RECOVERY OF INTERPRETERS FEES
P. BLAND TEST CASE RESULT.

Case No: CC 1206761

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 29 November 2013

Before :

MASTER CAMPBELL

Between :

JERZY MADEJ — Claimant

- and -

ARKADIUSZ MACISZYN — Defendant

Mr Benjamin Williams (instructed by Scott Rees) for the Claimant
Mr Shannon Eastwood (instructed by QM Costs) for the Defendant

Hearing date: 2 July 2013

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 Campbell, Costs Judge:

1. This judgment concerns CPR 45.8 which was the applicable law when the dispute between the Claimant and Defendant was resolved on 19 April 2011. On 1 April 2013, the Civil Procedure (Amendment) Rules 2013 amended CPR 45 and what was CPR 45.8 is now CPR 45.10. For the sake of clarity, this judgment will cite the law in force with effect from 1 April 2013 as the alteration made to the rules on that date makes no difference to the point to be decided.

2. The discrete issue which this judgment addresses is whether, in a matter to which CPR 45.10 applies, the Court can allow a claim for a disbursement which is not listed in CPR 45.10(2)(a). In plain English, that means that where, as here, a damages claim arising out of a road traffic accident has been settled for £3,200 and fixed costs apply under CPR 45, can the winning Claimant recover £125 for the fees of a Polish interpreter? He says he can: he speaks little English and needed a translator to accompany him to his medical examination. The Defendant says he cannot since the fee is not a cost specifically provided for in the CPR (expressly CPR 45.12 (2)(a)). Upon that issue I heard arguments advanced by Mr Benjamin Williams for the Claimant seeking to recover the fee, and from Mr Shannon Eastwood, contending that it should be disallowed. Both submitted helpful skeleton arguments, in addition to which I have had before me the bill, the points of dispute, a witness statement by the Claimant's solicitor, Monika Sitarek, together with her firm's working papers.

THE CLAIM

3. On 17 January 2010, the Claimant was hurt in a road accident. He contacted Scott Rees & Co Solicitors who forwarded a letter of claim to the Defendant on 4 February 2010 seeking damages for personal injuries. To support the claim, Scott Rees & Co instructed a medical expert. When the Claimant attended his appointment he did so with the assistance of an interpreter who spoke English to assist him in understanding what the expert was saying. The report prepared by the expert was sent to the Defendant together with a schedule of damages and on 19 April 2011, the Claimant accepted an offer from the Defendant made under CPR part 36 to settle the claim without proceedings for £3,200, plus costs, under a deemed costs order. Those costs could not be agreed and on 18 December 2012, "costs only" proceedings were commenced. On 15 January 2013, I made an order within those proceedings that the Defendant must pay the Claimant's costs on the standard basis to be assessed if not agreed. As no agreement has been possible, the matter returned to me for decision on the issue identified at the outset of this judgment.

THE LAW

4. The key provisions are CPR 45.12 (section II) and CPR 45.19 (section III), which have the following respective headings "*II . Road Traffic Accidents - Fixed Recoverable Costs*" and "*III. Pre – Action Protocol for Low Value Personal Injury Claims In Road Traffic Accidents*". CPR 45.10 provides as follows:-

> **" Application of Fixed Recoverable Costs**
>
> 45.10 Subject to Rule 45.13, the only costs which are to be allowed are –

(a) Fixed recoverable costs calculated in accordance with Rule 45.11; and

(b) Disbursements allowed in accordance with Rule 45.12.

(Rule 45.13 provides for where a party issues a claim for more than the fixed recoverable costs)....

Disbursements

45.12-(1) The Court-

(a) may allow a claim for a disbursement of a type mentioned in paragraph (2); but (b) will not allow a claim for any type of disbursement.

(ii) The disbursements referred to in paragraph (1) are –

(a) the cost of obtaining -

(i) medical records;

(ii) a medical report;

(iii) a police report;

(iv) an engineer's report; or

(v) a search of the records of the Driver Vehicle Licensing Authority ...

(b) where they are necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in Part 21- (i) the fees payable for instructing counsel; or (ii) court fees payable on an application to the court; or

(c) any other disbursement that has arisen due to a particular feature of the dispute."

