Case No: D00OL301

IN THE COUNTY COURT
AT MANCHESTER

Manchester Civil & Family Justice Centre
1 Bridge Street
Manchester
M60 9DJ

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Before:

HIS HONOUR JUDGE SEPHTON QC

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Between:

MR CARL LOVATT	**Respondent**
- and -	
LEW DIECASTINGS LIMITED	**Appellant**
(In Liquidation)	

- -

MR KEVIN LATHAM for the **Respondent**
MR MATTHEW SMITH for the **Appellant**

- -

APPROVED JUDGMENT

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JUDGE SEPHTON:

1. This is an appeal against the Order of District Judge Richmond, made on 2nd July 2017.

2. On 22nd March 2014, the Claimant suffered an accident at work. He was injured when molten aluminium splashed onto his leg, causing him serious injury. A claim was submitted on his behalf under the Employers' Liability Protocol. In a statement from Joanne Asteridge, the Claimant's legal representative, she says that the value of the claim was put at somewhere around £50,000 and that had the claim been litigated, it would have been allocated to the multi-track. The claim fell out of the Employer's Liability Protocol because the Defendant did not admit liability.

3. On 4th January 2017, the Claimant accepted the Defendant's Part 36 offer of £29,000.

4. The parties could not reach agreement as to the costs to which the Claimant was entitled. The Defendant contended that the Claimant was entitled to fixed costs only in accordance, they said, with CPR 45 part IIIA which is headed "Claims which no longer continue under the RTA or EL/PL Pre-action Protocol". The Claimant's solicitors contended that because the value of the claim exceeded the maximum amount referred to in table C to that Part, the Claimant should be entitled to an assessment of their costs without reference to the fixed costs regime.

5. On 4th April 2017, the Claimant issued Part 8 proceedings for assessment of costs and on 10th April 2017, Deputy District Judge Shaw made an Order that:

> "The Defendant do pay the Claimant's costs of the claim pursuant to CPR 45 section IIIA. Non-fixed costs will be assessed if not agreed."

6. Unfortunately, this did nothing to resolve the dispute between the parties because the Claimant's solicitors contended that the costs payable under section IIIA were nil because the value of the claim exceeded the limit in table 6C and the Defendant contended the Defendant *was* so limited and that the mention of "non-fixed costs" was a reference to disbursements to which table 6C does not apply.

7. The matter duly came before District Judge Richmond who made an Order as follows:

> "The court declares that the quantification of the Claimant's costs, pursuant to the Order of 10th April 2017, should be by reference to table 6B in paragraph 45 as at the date of issue, namely 4th April 2017, and that as the agreed settlement figure exceeds £25,000, the costs and disbursements shall be subject to a general detailed assessment not restricted by the figures in the table."

He also gave directions as to the notice of commencement of assessment and directed that the Defendant pay the Claimant's costs of the application.

8. The pre-action Protocol for Employers' Liability claims is designed to accommodate claims with a value of up to £25,000; that is apparent from paragraph 4.13 of the Protocol which says that the Claimant values the claim at not more than £25,000, also from paragraph 4.2 of the Protocol, which states that the Protocol ceases to apply

where the Claimant notifies the Defendant that the claim has been revalued at more than the upper limit.

9. The effect of the Protocol finds its way into a large number of rules in the Civil Procedure Rules. The first one I need to refer to is 36.13(1) which provides:

> "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."

It makes the point that 36.20 makes provision for the costs consequences of accepting a Part 36 offer in certain personal injury actions where the claim no longer proceeds under the RTA or EL/PL Protocol. I need not read out 36.20 in full.

10. At the time at which the Claimant accepted the Defendant's part 36 offer, Part 45 of the CPR provided, so far as relevant, as follows:

> "45.29D Subject to rules 45.29F, 45.29H and 45.29J…in a claim started under the EL/PL Protocol…the only costs allowed are: (a) fixed costs in Rule 45.29E; and (b) disbursements in accordance with Rule 45.29I."

11. 45.29E provided that the amount of fixed costs is set out (in respect of Employers' Liability claims) in table 6C. Table 6C contained four parts, part A of which is relevant: "If parties receive a settlement prior to the Claimant issuing proceedings under Part 7" then there are two sub-headings under that. The first is "agreed damages" and the relevant amount of agreed damages, for these purposes, reads as follows: "More than £10,000 but not more than £25,000". The fixed costs referable to that category is: "The total of a) £2,500; and b) 10% of the damages over £10,000."

