Case No: JMS 1205590

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building,
Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: 30/10/2013

Before :

MASTER SIMONS

- -

Between :

(1) Simon Davies
(2) Kathleen Ollin
(3) Cheryl Ollin — **Claimants**

- and -

Roger Greenway — **Defendant**

- -
- -

Mr Christopher McCauley (instructed by **Lyons Davidson**) for the **Claimants**
Mrs Sarah Robson (instructed by **Taylor Rose Law**) for the **Defendant**

Hearing dates: 25 July 2013

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Master Simons, Costs Judge:

1. This is an appeal by the Defendant pursuant to CPR47.20 against decisions made by Costs Officer Pigott at a detailed assessment on 13 March 2013. The Grounds of Appeal stated:

> *"The Costs Officer decided that the order for assessment on the standard basis prevented him from even considering whether to restrict the Claimants' costs to RTA Protocol amounts. He assessed the Claimants' bill on an "hourly rate" basis.*
>
> *The Costs Officer was thereby wrong in law.*
>
> *Nothing in an order for assessment on the standard basis ousts the power of the Court in CPR45.36 (now CPR45.24) to restrict costs to RTA Protocol amounts."*

2. On 1 April 2013 substantial changes were made to the Civil Procedure Rules 1998 which included the renumbering of certain rules. For the avoidance of doubt, the numbering of the rules to which I will be referring in this judgment is based on the rules that existed prior to 1 April 2013 as the detailed assessment proceedings commenced prior to that date.

THE FACTS

3. I recite these facts based on statements made in the Defendant's skeleton argument. There was a road accident on 18 November 2010. The First Claimant was the driver of the vehicle and the Second and Third Claimants were his passengers. Their vehicle was struck in the rear by the Defendant's vehicle as it slowed for a zebra crossing.

4. The Claimants instructed Lyons Davidson Solicitors to pursue claims for damages. The claims were within the scope of the RTA Protocol (as defined in CPR45.27 (now 45.16). The Claimants' solicitors sent "early notification of claim" letters on behalf of the Claimants to the Defendant's insurer, AXA Insurance UK PLC in Birmingham on 23 November 2010. The following day a Claim Notification Form ("CNF") for each Claimant was sent via the RTA Protocol's online portal. Instead of directing the CNFs to AXA in Birmingham, they were sent to AXA Insurance Ireland.

5. On 13 January 2011, having received the "Defendant only" hard copies of the CNFs which had been sent by post to the Defendant in person, the Defendant's insurer wrote to the Claimants' solicitors. It observed that the "Defendant only" CNFs showed that the CNFs themselves had been sent to the wrong insurer. It invited the Claimants to resubmit the CNFs to it, the correct insurer, via the portal. The insurers further stated that liability was admitted.

6. The Claimants did not resubmit the CNFs via the portal. Instead they attempted to correspond with the Defendant's insurers and, having received limited response, issued Part 7 proceedings on behalf of all three Claimants in the Cardiff County Court on 8 July 2013. Judgment was entered for the Claimants on 16 August 2011 for amounts to be decided. The claims subsequently settled by consent in the sums of £1,126.18, £1,113.10 and £1,147.50 respectively.

7. The terms of the settlement were embodied in a form of a Consent Order ("the Consent Order") which was sealed by the Cardiff County Court on 14 November 2011. Paragraph 2 of the Order provided:

> *"The Defendant do pay the Claimants costs of this action on the standard basis to be assessed if not agreed."*

8. Notice of Commencement of Detailed Assessment Proceedings was served on 24 January 2012 when the Claimant's solicitors served a bill totalling £17,430.11.

9. The Defendant duly served Points of Dispute and raised the following preliminary point:

> *"The Claimant has unreasonably failed to comply and/or elected not to continue with the RTA process and its fixed costs scheme.*
>
> *The Claimant entered the incorrect insurer details on the claim notification form ("CNF") and as such the claim was not directed to the correct insurer. The Defendant advised the Claimant of this in their letters dated 13 January 2011. The Defendant advised that liability was not disputed and requested that the CNF be resubmitted through the portal. This was not done. Instead the claim exited the portal and Part 7 proceedings were issued.*
>
> *Costs are to be limited to an amount commensurate with the costs under CPR45 of Section VI pursuant to the express power in CPR45.36."*

10. By an Order dated 26 September 2012, District Judge Phillips, sitting at the Cardiff County Court, ordered that the case be transferred to the SCCO for the purpose of undertaking the detailed assessment of the Claimants' costs. The detailed assessment was carried out before Costs Officer Pigott on 13 March 2013 and, after hearing arguments from both sides, he stated:

> *"I find that I do not have the power as a Costs Officer to actually overturn any of the orders, ie of 22 April 2011 or 1 November 2011, and so I am going to deal with the costs on a standard basis and not to deal with them under the fixed costs scheme."*

11. I would comment that it would appear that reference to the dates of those orders is incorrect as it is clear, as has been acknowledged by both counsel who appeared before me, that the Order that has to be considered is the one approved by the Cardiff County Court on 14 November 2011. There does not appear to be any orders dated 22 April 2011 or 1 November 2011.

