Case No: A2/2016/2772 & B

Neutral Citation Number: [2018] EWCA Civ 852
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CHESTERFIELD COUNTY COURT
His Honour Judge Godsmark QC
B00CD112

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/04/2018

Before:

LORD JUSTICE LEWISON
LORD JUSTICE HAMBLEN
and
LORD JUSTICE COULSON

- -

Between:

Williams	**Claimant/ Respondent**
- and -	
The Secretary of State for Business, Energy & Industrial Strategy	**Defendant/ Appellant**

- -
- -

Tom Carter (instructed by **Heptonstalls LLP**) for the **Claimant**
Alexander Hutton QC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing Date: Tuesday 20th March 2018

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Judgment

Lord Justice Coulson :

Introduction

1. In this Judgment, I shall refer to the claimant, the respondent to this appeal, as 'the claimant'. I shall refer to the defendant, who brings this appeal from the decision of Judge Godsmark QC, as 'the defendant'. The appeal concerns the appropriate approach to costs when a claimant unreasonably fails to follow a Pre-Action Protocol which allows for the recovery of fixed costs and disbursements only, where the claim is settled before the commencement of proceedings.

2. In a judgment handed down on 30 March 2016, Deputy District Judge Morris ruled that the claimant's claim for noise-induced hearing loss ("NIHL") should have been brought under the Pre-Action Protocol for Low Value Personal Injury (Employer's Liability and Public Liability) Claims ("the EL/PL Protocol"), and its accompanying Claims Portal. In consequence, he held that, pursuant to CPR 45.24, the claimant was only entitled to the fixed costs and disbursements specified in that Protocol. On 20 June 2016, Judge Godsmark QC ruled that the DDJ had been wrong in his interpretation of r.45.24, and instead ordered a provisional assessment of costs pursuant to CPR 47.1. However, he indicated that one result of that assessment might be that the claimant was limited to those same fixed costs.

3. The claimant's costs (if not subject to the fixed costs regime) are put at £4,924.52 (including disbursements). The fixed recoverable costs in accordance with the EL/PL Protocol would be £1,970.00 (again including disbursements). Although the sum in dispute is itself modest, it represents a significant difference between the parties' respective positions.

4. There are two broad grounds of this appeal. The first is whether, on a proper interpretation of the EL/PL Protocol and/or CPR Parts 36 and 45, Judge Godsmark QC was right to conclude that the fixed costs regime envisaged by the EL/PL Protocol did not directly apply in a case where the claim itself was settled before proceedings were started. This issue also encompasses an attempt by the defendant to redraft r.45.24 because of what is said to be a failure by the Civil Procedure Rules Committee ("the CPRC") to follow a policy set out in various documents by the Ministry of Justice. The second issue is whether, even if r.45.24 does not apply to this case, the various rules within CPR Part 44, that allow a court to take into account the conduct of a party when assessing costs, apply to this case and, if so, whether they lead to the same result, namely that the claimant was entitled to recover only his fixed costs and disbursements in accordance with the EL/PL Protocol.

The Relevant Facts

5. Between 1977 and 1991, the claimant was employed by the National Coal Board, whose liabilities have now devolved to the defendant. Between 1991 and 1993, and again between 1997 and 2008, the claimant was employed by British Tissues.

6. The claimant was diagnosed with NIHL. On 19 December 2013, his solicitors sent a letter of claim to British Tissues. A similar letter was sent to the defendant on 6 February 2014. At no time did the claimant seek to pursue this claim by reference to the EL/PL Protocol, and its related Claims Portal, which is the usual vehicle for NIHL

claims worth less than £25,000. In their response dated 14 February, the defendant's solicitors noted this and said:

> "If this claim is not submitted through the Claims Portal and the claim is ultimately settled against our Client alone, the Defendant will seek an order from the Court for fixed costs to be applied under CPR Part 45.24."

7. On 20 March 2014, the claimant's solicitors noted that comment but went on to say:

> "…however as we have previously advised you we are pursuing a claim against British Tissues who have confirmed that they're on cover."

8. On 25 March 2014, the claimant's solicitors enclosed his medical report. It was the consultant's opinion "that, on the balance of probabilities Mr Williams has more likely than not sustained noise induced hearing loss in the order of 12dB over and above the hearing loss expected for someone of this age". The likely cause of the NIHL was said to be "a history of unprotected noise exposure of high level and long duration"." The report referred specifically to the claimant's employment by both the defendant and British Tissues.

9. On 21 May 2014, solicitors acting for British Tissues responded to the claimant's solicitor's letter of claim by disclosing a copy of his contract, which made it a condition of his employment that he wore personal hearing protection. They also disclosed certificates which showed that the claimant had completed a Working Safely course, and other documents which showed there had been a formal disciplinary hearing against the claimant for failing to follow Health and Safety procedures. None of this was disclosed to the defendant's solicitors at the time.

10. On 27 June 2014 the claimant's solicitors sent his witness statement to the defendant's solicitors. This dealt in some detail with the claimant's exposure to noise whilst employed by both the defendant and British Tissues. He made no mention of the disciplinary hearing and instead maintained that he was never given any specific training or advice regarding noise exposure. He said that hearing protection "was not enforced".

