



Neutral Citation Number: [2021] EWHC 1670 (QB)

Case No: QA-2020-000233

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/06/2021

Before :

THE HONOURABLE MR JUSTICE CALVER

Between :

ALAN MOUTARDE

**Appellant/
Claimant**

- and -

**(1) SIG LOGISTICS
(2) TRANSPLASTIX**

**Respondents/
Defendants**

Andrew Hogan (instructed by **Hodge Jones & Allen Solicitors**) for the **Appellant/Claimant
Respondents/Defendants** did not attend and was not represented.

Hearing date: 18 June 2021

APPROVED JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 18 June 2021 at 12:30 pm

Mr Justice Calver :

Introduction

1. This is the hearing of a renewed oral application for permission to appeal against a decision of Master Rowley made on 17th November 2020 in the Senior Courts Costs Office that the Applicant/Appellant (the Appellant) was only entitled to recover a 27.5% success fee rather than a 100% success fee on the costs incurred by him in respect of his pursuit of a personal injury claim for damages for mesothelioma. Mr. Justice Johnson refused the application on paper by order dated 26 April 2021.
2. There are two grounds of appeal as follows:
 - a) The Master erred in law in his construction of former rules 45.15, 45.23 and 45.24 CPR in determining what was a “*final contested hearing*” or “*trial*” for the purpose of determining the applicable success fee and his decision was accordingly wrong.
 - b) The Master erred in law in his application of former rules 45.15, 45.23 and 45.24 CPR to the facts of this case in finding that a dispute about the costs Order to be made on the claim that was determined at a hearing did not fall within the scope of a “*final contested hearing*” or “*trial*” and his decision was accordingly wrong.

The relevant legal provisions

3. The relevant rules governing the issue at the heart of this application are contained in section V of former part 45 of the CPR, in particular the following:

“V FIXED RECOVERABLE SUCCESS FEES IN EMPLOYER’S LIABILITY DISEASE CLAIMS

45.23 Scope and Interpretation

(1) Subject to paragraph (2), this Section applies where –

(a) the dispute is between an employee (or, if the employee is deceased, the employee’s estate or dependants) and his employer (or a person alleged to be liable for the employer’s alleged breach of statutory or common law duties of care); and

(b) the dispute relates to a disease with which the employee is diagnosed that is alleged to have been contracted as a consequence of the employer’s alleged breach of statutory or common law duties of care in the course of the employee’s employment; and

(c) the claimant has entered into a funding arrangement of a type specified in rule 43.2(1)(k)(i).

...

(3) For the purposes of this Section – (a) rule 45.15(6) applies...

45.15(6) In this Section – ... (b) a reference to ‘trial’ is a reference to the final contested hearing or to the contested hearing of any issue ordered to be tried separately;

(c) a reference to a claim concluding at trial is a reference to a claim concluding by settlement after the trial has commenced or by judgment;

45.24 Percentage increase of solicitors' fees

(1) In the cases to which this Section applies, subject to rule 45.26, the percentage increase which is to be allowed in relation to solicitors' fees is –

(a) 100% if the claim concludes at trial; or

(b) where –

(i) the claim concludes before a trial has commenced; or

(ii) the dispute is settled before a claim is issued, to be determined by rule 45.24(2).

(2) Where rule 45.24(1)(b) applies, the percentage increase which is to be allowed in relation to solicitors' fees is –

(a) in type A claims –

(i) 30% if a membership organisation has undertaken to meet the claimant's liabilities for legal costs in accordance with section 30 of the Access to Justice Act 1999; and

(ii) 27.5% in any other case..."

