In the County Court at Liverpool
Case number E10LV801
On Appeal from District Judge Wright (Appeal No 116/2018):

BETWEEN

DR CAROL BEARDMORE

Appellant/Claimant

and

LANCASHIRE COUNTY COUNCIL

Respondent /Defendant

Before **His Honour Judge Graham Wood QC**

Mr Paul Hughes (instructed by Scott Rees & Co Solicitors) for the Appellant

Mr Kevin Latham (instructed by SPH Costing Services) for the Respondent

Hearing date: 1st February 2019

Judgment

.....

His Honour Judge Wood QC

Introduction

1. This appeal arises from a decision made in Part 8 costs only proceedings by District Judge Wright on 11 October 2018 with her permission. The proceedings related to a trifling amount of money within the predictable fixed costs regime for low value personal injury claims, a matter of only tens of pounds, and it may seem that the cost involved in pursuing the appeal point is wholly out of proportion to the sum which is in issue.

2. However, I am told that there are a substantial number of cases which would be affected by the discrete point, which involves, essentially, the recovery of medical agency fees incurred in obtaining medical records as disbursements. This explains, undoubtedly, why senior and experienced costs counsel have been instructed to represent the receiving and paying parties.

3. I heard argument on Friday of last week, and reserved my judgment to consider the authorities, and the relevant rules.

Background

4. The background is briefly this. The Claimant was injured in a tripping accident in March 2016. The Defendant was the highway authority. There were relatively minor injuries, and negotiations began initially under the pre-action protocol for public liability claims. Liability was not resolved, and accordingly the matter came out of the protocol process and proceeded as a potential claim. After some pre-action disclosure and medical evidence was obtained, liability was admitted, and the claim settled in the sum of £3500. So far, it might be said, so good. The Claimant was entitled to her costs which were fixed costs under section IIIA of CPR 45. The vast majority of these costs were not in issue and determinable by reference to the various tables.

5. What was disputed, as I have indicated, were the disbursements recoverable for obtaining the medical records. In this case medical records were obtained by a company known as Target Medical who were also involved in commissioning the medical reports. The relationship between Target Medical and the Claimant solicitors is not clearly stated, although it is believed that there were mutual directorships and the latter had a financial interest. The costs claimed as disbursements included both hospital and GP notes, being the direct costs of £50 and £10 respectively (that is the sum paid directly to the medical

institutions) and a profit element on top of that, leading to claims of £96 including VAT in relation to each, or £192 for both. It was the Defendant's contention that the recoverable sums should be limited to the direct costs only.

6. The use of a "medical agency" is commonplace with many claimant firms who handle this kind of litigation in bulk. It provided a one-stop shop, and from the altruistic point of view made some sense; these agencies have a lot of experience, which enables the solicitors' time to be freed up, and where bulk work is handled, bookings and record requests can be made *en bloc*. However, from a more cynical perspective it might be said that it was a means of maximising solicitors' profit when they were already squeezed on the fixed costs regime. Requesting medical records and arranging medical appointments would normally be part of the solicitors' retainer responsibilities and no cost could be recovered over and above the fixed fee, whereas if there was a separate company undertaking this work as an agent (and in which the solicitor had a financial interest) the cost could potentially be recovered as a disbursement and dealt with separately.

7. It seems to me that these are factors which lie behind the pursuit of, and opposition to the present appeal. The Defendant's objection to paying an agency fee led to the issuing of Part 8 costs only proceedings, and as I have indicated and the disputed matter came before District Judge Wright who heard argument from solicitors for both sides. She did not provide a separately transcribed judgment, but gave an ex tempore decision. It was very short, and therefore I set it out verbatim:

> "Right. Well it seems to me perfectly reasonable for the solicitors to write to whoever has got the medical records and get them in that way. I very often see that done. It seems a very easy thing to do and I think it is unreasonable to instruct the agency to do that. I appreciate that the rules provide for an agency fee in RTA cases, but they do not provide for that in the PL cases and therefore I am not going to allow it in this particular case, I am afraid."

