the fixed costs regime providing for fixed recoverable costs (FRC).

7. However, that was not the end of the matter, because the parties could not agree which fixed cost regime applied, with the solicitor acting on behalf of the estate contending that it was the predictable costs regime (CPR 45 section II, 45.9ff) and the Defendant's solicitor/insurer saying that those costs were payable under the RTA low value PI fixed costs regime (CPR 45 section IIIA) being Rule 45.29A, as a claim which had commenced, but no longer continued under the protocol or portal.

8. The battle lines were now drawn, and to resolve the issue solicitors acting on behalf of the estate issued Part 8 proceedings (costs only) to have the matter determined by the court. It is noted that by necessity the Claimant is now described as the *executor of the estate of Mr Kenneth Morriss deceased*. Within the claim form (which can be found at the bundle at page 106), whilst the costs of the claim "*to be assessed by way of detailed assessment on the standard basis"* were claimed, it was clear from the details of the claim that this was to be on the predictable cost basis, being £800, plus £275, which was 20% of the damages agreed, together with VAT and disbursements.[1]

9. When the matter first came before a deputy district judge as boxwork on 24th July, an order was made on the papers directing that the Defendant *do pay the claimants costs as provided for in part 45 of the CPR*, amongst other directions. Regrettably this was unhelpful, because both parties agreed that CPR 45 was the basis for the assessment of the fixed costs, but the disagreement was <u>which</u> provision was to be applied. Therefore it was necessary for a hearing to be convened, and this is the hearing which took place before District Judge Baldwin initially on the 21st October, when it had to be adjourned because the Claimant had not provided a skeleton argument, and subsequently at a further hearing on 3rd December 2019 giving rise to the order which is the subject of this appeal.

10. In short form, the relevant part of the order and the challenge is paragraph 2, where the learned judge directed that the defendant was to pay the fixed recoverable costs and the disbursements of the original claim including any applicable VAT in the total sum of £1880. I will look at the judgment of District Judge Baldwin in more detail later, but the effect of his order was that he had accepted the Claimant's argument as to the applicable costs, and had awarded an amount of fixed recoverable costs under CPR 45.11 within the predictable costs regime. If he had favoured of the Defendant's argument it is axiomatic that costs would have been awarded under CPR section IIIA, and the sum involved would have been a few hundred pounds less.

11. Accordingly the issue in the case is one which may appear to be disproportionately expansive bearing in mind the sum at stake, but in the absence of any prior authority save at

[1] Supra, CPR 45.9ff

County Court level, and a perception that there is an ambiguity in the rules which requires clarification, there is no criticism of the parties for pursuing this appeal. It is to be observed, however, that whatever the outcome of the appeal, unless a second appeal is sought, there will remain only County Court precedent. At one stage consideration had been given to transferring the appeal to the Court of Appeal pursuant to CPR 52.23, but this course of action has not been followed. On the basis of my judgment it will be a matter for the appellate court to consider whether or not the second appeal test is satisfied, or if there is a lacuna in the rules, this matter should be referred to the Rules Committee.

Relevant legal principles

12. There have been several recent authorities dealing with the general principles of FRC, where low value claims are concerned, the rationale behind them and the importance of the universality of the regime save in the most exceptional cases, for the provision of clarity and the introduction of proportionality in an area of litigation which has grown profoundly and exponentially over decades.[2] I will refer to those principles as need be when addressing the submissions of counsel.

13. The appropriate starting point inevitably, is the pre-action protocol itself, the mechanism by which low value RTA personal injury claims fall within the portal, and compliance with which ultimately determines any subsequent court involvement. I extract the relevant sections, as they have been referred to, starting with the definitions.

> **Definitions**
>
> **1.1** In this Protocol—
>
> (A1)
>
> (1) 'admission of liability' means the defendant admits that…….
>
> …….
>
> (b) the accident was caused by the defendant's breach of duty;
>
> (c) the defendant caused some loss to the claimant, the nature and extent of which is not admitted; and
>
> (1A) ……..
>
> (6) 'claim' means a claim, prior to the start of proceedings, for payment of damages under the process set out in this Protocol;
>
> (7) 'claimant' means a person starting a claim under this Protocol unless the context indicates that it means the claimant's legal representative;

[2] It is unusual for any "innocent" passenger or driver involved in an RTA not to have any perception of soft tissue whiplash injuries which regrettably in some instances is more suggested than apparent.

