Case No: D12YM299
IN THE COUNTY COURT AT BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street
Birmingham B4 6DS

Date: 28 October 2019

Before :

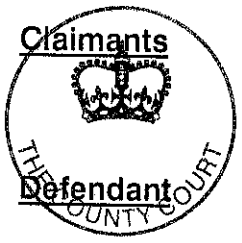
District Judge Griffith

Between :

Timothy Taylor and Others — **Claimants**

- and –

Z Stage UK Limited T/A The Real China — **Defendant**



Mr Roger Mallalieu (instructed by Irwin Mitchell) for the **Claimants**
Ms Sarah Robson (instructed by Percy Hughes & Roberts Solicitors) for the **Defendant**

Hearing date: 27th March 2019

JUDGMENT

District Judge Griffith :

1. The substantive case has settled, the only issue outstanding being in respect of costs. The claim itself, by 28 claimants, is one for personal injury as a result of contracting food poisoning when eating at the Defendants' restaurant in July 2014. Letters of claim were served in August and September 2014 and a formal letter of response was sent on behalf of the Defendants' public liability insurer, extremely promptly, on 11th September, the day after receiving the second letter of claim. Although some admission was made, the claims did not settle and Part 7 court proceedings were issued in July 2017. All 28 Claimants were included in the same action, and the majority had been included in the letters of claim. A Defence was filed and the claim allocated to the multi-track. In due course, the claims settled in a global sum by a Tomlin order dated 24th May 2018, duly sealed. Six of the Claimants are minors and therefore court approval was sought and given for them.

2. The nub of the issue for determination in this judgment is that the Defendant maintains that the claims should have been dealt with individually under the Pre-action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the Protocol") rather than the way they were, 'en bloc'. That would have involved a Claims Notification Form ("CNF") for each Claimant being sent to the Defendant insurers through the appropriate Portal. The preamble of the Protocol, at paragraph 2.1 says:

> "This Protocol describes the behaviour the court expects of the parties prior to the start of proceedings where a Claimant claims damages valued at no more than £25,000 in an employers' liability claim or in a public liability claim. The Civil Procedure Rules 1998 enable the court to impose costs sanctions where this Protocol is not followed".

3. Paragraph 3.1 sets out its aims, in essence, to ensure that claims are settled without the need for court proceedings, that damages are paid within a reasonable time and that the Claimant's legal representative receives fixed costs at each appropriate stage.

4. The Defendants' concern now is that the Claimants are seeking costs in excess of £400,000 whereas, if the Protocol had been used, the costs would have been limited to about 10% of that. They say that the Claimants should be limited to fixed costs and disbursements as set out in CPR 45.18 & 19. As such, the parties have agreed that this issue should be the subject of a preliminary determination by the court.

5. The Tomlin order itself provides, at paragraph 3, that the Defendant is to pay the Claimants' costs of the action to be the subject of a detailed assessment if not agreed. However, paragraph 4 qualifies that by referring to the preliminary issues to be dealt with, (a)–(c). This judgment deals with (a) only which states, "Whether the costs of each of the Claimants are to be assessed on the basis of standard costs or fixed costs per Section III

of Part 45;". I should make it clear that my decision is made within the confines of the substantive claim, no detailed assessment proceedings having yet been commenced. Both parties are content with this.

6. The Defendants' first line of attack is by reference to CPR 45.24 headed, "Failure to comply or electing not to continue with the relevant Protocol – costs consequences". It states:

> "(1) This rule applies where the Claimant –
>
> (a) does not comply with the process set out in the relevant Protocol; or
>
> (b) elects not to continue with that process,
>
> and starts proceedings under Part 7.
>
> (2) Subject to paragraph (2A), where a judgment is given in favour of the Claimant but –
>
> (a) ...;
>
> (b) the court considers that the Claimant acted unreasonably-
>
> (i) by discontinuing the process set out in the relevant Protocol and starting proceedings under Part 7;
>
> (ii) by valuing the claim at more than £25,000, so that the Claimant did not need to comply with the relevant Protocol; or
>
> (iii) except for paragraph (2)(a), in any other way that caused the process in the relevant Protocol to be discontinued; or
>
> (c) the Claimant did not comply with the relevant Protocol at all despite the claim falling within the scope of the relevant Protocol,
>
> the court may order the defendant to pay no more than the fixed costs in rule 45.18 together with the disbursements allowed in accordance with rule 45.19".