12. In *Qader v ESure* [2016] EWCA Civ 1109, the Court of Appeal was required to address the unqualified words of 45.29B, which is the provision which corresponds to 29D, but which refers to road traffic claims rather than Employers' Liability claims. The problem arose because the claims came out of the road traffic protocol because the Defendant had alleged that the Claimant was guilty of dishonest behaviour. This gave rise to a far more complex case than would otherwise be the situation and, as a result, the relevant claims were referred to the multi-track. At the conclusion of the cases, the Defendant argued that notwithstanding that these were multi-track cases, the clear wording of 45.29B meant that only fixed costs were recoverable. Briggs LJ gave the judgment of the Court of Appeal and said this at paragraph 35:

> "After more hesitation than Tomlinson and Gross LJ, I have come to the conclusion that section IIIA of Part 45 should be read as if the fixed costs regime, which it prescribes for cases which start within the RTA Protocol but then no longer continue under it, is automatically dis-applied in any case allocated to the multi-track, without the requirement for the claimant to have recourse to Rule 45.29J by demonstrating exceptional circumstances."

13. Paragraph 39 of his judgment is relevant to the current case, he said:

> "Mr Horlock and Mr Mallalieu were both constrained to accept that the reference in part A of Table 8B to an upper limit for damages of not more than £25,000 was, on their construction of section IIIA of Part 45 as a whole, clearly a drafting error. But they submitted that this anomaly could not, on its own, come anywhere near to undermining the otherwise uniform and consistent message to be derived from reading [the relevant Rules], namely that this fixed costs regime applied to all cases properly started in the RTA Protocol which no longer continue thereunder. I agree. Furthermore, the anomaly would only have any consequence in the very small number of cases properly started under the RTA Protocol which settled for more than £25,000 damages before proceedings were even issued under Part 7. It would have no direct effect on claims settled, regardless of the level of damages, after the issue Part 7 proceedings, or upon claims disposed of at trial, again regardless of the amount of damages awarded. Furthermore, that particular anomaly could arise even in a case fit for a fast track trial, because only liability rather than quantum was in issue, or because the addition of vehicle related damages so as to take the case above £25,000 but did not in any event give rise to issues requiring the court's determination. As I have said, the court has a discretion to allocate a case to the fast track even if the amount claimed exceeds £25,000, for example, where the case is in all other respects suitable for fast track case management and trial."

I pause to observe that Briggs LJ there identifies the problem which faces this court but says absolutely nothing to help us to reach a conclusion as to what to do in such a case.

14. In paragraph 42 of his judgment, Briggs LJ explains why, in his judgment, the construction for which the Defendants were there contending was a rational approach. As I have indicated, the court held that it had power to interpret 45.29B so as to add the words, "unless the case has been allocated to the multi-track."

15. *Qader* made a number of comments which are material in relation to the submissions made in this case. At paragraph 51 Briggs LJ made this point:

> "Finally, the tell-tale inclusion of £25,000 as the upper limit for damages in a settlement before issue of a Part 7 claim in part A of Table 6B strongly suggests that the Rule Committee were under the illusion that no claim above that limit could continue outside the Protocols after being started within them, so that allocation to the multi-track was not a realistic possibility calling for express provision."

I draw attention to that passage in the judgment - it follows a careful setting out of the history by Briggs LJ as to how the Rule came to be made and demonstrates, in my judgment, an accurate assessment, namely that the Rule Committee simply thought that no claim worth more than £25,000 would remain in the Protocol.

16. He also said at paragraph 53:

> "It may be said that the interpretative jurisdiction to put right obvious drafting errors in a statute is fortified by the difficulties which typically

> face Parliament in doing so, in relation to primary legislation in the light of its heavy workload. The same difficulties do not affect the Rule Committee to any similar effect. It can, and regularly does, re-consider Rules when invited to do so by the court, either to correct drafting errors or other infelicities which have been proved to cause procedural difficulty. Nonetheless, it is almost invariably the case that corrections cannot be made with retrospective effect, so that parties in ongoing litigation who are adversely affected by the relevant error do not thereby obtain relief from their predicament."

17. At paragraph 55, Briggs LJ said this:

> "By contrast, I do not consider that the Rules Committee would have carried back to a pre-allocation stage a policy to dis-apply fixed costs, merely because a claim properly started in the Protocols had grown in value beyond £25,000, or had become the subject of a pleaded defence of fraud or dishonesty."

18. At paragraph 58, he made the point that there was a continuing anomaly in relation to the £25,000 apparent damages ceiling in table 6B.

