



Case No: PHW 1806767

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building,
Royal Courts of Justice, Strand,
London, WC2A 2LL

Date: 13 July 2020

Before :

MASTER HAWORTH

Between :

John Coleman

**Claimant/
Respondent**

- and -

Daniel Townsend

**Defendant/
Appellant**



Sarah Robson (instructed by **Weightmans LLP**) for the **Appellant**
Benjamin Williams QC (instructed by **Bond Turner**) for the **Respondent**

Hearing date: 17 October 2019

Approved Judgment

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.

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Master Haworth, Costs Judge:

Background

The Appellant appealed a decision of Costs Officer Martin on 22 May 2019 which was the oral review of a provisional assessment. The scope of the appeal is limited to the award of two items:

Counsel's abated brief fee for trial at £852.50;

Counsel's fee for a skeleton argument at £370.00.

The appeal proceeds by way of a re-hearing pursuant to CPR 47.21. It is common ground that the Appellant's costs fall to be fixed pursuant to CPR Part 45 Section IIIA.

The fixed recoverable costs regime was originally introduced for RTA claims in 2003 and, following the Jackson review, and in 2013 for issued claims only. Working in tandem with the MOJ Portal for Low Value Personal Injury Claims in Road Traffic Accidents, it provides a structured system of costs recovery in high volume, low value, personal injury litigation.

Facts

These proceedings arise out of a road traffic accident which occurred on 9 November 2015. The claim was for personal injuries, pre-accident value, hire car costs recovery, storage, damaged items and miscellaneous expenses. Pursuant to the pre-action protocol for low value personal injury claims in road traffic accidents, the matter was uploaded to the Portal and the Claim Notification Form sent electronically to the Defendant's insurers on 25 November 2015. The Defendant's representatives did not admit liability, therefore the claim exited the Portal. Proceedings were commenced in the Northampton County Court on 13 July 2017. An Acknowledgement of Service and Defence were filed thereafter, which admitted liability. The claim was subject to directions made by DDJ Oldham on 9 November 2017. Direction 13 provided for Skeleton Arguments to be exchanged two days prior to trial. Judgment was entered for the Claimant and the matter listed for trial on 26 April 2018, transferred to the Romford County Court with Counsel briefed to attend the trial. After discussions, the matter settled following acceptance of the Defendant's Part 36 offer on 25 April 2018, the afternoon prior to the trial date.

The Law

The costs are dealt with in Part 45 CPR. Table 6B deals with the costs of a claim which no longer continues under the RTA Protocol, as follows:

Table 6B Fixed costs where claim no longer continues under the RTA Protocol

- A. If Parties reach a settlement prior to the Claimant issuing proceedings under Part 7.

Agreed Damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000
Fixed costs	The greater of – (a) £550; or (b) the total of – (i) £100; and (ii) 20% of the damages	The total of – (a) £1,100; and (b) 15% of damages over £5,000	The total of – (a) £1,930; and (b) 10% of damages over £10,000

B. If proceedings are issued under Part 7, but the case settles before trial.

Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior to the date of trial
Fixed costs	The total of – (a) £1,160; and (b) 20% of the damages	The total of – (a) £1,880; and (b) 20% of the damages	The total of – (a) £2,655; and (b) 20% of the damages

C. If the claim is disposed of at trial.

Fixed costs	The total of – (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee
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D. Trial advocacy fees.

Approved Judgment

Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

In addition to the fixed costs allowed in Table 6B, disbursements are dealt with in Rule 45 29I which states:

“45.29I(2) In a claim started under the RTA Protocol, the EL/BL protocol or the pre-action protocol for resolution of Package Travel Claims (PTC) the disbursements referred to in paragraph (1) are

(a) ... (g)

(h) Any other disbursement reasonably incurred due to a particular feature of the dispute.”

Submissions

Appellant

Table 6B only provides for a trial advocacy fee to be recoverable where a claim is settled on the day of trial or at trial. It was submitted there was no provision for a trial advocacy fee to be payable at any earlier point irrespective of when such a brief fee may be incurred.

In relation to allowable disbursements, it was submitted that whilst CPR 45.29I prescribes a long list of disbursements, the only Counsel’s fee is for an advice as provided for in a relevant Protocol, usually by a Claimant on a quantum settlement for an infant, otherwise Counsel’s fees are notable by their absence. In terms of discretion, neither disbursement was reasonable or proportionate in the circumstances. Overall, fixed costs involves swings and roundabouts. The overall purpose of the fixed recoverable costs regime is to ensure that, save for express exceptions, the amount recoverable is limited to the sums set out in the relevant tables.

Respondent

It was submitted that Counsel’s fees are a disbursement recoverable in this instance because they were reasonably incurred due to a particular feature of the dispute. In terms of jurisdiction, as the Court had made a direction for skeleton arguments to be exchanged, Counsel’s fee was manifestly a disbursement and was therefore jurisdiction to award it pursuant to CPR 45.29I(2)(h). As far as the abated brief fee was concerned, this case settled a day before trial. Counsel had inevitably already been briefed and whilst the trial advocacy fee under CPR45.29C and Table 6B was concerned, there was nothing in either of those provisions to exclude its recovery as a disbursement which otherwise met the requirements of CPR45.29I(2)(h).

