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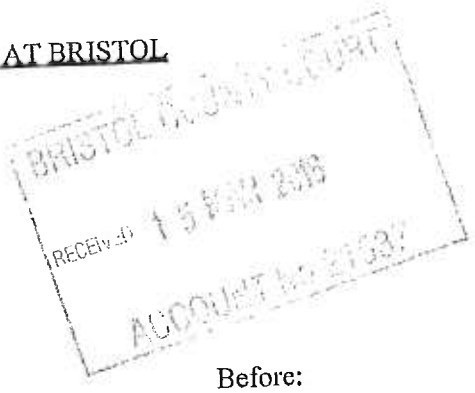
THE COUNTY COURT AT BRISTOL



Claim No. A00BA226

2 Redcliff Street
Bristol

Tuesday, 9th June 2015

Before:

HIS HONOUR JUDGE DENYER QC

Between:

MARK DAVIES — Claimant

-v-

ASDA STORES LIMITED — Defendant

Counsel for the Claimant: MR. LANCHESTER

Counsel for the Defendant: MR. HANDY

JUDGMENT APPROVED BY THE COURT

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APPROVED JUDGMENT

1. THE JUDGE: This is an appeal from a decision of Deputy District Judge Webb given on the twelfth day of February 2015. The matter comes before me with the leave of the learned deputy district judge.

2. On 30th March 2014 the claimant, whilst an apparently lawful visitor to supermarket premises occupied by the defendants, allegedly sustained some sort of relatively minor injury. The claimant instructed solicitors. Initially this claim clearly fell within the pre-action protocol in respect of low value personal injury claims connected with employment or, in this case, occupation duties. Liability was not accepted by the defendants and so it is common ground that the proceedings, so to speak, then dropped out of the portal and fell to be dealt with under a different regime. I think it was on 19th August 2014 that a claim form was issued.

3. On 26th November 2014 the claimant made an application for pre-accident disclosure in respect of certain classes of documents. That application was of course made pursuant to Part 31.16 of the Rules. Although it is trite law, let me just briefly set that out. 31.16:

> "This rule applies where an application is made to the court under any act for disclosure before proceedings have started."

The application was dealt with on paper by District Judge Goddard sitting in Bath on the third day of December 2014. As I say, it was a paper application and a draft order accompanied the application. The learned district judge made an order effectively ordering disclosure as per the terms of the application.

4. The application itself, as I say, specified the documents which it was sought to obtain, but in paragraph 4 of the order, which was the order ultimately made by District Judge Goddard, it was said as follows:

> "The defendant is to pay the claimant's costs of and incidental to the application, summarily assessed by the court in the sum of £931.88. Such costs to be paid to the claimant's solicitors no later than 14 days from the date of this order."

Of course, because the order was made without a hearing, it was open to the defendants to make an application to vary or rescind the order. The defendants duly did this. They made an application in respect of the costs. They asserted that the fixed costs regime should have governed and that the award of £900-plus was excessive.

5. The application is to be found at page 19 of the bundle with which I have been provided. Let me just spell it out in a little more detail:

> "The defendant seeks permission to vary the court order of 3rd December as follows:
>
> (1) Paragraph 4 to be amended to, 'The defendant is to pay the claimant's costs of and incidental to the application in the sum of £305.' This is pursuant to Part 45.29H."

The grounds are then set out. The short point taken was this: that the claimant was only entitled to fixed costs pursuant to 45.29A – and then the reasoning is set out. The argument was that the entitlement was to a total of £305.

6. In order to understand the argument, it is necessary to look at certain parts of the rules, remembering, if you like, the desire on the part of the government to control legal costs, in particular solicitors' costs in connection with low value personal injury claims. A similar regime applies, of course, in respect of low value road traffic accident claims. If one goes to 45.29A, that is the starting point. It is to be found at page 1502 of the current *White Book*. 45.29A:

> "(1) Subject to paragraph (3), this section applies where a claim is started under—
>
> [...] (b) the pre-action protocol for low value personal injury (employers' liability and public liability) claims ('the EL/PL protocol'),
>
> but no longer continues under the relevant protocol or the stage 3 procedure in Practice Direction 8B."