11. Some time prior to 14 November 2014, the claimant's solicitors concluded that there was no viable claim against British Tissues. On that date, they informed the defendant's solicitors that the claim was now pursued "solely against yourselves". On 17 November, in response to a request from the defendant's solicitors, the solicitors acting for British Tissues provided them with the information set out in paragraph 9 above.

12. Also on 17 November, the defendant made an offer in accordance with CPR Part 36 in the £2,000. On 8 December 2014, the claimant made a Part 36 counter offer in the sum of £4,000. A week later, on 15 December, the defendant made a further Part 36 offer to pay £2,500. The claimant accepted that on 23 December. All of this correspondence was in conventional Part 36 form. Part 36 was expressly referred to at the top of each letter, and there was a detailed summary of what the consequences would be if the offer or counter-offer were not accepted. At no point prior to the

settlement under Part 36 on 23 December did the defendant's solicitors suggest in this correspondence that their liability was limited to fixed costs only.

13. Subsequently, on 19 January 2015, the claimant's solicitors confirmed to them that a claim was not pursued against British Tissues. Thereafter on 13 February, the defendant's solicitors took the point that, because there was no reasonable prospect of British Tissues being a defendant and/or that there was no reasonable prospect of the claimant successfully pursuing a claim against British Tissues, the relevant exception to the EL/PL Protocol (that it did not apply to a claim where there was more than one employer defendant) was not triggered and that, in consequence, the defendant was only liable for the fixed costs that would have been payable under the EL/PL Protocol.

14. Before turning to note the outcome of that debate before the DDJ and then Judge Godsmark QC, it is necessary to set out both the EL/PL Protocol and the relevant parts of the CPR in some detail.

The EL/PL Protocol

15. The EL/PL Protocol applies to a disease claim where the claim is for less than £25,000 damages but is above the fast track limit. A claim for NIHL is a disease for these purposes: see *Dalton v BT PLC* [2015] EWHC 616 (QB). Relevant provisions of the EL/PL Protocol include the following:

> "**Preamble**
>
> 2.1 This Protocol describes the behaviour the court expects of the parties prior to the start of the proceedings where a claimant claims damages valued at no more than £25,000 in an employers' liability claim or in a public liability claim. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where this Protocol is not followed.
>
> **Aims**
>
> 3.1 The aim of this Protocol is to ensure that –
>
> (1) the defendant pays damages and costs using the process set out in the Protocol without the need for the claimant to start proceedings;
>
> (2) damages are paid within a reasonable time;
>
> (3) the claimant's legal representative receives the fixed costs at each appropriate stage.
>
> **Scope**
>
> …
>
> 4.3 This Protocol does not apply to a claim –

…

(6) In the case of a disease claim, where there is more than one employer defendant…"

16. The EL/PL Protocol envisages three stages. Stage 1 is principally concerned with the completion of the Claim Notification Form. There are various mandatory requirements in respect of both that Form and the Response. CPR 45.18 (paragraph 22 below) identifies the relevant fixed costs for Stage 1.

17. Stage 2 concerns Medical Reports, other evidence, and a possible request for an interim payment of £1,000 or more. Section 7.30 of the EL/PL Protocol envisages a claimant submitting to a defendant a Stage 2 Settlement Pack containing medical reports, evidence of pecuniary losses, and like. There is then a 35 day period for consideration, during which the defendant can make an offer and there can be negotiations. As Mr Hutton QC correctly pointed out, there are a number of costs sanctions within these provisions to encourage compliance with the detailed requirements of the Protocol. He submitted that this case concluded at the equivalent of the end of Stage 2 and that the fixed costs indentified for Stages 1 and 2 (together with disbursements) should therefore be the total amount recoverable by the claimant. Again r.45.18 sets out the fixed costs for Stage 2.

18. Stage 3 takes place where liability has been agreed but where the parties have not been able to agree damages. Paragraph 8.1 of the EL/PL Protocol provides that the Stage 3 procedure is set out in Practice Direction 8B. That Practice Direction requires the commencement of Part 8 proceedings, and contains various modifications to other rules within the CPR so as to give rise to a streamlined process in circumstances where the dispute is limited to quantum.

19. Finally, I note paragraph 7.59 of the EL/PL Protocol, where there is this general warning:

"7.59 Where the claimant gives notice to the defendant that the claimant is unsuitable for this Protocol (for example, because there are complex issues of fact or law or when claimants contemplate applying for a Group Litigation Order) then the claim will no longer continue under this Protocol. However, where the court considers that the claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18."

Parts 36 and 45 of the CPR

20. The relevant parts of CPR Part 36 are as follows:

"**Scope of this Part**

36.1

(1) This Part contains a self-contained procedural code about offers to settle made pursuant to the procedure set out in this Part ("Part 36 offers").

(2) Section I of this Part contains general rules about Part 36 offers.

(3) Section II of this Part contains rules about offers to settle where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") or the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol") and have started proceedings under Part 8 in accordance with Practice Direction 8B.