19. My attention is drawn to the case of *Sharp v Leeds City Council* [2017] EWCA Civ 33, in which a Claimant made an application for pre-accident disclosure and the issue arose as to whether or not the Claimant was entitled to seek costs outwith the Protocol figures set out in 45 part III. Briggs LJ gave the judgment of the court, which was to the effect that the Claimant was bound by the requirements of the fixed costs regime and he said this at paragraph 32:

> "That conclusion, in my view, is expressly prescribed by the clear word of Rules 45.29A and 45.29D. In particular, 45.29D provides that the fixed costs of disbursements prescribed by the regime are 'the only costs allowed.' Although this is subject to Rules 45.29F, 29H and 29J, they are each part of the fixed costs regime in that they permit different or, in large recovery, in precisely defined circumstances."

I draw from that that the proper construction of 45.29D is that it, and it alone, provides what costs should be permitted to be claimed.

20. Consequent on *Qader*, the Rules Committee acted and on 2nd February 2017, the Civil Procedure (Amendment) Rules 2017 (S.I. 2017/95) were made. Rule 2 stated: "These Rules come into force on 6th April 2017" and then there were some exceptions which are not relevant in this case. Then, so far as relevant, Rule 8.3 provided:

> "In rule 45.29D, after 45.29J, insert 'and for as long as the case is not allocated to the multi-track.'"

Sub-rule 4 omitted the words "but not more than £25,000" from table 6C.

21. The effect of that amendment of the Rules would, in this case, mean that the Rule would make it perfectly clear that in the present case the Claimant was entitled to fixed costs of a fixed figure, £2,500, and 10% of damages over £10,000.

22. The way in which the case was argued before District Judge Richmond was that he had a choice between the old provisions, under which, said the Claimant, he was entitled to an assessment of costs or under the new Rules, which everyone agreed, meant that the Claimant was entitled only to fixed costs. There has been a dispute about whether the provisions of S.I. 2017/95 should have what the Claimant submitted was a retrospective effect or whether, as the Defendant contended, the court was obliged to apply the Rules as they were at the time at which the decision was made.

23. My attention has been drawn to a number of authorities relating to retrospectivity. I was referred to the case of *Williams v The Secretary of State for Business, Energy & Industrial Strategy* [2018] EWCA Civ 852, where Coulson LJ dealt with a submission relating to the relevance of proceedings before the Civil Procedure Rule Committee and he said this:

> "As a matter of law, the policy documents themselves cannot usually be relied upon [that is, policy documents issued by the Ministry of Justice] 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)."

I have already referred to that passage in *Qader*.

24. Mr Latham, for the Respodnent, also drew my attention to *Yew Bon Tew v Kenderaan*, a decision of the Privy Council [1983] AC, 553. At page 562 Lord Brightman said this at H:

> "Whether has a statute has a retrospective effect, it cannot in all cases be safely decided by classifying a statute as procedural or substantive."

He went on, at 563B:

> "Their Lordships consider that the proper approach to the construction to the Act of 1974 is not to decide what label to apply to it, procedural or otherwise, but to see whether the statute, if applied retrospectively to a particular type of case, would impair existing rights and obligations… In their Lordships' view, an accrued right to plead a time bar which is acquired after the lapse of the statutory period is, in every sense, a right even though it arises under an Act which is procedural. It is a right that is not to be taken away by conferring on the statute a retrospective operation unless such a construction is unavoidable."

25. I was also referred to *L'Office Cherifien Des Phosphates v Yamashita Shinnihon Steamship Co Ltd* [1994] 1 AC 486. The ratio of the decision is helpfully set out in the headnote, which says this:

> "Held, allowing the appeal that the basis of the Rule regarding retrospectivity was fairness. The Rule was not absolute and the question

> in each case was whether the consequences of reading the statute with a suggested degree of retrospectivity was so unfair that Parliament cannot have intended its words to be so construed."

So much for the law.

26. For the Appellant, Mr Smith conceded in relation to his first ground of appeal that Deputy District Judge Shaw's Order was not gone behind by District Judge Richmond (see paragraph 5 of the judgment of District Judge Richmond) and, accordingly, he has not pressed that point. In relation to grounds 2 and 3, he submitted that, on any construction of Rule 45.29D and E, the effect was that the Defendant was subject to the fixed costs regime. I do him no disservice by saying that his submission did not go to any greater extent than that.