In terms of discretion, both fees were incurred reasonably. It would have been unusual for Counsel not to have been instructed to conduct a trial of a claim of this sort where damages were approximately £12,000. Skeletons had been exchanged in accordance with a direction of the Court. All that had happened in this case was that a different view was taken of the merits once the Defendant's skeleton argument was received. The Claimant accepted the Defendant's Part 36 offer within the 21 day period and consequently an abated brief fee was a reasonable disbursement to recover.

In light of the Court of Appeal decision in *Aldred v Tyreese Sulay Alieu Cham* [2019] EWCA Civ 1780, it was submitted that the Court had found that CPR45.29I(2)(h) was to be interpreted as referring to some particular characteristic of the claim, rather than the Claimant. In this case the disbursements sought did not arise out of any particular characteristic of the Claimant, but rather from features of the dispute. That term had been narrowly interpreted by the Court of Appeal and as a consequence the disbursements were properly allowed.

Discussion

I originally heard this matter on 17 October 2019 with detailed argument from both parties. The matter was adjourned without a decision to await the outcome of the Court of Appeal case in *Aldred v Cham*. I directed that once that decision was handed down, the parties had permission to file further written submissions.

CPR45.29B makes it clear that in relation to an RTA protocol case, the only costs allowed are:

- i) The fixed costs in Rule 45.29C;
- ii) Disbursements in accordance with Rule 45.29I,

for as long as the case is not allocated to the multi-track.

The Court of Appeal in *Aldred v Cham* were addressing whether the cost of an infant settlement opinion was recoverable in Part 45 Section IIIA cases. Written quantum opinions are required where the Claimant is an infant in almost every case. At paragraph 38 of the judgment in *Aldred*, Coulson LJ said:

“ ... However, I do consider that my reading of these words which would limit recoverability of sums over and above the fixed costs to disbursements due to specific features of the dispute which has arisen between the parties is consistent with the overall purpose of the fixed recoverable costs regime and in particular its aim of ensuring that save for express exceptions the amount recoverable is limited to the sums set out at the tables by way of fixed recoverable costs”.

After finding that Counsel's fees were a disbursement, Coulson LJ concluded by stating:

“48. The straightforward answer is that in the vast majority of cases, Counsel's fees although properly described as a

disbursement and although doubtless reasonably incurred, would not be allowed by the Court under r45.20I(1)(a). That is because the work that is the subject of the disbursement has already been allowed for in the fixed recoverable costs (Table 6B). Thus in *Mendes v Hochtief (UK) Construction Ltd* [2016] EWHC 976(QB) the trial advocacy fee under Stage D of Table 6B was recoverable because the case settled at Court on the day listed for trial. There was no suggestion that the fee was somehow due as a disbursement regardless of the operation of the fixed costs in Table 6B.”

At paragraphs 51, 58 and 59 of the judgment Coulson LJ went on to say:

“51. Applying a modicum of common sense, it seems to me that the two different concepts have been melded together in a robust and workable fashion in Section IIIA of Part 45. If an item of work is deemed (or can be said implicitly) to be within the fixed recoverable costs in Table 6B then it would not be separately recoverable as a disbursement. The brief fee is the most obvious example of that analysis.”

“58. ... I do not say that this correlation will always be required to allow recovery under r45.29I(2), but it certainly supports my view that the rule at r45.29I(2)(h), even if it can properly be described as a catch-all, needs to be carefully and narrowly interpreted by reference to Section IIIA as a whole.”

“59. ... In my view the parties should focus on the rules that cover their particular dispute: it is neither practical nor necessary to argue about the recoverability of an item of costs worth £150 by reference to lengthy sections of the CPR which, on any view, apply at best tangentially to the dispute that has arisen.”

I prefer the submissions of the Appellant/Defendant to those of the Respondent/Claimant. The costs in Table 6B set out the recoverable costs for each stage of the claim which no longer continues under the RTA Protocol and include all the work which could reasonably be expected to be carried out for each stage. In relation to Table C that specifically includes the trial advocacy fee and implicitly the costs of preparing for the trial which self-evidently would include a skeleton argument. That stage was not reached in this case. The day of the trial was not yet at hand. It follows that both the claim for the preparation of the skeleton argument and an abated brief fee fall within Table B, which includes all work “on or after the day of listing, but prior to the date of trial”.

I am not persuaded by the Respondent’s arguments that *Aldred* has no application in this case and that these disbursements fall squarely within CPR45.29I(2)(h) where the Court can allow any other disbursement incurred due to the particular feature of the dispute, in other words some particular characteristic of the claim rather than the Claimant. I

do not accept the Respondent's argument that these disbursements by way of Counsel's fees were either properly or reasonably incurred.

It follows that the appeal succeeds. Both Counsel's abated brief fee and the fee for the preparation of the skeleton argument are disallowed.