8. The learned judge therefore did not engage in any greater detail with the finer points of the fixed costs rules, but made her decision on the basis of what it would have been reasonable for the Claimant's solicitors to do. However, she noted the disparity between RTA cases, and what she described as an EL case (clearly meaning a PL case) and it is clear that whilst she purported to exercise a discretion on the basis of what was reasonable and proportionate, that discretion was prescribed by her understanding that there was no provision in the rules for the allowance of an agency fee over and above the direct costs. It is fair to point out that the learned district judge heard only a fraction of the substantial argument which was advanced by counsel before me on the appeal hearing.

The law

9. The fixed recoverable costs regime which applies to cases which have exited the RTA and the El/PL pre-action protocols is contained in part 111A of CPR 45. Whilst this court is mainly concerned with Paragraph 45.29I, it would be helpful to set out the explanatory rule which applies to the various rules dealing with fixed costs and disbursements recovery.

10. Although this is a PL case, it is useful to start with the rule which applies to claims which started within the RTA protocol.

> Application of fixed costs and disbursements – RTA Protocol
>
> **45.29B** Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—
>
> (a) the fixed costs in rule 45.29C;
>
> (b) disbursements in accordance with rule 45.29I.

11. 45.29B thus establishes the basis on which fixed costs and disbursements paid in RTA cases by reference to the relevant rules and sub-rules. In comparison,45.29D which applies to EL/PL cases has very similar wording: –

> Application of fixed costs and disbursements – EL/PL Protocol and Pre-Action Protocol for Resolution of Package Travel Claims
>
> **45.29D** Subject to rules 45.29F, 45.29H and 45.29J, and for as long as the case is not allocated to the multi-track, in a claim started under the EL/PL Protocol or in a claim to which the Pre-Action Protocol for Resolution of Package Travel Claims applies,the only costs allowed are—
>
> (a) fixed costs in rule 45.29E; and
>
> (b) disbursements in accordance with rule 45.29I.

12. The only difference is that RTA claims are subject to 45.29G (counterclaims) which are not relevant for present purposes, and of course fixed costs are addressed by a different rule with an appropriate table because different rates apply. It is significant that in both RTA and EL/PL cases disbursements are determined under the same rule (45.29I). I set out the relevant parts:

> Disbursements
>
> **45.29I**
>
> (1) Subject to paragraphs (2A) to (2E), the court—
>
> (a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but
>
> (b) will not allow a claim for any other type of disbursement.
>
> (2) In a claim started under the RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, the disbursements referred to in paragraph (1) are—
>
> (a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;
>
> (b) the cost of any non-medical expert reports as provided for in the relevant Protocol;
>
> (c) ……(h)
>
> (2A) In a soft tissue injury claim started under the RTA Protocol, the only sums (exclusive of VAT) that are recoverable in respect of the cost of obtaining a fixed cost medical report or medical records are as follows—
>
> (a) obtaining the first report from an accredited medical expert selected via the MedCo Portal: £180;
>
> (b) obtaining a further report where justified ……
>
> (c) obtaining medical records: no more than £30 plus the direct cost from the holder of the records, and limited to £80 in total for each set of records required. Where relevant records are required from more than one holder of records, the fixed fee applies to each set of records required;

13. Thus the rule provides for this cost for claims which started in the RTA or EL/PL protocol by reference to that which was allowable within the protocol, in other words making this disbursement, as part of the recoverable fixed costs, no different to that which would have been obtained had the claim remained within the protocol. It is unnecessary to delve into

the detail of CPR 45.19 other than to note that this provides for the mechanism of recovery for claims which have settled within the protocol.

14. The difficulty appears to arise at sub-paragraph 2Ato the specific provision made at (c), where there is a maximum sum allowable in relation to RTA claims (the provision is the same whether within or without the protocol) but it is to be noted that there is no specification of the sum allowable in relation to EL and PL claims.

The respective arguments

15. The Claimant's argument is based on a simple premise. Mr Hughes of counsel submits that the learned district judge fell into error in concluding that agency fees were not recoverable in PL cases by reference to what was no more than a restriction on the maximum disbursement which could be claimed in RTA cases, over and above the direct costs. It is said that she was wrong to interpret this provision as meaning agency fees were only recoverable in RTA cases, and by implication the absence of any reference in the rules to the recoverability in PL cases effectively excluded anything other than the direct costs.

