Case No: C88YX386

IN THE PLYMOUTH COUNTY COURT

Plymouth Combined Court, Armada Way, Plymouth PL1 2ER

Date: 12 June 2017

Before :

DISTRICT JUDGE RICHARDS

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Between :

MASTER LOGAN PRESCOTT	**Claimant**
(A child by his litigation friend Mr Paul Prescott)	
- and -	
THE TRUSTEES OF THE PENCARROW 2012 MAINTENANCE FUND	**Defendant**

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Mr Thomas Challacombe for the **Claimant**
Mr Andrew Roy for the **Defendant**

Hearing date: 24 April 2017

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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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DISTRICT JUDGE RICHARDS

DISTRICT JUDGE RICHARDS :

1. On the 27 October 2015, the claimant Logan Prescott, a minor, was a passenger in a car being driven by his mother. The car collided with a tree that fell on to the highway. The tree was owned by The Trustees of the Pencarrow 2012 Maintenance Fund, the defendants. The claim was settled for £1000, which was approved at an infant approval hearing on 7th October 2016.

2. The issue before the court is now one of costs. The claimant is seeking costs on a standard basis, the defendant avers that the public liability (EL/PL) protocol applies and thus the costs should be under the fixed cost regime (FCR).

3. Counsel for the claimant at the original settlement approval hearing had attended the wrong court and replacement counsel was not briefed to deal with the cost argument . The matter was relisted with an increased time estimate on 3rd February 2017, on that occasion the costs draftsman for the defendant had a mechanical breakdown on way to the court and the matter was adjourned once again. The hearing eventually took place on 24th April 2017.

4. There are a number of Low Value Personal Injury Protocols. Whilst the claimant was a passenger in a motor vehicle and whilst he was injured whilst that vehicle was being driven on the highway, it is agreed between the claimant and the defendant that this claim is not governed by the RTA protocol.

5. RTA Protocol. Para. 1.1 provides:

> *In this Protocol—*
> *…*
> *(13) 'motor vehicle' means a mechanically propelled vehicle intended for use on roads;*
> *…*
> *(15) 'road' means any highway and any other road to which the public has access and includes bridges over which a road passes;*
> ***(16) 'road traffic accident' means an accident resulting in bodily injury to any person caused by, or arising out of, the use of a motor vehicle on a road or other public place in England and Wales unless the injury was caused wholly or in part by a breach by the defendant of one or more of the relevant statutory provisions as defined by section 53 of the Health and Safety at Work etc Act 1974;***

The exclusions are set out in para 4.5 namely:

> ***This Protocol does not apply to a claim—***
> ***(1) in respect of a breach of duty owed to a road user by a person who is not a road user;***
> *(2) made to the MIB pursuant to the Untraced Drivers' Agreement 2003 or any subsequent or supplementary Untraced Drivers' Agreements;*
> *…*
> *(6) where the defendant's vehicle is registered outside the United Kingdom.*

6. In this case the injury was not caused by the defendant as a road user so the RTA protocol does not apply.

7. It is notable that the RTA protocol is a distinct protocol. Save for one very limited exception all communications must be made through the Portal. The exception being a self-insurer defendant. The RTA protocol works on the basis that the potential defendant is the user of a motor vehicle for which compulsory insurance is required. There is a comprehensive central database of motor insurance policies that is fed into the Portal.

8. A distinction could be drawn, for example, with a cyclist who does not have to hold compulsory motor insurance and thus would not fall within the RTA protocol as a defendant.

9. Master Logan's claim is a claim based in Public Liability. The EL/PL protocol sets out the following :

In this Protocol—

> …
> ***(18) 'public liability claim'—***
> ***(a) means a claim for damages for personal injuries arising out of a breach of a statutory or common law duty of care made against—***
> ***(i) a person other than the claimant's employer; or***
> ***(ii) the claimant's employer in respect of matters arising other than in the course the claimant's employment; but***
> ***(b) does not include a claim for damages arising from a disease that the claimant is alleged to have contracted as a consequence of breach of statutory or common law duties of care, other than a physical or psychological injury caused by an accident or other single event;***
> *(19) 'Type C fixed costs' has the same meaning as in rule 45.18(2) of the Civil Procedure Rules 1998*

1. *Para. 4.3* provides:

> *This Protocol does not apply to a claim—*
> *(1) where the claimant or defendant acts as personal representative of a deceased person;*
> *(2) where the claimant or defendant is a protected party as defined in rule 21.1(2);*
> *(3) in the case of a public liability claim, where the defendant is an individual ('individual' does not include a defendant who is sued in their business capacity or in their capacity as an office holder);*
> *(4) where the claimant is bankrupt;*
> *(5) where the defendant is insolvent and there is no identifiable insurer;*
> *(6) in the case of a disease claim, where there is more than one employer defendant;*
> *(7) for personal injury arising from an accident or alleged breach of duty occurring outside England and Wales;*

(8) for damages in relation to harm, abuse or neglect of or by children or vulnerable adults;
(9) which includes a claim for clinical negligence;
(10) for mesothelioma;
(11) for damages arising out of a road traffic accident (as defined in paragraph 1.1(16) of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents).