…

Costs consequences of acceptance of a Part 36 offer

36.13

(1) Subject to paragraphs (2) and (4) and to rule 36.20, where a Part 36 offer is accepted within the relevant period the claimant will be entitled to the costs of the proceedings (including their recoverable pre-action costs) up to the date on which notice of acceptance was served on the offeror.

(Rule 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury claims where the claim no longer proceeds under the RTA or EL/PL Protocol.)…

(3) Except where the recoverable costs are fixed by these Rules, costs under paragraphs (1) and (2) are to be assessed on the standard basis if the amount of costs is not agreed.

(Rule 44.3(2) explains the standard basis for the assessment of costs.)

…

(Part 45 provides for fixed costs in certain classes of case.)

…

Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies

36.20

(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).

(2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

…"

21. Rule 36.24 and following deals with the costs consequences of offers where the parties have followed the EL/PL Protocol and have embarked on the Stage 3 procedure.

22. The relevant parts of CPR Part 45 are as follows:

"*III The Pre-Action Protocols for Low Value Personal Injury Claims in Road Traffic Accidents and Low Value Personal Injury (Employers' Liability and Public Liability) Claims*

Scope and interpretation

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 relevant Protocol rule 45.24 will apply.

'The relevant Protocol' means

(a)…

(b) the Pre-action Protocol for Low Value Personal Injury Claims (Employers' Liability and Public Liability) Claims ('the EL/PL Protocol')…

Application of fixed costs, and disbursements

45.17 The only costs allowed are –

(a) fixed costs in rule 45.18; and

(b) disbursements in accordance with rule 45.19; and

(c) where applicable, fixed costs in accordance with rule 45.23A or 45.23B.

Amount of fixed costs

45.18

(1) Subject to paragraph (4), the amount of fixed costs is set out in Tables 6 and 6A.

(2) In Tables 6 and 6A –

'Type A fixed costs' means the legal representative's costs;

'Type B fixed costs' means the advocate's costs; and

'Type C fixed costs' means the costs for the advice on the amount of damages where the claimant is a child.

(3) 'Advocate' has the same meaning as in rule 45.37(2)(a).

(4) Subject to rule 45.24(2) the court will not award more or less than the amounts shown in Tables 6 or 6A.

(5) Where the claimant –

(a) lives or works in an area set out in Practice Direction 45; and

(b) instructs a legal representative who practises in that area,

the fixed costs will include, in addition to the costs set out in Tables 6 or 6A, an amount equal to 12.5% of the Stage 1 and 2 and Stage 3 Type A fixed costs.

(6) Where appropriate, VAT may be recovered in addition to the amount of fixed costs and any reference in this Section to fixed costs is a reference to those costs net of any such VAT.

…

TABLE 6A

Fixed costs in relation to the EL/PL Protocol			
Where the value of the claim for damages is not more than £10,000		Where the value of the claim for damages is more than £10,000, but not more than £25,000	
Stage 1 fixed costs	£300	Stage 1 fixed costs	£300
Stage 2 fixed costs	£600	Stage 2 fixed costs	£1300
Stage 3 - Type A fixed costs	£250	Stage 3 - Type A fixed costs	£250
Stage 3	£250	Stage 3	£250

- Type B fixed costs		- Type B fixed costs	
Stage 3 - Type C fixed costs	£150	Stage 3 - Type C fixed costs	£150

…

Settlement before proceedings are issued under Stage 3

45.23A Where—

(a) there is a settlement after the Court Proceedings Pack has been sent to the defendant but before proceedings are issued under Stage 3; and

(b) the settlement is more than the defendant's relevant Protocol offer,

the fixed costs will include an additional amount equivalent to the Stage 3 Type A fixed costs.

Failure to comply or electing not to continue with the relevant Protocol – costs consequences

45.24

(1) This rule applies where the claimant –

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

(b) elects not to continue with that process,

and starts proceedings under Part 7.

(2) Subject to paragraph (2A), 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 relevant 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 relevant Protocol and starting proceedings under Part 7;

> (ii) by valuing the claim at more than £25,000, so that the claimant did not need to comply with the relevant Protocol; or
>
> (iii) except for paragraph (2)(a), in any other way that caused the process in the relevant Protocol to be discontinued; or
>
> (c) the claimant did not comply with the relevant Protocol at all despite the claim falling within the scope of the relevant Protocol,
>
> the court may order the defendant to pay no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19.
>
> (2A) Where a judgment is given in favour of the claimant but the claimant did not comply with the process in paragraph 6.3A(2) of the RTA Protocol, the court may not order the defendant to pay the claimant's costs and disbursements save in exceptional circumstances."

23. It should be noted that, under Section IIIA of Part 45 ("*Claims Which No Longer Continue Under the RTA or EL/PL Pre-Action Protocols*"), r.45.29A and following do not apply "to a disease claim which is started under the EL/PL Protocol".

The Decision of the DDJ

24. Before both the DDJ and Judge Godsmark QC, the claimant took a threshold point that, because of an earlier order by DJ Stark directing a detailed assessment of the claimant's costs on a standard basis, neither judge had the power to consider these issues at all. Both judges roundly rejected that contention, and Mr Carter does not raise it again on this appeal. It does however raise the question of when and how a defendant in the position of this defendant should set out its objection. I deal with that in paragraph 63 below.

