Neutral Citation Number: [2021] EWCA Civ 1005

Case No: A2/2020/1947

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COUNTY COURT AT LIVERPOOL
HH Judge Graham Wood QC
Claim No F08LV675

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/07/2021

Before :

LORD JUSTICE SINGH
LORD JUSTICE DINGEMANS
and
SIR NIGEL DAVIS

- -

Between :

Anthony Mitchell West **(Executor of the Estate of the late Kenneth Morriss)**	**Respondent/ Claimant**
- and -	
Peter Burton	**Appellant/ Defendant**

Roger Mallalieu QC and Sofia Ashraf (instructed by **DWF Costs Ltd**) for the **Appellant**
Benjamin Williams QC (instructed by **PM Law Limited, Solicitors**) for the **Respondent**

Hearing date : 15 June 2021

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Approved Judgment

Sir Nigel Davis :

Introduction

1. This appeal raises an issue as to the fixed costs and disbursements payable under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the Protocol"). The amount at stake in the present case is very modest – a few hundred pounds. But the issue raised potentially could bear on many thousands of other cases arising under the Protocol; and, as we were told, could also potentially bear on cases relating to employment and public liability, by reference to the separate Protocol relating to such cases. So this appeal has a significance going beyond its own individual determination. Permission to appeal was granted by Males LJ on 17 December 2020.

2. As the Judge in the court below (Judge Graham Wood QC, sitting in the Liverpool County Court) observed, the issue arising in this case is straightforward to describe but is not straightforward to resolve. That issue perhaps can be put in this way. Where a person gives notification of a claim under the Protocol but thereafter dies before its conclusion and the notified claim then, without legal proceedings being issued, proceeds to settlement between the deceased's personal representative and the defendant's insurers, are the costs and disbursements payable by the defendant to be calculated by reference to Section IIIA (or, as the case may be, Section III) of Part 45 of the Civil Procedure Rules? Or are they to be calculated by reference to Section II of Part 45 of the Civil Procedure Rules?

3. The appellant (the defendant in the Part 8 proceedings relating to the recovery of costs issued in the County Court) has argued for the former proposition. The respondent (the claimant in such proceedings) has argued for the latter proposition. It was common ground before us that costs and disbursements will always, or almost always, be greater if calculated under Section II; and given the huge volume of cases brought under the Protocol the outcome is thus important both for solicitors' firms specialising in such cases and for insurers in this field.

4. The appellant was represented before us by Mr Roger Mallalieu QC and Ms Sofia Ashraf. The respondent was represented before us by Mr Benjamin Williams QC. The arguments presented to us, both written and oral, were excellent.

Background Facts

5. The backgrounds facts, and chronology of events, can be shortly summarised.

6. On 8 April 2016 Mr Kenneth Morriss (who was born on 26 May 1933) was involved in a road traffic accident with Mr Peter Burton. He promptly consulted solicitors. On his behalf they submitted electronically, via the Portal, a claim notification form ("CNF") directed to Mr Burton's insurers. This was on 3 May 2016. The CNF was acknowledged by the insurers on 18 May 2016. The procedure adopted was pursuant to the Protocol.

7. No admission as to liability was made (it is said that at that stage there was an issue as to causation). That being so, under the terms of the Protocol, to which I will come,

the notified claim on 8 July 2016 "exited" (in the word commonly used in this context) the Portal.

8. Very shortly after that, on 14 July 2016 Mr Morriss sadly died. It was and is common ground that his death was in no way related to the road traffic accident.

9. There was then a period of silence with regard to the CNF. However, on 17 December 2018 the same solicitors who had been instructed by Mr Morriss wrote to the insurers. The letter described their client as "Mr K Morriss (deceased)". They indicated that they gave notice in accordance with the Protocol that they proposed to instruct an expert doctor, giving the names of three proposed doctors. Such a report was thereafter provided. On receipt of that report, and before any legal proceedings had been issued, the insurers made a Part 36 offer on 28 March 2019. The solicitors' client was there described as "Mr Kenneth Morriss". The offer was in the sum of £1,375, with costs. On the same day, the solicitors responded that they were "now in receipt of our client's instructions" to accept the offer. In the meantime, probate in respect of the estate of Mr Morriss had been granted to Mr Anthony West and his wife, Mrs Rosemary West, on 20 March 2019. A copy of the Grant was provided to the insurers, it being the usual practice of insurers in such situations to require a Grant of Representation in order to ensure that they received a valid discharge.

