



SCCO No: 1900566

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building,
Royal Courts of Justice,
London WC2A 2LL
Date: 10 October 2019

Before:

MASTER BROWN

Between:

SCOTT DOVER

Claimant/
Respondent

- and -

FINSBURY FOOD GROUP PLC

Defendant/
Appellant

Peter Mant (instructed by Thompsons Solicitors) for the Claimant/ Respondent
Matthew Hoe (Solicitor of Taylor Rose TTKW) for the Defendant/Appellant

Hearing date: 25 September 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 Brown:

1. This appeal from the decision of Costs Officer Martin concerns a claim which was started under the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ('the EL/PL protocol') but which settled after exiting the protocol. The issues arising are as to whether the costs of advice from counsel are recoverable as a disbursement under the provisions of Section IIIA in CPR 45, and, if so, the amount of any such costs - in particular whether they are limited to £150 plus VAT in accordance with CPR 45. 23B (read with Table 6A).

Background

2. The Claimant sustained injury in the course of his employment at work on 26 June 2015 when pouring a 25 kg bag of flour into a machine in a bread mixing room. There was an extractor above the machine and, suddenly, so it was alleged, the bag was sucked up into the extractor taking the Claimant's hands with it. As a result, he suffered injury to his right hand, in particular his right middle and index fingers. He underwent an initial operation under local anaesthetic involving the shortening of the distal phalanx of the middle finger. He returned for further surgery on several occasions over the subsequent five weeks but was left with what is referred to as a damaged middle finger stump. He was off work for three months.

3. A Claims Notification Form (CNF) was prepared and uploaded to the portal on 23 July 2015. The Defendant failed to provide a response within the relevant period and the claim exited the portal on 15 September 2015. The insurers acknowledged the claim and requested the claim be resubmitted to the portal. This was rejected by the Claimant. A further request was made for re-submission on 3 November 2015. But on 10 November 2015 the Claimant confirmed that the matter would not be resubmitted to the portal. Liability was subsequently admitted on 29 February 2006 subject to "medical causation". Thereafter the Claimant's medical records were obtained, and instructions sent to a consultant plastic surgeon. The surgeon observed in his medical report dated 31 August 2016 that the Claimant had lost the tip of the middle finger and that he had lost pulp rather than bone over the index finger; he concluded that the Claimant would not be able to use his right hand normally again and would remain disabled. No improvement was expected. The expert suggested that the Claimant might benefit from CBT counselling in respect of psychological symptoms. Investigations were undertaken as to the Claimants' losses and a detailed schedule of special damage was prepared in response to the Defendant's request for details of his pre-accident earnings.

4. Counsel advised on the value of the claim in a conference which took place on 22 March 2017. Thereafter the Defendant questioned the Claimant's expert regarding the claim for damages for disadvantage on the open labour market. In his response the expert confirmed his view that the Claimant was disabled for the purposes of the Equality Act 2010.

5. On 6 September 2017 the Claimant put forward a Part 36 offer of £93,000. On 30 November the Defendant put forward an offer of Part 36 offer of £70,000 which offer was accepted on 19 December 2017.

6. In the Bill of Costs, Counsel's fee was claimed in the sum of £650. In their Points of Dispute, the Defendants disputed any entitlement to payment of Counsel's fee. It was contended that no such fee was payable under the relevant provisions in a claim which exited the EL/PL protocol if incurred after the claim has left the protocol; the costs were deemed to be included within the fixed fees. Alternatively, it was said that if Counsel's advice were recoverable in principle then the costs of such advice should be limited to £150 plus VAT.

Decision of the Costs Officer

7. The Costs Officer rejected the contentions made in the Points of Dispute. He held that the relevant provisions permitted recovery of counsel's fee for advising in conference as a disbursement. He, however, reduced the sum claimed from £650 (plus VAT) to £500 (plus VAT).

Core provisions

8. It is common ground that the provisions in Section IIIA of Part 45 of the CPR apply. As the title of this section states it applies to claims which have started but no longer continue under the EL/PL Protocol. CPR 45.29D provides, so far as is relevant:

Subject to rules 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... the only costs allowed are—

(a) the fixed costs in rule 45.29C;

(b) disbursements in accordance with rule 45.29I.

