

FINSBURY FOOD GROUP PLC V DOVER [2020] EWHC 2176 (QB)

CASEWATCH



Heather Beckett of Goldsmith Chambers' Civil Team looks at a recent costs matter which was appealed to the High Court and clarifies the position of recoverable disbursements of counsel's fees for advising on quantum in PI claims which start life in one of the Low Value Portals but "fall out".

After *Aldred v Cham*¹ put an end to recoverability of disbursements incurred due to a particular feature of the claimant rather than a particular feature of the dispute, (at least for the time being²), this time there is a bit of "good news" for claimant solicitors from the court in respect of interpretation of another sub-paragraph of CPR 45.29I (2).

THE CASE

The recent appeal to the High Court in *Finsbury Food Group plc v Dover*, considered the correct interpretation of CPR 45.29I (2) (c):

"In a claim started under the RTA Protocol, the EL/PL Protocol or the Pre-Action Protocol for Resolution of Package Travel Claims, the disbursements [for which the court may allow a claim are] the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol".

The claim involved an injury to his hand sustained by the Claimant during the course of his employment.

A CNF was uploaded to the online Portal in 2015 but the Defendant failed to respond within 30 days and the claim automatically exited the Protocol for Low value personal injury EL claims accordingly. Liability was subsequently admitted by the Defendant, subject to causation. Counsel's advice was obtained in relation to the value of the claim in conference in 2017. In fact, the claim ultimately settled for £70,000, significantly above the upper limit for Portal claims in any event.

Within its Bill of Costs, the Claimant included counsel's fee of £650 + VAT for the advice in conference. The Defendant disputed this, saying that no such fee was

¹ [2019] EWCA Civ 1780 – this appeal addressed recoverability under CPR 45.29I (2) (h), in particular recoverability of a £150 fee for counsel's advice, required for the purpose of an infant approval hearing because the claimant was a child, a feature of the claimant, not a particular feature of the dispute.

² Permission to appeal *Aldred v Cham* was refused by the Supreme Court earlier this year, but the order refusing permission did add "*The panel expressed the view that it is appropriate that the Civil Procedure Rule Committee consider this matter*".

payable and that costs were subsumed within the fixed fees when incurred after the claim had left the Protocol. In the alternative, the Defendant argued that the cost should be limited to £150 plus VAT, the fixed costs in relation to the Low Value EL Protocol for advice on the amount of damages where the claimant is a child³.

A Costs Officer rejected the Defendant's arguments although on assessment reduced counsel's fee for advising on value in conference to £500 + VAT. The Defendant appealed both the award of the disbursement and its value.

At the first appeal⁴, Master Brown rejected the Defendant's arguments and dismissed the appeal but granted permission to appeal to the High Court on the single basis that the argument "*may have the potential to apply to a significant number of cases*".

When the appeal was heard by Mrs Justice Lambert in July 2020, the Defendant pursued only the issue of the quantum of counsel's fee that was recoverable, arguing that on the construction of CPR 45.29I (2) (c), counsel's fee should be restricted to the fixed (Type C) costs of £150 plus VAT as per Table 6A at CPR 45.

Mrs Justice Lambert carried out an interpretation exercise in relation to the construction of CPR45.29I (2) (c). On a literal interpretation, she held that the meaning was "*clear and unambiguous*". It was also logical and there was no need to consider an alternative purposive construction on the grounds that the literal meaning would lead to an absurd outcome, or one which had not been intended by the drafter of the rule. If it had been intended that the costs of legal advice for a claim outside the Protocol should be fixed, the drafter could have included a provision accordingly, but in contrast to the provision relating to claims that remained within the Low Value EL Protocol, that had not occurred.

In summary, the court interpreted the matter by reference to what happens when a claim has "fallen out" of the one of the "Portal" Protocols. CPR 45.23 B and Table 6A (and presumably Table 6 also) apply to claims which settle under Stage 3 under Practice Direction 8B. However, once a claim is no longer in the Portal, the drafting of Part IIIA of CPR 45 applies and this suggests a different and more flexible policy. A fee for counsel's valuation of such a claim is not a fixed fee therefore but depends upon the difficulty and complexity of valuing the claim. In some cases, valuation will be relatively straightforward. In others considerable skill and expertise may be required to quantify the effect of loss of earnings or loss or handicap on the labour market.

The Defendant's appeal was dismissed and the Cost Officer's (and Master Brown's) award of £500 + VAT for counsel's fee in this particular case (against the original fee of £650 + VAT) remained in place.

³ Table 6A CPR 45

⁴ *Dover v Finsbury Food Group Plc* [2019] EWHC B11 (Costs)

CONCLUSIONS

Once a claim has “fallen out” of one of the Low Value Protocols and left the relevant Portal, it cannot re-enter.

Interpretation of the relevant sub-rule under CPR 45.29I (2) as regards a recoverable disbursement is treated by the court according to the literal meaning of the words. In this case, CPR 45.29I (2) (c) does not prescribe a fixed cost for counsel’s advice on valuation of quantum where that has been reasonably obtained.

The court does, however, still retain a discretion in relation to recoverability of counsel’s fee for quantum valuation, and in addition, the fee can be subject to detailed assessment as to reasonableness.

This case should provide both reassurance and a good argument for claimant solicitors that if counsel’s advice on the value of the case is reasonably required due to the complexity or difficulty of assessing quantum, the court will allow the claimant to recover a reasonable fee incurred accordingly.

This note is for general information only and is not and is not intended to constitute legal advice on any general or specific legal matter. For legal advice on particular cases please contact Ben Cressey, Senior Civil Team Clerk, on 0207 427 6810 or Alice Martin, Junior Civil Clerk, on 0207 427 6821, or e-mail clerks@goldsmithchambers.com to discuss instructing Counsel.

**HEATHER BECKETT
GOLDSMITH CHAMBERS
17 August 2020**