25. As to the argument about the applicability of the EL/PL Protocol, the DDJ said:

> "I have already said that there is no helpful definition of claim or employer defendant within the protocol or otherwise which assists either party or the court. It is the defendant who urges me to import the word 'viable' into my interpretation of what a defendant should mean. The simple fact that a potential claimant may have had more than one employer with whom he was exposed to noise does not necessarily mean that there is more than one employer defendant to enable the claimant to avoid the limitations of the protocol.
>
> Though it is not suggested it arose in this case, there is an implication that by simply making it plain, however unlikely, against more than one employer, could be used by unscrupulous representatives to avoid the protocol and more particularly the costs regime of that protocol.

> I agree that there was no viable claim against the proposed defendant [British Tissues]. I agree that had the claimant been fully open with his instructing solicitors or fully understood what he had to provide, or had full recollection of the history of matters, those solicitors would have been on notice from the outset that there may not have been a viable claim against the other proposed defendant. Even so, would a responsible and sensible solicitor have done nothing with regards to that proposed defendant would he or she at least have carried out some enquiries to confirm and clarify any instructions to check if that employer had fulfilled its full duty of care? If proper instructions had been given to the claimant's solicitors from the outset no doubt they would have considered that there was a very weak claim. However, nowhere in the protocol are the words viable or very weak or any other definition of the claim given. The claimant argues that it is not for me to import words into the protocol which do not exist or to apply some sort of purposive interpretation."

26. The DDJ resolved that part of the dispute in this way:

> "Protocols complement and are effectively subject to the overriding objective and vice versa in that the protocols were prepared with the overriding objective in mind. They can be read together as attempting in clear language to simplify the thinking behind litigation and to bring common sense into play. Applying that thinking to this case it seems unjust to me so far as the defence is concerned that it may be required to pay substantially more costs because the claimants have made a claim against another potential defendant, which failed at the first hurdle i.e. once the proposed defendant responded.
>
> … it seems to me that to prevent abuse, however innocent, some sort of qualifying test for the validity of the claim against an alternative defendant employer must be considered. Whether that test is that the claim must be more than weak, reasonable, viable, compelling, or some other term, is not for me to say.
>
> However in this case with which I am dealing and which we now know and the solicitors would have known had they received full instructions at the outset from the claimant that any potential claim against the other proposed defendant was a very weak prospect. Perhaps to the point where if the claimant had given fuller instructions his solicitors would have taken a commercial as well as legal view as to whether they investigated the proposed defendant at all, or whether they simply opened correspondence as part of a 'fishing' enquiry to confirm what they knew or should have been told.
>
> The claimant makes the point that I should not judge this with hindsight but as to the knowledge at the time when the claim

> letters were sent, I appreciate the point made. I am not judging this on the solicitor's knowledge upon what the claimant himself knew or should have known. Any issues in connection with the breakdown in instructions is between the claimant and his solicitors and this defendant should not be responsible for the additional costs arising.
>
> On that basis I take the view that the protocol should have applied to this case."

27. There is no appeal by the claimant against the finding that he did not give full instructions to his solicitors and that, if he had behaved reasonably, the claim would have been made against the defendant only, under the EL/PL Protocol.

28. As to whether r.45.24 applied (thereby providing a route by which the claimant might be limited to fixed costs only), the DDJ said:

> "Does CPR 45.24 apply? For similar reasons of pragmatism and common sense I think it must apply despite the fact that there have been no formal proceedings and no judgments. The defence pointed out that their belief that the protocol would apply at an early stage and therefore there would be a costs limitation. The defendant appears to have acted properly and within the spirit of the protocol on what was achieved in this case was precisely what the protocol was set up to achieve by yearly settlement by way of negotiation and without the need for litigation. I cannot understand why the defendant should therefore be prejudiced in costs for settling a case reasonably, appropriately and at an early stage. To say otherwise would leave the parties in the ridiculous position in my view of having to say to each other proceedings have to be commenced before we can achieve a settlement because of the costs implications of that settlement. That would be perverse.
>
> I am satisfied that 45.24(2)(c) applies to this case. The claimant did not comply with the protocol at all despite this claim falling within the scope of the protocol. As such I am entitled to order that the defendant pays no more than the fixed costs and disbursements allowed pursuant there to."

The Judgment of HHJ Godsmark QC

29. In his short judgment, Judge Godsmark reached precisely the opposite conclusion on r.45.24. He said:

> "The defendant urges me to apply a purposive construction and interpretation and says that the rule captures the circumstances where the Protocol ought to have been used when it was not. In my view this argument started in the wrong place. There was a settlement following the acceptance of a Part 36 offer. That

> created a contract and the contractual terms are fleshed out by Part 36 itself.
>
> The costs consequences are set out in CPR Part 36.13(1) and (3). Following the acceptance of a Part 36 offer the rules provide that the claimant gets his costs on the standard basis except where the recoverable costs are fixed by the Rules.
>
> The Rules apply when the Protocol is used. The Protocol was not used in this case. So, is there any other route to get to the position that only fixed costs are payable? The defendant says there is in the form of CPR Part 45.24.
>
> I reject Mr Joseph's approach to CPR Part 45.24. The terms of CPR Part 45.24 are clear. In this case there were no Part 7 proceedings and no judgments.
>
> I am not prepared to read CPR Part 45.24 in the terms which Mr Joseph urges as they require reinterpretation under the overriding objective as though those express requirements were met when they were not. I disagree with the DDJ. I cannot read CPR Part 45.24 as applying when express conditions are not met. It is even more difficult to do so when interpreting the terms of a contract. The claim was not brought within the protocol and there are no fixed costs. The claimant is entitled to costs to be assessed on the standard basis."