9. CPR 45.29I is headed ‘Disbursements’ and its provisions are central to the dispute between the parties. It provides, so far as is material, as follows:

(1) Subject to [two irrelevant exceptions], 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 EL/PL Protocol ..., 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) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;

(d) court fees;

(e) any expert’s fee for attending the trial where the court has given permission for the expert to attend;

(f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;

(g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and,

(h) any other disbursement reasonably incurred due to a particular feature of the dispute. [my underlining]

10. The relevant protocol, being the EL/PL protocol, states at paragraph 7.8:

In most cases under this protocol, it is expected the claimant's legal representative will be able to value the claim. In some cases, with a value of more than £10,000, an additional advice from a specialist solicitor or from counsel may be justified where it is reasonably required to value the claim.

11. CPR 45.23B, a provision relied upon by Mr Hoe, is in Section III of CPR 45. It provides:

Additional advice on the value of the claim:

Where—

(a) the value of the claim for damages is more than £10,000;

(b) an additional advice has been obtained from a specialist solicitor or from counsel;

(c) that advice is reasonably required to value the claim,

the fixed costs may include an additional amount equivalent to the Stage 3 Type C fixed costs.

12. Table 6A provides:

Fixed costs in relation to the EL/PL Protocol			
Where the value of the claim for damages is not more than £10,000		Where the value of the claim for damages is more than £10,000, <u>but not more than £25,000</u>	
Stage 1 fixed costs	£300	Stage 1 fixed costs	£300
Stage 2 fixed costs	£600	Stage 2 fixed costs	£1300
Stage 3 - Type A fixed costs	£250	Stage 3 - Type A fixed costs	£250
Stage 3 - Type B fixed costs	£250	Stage 3 - Type B fixed costs	£250
Stage 3 - Type C fixed costs	£150	Stage 3 - Type C fixed costs	£150

[my underlining]

The Grounds of Appeal/issues arising in the appeal

13. An appeal to a Costs Judge is by way of rehearing (CPR 47.24), no permission being required for the appeal to proceed (CPR 47.21). Nevertheless, the arguments of the Defendant (and the Claimant's in response) were directed to the following issues raised by the Grounds of Appeal:

- (1) Whether on a proper construction of CPR 45.29I (2) (c) the rule only preserves the recoverability of the fees of counsel or special solicitor incurred before the claim leaves the EL/PL protocol; (in this case the fees were, as noted above, incurred after the claim had exited the protocol).
- (2) Even if (2) (c) were held not to contain the temporal restriction referred to in (1) above, whether such a fee was payable in accordance with the provisions of CPR 45.23B (in Section III) and Table 6A, which, it is said, should be read as providing a damages upper limit of £25,000 for payment of such a fee. If so, it was contended that no fee is payable in this case because the claim settled for £70,000.
- (3) If the Defendant were wrong on issues (1) and (2), whether nevertheless CPR 45.23B restricted counsel's fees to the sum stated in Table 6A i.e. £150 plus VAT. It is contended (on this alternative basis) by the Defendant that there was a drafting error in Table 6A erroneously including an upper damages limit of £25,000.
- (4) Further, whether on a proper construction of CPR 45.29I (2) (c), CPR 45.29I (2) (h) permitted recovery of counsel's fees.

14. In their arguments both advocates addressed me as to the history of the provision concerning the advice fee (at (2) (c)) in support of their differing interpretations of the provision and as to the decision in *Qader and others v Esure Limited* [2017] 1WLR 110. I address these two matters first before turning to the specific issues arising.

Legislative history concerning Counsel's/Specialist Solicitor's advice fee

15. In February 2012 the government proposed extending the RTA fixed fee scheme to employer's and public liability claims up to the value of £25,000. An analysis was carried out by the Ministry of Justice of the responses to the call for evidence in relation to the extension of the RTA protocol. The analysis, in the form of a report, records the following response to the question, *what if any modification would need to be made to the pre-action protocol and the electronic portal for claims in value of between £10,000 and £25,000?*

.....

- *The protocol needs to stipulate that the advice on quantum can be obtained from the Bar.*
 - a. *As argued for EL and PL claims (see below in question 3) claimant representatives suggest that the protocol and rules should be amended to allow for advice on quantum from Counsel in RTA and EL/PL cases.*

16. The report further records the following, in response to the question, *what, if any, modifications would need to be made to the pre-action protocol and the electronic portal to deal with employers' and public liability claims?*

...

