Case No: B31YM002

IN THE COUNTY COURT AT CAMBRIDGE

197 East Road,
Cambridge, CB1 1BA

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Before:

HIS HONOUR JUDGE YELTON

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Between:

ARKADIUSZ BRATEK **Claimant**

- and –

CLARK-DRAIN LIMITED **Defendant**

- -
- -

MR ANDREW LYONS for the **Claimant**
MR ANDREW ROY for the **Defendant**

- -

Approved Judgment

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HIS HONOUR JUDGE YELTON:

1. This is an appeal by the defendants, Clark-Drain Limited, from an order of District Judge Matthews dated 27th October 2017 in the Peterborough County Court in a claim brought against the defendants by a Mr Bratek for personal injuries.

2. In fact the appeal does not concern the merits of the claim at all. It does concern the interpretation of a consent order which was dated 17th June 2016 and which settled the litigation. It is common ground between the parties that this was a personal injury claim which came under the EL/PT protocol but then came out of that protocol because it was not the subject of an agreement as to liability and was set down for trial in the fast track and was then settled, in fact, the day before the claim was due to be heard, if I have understood it aright.

3. It was ordered by the order dated 17th June 2016 that the defendant pay the claimant the sum of £10,000 in full and final settlement of the claim and by paragraph 2 the defendant to pay the claimant's solicitor's costs, inclusive of VAT and disbursements on a standard basis, to be assessed if not agreed. The claimant argues that that supersedes the matters set out in CPR 45.29A to J to which I will turn in a moment. The defendant says, no, it does not, but that it is subject to those rules of civil procedure.

4. It is a matter of some importance because on the basis that the claimants put forward their claim for costs they recovered, according to the district judge's order, something like, and I am using round terms deliberately, £24,000, whereas the claim, if restricted to fixed costs, would amount only to about £10,000. It is a matter perhaps of some importance that the reason for bringing in the fixed costs procedure was in order to cut down on substantial awards for costs because it was thought, rightly in some cases and I am saying nothing about this case, but rightly in some cases, that solicitors were trying to charge too much.

5. There is no doubt as between the parties, as I have said already, that this was a case to which the low value personal injury employer's liability and public liabilities claim, the so called EL/PL protocol, applied. But it no longer continued under that protocol for the reasons I have set out, in other words, because liability was not accepted and it was going to go to trial. That situation is dealt with in part IIIA of Rule 45 of the CPR.

6. Now, the important first rule, which Mr Roy on behalf of the defendants relies on strongly, is 45.29D. That says that subject to rules 45.29F H and J, (and only J could be relevant, it seems to me), and for as long as the case is not allocated to the multitrack, if a claim is started under the EL/PL protocol the only costs allowed, and that is important, are fixed costs in rule 29E and disbursements in accordance with rule 45.29I.

7. I am not concerned in this case with mathematics of costs, but simply with the principles. 45.29J is of some importance because that says:

> "If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in the previous paragraphs."

It goes on to say how the court should then deal with that situation, but clearly this case is not one in which that happened.

8. I have been given a helpful bundle of authorities, none of which directly deal in fact with the situation with which I am faced here. But in the case of Sharp v Leeds City Council [2017] EWCA Civ 33, Lord Justice Briggs said that, and he was dealing, as I have said, with a slightly different situation, he said and the head note reflects, that the plain object of intent of the fixed costs regime for claims started but not continuing under the protocol was that from the moment of entry into the portal pursuant to the protocol recovery of the costs pursuing or defending that claim and all subsequent stages was intended to be limited to the fixed rates of recoverable costs subject only to a very small category of clearly stated exceptions. That expression of principle seems to me to be an important one. The actual decision of the case is concerned with the applicability of the fixed costs regime to applications for pre-action disclosure, but the principle set out is of some very considerable importance because the claimant says that this was a case in which the agreement should be construed on the basis that the parties agreed that the fixed costs regime would not apply.

9. The claimant seeks to put in evidence from the solicitor who was dealing with the matter at that time, although in fact she was not the person who previously had conduct of it. I have read that witness statement. It does not seem to me to be helpful because it deals with what her view was at the time but is written with the benefit of hindsight. I am satisfied that is an entirely honest witness statement, as one would expect from the firm of solicitors concerned, but what you have to look at is what is the objective meaning of the order, construed against the background of statutory, and by statutory I include statutory instrument, regulation.

10. It seems to me that as a matter of principle if you take rule 45.29D, which I have already read, the only costs allowed are fixed costs and an order of the court, or an agreement between the parties reflected in an order of the court, it does not seem to me can go beyond that, unless there was agreement that section 45.29J applied and neither party directed their mind to that, particularly not the claimant. It would be for the claimant, it seems to me, to justify amounts beyond the fixed costs, which is set out in 45.29D.

11. I said earlier that the authorities to which I have been referred, which are obviously helpful, do not directly deal with the situation with which I am concerned, but it seems to me that I need to deal with a number of them, although, having looked at the rules again it seems to me that the defendant's appeal should succeed because the rules themselves compel me to come to the decision that it should. I do not think the respondent's case is burdened by merit, but that is neither here nor there. I have got to decide the case according to the law as I see it.

12. If one looks at the list of authorities it seems to me it would be helpful to look at them in temporal order rather than in the order they are set out in the bundle, because obviously cases follow on one from the other and do not always deal with the same point. It is also right to say that some of the earlier authorities reflect the rules as they then were rather than the rules as they now are.

13. It is important to bear in mind, and Mr Lyons relies on this strongly, that fixed costs and assessed costs are conceptually different. That was set out clearly by Lord Dyson, then Master of the Rolls, in the case of Broadhurst v Tan [2016] EWCA Civ 94 at page

19 of the bundle of authorities which I have been given. He sets out there the differences between the two forms of costs and I understand that.