THE RTA PROTOCOL FOR LOW VALUE PERSONAL INJURY CLAIMS IN ROAD TRAFFIC ACCIDENTS

12. I set out a number of relevant paragraphs of the RTA Protocol:

2.1 This Protocol describes the behaviour the Court would normally expect of the parties prior to the start of proceedings where a claimant claims damages valued at no more than £10,000 as a result of a personal injury sustained by that person in a road traffic accident.

5.1 The address for electronic communication with the defendant can be found at www.rtapiclaimsprocess.org.uk. The claimant will give an address for contact in the Claim Notification Form ("CNF"). Subject to paragraph 6.1(2) where the Protocol requires information to be sent to a party it must be sent electronically.

5.2 Where the claimant has sent the CNF electronically to the wrong defendant, the claimant may, in this circumstance only, resubmit the CNF to the correct defendant. The period of paragraph 6.11 or 6.13 starts from the date the CNF was sent to the correct defendant.

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

6.1 The claimant must complete and send –

(1) the CNF to the defendant's insurer.

THE CIVIL PROCEDURE RULES

Factors to be taken into account in deciding the amount of costs

"44-5 (now 44.4)

(1) the Court is to have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis -

(i) proportionately and reasonably incurred; or

(ii) were proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(2) In particular the court must give effect to any orders which have already been made.

(3) The court must also have regard to –

(a) The conduct of all the parties, including in particular –

(i) conduct before, as well as during, the proceedings, and

(ii) the efforts made, if any, before and during the proceedings in order to try and resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case; and

(g) the place where and the circumstances in which work or any part of it was done.

Scope and interpretation

45.27 (now 45.16) –

(1) This Section applies to claims that have been or should have been started under Part 8 in accordance with Practice Direction 8B ("the Stage 3 procedure").

(2) Where a party has not complied with the RTA Protocol Rule 45.36 (now 45.24) will apply.

Failure to comply or electing not to continue with the RTA Protocol-costs consequences

45.36 (now 45.24) –

(1) This rule applies where the claimant –

(a) does not comply with the process set out in the RTA Protocol; or

(b) elects not to continue with that process,

and starts proceedings under Part 7.

> (2) Where a judgment is given in favour of the claimant but -
>
> > (a) the court determines that the defendant did not proceed with the process set out in the RTA Protocol because the claimant provided insufficient information on the Claim Notification Form;
> >
> > (b) the court considers that the claimant acted unreasonably –
> >
> > > (i) by discontinuing the process set out in the RTA Protocol and starting proceedings under Part 7;
> > >
> > > (ii) by valuing the claim at more than £10,000, so that the claimant did not need to comply with the RTA Protocol; or
> > >
> > > (iii) except for paragraph (2)(a), in any other way that caused the process in RTA Protocol to be discontinued; or
> >
> > (c) the claimant did not comply with the RTA Protocol at all despite the claim falling within the scope of the RTA Protocol;
>
> the court may order the defendant to pay no more than the fixed costs in Rule 45.29 (now 45.18), together with the disbursements allowed in accordance with Rule 45.30 (now 45.19) *[and success fee in accordance with Rule 45.31(3)* ."

THE DEFENDANT'S SUBMISSIONS

13. The Defendant submits that an order for an assessment on the standard basis does not oust the Court's power under CPR45.36 to limit the costs to the amounts set out in CPR45 Section VI (now Section III) which apply to claims under the pre-action protocol for low value personal injury claims in road traffic accidents ("RTA Protocol"). Alternatively, the Court has the power under CPR44.4 and 44.5 (now CPR44.3 and 44.4) or at common law which is not ousted.

14. He further submits that the making of an order for costs in principle and the assessment of the amount of those costs are separate steps. CPR44.3 is concerned with the making of an order in principle and the Consent Order for standard assessment in this case was made under those powers. The Defendant submits that it is wrong to suggest that the power in that rule is exercisable only by the trial Judge and the words in CPR45.36 should not be read narrowly.