Factual background

4. The facts of the case may be shortly stated and are as follows.
5. The Appellant contracted mesothelioma because of exposure to asbestos dust in the 1970s when employed by the Respondents' predecessor in title. He became symptomatic in March/April 2018 and he instructed solicitors. Proceedings were issued by him against the Defendants in the High Court in April 2019.
6. The parties agreed directions and a listed CMC was vacated. By Order of Master Gidden, sealed I am told on 16th July 2019, Judgment was entered in favour of the Claimant on the issue of liability for a sum to be assessed by the Court and the Defendants were to make interim payments of damages in the sum of £50,000 and of costs in the sum of £20,000 by 1 August 2019.
7. The matter was listed for an assessment of damages hearing on 23rd January 2020. The hearing was attended by junior counsel for the Appellant Ms Akram and leading counsel for the Respondents, Ms Adams QC. The assigned judge was Mr. Justice Stewart.
8. There were negotiations towards the assessment of damages hearing date which ran late up to the night before the hearing and indeed carried on outside court until 20 minutes before the hearing, particularly over an issue of immunotherapy treatment. By the time the parties appeared before Stewart J, they had agreed on everything save for the costs of attendance that day. The transcript records that the Claimant's counsel told the judge:

“We have been able to come to an agreement on almost every point in front of you this morning, so we are hoping we will not detain you very long. We have agreed an order in the form of a front page order with a Tomlin schedule behind. My learned friend has the agreed copy. So in fact today we ask for you to approve the order which has been agreed between the parties. There is one small point of dispute, i.e. the costs of today which perhaps we can get to in a moment if you are satisfied.”

9. Stewart J refused the Defendant’s application for the costs of the hearing. He had made his views clear during the course of argument (finding that the Defendant had made no clear offer of settlement which had been refused by the Claimant) and so felt there was no need to expand upon those views with a further reasoned judgment. He said:

“So the application for today’s costs by the defendant is refused. So essentially the Tomlin order stays as it is, does it not? Because that provides for the defendant to pay the claimant’s costs. So subject to being tidied up there is nothing else I need to do, is there?”

“No? Thank you very much.”

10. The draft Tomlin order which was before the Court (and agreed before the hearing) provided for the Claimant’s costs to be paid by the Defendant. The Defendant’s discrete application for the costs of the day (“*the costs question*”) had been refused, and so the parties’ draft which they had agreed before the hearing came into effect.

Master Rowley’s judgment

11. Against this factual background Master Rowley was asked to rule upon the issue as to whether the claim concluded at trial or concluded before a trial commenced in order to determine the level of the success fee which the Appellant could recover. The Master held the costs question was not a contested issue that was sufficient to consider the case to be concluded at trial. He considered that the case had already concluded for the purposes of the old CPR 45 for the following reasons:

“i) My understanding of the purpose of the success fee scheme was that the 100% was reserved for those cases which reached a fully contested hearing where the case might lose and therefore the success fee was at risk. That is clearly the case on liability and in causation in many such disease cases. It is not as simple as that in relation to quantum, I appreciate, but the essence of it is that the claimant is at some risk of losing, and that is why the increased success fee appears there.

ii) There seems to me to be a distinct difference between a separate hearing for liability or quantum that is contemplated by the Rules as a split trial, and a contested hearing in relation to costs. Where the parties have reached an agreement in respect of everything else but the costs themselves, a separate hearing of the nature described by the Rule simply would not apply. The claimant would have succeeded on the CFA, and it seems to me that arguments as to the incidence of costs would not be of the same ilk as a liability or causation or quantum trial.

- iii) An order for costs is required in principle at the end of every hearing. It was accepted that quantification would not be enough to make the hearing a trial. Whilst I accept that there is a difference between quantification and the incidence of costs, it does not seem to me that the making of an order for costs, just because an order is required in the hearing in every case, makes it a contested issue in the manner of a trial.”

12. He added that:

“if there had been agreement on the immunotherapy treatment, the parties would have sought to vacate the hearing and costs of attendance would not have been incurred. It was not that there was some risk imperilling the costs to the claimant in the way of a contested hearing. So, in my view the question of costs is not sufficient to be a contested issue in itself. But if that is not right, then it seems to me that on the facts of this particular case it is not sufficient anyway, because it does not seem to me that the costs are contested in any manner that is sufficient. The only question of costs was the costs of the day itself, not the costs of the proceedings overall. It is no more, it seems to me, than a very minor order that was being sought by the defendant in comparison with the costs of the proceedings as a whole. Therefore, on the facts of this case, I do not think that it was a contested issue such as to require me to consider that the case had concluded at trial under the terms of the old CPR, even if it is possible in principle for the incidence of costs to be something that could conclude at trial in the way prescribed by the rules.”

