

Royal Courts of Justice
The Strand
London
WC2A 2LL

Thursday 30 June 2005

B e f o r e:

MASTER O'HARE

B E T W E E N:

CHRISTI NIZAMI

Claimant

- v -

MOHAMMED BUTT

Defendant

A N D B E T W E E N:

KADHAR KAMALUDEN

Claimant

- v -

MOHAMMED BUTT

Defendant

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MR DAVID ABRAHAM (of Messrs Colman Coyle, London N1)
appeared on behalf of **THE CLAIMANTS**

MR ROGER MALLALIEU (instructed by McCullagh & Co, Peterborough)
appeared on behalf of **THE DEFENDANT**

J U D G M E N T
(As Approved)

Thursday 30 June 2005

(Very poor recording due to faulty tape)

MASTER O'HARE:

1. Mr Christi Nizami was involved in a road accident with Mr Mohammed Butt. A clam was made. Compensation was agreed. What is before me are costs only proceedings to which CPR Part 45 applies. The purpose of Part 45 was to arrange that all or most of the costs in small road accident cases would be fixed. If they were to be fixed, then they could be paid by agreement without any assessment by the court. However, although there is an agreement to pay costs in principle, the amount of those costs has not been agreed in this case and hence these proceedings.

2. Before the defendant makes payment, the defence want certain information. First, they want a certificate by the claimant's solicitor as to his compliance with the CFA regulations in this case. The defence accept that, as a general rule, if such a certificate is forthcoming, the defence will not be entitled to any further information unless they can show a general issue. There have been many mentions of paragraph 81 of the judgment in Hollins v Russell. The defence accept that, as a general rule, the giving of an appropriate certificate would be sufficient where a copy of the CFA in question had already been supplied.

3. The defence also seek information about one of the disbursements claimed -- a fee of £250 in respect of a medical report. The defendant's insurer is not one of those insurers who is party to an agreement recently made by some insurers and others as to medical report fees. The defendant's interest here is to avoid paying any agency fees which may be included in the sum of £250 claimed. The defence describe such fees as "concealed profit costs". If they are profit costs, then they are a duplication of the fixed recoverable costs they would otherwise be willing to pay.

4. The claimant draws attention to the changed regime indicated by Part 45, that is the fixed recoverable costs and disbursements subject to certain restrictions and limitations. I derive from that proposition that in these cases the indemnity principle does not apply. The claimant is entitled to these costs even if he is not obliged to pay them or indeed is not obliged to pay anything to his own solicitor. The claimant's solicitor volunteers to give a certificate as to compliance with CFA regulations in this case. He says that the following consequences would follow: if such a certificate is given and is valid, then the claimant would be entitled to the fixed recoverable costs and also to the fixed success fee payable thereon at an extra 12.5% unless the defendant could raise a genuine issue by other means as to the validity of the CFA. The claimant's solicitor further says that if such a certificate is not given, or if the defendant can raise a general issue as to validity, then the claimant would still be entitled to fixed

recoverable costs without the success fee and would still be entitled to disbursements falling within Part 45, whether or not they were disbursements which the client had already paid.

5. I turn to the information about the medical report. The claimant says that no such information is appropriate. Given the small amount involved, it would be disproportionate for the court to do more than work out what is a reasonable sum for a medical report and then to allow the fee claimed, or a lower fee if reasonable, whether or not the fee claimed included agency fees.

6. In the course of these proceedings we have made a considerable study of Part 45 and also CPR 44.12A. The main purposes of both those Parts of the CPR are well understood and in the majority of cases will be fully effective. But I accept that there are difficulties in their application in some comparatively small respects. For example, Part 45 is all about fixed costs, ie sums arrived at without any intervention by the court. Nevertheless, CPR 45.10 provides for "a court" allowing disbursements in addition. CPR 45.12 provides a procedure to determine claims for amounts exceeding fixed recoverable costs. But Part 45 does not contain any procedure for determining the amounts of fixed recoverable costs themselves. The Costs Practice Direction, 25A.10 provides some useful guidance. It states:

"If the only dispute is as to disbursements, CPR 44.12A should be applied in the normal way."

That is to some extent circular because CPR 44.12A just says that costs would have to be assessed in accordance with Part 45.

7. Nevertheless, on the basis of those rules I think that I should deal differently with profit costs, which are what are comprised in fixed recoverable costs and disbursements. I deal, first, with fixed recoverable costs. I think that fixed recoverable costs are payable whether or not the claimant is obliged to pay his or her solicitor. Despite the concession made by the claimant, I think that the fixed recoverable costs may include a success fee of 12.5% if the claimant has entered into a CFA. In contrast to the submissions by both parties, I think it is immaterial whether the CFA relied on is a valid CFA. If CPR 45.11 was limited to valid CFAs, it would seem to me absurd if in the case of an invalid one the paying party would still have to pay the base fixed recoverable costs, because they are eight times larger than 12.5%, success fee. Accordingly, I think it is not appropriate for the defendant to seek any certificate in respect of fixed recoverable costs. Nor is it appropriate for the court to order any certification as a pre-condition to the payment of fixed recoverable costs. In my judgment, the defence objections to this part of the claim for costs are wholly unmeritorious. The purpose of the rules was to simplify the payment of costs in small cases, not to make it more complex. The fixed recoverable costs are just that; they are fixed. But they are payable by the defendant whether or not the claimant's solicitor's retainer is valid. An

extra 12.5% is payable if the claimant and solicitor entered into a CFA, whether that CFA is valid or not.

8. Having said that, I am unable to take the same approach to disbursements. It seems to me that, for them, the standard rules, including the familiar indemnity principle, continues to apply. I accept that it seems inconsistent to allow what might be invalid profit costs whilst at the same time disallowing unpaid disbursements where the profit costs are invalid. Nevertheless, I think that inconsistency arises because Part 45 does not deal with disbursements in the same way as it deals with profit costs. Disbursements are not fixed by Part 45. Despite Mr Abraham's persuasive attempt to place them in a semi-fixed category, it seems to me that disputes about disbursements will have to be resolved in the old way, ie by an order for detailed assessment, which will involve (unless directions are given) the drawing of a bill, the provision of points of dispute and ultimately the payment of the court fee for detailed assessment.

9. In conclusion, I think the appropriate order for me to make today is an order for detailed assessment. Subject to directions, the assessment will include an assessment of the fixed recoverable costs. Although they are included, that assessment should be no more than a formality. I would like to make a comparison here between the assessment of fixed recoverable costs under Part 44.12A and the summary assessment that takes place at the end of fast-track trials. In a fast-track trial the trial costs are fixed, but the amount of them is plainly included in the summary assessment. In the proceedings before me the profit costs are fixed, but the amount of them will be included in the detailed assessment I am about to order.

10. I said that it is subject to directions. One direction I want to give is to avoid the drawing of a bill, since the only item in dispute (subject to appeal from my decision) is the disbursement of £250. As well as making an order for detailed assessment, I am also going to make an order that a document already supplied shall stand as the bill of costs herein. That document is the schedule which is attached to the letter to AXA dated 28 January. So there will be an order for detailed assessment and it will further state that the bill of costs to be served under the notice of commencement shall be the schedule of costs attached to that letter.

11. Exactly the same points arise in the second case before me today, *Kamaluden v Butt*. I shall therefore make the same order in that case.