30. However, Judge Godsmark made plain that, in his view, that was not the end of the matter. He said that, although there had to be a provisional assessment, he was not limiting the DJ's discretion. He said expressly:

> "An appropriate sum may well be fixed costs but that is a matter for the district judge. I offered to deal with the matter today but the parties concluded that this was not appropriate. The appeal is allowed and the matter is remitted to the district judge."

31. Judge Godsmark QC may well have had CPR Part 44 in mind when he said this, because Part 44 had been expressly referred to by defendant's counsel in his skeleton argument. I also consider that, in the light of the modest sum at stake, Judge Godsmark was right to want to get on with it and to have offered to undertake the provisional assessment himself. The defendant's reasons for refusing this offer have not been explained. On behalf of the claimant, Mr Carter told us, with commendable frankness, that he was unwilling to agree because the Judge's 'steer' (noted above) indicated that he was against the claimant and may well have found that fixed costs was the appropriate basis of recovery. The parties' failure to accept the Judge's proposal has since been compounded by their agreement to stay his directions and the delays which have subsequently ensued.

The Proper Interpretation of the Protocol

32. The claimant's solicitors did not use the EL/PL Protocol (or the Claims Portal) because, at the time of the claim letters, there were claims against two potential employer defendants. On the face of it, therefore, the Protocol did not apply: see paragraph 4.3(6). This exception is not an accident: all of the new-style Pre-Action Protocols are expressly designed to apply only in cases where there is one defendant. The presence of two or more potential defendants makes it difficult to comply with some of the requirements of the Protocol, and makes the Portal impossible to operate efficiently. So, for example, the very recent Package Travel Claims Pre-Action Protocol, which came into effect this month, contains exactly the same exclusion.

33. Before the DDJ, the defendant argued that paragraph 4.3(6) of the EL/PL Protocol should be read as if the reference to "one employer defendant" was in some way qualified. But the judgment of the DDJ, set out at paragraphs 25-26 above, makes plain the difficulties with that approach. Should it be read as referring to more than one "viable" employer defendant? Or should the "claim" be defined as being "more than weak" or "reasonable" or even "compelling"? None of these competing qualifications can be discerned from the EL/PL Protocol itself.

34. Furthermore, it is not hard to envisage the practical difficulties that would arise from any qualification to the provision. What period would be under consideration when looking at the viability or weakness of one or more of the claims? Would it be a subjective or objective test? How are any changing strengths and weaknesses of the various claims to be taken into account? It is easy to envisage a range of satellite litigation that would arise as parties sought to argue whether a claim that was considered but not ultimately pursued against a second employer defendant was 'reasonable' or 'viable' or 'weak'.

35. Mr Hutton QC referred to paragraph 7.59 of the EL/PL Protocol and said that it was illogical that a claim which started under the Protocol and was then unreasonably removed from it would attract fixed costs, whilst a claim that was unreasonably never made under the Protocol at all would not attract fixed costs. There is some force in that submission. But any attempt to widen that paragraph would, on its face, require its wholesale rewriting. Moreover, even if that paragraph could be reworded, it is unclear how that could give rise to an automatic legal entitlement on the part of a defendant to pay only fixed costs. The paragraph is simply part of a Protocol. It does not have the force of a statute or a Rule made by SI.

36. For those reasons, I consider that it is inappropriate to start reading important qualifications into the plain words of the EL/PL Protocol. On the findings of the DDJ, the claim should have been made under the Protocol but was not. In such circumstances, the focus shifts to the CPR: what are the Rules which are relevant to the assessment of costs in this case?

The Proper Interpretation of Parts 36 and 45

37. The Part 36 regime is a self-contained procedural code for the making of and acceptance of settlement offers. In the present case, the offer was made in accordance with Part 36. It was accepted in accordance with Part 36, so CPR Part 36.13(1) and 36.13(3) applied. The EL/PL Protocol had not been used at any time, so Part 36.20 did not apply, and would not have applied anyway because r.45.29A(1) (to which it refers) did not apply to disease claims. Therefore, as Judge Godsmark QC found, the

starting point under Part 36 was that the claimant was *prima facie* entitled to its costs assessed in accordance with the usual rules (ie not by reference to fixed costs).

38. The Judge indicated that, if the defendant had wanted to limit its Part 36 offer to fixed costs, because of the argument about the viability of the claim against British Tissues, then it could have said so expressly in their offer letters. Of course, there may then have been arguments as to whether, in those circumstances, it was a Part 36 offer at all: that qualification may have made it a *Calderbank* letter instead. It might also have meant that the offer was less likely to be accepted. But certainty is impossible where there are arguments about whether or not the Protocol was not reasonably followed, and such a letter would at least have made the point openly at the relevant time, rather than it arising after the claim had been settled. As the Judge said, it would have provided some costs protection to the defendant.