16. Mr Hughes relied heavily on the use of the expression "*cost of obtaining*" which was specifically referenced in sub-paragraph 2 (a) in relation to the disbursements involved with medical records and expert reports arising under both protocols. These words, which he said could not simply be limited to the direct costs of the medical institutions, carried some significance particularly because of the development of the fixed costs rules.

17. His historical starting point was the case of **Woollard & Another v Fowler [EWHC] 90051**, where Senior Costs Judge Hurst, sitting as a recorder in 2006 in the Weston-super-Mare County Court, allowed an appeal from the first instance costs judge, which was directly concerned with the recoverability of fees charged by a medical agency (Mobile Doctors Ltd) in relation to the obtaining of a medical report and medical records, when considering allowable disbursements under the fixed costs regime and in particular CPR 45.10. The claim had arisen from a road traffic accident. At that time the fixed costs regime applied only to cases which settled before issue, but it was significant, said Mr Hughes, that the relevant provision allowed for the recoverability of disbursements related to the "*cost of obtaining*" in relation to five separate aspects, namely medical records, medical reports, police reports, engineers' reports, and a search of the DVLA records. The learned judge rejected an argument that the word "obtaining" was superfluous, and ruled that the cost of obtaining the medical records raised by the agency was a recoverable disbursement.

18. Whilst an appeal was indicated against the decision in the case of the **Woollard**, this was never pursued. Instead interested parties, being described as "the medical reporting

organisations" (four separate medical agencies) and the "compensators" (who were nine separate insurance companies), entered into an agreement known as the MRO agreement which allowed for the recoverability of agency fees as disbursements, as a component part of a fixed rate for medical reports, as well as the cost of obtaining medical records, over and above the cost charged by the data provider.

19. Mr Hughes relies upon this agreement not because it is of universal application, but because it reflects, as he submits, an almost invariable practice which has developed in relation to the fixed costs regime where paying parties regard agency fees as recoverable by way of disbursement, as long as they are claimed within certain parameters. This practice is affirmed in the most recent addition of Dr Mark Friston's respected publication on costs.

20. However, he does not rely simply on post **Woollard** practice, but also points to the development of the fixed costs rules and in particular the fact that whilst in CPR 45.10 in its previous guise (referred to by senior costs judge Hurst) the "*cost of obtaining*" was seemingly allowed across a range of items, in the most recent incarnation (for present purposes, CPR 45.29I) it is considerably restricted, applying only to medical records and expert medical reports. This is said to support the argument that agency fees were properly recognised as recoverable disbursements, on top of the direct costs, whereas other items were not. He gave the specific example by referring to 45.29I(3) where the "*costs of obtaining*" engineers' reports and DVLA searches, have been replaced by "*the cost of*" such items. Similarly, in sub-paragraph (2)(b) the word "*obtaining*" is absent when reference is made to the cost of non-medical reports. In other words, the drafters of the rules have specifically preserved the cost of obtaining medical records, and this recognises the recoverability of the agency fee.

21. In relation to sub-paragraph (2A), it is submitted that again it was no accident that the rule drafters have used the words "*cost of obtaining*" not just in the main body of the sub-paragraph, but also in the sub-sub-paragraphs, and in particular sub sub-paragraph (c) which makes specific reference to the <u>obtaining</u> of medical records. What subparagraph 2A is intended to achieve, says Mr Hughes, is a maximum limitation on recovery of certain types of disbursement to RTA claims, whereas subparagraph (2) denotes the <u>nature</u> of the disbursements which are recoverable. Nowhere within the rules does it state that medical agency fees in PL and EL cases cannot be recovered, whereas (2A) (c) specifically identifies medical agency fees as an appropriate recoverable item. This could not be interpreted in any other way, because there would be no need to define that which follows after the colon in the sub sub-paragraph. The solicitors' work would be included within the applicable fixed fee, so this must refer to an agency. Mr Hughes submits that it would be illogical to treat the cost of obtaining medical records in relation to an EL/PL case any differently.