7. Sub-paragraph (2)(b) clearly does not apply in this case as it only applies to a claim which is already in the Protocol. In this case, the claims were never entered into the Protocol and therefore the Defendants' argument is based on (2)(c).

8. However, before I consider whether there has been a failure to comply, I need to deal with the Claimants' submission that 45.24 is simply not activated at all and refers to the qualifications given in subparagraphs (1) and (2). So far as the former is concerned, clearly Part 7 proceedings have

been started. The issue is in respect of (2) which refers to a judgment having been given. The Claimants argue that no judgment has been given but simply a settlement reflected in a Tomlin order. There has been no court decision as such. There is no definition of "judgment" in the rules' glossary. Ms Robson, however, referred me to CPR 40.1, which deals with judgments and orders. Whilst that rule refers to judgments and orders separately, suggesting they are different, the note in the 2018 Green Book at 40.1[1] states:

> "These terms are not defined in the glossary section of the rules and although the rules use both expressions, there is nothing to indicate that any distinction is now drawn between them in the rules themselves. Indeed, they tend to be used together in the phrase 'judgment or order' purely for the sake of completeness. Historically a judgment was a final decision in an action, an expression now replaced ... by the expression 'claim'; an 'order' was the term applied to every other decision in an action or matter ... If any distinction between the expressions can be discerned from this Part of the rules it would appear to be that a judgment is a judicial act or an act of the court through one of its authorised officers and whether it is an act of a judge or court officer as a result of an actual decision or by default, it is a final decision in the claim. ... Everything else is an order, whether it is the result of a decision of a judge or an authorised act of a court officer. However, the term judgment is used in different contexts and must not be confused. It is used to refer to the pronouncement of the judge when giving reasons for the making of a judgment or order. It is also used in the expressions 'summary judgment' and 'default judgment', neither of which need necessarily need to be a final decision in a claim".

9. It almost goes without saying that this, of course, is simply commentary rather than binding authority, useful as it is. I have not been referred to any binding authority on the precise definition of "judgment" under the court rules generally and specifically 45.24. Mr Mallalieu referred me to the case of **Williams v The Secretary of State for Business, Energy and Industrial Strategy [2018] EWCA Civ 852**. That was also a claim where a Defendant argued that a claim should have been brought within the relevant Protocol and therefore fixed costs only were recoverable. However, that was a claim which settled before the commencement of proceedings and therefore, clearly, there had been no judgment. However, the first issue to be considered was whether 45.24 applied. Lord Justice Coulson gave the lead judgment. He did not approve of the approach of the Deputy District Judge at first instance, of reading in further wording to 45.24 so as to allow its application in a situation where there had simply been a settlement following the acceptance of a Part 36 offer in order to bring in wider considerations of common sense, wider justice and fairness. On an appeal to His Honour Judge Godsmark QC, he found against the Deputy District Judge and that 45.24 did not apply as there had been no Part 7 proceedings and no judgment. Lord Justice Coulson agreed and stated at paragraph 40 (B1, p149):

"... Those circumstances (where there are Part 7 proceedings and a judgment) are not examples, but pre-conditions which have to exist before the rule can be applied".

10. He went on in paragraph 43:

"As a matter of interpretation, I consider that the sub-rules cannot be interpreted as if these additional words had been incorporated. The new words radically change the meaning and scope of the rule, extending it back in time to the pre-action stage, and circumventing the express requirements for Part 7 proceedings and a judgment".

