Def's success fees are not fixed by Part 45.16.

Pritchard v Eaton and Liverpool Victoria

Judgment

His Honour Judge Graham Wood QC

Introduction

1. This court is concerned with an appeal against the order of Deputy District Judge Dawson made on 30th August 2012 whereby he determined that the percentage increase payable to the Defendant in relation to its costs and under a collective conditional fee agreement was 40%, and that the regime provided for by section III, Part 45 of the Civil Procedure Rules did not apply. The Claimant/Appellant was granted permission to appeal by His Honour Judge Bird on 10th of April 2013 and the case was fully argued before me on Friday of last week.

2. At the outset of the hearing, I gave permission to the Respondent to utilise a skeleton argument notwithstanding its failure to file and serve the same in accordance with the appeals practice direction, requiring this to be no less than seven days before the appeal hearing.

3. Unfortunately, the previous directions order when it had been drawn up specified the day of the appeal hearing in relation to the skeleton argument. However, it seemed to me that the Appellant was more than able to deal with the matters raised by the Respondent, and in particular the material annexed to the Respondent skeleton argument which supported the "purposive interpretation" of the rule which the Respondent's counsel, Mr Matthew Smith, was inviting the court to adopt.

4. In any case, where the interpretation of the rules is at the heart of the dispute, the court is assisted by full argument from both sides.

Background and respective arguments

5. The original claim which has given rise to this dispute involves a straightforward road traffic accident in October 2011 which was initially notified to the Respondent's insurers through MOJ portal. Although the Appellant's solicitors received confirmation from the insurer that liability was accepted but causation was not, and that further consideration would be given when medical evidence was submitted, nevertheless proceedings were issued in January 2012. A Part 36 offer was made in the sum of £2200, which was accepted by the Appellant. However, when the Appellant's solicitors subsequently sought their costs of the proceedings, an issue was taken that the claim had been issued prematurely, and the application for costs was resisted.

6. The Appellant's solicitors drew up their bill, and the matter was listed for detailed assessment before Deputy District Judge Dawson. He had a number of issues to deal with, including whether or not the proceedings had been issued prematurely. That substantive issue was determined in favour of the Respondent, and thus the Appellant was not entitled to any costs other than fixed costs, whereas the Respondent was entitled to costs of the detailed assessment process.

7. Indeed, the way in which the costs of the detailed assessment were approached by the judge is not challenged on this appeal. Further, the principle that the Respondent was entitled to a percentage increase because her solicitors' costs had been funded under a collective conditional fee agreement, a species of CFA whereby an insurance company can avoid paying costs to the instructed solicitors who act for the insured in the event of failure, was not challenged either, and thus the matter which fell to be considered by the court was how the percentage increase should be calculated and applied to the base costs of the detailed assessment, which had been assessed.

8. On this appeal, Mr Smith also conceded that no point was being taken about the nature of the hearing before the district judge, that is a detailed assessment, amounting to a "final contested hearing".

9. Unfortunately, the argument before the district judge as to the applicability of the appropriate regime for the assessment of the percentage increase which was to be applied was not advanced in any depth. This may partly explain why on the discrete point which is the subject of the appeal, his judgment is limited to the following:

> *... I take the view that it is a win situation for the Defendant here and therefore they are entitled to a success fee. It should not be tied to the percentage figures that are set*

*out in 45.15 (*clearly he means 45.16*) which in my judgment relate to the Claimant's fees. But it is not to be a 100% fee; I will allow a mark-up of 40% success fee.*

10. Section III of CPR part 45, at 45.15 and following provides for the fixed percentage increase in road traffic accident claims. It interpretation is fundamental to this appeal, and therefore I set out the relevant provisions:

> **45.15 Scope and interpretation**
>
> (1) This Section sets out the percentage increase which is to be allowed in the cases to which this Section applies.
> (Rule 43.2(1)(l) defines "percentage increase" as the percentage by which the amount of a legal representative's fee can be increased in accordance with a conditional fee agreement which provides for a success fee.)
> (2) This Section applies where-
> (a) the dispute arises from a road traffic accident; and
> (b) the claimant has entered into a funding arrangement of a type specified in rule 43.2(k)(i).
>
> (Rule 43.2(k)(i) defines a funding arrangement as including an arrangement where a person has entered into a conditional fee agreement or collective conditional fee agreement which provides for a success fee.)

11. The percentage applied is set out at paragraph 45.16 and the provision is in the following terms:

> **45.16 Percentage increase of solicitors' fees**
>
> Subject to rule 45.18, the percentage increase which is to be allowed in relation to solicitors' fees is-
> (a) 100% where the claim concludes at trial; or
> (b) 12.5% where-
> (i) the claim concludes before a trial has commenced; or
> (ii) the dispute is settled before a claim is issued.

12. In outline, the Appellant's argument is that the learned Deputy District Judge was wrong to exclude the fixed percentage increase in this case, because the Respondent's situation was clearly caught by rule 45.15(2), as the dispute arose from a road traffic accident and the Claimant had entered into a funding arrangement of the type specified in rule 43.2 (k) (i). In other words, the preconditions for the regime applied.