22. Whilst a limit is imposed in relation to the RTA claim by virtue of subparagraph 2A, it is the court's responsibility to approach the assessment of a disbursement, being the cost of obtaining medical records by an agency, by reference to that which is reasonable and

proportionate. That, says Mr Hughes, is what the judge should have done in this case instead of regarding her discretion as constrained.

23. The learned judge has then misdirected herself, and although she makes reference to "reasonableness" in the qualifying last sentence of the judgment she is clearly of the view that agency fees are not recoverable in PL and EL cases.

24. The Defendant's case based upon a respondent's notice containing several points but prior to the obtaining of the rather concise judgment, is essentially that on the summary assessment of costs, which is what this application was concerned with, the learned judge was exercising a judicial discretion which carried with it a broad ambit. The receiving party, that is the Claimant, bore the burden of proving the entitlement to the disbursement and the judge made a reasonable and proportionate allowance applying subparagraph 2(a). It was pointed out that the particular medical agency, whose fees it was sought to recover, was closely connected with the Claimant's solicitors, and if the request for the records had been made directly by the solicitors it would have been included in the recoverable fixed fee, making the additional VAT element unreasonable.

25. Pursuing the oral argument before this court, Mr Latham of counsel provided three main strands to his submissions. First, he focused on the work which was actually involved in obtaining the medical records, and which was carried out by the medical agency. He accepted that a solicitor was entitled to delegate this work, but as the principal legal representative under **CPR 47 PD 5.22 (6**) the charges of the agency were to be treated as the solicitors' charges. This was particularly important in the context of the fixed fee regime, were there was a maximum sum which could be claimed as the fixed base costs, and if a solicitor was delegating some of its work to an agency which was then dressed up as a disbursement, this was tantamount to circumventing the rules for extra remuneration.

26. He relied in particular on the Court of Appeal decision in **Crane v Canons Leisure Centre [2007] EWCA Civ 1352**. The issue which arose in that case was whether or not the costs of an agent cost consultant who dealt with the detailed assessment consequential upon the settlement of a personal injury case in which there was a collective conditional agreement could be the subject of a 45% uplift by way of success fee or whether they should be regarded as disbursements. By a majority the court held that these costs were not true disbursements as such because they did not represent expenses for other people's work which will be passed on to the client; instead they formed part of the base costs because the work involved in pursuing the costs at the conclusion of the case represented that which the solicitor had undertaken to do. In the circumstances such costs attracted the success fee uplift. Mr Latham referred to one particular passage from the judgment of May LJ:

> "14. The distinction in the definitions of "base costs" and "disbursements" in the Collective Conditional Fee Agreement is between charges for work done by or on behalf of the solicitors and expenses which the solicitors incur on the member's

> behalf. That is, in my view, a distinction between charges by the solicitors themselves for work which they themselves do or are directly responsible for; and expenses which they incur for the client some of which are for other people's work which they are not directly responsible for and which they simply pass on to the client at cost. If they properly choose to delegate their own work, they remain entitled to charge on their own account and the proper amount of the charge is not necessarily the same as the amount which they agree to pay to their subcontractor. It could be more or it could be less. In my view, the appellants are right to concentrate on whether the work is solicitors' work; and Master Hurst was right to say that a characteristic of such work is whether the solicitor remains responsible to the client for its proper conduct. Intrinsically, it might be said that profit costs should be limited to work which the solicitors do themselves, because if they delegate it, the subcontractor is making a profit as well. But, since the solicitor remains entitled to the proper amount which he, not the subcontractor, would charge, there is in theory only one amount of profit; and the success fee in a conditional fee agreement is supposed to cover the cost of other cases which the solicitor loses and for which he is paid nothing, not for his profit on this case which he has won. As a matter of detail, in the present case Costings Limited were not themselves contracted with Rowley Ashworth to receive any success fee, so that the product of success in this appeal would go to Rowley Ashworth, not Costings Limited."

