Claim No: H46YY659

IN THE COUNTY COURT AT NOTTINGHAM

Date: 8 November 2023

**Before**:

**DISTRICT JUDGE JAMES CARTER**

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**Between :**

**Mr DAVID BOSLEY** **Claimant**

**- and -**

**Mr CLIFFORD WHEATCROFT** **Defendant**

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# APPROVED JUDGMENT

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**Mr W Birch** (instructed by **Minster Law Limited**) for the **Claimant**
**Ms S Ashraf** (instructed by **DWF Law LLP**) for the **Defendant**

Hearing date: 20 October 2023

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**District Judge James Carter:**

1. Following the hearing on 20 October 2023, attended by counsel for both parties, I reserved judgment to deliver a written judgment. The defendant had requested I deliver a written judgment and I acceded to this request as I would have been unable to list the matter for an oral judgment prior leaving Nottingham County Court on 10 November 2023.

2. I make it clear, for the avoidance of doubt, that this is a decision I have made sitting as a District Judge, although it may be handed down formally after 12 November 2023, when I will be a Circuit Judge.

3. Pages references within this Judgment are to pages in the bundle prepared for the hearing running to a total of 213 pages.

4. I am grateful to both counsel for their submissions and their skeleton arguments.

The background

5. This application is made by the claimant for an order under CPR 45.29J, dated 28 February 2023 [page 3]. The claimant seeks an order for costs in excess of the fixed recoverable costs on the grounds of exceptional circumstances, engaging CPR 45.29J.

6. In summary, the claimant's claim against the defendant arises as the result of a road traffic collision caused by the defendant's alleged negligence on the 13 December 2018. It is alleged that the claimant was riding his motorcycle along Market Street, Heanor when the defendant attempted to perform a right turn cutting across the path of the claimant causing a collision. As a result of the collision the claimant sustained serious and significant injuries which included spinal injuries, cruciate ligament injuries to his right knee as well as damage to his patella, along with the exacerbation of pre-existing psychological injuries.

7. A Claims Notification Form (CNF) was sent to the defendant on 5 June 2019 and the defendant confirmed he wished to investigate liability further and the claim was withdrawn from the relevant portal. A number of medical reports were

obtained, from an orthopaedic surgeon, psychiatrist and an orthotist. As limitation was approaching the claim was issued on 3 December 2021, seeking damages of up £100,000. The defendant filed a defence, and the court issued a notice of proposed allocation to the multitrack. Thereafter the parties prepared for a CCMC.

8. On 29 June 2022 [page 14] the defendant put forward an offer to settle the matter in the sum of £135,000 by way of Part 36. Although I have not seen correspondence to that effect, it is agreed an extension was agreed between the parties, for the claimant to have until 27 July 2022 to accept the offer. On 25 July 2022 [page 16] the claimant's solicitor sent an e-mail to the defendant's solicitor asking whether the defendant had instructions on the possibility of contracting out of the fixed recoverable costs regime and asked whether the defendant would agree to pay the claimant's reasonable standard basis costs. It is possible this had initially been requested by the claimant on the 20 July 2022. There does not appear to have been a reply to the email or the one on 25 July 2022. The claimant's solicitors then on 26 July 2022 [page 15] accepted the Part 36 offer in the sum of £135,000. It is agreed that the Part 36 offer was accepted within the 'relevant period' for the purposes of Part 36. District Judge Nicolle, sitting in this court, allocated the case to the multi track on 28 July 2022 in boxwork and listed the matter for a CCMC on 4 November 2022 [page 185]. Ultimately because the matter had settled by the acceptance of the Part 36 offer, the hearing on 4 November 2022 did not proceed.

9. The agreed issues for me to determine are:
    a. Whether, when a Part 36 offer is accepted within the 'relevant period' under CPR 36.20, the fixed costs which are recoverable by reference to CPR 45.29C (and Table 6B) are subject to CPR 45.29J (Issue 1); and
    b. Whether on the facts of this case, an order under CPR 45.29J is appropriate (Issue 2).

10. In essence Issue 1 requires me to consider whether the court has jurisdiction under CPR 36.20 to consider 45.29J and Issue 2 requires me to consider

whether if CPR 45.29J is available, on the facts of this case, in my discretion, I should make a costs order that exceeds the fixed recoverable costs because there are 'exceptional circumstances' making it appropriate for me to do so.