10. The Part 36 offer having been accepted, the basis on which costs were to be paid – that is, whether it was pursuant to Section II or Section IIIA – became the subject of dispute. On 16 July 2019 Part 8 proceedings were commenced in the Liverpool County Court with a view to resolving this dispute. The claimant was initially named in the Claim Form as "Mrs W Morriss (as executor of the estate of Mr Kenneth Morriss, deceased)"; but this was in due course corrected by substituting Mr West as claimant, in his capacity as executor.

11. After various procedural matters had been sorted out in the Part 8 proceedings, the case came on substantively before District Judge Baldwin, an experienced Regional Costs Judge, on 3 December 2019. He concluded that the claimant's arguments were correct. He directed that the fixed recoverable costs and disbursements were payable under Section II : quantifying those costs and disbursements at £1,880. He ordered the defendant to pay the costs of the assessment and of the Part 8 proceedings (save that there was no order as to the costs of one previous hearing). On 30 October 2020, by a reserved judgment, Judge Graham Wood QC dismissed the defendant's appeal, with costs.

The Legal Framework

(a) Civil Procedure Rules

12. The applicable parts of the Civil Procedure Rules and of the Protocol, when taken together, are, it has to be said, something of a mouthful.

13. By CPR r.45.9, which sets out the scope and interpretation of Section II relating to (among other things) costs-only proceedings, it is provided by r.45.9 (2) as follows:

> "45.9
>
> …..
>
> (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) if a claim had been issued for the amount of the agreed damages, the small claims track would not have been the normal track for that claim."

It is common ground that all such matters were satisfied here. But by r.45.9(3) it is in the relevant respect provided as follows:

> "(3) This Section does not apply where-
>
> ….
>
> (b) Section III or Section IIIA of this Part applies."

14. Subsequent provisions in the rules go on to set out how fixed recoverable costs and disbursements are to be calculated under Section II (sometimes styled "predictive costs"). I need not, I think, for present purposes, set those out here. It is to be noted that r.45.13 also gives the court power to entertain a claim for an amount of costs (but not success fee or disbursements) greater than the fixed recoverable costs if it considers that there are "exceptional circumstances" making it appropriate to do so.

15. Rule 45.16 and following relate to fixed costs and disbursements under Section III. Those, in effect, deal with cases falling within what is described as the stage 3 procedure, where the matter has remained within the Portal. But it was and is common ground that Section III can have no application in the present case: just because the notified claim had exited the Portal on 8 July 2016. The potentially relevant section (if it is not Section II) thus has, in the circumstances of this case, to be Section IIIA once a costs-only application had been made in Part 8 proceedings.

16. Rule 45.29A sets out the scope and interpretation of Section IIIA. It provides as follows:

> "45.29A – Scope and interpretation
>
> (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) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol"),
>
> where such a claim no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B; and
>
> (b) to a claim to which the Pre-Action Protocol for Resolution of Package Travel Claims applies.
>
> (2) This section does not apply to a disease claim which is started under the EL/PL Protocol.
>
> (3) Nothing in this section shall prevent the court making an order under rule 45.24."

17. By r.45.29B it is provided:

> "45.29B Application of fixed costs and disbursements – RTA Protocol
>
> 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."

18. I also add that, with regard to fixed disbursements, Section II and Section IIIA allow, among other things for "any other disbursement that has arisen [or is reasonably incurred] due to a particular feature of the dispute": see r.45.12(2)(c); r.45.29I(2)(h). Additional costs under Section IIIA may also be allowed in exceptional circumstances: see r.45.29J.

(b) <u>The Protocol</u>

19. The Protocol (I note that a new version has come into effect from 31 May 2021 but that does not apply here) is lengthy. For present purposes, the provisions of particular materiality are as follows.

20. Paragraph 1.1 of Section 1 of the Protocol contains various definitions. By paragraphs 1.(6) and (7), which are of central importance in this case, it is provided:

> "(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;"

Paragraph 1(10) defines "defendant" in the following way:

> "(1) 'defendant' means the insurer of the person who is subject to the claim under this Protocol, unless the context indicates that it means-
>
> (a) the person who is subject to the claim
>
> (b) the defendant's legal representative
>
> ….."

21. Paragraph 1.2 sets the upper limit for claims notified under the Protocol. The Preamble contained in paragraph 2.1 of the Protocol then provides as follows:

> "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."

Paragraph 3.1 then sets out (and importantly so) the aims of the Protocol. Those aims include ensuring that the defendant pays damages and costs using the process set out in the Protocol without the need for legal proceedings and that the claimant's lawyers receive the fixed costs at each appropriate stage. Paragraph 4.1 then sets out, by way of scope, the circumstances where the Protocol applies. It is common ground that those circumstances as set out in that sub-paragraph applied in the present case. Paragraph 4.3 goes on to state that the Protocol ceases to apply where, at any stage, the claimant notifies the defendant that the claim has now been revalued at more than the Protocol upper limit. (In paragraph 7.76 it is further provided that a claim will no longer continue under the Protocol where a claimant gives notice that it is unsuitable for the Protocol.)