His particular concern is expressed in paragraph 41:

"Moreover, it is unsurprising that r.45.24 assumes the existence of proceedings and a judgment. It is part of a wider scheme. With the exception of r.45.23A ..., all of Section III of Part 45, starting at r.45.16 and including r.45.24, applies where proceedings have been commenced and been pursued to a judgment. That in turn is consistent with the principal function of the CPR: to govern the conduct of proceedings once they have been commenced".

11. That concern is not a concern in the case before me as proceedings have been issued and the Defendant is not seeking to read any additional words into 45.24. It is simply a question of what "judgment" means and **Williams** does not help on this. I agree with Ms Robson's submission that, to read "judgment" as meaning a reasoned decision in a contested matter at a final hearing, would radically limit the scope and effectiveness of this rule. It would mean that Defendants would be obliged to contest a case through to a trial in order to achieve, what in their view would be, a more favourable costs order. That would be wholly contrary to the overriding objective and the need to deal with cases proportionately, saving expense, dealing expeditiously and fairly and allotting an appropriate share of the court resources. As such, I find that "judgment" encompasses a final order by consent, considered by a judge and sealed by the court. As such, I find that 45.24 falls for consideration.

12. I now need to consider whether the Claimants are caught by (2)(c) by not complying with (starting) the Protocol despite falling within its' scope. What is meant by scope? Paragraph 4.1 of the Protocol states:

"This Protocol applies where –

(1) either –

(a) the claim arises from an accident occurring on or after 31st July 2013; or

(b) in a disease claim, no letter of claim has been sent to the Defendant before 31st July 2013;

(2) the claim includes damages in respect of personal injury;

(3) the Claimant values the claim at no more than £25,000 on a full liability basis including pecuniary losses but excluding interest ('the upper limit'); and

(4) if proceedings were started the small claims track would not be the normal track for that claim".

13. Paragraph 4.3 gives some exceptions, none of which apply. The Claimants, having failed on their primary argument as to applicability of 45.24, revert to their argument as to the reasonableness of the Claimants' solicitors approach. It seemed to me that Mr Mallalieu was seeking to bring this in both at the earlier stage when considering (c) and the falling within scope and, failing that, at the general discretion stage at the end.

14. Mr Mallalieu has referred me to the case of **Qader and Others v Esure Services Limited and Others [2016] EWCA Civ 1109**. This case is different to the one before me albeit it was dealing with the fixed costs regime for claims started under the RTA Protocol (almost identical to the EL/PL Protocol). The question was whether the fixed costs regime continued to apply to a case which no longer continued under the RTA Protocol but was allocated to the multi-track after being issued under Part 7. It involved, in the main, consideration and interpretation of Section IIIA of CPR 45, together with the relevant parts of the RTA Protocol. By reference to various extracts from the judgment of Lord Justice Briggs (as referred to in his skeleton argument paragraph 36), Mr Mallalieu referred to several occasions when the fixed costs rules were mentioned as applying to cases "properly" started under the Protocol. This, Mr Mallalieu suggests, indicates a judgment being needed on the part of the practitioner when deciding whether or not to place a claim in the Protocol, such to be considered under the hat of reasonableness. My reading of those extracts from **Qader** is that "properly" simply referred to whether or not a claim was within scope. If it was within scope then it was properly started. I would not go so far as to say that there was a judgment to be exercised upon the basis of reasonableness generally, but of course the solicitor would need to take a view as to the value of the claim and that would have to be based on information available to him at that time. To that degree therefore, **Qader** does not assist the Claimants in arguing that they were not caught by 45.24(2)(c) but it may be of more relevance when looking at the general discretion and the question of reasonableness.