The relevant CPR provisions

11. The relevant CPR provisions in place at the relevant time are:

> **36.20**
> (1) This rule applies where—
> (a)a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1); or
> (b)the claim is one to which the Pre-Action Protocol for Resolution of Package Travel Claims applies.
> (2) Where a Part 36 offer is accepted within the relevant period, the claimant is entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.
>
> **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.
>
> **45.29C**
> (1) Subject to paragraph (2), the amount of fixed costs is set out in Table 6B.
> (2) Where the claimant—
> (a) lives or works in an area set out in Practice Direction 45; and
> (b) instructs a legal representative who practises in that area,
> the fixed costs will include, in addition to the costs set out in Table 6B, an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in Table 6B.
> (3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT.
> (4) In Table 6B—
> (a) in Part B, 'on or after' means the period beginning on the date on which the court respectively—
> (i) issues the claim;
> (ii) allocates the claim under Part 26; or
> (iii) lists the claim for trial; and
> (b) unless stated otherwise, a reference to 'damages' means agreed damages; and
> (c) a reference to 'trial' is a reference to the final contested hearing.

> **45.29J**
> (1) 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 rules 45.29B to 45.29H.
> (2) If the court considers such a claim to be appropriate, it may—
> (a) summarily assess the costs; or
> (b) make an order for the costs to be subject to detailed assessment.
> (3) If the court does not consider the claim to be appropriate, it will make an order—
> (a) if the claim is made by the claimant, for the fixed recoverable costs; or
> (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,
> and any permitted disbursements only.

Issue 1:

*The parties' arguments*

12. The claimant submitted that the decision of Costs Judge Leonard in *McGreevy v Kiramba* [2022] EWHC 2561 (SCCO) should not be followed. Cost Judge Leonard had concluded at paragraph 51:

> *I can see that the defendant's case in this respect might be seen as an unattractive one. Nonetheless, CPR 36.20(2) makes no reference to CPR 45.29B or CPR 45.29J (or even CPR 45.29C). It simply confers upon the claimant a right to recover the fixed costs in Table 6B. I cannot find any basis for putting a gloss upon the plain wording of CPR 36.20(2) so as to confer upon the defendant a right to claim costs beyond what is prescribed by the rule itself.*

13. The claimant further submitted that CPR 45.29J could apply with CPR 36.20 because Coulson LJ in *Hislop v Perde* [2018] EWCA Civ 1726 said, at paragraph [54], that:

> *Finally, it remains the position that, in an exceptional case of delay, it may be possible for the claimant to escape the fixed costs regime. That arises under r.45.29J. In this way, my interpretation of the specific rules within Part 36 does not lead to a dogmatic or rigid conclusion, because the draftsman of the Rules already had one eye on ensuring that, in an exceptional case, it might be possible for a claimant to escape, at least in part, the fixed costs regime. In that way, there remains a clear incentive for a defendant not to delay in accepting a claimant's Part 36 offer.*

14. Coulson LJ also stated at paragraph [55]:

> *I am anxious not to express detailed conclusions about the scope and extent of r.45.29J because, other than acknowledging that it provides a*

> *potential escape route in an appropriate case, I do not consider that its general ambit is directly relevant to this appeal:*

15. It was accepted this was an *obiter* comment and the facts in *Hislop* were different. The background to *Hislop* being the late acceptance of a Part 36 offer by a defendant with the Court of Appeal concluding that CPR 36.20 still applied to a late acceptance. It is therefore substantially different to the facts in this matter.

16. The claimant also submitted that Coulson LJ (in paragraph [48]) had expressly rejected a suggestion that CPR 45.29J was not relevant under CPR 36.20 in the way it had been argued based on the drafting of the rules.

17. The defendant's position was that Issue 1 was answered by following the decision of Costs Judge Leonard in *McGreevy*. It was accepted that *McGreevy* was not a binding decision upon me sitting in the County Court but one I should give weight to. It was further submitted that the comments from Coulson LJ in *Hislop* were not binding as they were *obiter* and further that Coulson LJ had been carefully to note, in paragraph [55], that he was not expressing detailed conclusions about the operation of CPR 45.29J and therefore clearly the observations were not binding.

*Judgment on Issue 1*

18. I accept that *McGreevy* is not a binding authority. However, in my judgment Costs Judge Leonard expressed the correct analysis in paragraph [51]. I concur with his reasoning. The drafting of CPR 36.20 is clear: the only costs that are recoverable are those in accordance with Table 6. Furthermore, CPR 45.29J is not the only rule that is excluded, CPR 45.29F and 45.29I are also excluded. Likewise, from the other viewpoint, in CPR 45.29B, other rules, including CPR 45.29J (and 45.29F and 45.29I (and others)) are expressly included. If those drafting the rules had intended that CPR 45.29J should be available under CPR 36.20, they would have expressly done so.

19. I cannot see why the court should depart from that clearly expressed words in CPR 36.20; such a result is not absurd or irrational. It is clear and capable of being understood by those lawyers engaged in this type of litigation.

20. Indeed, in this case, the claimant's solicitors must have understood that position as they sought, by correspondence, the agreement of the defendant to 'contract out' of the fixed costs regime. They therefore must have known if they accepted the Part 36 Offer prior to the court allocating the matter to the multi-track, fixed costs would apply.