39. Rule 45.24 does cover the position if a claim should have been brought under the EL/PL Protocol but was not. It cannot therefore be said that this was an eventuality that the CPR ignored. On the contrary, r.45.24 is a detailed provision dealing with the costs consequences where the claim was either not made or not continued under the EL/PL Protocol.

40. However, as Judge Godsmark QC found, r.45.24 does not apply to the facts of the present case. There have been no Part 7 proceedings. There has been no judgment. Although Mr Hutton QC sought to argue that in some way the requirement for Part 7 proceedings and a final judgment were simply examples of when the court could exercise its discretion under r.45.24, I am unable to accept that submission. It is clear that r.45.24 is dealing with specific circumstances where the court may exercise its discretion to order the payment of no more than fixed costs. Those circumstances (where there are Part 7 proceedings and a judgment) are not examples, but pre-conditions which have to exist before the rule can be applied.

41. Moreover, it is unsurprising that r.45.24 assumes the existence of proceedings and a judgment. It is part of a wider scheme. With the exception of r.45.23A (which was itself a later addition to fill a perceived gap in the Rules), all of Section III of Part 45, starting at r.45.16 and including r.45.24, applies where proceedings have been commenced and been pursued to judgment. That in turn is consistent with the principal function of the CPR: to govern the conduct of proceedings once they have commenced.

42. The approach of the DDJ involved the significant rewriting of Rule 45.24. Mr Hutton QC's submission also involved significant additions to aid his purposive construction. To r.45.24(1) he added the words "*or the claims settles for payment for a sum of money to the claim before proceedings start*" after the words "starts proceedings under Part 7", thereby immediately widening the entire scope of the rule to encompass anything that happened before proceedings started. He also wanted something similar in r.45.24(2), where he said that the words "*where settlement is reached for payment of a sum of money to the claimant or where*" should be inserted before the words "judgment is given in favour of the claimant".

43. As a matter of interpretation, I consider that the sub-rules cannot be interpreted as if these additional words had been incorporated. The new words radically change the

meaning and scope of the rule, extending it back in time to the pre-action stage, and circumventing the express requirements for Part 7 proceedings and a judgment.

44. As part of his argument, Mr Hutton QC relied on the decision of this court in *Solomon v Cromwell Group PLC* [2011] EWCA Civ 1584; [2012] 1 WLR 1048, where there was a discrepancy in the rules between the position of a claimant in a low value road traffic accident who accepted a Part 36 offer, and the position of a similar claimant who accepted an offer to settle made under Section II of Part 45 (r.45.7 and 45.8). The court concluded that, because the CPR contained both general and specific provisions, some of which were in conflict, the general must give way to the specific. That is a conventional approach to drafting conflicts. But that is not relevant to this case. Here, there is no discrepancy, because there are no Rules which deal with the settlement of a claim prior to Part 7 proceedings (and thus prior to judgment), where the defendant wants to argue that the EL/PL Protocol was unreasonably ignored. The next question is: should there have been such Rules?

45. Mr Hutton QC submitted that there should have been. He argued that the Ministry of Justice policy papers put before the CPRC in 2009/2010 showed that this was what was required. So, for example, he referred to a Policy paper for the CPRC on 15 May 2009, which said at paragraph 14:

> "To ensure that the new pre-action protocol is followed that Ministry proposes that the fixed recoverable costs applicable under the new process should also be applied by the court (in place of any other costs regime) where it considers that the claim has incorrectly been made outside the new process, or where it has been taken out of the process inappropriately…
>
> 18…thus, for example, where claim leaves the process because a request for a interim payment above £1,000 is not agreed by the defendant insurer but the court concludes that the additional interim payment was not reasonably pursued by the claimant, then the court would apply the fixed recoverable costs of the new process. This will ensure that claims are pursued within the process when it is appropriate to do so and avoid behaviour aimed at avoiding the fixed recoverable costs associated with the process."

Other subsequent policy papers said the same or similar things.

46. In support of his argument that the CPRC had failed to give effect to this policy, and that the rule should be re-written with that in mind, Mr Hutton QC relied on the decision of this court in *Qader & Ors v Esure Services Ltd & Ors* [2016] EWCA Civ 1109; [2017] 1 WLR 1924. There, "an obvious drafting mistake" by the CPRC meant that, contrary to the recommendation of Sir Rupert Jackson and the unqualified endorsement of that recommendation by the Ministry of Justice, there was nothing in r.45.29 which limited the fixed costs regime to fast track cases, or which excluded that regime when a case was allocated to the multi track. Briggs LJ (as he then was) demonstrated that this was an obvious drafting mistake and that it was not in fact the intention of those legislating for this regime that it should ever apply to a case allocated to the multi track. Applying the three stage test derived from *Inco Europe*

Ltd & Ors v First Choice Distribution & Ors [2000] 1 WLR 586, the Court of Appeal was "abundantly sure" (i) of the intended purpose of the provision in question; (ii) that by inadvertence the draughtsmen in Parliament had failed to give effect to that purpose; and (iii) of the substance of the provision Parliament would have made had the error been noticed.