27. In an earlier unreported case (referred to in the judgment in **Crane**) **Stringer v Copley** (**Kingston upon Thames CC 17.5.2002**) His Honour Judge Cook (the authoritative author of Cook on Costs) adopted a similar approach when dealing with the costs of an outside agent to whom the work of taking witness statements had been delegated. These were approved as a component part of the base costs of the solicitors because of the nature of the work. The judge in that case had followed the earlier decision of the Court of Appeal in **Smith Graham (a firm) v Lord Chancellor's Department 1999 2 Costs LR**, a case also cited with approval in **Crane**.

28. All these cases, says Mr Latham, support the proposition that it is the nature of the work undertaken which is important, and for which a charge is sought to be raised. Bearing in mind that there is a specific provision by way of fixed costs in the table set out at CPR 45.29E for EL/ PL cases intended to cover the work which the solicitor should have undertaken, there is no reason why this straightforward task, for which it is it responsible, should not be taken as included in that.

29. Sub-paragraph 2A should only be taken to apply to RTA cases on the strict and literal interpretation of the rule. If the drafters had intended otherwise, it is submitted, there would have been specific provision made for EL/PL cases. In this respect, it is to be noted that there is a significant difference between the recoverable amount of fixed costs for an RTA claim of the same value and a EL/PL claim. Here it was almost £1600, whereas it would have been half of that if the same damages have been recovered in an RTA claim. Thus, the rules were providing a modest additional recompense for the agency fee in RTA protocol claims, clearly not intended to cover the well rewarded EL/PL claims.

30. The second strand to Mr Latham's submission involves a challenge to the reliance placed by the Claimant's counsel on the words "*cost of obtaining*". He says that these words should carry no special meaning and are equally consistent with comprising only direct costs (i.e. the data/copying charges) or the direct costs together with the additional cost of a medical agency. Insofar as only sub-paragraph 2A makes provision for the medical agency a restrictive interpretation is more appropriate. He accepts that the **Woollard** decision did construe a similarly worded provision as the Claimant has suggested, but submits that Master Hurst's judgment should be treated cautiously because: (a) it was provided in the context of a new set of rules which dealt with settlement before the issue of proceedings and before the present complex raft of rules had been developed; (b) it was a fundamentally different regime and qualified by Master Hurst as borne out of a need to provide some degree of certainty when it was not known whether a case would settle, whereas the present set of rules make clear the recoverability of fixed costs and disbursements both within and without the protocol; and (c) most significantly it was decided before the Court of Appeal decision in **Crane** (in which Master Hurst also sat as an assessor).

31. In this latter respect, Mr Latham makes this observation. Although the costs master made reference in **Woollard** to his own previous decision in the **Claims Direct Test Cases (Tranche Two Issues) [2003] EWHC 9005**, in which he had disagreed with HHJ Cook in **Stringer**, (who accepted the recoverability of medical agency fees in principle, provided they did not exceed the reasonable and proportionate costs which would have applied if the solicitors had done the work), that such agency fees should be treated "*as though they were part of the solicitors' base costs"* by expressing the view that such expenditure should be treated as *disbursements*, nevertheless insofar as he had allied himself with the majority view in Crane in 2008 he must have changed his position.

32. The final strand represents his alternative position in the event that this appeal court accepts that medical agency fees are recoverable in an EL/PL case. He acknowledged that he was on shaky ground in arguing that it would still have been open to the judge to conclude that the instruction of an agent was unreasonable in the circumstances, if the rules allowed for recoverability, but nevertheless this court should still consider the paucity of evidence in support of the receiving party's contention that what was claimed was a reasonable and proportionate amount. Insofar as any doubt should be resolved in favour of the paying party it would have been open to the first instance judge (and this court if it is deciding the matter *de novo*) to disallow a substantial part of that which is claimed. There is no indication, says Mr Latham, particularly in the context of the minimal cost of obtaining the GP records (direct cost £10) as to how a £80 fee net of VAT is justified.

33. Mr Latham advances his own suggestion for the disbursement which should be allowed, if this court undertakes the exercise.