15. In this regard, I agree with Ms Robson's submission that, individually, at the time that a decision was being made as to the format of notifying the claims to the Defendant in August 2014, the values of each claim could not be identified as more than £25,000 as there was no medical evidence available at that time, such having been obtained between 2016 and 2018. The Protocol requires each claim to be notified individually rather than 'en bloc'. At the outset, each of these claims, individually, was within scope and therefore, it can be said in the first instance that each Claimant did not comply with the Protocol by failing to notify the claims using a CNF.

However, that is not the end of the consideration as will be clear later in my judgment. At this stage, however, I note that (2)(c) is not qualified by reasonableness as is (2)(b). The Defendant makes the point that there must be a reason why reasonableness was omitted in (c). On the face of it, it seems a deliberate choice by the rule drafter that reasonableness be considered in (b) but not in (c) at the point of considering whether there was a failure to comply despite falling within scope. I agree. At that point, it is simply a question of fact as to whether it fell within scope or not and I have found that it did.

16. However, that only considers the interrelationship between (b) and (c) at that point. Having made the finding I have, the next stage is to consider whether and how to exercise my discretion in making the order sought. It is clear, by the use of the word "may", that there is a remaining discretion which applies to (a), (b) and (c).

17. Mr Mallalieu's position is that reasonableness should be considered within the ambit of rules 43 and 44. Ms Robson's position is that the discretion should be exercised rarely and I should not refer to rules 44.3 and 44.4 but rather simply take into account all the circumstances of the case up to the point of the breach of the Protocol, that is, at the time that the initial decision was made to notify the claims by a letter of claim rather than a CNF. Her overarching point is that reasonableness should not be allowed in through the back door when considering a matter under (2)(c) rather than (2)(b). In essence, once within scope, a claim should be started within the Protocol even if subsequently, for good reason, it has to come out. Whilst I can see the simplicity of that argument, the fact remains that there is a residual discretion and a basis for exercising that. If it was simply a question of fact as to whether or not a case fell within scope, then there would be no place at all for any discretion at any point in time but clearly that is not what is provided by the rule.

18. In arguing her point, Ms Robson refers to the case of **Liaqat Raja v Mr Kane Day and Motor Insurers Bureau**, claim number 3YM66264, a decision of His Honour Judge P Gregory, an unsealed transcript of which is in the bundle (B1, p207). That was an appeal from a decision of a District Judge in a case where it was accepted by both parties that a claim should have been made through the RTA Portal. The decision being appealed was an order made in a provisional assessment of costs. The basic issue was that the Defendant was seeking an order that costs be assessed on the fixed costs basis but this was rejected by the District Judge. The Defendants' appeal was upheld on the basis that the District Judge had made a fundamental error by considering that the claim, due to its stated value, was always destined to exit the Portal process and made findings that the Claimant's solicitors had acted reasonably without identifying the factual basis for it. His Honour Judge Gregory considered 45.24(2)(b) and (c) and referred, in paragraph 25 of his judgment, to the "default position" being that the court should consider awarding only fixed costs. In other words, says Ms Robson, the burden would effectively shift to the Claimant to show why costs should not be restricted to fixed costs. Even though

this case is not binding on me and is quite different on the facts to that before me, in that both parties accepted that the case should have been started in the Portal, I find it useful and relevant. For the reasons I have given, there needs to be some way in distinguishing between (b) and (c) and the reference to reasonableness in the former. I therefore agree with the learned judge' reference to "default position", insofar as it applies to (c), and that this shifts the burden onto the Claimant, as Ms Robson submits. I say this conscious of the fact that reasonableness is specifically not included in (2)(c) and therefore intended to be treated differently in some way to (2)(b). However, I do not go so far as finding there to be, in effect, strict liability. I am not sure that, in the case before me, the Defendant's position goes quite that far in any event, inviting me to consider all the circumstances of the case.

