



Case No: QB-2017-000013

SCCO Reference: SC-2021-APP-001102

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

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

Date: 22/01/2022

Before:

COSTS JUDGE LEONARD

Between:

ABA
(by his Father and Litigation Friend, ABB)
- and -
University Hospitals Coventry and Warwickshire
NHS Trust

Claimant

Defendant

James MacPherson for the Claimant
Ben Petrecz for the Defendant

Hearing dates: 27 October and 30 November 2021

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.

.....
COSTS JUDGE LEONARD

Costs Judge Leonard:

1. On 22 December 2017 the Claimant issued a claim for personal injury against the Defendant, based upon alleged clinical negligence. On 6 February 2019 (I am told) Master Cook made an order providing for liability and causation to be tried as preliminary issues.
2. On 11 January 2021, Mr Justice Saini gave judgment for the Claimant against the Defendant for 65% of damages to be assessed. His order, made by consent, made the following provision for costs:

“the Defendant do pay the Claimant’s costs of and incidental to the issue of liability on the standard basis such costs to be the subject of a detailed assessment, if not agreed...”
3. On 11 November 2021 Master Cook made an order, referring in recitals to the order of 11 January 2021 and incorporating this provision:

“The Claim remains allocated to the Multi -Track and is assigned to Master Cook for case management”.
4. Master Cook gave directions for document retention, disclosure, witness and expert evidence and the updating of schedules of loss extending to 30 December 2022. A trial window was set between 6 February and 26 May 2023 with a time estimate of 10 days.
5. In the meantime, on 13 August 2021, the Claimant served, in respect of the costs of the liability issue, notice of commencement of detailed assessment proceedings, citing as the authority for assessment the order of 11 January 2021 and enclosing a bill of costs in the sum of £827,406.85. On 27 August 2021 the Defendant applied for the notice of commencement to be set aside on the grounds that, in the absence of an order for immediate detailed assessment, it was premature.

The Civil Procedure Rules (“CPR”) and the Matter in Issue

6. The relevant provisions, for the purposes of this application, are to be found at CPR 47.1 and Practice Direction 47, paragraphs 1.1 to 1.4. CPR 47.1 reads:

“The general rule is that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the conclusion of the proceedings, but the court may order them to be assessed immediately.

(Practice Direction 47 gives further guidance about when proceedings are concluded for the purpose of this rule.)”
7. The Practice Direction says:

“1.1 For the purposes of rule 47.1, proceedings are concluded when the court has finally determined the matters in issue in the claim, whether or not there is an appeal, or made an award of provisional damages under Part 41.

1.2 The court may order or the parties may agree in writing that, although the proceedings are continuing, they will nevertheless be treated as concluded.

1.3 A party who is served with a notice of commencement (see paragraph 5.2 below) may apply to a costs judge or a District Judge to determine whether the party who served it is entitled to commence detailed assessment proceedings. On hearing such an application the orders which the court may make include: an order allowing the detailed assessment proceedings to continue, or an order setting aside the notice of commencement.

1.4 A costs judge or a District Judge may make an order allowing detailed assessment proceedings to be commenced where there is no realistic prospect of the claim continuing.”

8. CPR 47.1 and paragraph 1 of Practice Direction 47, self-evidently, stand to be read together. For the sake of brevity, I shall (except where the context requires me to do otherwise) use CPR 47.1 as a shorthand for both.
9. On 27 October 2014 I made a finding to the effect that there had been no agreement in writing between the parties to the effect that although the substantive proceedings were continuing, they would nevertheless be treated as concluded. The purpose of this judgment is to address submissions made by the Claimant to the effect that, even absent such an agreement, the Claimant is entitled to commence detailed assessment proceedings on the liability issue, the authority for assessment being the order of 11 January 2021.
10. I am grateful to both parties’ representatives for their careful and detailed submissions on the point.

