Case No: A2/2011/0160; A2/2011/0161

Neutral Citation Number: [2011] EWCA Civ 941
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CAMBRIDGE COUNTY COURT (SITTING AT SOUTHEND)
(HIS HONOUR JUDGE MOLONEY QC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 11th July 2011

Before:

LORD JUSTICE MOORE-BICK

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(1)	**RENNIE**	**Applicant**
	- and -	
	LOGISTIC MANAGEMENT SERVICES LTD	**Respondent**
(2)	**SMITH**	**Applicant**
	-and-	
	WYATT	**Respondent**

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Mr R Mallalieu (instructed by GMS Law) appeared on behalf of the **Applicant**, **Mr P Smith**.

The remaining parties did not appear and were not represented.

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Judgment
(Approved by the court)

Lord Justice Moore-Bick:

1. I have before me two applications for permission to appeal which have been renewed following refusal on paper by the single Lord Justice. The two cases were heard together below because they raise the same issue and the judge delivered a single judgment. These applications are being heard together for the same reason.

2. The circumstances giving rise to the appeals are described in the judgment of HHJ Moloney QC below as follows:

> "2. In each case the essential circumstances giving rise to the question are similar, and are as follows:
>
> a. The claim is for personal injury damages following a road traffic accident.
> b. The Claimants (who are otherwise completely unconnected) were represented by the same specialist firm of solicitors.
> c. The claim was notified at an early stage after the accident.
> d. Important material relevant to settlement was not provided, or not until a late stage (in Rennie the special damages schedule, in Smith the medical report).
> e. Proceedings were however issued, very shortly before the expiry of the relevant 3-year limitation period.
> f. Soon after the issue of proceedings, the Defendant made a Part 36 offer which was fairly promptly accepted.
> g. This gave rise to a 'deemed costs order' entitling the Claimant to his costs, to be the subject of a detailed assessment on the standard basis if not agreed.
> h. No such agreement being reached, the matter was listed before a District Judge for detailed assessment.
> i. At the detailed assessment hearing, the District Judge did not carry out a 'line by line' or 'item by item' review of the Claimant's bill of costs as the Claimant would wish. Instead, the DJ awarded a global sum in respect of costs, equal to that which the Claimant would have received under the 'fixed costs regime' if the matter had been settled before rather than after the issue of proceedings."

3. The question is whether in each case the District Judge, before whom the matter came for the assessment of costs, was entitled, instead of considering each item of the claimant's bill, to limit the award to the amount that would have been recoverable if the claim had been settled before proceedings had been issued, as in each case he thought it should have been. On appeal, the judge accepted that the claimant in each case was entitled to an assessment, but it was common ground before him that the amount that would have been awarded under the so-called "fixed costs regime" was a factor that the District Judge could properly take into account when deciding what costs had been reasonably and properly incurred.

4. The judge pointed out that the rules governing assessments provide the procedure to be followed but do not dictate the methods which the costs judge is to apply when carrying out that procedure. In particular, he held that the Rules do not dictate a line-by-line or item-by-item approach. The judge referred to a number of decisions in this court, including Lahey v Pirelli [2007] EWCA Civ 91, O'Beirne v Hudson [2010] EWCA Civ 52, and Drew v Whitbread [2010] EWCA Civ 53, and also to the decision of HHJ Bursell QC in the Bristol County Court in the case of Price v McMahon. He then identified the question for decision as follows:

> "How is a costs judge to deal with a case which on its face falls within a more generous costs regime, but which in his judgment ought to have fallen within a less generous one?"

The judge held that the authorities in this court supported the conclusion that the answer to his question has two aspects, one procedural and one substantive. The procedural aspect requires the costs judge to carry out a detailed assessment; he cannot simply award costs on a basis different from that for which the order for costs provides. However, the substantive aspect requires him to consider to what extent costs have been necessarily and reasonably incurred, and that in turn entitles him to consider the manner in which the litigation has been conducted. In paragraph 14 of his judgment, he said this:

> "In the event of a decision that the whole group to which a particular item belongs was unreasonably incurred because, for example, it was unreasonable to issue proceedings, that general decision will render a line-by-line enquiry into the reasonableness or amount of the particular items necessary."

