IN THE COUNTY COURT AT MOLD

Case No: C96YM017

Courtroom No. 3

Law Courts
Mold
CH7 1AE

Tuesday, 29th January 2019

Before:
HER HONOUR JUDGE HOWELLS

B E T W E E N:

WILLIAM LLOYD

and

2 SISTERS POULTRY LIMITED

MR SMITH appeared on behalf of the Appellant
DR M FRISTON appeared on behalf of the Respondent

JUDGMENT
(Approved)

HHJ HOWELLS:

1. This is an appeal in the case of William John Lloyd v 2 Sisters Food Group, Case Number C96YM017, appeal reference NW0092018CA, and it was heard before me today. I now give my judgment, having heard the submissions by Mr Smith on behalf of the appellant defendant and Dr Friston on behalf of the claimant respondent.
2. This is an appeal from the order of DDJ OW Williams in Caernarfon on 27 May 2018 by way of an appeal notice dated 12 June 2018. I have been assisted by the grounds of appeal and the skeleton arguments which have been filed on behalf of both parties which I had an opportunity to read prior to the commencement of this hearing. I also had an opportunity of reading the skeleton arguments that were put before the Deputy District Judge at the original hearing and of reading the Deputy District Judge's judgment in this matter, there having been a transcript provided.
3. This claim arose out of an accident that the claimant suffered in the defendant's employment on 18 October 2013. The claim was brought within the pre-action portal, but it left the portal on 2 September 2016, and Part 7 proceedings were issued on 11 October 2016. The proceedings concluded before the case had been allocated to either the fast-track or the multi-track by acceptance by the claimant of a Part 36 offer of £50,000 on 3 February 2017. The claimant then drew up a costs bill which amounted to over £45,000. The defendant responded by contending that this was a case which fell within the fixed recoverable costs scheme pursuant to CPR45 and therefore they say the costs should only have been, on the defendant's assessment, £16,384. It is accepted by both parties that this matter was not allocated to the multi-track and therefore the principal as set out in the case of *Qader v Esure Services Limited & Ors* [2016] EWCA Civ 1109 whereby cases, which have been allocated by a judicial act fall outside the fixed costs regime, does not apply.
4. The matter came before the Deputy District Judge at the provisional assessment of costs where there was a preliminary argument as to whether the claimant could argue pursuant to CPR45.29J that this case fell within an exception to the fixed costs regime, namely that if there were exceptional circumstances making it appropriate to do so, the Court would then consider a claim for an amount of costs excluding disbursements which was greater than the fixed recoverable costs. The Deputy District Judge heard arguments as to that and then gave the claimant permission to argue that point. There is no appeal brought in relation to that part of his decision. What the appeal relates to is whether in fact the Deputy District Judge, in making his decision that this case fell within the exception to the fixed recoverable costs regime and applying CPR45.29J, was correct in doing so. It is the claimant's case that the Deputy District Judge was correct. It is the defendant appellant's case that the Deputy District Judge was wrong in law in doing so and in considering that matter to fall within the exceptional circumstances test.
5. What then is the basis of this appeal? That is something which I sought to clarify with the parties at the outset of this appeal, because it is an appeal in relation to costs, and I thought it appropriate and necessary to clarify what the position is. I remind myself that this is an appeal which is a review, not a re-hearing and in relation to an appeal in respect of costs, I refer specifically to CPR52.1.14 under notes to the White Book in that regard, which reads as follows:

> 'Approach of appeal court to costs appeals
> Subject to any enactment and rules of court relevant to the matter, "the costs of and incidental to "all proceedings in the court of appeal, high court, family court and county court, are in the discretion of the court" (Senior Courts Act, Section 51).

> The Court has a discretion whether costs are payable by one party to another, the amount of those costs and when they are to be paid (Rule 44.2).
> The discretion is not at large. It has to be exercised in accordance with established principles. The rule that an appeal court will allow an appeal where the decision of the lower court was wrong or unjust because of serious procedural or other irregularity in the proceedings of the lower court applies to costs of appeal, the legislation including rules of court rather than to the awards of costs or the assessment of costs further to the discretion as to costs as subject is very complicated. The potential submissions that judges have erred in applying them and their decision are therefore wrong is considerable. The discretion of the court is wide and the potential for submissions that judges, whilst applying the right principles, are those in exercising it is also considerable. The cumulative effect of these two potentials places great stresses on appeal courts. Not surprisingly, the court of appeal has stated on a number of occasions that appeal courts should adopt a conservative approach.'