Submissions

11. The Claimant contends that for the purposes of CPR 47.1, the order of 11 January 2021 was a final order determining the matters in issue in the claim. In that respect the Claimant relies upon the doctrine of merger, as recently considered in *Zavarco Plc v Tan Sri Syed Mohd Yusof Bin Tun Syed Nasir* [2021] EWCA Civ 1217, and as applied by Morritt J in a pre-CPR case: *Molnycke AB and Another v. Procter & Gamble Ltd and Others* (No. 6) [1993] F.S.R. 154 (“*Molnycke*”).
12. The *Molnycke* judgment followed a five-week trial by Morritt J of a claim for patent infringement, judgment for the plaintiffs and an order in March 1992 providing, among other things, for an injunction to prevent further infringement by the defendants; an inquiry as to the damages suffered by the plaintiffs by reason of the infringement; an order for the defendants to pay to the plaintiffs all sums, including interest, certified to be due on the taking of such enquiries; and an order for the defendants to pay the plaintiffs’ costs, with no provision for immediate assessment.
13. The question was whether the plaintiffs were entitled immediately to proceed to the detailed assessment of the costs of the proceedings to March 1992, or whether that assessment should await the outcome of the inquiry. The pertinent provision at the time was in the old Rules of the Supreme Court, at RSC Order 62, rule 8:

“(1) Subject to paragraph (2), the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise.

(2) If it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may, except in a case to which paragraph (3) applies, order accordingly.”

14. Morritt J was of the view that the plaintiffs were entitled to proceed to detailed assessment:

“The original cause of action of the plaintiffs, which was raised by the writ and pursued by them to judgment, as I understand the law, merged in the judgment, subject of course to any successful appeal, that I gave in February last.

The liability under the accounts and enquiries and the obligation to pay sums due as found by those accounts and enquiries arises under the judgment into which the original cause of action had merged. It may well be and it is the case that the reference number relevant to the enquiries will be the same as that which appears on the writ which started the action. But it seems to me that the cause or matter, namely, the activation of the jurisdiction of the court to establish the plaintiffs’ cause of action was concluded for this purpose by the judgment that I gave in February last, notwithstanding that under that judgment there are certain enquiries and costs of those enquiries reserved to future hearings.”

15. The Claimant argues that that is precisely the position here. The “proceedings” to 11 January 2021 have concluded because the matters in issue (those arising out of the Claimant’s original cause of action) have been finally determined. The proceedings under way now are based upon the judgment obtained by the Claimant and the original claim has been superseded by that judgment.
16. The Claimant also argues that the words “finally determined” at paragraph 1.1 of Practice Direction 47 are analogous to the words “final decision”, and “final” means nothing more than not interim or interlocutory (like the interlocutory appeal in *Khaira v Shergill*). It does not mean “last” or “ultimate”.
17. In that respect the Claimant relies upon the definition of a “final order”, for the purposes of determining the correct route of appeal under the (now superseded) Access to Justice 1999 (Destination of Appeals) Order 2000, as adopted by Lord Justice Brooke in *Tanfern Ltd. v Cameron-Macdonald and Anor* [2000] 1 W.L.R. 1311:

“For this purpose a final decision is one that would finally determine the entire proceedings, subject to any possible appeal or detailed assessment of costs, whichever way the court decided the issues before it: article 1(2)(c) of the Order of 2000. A final decision includes the assessment of damages or any other final decision where it is ‘made at the conclusion of part of a hearing or trial which has been split up into parts and would, if made at the conclusion of that hearing or trial, be a final decision:’ article 1(3) of the

Order of 2000; it does not include a decision only on costs. This means that if a judge makes a final decision on any aspect of a claim, such as limitation, or on part of a claim which has been directed to be heard separately, this is a final decision within the meaning of this provision.”

18. The order of 11 January 2021 is accordingly, says the Claimant, a final order, which could only be overturned by an appeal.