5. Applying the test that he had derived from the authorities, the judge considered the manner in which the District Judge in each case had carried out an assessment as expressed in their judgments, and held that they had each followed the proper approach, albeit in one case it was less clear than it might have been. He therefore dismissed both appeals.

6. The grounds of appeal are that the District Judge in each case failed to carry out a proper assessment of costs and that the judge below misunderstood, or at least misapplied, the authorities to which he had referred. It is said in particular that the passage in paragraph 14 of his judgment to which I have just referred is wrong insofar as it suggests that a costs judge can disregard a whole group of costs if he is satisfied that as a body it was unreasonably incurred.

7. These are applications for permission to make a second appeal and therefore the applicants must satisfy the court that the appeals would raise an important issue of principle or practice or that there is some other compelling reason for this court to hear them. It is established that in this context an important point of principle or practice means one which is yet to be decided.

8. In my view, the judge below correctly identified the principles to be derived from the cases in this court to which he referred. I tend to think that his application of those principles to the particular facts of these cases was correct, although I can see that the contrary is perhaps not beyond argument.

9. It is also said in the applicants' written arguments (though it has not been at the forefront of Mr Mallalieu's submissions this morning) that these two cases raise an important point of principle that has yet to be decided, namely, whether a defendant can agree to pay reasonable costs to be assessed by way of detailed assessment and then ask the court to assess costs by reference to a more restrictive regime.

10. In my view, the criticism of paragraph 14 of the judge's judgment was not well made. It is the function of the costs judge to determine whether costs have been reasonably and necessarily incurred and, if he can see that a particular course of conduct has led to a group of costs being incurred unnecessarily, he is entitled to say that and need not to consider each item individually. In my view, the argument to the contrary is not really sustainable.

11. The question whether a defendant can agree to pay reasonable costs to be assessed by way of a detailed assessment and then invite the court to assess costs by reference to a more restrictive regime is not in my view an important point of principle of the kind contemplated by Rule 52.13. If the defendant settles a claim on terms that he will pay the claimant reasonable costs to be assessed, it will be a matter of construction of the agreement whether he is agreeing to submit to a detailed assessment in which the costs judge is to have power to make an assessment by considering all the circumstances or whether he is agreeing that the costs judge is to ignore the possibility that the proceedings might have been conducted in a more economical way. That might vary from case to case although, speaking for myself, I should have thought that a defendant is unlikely to be taken to have given up a valuable argument unless it is clear that he has done so.

12. For completeness, I should also mention that another argument was raised in the skeleton argument to the effect that the judge failed to have regard to the decision in Lownds v Home Office [2002] EWCA Civ 365. However, that case concerned a rather different question, namely, the interrelation between costs that have been necessarily and reasonably incurred and costs that are proportionate. That question does not arise in this case.

13. When he refused permission to appeal on paper, Maurice Kay LJ expressed the view that the principles in this area have been settled and that what was really at stake in this case is whether those principles were properly applied. In my view, the principles which the judge derived from the authorities were correct and in my view neither of these appeals raises an important point of principle or practice that remains undecided. For those reasons, I would refuse permission to appeal.

14. As I have mentioned to Mr Mallalieu, one cannot help noticing that when he refused permission, Maurice Kay LJ also expressed the view that it would be disproportionate for a second appeal to be pursued in either of these cases and having regard to the amount in

issue one can understand why he should have taken that view. I agree with his observation, but I make it clear that I do not rest my decision on that fact. I have reached my decision on the grounds that for the reasons I have given these cases do not fall within Rule 52.13.

Order: Applications refused.