22. Paragraph 4.5 of the Protocol provides as follows:

> "4.5 This Protocol does not apply to a claim—
>
> (1) in respect of a breach of duty owed to a road user by a person who is not a road user;
>
> (2) made to the MIB pursuant to the Untraced Drivers' Agreement 2003 or any subsequent or supplementary Untraced Drivers' Agreements;
>
> (3) where the claimant or defendant acts as personal representative of a deceased person;

> (4) where the defendant is a protected party;
>
> (5) where the claimant is bankrupt; or
>
> (6) where the defendant's vehicle is registered outside the United Kingdom."

23. By paragraph 5.11 it is provided:

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

This, in the present case, is also to be read in the light of paragraph 6.15 of the Protocol, which among other things provides that the claim will no longer continue under the Protocol where the defendant does not, within the relevant specified period, admit liability. It has always been common ground that that was the position here. Accordingly, by reason of the non-admission of liability the claim no longer continued under the Protocol as from 8 July 2016 and could not thereafter re-enter the process.

24. There are then detailed provisions with regard to CNFs, medical reports, payment at various stages of the process and so on. I do not, I think, need further to refer to those.

(c) Law Reform (Miscellaneous Provisions) Act 1934

25. Also of some potential relevance in this case are the provisions of the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act"). In particular, s.1(1) of that Act provides as follows:

> "(1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate."

It is plain from this wording that s.1(1) does not of itself create any cause of action; rather, it causes a pre-existing cause of action to survive death. Those provisions are also reflected in CPR r.19.8.

Legal Authorities

26. Counsel's researches indicate that there is no authority which they have found which deals directly with the issue arising in this case.

27. We were, however, referred to a number of Court of Appeal decisions in which CPR Part 45 and the Protocol were considered. From these authorities, it appears that the general approach is to endeavour to treat the relevant provisions of CPR Part 45 and of the Protocol as comprehensive and not readily to be subject to judicial amplification or implication.

28. The decision in Cham (a child) v Aldred [2019] EWCA Civ 1780, [2020] 1 WLR 1276 illustrates the relatively strict approach taken and the importance attached to

close adherence to the wording of the rules. In that case, a claim under the Protocol was made on behalf of a child. The relevant Practice Direction, in such circumstances, positively required the obtaining of a legal opinion on the merits of a proposed settlement. Such an opinion was duly obtained, and the cost of doing so (£150) was then claimed as a disbursement. That was not expressly covered by the provisions of the Rules or Protocol as to fixed disbursements. The argument that, nevertheless, the disbursement was "reasonably incurred due to a particular feature of the dispute" was rejected. It was adjudged that the fact that the claimant was a child was nothing to do with the actual dispute. It was accordingly held that the item of work involved was to be deemed to be included in the tabulated fixed costs and disbursements and no further recovery of the fee of £150 could be obtained.

29. In the course of his judgment, Coulson LJ (with whom Nicola Davies LJ and McCombe LJ agreed on this aspect) referred with approval to the observations of Briggs LJ in Sharp v Leeds City Council [2017] EWCA Civ 33, [2017] 4 WLR 968, in which he had stressed the "comprehensive nature of the fixed costs regime, the small category of exceptions, and the fact that there will inevitably be swings and roundabouts as there are in any regime designed to deal with high bulk, low value claims": paragraph 56 of the judgment of Coulson LJ.

30. In Hislop v Perde [2018] EWCA Civ 1726, [2019] 1 WLR 201, Coulson LJ, again citing with approval the decision in Sharp (cited above), referred to the "comprehensive nature of the fixed costs regime in Part 45": see paragraphs 29 and 50 of his judgment. He referred to the "autonomy" of the fixed costs regime and the expectation that fixed costs are all that will be recoverable: paragraph 50. A correspondingly strict approach was taken in Ferri v Gill [2019] EWHC 952 (QB), [2019] Costs LR 367, where Stewart J among other things indicated that the test of exceptionality, as provided for in CPR s.45.29J, connoted a high bar.

The judgments below

31. District Judge Baldwin, in an ex tempore judgment, accepted the claimant's argument that Section II was the applicable section in this case. To some extent, he relied on certain cases based on Scottish law which did not then correspond with the 1934 Act, and it is agreed that was an error. To some further extent he also relied on the provisions of Table B relating to fixed costs: which it is agreed before us are, in substance, neutral. Nevertheless, his primary reasoning was to accept the argument advanced on behalf of the claimant to the effect that the claim which was settled was that of Mr West as executor, not that initially notified by Mr Morriss himself. Accordingly, he held that this was not a Section IIIA case but was a Section II case.