Conclusions

19. I am unable to accept the Claimant’s submissions, for the following reasons.
20. The first is that a review of pre-CPR authority demonstrates that even if RSC Order 62, rule 8 still applied, the Claimant would not have been in a position to rely upon *Molnycke* to justify starting detailed assessment proceedings at this point.
21. Mr McPherson for the Claimant has very properly included in a bundle prepared for the hearing of this application a case report which is not helpful to the Claimant, but which is of assistance to this court. That is the judgment of Master Campbell in *Bottin (International) Investments Ltd v Venson Group Plc* [2005] EWHC 90005 (Costs), in which he concluded that under the CPR, the costs of preliminary issues could not be assessed immediately absent an order to that effect.
22. At paragraph 21 of his judgment Master Campbell contrasted *Molnycke* with general pre-CPR practice exemplified by the judgment of the Court of Appeal in *Industrie Chimiche Italia Centrale & Anor v Alexandra G. Tsavlis Maritime Co. & Ors* [1992] 7 WLUK 182 (“*Industrie*”). Master Campbell cited *Industrie* as authority for the proposition that under Order 62 rule 8(1), absent a specific order for an earlier assessment, the costs on a trial of preliminary issues did not fall to be assessed until “the conclusion of the cause or matter” as a whole.
23. I entirely agree with Master Campbell in that respect. In *Industrie*, as to the appropriate application of RSC Order 62, rule 8, Lord Justice Parker said this:
- “On the face of... “(RSC Order 62, rule 8) “... it appears to me that in the case of a preliminary issue it is a proceeding in the course of a cause or matter and accordingly that, absent a specific order for an earlier taxation, taxation does not take place until the conclusion of the cause or matter.”
24. Unlike *Molnycke* (which seems to have turned on its particular facts, including the nature of the proceedings and the remedies ordered), if it were not a pre-CPR case *Industrie* would, on the facts of this case, be directly on point and unlike *Molnycke* it bears the authority of the Court of Appeal. To my mind it demonstrates that the doctrine of merger has never determined the timing of the assessment of the costs of a preliminary issue. On the contrary, under RSC Order 62, rule 8 the Claimant’s position would have been untenable.
25. This takes me to my second reason for rejecting the Claimant’s submissions. *Molnycke* is a pre-CPR case. CPR 47.1 and paragraph 1 of Practice Direction 47 are worded differently from RSC Order 62, rule 8, in particular in referring to “the claim” rather than “the cause or matter”, the wording considered Morritt J in *Molnycke*.

26. I do not believe that I have heard any submissions on the definition of the word “claim” under the CPR. Generally, the term appears to encompass a claim (or counterclaim) for any remedy. As far as I can see, the most useful definitions for present purposes are at CPR 2.3:
- “‘claimant’ means a person who makes a claim...
- ‘claim for personal injuries’ means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person’s death, and ‘personal injuries’ includes any disease and any impairment of a person’s physical or mental condition.”
27. On normal principles of interpretation, one would understand that by reference to those words that for the purposes of the CPR, before and after 11 January 2021 the Claimant has been pursuing one “claim”, not two different claims. Master Cook’s order of 11 November 2021 to the effect that “The Claim remains allocated to the Multi -Track”, is consistent with that. So for that matter is of use of the words “preliminary issues” in the order of 6 February 2019. Liability and causation could not properly be defined as “preliminary issues” if, once established, they necessarily brought the original claim to an end.
28. As Mr Petrecz for the Defendant points out, this is a personal injury claim where breach of duty, causation and the quantification of damages will all have been essential elements of the Claimant’s pleaded case from the outset. The order of 21 January 2021 determined some of the matters in issue in this claim, but not all of them. There are still enough issues to be determined on the Claimant’s pleaded case to merit a 10-day trial estimate. They include the quantification of damages; the determination of whether the award should take the form of a single payment or periodical payments; and potentially, the approval of a settlement under the provisions of CPR 21.
29. The alternative proposition, that the establishment of liability and the quantification of a claim for damages do not, for the purposes of the CPR, form part of the same “claim”, would accordingly be highly dubious even if there were not clear and unequivocal authority on the appropriate application of CPR 47.1 which, to my mind, shows that the Claimant’s position is unsustainable. The doctrine of merger (insofar as it might have any application to the determination of a preliminary issue, which for the reasons I have given seems doubtful) cannot override the provisions of the CPR, and the Claimant’s attempted use of that doctrine runs directly contrary, in my view, to that established authority.
30. The Claimant submits that such authority as there is, is confined to the costs of interlocutory appeals. In my view, a full reading of the relevant authorities demonstrates that that is not correct. They do deal with the costs of interlocutory appeals, but only because of a tendency by receiving parties to treat such appeals as separate proceedings for assessment purposes. The principles which they espouse are however of general application.
31. In *Crystal Decisions (UK) Ltd v Vedatech Corporation* [2007] EWHC 1062 (Ch) (“*Crystal*”) Mr Justice Patten (as he then was) addressed an appeal against an order of Master Campbell. The order concerned the costs of the defendants’ unsuccessful applications to the Court of Appeal for permission to appeal against orders made by