Appellant’s submissions

13. Mr. Andrew Hogan of counsel, who appears before me on this application, submits that the key question for the court to resolve is whether a final contested hearing had commenced on the 23rd January 2020, with the claim then concluding after that point had been reached.
14. He relies upon an obiter remark of Wilson LJ in *Thenga v Quinn* [2009] EWCA Civ 151, which was itself an application for permission to appeal, as follows:
- “18. My view is that it is plain beyond serious argument that, in drafting Rule 45.15(6)(b), the rule-makers have not thrown the conventional notion of a “trial” to the winds; and that the “final contested hearing” relates to the substantive claim, albeit (probably and as the circuit judge appears to have concluded) including a hearing referable to a disputed claim for an award of costs in principle, i.e. subject to quantification. In this conclusion I feel no need for fortification but I find it nevertheless in the definition of a “trial period” in Rule 45.15(6)(d), viz “a period of time fixed by the court within which the trial is to take place”. As I suggested to Mr Ralph in the course of our dialogue, the courts do not fix periods of time within which summary assessments are to take place.” (emphasis added)
15. In the case of *Loizou v Gordon and another* (Master Leonard SCCO 21st August 2012), after considering *Thenga* and a further High Court case of *Amin and Hussain v Mullings and Royal Sun Alliance* [2011] EWHC 278 (QB), the Master concluded:

“41. To my mind the most significant distinction between this case and Gandy, Thenga, Dahele, Sitapuria and Amin is that when on 21st July 2011, the liability trial open all issues, including the substantive issues of liability and damage between the parties to this assessment were still (not having been settled) contested.

42. The Claimant’s counsel properly opened, albeit briefly, and equally properly gave way to the First Defendant’s application to adjourn. That was swiftly followed by a short adjournment before the First Defendant capitulated. The question is whether in those circumstances, a contested hearing commenced by reference to CPR 45.15(6)(b) and (c) and CPR 45.16. In my view it did, for these reasons.

43. The above provisions, read together as they must be, refer to the commencement of the substantive hearing of an issue or issues that, not having settled, are still contested. They do not refer to the stage that the hearing has reached.”

16. The more recent authority of *James v Ireland* [2015] EWHC 3 Costs LR 511 reiterates the point that the mere fact that the case is called on is not determinative. What matters is what then happens and the nature of the hearing: is it the trial or case management antecedent to a later trial? At [40] the Court stated:

“The 100% percentage increase is payable when a settlement is reached after the commencement of the final contested hearing, or in this case, contested hearing of the liability issue. It is not triggered by the commencement of any hearing of whatever nature related to the contested liability hearing. In this case there may be hearings before the start of the contested hearing of the liability issue to deal with evidence and other case management matters. Whilst the hearing before Mr Justice Griffith Williams which started after his judgment on the adjournment of the quantum issue was related to the trial of the liability issue, it was to put back the start of the hearing of that issue and then to take it out of the list. The hearing which took place from the afternoon of 8 June and on 9 June 2011 was not the contested hearing of the liability issue within the meaning of CPR 45.15(6)(b). ... In my judgment Master Campbell erred in treating the start of a hearing related to the liability issue concerned with when the trial would start as the start of the contested hearing of that issue.”