Discussion

34. Although there is a corpus of case law which deals with the recoverability of agency costs when the work would normally be regarded as work for which the solicitor had a responsibility in the discharge of his duty to his client, and the extent to which those costs could be included as profit costs as opposed to disbursements, and further support can be derived for the actual recoverability of medical agency fees which are incurred in obtaining both medical records and medical reports, there is no specific authority which addresses the applicability or interpretation of the complex raft of rules under Part III which were intended to provide a predictable regime for the payment of fixed costs and disbursements, and in particular the interplay between 45.29 I (2)(a) and (2A). Accordingly this case is venturing into virgin territory.

35. There is no doubt (and neither counsel dispute) that the relevant rule does allow for the recovery of the medical agency fee as a disbursement (and over and above fixed costs) in the sum of £30 as a maximum plus direct costs in relation to whiplash claims arising from RTAs [see (2A)(c)]. The question which lies at the heart of this appeal is whether the specific reference to the medical agency recovery disbursement in this context is intended to restrict the entitlement to RTAs only, as the Defendant contends, or whether it is merely a provision when read in conjunction with the balance of the rule which sets a maximum where the claim has been started under the RTA protocol, and that EL/PL claims also allow for recovery, as the Claimant contends.

36. In the circumstances, it seems to me that I should decide as a matter of principle whether the judge was wrong in law to regard herself as restricted by the wording of CPR 45.29I subparagraphs (2) (a) and (2A) to disallow an element in the disbursements for the agency costs. If I do come to that conclusion, clearly she has unlawfully fettered her discretion in making the assessment as to the reasonable and proportionate amount which should be allowed, and I can substitute my own decision on an appropriate assessment.

37. It seems to me that there are two main principles which can be culled from the various authorities relied upon by counsel, and which are relatively uncontentious.

38. The first of these is that where a solicitor delegates some of his work which he has a responsibility to undertake on behalf of the client to an outside agent, then the cost of such work is usually recoverable as part of the base costs and should not be considered as a disbursement. The test of "direct responsibility" as enshrined in the **Crane** case is the appropriate one.

39. Second, the fees of a medical agency in obtaining medical reports and records will be recoverable as part of the *inter partes* costs, regardless as to whether or not they are assessed as disbursements or profit costs. The test is whether or not the fee / costs claimed are reasonable and proportionate to the work involved, and the burden of so proving will be on the receiving party. (**Stringer**)

40. Insofar as reliance has been placed upon the **Woollard** case, with respect to the eminence of the judge involved in that decision, I am unable to derive any great assistance from the ratio, because it was highly dependent upon a specific set of rules which had been introduced to deal with a narrow situation, namely the applicability of fixed costs *to pre-issue settlement*, which rules have been very substantially modified in the context of the predictable fixed costs regime "across the piste". There is no doubt, however, that whilst his position is not apparent in the **Crane** case, Senior Costs Master Hurst has been fairly consistent in his view (expressed robustly in **Claims Direct**) that medical support agency involvement should not be treated as work done by the solicitors, in other words it was properly claimable as disbursements.

41. Equally, in my judgment, only a limited amount of assistance can be obtained from the **Stringer** case as to whether the recoverability of the medical agency fee, clearly acknowledged, was a disbursement or part of the profit costs, because Judge Cook did not specifically answer this question.

42. Irrespective of any judicial authority or court rule in respect of fixed costs, a practice had developed (notably several years after the decision in **Crane**) based upon a specific agreement between several medical reporting organisations (the medical agencies) and nine separate insurance companies which treated the cost of the medical reports and records which those medical reporting organisations had been instructed to obtain as disbursements payable directly by the compensators without any inclusion in the solicitors' base costs.

43. I take this practice into account, but it is not determinative of this appeal, as there are a whole host of commercial reasons why insurers and claims handlers would want to encourage a direct payment process such as that represented by the agreement. Further, the agreement was established before the rule was drafted in its present incarnation.

44. It seems to me that to resolve the issue identified above it is necessary to understand the purpose behind this rule, and the fixed costs rules generally, before considering the nature of the wording which has been used in the identified two subparagraphs.

