IN THE COUNTY COURT AT PLYMOUTH

Case No: D58YX915

The Law Courts
Armada Way
Plymouth
PL1 2ER

Monday, 2nd September 2019

Before:
HIS HONOUR JUDGE MITCHELL

B E T W E E N:

MR NICHOLAS BATEMAN

and

DEVON COUNTY COUNCIL

MR J BENTLEY appeared on behalf of the Claimant
MR P MADAN appeared on behalf of the Defendant

JUDGMENT
(Approved)

HHJ MITCHELL:

INTRODUCTION

1. This is the hearing of a preliminary point in the context of a detailed assessment of costs following the conclusion of a claim brought by Mr Nicholas Bateman against the Devon County Council for damages.

BACKGROUND

2. On 22 April 2016 the Claimant was riding his motorbike along Woolwell Road, Plymouth when he rode over an uneven defect in the road causing him to fall and sustain certain injuries as a result.
3. Following defence the claim, or indication of a defence, a Part 36 offer was made by the Claimant on 18 July 2017 for £1,500 which came to be accepted by the Defendant. The usual cost consequences then flowed from that acceptance at least in terms of liability to pay.
4. The Claimant subsequently submitted a bill of costs for service on the Defendant. In its response, the Defendant raised points of dispute, including, that this claim came within the scope of the Low Value Personal Injury Employer's Liability and Public Liability Claims Protocol – I will refer to that as the Public Liability Protocol in short – and therefore the fixed costs applied pursuant to CPR 45.29.
5. District Judge Skelton considered the bill and the points of dispute on paper on 18 October last and held provisionally on paper that the Public Liability Protocol did not apply.
6. In response, the Defendant requested an oral reconsideration about the fixed costs issue amongst others and the case came then before Deputy District Judge Thomas on 20 June of this year, who directed a listing before me of the following preliminary issue ,that is, whether the fixed costs regime at 45.29(iii)(a) applies to the claim directly as held in the case of *Master Logan Prescott v The Trustees of the Pencarrow 2012 Maintenance Fund* – (a decision at first instance by District Judge Richards as he then was) – or indirectly, by analogy with the Court of Appeal case *Williams v The Secretary of State for Business, Energy & Industrial Strategy* [2018] EWCA Civ 852.
7. That is the issue that comes before me.

THE ARGUEMENT

8. It is common ground in this case that the Road Traffic Act Protocol does not apply to the subject accident, the reason being that there are a number of exclusions to that protocol including at 4.5(1) in respect of a breach of duty or a claim arising in respect of a breach of duty owed to a road user by a person who is not a road user. In this instance, I interject that Devon County Council was not a road user in respect of this accident.
9. The Public Liability Protocol also has exclusions.
10. Those include at paragraph 4.3(ii) damages arising out of a road traffic accident and that road traffic accident is as defined in paragraph 1.1(16) of the Road Traffic Act Protocol. The definition of a road traffic accident at paragraph 1.1 of the Road Traffic Act Protocol is 'An accident resulting in bodily injury to any person caused by or arising out of the use of any motor vehicle on a road'. The definition continues, but for purposes which are not consequential in this instance.
11. In very broad terms, the claimant says that the wording of the Public Liability Protocol is clear, and leaves no room for ambiguity. It simply does not apply and the fixed costs regime therefore has no application.

12. The Defendant, on the other hand, has argued that the Public Law Protocol should be read and construed in a purposive way such that fixed costs should be applied to this claim.

13. Alternatively, fixed costs should be indirectly applied by use of CPR 44.4 which contains matters the Court has to have regard to in dealing with costs, including conduct of the parties.

13. In essence, this is a conflict between two different approaches to interpretation: the strict approach by the Claimant and the purposive approach by the Defendant. Certainly that has been the position until today.

14. The position of the defendant today – and it has followed the need for a change of counsel because counsel Mr Roy who settled the original skeleton argument was not available so counsel Mr Madan has come on board – has been put slightly differently, or perhaps I should say there is an additional aspect that has been raised in support of the Defendant's case.

15. Until today, no issue had been taken that, at least on a literal interpretation, this claim appeared to have been excluded from the Public Law Protocol. That is no longer the position adopted by the Defendant, who says that even on a plain reading of the exception and the definition of a road traffic accident that in fact one could read that as meaning that the Protocol applies.

DECISION

The first point that I must address, by way of the Defendant's revised submission, is that in fact the road traffic exception from the Public Liability Protocol does not apply to this case.

16. The basis on which that argument is made is that it is said that the cause of the accident was not another vehicle, but a defect in the road so it is argued that the claim does not come within the definition of an accident caused by or arising out of the use of any motor vehicle. In other words, it is argued that there is no sufficient causal connection between the accident on the one hand and the use of a vehicle on the other hand; that the use of a vehicle was simply part of the background circumstances.

17. I have to say, whilst initially considering that argument as it was being developed I was tempted to agree with it, in the sense that that approach would introduce congruity in the approaches between the two protocols.

18. In developing the argument, I have been referred to a recent Supreme Court case of *R&S Pilling t/a Phoenix Engineering (Respondent) v UK Insurance Ltd* [2019] UKSC 16. That case considered a similar phrase in terms of use or arising out of the use of a vehicle for the purposes of Section 145(3) of the Road Traffic Act 1988. That was the case of a fire in a vehicle in a garage, and it was held that that did not arise out of the use of a vehicle but the use of the vehicle was incidental.