10. It is clear that this is a public liability claim within the definition in 18(a)(i) above. The Claimant avers that paragraph 4.3 (11) above excludes this public liability claim from the EL/PL protocol and because (for reasons set out in paragraph 5 above) the claim does not fall within the RTA protocol , then the costs must be dealt with on a standard basis.

11. It can be seen from the exceptions to the EL/PL protocol above that most of the exceptions relate to cases where the issues may be more complex, such as clinical negligence or mesothelioma , or cases where the streamlining of the protocol may be less suited, for example cases outside England and Wales or cases of neglect or harm to children. The final exception is that of RTA claims. The reason for this is to avoid the confusion of a claim which could be brought under two different protocols.

12. It is notable that the protocols have developed over time. The RTA protocol led the way and the EL/PL protocol was added at a later date as a "bolt on " rather than the whole of the protocols having been drafted as one complete code.

13. The effect of the interaction between the RTA and EL/PL protocol has in this case led to the unusual (and the defendant would say unintended) consequence of a simple very low value PI case falling outside of the protocols. Had the claimant, for example, been a pedestrian, cyclist or horse rider who had been struck by the defendant's tree then the matter would have proceeded under the EL/PL protocol. It is the fact that he was a passenger in a motor vehicle that leads to him apparently being excluded from that protocol as it is classified as an RTA (albeit one that does not fall within the RTA protocol). That situation leads to a result which is incompatible with the FCR.

14. Counsel for the defendant helpfully set out in his skeleton argument dated 21 April 2017 the background to the fixed cost regime as follows.

(2) The history of the FCR

This was described by Briggs LJ in ***Qader v Esure Services Ltd*** *[2016] EWCA Civ 1109; [2017] C.P. Rep. 10 at [44-51]. Briggs LJ therein explained that the FCR originated in the Jackson LJ's Final Report in December 2009, and that the Government and Rules Committee decided faithfully to implement Jackson LJ's proposals.*

Looking then at origin of the FCR, the Final Report (https://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Reports/jackson-final-report-140110.pdf). Jackson LJ in his Executive Summary recommended (Section 2 Major recommendations) the following at 2.9:

> *Fixed costs in fast track litigation. Cases in the fast track are those up to a value of £25,000, where the trial can be concluded within one day. A substantial proportion of civil litigation is conducted in the fast track. I recommend that the costs recoverable for fast track personal injury cases be fixed.*

He set out rationales for this at 2.10:

> *There are several advantages to the fixing of costs in lower value litigation. One is that it gives all parties certainty as to the costs they may recover if successful, or their exposure if unsuccessful. Secondly, fixing costs avoids the further process of costs assessment, or disputes over recoverable costs, which can in themselves generate further expense. Thirdly, it ensures that recoverable costs are proportionate. There is a public interest in making litigation costs in the fast track both proportionate and certain.*

In Chapter 15 (Fast Track Fixed costs) Jackson LJ made clear that the FCR should be comprehensive for PI claims. See 5.8 (emphasis added):

> *My conclusion is that **all** costs for personal injuries litigation in the fast track should be fixed ... In my view, there is a high public interest in making litigation costs in the fast track both proportionate and certain.*

He was likewise clear at 5.18 that, whilst there should be exceptions, they should be closely circumscribed (emphasis added):

> *The escape clause in the existing FRC scheme18 is contained in CPR rules 45.12 and 45.13. It applies where (a) the court considers that there are exceptional circumstances and (b) upon assessment the costs turn out to be at least 20% higher than the fixed costs. This escape clause19 has proved satisfactory and has not led to any mass escapes from the FRC regime. I am advised that the escape clause is seldom used; it does not in practice undermine the principle of the FRC regime. I recommend that an escape clause in similar terms be incorporated in the new **comprehensive** fixed costs regime for personal injury cases.*

The chosen method of implementation was to extend the existing RTA Protocol rather than create a new freestanding one. As Cook on Costs notes at 26.15 "the employers' liability ('EL') and public liability ('PL') claims have been grafted on to the original RTA Protocol making everything more awkwardly drafted than would probably have been the case if the protocol was drafted from scratch".