5. CPR 45.19 (section III) has no significant distinction.

CASE LAW

6. I was referred to two decisions. The first, *Dockerill v Tullett* [2012] EWCA Civ 184, I shall deal with later in this judgment.

7. In *Olesiejuk v Maple Industries* (Liverpool County Court) 4 January 2012 (His Honour Judge Graham Wood QC) was also asked to decide whether the costs of a Polish interpreter used during the course of taking the medical report, was recoverable under CPR 45.10 of the pre 1 April 2013 CPR. He decided the point in the following way:-

"12. Let me say at the outset that I have little doubt that the Claimant needed assistance in explaining the circumstances of the accident to the doctor if he spoke little or no English. One can see how a problem may arise if a doctor misunderstood the circumstances of the accident and it turned out at a later date that quantum was not agreed, or even liability was not agreed with an inconsistent account given to the doctor. This is a situation that the court often has to address in the context of cases that come before it.

13. Does such a need qualify in this case for the costs of an interpreter that is recoverable under 45.10(2)(d)? In my judgment, it does not. It seems to me that it arises out of a characteristic of the Claimant and not out of a particular feature of the dispute. The Appellant's counsel's contention is that it does not in fact arise out of a feature of the dispute which is the quantification of damages. I do not agree with that. It seems to me that medical reports are necessary to resolve quantum issues but there is nothing idiosyncratic in the process ...

15. It seems to me that this is the correct approach, because otherwise the drafters of the rule have been quite careful in the way that they have defined the recoverability of disbursements. I made it clear to Counsel in the course of exchange that I do not accept that it would be appropriate to describe sub-rule (d) as a catch-all or a sweep up provision ... If the Rule Committee had intended that this should be broadly defined, it seems to me the qualification would have been in terms such as *any other disbursement that is not recovered by the above situations*. In other words, an anticipation that the foregoing situations are apparently exclusive of other situations that might arise. Instead the rule drafters chose to use a particular description which this court has had to define and that is whether the disbursement has arisen due to a particular feature of the dispute.

16. If interpreters' fees were to be recoverable, there would have to be, in my judgment, a qualitative assessment made by the Costs Judge, which would depend upon the degree of understanding of a Claimant. It seems to me that this would undermine the purpose of a predictable costs regime. In any event, even if a purposive approach were applied to the interpretation of this rule, it would achieve the opposite effect to that which was sought by Counsel of the Claimant, because it would have the effect of making it uncertain and unpredictable as to how fees in such a context should be assessed.

17. One might say that if interpreters' fees were recoverable, it would not just apply to the obtaining of the medical report, it would apply to any situation where an interpreter was required,

> say for instance, on the taking of a statement in the solicitor's office, if there was no Polish speaker, or on the signing of a hire agreement, so that the parties could be sure that the individual understood provisions such as the cancellation of contracts, consumer regulations and the like ...
>
> 20. I have come to the conclusion that the cost of an interpreter, as one defines this particular provision, is not another disbursement that has arisen due to a particular feature of the dispute, regardless of how previous decisions have proceeded before District Judges on cost determinations."

THE PARTIES' SUBMISSIONS

8. For the Defendant, Mr Eastwood focuses on three principal points. First, he observes that the rules do not provide for recovery of the fees of a translator. Sub-paragraph (2)(a) to CPR 45.12 sets out various disbursements which may be allowed; that list does not mention translators' fees whilst sub-paragraph (2)(b) deals with protected parties and so does not concern the Claimant. In these circumstances, the only route by which recovery is possible is through sub-paragraph (2)(c), namely that the disbursement in question has arisen "due to a particular feature of the dispute". In this respect, Mr Eastwood submits that it is noteworthy that the rule provides a lengthy list of disbursements which are included within the fixed costs regime and therefore sub-paragraph (2)(c) is not intended to be a "catch all".