Advice from counsel

Some claimant representative suggested that the Protocol should be amended to allow for advice on quantum from Counsel in RTA and EL/PL cases. It was argued that allowing advice from counsel at Stage 2 would protect damages from being driven down, and that this should be recoverable as a disbursement rather than coming out of the fixed fee.

17. In its consultation response dated 27 of February 2013, and under the heading ‘RTA claims between £10,00 and £25,000’, the Ministry of Justice stated:

Consultation Response

53 Claimant solicitors and others argue that access to independent advice on quantum must be available from Counsel if required, particularly in relation to claims towards the higher end of the extended scheme. They cited the fact that Professor Fenn’s report on the existing schemes first year of operation has already demonstrated a reduction in the level of damages awarded.

....

Government response

60. The government does, however, consider there to be greater force in the argument that some cases in the higher bracket (£10,001 to £25,000) would benefit from an opinion on quantum from Counsel or a specialist solicitor in order to ensure that claimants in these higher value cases have access to independent advice in this area if required. The Government accepts that there will be circumstances in such cases where expert opinion is merited should be recoverable as a fixed cost where (like an expert report) it can be justified.

18. The then Lord Chancellor stated in a letter dated 27 February 2013 (the same date as the response above):

In the light of the consultation I have decided that it is expedient for the Civil Procedure rules to include a provision to achieve the following purposes:

- *The fixed recoverable costs in the respective Protocols should be those set out in Annex A of the response document*
- *For cases in the £10,001-£25,000 bracket, the cost of Counsel’s, or specialist solicitor’s advice on quantum should, in exceptional circumstances where it is justified in the same way as an expert report, be recoverable as a disbursement.*
- *Furthermore, in respect of claims arising out of employers’ liability disease cases which fall out of the EL protocol, the existing costs regime should continue rather than the one new one proposed. The cost in all other cases falling out of the protocols should be those set out in the relevant table in Annex A of the response document.*

19. Notice under section 3A of the Civil Procedure Act 1997 was given by the Lord Chancellor to the Civil Procedure Rule Committee (CPRC) on the same date.

20. Particular reliance is placed by the Defendant upon the contents of the letter of Lord Dyson, Master of the Rolls, to the secretary of the Personal Injuries Bar Association (PIBA) dated 16 May 2013. PIBA had written to Lord Dyson and the CPRC submitting that in respect of Fast-track cases there ought to be separate ring-fenced allowances for work on Statements of case, Part 18 requests, as well as separate advices on liability and quantum. Lord Dyson replied that the issues raised by PIBA should be addressed by the Ministry of Justice rather than the Rule Committee itself. He said:

“The Lord Chancellor’s written notice to the committee set out the fixed recoverable costs for which provision should be made in the Rules. Such costs were not expressed to relate only to solicitors’ costs. Indeed, they included fixed costs in respect of trial advocacy, and the notice also set out the cases in relation to which provision should be made for the recoverability, as a disbursement, of the cost to counsel’s or specialist solicitors advice on quantum. The Committee took the view that the making of additional provision, as suggested in your letter, for the recoverability of counsel’s fees in the situations covered by the notice would be inconsistent with the notice and with the Committee’s statutory duty to give effect to it.”

Qader

21. In *Qader* Briggs LJ, as he then was, described the Pre-action Protocol for Low Value Personal Injury claims in Road Traffic Accidents (‘the RTA protocol’) as providing an efficient modern framework for the resolution of modest personal injury claim arising out of road traffic accidents. It was not designed for the resolution of large claims or complex disputes. At [2] to [13] of his judgment Briggs LJ set out the workings of the RTA protocol and at [8] he observed that the EL/PL protocol is very similar to, and in part overlapping with, the RTA protocol.