45. There is little doubt that the primary purpose behind the predictable fixed costs regime was to provide litigants with a degree of certainty as to the potential costs which could

be recovered, as well as keeping those costs within the bounds of proportionality. The tables provide different scales of recovery of base costs which are dependent upon the amount of the settlement, or the level of disposal at trial. It is noteworthy that whilst there are significantly different levels of fixed recoverable costs applicable to those cases which are resolved within the protocol and those which no longer continue under the protocol (whether RTA or EL/PL), provision is always made for the payment of disbursements on top of those fixed costs within strictly defined parameters, but always following the same process.

46. The formula for disbursements described as "*the court: (a) may allow a claim for a disbursement of the type mentioned in paragraph (2); but (b) will not allow a claim for any other type of disbursement,*" appears at CPR 45.12 (the general rule on disbursements in the fixed costs regime for RTA claims), CPR 45.19 (stage 2/3 protocol settlements), and CPR 45.29 I (the rule with which this court is concerned). I have looked at the first two of these rules separately, although little reference was made in the course of submissions, to see whether any assistance could be derived in terms of understanding the extent of recovery of disbursement which those rules allowed, and in particular whether any special meaning could be attributed to the phrase "*cost of obtaining*". In this respect it is interesting that under CPR 45.12, recoverable disbursements related to the *cost of obtaining* not just medical records and the medical report, but also a police report, an engineer's report or a search of the records of the DVLA. To an extent this undermines the argument of Mr Hughes that there have been changes to the rules restricting the "*cost of obtaining*" from that set out in the old CPR 45.10.

47. For this reason I am unconvinced that any special meaning can be inferred from the addition of the words "*of obtaining*" when reference is made to any individual specific *"cost"*, and that an intention of the rule drafters that this should relate to agency costs is clear. It seems to me that the expression is used in variant forms throughout the fixed cost rules.

48. It is more important to focus on that which appears to be permitted by the relevant rule which we are looking at, namely 45.29 I. As counsel have agreed, this clearly allows an agency fee as a disbursement for RTA claims in (2A)(c). It could be interpreted in no other way, and certainly could not represent base costs, because those are curtailed by 45.29C for RTA claims. Does it follow from the inclusion of a specific reference to RTA claims that EL/PL claims are excluded from agency fee recovery as a disbursement?

49. In my judgment, it does not. Whilst the argument of Mr Latham that a specific reference to non-RTA claims and the basis of recovery is noteworthy by its absence, gave me a little cause for concern, it seems to me that there is equal force in the countervailing argument that if the rule drafters had intended to exclude EL/PL claims there would have been clear provision made for this. The disbursements set out in sub-paragraph 2 provide a broad range of recovery for all three types of low value PI claim. It would have been simple enough to have included within that this section words to the effect "*only in respect of a*

claim started under the RTA protocol" if the purpose was that the fixed fee for an EL/PL claim was considered sufficient to cover this type of additional work without the need for any additional provision.

50. In that latter regard, I am unimpressed by the submission of Mr Latham that the differential between the fixed recoverable costs for an RTA claim compared to an EL/PL claim justifies a conclusion that the rule drafters intended there to be sufficient reward in the latter without any additional allowance made by way of disbursement for work which could and should have been undertaken by the solicitors without utilising an agency. There are a number of reasons why the fixed costs in an EL/PL claim should be substantially higher than those in an RTA claim. They are less straightforward, can involve extensive disclosure (e.g. street inspection records, risk assessments, minutes of health and safety meetings etc) and the injuries do not follow the obvious pattern observed in RTA claims which are almost invariably whiplash.

51. Further, in my judgment it is not possible to draw any comfort from the case law, including both **Crane** and **Stringer**, that work which could properly be described as solicitors' work, albeit delegated to an agent, was appropriately included as base costs and not disbursements, regardless of the contrary view of Master Hurst expressed in **Claims Direct** and **Woollard**. Not only were those cases not considered against the backcloth of the detailed predictable fixed costs rules (save for **Woollard** on a limited basis), instead involving favourable interpretations to reflect the reality of the situations with which they were dealing, but also taken to its logical conclusion such a principle would exclude the recovery of medical agency fees in RTA cases, notwithstanding the express reference in (2A)(c). It is insufficient, in my judgment, to argue that the specific inclusion proves the exception for RTA claims; there is an illogicality in the rule drafters, who were seeking to restrict recovery of unnecessary costs in litigation, and thereby providing certainty, nevertheless giving something of a sweetener or "backhander" for RTA Claimants if it was considered that agency costs recovery should always be base costs and not disbursements.