14. The importance of the protocol is emphasised in the preamble:

> **Preamble**
>
> **2.1** This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a claimant claims damages valued at no more than the Protocol upper limit as a result of a personal injury sustained by that person in a road traffic accident. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where it is not followed.

15. Reference has been made to the scope of the protocol, as well as the circumstances in which it applies, and the exceptions:

> **Scope**
>
> **4.1** This Protocol applies where—
>
> (1) a claim for damages arises from a road traffic accident where the CNF is submitted on or after 31st July 2013;
>
> (2) the claim includes damages in respect of personal injury;
>
> (3) the claimant values the claim at no more than the Protocol upper limit; and
>
> (4) if proceedings were started the small claims track would not be the normal track for that claim.
>
> ……..
>
> **4.5** This Protocol does not apply to a claim—
>
> (1)……
>
> (3) where the claimant or defendant acts as personal representative of a deceased person;[3]
>
> ……

16. A claim can exit the protocol in certain circumstances. Relevant to this claim is 6.15 (3):

> **6.15** The claim will no longer continue under this Protocol where the defendant, within the period in paragraph 6.11 or 6.13—
>
> **…….**
>
> (3) does not admit liability; ……

[3] My emphasis

17. Although slightly out of sequence, the final reference to the protocol should be paragraph 5.11 which deals with those cases which exit:

> **Discontinuing the Protocol process**
>
> 5.11 **Claims which no longer continue under this Protocol cannot subsequently re-enter the process.**

18. CPR 45 deals with fixed costs across a broad range of settings. Part 45 provides a raft of rules which are difficult to navigate for the uninitiated because of amendments and insertions over the years, with applicable tables to allow the calculation of fixed recoverable costs. The first relevant section is that which has been described as the "rump" provision by counsel, but in fact it was the first embodiment for fixed recoverable costs in the context of road traffic accidents before subsequent amendments to the rules provided a far more detailed tapestry for low value claims when the protocol was put in place. It is set out in Section II from CPR 45.9 onwards. It is this which gives rise to the "predictable costs regime" as it became known. I set out the pertinent provisions as they relate to the issue on this appeal:

> II ROAD TRAFFIC ACCIDENTS – FIXED RECOVERABLE COSTS
>
> **Scope and interpretation**
>
> **45.9**
>
> (1) Subject to paragraph (3), this Section sets out the costs which are to be allowed in –
>
> (a) proceedings to which rule 46.14(1) applies (costs-only proceedings); or
>
> (b) ……
>
> in cases to which this Section applies.
>
> (2) This Section applies where –
>
> (a) the dispute arises from a road traffic accident occurring on or after 6 October 2003;
>
> (b) the agreed damages include damages in respect of personal injury, damage to property, or both;
>
> (c) the total value of the agreed damages does not exceed £10,000; and
>
> (d) ……
>
> (3) This Section does not apply where –
>
> (a) …….
>
> (b) Section III or Section IIIA of this Part applies.[4]

[4] My emphasis

19. Although these were costs only proceedings, this was not the only relevant aspect which would have enabled the court to deal with the costs under section II, because there are specific exclusions in sub-rule three, to which I shall refer shortly. The principle of FRC and the amount of set out in the next two provisions:

> **Application of fixed recoverable costs**
>
> **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.)
>
> **Amount of fixed recoverable costs**
>
> **45.11**
>
> (1) Subject to paragraphs (2) and (3), the amount of fixed recoverable costs is the total of –
>
> (a) £800;
>
> (b) 20% of the damages agreed up to £5,000; and
>
> (c) 15% of the damages agreed between £5,000 and £10,000.
>
> (2)……..

20. The exceptionality principle which allows greater recovery over FRC is at 45.13 which I set out in part for the sake of completeness, although it does not arise in this case as an issue.

> **Claims for an amount of costs exceeding fixed recoverable costs**
>
> **45.13**
>
> (1) The court will entertain a claim for an amount of costs (excluding any success fee or disbursements) greater than the fixed recoverable costs but only if it considers that there are exceptional circumstances making it appropriate to do so.
>
> …….