15. Further the court has to consider and implement the Overriding Objective at all stages of the litigation. **CPR 1.2** provides:

> ***Application by the court of the Overriding Objective***
> *The court **must** seek to give effect to the overriding objective when it –*
> *(a) exercises any power given to it by the Rules; or*

(b) *interprets any rule …*

The Overriding Objective is set out at **CPR 1.1** which provides:

> *(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly* ***and at proportionate cost****.*
>
> *(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –*
>
> *(a) ensuring that the parties are on an equal footing;*
> ***(b) saving expense;***
> ***(c) dealing with the case in ways which are proportionate –***
> ***(i) to the amount of money involved;***
> ***(ii) to the importance of the case;***
> ***(iii) to the complexity of the issues; and***
> ***(iv) to the financial position of each party;***
> *(d) ensuring that it is dealt with expeditiously and fairly;*
> ***(e)*** *allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases****; and***
> ***(f) enforcing compliance with rules, practice directions and orders.***

16. In this particular case the claim is straightforward and low value. The costs should be proportionate and the court's time allotted to this matter would have been limited in respect of costs had it been clear that a protocol and thus the Fixed Cost Regime applies.

17. The Claimant contends that the court should interpret the literal (grammatical) meaning of the EL/PL and RTA protocols as set out above. That in my view leads to a perverse decision for reasons already set out.

18. The defendants contend that the court is under a duty to interpret the secondary legislation " not in the abstract purely by reference to their literal meaning but rather contextually in order to ascertain the true legislative intention"

19. Counsel sets out the following from Bennion on Statutory Interpretation 6th Edition: *As per Bennion on Statutory Interpretation 6th edition, s.2: "The interpreter's duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning". The legal meaning is "the meaning that correctly conveys the legislative intention" (s.150).*

It is thus necessary to adopt an informed interpretation. See Bennion s.201

> *(1) It is a rule of law (in this Code called the informed interpretation rule) that the person who construes an enactment must infer that the legislator, when settling its wording, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result).*

> *(2) Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of an enactment (and if so how to resolve it) until the court has first discerned and considered, in the light of the guides to legislative intention, the context of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.*

And also s.202:

> *For the purpose of applying the informed interpretation rule, the context of an enactment comprises, in addition to the other provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts* in pari materia*, and all facts constituting or concerning the subject-matter of the Act.*

Qader v Esure Services Ltd *[2016] EWCA civ1109; is of course a paradigm worked example of this approach.*

20. Counsel for the defendant further sets out in his skeleton argument :

> *(1) The legislative intention is that all PI fast track cases should come within the FCR; see paras. 12-16 above. It follows that excluding these cases from the FCR would be contrary to that intention and thus contrary to the fundamental principles of interpretation described above.*
>
> *Exclusion would for the same reasons be contrary to the principles of purposive interpretation. See Bennion, s.289:*
>
> > *Parliament intends that an enactment shall remedy a particular mischief. It is presumed therefore that Parliament intends the court, in construing the enactment, to endeavour to apply the remedy provided by it in such a way as to suppress that mischief.*
>
> *The mischief here is indeterminate and disproportionate costs in fast track PI cases; see para. 14 above. The remedy identified was that all such cases should fall within the FCR. See Bennion, s.312:*
>
> > *Parliament intends that an enactment shall remedy a particular mischief. It is presumed therefore that Parliament intends the court, in construing the enactment, to endeavour to apply the remedy provided by it in such a way as to suppress that mischief.*
>
> *(2) A related rationale is that presumption against evasion. See Bennion, s.319:*
>
> > *It is the duty of a court to further the legislator's aim of providing a remedy for the mischief against which the enactment is directed. Accordingly the court will*

> *prefer a construction which advances this object rather than one which attempts to find some way of circumventing it.*

C's interpretation would create a loophole permitting claimants to circumvent the FCR and thus frustrate the legislative intention to remedy mischief of disproportionate and indeterminate costs.

21. To take a literal interpretation of the interaction between the protocols results in my judgment, in a perverse result that was clearly not the intention of the protocols. In effect the claimant solicitors would have the windfall of significantly increased (and therefore disproportionate) costs in this case as opposed to the claimant having been for example a pedestrian. There is no good reason for that. There are, in my judgment no increased risks of such litigation. Further there are no public policy reasons such as solicitors being unwilling to undertake this claim under the FCR regime.

22. I thus find that the claim falls within the FCR and that the Claimant shall be entitled to fixed costs of £1860 inclusive of VAT plus disbursements in accordance with CPR 45.19.