32. On appeal, in his careful and lucid reserved judgment Judge Graham Wood QC reached the same conclusion. He noted that (among other stipulated exclusions) claims by personal representatives were excluded from the Protocol: the rationale evidently being that (as with, for example, bankruptcy and protected persons) potential complications, and thereby potentially increased costs, were inherent in such situations. He considered that it was necessary, under the fixed costs regime, to have regard to the identity of the claimant; and in the present case, as he held, the entitlement to the damages (and costs and disbursements) had, on settlement, been the entitlement of Mr West as executor, who had not started the process: not of the

deceased Mr Morriss who had initially notified the claim. He thus, in effect, considered that the scheme contemplated that the same individual would be involved as claimant throughout.

33. The Judge considered that such an interpretation was strongly supported by purposive considerations. He could see no sensible rationale for the claim being outside the Protocol had Mr Morriss died before the CNF was issued (because of paragraph 4.5 of the Protocol) but within it had he died just one day after the CNF was issued. He endorsed remarks to similar effect made by Judge Gargan, sitting in the Middlesbrough County Court, in the case of Hilton v Proudfoot (15 April 2019; Claim No F03 YX 717).

Submissions

34. The arguments of Mr Mallalieu and Mr Williams in substance replicated the arguments which they had addressed to the Judge below.

35. Mr Mallalieu's arguments on behalf of the appellant came to this. Because of the non-admission of liability, the claim no longer continued to be under the Protocol; and it thereafter could not re-enter it. Rules 45.29A and 45.29B, he went on, are specific that they apply to a claim "started under the Protocol". Likewise, the definition of claim in paragraph 1(6) of the Protocol connotes a person starting a claim under the Protocol. Here, Mr Morriss was just such a person. The fact that, had he died before the CNF was issued, the claim would (by reason of paragraph 4.5(3) of the Protocol) have been excluded from the Protocol was, he said, irrelevant : just because he had *not* died before the CNF was issued. Thereafter the claim that was pursued and settled was the claim started by Mr Morriss, albeit vested (consequent upon the death of Mr Morriss) in Mr West as executor by reason of s.1(1) of the 1934 Act. Likewise under the provisions of CPR r.45.29A and r.45.29B the focus, he said, was on the "claim started": not on "the claimant". Thus whatever happened subsequently could not affect the position as it was when the claim was started. He also noted (in what was really, I think, a forensic point) that the letter of 17 December 2018 had not even purported to be a fresh claim but in effect by its wording connoted continuance of an existing claim.

36. He further submitted that that interpretation gave rise to certainty. Nor did it give rise to a senseless or arbitrarily unfair result. To the contrary, if there was recovery of lesser costs and disbursements in any such case by reference to Section III or Section IIIA, as the case may be, that was the product of a scheme designed to be comprehensive and where (as the authorities showed) an element of "swings and roundabouts" was to be expected. Besides, he said, in appropriate cases resort could be had under the Rules (with regard to disbursements) to an argument based on a "particular feature of the dispute" or (with regard to profit costs) to an argument based on "exceptional circumstances".

37. Mr Williams' arguments on behalf of the respondent challenged the starting point of Mr Mallalieu. Mr Williams submitted, in essence, that whilst of course it was the case that Mr Morriss had started a claim by his issue of the CNF via the Portal that was not the claim which was the subject of the settlement; for that settlement related to the claim of Mr West as executor and Mr West was not the "claimant" as

contemplated by the Protocol. For this purpose, he said, it was important to appreciate that under the Protocol a "claim" was not simply to be equated with a claim in the form of a cause of action enshrined in legal proceedings as generally subject to and contemplated by the Civil Procedure Rules. He further submitted that purposive considerations strongly supported such an interpretation. He submitted that the scheme did not contemplate the involvement of any third parties, whether by reason of death, bankruptcy, mental health or otherwise; and it would be surprising that the costs outcome could be so different depending on the happenstance of whether, say, a prospective claimant died a day before a CNF could be issued or died a day after a CNF was issued. His position overall was that Judge Graham Wood QC was right, and was right for essentially the right reasons.