Pumfrey J. The Court of Appeal had ordered the defendants to pay the costs of the applications but had not ordered an immediate assessment.

32. The claimants applied to Master Campbell for an immediate assessment of those costs. He held that they were entitled to it, because the orders of Pumfrey J had directed an immediate assessment and the Court of Appeal had simply refused permission to appeal against those orders.
33. Patten J, having considered the provisions of CPR 47.1 and paragraph 1 of Practice Direction 47 reproduced above, said this at paragraph 77 of his judgment (the emphasis in bold text is mine):

"It seems to me that the correct starting point is to look at the terms of the costs order made by the Court of Appeal. That was not an order for the immediate assessment of costs and the fact that it dealt with an application for permission from an order which did include a direction for immediate assessment, does not alter the terms of the Court of Appeal's own order. The Master approached the matter on the basis that the Court of Appeal's order brought to an end one aspect of the proceedings: i.e. the issue about the grant of the anti-suit injunction. This is also correct, but **the purpose of CPR 47.1 is to lay down a general rule that the costs of part of the proceedings are not to be assessed until the conclusion of the proceedings as a whole unless the Court orders them to be assessed immediately**, which the Court of Appeal did not. The order made by the Court of Appeal is therefore governed by this general rule and although it would have been open to the Court of Appeal to order an immediate assessment... it did not do so. Master Campbell's decision on this point effectively re-writes CPR 47.1 and cannot stand."

34. In *Khaira v Shergill* [2017] EWCA Civ 1687 Lord Justice David Richards cited the above passage from the judgment of Patten J, along with the judgment of Mr Justice Hamblen in *GB Gas Holdings Ltd v Accenture (UK) Ltd* [2010] EWHC 2928 (Comm), in support of the Court of Appeal's conclusion to the effect that if no order is made for the immediate assessment of the costs of an interlocutory appeal, those costs cannot be assessed until the conclusion of the substantive proceedings.
35. As to the appropriate reading of CPR 47.1 David Richards LJ said, at paragraph 39 of his judgment:

"It is necessary to look carefully at the terms of CPR 47.1, read with paragraph 1.1 of 47PD which is expressly incorporated as "further guidance about when proceedings are concluded for the purpose of this rule". Read together, they provide that "the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the court has finally determined the matters in issue in the claim, whether or not there is an appeal". The matters in issue in the claim are not finally determined until the court at first instance has finally ruled on them, but once it has done so the proceedings are for these purposes concluded even if there is an appeal."

