IN THE COUNTY COURT AT MANCHESTER Case No. D07YM204

Before His Honour Judge Pearce, sitting at Manchester Civil Justice Centre on 9 April 2018, judgment reserved on the issue of costs

MR MURAT KAVAK

Claimant

and

FMC CHEMICALS LIMITED

Defendant

JUDGMENT ON THE ISSUE OF COSTS

Appearances: Claimant: Mr Ian Huffer

Defendant: Mr Jamie Marriott

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.

1. This case was allocated to the fast track and tried by me on 9 April 2018. Following evidence and submissions, I found that the Defendant was liable to the Claimant for injury loss and damage suffered in the accident, subject to a deduction of 25% for contributory negligence. I further found that the Claimant had not proved on the balance of probabilities that the personal injury of which he complained was a consequence of the accident but I found that he proved that damage to his vehicle in the sum of £1,140.76 was caused by the accident. Having regard to the 25% deduction for contributory negligence, I gave judgment for the Claimant in the sum of £855.57.
2. I gave oral reasons for my decisions and do not propose to repeat them here. However, it is relevant to note that:
    a. The Claimant had been involved in three road traffic accidents within a period of just exceeding six months. On the undisputed medical evidence, the first two accidents were still causing symptoms at the time of the third accident and based on the Claimant's own evidence I was not satisfied that he proved that his injury was any greater after that accident than it was before.

b. Whilst the Defendant had not alleged to the claimant was guilty of dishonesty in asserting that the third accident had or may have caused him injury, I expressly found that he was not dishonest either in giving evidence or in advancing his case.

3. After the trial, an issue as to costs arose. The claim had been originally intimated through the Pre-action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA protocol"). The Defendant disputed causation in its entirety and alleged contributory negligence. For those reasons, the claim had not been resolved under the protocol but rather was the subject of Part 7 proceedings leading to the trial before me.

4. The Claimant therefore contended that, because the claim had been started under the RTA protocol but had come out of the protocol in accordance with section IIIA of part 45 of the CPR, the fixed costs regime as set out in that section applied to the claim.

5. The Defendant on the other hand contended that the claim should not have been commenced under the protocol at all, since the claimant could not prove that he had suffered injury as a result of the road traffic accident. In those circumstances, the value of the claim was such that it ought to have been bought by proceedings that would have been allocated to the small claims track.

6. During brief oral submissions at the end of the trial, Mr Marriott for the Defendant contended that the result that he urged could be achieved by two means:

   a. His preferred argument was that the claim could and should be reallocated to the small claims track pursuant to CPR 26.10 and that the Claimant should thereafter be limited to his costs as set out in CPR 27.14;

   b. The alternative argument, advanced at the instigation of the court, was that part IIIA of CPR 45 could and should be disapplied where the claim should never have been brought under the RTA protocol in the first place, in which case costs were large and the court should make an order limiting the costs to those that would have been recoverable had the claim been allocated to the Small Claims Track.

7. Neither party was able at court to cite authority on the proper application of the cost rules in the circumstances of this case. Mr Marriott for the defendant cited the case of Conlon v Royal and Sun Alliance [2015] EWCA Civ 92 as authority for the wide power of the Court to re-allocate cases even after judgment, but Mr Huffer for the Claimant had not had opportunity to consider that case or its application to the facts of this case.

8. To avoid possible in fairness to the parties or an unnecessary appeal generated by the court not being aware of relevant authority, it was agreed that the costs issue was best dealt with by the parties filing written submissions and the court delivering a written judgment on the issue.

9. Both parties have filed written submissions and I am grateful to counsel for those documents.

10. Mr Marriott for the Defendant concedes that, subject to his argument as to reallocation, the effect of the costs regime under section III A of CPR 45 is to provide that the fixed

cost regime applies. He does not pursue the argument referred to at paragraph 6(b) above that the court in any event has a discretion to disapply the fixed costs regime. Having reviewed the structure of the rules, I agree that he is right not pursue that contention.

11. However, Mr Marriott continues to press the case that the court ought retrospectively to reallocate the claim to the small claims track regime with effect from the date that it was allocated to the fast track. He says that, but for the claim for personal injury in excess of £1000, this is a claim that would have been allocated to the small claims track by virtue of CPR 27.1, since it would have been limited to a claim for vehicle damage the value of which was well less than £10,000. It would be unjust if a Claimant who had failed at trial to prove that he had suffered personal injury could recover his costs pursuant to the fixed costs regime when the entry requirement for that regime was that the claimant had suffered personal injury.

