IN THE COUNTY COURT sitting at NORTHAMPTON

Claim No.E65YX315

BETWEEN:

SAMEER KHAN

Claimant

and

AVIVA INSURANCE LIMITED

Defendant

JUDGMENT ON COSTS ISSUES

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1. This case was listed for a fast track trial on 22 July 2019. I heard the evidence on that date and gave judgment on the issues arising, but I was told after giving an ex tempore judgment that there were various costs issues arising which required adjudication and citation of authorities. Because of the late hour I directed that the parties file written submissions on those issues and that I would give a written judgment. I have received the submissions (for which I am particularly grateful). This is that judgment.

2. To re-cap, the claim arose out of road-traffic accident which occurred on 21 August 2017 in Car Park 4 of the Northampton General Hospital when the Defendant's insured (Julie Hayward) reversed her Volvo SUV into the Claimant's Toyota Avensis car.

3. By the Claim, which was issued on 11 July 2018, the Claimant (Mr Khan) claimed damages for personal injuries (whiplash/soft tissue injuries to the neck, left shoulder and back) and special damages including repairs and credit hire charges. The Claim Form sought damages in excess of £5,000 but not exceeding £10,000. There was no specific value ascribed to the personal injury element.

4. A Defence was filed dated 9 August 2018. Although it was admitted that Ms Haywood had been negligent in reversing her car into Mr Khan's vehicle, causation of personal injuries and the existence of damage was denied. In their additional submissions attached to the Directions Questionnaire, it was asserted that this was a Low Velocity Impact (LVI") claim.

5. By the order of DDJ Shedden made on 26 October 2018 the claim was allocated to the fast track. This was in accordance with the notice of provisional allocation dated 16 August 2018.

6. At trial the Defendant asserted that the Claimant had been fundamentally dishonest or least had failed to discharge the burden of proof, submitting that given the nature of the collision it was unlikely that the Claimant had suffered any injury, referring to the well-known decision of *Molodi v Cambridge Vibration Services* [2018] EWHC 1288 QB.

7. On behalf of the Claimant it was submitted that (based upon the medical evidence) an award for general damages for pain suffering and loss of amenity of £2,900 would be appropriate if I was satisfied that the Claimant had been injured as alleged.

8. Although I reached the view that the impact between the vehicles was one which would be capable of causing injury, because of various inconsistencies and other discrepancies in the evidence (which I dealt with fully in my judgment on the day of trial) I was not satisfied as to the reliability of the Claimant's evidence and I found that the Claimant had not proved that he had sustained personal injuries. I therefore dismissed the claim for personal injuries. However, I was satisfied that the Claimant's vehicle had been damaged in the collision and that he was impecunious. I allowed the credit hire claim in full (less a modest deduction of £138.52 arising out the overclaimed amount for repairs) in the sum of £6,265.80. I was not satisfied (the burden of proof being on the Defendant) that either the Claim or the Claimant were fundamentally dishonest.

9. On the issue of costs
    a. the Claimant says that costs should follow the event (adopting the normal rule in CPR 44.2(2)(a)) and calculated in accordance with the fixed cost regime pursuant to CPR 45.29B;
    b. the Defendant says that because the claim was only allocated to the fast track because of the personal injury element of the claim (which has failed) and that the Claim would otherwise have been allocated to the small claims track the order should be that
        i. (1) the Claimant should pay the Defendant's fixed recoverable costs under CPR 45.29F in defending the personal injury element of the claim and (2) the defendant should pay the Claimant's small claims costs, with (3) the Defendant's costs being set off against the Claimant's costs and damages; or
        ii. In the alternative, the Defendant should pay the Claimant's costs but limited to the costs which would be recoverable on the small claims track.

Submissions

10. The Defendant submits that (in summary)
    a. Pursuant to CPR 44.2(4) the court must take into account the parties' conduct, including whether it was reasonable for a party top pursue a particulars issue, the manner in which an issue was pursued and whether a party has exaggerated part of the claim;
    b. In this case the inconsistencies in the Claimant's evidence and the late disclosure of some bank statements by the Claimant were issues of conduct which lean in favour of making the order as sought by the Defendant;
    c. Comparison can be made with *Green v Arriva North West Wales Ltd* [2010] QBD 25 May 2010 in which Hickinbottom J (as he then was) heard an appeal on a costs point. There, the trial judge accepted the evidence of the claimant's G's statement, that she had suffered relatively minor symptoms for a ten-week period. He rejected her contradictory evidence as reported to the medical expert, that her symptoms lasted very much longer. General damages were assessed in the sum of £900. In