22. As to the issue arising in the appeal, Briggs LJ stated that *“the provisions for the recovery of fixed costs in relation to a claim started but no longer continuing under relevant protocols was developed upon the assumption that, if Part 7 proceedings were issued, they would in due course be allocated to the fast track, if not determined at a disposal hearing following judgment for damages to be assessed.”* ([14]). He then set out a number of situations where claims properly started in the RTA protocol may in due course be allocated to the multi-track: because they are for an amount more than £25,000, because they are likely to require a trial lasting longer than one day, or because they involve the deployment of multiple expert witnesses. He said:

“Plainly, they involve the expenditure of costs on a scale which will always be higher, and often much higher, than that requisite for the determination of claims in the fast track. Just as personal injury claims for less than £1,000 are inappropriate for the Protocols, so are claims for more than £25,000 so that there is an initial apparent symmetry between scope of the Protocols and the fast track, in terms of the amount claimed.” [15]

23. The problem which arose for consideration in *Qader* was that *“there was nothing in rule 45.29 which expressly limited the fixed costs regime applicable to cases started but no longer continuing under the relevant Protocol to fast track cases, or which excluded the fixed*

cost regime when a case is allocated to the multi-track” [20]. Briggs LJ commented, “[on] the contrary [the relevant provision] appears unambiguously to apply the fixed cost regime to all cases which start within the relevant Protocols but no longer continue under them. Only rule 45.29J provides for relief in exceptional circumstances.” [20]. He went on to say that the problem was exacerbated by the fact that the design, consultation about and determination by the CPRC of the detail of the fixed costs regime was focused on the creation of a fixed cost regime for fast track, but not multi-track, cases [21].

24. The Court concluded that the relevant provisions of Section IIIA, the provisions which I am concerned with in this appeal, should be read as if the fixed cost regime which it prescribes for cases to start within the RTA protocol but then no longer continue under is automatically disapplied in any case allocated to the multi-track without the requirement for the claimant to have recourse to rule 45.29J (i.e. by demonstrating exceptional circumstances). This conclusion was reached not by the ordinary process of construction or interpretation of the wording of the relevant rules. The Court found the express meaning of the rules was clear. However, an analysis of the historic origins of the scheme demonstrated that it was not in fact the intention of those legislating for this regime that it should ever apply to a case allocated to the multi-track. The conclusion that it should so apply was as a result, the Court concluded, of a drafting mistake. Pursuant to the Court’s exceptional jurisdiction, per *Inco Europe Limited v First Choice Distribution* [2000] 1 WLR 586, 592, the Court put right such an error by interpretation even though it required the addition of words.

25. In *Inco* Lord Nicholls cited the following comments of Professor Sir Rupert Cross in *Statutory Interpretation*, 3rd ed (1995), pp93-105:

“In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text the statutory provision read in its appropriate context within the limits of the judicial role.”

*This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So, the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105–106.”*

26. The Court held that the Rule Committee’s apparent failure to implement the continuing intention of the government to exclude multi-track cases from the fixed cost regime being enacted the cases leaving the RTA and EL/ PL protocols satisfied all three of Lord Nicholls’s preconditions. Following the decision, the rules were amended so that CPR 45.29D now provides that the fixed costs regime applies “for as long as the claim is not allocated to the multi-track”. At [58] Briggs LJ noted that the insertion of such words did not

deal with what he considered to be another anomaly in the rules represented by a £25,000 ceiling in Part A of Table 6B (dealing with RTA claims) such that where parties reach a settlement after exiting a relevant protocol and prior to the parties issuing proceedings under Part 7, no provision is made in the table for a settlement of over £25,000. However, following the invitation by the Court in *Qader* to the Rules Committee, by Civil Procedure (Amendment) Rules 2017 (SI 2017/95) Table 6B was amended, together with the related tables 6C and 6D (dealing with employers' liability and public liability claims).

Issue 1- is there a temporal restriction in CPR 45.29I (2) (c)?

27. The Defendant's argument that there is such a restriction proceeds not on the basis of the wording in sub-rule (2) (c) itself, that is to say: "*the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol*". It is accepted that the words '*as provided for in the relevant Protocol*' do not of themselves provides any such restriction. The contention turns on what is said in the EL/PL protocol. It is argued that the provision that only "[in] *some cases*" the relevant advice will be required, must be a reference to some cases under the protocol. That is said to be a necessary reading of the provision in the light of the preceding sentence which refers to "*most cases under this Protocol*". 'Some cases' is to be contrasted with 'most cases' and must, it is argued, implicitly be referring to cases proceeding under the EL/PL protocol. So, it is argued, Para 7.8 cannot therefore permit recovery of the costs of this advice if incurred after exiting the protocol.