15. Consequently the power under CPR45.36 may be exercised on assessment and that would not involve the Court going behind the Consent Order, nor the Defendant

resiling from the Consent Order whereby the parties agreed to a detailed assessment on a standard basis.

16. The Defendant further submits that by consenting to an order for costs to be assessed on a standard basis, the Defendant should not be presumed to be abandoning valuable costs arguments unless there were clear words to that effect.

17. The Defendant refers to the judgment of Waller LJ in *O'Beirne v Hudson* [2011] 1 WLR 1717, who stated that where there was a consent order for assessment on a standard basis, the Court could not limit the costs to those that are fixed costs for the small claims track. The same difficulty does not arise for the RTA Protocol because CPR45.36 expressly provides that the Court can limit costs to RTA Protocol amounts.

18. In this case the Defendant submits that CPR45.36 is engaged. Part 7 proceedings were commenced. The Claimants' action in not resending the CNFs was both non-compliant and electing not to continue with the process in the RTA Protocol.

19. The Defendant says that the Claimants should be limited to RTA Protocol Stage 1 and Stage 2 costs only. The Claimants had behaved unreasonably and they should not be perceived as benefitting from failing to comply with the RTA Protocol.

THE CLAIMANTS' SUBMISSIONS

20. The Claimants submit that the Consent Order is a contract that binds the parties. As there was no question of fraud, misrepresentation, duress or mutual mistake, the contract cannot be set aside or varied. Each party was represented and signed the Consent Order on equal footing.

21. The Claimants say that the Consent Order binds the Costs Judge as it is final order and it is the role of the Costs Judge to give effect to the order. By seeking to limit the Claimant to RTA Protocol costs where there has already been an order for a detailed assessment is an attempt by the Defendant to rewrite the Consent Order. The Claimants submit that the Defendant is estopped from raising this issue.

22. Whilst the Claimants acknowledge that it was a mistake on their part to fail to re-send the CNF to the correct address and, if it was open to the Costs Judge to exercise his discretion under CPR45.36 (which the Claimants say that it is not), the Court should not do so as, if it is going to take into account the conduct of one party, it must also take into account the conduct of the other party. In this respect the Defendant failed to engage in any meaningful negotiations with the Claimants, despite numerous attempts by the Claimants' case handler, until the claim was issued. Consequently both parties are guilty of culpable conduct and arguments related to conduct do not take the matter further.

23. The Claimants say that an award of fixed costs cannot constitute a standard basis of assessment. This supported by the authority of *Solomon v Cromwell* [2011] EWCA Civ 1584.

24. The Claimants submit that the Court must assess the costs in line with the consent order.

MY CONCLUSIONS

25. I have attempted to précis each parties' submissions. However, if I have not specifically referred to an oral or written submission made by one of the parties, it must not be taken that such submission has not been considered by me.

26. In my judgment, the Defendant cannot rely on CPR45.36. It seems implicit from the wording of the rule that the power to restrict the costs is to be exercised when the judgment is given in favour of the Claimants. If the Defendant wished to seek an order under CPR45.36, the time for doing so was after the terms of the settlement had been agreed and the parties were negotiating on the question of costs. He did not do so and consented to an order for there to be a detailed assessment on a standard basis. That is a contract which the Costs Judge does not have power to vary. Furthermore, there is an order of the Court which the Costs Judge is under an obligation to act upon.

27. Even if I am wrong, I bear in mind that the power set out in CPR45.36 is discretionary and not mandatory.

28. However, that is not the end of the matter. The parties have agreed to a detailed assessment on a standard basis. At that detailed assessment the Costs Judge is obliged to have regard to all the circumstances in deciding whether the costs were proportionately and reasonably incurred or were proportionate and reasonable in amount. The Costs Judge must also have regard to the conduct of the parties including in particular the efforts made, if any, before and during the proceedings in order to try and resolve the dispute.

29. *Smith v Wyatt* was a decision of His Honour Judge Maloney QC, handed down in the Cambridge County Court on 13 January 2011. In paragraph 13 of that judgment the Learned Judge stated:

> *"13. The essential test that emerges from O'Beirne and Drew appears to me to have two elements, one of substance and one of process.*
>
> *(a) In substantive terms, the test to be applied on a detailed assessment when this problem arises is:*
>
> *whether it is reasonable for the paying party to pay more than would have been recoverable had the relevant alternative regime applied.*
>
> *(b) In process terms, what is important is that the Costs Judge always bears in mind that he is both conducting a detailed assessment and applying the test at (a) above. If he does so, and having done so concludes that it was not reasonable to take the case out of the alternative regime and hence not reasonable to incur the extra costs that flow from that unreasonable decision, he will have remained within his proper discretion. If he does not do so, but simply concludes that the case ought really to have been (say) a small claim and*