6. The notes go on to talk about the judicial efforts in relation to this approach, but then quote the case which the parties accept is applicable today, which is the *AEI Redeffusion Music Limited v Phonographic Performance Limited* [1999] EWCA Civ 834 test where Lord Woolf MR explained that,

> 'The conventional approach of the Court of Appeal to costs of appeal was as stated by the Court in *Roache v News Group Newspapers* [1998] EMLR 161 as follows. Before the Court can interfere, it must be shown that the judge has either erred in principal in his approach or has left out of account or taken into account some feature that he should or should not have considered, or that his decision is wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors in this scale'.
> 'Where the issue of the appeal is not whether the lower court judge erred in law, but were for the judge exercised his or her discretion properly, the test is the same as that to be applied in other context, that is, the Appeal Court should only interfere where the Judge's exercise of discretion has exceeded the generous ambit within which reasonable disagreement is possible', and that is *Tanfern v Cameron McDonald* 1 WLR 1311, Practice Note citing *G v G*.

7. Therefore, on that basis, the question for me is whether the Deputy District Judge was in fact wrong in law or whether he misapplied the law, or going on further, whether he acted outside the generous ambit of his discretion, if we reach that stage. It is the defendant appellant's case that here the Deputy District Judge in fact misapplied himself as to the law in finding, pursuant to CPR45.29J, if he did so find, that there were exceptional circumstances making it appropriate for him to move away from the fixed costs regime and to order costs which were further than that. When the appeal came through on paper, I gave permission to appeal, and I have heard the submissions today of Mr Smith on behalf of the appellant and Dr Friston as I indicated on behalf of the claimant respondent to this appeal.
8. The nub of the appeal effectively boils down to this: it is said on behalf of the appellant that the Deputy District Judge failed to articulate the test which he was to apply. As such, it is not clear the test that he did apply, and it is not apparent that he applied the test correctly. Further, on a proper application of the test as set out in CPR45.29J, there are no exceptional circumstances which he could have identified here, such as it would be appropriate to make an award of costs greater than that in the fixed costs regime. It is said there is nothing

exceptional about this case. By way of background , the case arose as a result of a personal injury accident at the claimant's place of employment. Liability I think was not in dispute. The proceedings started on the assumption of one medical report which was that the claimant sustained orthopaedic injuries but had a good prognosis. The second medical report in fact gave a much gloomier prognosis and that indicated that the claimant had a permanent disability, that he would be disabled pursuant to the Equality Act 2010, that meant that he had a disability in terms of his employment, and as such an Ogden calculation in relation to loss of earnings or a Billett calculation in relation to effectively Smith and Manchester as it used to be known, would be appropriate.

9. It is said by the appellant that there is nothing exceptional about this case and albeit that the claim exceeds a value that which would normally be awarded in a fast-track case, that is not a relevant consideration in looking at exceptional circumstances. It is said that there is nothing here that the learned Deputy District Judge could have looked at to have said this case is exceptional, making it appropriate for it to award costs exceeding the fixed recoverable costs.

10. The submissions by Mr Smith on behalf of the appellant were that the reasoning of the District Judge is not clear in relation to this, and in effect it boils down to him concluding that this case was not suitable for the fast-track and as such, that amounted to exceptional circumstances. It is said that cannot be the position because this claim had not been allocated to the multi-track and pursuant to the decision quoted earlier in *Qader*, there had been no judicial act of allocation which would take it automatically outside the fast-track regime. As such, the appellant says, the fact that a case is or had a value which may bring it within the multi-track regime, is not of itself exceptional circumstances and the Deputy District Judge, in focusing on that factor, misdirected himself. It is said that here there are no exceptional circumstances. The fact that the Deputy District Judge identified that the costs were significantly in excess of what would be recoverable in a fixed costs regime case, is not a correct principle and in fact it is said that would be the tail wagging the dog and would be working backwards by saying: well a lot of costs have been expended reasonably and therefore that makes this exceptional. It is said that that is not an exceptional circumstance which the District Judge could or should have taken into consideration.