14. It seems to me that I should start, because I am not going to deal with every authority to which I was referred, with the case of O'Beirne v Hudson [2010] 1 WLR 1717. That was a case in which the defendant was ordered to pay the claimant general damages of £400, special damages of £719 and costs and disbursements on the standard basis, subject to a detailed assessment if not agreed. The defendant disputed the bill of costs, contending that if the matter had gone through allocation it would have been allocated to the small claims track and so, as a matter of principle, costs should be fixed by reference to the small claims regime.

15. That, of course, is a different argument from the arguments put forward in this case because that case was not in fact allocated to the small claims track. The court held that a costs judge had no power to alter or vary an order for costs made by a judge. So where a consent order provided for the costs to be assessed on the standard basis the costs judge was not free to rule that the costs would be assessed and awarded solely on a small claims track basis. But, of course, that is different from this case. In this case 45.29D restricts the amount of costs that would be awarded. O'Beirne v Hudson is a case about what should have happened if the case had been brought on the small claims track. The case did go on to say that very careful scrutiny should be given to a bill in the circumstances which I have just described.

16. The second judgment is that of Solomon v Cromwell Group Plc, [2012] 1 WLR 1048, upon which both counsel rely as supporting their case. I am not sure, again, that Solomon v Cromwell is relevant because of some of the things that were said. Directly it is not applicable. It was a case in which there were two road traffic accident claims and the claimant accepted the defendant's offer of damages made under CPR 36 and sought to have the costs of the proceedings assessed by the County Court on the standard basis under CPR 36. It was held by the judge in one case and by the district judge in the other that since the case fell within section II of CPR part 45 the rule would not apply. On the claimants' appeals it was held, dismissing the appeals, that rule 36 contained rules of general application whereas section II of part 45 contained rules specifically directed to a narrow class of cases and the principle that the general gave way to the specific was applied. As I have said more than once, that does not directly apply to this case, but it seems to me that the general rule that you can have line by line costs assessed must give way to the specific rule that restricts the costs that you are entitled to recover under 45.29D.

17. The next relevant case is Broadhurst v Tan [2016] EWCA Civ 94, to which I have already drawn attention. That deals with an entirely different situation which is reading together other parts of CPR 36 and 45.29. It held that the general rule in 45.29 gave way to the provisions for the granting of an order for indemnity costs in the circumstances set out in that case, which again do not apply in the case with which I am dealing.

18. I was next referred to the decision in Sharp v Leeds City Council and I have already quoted from that case. Again, it does not directly apply.

19. I was finally directed to a very recent case in which judgment was given on 20th April, only a few days ago, Williams v The Secretary of State for Business, Energy and

Industrial Strategy [2018] EWCA Civ 852. That again was a case which was slightly different. The claimant in that case unreasonably failed to follow the pre-action protocol which would have restricted him, that is, the claimant, to the recovery of fixed costs and disbursements only. He, that is, the claimant, then applied for more costs than the fixed costs, if I can use that expression. So again, his claim was not encumbered by merit.

20. Mr Lyons on behalf of the claimant says that what is said at the end of that case because, not surprisingly, the Court of Appeal held that he was in fact restricted to fixed costs as it were by inference, Mr Lyons says in paragraph 61:

> "For these reasons I consider that part 44 provides a complete answer to the issues raised on this appeal."

Part 44 which deals with the general provisions as to costs says that the court can take into account misconduct and all other matters of that sort and it plainly was misconduct in a wide sense not to go through the protocol in the proper way.

21. The learned justice of appeal went on to say:

> "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 rule 45.24, such as this one, the defendant can rely on the part 44 conduct provisions to argue that only the EL/PL protocol fixed costs should apply."

Mr Lyons says this is what the defendant should have done in this case and they clearly did not. They clearly did not rely on the general provisions of part 44. But they did not need to in my judgment because there had not been any misconduct on the claimant's part to which they could have drawn attention. It is quite clear from the decision of the Court of Appeal, which is a decision of Lord Justice Coulson, that a defendant can rely on part 44 to argue that the protocol fixed costs should apply in a case which was not covered by, in that case, 45.24, in this case by 45.29. If it is covered by 45.29 then, in my judgment, they need to rely on provisions of 44.

22. It does seem to me that a number of the cases which have come before the Court of Appeal are cases in which the claimant has tried to take bad points and to get round the provisions of the fixed costs. This is not the case here because the claim was properly started, the protocol was followed and the claim exited the protocol, if that is the right way of putting it, because there was going to be a trial. There are no grounds at all for criticising the claimant or its solicitors for their conduct of the litigation and it is wrong to say that that is the way in which the defendants should have put the case.

23. It seems to me that if one goes back to what was said in the Sharp case as an expression of principle rather than part of the judgment the courts should uphold the restriction on costs set out in part 45 of the CPR save in exceptional circumstances. What Mr Lyons on behalf of the claimant says is that by agreeing to an order that the costs be assessed the defendants were impliedly going outside the terms of part 45, or perhaps bringing in further provisions. In my judgment the provisions of 45.29D, which I started off this judgment by reading, are mandatory and it does not seem to me that you can contract out of them in those circumstances other than in the very limited provisions referred to

by the Court of Appeal in the Sharp case, which the claimant does not assert applied in this case.

24. This case has been very well argued on both sides and I have looked at the various authorities and I am satisfied at the end of the day that the defendants are right and the learned district judge, who is rarely appealable, was not right. So I shall allow the appeal.

25. What I will do is I will allow the appeal, set aside the order of District Judge Matthews and order that the costs recoverable by the claimant are restricted to the fixed costs and disbursements, because there is some dispute as to the exact figure, is there not?

(Discussions re costs follow)