It is, as I have already said, common ground that although this claim started under the protocol it ceased to be under the protocol and therefore the provisions at 45.29 *prima facie* apply.

7. At 45.29D and E we find the regime in respect of fixed costs so far as the EL Protocol cases are concerned. 45.29D:

> "Subject to 45.29F, 45.29H and 45.29J, in a claim started under the EL/PL protocol the only costs allowed are—
>
> (a) fixed costs in Rule 45.29E; and
>
> (b) disbursements in accordance with Rule 45.29I."

It then goes on to deal with the amount of those fixed costs. 45.29E:

> "(1) Subject to paragraph (2) *[which I do not think is relevant in this case]*, the amount of fixed costs is set out—
>
> (a) in respect of employers' liability claims, in Table 6C; and
>
> (b) in respect of public liability claims, in Table 6D."

Of course, it is the defendants' case that that governs and governed the application made by the claimant in respect of pre-action disclosure.

8. I turn then to 45.29H, to be found at page 1510 of the current *White Book*. 45.29H:

> "(1) Where the court makes an order for costs of an interim application to be paid by one party in a case to which this section applies, the order shall be for a

sum equivalent to one half of the applicable Type A and Type B costs in Table 6 or 6A."

Then, by subparagraph (3):

"If an order for costs is made pursuant to this rule, the party in whose favour the order is made is entitled to disbursements in accordance with 45.29I."

The question that really arose in front of the district judge and which arises in front of me today is whether in fact this application for pre-accident disclosure is properly to be regarded as an interim application and therefore governed by 45.29H or whether in fact some other regime, as the learned district judge so found, governs. That raises the question of what is and what indeed is not an interim application.

9. Some guidance, in my view, can be obtained from Part 25 of the rules. I go to page 772, where 25.1 is set out:

"(1) The court may grant the following interim remedies—

[...] (c) an order—

(i) under section 33 of the Senior Courts Act or section 52 of the County Courts Act, an order for disclosure of documents before the claim has been made."

Now, it is quite true that the making of the order for pre-action disclosure is indeed a remedy. By definition, the remedy can only be granted consequent upon the making of an application. It does seem to me that the wording of 25.1 is a strong indication that applications for pre-accident disclosure are an interim remedy and, in my view, almost by definition are therefore an interim application.

10. The matter, of course, does not in fact end there because I have to consider Part 46.1, set out at 1533 of the current *White Book*. 46.1 is headed:

"Pre-commencement disclosure and orders for disclosure against a person who is not a party."

46.1:

"(1) This paragraph applies where a person applies—

(a) for an order under—

[...] (ii) section 52 of the County Courts Act 1984; or

[...] (b) (ii) section 53 of the County Courts Act 1984."

By subparagraph (2) of this rule:

"The general rule is that the court will award the person against whom the order is sought that person's costs—

(a) of the application; and

(b) of complying with any order made on the application."

I pause there. That reflects my understanding of what has always been the position. *Prima facie*, if you seek disclosure of documents from a person who at that point is not a party to proceedings and who will be put to expense in terms of complying with it, you, as the applicant, must be expected to pay the costs. However, there is clearly an exception to that. Subparagraph (3) of the rule:

"The court may however make a different order, having regard to all the circumstances, including—

(a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and

(b) whether the parties to the application have complied with any relevant pre-action protocol."