11. It is said by Mr Smith that the Judge did not analyse in his judgment the circumstances which could be exceptional and for the District Judge to focus, as it is said he did, on the fast-track/multi-track regime point, undermines the whole point of principle of fixed costs regime which is to have certainty and clarity from the beginning to the end of cases so the parties know what costs are likely to be awarded. It is said that there was some judicial value judgments here, but that such a judgment would have to establish, to escape a claim for fixed recoverable costs, exceptional circumstances and then a sort of bipartite test that those exceptional circumstances make it appropriate for the Court to consider a claim outside the fast-track regime. It is said that those two factors together ought to have been analysed by the District Judge and he did not do so despite in fact the decoupling of a causation point in the decision of *Hislop v Perde and Kuar* [2018] EWCA Civ 1726. These in brief were the defendant appellant's submissions.

12. The claimant respondent's position is that the District Judge properly applied the exceptional circumstances test here and also that that amounted to an exercise of his discretion in all the circumstances, and I was referred to the case of *Touhey*[?] in that regard in relation to a costs appeal. It is said on behalf of the claimant respondent that the District Judge took into account, as he ought to have done, all of the circumstances and he had his attention drawn to the correct test as is clear from his judgment. He refers in fact in his

judgment to what was agreed by the parties at the hearing below to be the correct test as it was then, as it was clarified and set out by Leveson LJ on the permission to appeal point in the case of *Costin v Merron* [2013] 3 Costs LR 391. It is said that the Deputy District Judge looked at all of the circumstances and concluded that there were exceptional circumstances in this case, having looked at the file; and looked at the work which the solicitors had done and had been appropriate for them to do; and that is information which the defendant appellant could not necessarily have had, but the District Judge did. It is also something which the Court today does not have because I do not have the file, but it is something which the experienced Deputy District Judge would have had reference to in determining the question of exceptional circumstances.

13. It is said that the Deputy District Judge was carrying out, in effect, an assessment process looking at all the circumstances as he ought to have. It is further said that the Deputy District Judge looked at a number of matters in assessing the question of exceptional circumstances, and my attention was drawn to the skeleton arguments that were put before the Deputy District Judge at the hearing. I do not have the transcript of what was said but I do note that at page 110 of the bundle the District Judge's attention was drawn to a great deal of work that was carried out, (that is at page 109 of the appeal bundle). In particular a schedule of special damages totalling over £71,500 which was 27 pages long, having a detailed calculation of an Ogden 7 approach in terms of future loss of earnings and an alternative Billet approach; the witness statement from the claimant running to 16 pages dealing in detail with the claimant's pre-existing medical conditions, current condition, educational, employment, need for care and assistance, all of which went to the question of future loss of earnings and Ogden/Billet calculations; the witness statement taken from the claimant's sister; the solicitor correspondence which included attendance notes which ran to 63 pages and was said to be detailed correspondence with almost no padding, very little administrative client care. Much of it was directly relevant to the schedule of special damages and to quantum in general, and it is said in reaching his conclusion as to exceptional circumstances, the Deputy District Judge had in his mind all of those matters, because he refers in his judgment explicitly to the work that was done and so he must have been looking at those matters which have been referred to in the skeleton argument.

14. In relation to the question of the reference by the judge to the fast-track rather than multi-track allocation, it was said by the respondent that this was directly in response to the defendant's submissions that this case was a case which could in fact have been allocated to the fast-track, and was in fact a matter which the Deputy District Judge could take into consideration. It is said that the Deputy District Judge considered, as set out in his judgment, relevant factors in determining whether the test in 45.29J ought to have been applied, which include identifying those matters which I have highlighted above in terms of the complexity of the matter; he looked at the bill which had been three times initially that of the fixed costs regime, and he in fact had assessed it himself in a provisional assessment at 60% above; he had seen the correspondence and he appreciated the duty on the claimant solicitor's in those circumstances to appropriately deal with those issues. It was said that this was an evaluative judgment as to the facts by the Deputy District Judge and he therefore considered all of those matters in determining whether there were exceptional circumstances making it appropriate to order a sum exceeding the fixed recoverable costs.

15. It is against that background and those submissions that I determine this appeal. I have considered specifically the test that was set out at 45.29J which is under the heading 'Claims for an amount of costs exceeding fixed recoverable costs', which states:

> '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.

Then it deals with how the Court should deal with that.

16. The applicability and how that test should be approached has been dealt with by Leveson LJ in the case of *Costin v Merron* [2013] 3 Costs LR 391which the District Judge referred to in his judgment and I reiterate now when Leveson LJ said:

> 'I for my part have no difficulty in concluding that the exceptional circumstances to which 45.12 refer must be exceptional in the sense that the case is taken out of the general run of this type of case by reason of some circumstances which means that greater costs are in fact incurred that would reasonably be expected to be incurred', and he went on to say this, 'In my judgment the phrase "exceptional circumstances" in the context of 45.12 speaks for itself. It cannot possibly mean anything other than that for reasons which make it appropriate to order the case to fall outside the fixed costs regime exceptionally more money is had to be expended on the case by way of costs than would otherwise had been the case'.