9. It is sub-paragraph (2)(c) that is the backbone of the second of Mr Eastwood's three principal points. He submits that a characteristic a Claimant may have is not a "particular feature of the dispute" save where expressly provided for in the rules under Rule 45.12(2)(b). It follows, that where, as here, the Claimant is not a child or protected party, his characteristic (monoglot) is not a feature of the dispute where the word "dispute" means the dispute between the parties. Thus a feature of the dispute can only relate to matters of liability and quantum and the fact that a Claimant may have difficulty speaking English is not "a particular feature of the dispute" - see *Olesiejuk* and in particular, paragraph 13 that "... it seems to me that [the costs of an interpreter] arises out of a characteristic of the Claimant and not out of a particular feature of the dispute".

10. Mr Eastwood's third principal point is a policy argument. He contends that the rule must be interpreted "literally" (I take that to mean strictly) lest otherwise it would offend against having a fixed costs regime where everything is certain. Within such a regime, Mr Eastwood submits claims are cross-subsidised. By that he means that in some fixed costs cases, solicitors will make profits and in others they will not, but that, overall, they will be adequately remunerated. Were the fixed costs regime not to be implemented with certainty, there could be a separate disbursement for every point of contact if the client in question had a particular characteristic such as lack of understanding of English (the situation here), a disability relating to mobility, and so on. That would mean that claims could be extended from the need to have an interpreter when the client first meets his solicitor, to when he is examined by his doctor, to when he has a conference with Counsel, to when he goes to court. A "predictive costs scheme" such as that provided for under CPR 45 exists to provide simplicity and certainty. The broad and generous discretion in the nature of that

urged on the Court by Mr Williams, would result, in Mr Eastwood's submission, in any disbursement becoming recoverable in principle. To avoid that happening, the rules were drafted so that only claims involving protected parties are treated differently, hence the existence of CPR 45.12(2)(b). It follows that, if necessary, costs under a predictive costs scheme need to be absorbed by solicitors or addressed in such a way that a disbursement is not incurred, for example, by finding a General Practitioner who speaks the Claimant's native tongue. To do otherwise would be to open the floodgates and to create the need for detailed assessments where the whole purpose of fixed costs is to avoid any sort of assessment process. Allowing the interpreter's fee here would lead to these types of argument in every case and would circumvent the language of the rule. Mr Eastwood submits that that should not be permitted and the fee should be disallowed.

11. For the Claimant, Mr Williams accepts that for a disbursement such as a translator's fee which is not provided for in sub–paragraphs (2)(a) or (b) of CPR 45.12 to be recoverable, it must fall within the non-specific ambit of sub-paragraph (2)(c). Having included sub-paragraph (2)(c) in the rules, it is Mr Williams' submission that the Rule Committee endowed on the Court a discretion to allow disbursements not catered for within sub-paragraphs (2)(a) and (b). Insofar as Mr Eastwood had argued that if the Claimant were right and that sub-paragraph (2)(c) permitted recovery of such disbursements which could include the additional costs incurred by a protected party thereby making the existence of sub-paragraph (2)(b) otiose, that was to ignore the fact that sub-paragraph (2)(b) disbursements were subject to the more stringent test of "necessity". In any case, the Rule Committee had decided to ring fence approval hearings, hence the inclusion of sub-paragraph (2)(b) in the Rules. A further flaw in Mr Eastwood's argument was that if sub-paragraph (2)(c) did cover everything, there would no need for sub-paragraph (2)(a) either which concerns a medical report which would always be required where personal injury was a particular feature of the dispute. In Mr Williams' submission, the existence of sub-paragraph (2)(c) is precisely as a "catch all" or "sweep up" provision permitting the Court to allow reasonably incurred disbursements where they have arisen due to a particular feature of the dispute.

12. As to "feature", Mr Williams submits that the personal characteristics of a Claimant are part of the features of a dispute. Some may be irrelevant, for example the fact that the Claimant might be six feet six tall or have red hair, but others may not, for example, as here, that the Claimant had little understanding of the English language. It follows, in Mr Williams' submission, that there is no blanket exclusion for disbursements which are not specifically identified within CPR 45.12. On the contrary, if the personal characteristics of the Claimant reasonably cause disbursements to be incurred that would not otherwise be incurred, then they are recoverable under CPR 45.12(2).

13. Here, the translator's fee was, in any event, a disbursement which progressed the case, Mr Williams submits. It enabled the Claimant to have a medical examination which otherwise he would not have been able to have. That, in turn, had enabled him to recover general damages. Nothing in CPR 45 exists to exclude recovery of such a disbursement. Indeed, the very presence and purpose of sub-paragraph (2)(c) is as a "catch all" enabling the Court to allow it.