28. It is argued that (2) (c) is concerned merely with 'preserving' the Claimant's right to the fee if incurred under the protocol. This, it is said, is consistent with the more "tailored approach" to recoverable costs under Section IIIA which sets the amount of recoverable fixed costs by reference to the amount of damages and the stage the claim reached. There is, it is said, no compelling reason to interpret the relevant provisions of the CPR as providing an open-ended discretion to allow counsel's fees which the EL/PL protocol does not provide for. If such fees are to be recoverable in excess of the fixed recoverable costs it would be by way of application under CPR 45.29J, in circumstances where exceptional circumstances arise (albeit in this case the Claimant could not overcome the 20% hurdle in CPR 45.29K).

29. I do not accept the Defendant's contention. The restriction is not set out expressly in the provisions and in my judgment the Defendant's reading is, as the Costs Officer found, strained; indeed, such a restriction would in the context of other provisions be anomalous. The more workable reading, consistent with the aims that underlie the scheme, is that there is no such temporal restriction.

30. The Defendant accepts that such a temporal restriction does not apply in respect of the corresponding provisions dealing with medical records, medical expert reports and non-medical experts reports notwithstanding that the relevant provisions at (2) (a) and (b) of CPR 45.29I also contain the phrase '*as provided for in the relevant protocol*'. Mr. Hoe also accepts, as I understand it, that unlike the costs of an advice if incurred after a claim has left the protocol, they are recoverable subject to a determination/assessment of reasonableness¹ (see *Nazimi v Butt* Lawtel 30/06/2005² Master O'Hare). The reason for such a difference in treatment is, it is argued, that medical and other such evidence is essential to presenting a claim whereas counsel's or specialist solicitor's advice is not. Moreover, in respect of the

¹ Albeit not necessarily by a process of formal assessment.

² The appeal to Simon J, as he then was, reported at [2006] 1 WLR 3307 appears to have been in respect of a different issue.

costs covered by (2) (a) and (b) the relevant provisions of EL/PL Protocol, at 7.1 to 7.7 do not contain the phrase ‘under the protocol’ or anything similar and therefore does not contain any explicit or implicit restriction as to when such costs might be incurred.

31. It seems to me however that the Defendant is constrained to accept that a temporal restriction does not apply to (2) (a) and (b) because it plainly cannot be correct that such costs could be subsumed within the fixed fee payable under Section IIIA. The EL/PL Protocol envisages that a medical report should be obtained, if one has not already been obtained, after the defendant has sent its response to the CNF (see para. 6.9 and 7.1). It would be highly anomalous if the claimant were unable to recover as a separate cost the costs of medical evidence notwithstanding it had obtained these after the defendant had declined to provide a response to the CNF in accordance with Stage I.

32. There seem to me to be no clear grounds of principle to distinguish between medical evidence and specialist advice in this regard. Whilst it is obviously true that medical reports and medical notes are generally part of the evidence upon which the claim is made, as the background material provided to me acknowledges, the relevant advice can, in appropriate cases, be important to the proper resolution of the claim.

33. Moreover, it might legitimately be asked why would, consistent with the aims of the scheme, there be a ‘preserved right’ to claim for advice incurred while the claim was in the protocol but not otherwise? If it were intended that an allowance should be made for the relevant advice, then presumably it would be recoverable when the fee was incurred. If such advice were to be subsumed within the fixed fees payable under section IIIA then there would be no need to ‘preserve’ any right to the fee.

34. I think the legislative history is helpful on this point. It is clear that the concern which gave rise to the separate allowance under (2) (c) was the need for advice from counsel or special solicitor. As Mr. Mant said, a feature of the advice was that it should be of an independent nature. Indeed it seems to me clear that the particular concerns raised, which the government accepted, were that without the provision of such costs there was a risk that claims would be under-settled (one of the features of the fixed fee scheme being that legal representatives with conduct of the claim become entitled to the full fixed fee without reference to the work that has been done). Hence, specialist and independent advice (if reasonably required) would be payable by, in effect, a ring-fenced payment in the form of a disbursement.