17. That test was further clarified and considered in the Court of Appeal in the case of *Hislop v Perde and Kuar* [2018] EWCA Civ 1726, the judgment of Coulson LJ in particular being referred to me; I quote paragraphs 57 and 58 of that judgment;

> '57. Secondly, I reject the argument advanced by Mr Post QC, in the Kaur appeal, that this provision' which is the provision we are talking about, 'would only come into play if it could be shown that the exceptional circumstances had caused the litigation to be more expensive for the claimant. In support of this proposition, he relied on r.29J and r.29K which are concerned with the circumstances in which a party seeks to recover more than fixed costs. The rules make that party liable for the costs consequences if the assessment gives rise to a sum which is less than 20% greater than the amount of the fixed recoverable costs.
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> 58. I do not accept Mr Post's gloss on r.45.29J. His suggestion that a claimant must demonstrate a precise causative link between the exceptional circumstances and any increased costs would, in my view, lead to an unnecessarily restrictive view of the rule. It goes without saying that a test requiring "exceptional circumstances" is already a high one. It is not a proper interpretation of the rules to suggest that there should be further obstacles placed in the way of a party who wishes to rely on that provision.'

18. Though I recognise and take into account that the appropriate test is as set out there by Coulson LJ and also as set out prior to that by Leveson LJ, in fact the link between the causation of the increased costs and the exceptional circumstances appears to have been uncoupled somewhat by Coulson LJ's judgment in that regard. However I reiterate, going back to what Leveson LJ said, that the exceptional circumstances were in the context of 45.12 so it is in the context of exceptional circumstances within the fixed costs regime, not exceptional circumstances in terms of litigation of personal injury claims generally. It is against that context that I am considering exceptional circumstances, and I reiterate what Leveson LJ said in the paragraphs quoted above.

19. I do however recognise what Coulson LJ said, that the exceptional circumstances test is a high one. The question for me to first consider then is, did the District Judge apply that test? It is said on behalf of the appellant that there is lack of clarity in his judgment as to whether he did in fact apply that test and whether he considered or identified exceptional

circumstances in this case. I have reminded myself of what the District Judge said in his judgment, and I also remind myself that this judgment was given on an *ex tempore* basis during the course of the hearing between the parties. It was not a reserved judgment when careful consideration can be given to the niceties of phraseology, and one has to read the judgment in that context. However I note at paragraph 6 of the judgment that the judge specifically referred to the test expanded by Leveson LJ which I have quoted above in *Costin v Merron* [2013] 3 Costs LR 391.

20. What he then went on to say is that in this case the claimant's case had changed in its nature substantially when the second medical report was obtained. The claimant was permanently disabled. He said that this case bore no resemblance to a run of the mill fast-track case which one would expect to have been concluded under the portal, so was the expenditure necessary? Well in that regard he said he found that the claimant had to expend further sums of money on this claim than otherwise would have been done in a standard fast-track claim, and it is clear upon my reading of his judgment, that he had considered the file that the claimant had presented, and that has to be the position because references in the file are clear in the claimant's skeleton argument that I have referred to above. The claimant's solicitors, it is said, were faced with a man who was permanently disabled.

21. He then went on to deal with the question of the bill of costs exceeding the fixed costs threefold, that his provisional assessment I think exceeded it by 60%, and he said this:

> 'Having seen the solicitor and client correspondence, the claimant's solicitors were under a duty to run this case properly and the amount of money that they expended to run that case was exceptionally more money than would have had to be expended on the case than would have been the case'.

I think there may have been some mis-phraseology there, but I think he means exceptionally more money had to be expended than if this were a straightforward matter.

22. Without wishing to put any gloss on the terms "exceptional circumstance" and recognising that it is a high test, I find upon my reading of his judgment and what happened at the hearing below, that the Deputy District Judge took into account all of those circumstances. He referred specifically to the claimant being permanently disabled. There is reference to the Ogden calculation. There is reference to the considerable correspondence and the work done in terms of proving that aspect of the claim. This is not a case where, as may have been submitted , the Deputy District Judge simply said, "well really this should have been a multi-track case so I am going to say it is exceptional circumstance". In my judgment, reading the judgment that he gave and recognising that it was given on an *ex tempore* basis, I am satisfied that he took into consideration all of the circumstances and reached the conclusion that this was a case which, within the context of a fixed costs regime, did have exceptional circumstances for those matters referred to.