13. The Respondent on the other hand contends that the learned Deputy District Judge was correct to consider that the regime only applied to determination of fixed percentage increases when dealing with claimant solicitors fees, and that in the unusual situation which had prevailed he was right to conclude that the assessment of the percentage increase was at large, his powers derived from CPR Part 44 Rules 44.3-44.5. Insofar as 45.15 (2) appears to create an anomaly if it is interpreted literally, he invites a purposive approach which requires the court to look beyond the rule and to the background to its creation.

14. Whilst this is far from determinative, his approach is endorsed by the editorial note on page 1436 of the white book which provides:

> *The third section of Part 45 (costs) lays down the success (percentage increase) which will be allowed to a successful Claimant in a road traffic accident case conducted on a CFA with a success fee (as specified in CPR rule 43.2 (K) (i)).*

15. Part 43 deals with the scope of the cost rules and definitions and is related to the Costs Practice Direction, and Rule 43.2 provides amongst other definitions that of "*a funding arrangement*". It is to be noted that sub rules (ii) and (iii) provide additional requirements for a funding arrangement in respect of any person's own liability to costs on an alternative basis, either that an insurance policy is in place, or an agreement from a membership organisation (i.e. a collective conditional fee agreement). Although in this case the Defendant has acted under such a CCFA, the membership organisation is clearly intended to be a union or similar organisation.

16. There is no other reference in any part of CPR to the approach which is to be taken in relation to percentage increases where a successful party has been funded by a CFA other than Part 45, which refers to fixed costs, and where it is clearly intended that in certain situations there will be less scope for satellite litigation by the provision of certainty relating to recoverable costs. For instance, Section II deals with fixed costs in certain types of RTA claim (costs only proceedings and approval proceedings), Section III (which is the section under scrutiny) relates to other types of RTA claim, and Section VI deals with low value personal injury RTA claims which come under the pre-action protocol, in particular identifying (45.31) the basis upon which success fees are to be determined at stage 3 where a protocol offer had been made. Interestingly, as far as I can tell, this is the only part of the costs rules which deals with the amount of the defendant's success fee or indeed makes any reference to a defendant's success fee. In this case it does not differentiate between a higher and a lower percentage but simply states that if at stage 3 a claimant recovers less than a defendant's RTA protocol offer, the success fee will be fixed at 100% of the stage 3 fixed costs. It may be relevant that on this single occasion of reference to the Defendant's costs the success fee is automatically 100%, without the two-tiered approach which permeates all the other rules which deal with the fixed percentage.

17. On behalf of the Defendant/Respondent Mr Smith acknowledges that a strict or literal interpretation of rule 45.15 could be that the application of the section arises on the fulfilment of a condition precedent that the Claimant has entered into a funding arrangement, regardless as to which party's fixed percentage success fee is under consideration. However, he contends that this flies in the face of not only common sense, but also the purpose for which

the rules have been implemented, and he invites the court to construe the rule accordingly, thus upholding the Deputy District Judge's decision. For an approach which adopts a purposive method of interpretation he relies on the Access to Justice interim report which is highlighted in volume 2 of the current White Book at page 2872. The relevant reference in the interim report at page 215 is to the effect that an over technical interpretation should be avoided, and the new rules (CPR) were to be used in a different way, being read as a whole, and not dissected and being viewed word by word under a microscope.

18. In particular, he refers to the fact that interpretation is to give effect to the overriding objective enshrined in Part 1 of CPR. In support of his purposive interpretation, Mr Smith relies upon an important report which was submitted to the CJC in October 2003 by Paul Fenn and Neil Rickman and which provided evidence as to how a reasonable success fee should be calculated in RTA claims in order to achieve what is described as a *revenue neutral income stream.* A revenue neutral income stream means that the success fee provides some level of compensation for those cases which claimant solicitors lose.

19. The significance of this report is that it is said to have informed the CJC, as evidenced by the press release on 7 October 2003, arising from a mediation involving all the interested parties in this type of litigation, in the recommendations made to the Civil Procedure Rule Committee, which then formulated Part 45.

20. If CPR Part 45 was written to reflect this agreement, he submits that rule 45.16 should be interpreted on the basis that the percentage increase to be allowed is only in relation to a Claimant solicitor success fee on a fixed percentage basis. He demonstrates the potential illogicality of a literal interpretation which could result in a capricious operation, namely where the Defendant's entitlement to success fee would only be fixed, and not a large, in the event that the Claimant has a funding arrangement. If the Claimant had no funding arrangement, perhaps perversely, the Defendant would face no restriction on the assessment of his success fee.