restricting the costs, the judge considered that there was no issue in the claim that could not have been dealt with on the small claims track and the only reason the matter had been allocated to the fast track was because of the claimant's valuation of her claim in her particulars. Whilst that in itself might not have been enough to warrant a reduction in costs, he considered that the additional costs (claimed at £30,000) were effectively the result of the way the claimant had conducted her claim, including the exaggeration of her claim and the many inconsistencies in her evidence. An appeal Hickinbottom J held that the court has a wide discretion on the issue of costs, and the way in which the trial judge had approached the matter was unimpeachable. In this case the Defendant submits that the Claimant failed to prove any injury at all, and it is therefore only just and reasonable that the Claimant should be ordered to pay the Defendant's costs;

d. Reliance can also be placed on *Painting v University of Oxford* [2005] EWCA Civ 161 as authority for the proposition that "success" is not limited to obtaining an award of damages;

e. In this case Mr Khan had made two Part 36 offers and had not done better than either of them. The Defendant had also made Part 36 offer which had not been beaten. However, the real issue in this case was that it was the personal injury element of the claim which had turned what would otherwise have been a small claims track case into one allocated to the fast track. On that issue (the personal injury claim) the claimant had failed.

11. The Claimant submits (again, in summary):

a. The Defendant failed to establish fundamental dishonesty. The allegation that this was an LVI claim and was fundamentally dishonest justified allocation to the fast track;

b. As was decided in *Kearsley v Klarfeld* [2006] 2 All ER 303 a re-allocation from the fast-track to the multi-track was justified given the allegation that the injury was fabricated. The causation issue and fundamental dishonesty alleged in this case justified allocation to the fast track (at the very least), regardless of the financial value of the claim. The issue of fundamental dishonesty went to the issue of credit hire as well as the personal injury claim because of section 57 of the Criminal Justice and Courts Act 2015;

c. Having been correctly allocated to the fast track, the fixed-costs regime is applicable, to provide the quick, rough-and-ready but reasonable solution on the issue of costs;

d. The heads of loss arise out the same cause of action and so must be brought as one claim (*Johnson v Gore Wood* [2002] 2 AC 31). The claim cannot be split into two different parts with one part allocated to one track and one part to another;

e. There should not be a costs set-off, as that would have the effect of enabling by the back door the enforcement of costs which the front door of QOCS has closed.

Analysis and comment

12. Dealing fist with allocation, I agree with the Claimant that individual parts of a claim cannot be allocated to different tracks. Not only does CPR 26.5 provide that the court will allocate "**a claim to a track**" and in 26.8(1) refer to "when deciding **the** track for a claim", it would be

a nonsense if different rules of evidence applied to the various limbs of the claim (compare the position in small claims and fast track trials). as the notes in *Civil Procedure 2019* to Part 26.10 rightly observe (26.10.1) it is not possible to allocate different parts of a claim to different tracks simultaneously.

13. The Court may, of course, re-allocate a claim to a different track, but no such application has been made in this case. The claim was, and remained, allocated to the fast track. It appears to have been assumed that the value of the personal injury claim was over £1,000, although there is no such statement on the Claim Form or Particulars of Claim.

14. In my judgment it was the personal injury element of the claim which was the reason why the claim was allocated to the fast track. If there had not been the personal injury claim, the claim for the other losses (credit hire repairs and miscellaneous) would almost certainly have been allocated to the small claims track as they had a total value of under £10,000.

15. Although the Defendant raised the issue of fundamental dishonesty, this was only raised because of the personal injury claim. I have no doubt that this was raised because a finding of fundamental dishonesty provides a means of avoiding the costs consequences of Qualified One-Way Costs Shifting (QOCS) under CPR 44.16 and/or is a means of having a claim dismissed where on the claim for personal injury the claimant has been fundamentally dishonest (section 57 of the Criminal Justice and Courts Act 2015). But for the personal injury claim, this issue would not have seen the light of day.

16. I then turn to the court's discretion as to costs. CPR Part 44.2 sets out the Court's general discretion as to costs. Sub-rule (2) provides that (if the court decides to make an order about costs) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, but the court may make a different order.

17. In deciding who is the successful party, the most important thing is to identify the party who has to pay money to the other by deciding who has to write the cheque" (see generally Civil Procedure 2019 para 44.2.13). On that basis, in my view there is no doubt that the successful party is Mr Khan, the Claimant. It is the Defendant who is writing the cheque.