23. He took into account the costs that had to be incurred, specifically in relation to the permanent disability and the reference to the Ogden calculations. It may not have been explicitly set out in his judgment, but it is clear that those were issues which he was taking into consideration, because they were issues to which his attention was drawn and he referred to reference the solicitor's file in that regard. They are factors which I find it was appropriate for him to find to be exceptional circumstances within the test set out in 45.29J in the context of the fixed recoverable costs regime.

24. It is said by counsel for the appellant that an Ogden calculation would be capable of being exceptional circumstances, but in the circumstances of this case in fact was not, because that did not give rise to or make it appropriate for the further costs outside the fixed costs regime to have been incurred. I am afraid I do not agree with that submission. It is not simply a

question of saying there is a claim for an Ogden loss of earnings and that can be pleaded very quickly and very easily. The whole background which substantiates such a claim needs to be investigated and it is clear from the skeleton argument presented at the Court below, that is what was done. It is also clear that this is a factor which the learned Deputy District Judge referred to when he was looking at the solicitor's file and when he said that there was work to be done, that needed to be done to do the case properly.

25. In my judgment there were, in this case, factors which would entitle the Deputy District Judge to find that there are exceptional circumstances making it appropriate to effectively award costs higher than the fixed costs regime, and the Deputy District Judge took those matters properly into consideration. No guidance is given in the notes to the White Book in relation to the applicability of this test. However, I find that the Deputy District Judge looked at all relevant matters and, in reference to those matters which he referred to in his judgment, particularly considering the correspondence between the parties, it was appropriate for him to reach the conclusion that there were exceptional circumstances here, making it appropriate to consider a claim for a higher amount of costs. Those factors as stated were not only the value of the claim, but also the permanent disability and the Ogden calculation. All of those factors are in my judgment capable of being exceptional circumstances in the context of CPR45.12, i.e. within a fixed costs regime.

26. The Deputy District Judge in my judgment looked at all of those issues and he was not wrong to find exceptional circumstances, nor was this a case where he found exceptional circumstances purely on the basis that the case ought to have been allocated to a different track. I find that his judgment has to be read in its entirety, so whilst there are references to this not being a fast-track claim, that was not in itself the exceptional circumstance. The allocation issue obviously goes not simply to a question of the value of the claim, but to the issues that were involved; for example, a case which is particularly complex, where there is likely to be a trial of more than one day, where there is likely to be a need for more expert evidence, all of that would factor into an allocation process in any event. I make it clear that the question of allocation, whilst referred to in the District Judge's judgment in terms of it not being a fast-track case, was not the exceptional circumstances relied upon. It was the matters that I have referred to above. I find it was appropriate therefore for him to make an order as he did, he having found not only that there were exceptional circumstances, but that as a result of those that what that meant was that further costs were appropriate to be incurred, as set out in the test in full in 45.29J.

27. I have been referred by counsel to policy decisions in a case of this nature, and I recognise those entirely. I recognise that the purpose of the fixed costs regime is to give certainty and clarity to parties in bringing claims in terms of what the costs will be. I recognise that the test in 45.29J is one of exceptional circumstances and that any Court would be loath to open too wide an ambit in allowing claims to fall outside the fixed costs regime. The Court needs to ensure that we do not have satellite litigation and that the fixed costs regime provides certainty to all parties. It is a regime which is said to have swings and roundabouts in that, in some claims, the receiving party will perhaps receive more than they would have done had costs been assessed in a different way. I agree with all of that, but I also recognise that the fixed costs regime is one that has an exception, and one of those exceptions, a safety valve so to speak, is 45.29J. I do not find that in upholding the judge's finding of exceptional circumstances I am widening the ambit in any way, or loosening the control of the fixed costs regime, or opening us up to satellite litigation.

28. I find that the Deputy District Judge properly applied the test as set out there. He looked at all of the circumstances. He set out, having considered the file, what were capable of

amounting to exceptional circumstances making it appropriate to make a costs order other than the fixed costs one. I find that he did so properly. He did not misdirect himself as to the law. He did not err as to the law. There is no widening of the rule in this judgment and I find that there is no criticism of what the Deputy District Judge did. In all of those circumstances, I reject this appeal and I dismiss it.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.