21. The next section, (III), of CPR 45, beginning at 45.16 deals with FRC under the stage 3 procedure, that is where part 8 claims have been issued in circumstances where the protocol has been followed, but agreement has not been reached on the final amount of damages. It was a section introduced in 2013 to provide a more rigorous and cost effective setting for the many thousands of claims which were likely to be litigated as a result of disagreement on quantum. It is the section most commonly used for determining the incidence of fixed costs in stage 3 claims, and it is to be noted that it also applies to the employers' liability and

public liability protocols. I mention it in passing, as it is not applicable in the present case on any view, because the matter did not remain in the portal.

22. It is section IIIA which is appropriate, and which requires a little more consideration, because this was a claim which had started but then exited the relevant protocol. It is the applicable section for which the appellant contends. It begins at CPR 45.29A:

> SECTION IIIA CLAIMS WHICH NO LONGER CONTINUE UNDER THE RTA OR EL/PL PRE-ACTION PROTOCOLS – FIXED RECOVERABLE COSTS AND CLAIMS TO WHICH THE PRE-ACTION PROTOCOL FOR RESOLUTION OF PACKAGE TRAVEL CLAIMS APPLIES
>
> **Scope and interpretation**
>
> **45.29A**
>
> (1) Subject to paragraph (3), this section applies—
>
> (a) to a claim started under—
>
> (i) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol'); or
>
> (ii) ……
>
> where such a claim no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B;
>
> ……
>
> **Application of fixed costs and disbursements – RTA Protocol**
>
> **45.29B**
>
> Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—
>
> (a) the fixed costs in rule 45.29C;
>
> (b) disbursements in accordance with rule 45.29I.

23. CPR 45.29C contains the various tables which allow the court to calculate the amount of FRC, and there is an extensive provision at 45.29I which provides the rules for dealing with the various disbursements; these do not require elaboration as there is no dispute about the amount of costs which would have been calculated at this matter being determined as coming within Section IIIA.

24. The final provision to which reference has been made can be found at 45.29J which is the exceptionality provision for the purposes of Section IIIA. Mr Mallalieu QC places significant reliance on it for reasons which I elucidate below.

Claims for an amount of costs exceeding fixed recoverable costs

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—

(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.

25. I make no apology for setting out in reasonable detail relevant parts of the rules and the protocol, because they provide the framework for the arguments of both parties. However, will be seen that there is an absence of any reference to the situation which arises in the present case namely where the specific identity of the claimant who began the claim under the portal, on the claimant who brought matter to a conclusion in costs only proceedings is not one and the same.

The judgment below

26. District Judge Baldwin, who is an experienced regional costs judge familiar with the interplay between the various provisions in CPR 45, decided this matter on a fairly narrow basis, with his conclusions appearing at paragraphs 14 and following. Although he had referred to the Scottish case of **Stewart v London and Midland Scottish Railway [1943] SC (HL) 19**, and suggested that this confirmed the principle that the cause of action dies with the deceased, this was not in fact of correct application to English law, because the LRMPA had not been enacted in Scotland, but it is agreed by both counsel that this does not appear to have formed any basis for his decision.

27. His starting point was that it was a different claimant who had started the claim to the one who was settling. He was influenced not only by the definitions in the protocol itself of "claimant" and "claim" but also by the wording at the commencement to Table 6B, and the provision in 45.29C:

> "15. To that extent, I am satisfied that the combination of the definitions of 1.1 (6) and (7) and the use of the word "claimant" not only in table 6 B but also, for example in rule 45.29 C, where reference

> is made to "the claimant living or working in an area set out in Practice Direction 45"[5] that there is an inexorable connection between the claimant who commences the portal process and the claimant who emerges from the other side and is entitled to costs as a result of the settlement of that process whether it has dropped out of the portal (*sic*) - in this instance as a result of it having started in the portal and then having dropped out – for section IIIA to be properly applied, in my judgment that claimant needs to be, and to remain, the same person who started the claim under the protocol."

28. The learned judge then proceeded to observe that one might have expected provision to be made by the rules committee to deal with such a situation, before concluding as follows:

> "17. It follows, then, in my judgment that it is not appropriate to apply section IIIA because the claim which was settled was not the claim which was started under the protocol because in the course of dealings between those who were pursuing the cause of action and the defendant's insurers that the claimant or the identity of the claimant changed. (*sic)* A claimant – namely the personal representative or the executor of Mr Morris's estate – could not have then gone back and began another claim under the portal because of paragraph 4.5 (3) of the protocol, and therefore it does seem to me that the settlement of the estate's claim inevitably falls within section II as one of the ever diminishing, it seems to me, number of cases where there is a claim for personal injury which nevertheless is susceptible to the predictive costs regime"

Respective submissions

29. Mr Mallalieu QC who did not appear before the district judge at first instance, together with Ms Ashraf who did, provided a detailed written skeleton argument which has supplemented his oral submissions on behalf of the Appellant/Defendant.