18. The application of the general rule would therefore mean that the Defendant should pay the Claimant's costs. Because this is a fixed costs case within the meaning of CPR part 45 Section IIIA, the assessment of those costs would be undertaken by using the fixed costs regime.

19. As I read the Defendant's submissions, Mr Waite (for the Defendant) has stopped short of seeking to say that (in accordance with the decision in *Painting*) it is the Defendant who is the successful party: what he says is that, by analogy with that decision, when a claim fails (being beyond mere exaggeration) the costs order should reflect that. It is only the personal injury claim which has given rise to a substantive potential liability as to costs and, as that claim failed, it would be unfair for the Claimant to get the costs which (if the claim had been allocated to the small claims track) he would not receive.

20. The issue is therefore, because of that factor, whether the court should make "a different order" to the normal rule.

21. Rule 44.2(4) provides that in deciding what order (if any) to make about costs, the court will have regard to all the circumstances, including:

> "(a) the conduct of all the parties;
> (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and
> (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply."

By rule 44.2(5) the conduct of the parties includes

> "(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction – Pre-Action Conduct or any relevant pre-action protocol
> (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue
> (c) the manner in which a party has pursued or defended its case or a particular allegation or issue; and
> (d) whether a claimant who has succeeded in the claim, in whole or in part, exaggerated its claim.

22. Rule 44.2(6) then sets out a menu of orders which the court might make under this rule, including (f) costs relating only to a distinct part of the proceedings. However, Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead, that it to say an order that a party must pay (a) a proportion of another party's costs (b) a stated amount in respect of another party's costs or (c) costs from or until a certain date only.

23. Part of the complicating feature of making a costs order relating to only part of the proceedings (in effect what the Defendant invites the Court to do under the first of its proposed orders) is the effect of the Fixed Costs Regime under CPR Part 45 Part IIIA. The object of the fixed costs regime is to provide costs certainty in the cases to which it applies a mechanism of easy calculation of recoverable costs. There is an element "swings and roundabouts" for lawyers who conduct low-value personal injury litigation arising out of road traffic accidents: the cases which go to trial and the roundabouts to the early settlement swings. Under CPR 45.29B (and subject to various exceptions) and so long as the claim is not allocated to the multi-track, the only costs allowed are the fixed costs in rule 45.29C and disbursements in accordance with rule 45.29I. if a Defendant is awarded costs, the calculation of the fixed costs occurs under rule 49.29F. Although there is provision for the fixed costs to be exceeded in "exceptional circumstances" (CPR 45.29J), there is no specific provision for an amount to be awarded which is ***less*** than the fixed fees.

24. On its face, this does not sit well with the general provision under rule 44.2 empowering the court to make an issue-based costs order, because under the fixed-fee regime there is no means of assessing what the costs relating to each issue should be. There is no mechanism for determining what are the defendant's fixed recoverable costs for defending the claim for personal injury" (as sought in the draft order) as distinct from the fixed recoverable costs in defending the entire claim (on which the Defendant has failed). It is true that there is, under rule 45.29F(2), a wider discretion for Defendant's costs than for a Claimant, but it is clear that the broad principles of the fixed-fee regime do not suggest that an issue-based assessment is appropriate.

25. The authorities cited by the Defendant do not assist in this regard: both were decided before the fixed-cost regime was introduced in 2013. In any event
    a. I do not view the decision in *Green v Arriva* as authority for a general proposition that (on cases allocated to the fast track) where the amount of damages does not exceed the small claims limit then costs should be limited to the small claims track. The decision underlines that the court has a wide discretion and that in exercising its discretion it should regard to the matters set out in CPR 44.3(4).
    b. *Painting* was a case in which the exercise of the judge's discretion as to costs was held to be flawed. The totality of the judge's decision, once he had found that the claim had been exaggerated, had been in favour of the Defendant. The judge had failed to take that into account in determining the liability for costs. He also failed to take into account the probability that if it were not for the exaggerated claim, the matter would have settled at an early stage. Longmore at para 24 held

> "The Recorder did not clearly address the question of who was the overall winner or give the fact that the University of Oxford was the effective overall winner appropriate weight; nor did he properly weigh the balance between the deliberately misleading claim as against the inadequacy of the payment into court."