Discussion

17. In my judgment the Master was right to hold in this case that the applicant was only entitled to recover a 27.5% success fee for essentially two reasons, and I reject both grounds of appeal.
18. First, the applicant is only entitled to a 100% success fee “*if the claim concludes at trial*” and not if it concludes before the trial has commenced. The CPR makes clear that the reference to “*trial*” is a reference to the final contested hearing and a reference to a claim concluding at trial is a reference to a claim concluding by settlement after the trial has commenced or by judgment. The first question which arises therefore is what is “*the claim*” for the purposes of CPR 45.24(1)?
19. In my judgment, the relevant claim in this case, for the purposes of CPR 45.24(1), is a claim for damages for breach of duty. The elements of that claim were (a) that the defendant owed the claimant a duty; (b) it breached that duty and (c) that caused the Claimant to suffer specified loss. If the Claimant succeeded in establishing those

elements of its claim at trial, he would in principle be entitled to his costs. If he did not, he would in principle not be so entitled. But “*the claim*” for the purposes of CPR 45.24(1) is not a claim for costs. It is the substantive claim.

20. Indeed, were it otherwise it would potentially lead to absurd consequences: a party could obtain a 100% success fee if any small dispute about costs remained outstanding despite the parties having agreed all substantive terms of the settlement of the claim. The Claimant’s construction of CPR 45.24(1) would encourage a claimant to settle the claim but to separately require a small costs dispute to be resolved thereafter in order to trigger the 100% success fee. As the Master noted in this case, the increased success fee (100% compared to 27.5%) no doubt recognises that if a claimant’s claim concludes at trial, he has borne a significant risk of losing and he is to be compensated for that fact. The Claimant’s contention in this case would wholly undermine that rationale.
21. In this case, as the Tomlin order shows, the parties had agreed all aspects of the claim for damages before the hearing began before Stewart J. Liability and quantum had been agreed, including that the Defendants would pay the costs of the action on the standard basis to be subject to detailed assessment if not agreed. The parties had also recognised and agreed that in respect of the claim, that is the claim for damages arising out of the Claimant’s employers’ liability for the disease, the Defendant should pay the costs of the action. The Court then gave effect to that agreement. The claim had therefore already concluded before the trial. There was no final contested hearing before Mr. Justice Stewart in respect of the claim.
22. The reference to “*trial*” in CPR 45.15(6)(b) is said to be a reference to the final contested hearing of the claim. It is not concerned with a dispute about costs; it is concerned with the final contested hearing leading to a judgment on the claim for damages for breach of duty.
23. In so far as Wilson LJ was suggesting, *obiter*, something different in *Thenga v Quinn*, I respectfully disagree. That stated, I observe that the learned judge himself stated that the “*final contested hearing*” relates to the substantive claim, before tentatively adding “*albeit...probably including a hearing referable to a disputed claim for an award of costs in principle*” (emphasis added).
24. Second and in any event, the only discrete issue which the court determined at the hearing before Mr. Justice Stewart was that the Claimant should not have to pay the costs of that short hearing – which, because of the prior settlement, became an uncontested hearing intended to give effect to the Parties’ settlement agreement – by reason (it was said) of the Claimant having acted unreasonably in finalising that settlement. If the court had so ordered, it would still have awarded the Claimant the costs of the action (which had been agreed) and given effect to the Tomlin Order in the schedule to the Order, save that it would have added as a term of its order that “*the separate costs of today’s hearing shall be paid by the Claimant to the Defendants*”. Those would not have been the costs of the claim which the parties had already agreed before the hearing were for the Defendants’ account; they would have been additional or wasted costs which had been incurred by reason of the Claimant’s separate, unreasonable behaviour in its conclusion of the settlement agreement. It cannot sensibly be said that such a discrete finding on this element of costs transforms “*the claim*” from one which was settled before the trial commenced into a claim which was concluded at trial.

25. As Mrs Justice Slade stated in *James v Ireland*, the 100% percentage increase is payable when a settlement is reached after the commencement of the final contested hearing (in that case on liability, but it could equally be the contested assessment of damages hearing). It is not triggered by the commencement of *any* hearing of whatever nature *related to* the final contested liability or assessment of damages hearing. Indeed, in this case it is arguably not even *related to* a final contested hearing of *the claim*, whether as to liability or damages.
26. In the circumstances, despite the attractive submissions of Mr. Hogan, like Mr. Justice Johnson (who refused permission on paper) I do not consider that there is a real prospect of the Claimant establishing that the Master was wrong to determine the issue in the way that he did and accordingly I dismiss this application.