14. Mr Williams also takes issue with Mr Eastwood so far as the meaning of "dispute" is concerned. It is right, he says, that the need for an interpreter was not a matter in dispute, but that is to miss the point. The "dispute" means the case between the Claimant and Defendant which was settled without a claim having been issued. In any event, as a matter of ordinary English, a feature of the dispute between the Claimant and Defendant here has been the need for an interpreter and that the feature in question is that the Claimant spoke little English and therefore needed an interpreter to have an effective medical examination.

15. So far as policy is concerned, Mr Williams submits that the Defendant's case is based upon on a false premise. Whilst it is correct that the regime of fixed costs has put an end to disputes about such matters as profit costs and success fees, the same is not true so far as disbursements are concerned. Thus disbursements are not fixed under the rules and are subject to allowance, reduction or disallowance on detailed assessment. For that reason, there is nothing in Mr Eastwood's "floodgates" argument. In so far as policy is relevant, fixed costs relate only to profit costs with the Court being endowed with a discretion to allow unspecified classes of disbursements which fall within sub-paragraph (2)(c) of CPR 45.12. It follows that since it is agreed that the translator's fee was reasonably incurred, it should be allowed by the Court as being a disbursement falling within that sub-paragraph.

DECISION

16. It is common ground that if the translator's fee claimed here had been incurred outside the CPR 45 fixed costs regime, it would have been recoverable, both in principle and in amount. The solitary factor which subjects it to challenge now is that the level of the Claimant's damages consigned the costs order made in his favour to the Fixed Costs regime covered by CPR 45. Therefore the issue for decision is whether there reposes in the Court an ability within CPR 45 to allow a disbursement such as a translator's fee. In this respect, there is more common ground: both Mr Eastwood and Mr Williams agree that CPR 45.12(2)(c) is the only route open to the Claimant if he is able to recover the fee.

17. The term "fixed fees" at the start of Rule 45 is something of a misnomer. It would be expected that if the costs were truly "fixed" the regime would be "one size fits all", but that is not the case. The very existence of sub-paragraph (2)(c) means that costs in road traffic accident claims will not be identical in every case because the sub-section enables the Court to allow a claim for a disbursement which is outside the fixed scope of sub-paragraphs (2)(a) and (b). The question therefore is, how far does sub-paragraph (2)(c) permit the Court to venture outside the fixed costs tramlines where the sub-section is engaged?

18. Mr Eastwood asserts that the interpretation must be limited. Mr Williams argues that the Court's discretion is wider and that the presence of sub-paragraph (2)(c) is a sweeping up clause which permits justice to be done to the Claimant without doing injustice to the Defendant where a disbursement is claimed which would not be recoverable otherwise.

19. I agree with Mr Williams. In the first place, if the regime were truly fixed there would be no need for sub-section (2)(c) of CPR 45.12. Its very existence pre-supposes that the Rule Committee envisaged there might be occasions when a

disbursement would be incurred which should be recoverable, notwithstanding that it did not fall within sub-paragraphs (2)(a) and (b). Therefore I consider the jurisdiction of the Court to go outside the fixed boundaries is not as literal as Mr Eastwood contends. In my judgment, a sweeping up clause is precisely what sub-paragraph (2)(c) is intended to be, so that where there is a feature present in a dispute which would not arise in every case, here lack of English, a reasonably incurred disbursement can be recovered. It follows that I consider that a Claimant's personal characteristic is capable of being a feature to which sub-paragraph (2)(c) can relate. As Mr Williams observes, that will not be so in every case (see his example of a six foot six man with red hair *ante* paragraph 12) but in circumstances where the Claimant might have a mobility problem and require a carer to accompany him or her to Court, or, as here, is a monoglot, such characteristics, would, in my view, be a particular feature within CPR 45.12(2)(c).