35. I do not read the material relating to the enactment of these provisions, including the letter of Lord Dyson as qualifying this concern. It seems to me clear that he was responding to an invitation by PIBA to ring-fence additional elements of work that might be carried out by counsel (such as work on Statements of Case), not the advice with which I am concerned. Further, whilst it was clear from the consultation response of 27 February 2013 that in respect of claims that exit the protocol the government was concerned that costs should be controlled as effectively as those in the scheme, I would not read the Lord Chancellor’s letter as indicating that the separate advice was not appropriate to claims which exit the protocol. After all, as Mr. Mant argued, not only do the concerns that gave rise to the need for the provision of a separate advice (payable as a disbursement) clearly also apply to those claims which exit the protocols, it might be said that the need for independent advice was more acute in such circumstances: there might be significant issues as to liability affecting the value of the claim and the claim might be worth over £25,000, perhaps substantially so, with significant additional complexity. I agree with the comments of the Costs Officer that to

allow recovery of a fee for separate advice only where the fee was incurred before the case left the protocol but not afterwards would seem perverse and I am unable to infer an intention to impose the restriction contended for.

36. The EL/PL protocol was not drafted in the same way as a statutory provision. 45.29I (2) (c) is, of course, a provision dealing with claims which, *ex hypothesi*, have left the protocol ('ex-protocol claims'). The EL/PL protocol is concerned, in the same way, with cases subject to the protocol. As was demonstrated to me in the course of argument the protocol refers to rules which are applicable to the claim which remain subject to the protocol (see para. 7.41 in relation to the deemed terms of offers). It seems to me that it cannot have been intended to incorporate implicitly the provisions in this protocol which apply to claims which are under the protocol when separate or different rules apply to ex-protocol claims under section IIIA. In the same way it seems to me that the drafter would not have intended to incorporate a requirement, which was at best implicit, in para. 7.8 so as to exclude any entitlement to claim the costs of the relevant advice. Had such a restriction been intended, I would have expected this to be set out expressly.

37. The more obvious reason for the reference to the protocol, is, as with medical reports, to the grounds upon which recovery of the relevant fee can be justified. I agree with Mr. Mant that in context the meaning of subsection 45.29I (2) (c) read in combination with para. 7.8 of the EL/PL Protocol is that the first sentence of the protocol makes clear the circumstances in which an advice will generally not be required but it does not limit the scope of applicability of the second sentence.

38. I would add I do not accept that the exceptional circumstances provision is apt to apply here. The bar is set high for claims under CPR 45.29J (see *Ferri v Gill* [2019] EWHC 952 (QB)). It is not clear to me that the need to obtain independent advice from counsel or specialist solicitors could be said to amount to "exceptional circumstances": CPR 45.29I and the EL/PL Protocol require a claimant to justify the advice as being "reasonably required", not exceptional. Moreover, as I read it, under the scheme the relevant advice was to be independent and its costs were to be ring-fenced as a disbursement. The exceptional circumstances claim under CPR 45.29J is "*for an amount of costs (excluding disbursements) which is greater than the fixed recoverable cost*". Thus, it would appear that a significant feature of the scheme would be lost if in ex-protocol claims such a fee were to all intents and purposes only recoverable under this provision.

(2) No fee payable because none provided for under Table 6A?

39. The Defendant argues that nevertheless no fee is payable for the costs of separate advice as CPR 45.23B provides "*that fixed costs may include an additional amount equivalent to the Stage 3 Type C fixed costs*"; this is to be read in combination with Table 6A which provides that the fee payable for the Stage 3 Type C fixed costs is in, effect, only for claims of up to £25,000. So, it is said, there is no recovery of the costs of the relevant advice in claims which exceed £25,000 in value.

40. It seems to me that the clear difficulty with this contention is that rules 45.16 and 45.17 provide that the costs set out in CPR45.23B apply in respect of claims covered by section III of CPR 45 (namely claims which have been or should have been started under Part 8 in accordance with Practice Direction 8B, the Stage III procedure, or where a party has not complied with the relevant protocol). On its face it is clear that Rules 45.16 and 45.17 do not

apply to this claim, which under the relevant provisions has exited the protocol and is governed by Section IIIA.