Again, it is not a decision which assists on the question of whether an issue-based assessment is appropriate in a fixed-costs case, but is simply an illustration of how the general discretion should be approached. What was, however, said in Painting was that it remains open to a Defendant to protect itself by making an appropriate Part 36 offer. Kay LJ held

> "19. I am not impressed by Mr Waters' suggestion that the defendant is placed in a very difficult position by an exaggerating claimant. Of course it is not easy to anticipate to a nicety the amount of the eventual award, but there is nothing unusual about that where there are unresolved issues of fact and expert opinion.
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> 20. What the University chose to do was to make a Part 36 payment which amounted to a rock-bottom figure even on the basis that it established exaggeration to the maximum extent. If it had chosen to do so, it could have pitched the payment higher without for a moment weakening its position on the central issue in the case."

26. Nonetheless, in my judgment, notwithstanding the difficulties which may arise in assessing an appropriate figure, the fixed-cost provisions do not oust the general discretion of the Court in assessing costs under CPR Part 44 (derived from section 51 of the Senior Courts Act 1981) and do not prevent the court doing its best to assess costs if an issue-based order is, in fact, appropriate. In this context, I note that there is some similarity between the provisions of Part 45 sections IIIA and VI. Section VI of Part 45 (45.38 and following) provides that (where applicable) as to trial costs, by rule 45.38(2) the court may not award more or less than the amount shown in the table except where (a) it decides not to award any fast track trial costs or rule 45.39 applies. However, as is set out in *Civil Procedure 2019* para 45.38.1 "the court may apportion the amount between the parties to reflect their respective degrees of success on the issues at trial but even where this is done, the total amount of fast track trial costs may not be exceeded." In my view a similar approach is permissible under Section IIIA.

27. However, the very fact that a fixed-costs regime is applicable would, in my view, suggest that exercising the power to make an order as set out in rule 44.2(6) should be exercised with caution.

28. In addition, where a case has in fact been allocated to a particular track and has succeeded, to deprive the successful party of the costs normally awarded simply because the level of damages in fact fell ultimately below the threshold for that track is, again, not an automatic reason to depart from the normal rule. Where a claim is begun under the RTA protocol, then the fixed fee regime applies. The protocol does not apply where if proceedings were started the small claims track would not be normal track for that claim (para 4.1(4)). It is for that reason that RTA Protocol claims are normally fast track claims, unless they are allocated to the multi-track track (see the explanation given in *Shahow Qader v Esure Services Ltd* [2016] EWCA Civ 1109).

29. In considering all the circumstances, and in particular the specific factors set out in rule 44.2(4) and (5), in my judgment the following matters are worthy of emphasis:
    a. The Claimant has succeeded on what in terms of value was the largest part of his claim;
    b. In finding for the Claimant on his credit hire claim I did accept the Claimant's evidence that he was impecunious. Although I admitted bank statements which were produced by the Claimant late (without good reason) in fact, as I said in my original judgment, even without that late evidence I would still have found for the Claimant on this point as the additional documents added little to the matter;
    c. However, the Claimant failed in proving his personal injury claim: he therefore succeeded on only part of his claim. To that extent, the Defence was successful;
    d. Although it was the personal injury element of the claim which was the reason why the claim was allocated to the fast track (see above), the entire claim was indeed allocated to the fast track;
    e. The findings which I made at trial in this case are somewhat unusual in that although I was not satisfied that the Claimant had proved his personal injury claim, equally I was not satisfied by the Defendant that the Claim or the Claimant were

fundamentally dishonest. As I have said, I accepted that he was impecunious. It is not often that such matters will turn on who bears the burden of proof. However, such a result was one recognised by Martin Spencer J in *Molodi* (see para 44) where the court is not satisfied that the Claimant is reliable, as opposed to being dishonest or demonstrably untrue (which I did not find in this case). The Defendant raised the issue of fundamental dishonesty, but failed to satisfy the Court on the issue. This is not a case in which I have found that a claim has been exaggerated, but simply not proved. Factually, this is a different scenario to that in *Painting.* I do not view it as unreasonable for the Claimant to have raised the personal injury issue. The position is simply that that element of the claim has failed;

f. The purpose of the fixed costs regime is to provide certainty and ease of calculation. To depart from the regime is these circumstances would be to create uncertainty where the interests of justice do not, on the facts of this case, demand it;

g. The Defendant could have protected itself against the credit hire claim by making an appropriate Part 36 offer. It failed to do so, having pitched its offer at only a little more than half of the damages award.

30. In balancing these various matters, I am not persuaded that it is appropriate to depart from the normal rule and the fast track fixed-costs regime. In the exercise of my discretion I determine that the Claimant should be (and is) awarded his costs to be assessed on the normal fixed costs basis under part 45.29B. The parties shall by 4pm 21 August 2019 file with the court the agreed figure for inclusion in the order or full reasons why agreement has not been reached.

His Honour Judge Hedley

8 August 2019