21. Mr Eastwood, counsel for the Appellant, did not disagree that much of this consultation material lay behind part 45, but he contended that a consultation study should have no bearing on the court's interpretation of the rules because there is no reserved discretion in CPR 45.16. In particular, he provides 2 exemplar authorities which lends support to his contention, in the first of which a High Court costs judge did not question that CPR 45.16 applied to a Defendant CFA, in circumstances where an assessment was to be made of the percentage increase when the Defendant had succeeded, seemingly by default, at trial in an RTA, and where a conditional fee agreement was in place. (**Loizou v Gordon & Patsias SCCO [21/08/2012]**). However in that case there was no argument as to

applicability, and the only question was whether or not the hearing which gave rise to the entitlement to costs was a contested hearing of liability so as to come within 45.16 (b) (ii). The second case was **Lamont v Burton [2007] EWCA Civ 429**, in which the court was concerned with the consequences of a claimant failing to beat a Part 36 offer, and therefore there is no direct correlation with a defendant success fee. However reliance is placed upon the reluctance of the court in that case to allow policy considerations to affect the interpretation of Part 45, and the observation that the Fenn and Rickman report did not really address the effect of Part 36.

Conclusions

22. It is unfortunate that the Deputy District Judge did not give full reasons for his decision, which may be reflective of the fact that the argument on the point was fairly limited. However this does not in itself make his decision flawed and I take into account that he was not exercising discretion in deciding that 45.16 and section III did not apply. If he was wrong in law, of course it is open to this court, without more, to substitute its own decision based upon the correct legal principles.

23. Despite this shortcoming, I have come to the conclusion that the Deputy District Judge was not wrong in law in interpreting section III as applying only to Claimant conditional fee agreements. In my judgment it is axiomatic that Part 45 was implemented to establish a regime in which a degree of certainty and a measure of control was provided for the recovery of claimant legal costs. A defendant's entitlement to recover costs will always arise in the event that it is the "*successful*" party and accordingly there is ample scope within rule 44.3 and the broad discretion to enable the payment of defence costs in such circumstances.

24. The language which runs throughout part 45 is expressive of specific cost items relating to the bringing of claims. This is abundantly plain from section I where there is listed five separate tables for dealing with all shapes and sizes of claims on a fixed cost basis. In section II again there is a restriction on the recoverability of course in certain types of proceedings involving road traffic accidents, and 45.11 makes reference only to the claimant success fee, understandably because of the nature of the proceedings with which that section deals. In section III, the section under consideration, there is no specific reference to any separate restriction on the recoverability of defence costs, which of course will only arise in the event that the Defendant is successful, section IV mirrors section III as the section V and section VI is the only section which actually makes a reference to defence costs recoverability (45.31 (4)). Plainly this reference is reciprocal and arises in the context of Part 36 offers which have been exceeded.

25. I agree that the Civil Procedure Rules require a purposive interpretation in circumstances where the precise meaning is not clear, or where there is a degree of equivocality. It seems to me that when account is taken of the fact that the distinction between 100% and 12.5% success fee recovery was plainly arrived at on the basis of the mediation which took place before the implementation of these rules, and the reports which had been written to inform the mediation, the restriction of a Defendant's success recovery to either of these two markers does not make sense. It does not require an understanding of the Rickman and Fenn report to appreciate that the figure of 12.5%, which would apply to the vast majority of several cases, has been settled to arrive at what has been described as a "revenue neutral income stream" for claimant solicitors. It is difficult to see what logical basis there could be for fixing a defendant's success fee recovery at such a level where there had been no contested hearing.

26. In the overwhelming majority of cases a defendant will not need or wish to fund its defence of an action by a conditional fee agreement. In fact, in an RTA the defendant himself has an indemnity from his insurance company against any costs which he incurs. The collective conditional fee agreement is an arrangement of convenience for an insurance company and a defendant's solicitor.

27. Further, in my judgment, the interpretation contended for by the Appellant in this case is one which would lead to significant uncertainty rather than the certainty which was intended. In this respect I agree with counsel for the Respondent that a capricious outcome would flow if the assessment of the defendant success fee depended entirely on whether or not the claimant had entered into a funding arrangement. On this basis, a defendant success fee at trial in an RTA would recover a 100% uplift if the Claimant had entered into a funding arrangement; if he had not, the assessment of the success fee would be a large. I do not believe that that was the intention behind the rules.

28. In the circumstances, although one interpretation of rule 45.15 is that a claimant's funding arrangement is a precondition to the assessment of either party's success fee and the applicability of the fixed percentage, in my judgment that interpretation does not lend itself to the implementation of the purpose of the part 45 regime. If it amounts to loose or ambiguous wording, I am entitled (as indeed was the judge at first instance) to interpret in a manner which is consistent with the purpose behind the rule. The purpose, in my judgment, was to ensure that a claimant's cost recovery was certain and established and had nothing to do with the recovery of defence costs, including percentage increase for collective conditional fee agreements, which remain at large, and subject to part 44.

29. Accordingly I would dismiss this appeal. I invite the parties to agree any consequential costs orders and to submit a final order in agreed form for sealing.

GW

22.5.2013