11. The defendants have always accepted that they did not comply with the request for disclosure; that they were in principle liable to pay the costs of the application which the claimant had to make to get disclosure. They did not, however, oppose the application in front of District Judge Goddard. It was, as I say, a paper hearing in front of him, no parties attended and the defendants did not put in any grounds of opposition. I note that subparagraph (3) uses the conjunction 'and', not a disjunctive 'or', so although the defendants did not comply with the relevant pre-action protocol, which seems to me properly to be regarded as a circumstance, justifying the making of a different order, as the defendants themselves accept, it is not a situation where any opposition was actively advanced by the defendants so one cannot say that both limbs of subparagraph (3), i.e. (a) and (b) were in fact in play. In any event, those are only two particular circumstances because it is quite clear from the wording of subparagraph (3) that, in contemplating a different order, the court has to have regard to all the circumstances. However, I agree with the defendant (the appellants in this case) that 46.1 does not really assist as to how a different order should be quantified. In other words, it does not assist as to whether the claimant/respondent was entitled to the summary assessment of the tasks which they in fact obtain from District Judge Goddard or whether they were in truth limited by the fixed costs regime to which I have already alluded. In my view, as I have said, I think that an action for pre-action disclosure by virtue of Part 25 is properly to be regarded as an interim application giving rise to an interim remedy.

12. In a slightly different context, I note that a not dissimilar conclusion was arrived at by a senior costs judge, Master Howarth, in the case of *Connaughton v Imperial College Healthcare [2010] EWHC 90173*. It is true that that case really related to the construction of a CFA but in the course of that litigation the claimants had sought pre-action disclosure and one of the issues before the court was whether the CFA covered the application for pre-action disclosure. At paragraph 28 of his judgment, the learned costs judge said this:

"In my judgment, although the scope of the agreement does not specifically include applications for pre-action disclosure, neither does it exclude them.

A

B

C

D

E

F

G

H

> The fact is that applications for pre-action disclosure are interim orders in accordance with Part 25 of the CPR, and I am persuaded by the reference in the CFA to 'appeals from interim orders' being included within its scope as an indication that by analogy an application for pre-action disclosure is also included within the definition of 'your claim'. In my judgment this application was part and parcel of the claimant's claim for damages arising out of the accident which had occurred. It was a natural consequence of the defendant's failure to comply with the personal injury pre-action protocol."

That seems to me to be supportive of my view that an application for pre-action disclosure is indeed an interim application seeking an interim order for the purposes of 45.29H. In other words, although I can see the potential for abuse adumbrated in this case by the claimant, but no doubt would be said by many claimants in many cases, the abuse being that by being deliberately tardy and by being deliberately obstructive, knowing that in respect of any application the claimant would be restricted to fixed costs, it would make conducting litigation on behalf of claimants difficult and uneconomic so far as claimant solicitors are concerned.

13. I follow the argument, as I follow the argument advanced by the defendants that it was clearly the intention of the government, and indeed the Rules Committee in response to some pressure from the government, that in respect of low value claims, strict control should be exercised over recoverable costs, but it does not seem to me that I should approach this case really by reference to either of those views. It is not for me to seek to precisely understand the thinking of the Rules Committee; likewise, it is not for me to start expressing views about the desirability or otherwise of limiting the amount of costs that can be recovered by claimant solicitors. My job is simply, for good or ill, to interpret the rules. That is what I have sought to do in this judgment. In my interpretation of the rules, the learned deputy district judge was wrong and the defendant's application ought to have succeeded and the claimant's costs limited to half the appropriate fixed costs scale as per 45.29H and 45.29D and E. I allow the appeal.

(Brief discussions with counsel)

14. I am reminded by counsel for the claimant, and properly so reminded, that I have not in the course of this judgment actually considered 45.29J, which provides as follows:

> "(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs which is greater than the fixed recoverable costs referred to in 45.29H.
>
> (2) If the court considers such a claim to be appropriate, it may—
>
> (a) summarily assess them; or
>
> (b) make an order for detailed assessment."

That is quite clearly related to the existence of exceptional circumstances. In my view, the simple failure to respond to a request for pre-action disclosure, although it may legitimately justify the making of an order in favour of the applicant, thereby reversing the normal rule, does not of itself amount to an exceptional circumstance. Indeed, it

must be commonplace in litigation that defendants do not always respond to a request for pre-accident disclosure, necessitating claimants having to make the sort of application that the claimant has made here. I do not believe that the circumstances are in any way exceptional that would justify me in concluding that such exceptional circumstances exist here which would justify a departure from the fixed costs regime.

(End of judgment)

(Discussions with counsel as to the drafting of an order and costs follow)