41. Mr. Hoe argued that the provisions he relies upon are incorporated into rule 45.29I (2) (c) by the provisions of the EL/PL protocol (relying on the words ‘*as provided for in the relevant Protocol*’). The difficulty with this submission is that EL/PL protocol provides no such express incorporation of the terms of CPR 45.23B. Paragraph 7.8 (the only provision expressly dealing with claims for separate advice under (2) (c)) does not refer to this rule; nor does anything in the rest of the protocol purport to incorporate such a provision.

42. Mr Hoe contended that the rule was incorporated implicitly by the terms of the EL/PL protocol and relied upon the terms of section 7.41 which provides as follows:

7.41 Any offer to settle made at any stage by either party will automatically include, and cannot exclude—

(1) the Stage 1 and Stage 2 fixed costs in rule 45.18;

(2) an agreement in principle to pay a sum equal to the Type C fixed costs of an additional advice on quantum of damages where such advice is justified under paragraph 7.8;

(3) an agreement in principle to pay relevant disbursements allowed in accordance with rule 45.19; or

(4) where applicable, any success fee in accordance with rule 45.31(1) (as it was in force immediately before 1 April 2013).

43. To my mind, para. 7.41 the EL/PL Protocol is concerned specifically with claims that are proceeding under that protocol. Rules 45.18 and 45.19, referred to in para. 7.11, are provisions of Section III and, accordingly, the provision applies to claims which are then under the protocol.

44. It seems to me clear that CPR 45.23B and Table 6A do not apply to claims which exit the protocol and that if it had been intended that CPR 45.29I (2)(c) would contain the limitation on costs found in Section III it would have said so in Section IIIA.

45. To the extent that the provisions relied upon by the Defendant do limit the fees only in respect of claims for £25,000 this seems to reinforce my conclusion that they cannot apply here. It cannot have been the intention of the Rules Committee to allow a fee for a claim with a value of less than £25,000 but not one in a claim exceeding this sum.

46. In my judgment therefore the provisions of CPR 45.23B and Table 6A do not prevent the recovery of this fee.

(3) Drafting error in Table 6A?

47. The Defendant relies on what is said by the Court of Appeal in *Qader* at [58], namely that Table 6B erroneously included a damages ceiling of £25,000. Mr. Hoe notes that such an anomaly also appears in Table 6C and 6D dealing with employer’s liability and public liability claims. He says that the same anomaly may exist in Table 6A, and that if I were with him on issue (2) and that CPR 45.23B applies, I should read Table 6A as not including

the words ‘*but not more than £25,000*’ at the head of the second column. He says that Table 6A was not considered in *Qader*, but the reasoning of the Court of Appeal applies to it.

48. Since in my view Table 6A is not relevant in determining the costs recoverable under CPR 45.29I (2)(c), for the reasons set out above, it is not necessary for me to address this argument.

49. I should also perhaps say that in any event I could not be sure with the requisite degree of confidence (i.e. abundantly sure) of the three requisite conditions in *Inco* including in particular that the intended purpose of the provisions in question was a limitation to £150 plus VAT of the costs of the relevant advice. It seems to me that the costs of the relevant advice are more naturally to be read as recoverable in the same way as the costs of medical records, medical and non-medical reports under the immediately adjacent provisions of CPR 45.29I, that is recoverable subject to an assessment of reasonableness. This result would seem to me to be consistent with the aims of the scheme. I accept that in cases which have a value of less than £25,000 a judge might reasonably have regard to the sums provided for under CPR 45.23B even in cases which exit the protocol. However in cases which exit the protocols on the grounds that the value exceeds £25,000 (see [39] of *Qader* on this point), it is difficult to see, given the likely added complexity associated with them that it must have been intended that costs of any independent advice required would be so limited.

(4) Is the claim caught by (2) (h)?

50. Given the conclusions above, it is not necessary for me to deal with the alternative basis upon which this claim might be pursued, namely CPR 45.29I (2) (h). However the parties argued the matter in some detail and it seems to me appropriate that I should set out the arguments- albeit that I should express any views tentatively particularly as I am aware that CPR 45.29I (2) (h) and the term “*any other disbursement*” are being considered by the Court of Appeal in *Cham v Aldred*. I am not aware of the precise arguments in that case nor has either of the parties asked me to adjourn this hearing pending the hearing of that appeal (as I understand it the other provisions which I have considered above are not, at least directly, in issue).