12. On behalf of the Claimant, Mr Huffer concedes the principle that the court has the power retrospectively to reallocate the case, following the decision of the Court of Appeal in Conlon v Royal Sun Alliance Insurance plc [2015} EWCA Civ 92. However, he contends that the court should not exercise this power. Drawing attention to the wording of the judgment of the Court of Appeal in that case, he says that an order should only be made where the is good reason for doing so. There is no such good reason here:

    a. The Claimant was found to be an honest witness, whose claim failed not because of any improper behaviour on his part but rather because he was unable to distinguish injuries caused in this accident from those caused in the two earlier road traffic accidents on 4 October 2015 and April 2016.

    b. In defending the claim, the Defendant denied both the personal injury and property damage element of the claim. They failed in respect of the property damage.

    c. Have the claim been allocated to the small claims track from the beginning, the Claimant would have been a litigation in person facing the contention that he was falsely claiming injury from the accident.

    d. The Defendant failed to protect its position from a costs consequence by settling the damage claim or by making a part 36 offer.

    e. Track allocation raises issues as to how cases are managed and should be decided prospectively so that the parties know how to deal with the issues in the case.

    f. The fast-track scheme under which the case proceeded provided material which assisted me in my determination of liability issues. The court would not have had such assistance had the case proceeded under the small claims track.

13. I agree that, following the decision of the Court of Appeal in Conlon, the case should only be reallocated between tracks with retrospective effect where there is good reason to do so. I accept that retrospective reallocation can lead to a situation in which a party has conducted litigation on certain expectations as to what steps are reasonable to take (and therefore what costs are reasonably incurred) which expectations are undermined by the reallocation.

14. However, there is considerable force in the Defendant's contention that, had the Claimant not pursued the personal injury element of this claim, the claim would have been limited to the small claims track cost and that the Claimant should not now get the benefit of the failure so to limit the claim. I say so for the following reasons.

    a. The decision as to whether to pursue a personal injury claim was that of the Claimant (and his lawyers). Such a claim could not or at least should not have been pursued unless both the Claimant believe that he had suffered personal injury and the lawyers acting on his behalf consider that he had a reasonable prospect of showing that. The Claimant's evidence in court amounted to an acceptance that he could not say whether he had suffered injury or not. In those circumstances, I do not see that he could ever properly have brought a claim for such injury.

    b. The Defendant's failure to succeed in respect of the property damage element of this claim would buck, but for the claim for personal injuries, have led simply to a liability for small claims track costs. The Defendant does not seek to avoid paying such costs now.

    c. The Claimant would only have been exposed to the risk of a finding that he had lied about suffering personal injury if he had asserted that he had suffered injury. For the reasons set out above, I do not see that he had the material upon which to assert that he had suffered injury. Insofar as the Claimant may have been exposed to an allegation that he was lying about whether his vehicle was damaged (a point not expressly taken on his behalf in the written submissions), that of course would have applied to any other litigant bringing a damage-only claim in the small claims track. There is nothing special about the Claimant's position that means it would have been inappropriate for his claim to have proceeded in the small claims track.

    d. It is correct that the Defendant could have protected its position by settling the damages element of the claim. However, in that respect, it is in no different position than it would have been as a Defendant defending a claim in the small claims track. As regards the suggestion that the Defendant could have protected its position by making a Part 36 offer, the consequence of such an offer would have been to expose the defendant to a liability for costs which, on its hypothesis, should never have been a risk.

    e. As acknowledged above, it is indeed important that track allocation is determined prospectively not retrospectively. However, it would be wrong to allow a litigant to take advantage of a track allocation which, in the event, did not prove justified. That is the situation here.

    f. Whilst it is correct that some of the documents provided because of this case being in the fast-track might not have been available had it been pursued as a small claims track claim from, I see no reason to think that the court could not equally have reached the same conclusion on the evidence had it proceeded as a small claims track case.

15. It should be noted that, based on the Claimant's argument, there is an incentive to a claimant to state that he has suffered personal injury so as to seek to achieve the

(perceived) benefits of a case being in the fast-track. There is certainly a potential benefit to those who may recover legal costs because of allocation to the fast-track. In my judgment it would be unattractive to make orders that put a premium on presenting a claim that cannot be justified.

16. For these reasons, I agree with the submission of the Defendant that the appropriate order in this case is one reallocated in the claim to the Small Claims Track with effect from the date of allocation, 16 November 2017.

17. The only indication of the amount of costs under the Small Claims Track is that in the skeleton argument for Mr Marriott for the Defendant, namely £419. Accordingly, I order that the Defendant pay the Claimant's costs in that sum.

18. In order to allow sufficient time for this order and judgment to be sent out and considered by the parties, I extend the time for filing an Appellant's notice either in respect of my judgment on 9 April 2018 or in respect of my determination on the costs issue to 25 May 2018.

24.4.18

HIS HONOUR JUDGE PEARCE
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