21. In my judgement Coulson LJ in paragraph [54] of *Hislop* was referring to the position in exceptional cases of delay, which is not the case before me. Furthermore, his Lordship, in paragraph [55], expressed caution about extent of CPR 45.29J, which indicates that he had not reached a settled view as to its wider application, outside the confides of his decision in *Hislop*. Likewise, his rejection, on the basis of the drafting of the rules, on the interplay with CPR 45.29J and CPR 36.20(2) being redundant. My interpretation, as set out above, is consistent with Coulson LJ's observation, as CPR 36.20 is relevant and not redundant as it identifies the fixed costs that are recoverable in accordance with the Table. I can therefore derive no further assistance from his Lordship's observations.

22. It follows that in my judgment, on the facts of this case, the claimant is unable to rely on CPR 45.29J and the only costs the claimant can recover are those as set out in either Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the defendant.

23. That may well be a harsh decision in light of the value of this litigation but it is in accordance with the principles espoused by Briggs LJ (as he then was) in *Sharp v Leeds City Council* [2017] EWCA Civ 33 and noted by Coulson LJ in *Hislop* at paragraph [51]: it provides certainty, ensures costs are proportionate and is part of the 'swings and roundabouts' of fixed costs litigation.

24. In light of my judgment above I do not need to determine Issue 2, but I will do so given that I heard argument on it.

Issue 2:

*The parties' arguments*

25. The claimant submitted that if CPR 45.29J is available, I should, in my discretion find that it is engaged in this case and that there are 'exceptional circumstances' such that I should make an order for costs exceeding the allowable fixed costs and for those to be assessed on the standard basis.

26. Mr Birch's skeleton argument noted CPR 45.29J provided a 'safety value' in relation to cases that are not suitable for the fixed costs regime. He identified six specific factors pointing to this case being exceptional.

27. The defendant's submitted that this case could not meet the high bar of exceptionality, noted by the Court of Appeal in *Hislop v Perde* at paragraph [58]: "*It goes without saying that a test requiring 'exceptional circumstances' is already a high one".*

28. The defendant further submitted that the 'basket of cases' for comparison for the purposes of exceptionality, would be those which have exited the Protocol and merely exiting the Protocol does not mean such cases are exceptional (per Stewart J in *Ferri v Gill* [2019] EWHC 952, at paragraph [49]).

*Judgment on Issue 2*

29. It is clearly established now following *Hislop* and as applied in *Ferri,* at paragraph [44], that the test for 'exceptional circumstances' is a 'high bar'. The cases upon which I should compare this matter to are those cases which have exited the Protocol process.

30. Considering the factors raised by Mr Birch in his skeleton, none of them alone or cumulatively lead me to conclude that this case was exceptional. Considering each in turn:

    a. Allocation: the matter had not yet been allocated to the multi-track. The fact that it was later so allocated in itself cannot be an exceptional matter in light of the basket of cases that I must compare this matter to, applying *Ferri*.

b. Permanent disability: this might be a feature of complexity to this matter but cases where the claimant suffers a permanent disability whether defined as such under the Equality Act 2010 or not, cannot be exceptional.

c. Ogden Tables: whilst the use of Ogden Tables may not be routine, again, in my assessment it is not exceptional when considering the 'basket of cases'.

d. Number of expert witnesses: three expert disciplines had been engaged so far in this matter and further experts were envisaged in the Directions Questionnaires (DQ). Again, in the context of matters against which this case has to be compared, the use of multiple experts and several disciplines does not make this case exceptional.

e. Complexity: references is made to a detail Schedule of Loss of 17 pages as well as the potential for a three day trial as set out in the DQs. Again, a three day trial in a personal injury matter as well as a detailed Schedule of Loss, does not set this case apart from its comparators: it is not exceptional.

f. Value: This matter settled for £135,000. In *Hammond v SIG* (2019) (unreported) (SSCO; Master Leonard) it was noted by reference to another matter, *Jackson v Barfoot Farms* (an unreported decision from District Judge Jackson sitting in the County Court at Canterbury) that *Jackson* settled for £350,000 and had been "very complicated", and the Master stated he agreed with the District Judge's assessment that such a case was exceptional. That does not assist me at all in considering whether this case is exceptional, particularly in light of the disparity in settlement value to this matter. The value of the settlement alone cannot in my judgment be an indication of its exceptionality. The value of this case is simply not exceptional.

31. For those reasons, in my judgment, this matter does not meet the 'high bar' test of exceptionality. Even if CPR 45.29J had been a rule that the claimant could have relied upon, I would not have found that any further costs beyond those allowed by CPR 36.20 would have been recoverable.

Conclusion

32. The claimant's application is dismissed. The claimant is not entitled to rely on CPR 45.29J and even if he were able to do so, the case would not have met the 'exceptional circumstances' test and I would not have awarded any additional costs pursuant to CPR 45.29J.

33. I understand that the defendant is not seeking any costs, in the event that I dismissed the application and accordingly I make no order for costs.

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