Disposal

38. I have not found this case altogether easy. But, on reflection, I consider that the Judge was correct.

39. If a "claim" and "claimant" for the purposes of the fixed costs regime are to be equated with the meaning which they conventionally bear in the context of legal proceedings, then, given the provisions of s.1(1) of the 1934 Act and CPR r 19.8, the force of Mr Mallalieu's arguments is clear-cut. But I do not consider that is how this scheme works. As the Judge noted, the word "claim" (and thence "claimant)" is not here being used in the Protocol in a formal sense. Rather it is being used as descriptive of a demand for damages prior to the start of any legal proceedings. Indeed, it is noticeable that, under the Protocol, a defendant is defined so as (primarily) to connote the insurer. The definition of "claim" in paragraph 1(6) of the Protocol is thus not to be equated with the definition of "claim" contained in CPR r.2.3. Read as a whole, the Rules and the Protocol are, in my opinion, drafted on the footing that the claimant throughout remains the person who issued the CNF. By way of example, that is illustrated by the entitlement to an increase in fixed recoverable costs by reference to a specified area "where the claimant lives and works …. and instructs a solicitor who practises in that area": (see CPR r. 45 (11)(2); 45.18(5); 45.29C(2)). That is also, in my opinion, the general tenor of the Protocol. For example, paragraphs 7.6 and 7.7 of the Protocol refer to photographs of "the claimant's" injuries and to situations where "the claimant" is not wearing a seat-belt. Likewise, paragraph 7.8 refers to situations where "the claimant" is receiving continuing medical treatment. All this connotes that, for the purposes of the Protocol, the claimant throughout is regarded as the person who was involved in the road traffic accident. Furthermore, r.45.29A and r.45.29B are in terms confined to claims started under the Protocol. I consider, accepting the submissions of Mr Williams, that in this case the claim that was settled was that of Mr West. But Mr West was not himself the person who started the claim, within the meaning of the Protocol. Indeed, as executor he never could have started such a claim, given the provisions of paragraph 4.5(3) of the Protocol. Consequently, this was not a claim, for the purposes of assessing costs, within the ambit of CPR r.45.29A or r. 45.29B. Accordingly, costs fall to be assessed by reference to Section II.

40. It further follows that I agree with the Judge that the outcome would have been the same even had the claim not exited the Portal. The provisions of Section III would not have come into play; and this would still have remained a Section II case.

41. It seems to me that such an interpretation is also supported by purposive considerations. I do not say, any more than did Mr Williams, that the interpretation argued for by Mr Mallalieu gives rise to a result devoid of all sense: and Mr Mallalieu was also entitled to rely on the "swings and roundabouts" elements inherent in the overall scheme, as explained by the Court of Appeal in Hislop v Perde (cited above). But his suggested safeguards against potentially unfair results did not, with respect, strike me as being very cogent in this context. For example, the strict approach taken by the Court of Appeal in Cham v Aldred (cited above) suggests that any claim to recover as a disbursement the costs of obtaining a Grant (or the appointment of a trustee in bankruptcy etc.) would not prosper. Nor is it at all easy to see how death (or bankruptcy etc.) could be viewed as an "exceptional circumstance" for the purposes of the Rules. This can matter. For example, the only reason in some cases (the present case may or may not be one, it is not altogether, on the evidence, clear) for obtaining a Grant of Representation may be to pursue a personal injury claim. If that is so, then the costs of doing so potentially may, in the event of a successful outcome, be requested as part of the costs of and incidental to the claim. But, in a situation such as the present, such a request is, on the appellant's arguments, prospectively altogether excluded as being recoverable or otherwise compensated by a higher rate of recovery of fixed costs and disbursements. It is difficult to think that such an outcome was contemplated by the overall scheme.

42. I should add that there was brief discussion in argument as to what the position might be if a cause of action under the Fatal Accidents legislation arose. That is, for the purposes of Protocol claims, likely only rarely, if at all, to arise. The considerations arising on such a scenario are very different from the present case: not least because such a cause of action could not, ex hypothesi, accrue to a potential claimant while alive. In any event, there is the potential for such a case to be assigned to the multitrack or to be subject to a notice under paragraph 7.76. I therefore do not consider that such a scenario bears on the proper outcome for this appeal.

43. I also add that the conclusion which I reach does not, in my opinion, result, as was suggested, in two potential applications for costs in two separate claims. The liability of Mr Morriss for costs incurred prior to his death will be a liability of his estate. As such, they are capable of being sought by the executor as part of the overall recoverable costs on the settlement or the determination of the executor's claim.

Conclusion

44. In all the circumstances, I would, for my part, uphold the decision of the Judge and would dismiss this appeal. It will be a matter for the Rules Committee to consider whether it would be advantageous to set out the desired outcome for situations such as these in express terms.

Lord Justice Dingemans :

45. I agree.

Lord Justice Singh :

I also agree.