52. There is an additional consideration derived from sub-paragraph 2D. This was not referred to in the argument of counsel before me, but it is the only other sub-rule in which mention is made of medical records. There is no VAT applicable to the *direct* costs of medical record provision from GPs or hospitals. It is my understanding that medical experts do not levy VAT on their reports as direct costs. The medical agencies are entitled to and do raise VAT on their invoices. Accordingly, sub-paragraph 2D can in my judgment only refer to the cost of instructing a medical agency to obtain medical records. It could not be the VAT attributable to the solicitors' work, because this is only chargeable within the base costs recoverable as part of the fixed fee. Insofar as sub-paragraph 2D does not make any reference to sub-paragraph 2A, but falls to be considered in the context of the wider application of disbursements recoverable under 45.29 I, it must follow that this aspect is not limited to RTA claims. The rule drafters have specifically indicated where a sub-rule is intended to apply only to claims started under the RTA protocol. (See for instance 45.29I (3)).

53. I do not believe that this court should be drawn into direct or indirect criticism of the use of medical agencies even those which are closely connected with bulk claims solicitors such as the Claimant's solicitors in the present case. It is the nature of modern litigation where there are increasing pressures on profit margins and limits of cost recovery for solicitors to be ever more creative in maximising the return from these claims. I can understand why paying parties should be cynical where such a connection exists, and it appears as though it is merely an additional payment to the receiving party solicitors which would not otherwise be recoverable, and the restrictions are being circumvented.

54. However, if as a matter of policy the rule makers believe that it is appropriate to make the fixed costs regime more restrictive and to exclude agency fee recovery then a simple rule change can be introduced. Such matters are outside the remit of myself as a simple County Court circuit judge dealing with the discrete issue of interpretation of the rules as they currently stand.

55. My conclusion, in the circumstances, is that CPR 45.29I (2) allows for the recovery of a medical agency fee in this public liability case as a disbursement, and it is not excluded by the specific reference to the maximum recovery for the medical agency fee in RTA claims. In a public liability case, in my judgment, the appropriate measure for the disbursement recovery is the reasonable and proportionate cost of obtaining the medical records. In this respect, the learned district judge misdirected herself and should have carried out this exercise by reference to the fee claimed.

What would be a reasonable and proportionate disbursement?

56. It is a valid observation contained within the Respondent's notice, and pursued by Mr Latham, that there is a paucity of evidence which would have enabled the appropriate assessment to be carried out, because it is not clear in relation to the £96 claimed for both sets of records, how such sum has been broken down in terms of the work involved. Nevertheless, I do not believe that that is a sufficient reason for excluding recovery which in my judgment is allowable under the rules.

57. It is plain that if one set of records cost £10 by way of direct cost, an additional £70 could not be justified on a proportionate basis, however much work was involved. Mr Latham has suggested (in his ultimate fall-back position) that a suitable measure would be by reference to the grade D guideline hourly rates allowing two letters per record set. In my judgment, in a relatively straightforward case such as this, that may suggest unnecessary precision, and it is more appropriate to adopt the sum which is considered as the maximum allowable in an RTA claim, namely £30 per set. There is no significant difference between Mr Latham's figure and Mr Hughes' figure in this regard.

58. Accordingly, I allow the respective sums of £80 and £40 which incorporate the direct costs for the medical agency fees involved in obtaining the identified records. The appropriate VAT can be added to the sums.

59. I invite the parties to provide the final order and if this can be achieved to agree the costs consequences arising from this judgment. As I indicated in court, I am prepared to undertake a summary assessment on the basis of the submitted schedules on paper if agreement cannot be reached.

HHGWQC

6th February 2019