19. I have to say I struggle with the concept of simply considering all the circumstances of the case, as Ms Robson suggests. Of course, the circumstances do need to be considered but there needs to be a standard by which conduct is judged and that, it seems to me, is where reasonableness comes in. Mr Mallalieu referred me again to **Williams**. After finding that 45.24 did not apply in that case, Lord Justice Coulson commented as follows:

> "55. More widely, Part 44 provides important general rules about costs and the sorts of matters which, in the exercise of its' discretion, a court may wish to take into account when assessing costs. For Part 44 to be disapplied (in whole or in part) ... there would have to be clear words setting out the nature and scope of any such disapplication. There are none here. Accordingly, I consider that Part 44 applies to this case. The unreasonable failure by the Claimant to follow the EL/PL Protocol, as found by the DDJ, triggers the Part 44 conduct provisions.
>
> 56. In my view, it is at this point that paragraphs 2.1, 3.1 and the warning at 7.59 of the EL/PL Protocol, become relevant. Taken together, those paragraphs comprise a clear indication that, if a claim should have been started under the Protocol but was not, and it was unreasonable that the claim was not so started, then by operation of the Part 44 conduct provisions, the Claimant should be limited to the fixed costs that would have been recoverable under the EL/PL Protocol".

20. Of course, in that case it was decided that 45.24 did not apply at all rather than, as in the case before me, it being found that there is applicability and a breach under 2(c). In paragraph 44 of his judgment the Lord Justice talked in terms of the CPR providing more than one route to the same result, being hardly uncommon. However, that was in the context of a case where the provisions of 45.24(2) did not need to be applied. I note the

references to paragraphs within the Protocol. In particular, 7.59 which states:

> "Where the Claimant gives notice to the Defendant that the claim is unsuitable for this Protocol (for example, because there are complex issues of fact or law or where Claimants contemplate applying for a group litigation order) then the claim will no longer continue under this Protocol. However, where the court considers that the Claimant acted unreasonably in giving such notice it will award no more than the fixed costs in rule 45.18".

21. The words "no longer continue" indicate this provision applying once a claim is within the Protocol. I can see how that might be linked in with the rule at (2)(b) which deals with situations where the claim is already in the Protocol and the question of reasonableness being considered. Despite this point, the remarks of Lord Justice Coulson are clear in paragraph 56 in stating that, if a claim should have been started under the Protocol but, unreasonably, was not, then Part 44 conduct provisions would apply to limit costs to fixed costs. He clearly had in mind a situation where the claim had not been dealt with under the Protocol. I can see the sense in this in having to apply the general discretion under the rule in a meaningful way and by some standard. I find that reasonableness is the appropriate standard. Although I can understand why the Defendant has taken the stance it has, I do not accept the argument that it is allowing reasonableness in by the back door. It is simply applying it at a different stage and with the onus on the Claimant, that is, not at the consideration at (2)(c) but rather at the stage of the general discretion after that. If the rule had intended there to be, in effect, strict liability for failing to use the Protocol when within scope, then it could have said so rather than leaving a general discretion.

22. I will therefore consider CPR 44. It is not entirely clear from **Williams** precisely which provision was in mind. I am not being invited to consider anything other than 44.3 and 44.4, both of which refer to reasonableness and proportionality. CPR 44.4, in particular, includes conduct as one of the specific factors. Although not cited in **Williams**, a similar decision was reached by Master Simons of the Senior Courts Cost Office in 2013 in the case of **Davis and Others v Greenway LTL**, case number JMS1205590, a sealed copy of the approved judgment being in the bundle (B1, p126).

23. This brings me to the point where I need to decide, under the residual discretion, whether the Claimants' solicitors acted reasonably or not in all the circumstances of the case, in bringing all the claims together using a letter of claim rather than notifying them individually within the Protocol.