19. It is plain from some consideration of that authority – and there has not been a great deal of time this afternoon to consider it in detail – but it is plain from even a relatively cursory examination of that authority, that the phrase in question has been considered in a plethora of cases down the years, including reference to the case of *Dunthorne v Bentley* [1999] Lloyd's Rep 560 at paragraph 44 where a motorist who was run down crossing the road, having run out of petrol, those circumstances still came within the definition of arising out of the use of a vehicle.

20. If the definition in the Road Traffic Act Protocol was injury caused by the use of a car then that would point to the definition not applying in this instance. However, it is important to my mind that the phrase being considered extends to 'arising out of', not simply 'caused by' and to my mind it is right to say that that denotes a broader approach.

21. It seems to me, standing back, that a person who drives into a defect in the road: that denotes an accident that arises out of the use of a vehicle. There is a clear nexus between

the use and the incident so to my mind, on the face of it, the exclusion of the Public Liability Protocol at paragraph 4.3(11) does apply.

22. That leads me then to consider the purposive approach to interpretation of the exclusion, in other words the case put by the Defendant in the skeleton argument and, indeed, in the original skeleton argument of the same counsel in the Pencarrow case.

23. The Defendant's case, in a nutshell, is that the basic policy objective has been to apply fixed costs to Road Traffic Accident and Public Liability claims of this nature, that the exception should be considered in the light that the Road Traffic Act Protocol was drafted first and that the Public Liability Protocol came later and, in many respects, was drafted onto the earlier protocol and inadvertently a loophole has been missed that was not intended because such would be contrary to the general policy objective.

24. In response to that, I have been taken by Mr Bentley on behalf of the Claimant to the case of *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 58 – another case at the highest level – and the speech by Lord Nicholls for the test to be applied in interpreting legislation. That is a threefold test and Lord Nicholls makes it clear that courts have to be abundantly clear in respect of each aspect of the test.

25. The first matter or the first aspect of the test is the intended purpose of the provision in question and what the Court would need to be clear about – certainly on the Defendant's case – is that the intended purpose, effectively, was to make sure that the protocols were all-encompassing.

26. The Claimant says, on the other hand, that the intention may well simply have been to ensure that road traffic accidents did not fall within the Public Liability Protocol, hence the exception, and that individual cases were then left to see whether they fell within the Road Traffic Act Protocol which was already in place prior to the Public Liability Protocol; and developing that, that in fact there is no all-encompassing approach, in the sense that both the Road Traffic Act Protocol and the Public Liability Protocol have exceptions to them.

27. I have to say in considering intended purpose, it is not clear to me – certainly not in the sense of being abundantly clear – that these Protocols when read against each other were intended to be an all-encompassing provision in the way that the Defendant maintains.

28. Second that by inadvertence, Parliament failed to give effect to the purpose intended. It is correct to say that in the Jackson Review of costs, one of the conclusions was an intention that fixed costs applied to all fast-track cases.

29. However, it is common ground that that has not been implemented by the rule makers. There are no less than six exceptions to the Road Traffic Act Protocol and no less than 11 exceptions to the Public Law Protocol. It might be said – indeed it has been argued, and I think I would agree – that not all those exceptions cover particularly complicated situations. Therefore, it is not clear to me that there was some inadvertent overlooking of an intended purpose, again certainly not abundantly clear.

30. The third aspect is the substance of the provision that Parliament intended. I accept that the Court does not need to be satisfied on the precise wording intended but it needs to be abundantly clear on at least the substance of what was intended. There is a distinct lack of evidence in that respect in this particular case.

31. I have been referred to the Court of Appeal case of *Qadar v Esure* [2016] EWCA Civ 1109. In that case, the Court had clear evidence from the Ministry that fixed costs were not intended to follow through into cases that were allocated to the multi-track, so the Court of Appeal was able to impose a purposive interpretation because the position was abundantly clear.

32. Contra-wise, in the case of *Williams v The Secretary of State for Business, Energy & Industrial Strategy* there was no policy evidence for reading the fixed costs provision at

CPR 45.24 as applying where there had not been Part 7 proceedings or the entry of judgment. Therefore, in that case the Court found that it could not find an obvious drafting error because the Court did not have the evidence in front of it.

33. This is a similar case, it seems to me. The Court simply has no policy evidence in front of it to be able to conclude what the substance of the intended provision actually was. Therefore, in conclusion, I have no sure foundations for adopting a purposive construction where the literal position is clear.

34. Indeed, it seems to me that it would have been clear to the draftsman that Road Traffic Act claims such as this, that have a public liability element, were likely to be excluded. The exception to the Road Traffic Act Protocol, in respect of breach of duty by someone who is not a road user, makes that position pretty obvious and – certainly from where I am sitting, without evidence to the contrary, there is no reason to think that that was overlooked. It does not seem to me to be a particularly difficult point.

35. That leads me very briefly to consider the indirect argument.

36. I have been referred, again, to the case of *Williams v The Secretary of State for Business, Energy & Industrial Strategy*. In that case it was held that CPR 44.4, which enables the Court to take conduct into account, can be a route to fixing a Claimant with, or limiting a Claimant to, fixed costs, even where a case does not fall within Protocol.

37. I have to say the case of *Williams v The Secretary of State for Business, Energy & Industrial Strategy* was a very different case from what I can currently dealing with. That was a case where the Court was highly critical of the Claimant's conduct in bringing a claim against two Defendants where the claim against one Defendant was very weak; and that was a means of avoiding the Protocol. This is not one of those cases. It seems to me this was always a case where the Protocol either applied or not. As it happens, I have held that it did not and so it seems to me there can be question of conduct being held against Claimant.

38. Therefore, my conclusion is that the Public Law Protocol does not apply directly or indirectly to this claim.

End of Judgment

Transcript from a recording by Ubiqus
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This transcript has been approved by the judge.