20. That deals with "feature". What of "dispute"? The case advanced by Mr Eastwood is that it is not a contentious issue whether the Claimant speaks English so there is no dispute. I do not agree. The parties may be *ad idem* about the need for an interpreter, but that is to miss the point. In my judgment what is meant by "dispute" in the present case is the putative claim for damages arising out of the road traffic accident which was resolved without a claim in court being issued. Mr Eastwood's riposte about the meaning of "dispute" is that the particular feature must relate to a dispute in issue such as the *locus* of the accident, or to the quantum or damages or whether the Defendant was driving whilst disqualified so that, for example, a criminal records check might be required. He argues that these can be contrasted with the situation which pertains where a matter is not disputed, such as the need for a translator's fee, in which case it is not a feature of the dispute.

21. In my view, the examples given by Mr Eastwood are of pre-existing matters which arise in the same way as not being able to understand or speak English. Simply because a particular disbursement might relate to quantum and another to the inability of the client to advance his case via his medical evidence unless he has an interpreter, to my mind has no distinction. There is no blanket exclusion for the recovery of disbursements for either. On the contrary, the presence of sub-paragraph (2)(c) of CPR 45.12 contemplates that situations might arise where all such disbursements would be recoverable.

22. As to Mr Eastwood's "floodgates" argument that if claimants were given *carte blanche* to recover translation fees, there would be no certainty for ease of calculation in such cases, contrary to the express purpose of the fixed costs regime, I do not agree with him. First, as Mr Williams points out, the policy argument has been directed at profit costs (see CPR 45.11). In respect of these, the regime is truly fixed (save for an escape route under CPR 45.13 where there are "exceptional circumstances") and there is no discretion for the Court to award costs outside its boundaries. That is not the case so far as disbursements are concerned. They are not fixed but are subject to detailed assessment or, as HH Judge Graham Wood QC expressed it in *Olesiejuk* "a qualitative assessment made by the Costs Judge". Plainly that is what CPR 45 contemplates in respect of disbursements. Such assessments need to be not only qualitative but also quantitive, so that if the disbursement has not been reasonably incurred, it will not be allowed. In any case, a claimant who speaks little English will not always need an interpreter. Here the requirements arose because a colleague who

had helped before, could not do so (see exhibit SR 3). In other cases, a member of the family or a friend would be able to assist. For these reasons, the floodgates argument fails.

23. Mr Eastwood also made submissions about *Dockerill v Tullett* [2012] EWCA Civ 184, with particular reference to the judgment of Moore-Bick LJ at paragraph 55. That part of the judgment concerns Counsel's fees on an application for approval of an infant settlement under CPR 21.10(2). Below, the Judge had held that children and protected parties merited the services of Counsel in all cases. However, Moore-Bick LJ's view was that "... that, I think, puts the matter too widely. If the use of Counsel in all Part 21.10 cases had been considered appropriate by the Rules Committee, then one would have expected to see that reflected in CPR 45.10(2)(c) or in the provisions of the Practice Direction to CPR 21. As it is, a much stricter test has to be satisfied".

24. I do not derive any assistance from *Dockerill*. First, *Dockerill* concerned Counsel's fees and CPR 21.10. That is not the situation here. Second, the use of Counsel in *Dockerill* was challenged on the basis that a local agent should have been instructed. Again, that is not the situation here. It is accepted that the instruction of the interpreter was reasonable. On Mr Eastwood's case, the claim fails only because recovery is sought within the fixed costs regime.

CONCLUSION AND NEXT STEPS

25. For these reasons, I accept the submissions of Mr Williams so the claim for the interpreter's fee is allowed. For completeness, I should add that in his skeleton argument, Mr Williams also advanced an Article 6 case under the European Convention on Human Rights, but I do not need to deal with this in view of his success on his primary submission.

26. There is no need for the parties to attend when this judgment is handed down. In principle, I consider that Claimant should have his costs. If these cannot be agreed, the Claimant should lodge a schedule together with a note of the reasons why the Defendant is not willing to agree them and I will carry out an assessment on the papers. As to permission to appeal, Mr Williams tells me that there have been conflicting decisions and that whatever the outcome, this is an appropriate case in which permission to appeal should be given so that the matter can be resolved by a Judge of the High Court. In my view, that is a compelling reason why permission should be granted under CPR 52. If the parties would draft an appropriate order for approval, the matter can go forward for resolution at a higher level should the Defendant wish to follow that course.