36. The claimant (the receiving party) in *Khaira v Shergill* submitted that, on the authority of *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2012] EWCA Civ 987, the appeal proceedings could be treated as separate from the proceedings at first instance, so that the effect of CPR 47.1 was to entitle the claimant to an immediate assessment of the appeal costs without any specific order to that effect.
37. That submission was rejected, because (to paraphrase in rather broad terms the detailed analysis undertaken by David Richards LJ) the judgment in *Hawksford* did not address the appropriate reading of CPR 47.1; it established rather that the meaning of "proceedings" depends on the terms, context and purpose of the provision in which it appears; and CPR 47.1 refers to "proceedings" without qualification (other than to exclude an appeal from a final order determining the matters in issue in the claim).
38. *Crystal* and *Khaira v Shergill*, both of which are binding on me, set out two clear principles. The first is that (as Patten J put it in *Crystal*) the purpose of CPR 47.1 is to lay down a general rule that the costs of part of the proceedings are not to be assessed until the conclusion of the proceedings as a whole (unless the Court orders them to be assessed immediately). As I have observed that principle is not confined to interlocutory appeals but is, expressly, of general application.
39. The second principle (*Khaira v Shergill*) is that *Hawksford* notwithstanding, appeals are not separate proceedings for the purposes of CPR 47.1, and so do not furnish an exception to that general rule. For present purposes it is important to bear in mind that that particular finding of David Richards LJ is based upon the fact that CPR 47.1 refers to "proceedings" without qualification, so that even an interlocutory appeal before a different court merely represents one part of the overall proceedings for the purposes of that rule.
40. It must follow that under CPR 47.1, where a claimant succeeds on preliminary issues of liability and causation and the claim then moves on to the quantification of damages, the preliminary issue, for the purposes of CPR 47.1, also represents one part of the overall proceedings, just as it would have done (on the authority of *Industrie*) under the old Rules of the Supreme Court.
41. It also necessarily follows that as the proceedings between the Claimant and the Defendant in the Queen's Bench Division are continuing (quite possibly into 2023), absent an order for immediate detailed assessment of the Claimant's costs of establishing liability the Claimant cannot yet commence detailed assessment proceedings in respect of those costs.
42. *Tanfern Ltd. v Cameron-Macdonald and Anor* has no bearing on any of this. The judgment of Brooke LJ in that case addressed the meaning of the word "final" in regulations that employed that term only for the purpose of determining routes of appeal. It cannot assist in the interpretation of CPR 47.1.
43. I should add (although I believe that it is not in issue for present purposes) that in *Kharia v Shergill* David Richards LJ, again approving the line previously taken by Patten J and Hamblen J, found that paragraph 1.3 of Practice Direction 47 does not confer upon a Costs Judge the power to make an order for immediate assessment. That power lies with the court that makes the order for costs. Paragraphs 1.3 and 1.4 of Practice Direction 47 between them confer on a Cost Judge, as David Richards LJ put it, "only

a very limited power to order the commencement of assessment proceedings where there is no realistic prospect of the claim continuing”.

44. For those reasons, the Claimant’s notice of commencement dated 13 August 2021 must be set aside.

Observations

45. For the reasons I have given, the position both under the CPR (and, previously, under the Rules of the Supreme Court) is that, absent an order for immediate detailed assessment, the costs of a preliminary issue cannot be assessed until the proceedings as a whole have concluded.
46. It is, nonetheless, not uncommon for receiving parties in such cases to commence detailed assessment proceedings, or even for paying parties to serve Points of Dispute, without realising that under CPR 47.1, detailed assessment is premature because all the matters in issue in the proceedings have not yet been determined.
47. I am aware that both parties in this case corresponded over a period of months on the mutual understanding that the Claimant could proceed immediately to the detailed assessment of the costs of the liability issue. As I have said, such mutual misunderstandings are quite common.
48. I will not restate here my reasons for concluding, on 27 October 2021, that the Claimant is not in a position to elevate that correspondence to the status of a written agreement meeting the requirements of Practice Direction 47 paragraph 1.2 (other than to observe that on the Claimant’s case, parties would be able to disapply CPR 47.1 simply by being unaware of it).
49. I will only say, with apologies for perhaps stating the obvious, that the default position being that interest will accrue upon the Claimant’s unpaid liability costs at 8% per annum, it might be to the parties’ mutual advantage to use the work done to date in an effort to settle what would appear to be a substantial claim for costs.