30. Reliance is placed upon four grounds of appeal, although the second ground has fallen away to some extent, it is accepted, because the Scottish position is not pursued by the Respondent, nor was it relied upon by the district judge.

31. The first ground asserts that the learned judge was wrong in law to say that the Claimant had succeeded on a different claim to that which had been brought by the late Mr Morriss. Essentially the argument is that both the protocol and the fixed costs rules which should be read as a composite, and complimentary of each other, focus on the claim and not the claimant, most obviously in the opening words to CPR 45.29A and 45.29B, which deal with a claim started under the protocol. The substance of the claim brought under the protocol and that which is brought to a conclusion to enable costs to be awarded under the FRC regime is identical notwithstanding the death of Mr Morriss. If he had commenced proceedings, his estate would have been entitled to take over those proceedings under the LRMPA without the need to bring a second or a fresh claim, on being substituted under an application by virtue of CPR 19.8.

[5] This allows for an enhancement of FRC where the fee earner is in the Greater London area.

32. It is submitted that the judge for his part focused on the Claimant and the Claimant's identity, being persuaded that the estate was a different legal person, but this missed the point that the change of the claimant did not automatically bring proceedings to an end.

33. There were only two possibilities, submitted Mr Mallalieu, which could apply to a claim which had started under the protocol, as here, because the position is a binary one. Either the matter remained within the protocol, in which case the FRC provided for by Section III apply, or where the matter exited the protocol in which case it was appropriate to apply FRC within the framework of section IIIA. Taken to its logical conclusion, the judge had provided for a third possibility, which was not enabled under either the rules or the protocol, namely a claim which would not have been brought under the protocol because of events which happened subsequently. This was both illogical, and contrary to the purposes of the rules which are intended to provide clarity. Whilst there will be certain exclusionary classes of case which did not come within the scope of the protocol (including claims brought on behalf of estates by personal representatives etc - see para 4.5) the matters to be considered are those at the time that the CNF was issued, and not subsequently. It was not something which could create a third species of claim, because of the timing of the death. In any event, if the matter had settled within the protocol, (or perhaps even come close to settling but Mr Morriss had subsequently passed away before the matter had been finalised), there is no reason why it could not have concluded within the protocol. Nothing in the rules or the protocol provisions prevented this from happening.

34. To illustrate his point, Mr Mallalieu referred to the possibility that a claim initially thought to be of relatively low value could subsequently turn out to be a substantial claim above the protocol limit. It would not mean that such a claim was not defined as an "ex-protocol" claim once it had left the portal, rendering the earlier process a nullity. There was no such thing as a "never" protocol claim, and every claim have to fall into one category or another. If the FRC regime was intended to be disapplied, and the claim treated as if it had never been in the protocol, then the rules would have made such a provision. They did not.

35. The challenge under ground 3 suggests that the judge was wrong to be influenced by the preface to Table 6B which refers to "*the claimant*", because the rules are concerned with the payment of costs to *a* claimant. There is a clear and obvious coinciding of costs between those of a deceased claimant and his estate, and only one award of costs is made when a claim is taken over in such circumstances whether these be FRC or assessed costs. A deceased claimant can have no entitlement to costs and the single award is made to the estate.

36. In relation to ground 4, it is submitted that the judge was wrong to regard the settled claim as a different claim to that which had commenced under the portal. It was germane that at no stage had there been any notification by the solicitors acting on behalf of the late Mr Morriss, and then the estate, that a different claim was being pursued.

