Bateman v Devon CC (HHJ Mitchell, Plymouth CC, 2nd September 2019) [1]

Falling in between the portals

The claim

The facts of the case were straightforward. The Claimant was riding his motorcycle along a road for which the Local Authority were responsible when he fell and injured himself as a result of a pothole. A claim was brought against the Local Authority. Liability was denied, but after proceedings were served the case settled for a sum of £800.

The dispute

There was a dispute as to the costs because the Claimant did not submit the matter through either the 'RTA protocol' or through the 'EL/PL protocol'. The reasoning was that on a strict interpretation of those protocols, the claim fell into neither.

The rules

It was agreed between the parties that the RTA protocol did not apply. It did not apply because as per paragraph 4.5 (1), the protocol did not apply to a claim:

In respect of a breach of duty owed to a road user ***by a person who is not a road user.***

The Local Authority was not a road user, and so it followed that that protocol did not apply.

It was submitted that the EL/PL protocol could not apply either. Paragraph 4.3 (11) excluded claims:

…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).***

[1] James Bentley acted for the successful Claimant

Paragraph 1.1 (16) defines a road traffic accident as:

…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 Claimant's submission was simple. On a plain reading of paragraph 1.1 (16), this was a road traffic accident, since it 'arose out of use of a motor vehicle on a road in England and Wales'. Therefore, the EL/PL protocol did not apply. Since neither protocol applied, the costs should (it was submitted) be assessed.

The Defendant relied on the County Court case of *Master Prescott v The Trustees of the Pencarrow 2012 Maintenance Fund [2017] 6 WLUK 166* (hereon '*Prescott*'), submitting that the rules had to interpreted in a 'purposive manner' and to adopt the Claimant's position would produce an obvious absurdity. For example, if the Claimant were on a bicycle, there could be no dispute that the EL/PL protocol applied. In *Prescott* District Judge Richards, sitting in Plymouth County Court, accepted that conclusion.

In *Bateman* the Defendant added to that argument by further submitting that even if fixed costs did not apply directly (as per *Prescott*) they should apply indirectly (as per *Williams v secretary of State for Business, Energy and Industrial Strategy [2018] EWCA Civ 852*.)

Provisional assessment

At the provisional assessment DDJ Thomas decided both points in the Claimant's favour. Fixed costs did not apply. The Defendant requested an oral review of the assessment.

At that review DDJ Thomas decided that since the matter was likely to be appealed whichever way he decided, and since it went to an important matter of interpretation which (on the Defendant's submissions) would affect a number of claims, the matter should be tried by way of a preliminary issue by the DCJ in Plymouth - HHJ Mitchell.

Argument

C's argument

The Claimant submitted that *Prescott* (which was not binding in any event) was wrongly decided. When interpreting the protocols, one had to have regard to *Quader v Esure [2016] EWCA Civ 1109,* and the case relied upon in *Qader* - *Inco Europe Limited v First Choice Distribution [2000] 1 WLR 586.*

Inco established that when the Court that is asked to interpret legislation it must be assured of three matters before proceeding to interfere, namely:

a. The intended purpose of the statute or provision in question;

b. That by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question;

c. 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.

Furthermore, *Inco* requires that the Court should not merely be convinced of the above '*on the balance of probabilities'*, but instead must be *'abundantly sure'* that the intention contended for was in fact the intention of the legislator.

In *Bateman* (as should have been with *Prescott*) the Claimant submitted it is the '*Inco* criteria' that must be satisfied before any changes are made to legislation.

Those criteria not being satisfied, the Court could not interpret either of the protocols to limit the Claimant to fixed costs only.

As to whether or not fixed costs should apply indirectly, *Williams* applied fixed costs indirectly only by way of the 'Part 44 conduct' provisions. In that case there was conduct that provided the judge with 'the complete answer'. It was submitted that in contrast to *Williams* however, there was no conduct to criticise in this instance. Indeed, it could hardly be egregious conduct to follow the provisions of the protocols.

D's argument

In addition to the arguments made and accepted in ***Prescott***, the Defendant added a further argument.

The Defendant submitted that the EL/PL protocol clearly applied, since this was not a road traffic accident as defined within that (and the RTA) protocol. It was said that because the cause of the accident was not another vehicle, but was the defect in the road, the claim did not come within the definition *'of an accident caused by or arising out of the use of any motor vehicle.'* The Defendant relied upon the case of ***R and S Pilling t/a Phoenix Engineering (Respondent) v UK Insurance Ltd [2019] UKSC 16.*** That case concerned a fire in a vehicle in a garage. It was held that the fire did not arise out of the use of a vehicle, but the use of that vehicle was incidental.

Decision

HHJ Mitchell held that fixed costs did not apply.

- The phrase '*caused by or arising out of the use of any motor vehicle'* had been considered in a plethora of authorities, not least ***Dunthorne v Bentley [1999] Lloyd's Rep 560.***
- The mention of '*arising out of'* was clearly meant to denote a broader approach than simply '*caused by'.*
- Someone who is injured as a result of driving into a defect in the road denotes an accident that *'arises out of'* the use of the vehicle. There was a clear nexus between the two and therefore the exclusion within the EL/PL protocol applied.
- The Inco criteria was not satisfied.
- Firstly, it was not clear that the intended purpose of the protocols (as the Defendant had submitted) was for them to be 'all-encompassing'.
- Second, it could not be said that Parliament had inadvertently failed to give effect to that purpose. It was true that the Jackson report envisage fixed costs 'in all fast track cases' but that was not what had happened. Indeed, there were a number of considered exclusions deliberately made within both protocols.

- Third, there was no evidence as to what the precise wording or substance of any amendment to the EL/PL protocol was meant to be.
- As to the point about the indirect application of fixed costs, *Williams* was an entirely different case. That case considered conduct. There was no conduct in this case that could be criticised. Either the protocol applied or it did not.
- Costs should therefore be assessed in the usual way.

Summary

The case highlights that if parties wish to change the wording of secondary legislation such as the protocol(s) it must be able to satisfy the 'Inco criteria', as was done in Qader. As the Courts have repeated a number of times - a strict approach to interpretation should be taken when it comes to fixed costs.

Whilst still a County Court decision, *Bateman v Devon County Council* was decided by the DCJ in Plymouth and was a thoroughly argued case (skeleton arguments on both sides extended to well over 15 pages). It is therefore persuasive as an authority. Despite the decision potentially affecting a number of claims, the Defendant did not seek leave to appeal.

James Bentley

Guildhall Chambers