51. Mr. Hoe’s contentions, on this point, were essentially threefold:

- First, the word “*other*” is to be set against the other disbursements listed in CPR 45.29I of which counsel’s advice was one, so, it is said, it could not be intended to cover counsel’s advice by the term ‘any other disbursement’;
- Second, the term ‘*particular feature of the dispute*’ prevented the recovery of the fee on the facts of this case. ‘Particular’ must here mean ‘special’, ‘notable’ or ‘unusual’. The value of the damages cannot be justification for use of counsel because that is commonplace and not special or notable; and
- Third, it is said that counsel’s fees cannot fall under this rule. This is because it is a basic premise of fixed recoverable costs that the fixed costs apply irrespective of the type of legal representative who has done the work. CPR 44.1(1) provides that fixed costs are the amounts to be allowed in respect of legal representative charges and a legal representative may be a barrister or a solicitor (CPR 2.3(1)). To allow a separate fee for counsel’s advice would potentially lead to a double payment under this head and in respect of the fixed costs; counsel’s advice in this case is to be funded

from the fixed costs. If the claimant seeks more for legal representatives' fees than provided for, he would have to justify this under the provisions of CPR 44.29J's as exceptional circumstances in the event that counsel's fees could overcome the 20% hurdle in CPR 45.29K.

52. In my judgment if the Defendant were correct and the fee claimed were not recoverable under (2) (c) it follows that the words "*any other disbursement*" should be read as covering counsel's fee here because it is clear that the words 'any other' amount to a wide 'catch-all' provision. On a plain reading a disbursement not caught by (a) to (g) would be caught by (h).

53. I would also agree with the Claimant that the requirement in the provision that the costs be "*due to a particular feature of the dispute*" is satisfied in the present case in the light of the changing circumstances (arising out a valuation far excess of the upper limit for the protocol) with accompanying added complexity. The case would in all probability have been allocated to the multi-track and fixed costs would not have applied.

54. As to the third point, the fact that similar (though not identical) wording to this provision is found elsewhere in CPR 45.12 and CPR 45.19 in circumstances where it is said these provisions could not be read being directed at counsel's fees is perhaps significant. And yet the Defendant's argument does not address the fact that counsel's advice is specifically listed as a disbursement under the heading 'disbursements': that counsel's advice would appear a disbursement for these purposes seems clear from the list in CPR 45.29I (2).

55. It appears from the transcript of the hearing before the Costs Officer that he expressed himself "not particularly happy" to rely on what he described as the 'catch all' provision at (2) (h). In my view, for the reasons set out above, it was not necessary for him to do so. Since the fee is caught by (2) (c) it is not caught by the term "*any other disbursement*" and the issues that would otherwise arise for consideration on the Defendant's third point do not arise.

56. Indeed, this seems to me to fortify my earlier conclusions: it cannot have been intended that counsel's fee (whenever incurred) would be caught by this provision because it is caught at (2) (c). Moreover, given that the recovery of costs for independent advice was, where reasonably required, considered to be important to the functioning of the scheme it would not perhaps be expected that it should be caught by this 'catch all' provision. Thus, this clause, (2) (h), might more obviously be read as applying to an interpreter's fees or the like- as the Cost Officer suggested.

57. However if I were wrong about my conclusions on issues (1) and (2) a reading of the plain words of sub-rule (2) (h) together with aims of the scheme would lead me, as it did the Cost Officer, towards the conclusion that the fee sought would be recoverable under this provision.

Conclusion

58. In my judgment the Costs Officer was correct to allow the fee as one which was to be assessed subject to reasonableness.

59. It was not clear to me that there was any issue as to the reasonableness of the amount of the fee if I were against the Defendant on the issues set out above. In any event having considered the relevant factors in CPR 44.4 (3) including the value of the sums involved, the amount at stake, the importance of the matter to the Claimant, together with the relative

complexity of the matter I agree with the Costs Officer that a sum greater than £150 for the separate advice was reasonable. Having considered the relevant papers, the reasonable assumed hourly rate of counsel, and the time required to prepare for and the time in the conference, £500 plus VAT is not, in my view, unreasonably high.

60. Accordingly, this appeal is dismissed.