47. In my view, there are a number of answers to this alternative argument. First, it is arguable that the policy referred to in paragraph 45 above was adopted by the CPRC, and found its way into r.45.24 and some of the costs sanctions within the EL/PL Protocol itself. Secondly, there is no policy document which contains the words which Mr Hutton QC now suggests are inadvertently missing. On that basis, it cannot be said that there has been an obvious drafting error. Thirdly, I consider that Mr Hutton QC's submission misunderstands the function of the CPRC.

48. The CPRC is a statutory body which is obliged to consider the MOJ policy documents with which it is provided, but has no obligation to accept or implement all or any part of those policies. The CPRC is there to consider the proposals from the MOJ and to make Rules to address any part of those policies which it considers appropriate. Therefore, as a matter of law, the policy documents themselves cannot usually be relied on as an aid to the interpretation of the CPR. At the very least, the minutes and other documents generated by the CPRC would be required, in order to see what the CPRC's response was to the policy in question. Moreover, the usual practice, if it transpires that there has been a drafting error, is simply for the rule to be corrected, although that is not a process that has retrospective effect (see *Qader* at paragraph 53).

49. Finally, I should say that, in my judgment, the DDJ's concerns – echoed in submission by Mr Hutton QC - that any result other than the rewriting of r.45.24 might lead to wholesale avoidance of the EL/PL Protocol, are over-stated. It is not likely that large numbers of claimants will invent bogus secondary or tertiary claims against other employers merely to avoid the EL/PL Protocol. Moreover, for the reasons given in paragraphs 52-60 below in respect of CPR Part 44, I do not consider that the creation of bogus secondary claims would provide a successful escape route in any event.

50. For these reasons, like Judge Godsmark QC, I would not be prepared to rewrite r.45.24 in order to meet the facts of the present case. The absence of Part 7 proceedings and the absence of a judgment means that r.45.24 does not apply to this case. Accordingly, that route to fixed costs is not open to the defendant.

The Proper Interpretation of CPR Part 44

51. CPR Part 44 contains general rules about costs. These include:

> "**Basis of assessment**
>
> **44.3**
>
> (1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –

(a) on the standard basis; or

(b) on the indemnity basis,

but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.

(Rule 44.5 sets out how the court decides the amount of costs payable under a contract.)

(2) Where the amount of costs is to be assessed on the standard basis, the court will –

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

(Factors which the court may take into account are set out in rule 44.4.)

(3) Where the amount of costs is to be assessed on the indemnity basis, the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

(4) Where –

(a) the court makes an order about costs without indicating the basis on which the costs are to be assessed; or

(b) the court makes an order for costs to be assessed on a basis other than the standard basis or the indemnity basis,

the costs will be assessed on the standard basis.

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

(6) Where the amount of a solicitor's remuneration in respect of non-contentious business is regulated by any general orders made under the Solicitors Act 1974[4], the amount of the costs to be allowed in respect of any such business which falls to be assessed by the court will be decided in accordance with those general orders rather than this rule and rule 44.4…

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

44.4

(1) The court will 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) 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 will give effect to any orders which have already been made.

(3) The court will 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 to 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;

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

(h) the receiving party's last approved or agreed budget.

(Rule 35.4(4) gives the court power to limit the amount that a party may recover with regard to the fees and expenses of an expert.)

…

Court's powers in relation to misconduct

44.11

(1) The court may make an order under this rule where –

(a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or

(b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.

(2) Where paragraph (1) applies, the court may –

(a) disallow all or part of the costs which are being assessed; or

(b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

(3) Where –

(a) the court makes an order under paragraph (2) against a legally represented party; and

(b) the party is not present when the order is made,

the party's legal representative must notify that party in writing of the order no later than 7 days after the legal representative receives notice of the order."

52. These provisions contain numerous ways in which a party whose conduct has been unreasonable can be penalised in costs (what I shall call "the Part 44 conduct provisions"). In my view, the Part 44 conduct provisions provide a complete answer

to a case like this. They provide ample scope for a District Judge or a Costs Judge, when assessing the costs in a claim which was unreasonably made outside the EL/PL Protocol, to allow only the fixed costs set out in the EL/PL Protocol.

53. Mr Carter sought to argue that it was somehow inherent in r.45.24 that Part 44 would not apply at all in cases like this. He argued that, if the same result could be achieved by way of Part 44, then r.45.24 was otiose.

54. I do not accept those submissions. Since r.45.24 does not apply to this case, its existence cannot be relied on as excluding rules which, on their face, do apply. Moreover, r.45.24 would not necessarily be rendered otiose by the provisions of Part 44: it would always depend on the facts. In any event, a situation where, depending on the circumstances, the CPR may provide more than one route to the same result, is hardly uncommon.

55. More widely, Part 44 provides important general rules about costs and the sorts of matters which, in the exercise of its discretion, a court may wish to take into account when assessing costs. For Part 44 to be disapplied (in whole or in part), as Mr Carter urges, there would have to be clear words setting out the nature and scope of any such disapplication. There are none here. Accordingly, I consider that Part 44 applies to this case. The unreasonable failure by the claimant to follow the EL/PL Protocol, as found by the DDJ, triggers the Part 44 conduct provisions.