37. By way of general argument, counsel for the appellant invites the court to consider the rationale behind the FRC as confirmed by the Court of Appeal, which has made it repeatedly clear that there were very limited exceptions to the application of CPR 45, section IIIA,

which was intended to provide a comprehensive and clear system for the recovery of costs. He referred in particular to the decision of **Hislop v Perde [2018] EWCA Civ 1726**, and in particular the judgment of Coulson LJ at paragraph 29 which incorporated the earlier dicta of Briggs LJ (as he then was) in **Sharp v Leeds City Council [2017] 4 WLR 98**:

> 29. The comprehensive nature of the fixed costs regime in part 45 and the limited ways of escaping from it was the subject of detailed consideration by this court in Sharp versus Leeds City Council…
>
> > 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 some of which I shall refer to in due course…
> >
> > 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 costs of recoverable costs subject only to a very small category of clearly stated exceptions……

38. Whilst it was noted that reliance was placed by the Respondent upon a County Court decision from Middlesbrough County Court (**Hilton v Proudfoot 15th April 2019 EWHC** (HHJ Gargan)), it was submitted that not only was that case also wrongly decided in that Judge Gargan was led into the same error as District Judge Baldwin, but also that there were a number of points of distinction, not least that the court was concerned with part 7 proceedings which had been listed for a disposal, and that the matter had never formally exited the portal before there was disagreement on quantum. Further, the learned judge's conclusions were illogical, effectively making an award of costs subject to a standard assessment for the post death costs yet dividing the costs which had been incurred before the death of the deceased by making them the subject of FRC.

39. Mr Mallalieu QC acknowledged that there will be special circumstances in which FRC did not provide sufficient remuneration for the work undertaken in a particular case, but it was the escape provision in CPR 45.29J which enabled the court to deal with exceptional cases.

40. On behalf of the Respondent / Claimant, Mr Benjamin Williams QC, again who did not appear below, provided a skeleton argument, which he supplemented with oral submissions. His points were succinctly made, and sought to uphold the decision of the district judge in most respects, although as I have indicated he did not abide by the submission made by his predecessor in relation to the Scottish decision.

41. Mr Williams for his part also relied upon the definitions within the portal, but submitted that the emphasis must be on the claimant, rather than the claim. The claimant who sought costs in the present matter was not the same claimant who had originally started the claim within the portal. It was his executor by reason of the operation of section 1 of the LRMPA. The significance of paragraph 4.5 of the protocol could not be ignored, where if Mr Morris' had passed away before the CNF had been issued, his estate would have been precluded from using the protocol. The wider scheme of the protocol was such that certain exceptions were considered to give rise to complications which made its use inappropriate. In

the present case the matter had not proceeded beyond stage 1 in any event, with Mr Morris passing away within a very short period of time of the process beginning.

42. Just as it was relevant to point out that the estate had not been the original claimant within the protocol, it was equally relevant that the deceased could not have been the claimant for the purposes of the provisions of CPR 45 because he was not the anticipated beneficiary of an award of costs – this was the estate. He referred by way of example to the way in which the word "claimant" was used, in CPR 45.18 (5), 45.24(1) and 45.29(C) which connotes an association between the person making the claim for costs and the person who started the claim within the protocol.

43. Whilst an estate could take over a claim and pursue it, by virtue of the operation of section 1 of LRMPA, the substance of which may to all intents and purposes be identical to that which had been pursued while the deceased was alive, this was not an automatic process and required active steps to be taken under CPR 19. The estate became a new party, and it is noteworthy that under section 35 (2) of the Limitation Act 1980 it would also be a new claim, although a limitation defence was precluded if the original claim had been brought in time. This supported the argument that a claim taken over by an estate was a new claim, and justified the approach taken by the learned district judge.

Discussion

44. I start by acknowledging the stringency of appellate authority on the near universal application of CPR Part 45 IIIA fixed cost recovery to low value RTA personal injury claims whatever their nature, where those claims have exited the portal. There is a clear tension which has led to the construction of the provisions to ensure that they are almost all-embracing and the plugging of loop-holes which have been exploited by claimants and their legal advisers. Although the fiscal advantage secured by obtaining an order under 45 Section II, as opposed to 45 Section IIIA is relatively small (as in this case) the cynical view might be that it is in the interests of the claimant to exit the portal and secure the better costs recovery if the exceptions are construed too generously. However, it seems to me, from the argument that has been advanced in this case, that the question which arises is not so much one as to whether or not certain classes of case should be excluded from the more limited FRC, but one of interpretation of the rules and the protocol provisions as they have been drawn up, in particular to give them a purposive meaning.