> *therefore that the regime automatically and comprehensively applies, regardless of reasonableness one way or the other, he will have stepped outside of his discretion and in effect rewritten the costs order he is supposed to be applying.*
>
> *As Waller J said in Drew at 42, this may in some cases be a distinction without a difference; but in other cases, an express consideration of reasonableness may lead to the conclusion that a particular item of costs is allowable, even though it would not have been paid or even considered for payment under the alternative regime."*

30. The Claimants in *Smith v Wyatt* sought permission to appeal to the Court of Appeal and at a permission hearing [2011] EWCA Civ 941, Lord Justice Moore-Bick stated in paragraph 10:

> *"10. It is the function of the Costs Judge to determine whether costs have been reasonably and necessarily incurred and, if he can see that a particular course of conduct has led to a group of costs being incurred unnecessarily, he is entitled to say that and need not to consider each item individually. In my view the argument to the contrary is not really sustainable."*

31. That, in my judgment is a correct statement of the law. Although in this case the Consent Order overreaches the costs consequences set out in CPR45.36 thereby necessitating a Detailed Assessment on a standard basis, at the Detailed Assessment it is permissible to consider whether the conduct of the Claimants was such that it was not reasonable for them to have taken the case out of an alternative regime and, hence, not reasonable for them to incur the extra costs that have flowed from that unreasonable decision.

32. Under the regime that existed at the time the detailed assessment proceedings were commenced, the first role of the Costs Officer or the Costs Judge, if the issue of proportionality has been raised in the Points of Dispute, was to consider the issue of proportionality. In this case proportionality was raised in the Points of Dispute. I heard no oral submissions by the parties on the issue of proportionality as the parties had agreed that the only issue that I had to decide was whether "their costs should be limited to the amounts for claims under that protocol prescribed by CPR 45 SectionVI (now Section III)". In my judgment, in the context of this case, it is important that I form a view on the issue of proportionality. The Claimants' solicitors have lodged their file of papers which I have had an opportunity to consider. After deducting additional liabilities and the costs of bill preparation, the Claimants were seeking profit costs in excess of £9,000. These were three straightforward small claims for minor injuries sustained in a simple rear end collision where liability was never in dispute. There was a slight complication in that the Claimants had been involved in an accident a few days before, but other than that these were three straightforward claims that were dealt with in a mechanical manner. There is no doubt in my mind that these costs appear to be disproportionate.

33. I have to have regard to the conduct of the parties. The Claimants acknowledge that a mistake was made by them in failing to re-send the CNFs to the correct insurer, but

they state that the Defendant's conduct cannot be ignored as the Defendant ignored correspondence and failed to engage in any negotiations. Whilst there can be criticism of the Defendant's conduct, nevertheless I am satisfied that the failure on the part of the Claimants to comply with the RTA Protocol has led to disproportionate costs being unreasonably and unnecessarily incurred.

34. Having made the decision that the costs are disproportionate, it is open to me to go through the bill on an item by item basis. However, supported by the authority in *Smith v Wyatt*, I am not obliged to do so.

35. In carrying out this detailed assessment I have to have regard to those factors set out in CPR44.5(3). I have decided that the costs are disproportionate. I have also decided costs have been unreasonably and unnecessarily incurred by reason of the Claimants acting unreasonably by failing to re-send the CNF to the correct insurer.

36. When the Claimants' solicitors were informed that the CNF had been sent to the wrong insurer, they were in error at that stage to take the case out of the RTA Protocol. They were obliged under the protocol to re-serve the CNF on the correct insurer and by failing to do so they acted unreasonably. Had they acted reasonably then they would not have been entitled to recover any more than RTA Protocol costs, and it seems to me that it creates an injustice if the Claimants' solicitors were to profit as a result of their unreasonable conduct.

37. Accordingly, in conducting this detailed assessment on a standard basis, this court is not necessarily obliged to carry out a line by line assessment of the Claimants' Bill of Costs as, in my judgment, the reasonable and proportionate costs that the Claimants should recover are those limited by Stages 1 and 2 of the RTA Protocol, and the Claimants should not recover more than those costs.

38. In my judgment, Costs Officer Pigott was correct in deciding that the Consent Order required him to carry out a Detailed Assessment. Where I disagree with the Costs Officer is that in carrying out the Detailed Assessment, for the reasons set out above, he was not precluded from considering whether the Claimants' costs should be limited to those costs that are recoverable under Stages 1 and 2 of the RTA Protocol.