56. In my view, it is at this point that paragraphs 2.1, 3.1 and the warning at 7.59 of the EL/PL Protocol, become relevant. Taken together, those paragraphs comprise a clear indication that, if a claim should have been started under the Protocol but was not, and it was unreasonable that the claim was not so started, then by the operation of the Part 44 conduct provisions, the claimant should be limited to the fixed costs that would have been recoverable under the EL/PL Protocol.

57. I consider that support for this approach can be found in *O'Beirne v Hudson* [2010] EWCA Civ 52; [2010] 1 WLR 1717. In that case, there was a claim for general damages just above the small claims track limit of £1,000 and the claim settled for £400. The judge said that there was nothing in the consent order which precluded the costs being assessed by reference to the small claims track. The Court of Appeal agreed, holding that, even where a consent order provided for costs to be assessed on a standard basis, Part 44 meant that the assessment of costs could proceed on the basis that, in respect of each item, the costs judge asked whether it was reasonable for the paying party to pay more than would have been payable had the case been allocated to the small claims track.

58. Mr Hutton QC sought to distinguish this case on the basis that there was no unreasonable avoidance of a Protocol. In my view, whilst that might a difference on the facts, it does not affect the applicability of Part 44 to any case where the payee might otherwise recover more than is reasonable in all the circumstances. Indeed, in another case relied on by the defendant (*Javed v British Telecommunications PLC* [2015] EWHC 90212 (Costs)), where the claimant had failed to follow a Protocol, Master Simons, Costs Judge, again approached the assessment under Part 44 and found at paragraph 42 that "had the claimant acted reasonably then her solicitors would not have been entitled to recover any more than fixed recoverable costs and it

seems to me that it would create injustice if they were to profit as a result of their unreasonable conduct".

59. In both *O'Beirne* and *Javed*, the assessment was to be undertaken by reference to what is now Part 44.4 (which, at the time of both those cases, was Part 44.5), namely by having regard to all the circumstances of the case, including conduct. It seems to me that, in a case where a claim was not reasonably made under a Protocol, Part 44.11 (Misconduct) is of equal, if not more, importance. It will very often be because of misconduct on the part of the claimant or the claimant's legal representatives that a claim was made which unreasonably avoided the relevant Protocol altogether. In addition, I note that, whilst *O'Beirne* favoured an item by item approach to the assessment, Master Simons in *Javed* said that that was unnecessary in these sorts of circumstances. For my own part, I prefer the approach of Master Simons. If the judge has concluded that, as a result of unreasonable conduct, the relevant fixed costs represent the maximum recovery, then an item by item approach is unnecessary.

60. Mr Hutton QC accepted that Part 44 provides a mechanism which achieves the result he seeks. His principal complaint was that it was a less certain remedy than the automatic application of the fixed costs regime. I have already said that that criticism is unrealistic: any dispute about whether or not the EL/PL Protocol should have been used, and whether its non-use was unreasonable, will inevitably introduce a level of uncertainty which cannot be cured by the CPR, at least until that dispute has been resolved.

61. For these reasons, I consider that Part 44 provides a complete answer to the issues raised on this appeal. In a case not covered by r.45.24, such as this one, a defendant can rely on the Part 44 conduct provisions to argue that only the EL/PL Protocol fixed costs should apply.

62. As I have already indicated, Judge Godsmark QC appeared to be attracted by this approach. However, he made no findings in respect of Part 44. In my view, he should have done. For the reasons that I have given, it will usually follow that a claimant who, on this premise, has only incurred a higher level of costs because he or she has unreasonably failed to follow the EL/PL Protocol, will be restricted under Part 44 to the fixed costs and disbursements encompassed by that Protocol.

63. We were also asked to indicate the best way in which an argument about whether or not the costs should be restricted in this way should be raised and addressed. I note that, pursuant to CPR 46.14, it is envisaged that, following settlement, costs-only proceedings can be issued under Part 8. That is what happened here. In my view, a defendant who wants to argue that the claimant should be restricted to fixed costs only should raise that submission as soon as possible in the Part 8 proceedings. Under 46PD 9.7 that would probably be when the defendant files an acknowledgement of service stating its intention "to contest the claim or to seek a different order".

Conclusions

64. For these reasons, I would dismiss the appeal on the first ground. Neither the EL/PL Protocol nor r.45.24 provides a mechanism which automatically applies the fixed costs regime in circumstances where a claim has not been started under the Protocol

and/or has not been the subject of a Part 7 claim and a judgment. There is no drafting error, obvious or otherwise, in the CPR.

65. Although Judge Godsmark QC may have had Part 44 in mind, I would allow the appeal on the second ground. In a case where the Protocol should have been used, and its non-use was unreasonable then, pursuant to the Part 44 conduct provisions, the claimant will usually be entitled to recover only the fixed costs and the disbursements permitted by the Protocol.

Lord Justice Hamblen:

66. I agree.

Lord Justice Lewison :

67. I also agree.