45. It is also important to recognise that a large majority of these claims which have been commenced within the protocol process will either be resolved or proceed to stage 3 hearings without having to exit the protocol.[6] The conduit for stage 3 hearings through the Part 8 procedure is provided for within the protocol itself and CPR 45.16 (ie Section III) which prescribes the costs which will apply to all the stages (1,2 and 3) of cases where liability is admitted but quantum disputed to the point where a determination is necessary. It is in only the relative minority of cases principally where liability/causation is not admitted (and this does not always mean that it is disputed, because there are strict time limits which must be

[6] In the first year of operation of the portal in its current manifestation almost half a million claims were processed.

complied with by an insurer) that a claim will exit and IIIA will become applicable. Some of these claims will require the issue of Part 7 proceedings, and possible fast track claim determination but many will settle with or without the commencement of proceedings.

46. In this respect, Mr Mallalieu is correct to describe the process as a binary one for a low value personal injury road traffic accident in the sense that for all conventional claims there are only two routes (albeit with a number of side routes) which could be taken. This is the context in which the rules, practice direction, and protocol provisions have been drawn up. However, there are some very limited exceptions where the portal process is precluded at the outset for reasons which whilst not stated may be implicit, and the relevant exception here is that the would-be claimant is deceased, having died between the date of the accident and before a claim was made within the protocol, such that any formal claimant would have to be his personal representative (Paragraph 4.5 (3)).

47. This particular exclusion is fundamental, in my judgment, to a determination of the issue as to whether or not a claim that is pursued by an estate is one which should be subject to the fixed recoverable costs regime provided for under CPR 45 IIIA if originally commenced within the portal. The elaborate analysis of various provisions where there is reference to "claim" or "claimant" is informed, and to a large extent simplified, by understanding the rationale behind the exclusion. A claim for or against an estate is less straightforward and has strata of potential complications which makes the simpler process of the protocol, and the pursuit of a portal claim unsuitable. The question is then begged as to whether or not a deceased claimant, who gets in under the wire, so to speak, but whose injury claim and other losses are then pursued on behalf of the estate when a portal claim was issued whilst he was still alive, should be treated differently to the claim which would never have entered the portal in the first place.

48. It may be correct, as Mr Mallalieu submits, that had this claim remained within the portal and had not exited before Mr Morriss passed away, any *agreement* reached at stage one or stage two would not have been vitiated by his demise before the settlement had been formalised. However, the matter would have become significantly more complex if there had been an admission of liability, but no agreement of quantum, and then Mr Morris had died. This would have raised the question as to whether portal process allowed the claim to continue with a personal representative stepping into the shoes of the deceased to allow the resolution of the claim. I can identify no mechanism which would enable this to happen: in fact the operation of paragraph 4.5 (3) to exclude a personal representative would appear to suggest that it does not exist. Nor do the rules suggest that in such circumstances the claim should exit the protocol.

49. The appellant's primary argument is predicated upon acknowledging that the substance or the elements of the claim being pursued is no different to the substance of the claim which had been started under the portal. However, it should be acknowledged that within CPR the word "claim" is used in both a formal and a descriptive manner. The most obvious formal use relates to the processes and proceedings, particularly under Part 7 and Part 8, or the striking out of "the claim" as a formal entity, whereas there are examples of a more informal or descriptive use, such as "claims for special damage" or "claims for

disbursements". It seems to me that it is only if a more descriptive definition is applied to "a claim started under…." in 45.29A (1)(a) that the court could be looking at the *substance* of the claim to determine whether or not it is in reality the same claim as that which was pursued by an individual before his death.

50. However, I remain unconvinced that the wording of the rule was intended to refer to anything other than the formal process, which by its very nature would require an identification of the person who was bringing the claim, rather than the substance of what was being claimed. It is correct that the LRMPA allows a very simple and straightforward transition, with the substitution of an executor or the personal representative of a deceased person to pursue exactly the same heads of claim, without the need for the issue of fresh proceedings. Nevertheless, the fact that the same vehicle can be used to pursue the heads of claim, in my judgment misses the point, which is that the entitlement to the damages, and also the costs of the claim is now vested in the *estate* as the Claimant.

51. It is primarily for this reason that I approach any interpretation of CPR 45 and the FCR as requiring a focus on the person bringing the claim, rather than the nature of the claim or its substance, even though, as Mr Mallalieu says, there is little reference to "*claimant*" and abundant reference to "*claim*" throughout the rules and the protocol. There is a simple and obvious reason for this; it was never anticipated that different individuals would be involved pursuing the same claim, and in view of the fact that certain situations were precluded (such as those involving personal representatives) there was no need for any express reference to the possibility.