27. For the Respondent, Mr Latham submitted that Mr Smith was not entitled to argue the point that I have just identified because it does not form any part of his grounds of appeal, although he was not able to point with any conviction to any prejudice that he had suffered as a result. He submitted that when I look at 45.29D in its form before the Rule Committee proposed the changes which came about in 2017, this was a case where the value was £29,000, therefore, he said that it did not fall within table 6C. There were three ways I could construe table 6C and, accordingly 45.29E: First of all, I could reach the conclusion that the Rule Committee has given an exhaustive definition of the parties' rights. That being the case, this case is not one that was less than £10,000 and not more than £25,000, therefore, the Claimant gets nothing and that cannot be right. Secondly, he said that another way of construing it might be that the Claimant gets the fixed costs item which, at the relevant time, was £1,930 plus 10% of the damages between £10,000 and £25,000. The third way of construing it was that the Claimant gets the fixed costs of £1,930 plus 10% of the balance over £10,000.

28. All of those, he submitted, were unsatisfactory and the alternative, he said, is that fixed costs do not apply. He said that the fixed costs regime should not apply because of the manifest injustice imposed by the ordinary construction of the Rules, and he pointed out that District Judge Richmond set out in paragraph 8 of his judgment the importance of the words "but not more than £25,000" and he said that I should adopt the same view as District Judge Richmond about the omission of those words from the construction of the Rule.

29. It seems to me that the answer to that point maybe that the Rule Committee were under the illusion (to use Briggs' LJ words) that the limit was £25,000, but be that as it may. He submitted that the decision of the Court of Appeal in *Wargenar,* to which I have not yet referred, was decided *per incuriam*. *Wargenar* was a case in which the issue arose whether the qualified one-way costs shifting regime should apply to a case which started before the regime came into effect but (inaudible) as was alleged by the Defendant, after the decision was made. I was referred to the decision of Gross LJ at paragraph 30:

> "It is well established that the presumption against retrospection does not apply to legislation concerned with matters of procedure and the provisions of that nature are to be construed as retrospective unless there is clear indication that that was not the legislator's intention."

It was submitted that *Wargenar* was decided *per incuriam* of the high authority, to which I have already referred, and, accordingly, I should ignore it.

30. The first question I have to ask myself is what was the appropriate set of Rules that District Judge Richmond ought to have had in mind when making the decision that he did. He was sitting in a court at a time at which the new Rules, if I can use that nickname for them, were in force. It seems to me that following the authorities, to which my attention has been directed, I have to consider whether there is some significant unfairness to the parties in reaching the conclusion that the new Rules should apply. That is the litmus proposed by the House of Lords in *L'Office Cherifien* case. These Rules clearly are procedural Rules, I accept, as I must, the decision of *Yew Bon Tew* to the effect that merely because they are procedural Rules that does not mean to say that they do not have retrospective effect.

31. What, it seems to me, those Rules were intended to be and indeed were, was a clarification. The original Rule had been conceived under the illusion, to use Briggs' LJ words, that the limit was £25,000 and the effect of the new Rule was to abolish that illusion and to make clear that Claimants who had brought a claim under the Protocol, which was subsequently settled for more than £25,000, were not deprived of any costs at all as the strict reading of table 6C, together with 45.29D, would imply.

32. In other words, it seems to me that the purpose of the revision to the Rules was not to impose unfairness upon Claimants but to make it clear, first of all, to all concerned what the consequences were likely to be if a claim was started under the Protocol but which ended up being worth more than £25,000. Secondly, to avoid injustice to Claimants whose claims were settled for more than £25,000 and who would otherwise, on a strict reading of Part 45.29D and Part 45.29E and the table annexed thereto, be entitled to no costs at all.

33. Accordingly, there being no unfairness, in my judgment, to the Claimant in adopting the new Rules, it seems to me that the new Rule should apply. It follows, in my judgment that District Judge Richmond was wrong in applying, or purporting to apply the old Rules. Had he done so properly, in my judgment, the Order that ought to have been made is zero because that is the strict interpretation of 45.29D and table 6C. Had I been approaching this matter afresh, I might have been tempted to read into table 6C an omission of the words "but not more than £25,000" but it seems to me District Judge Richmond was right when he said at paragraph 8 of his judgment that he simply could not ignore those words.

34. The conclusion I reach, therefore, is that the District Judge ought to have been applying the new Rules, that the fixed costs regime applies to this case and that, therefore, the appeal is allowed. I think it follows from what I have said that the submission that the grounds of appeal do not encompass the argument enhanced by the Appellant fall by the wayside.

This Judgment has been approved by the Judge.

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