52. I do not find myself greatly assisted by construing the reference to "*the claimant*" in the preface to table 6B as supportive of an interpretation that the claim of the estate cannot be the same as that originally pursued within the portal because it shows that there must be an inexorable connection between the person who started the process and the person who existed the portal; in this regard Mr Mallalieu is correct that the costs provisions refer to the recovery of costs by *a* claimant with the use of the indefinite article. At best it seems to me that the point is equivocal.

53. More germane, in my judgment is that the entitlement to bring the claim has switched from the person who incurred the loss and damage, because he is now deceased, to his estate by a vesting under the LRMPA. In this respect I agree with Mr Williams that by reference to the definitions within the protocol it is relevant that the executor of the estate of the late Mr Morriss had not been the person who had started the claim under the protocol.

54. There is a further valid point made by Mr Williams, which appears to have been influential for HHJ Gargan in Middlesbrough in the case of **Hilton**, that the operation of one scheme or another should not depend on what he describes as "the happenstance" as to whether or not the injured party had died just before there had been an opportunity to lodge the CNF, or within days of this taking place. As I have already indicated, it is difficult to see what procedure might have operated to enable the estate to continue the claim within the portal once commenced, but it is equally illogical, and lacking any clear rational basis that a

claim which exits the portal because the insurer has declined to provide the necessary CNF response before the injured party has passed away should be treated differently to a claim where the matter can no longer proceed under the portal because the of identity the claimant has changed to that of the estate, and thus must exit the portal.

55. In my judgment it is immaterial that the solicitors acting on behalf of the estate did not point out any difference in the claim which was being pursued, to that which had been commenced under the portal. It was only incumbent upon them to do so if the substance of the damages claim had changed, one particular example of which might have been the curtailment of any prognosis period by the untimely death of the injured party. For instance, a claim for physiotherapy, or symptoms continuing for a 12 month period could not be sustainable if a life was cut short. The damages would be evaluated on a different basis. However, if it is correct that the different claimant rendered the previous portal claim effectively redundant or otiose, it is axiomatic that the claim is being formulated afresh even if it contains the same as that which had been previously pursued. It is now an LRMPA claim on behalf of the estate.

56. Although I do not agree with the way in which HH J Gargan eventually resolved the costs question in the Hilton case, it seems to me that he was absolutely right in his reasoning, which was based upon the primacy of paragraph 4.5 of the protocol and its effect on a claimant who starts a claim under the protocol:

> "37. I consider that the defendant is right to point out that the claimant under the protocol is the person *starting the claim under the protocol*. However in my judgment that is precisely why the claim cannot continue under the protocol, namely because the MH is no longer able to pursue it. The only way that the surviving cause of action can be pursued is by a new claimant, the personal representative, was not entitled to bring a claim under the protocol.
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> 38. Further, even if the CPR provisions on amendment are imported into the protocol, the doctrine of "relation back" would prevent the personal representatives being substituted for NH. If, on amendment, the claim is deemed to have been commenced by the personal representatives from the outset, then such a claim cannot proceed under the protocol by reason of paragraph 4.5.
>
> 39. Finally, if it is necessary to do so, I consider that a purposive construction should be applied to paragraph 4.5 such that it prevents personal representatives proceeding with protocol claims after the claimant's death in order to prevent the arbitrary costs consequences that would follow if the defendant's submission was correct."

57. In my judgment, it is immaterial that this claim exited the protocol because of a failure by the insurance company to provide an appropriate response to the CNF form. The principles identified above still apply. A purposive construction of the protocol could lead to only one conclusion, and that is that the protocol process was rendered nugatory by the death of the original protocol claimant. It follows, for the purposes of determining whether or not Section IIIA applies, when the estate pursues a claim it is a different claimant entirely to the one whose claim was started under the protocol. This does not involve a sleight of hand, but in my judgment is the only sensible interpretation bearing in mind the unequivocal preclusion of personal representatives from the portal process.

Conclusion

58. For the reasons set out above, I have concluded that the learned district judge was correct to focus on the claimant, and that there was no error of law in his interpretation of the applicability of the FRC provisions. This is a case of to which CPR 45 29A at Section 111 and following did not apply, and therefore the appropriate regime for the real costs was the so-called predictable regime set out in CPR 45.9 (Section II).

59. In the circumstances, I invite the parties to agree the consequences of my determination, and any appropriate costs order. In the absence of agreement, I can consider brief oral submissions on the handing down of this judgment, or alternatively deal with the matter on written representations.

GW
16th October 2020