24. I have considered the witness statement of Clare Comiskey (B1, p37) which gives some background to the litigation. She confirms the letter of claim was sent on 29th August 2014 but reasons for not using the portal were not given until 21st April 2016, by letter. No explanation is given for the delay despite having been pressed by the Defendant for some time for reasons. Mrs Comiskey, in essence, states that her firm was only doing

what they had done in the past, based on experience that such claims brought together are allocated to the multi-track. A number of example claims are given. She refers to the nature of these claims, generic issues, length of trial and complexity. She also refers to a schedule of the Claimants in this case which shows that three of the Claimants were allocated (from the global sum) £25,000 and one (a minor) £26,000.

25. Whilst Mr Mallalieu argues that there is a degree of judgment to be exercised by a Claimant's solicitor when deciding whether to start a case in the portal, both counsel agree that an application of any test of reasonableness must not use hindsight. I agree with this and the Claimants' solicitors will be judged by matters that were evident at the time the decision was made. They cannot, for example, simply point to the fact that, subsequently, liability was contested, there transpired a need for common expert evidence or that the issued claim was allocated to the multi-track. It is clear from Mrs Comiskey's witness statement and Mr Mallalieu's submissions that their key point is that, if it is clear to the solicitor that, if proceedings are issued, claims will inevitably be allocated to the multi-track, this amounts to a reasonable decision being made in not placing a claim within the portal in the first place. Mr Mallalieu relies upon the case of **Qader** and I have already given my view on that case in the context of the meaning of cases "properly" started under the Protocol.

26. Albeit belatedly, the Claimant's solicitors gave their reasons for not using the Protocol in their letter 21st April 2016 (CB, p89). Their argument is based entirely on 7.59 of the Protocol. However, this clearly applies only to a claim already in the Portal but where there is an intention for it to leave. Specific reasons are given but none refer to a potential value of £25,000 or more. It is simply a case of envisaging the response of the Defendant and the impact on evidence, trial, etc., leading to a view being taken that a case would be allocated to the multi-track. These are all matters which would be of relevance once a claim was in the Protocol, when considering whether it should leave but were not intended to replace the clear definition of scope under paragraph 4.1, and in particular the question of value.

27. Even if I were, as Mr Mallalieu submits, to take the letter of claim as the most contemporaneous view of the Claimant's thoughts at the time, there is nothing in it which refers to the potential value of any claim. The closest comment (CB p105) states that, "...Given that this is a group action, and the severity of the symptoms suffered by our clients we believe that this claim would be allocated to the Multi Track." Although, by lumping together all 28 Claimants, the value of the claim would very likely have been over £25,000, there is nothing to indicate that any individual claim would reach that figure. In any event, I note that the solicitors did not have the benefit of any medical evidence at that time upon which such a view could be taken. The value of the claim is key in looking at the scope of the Portal and deciding whether a claim should be started within it. The other factors referred to in the Protocol are aimed at a case that is already in it. The Claimants' solicitors did not have sufficient information to take a

reasonable view that individual claims were valued at at least £25,000. At that time they could not know what the Defendants' response would be to individual claims, should they be started. It is insufficient, in order to comply with the letter and spirit of the Protocol, simply for the solicitors to anticipate liability being disputed, with the complications that this would entail, including expert evidence, and expecting the case to fall out of the Portal and subsequently be allocated to the multi-track. That may turn out to be the case but, if so, there is provision within the Protocol for cases to drop out. At that time steps could be taken for them to be dealt with together, as appropriate. This way, the Defendant would at least have an opportunity of attempting an early settlement within the Protocol, as proved to be the case with 62 other Claimants represented by other solicitors, as referred to in the witness statement of Jaqueline Smith on behalf of the Defendant (B1 p35, paragraph 4). This is not looking back with hindsight but simply pointing to a key benefit in having the Protocol. I do not find the Claimants' argument that they have adopted this procedure with a number of other cases previously without challenge, as persuasive. Neither am I persuaded that it is reasonable for a Claimants' solicitor to speculate on what might happen in a particular claim, even if that is based upon experience of similar cases. It follows, therefore, that I do not accept an argument that it was reasonable not to use the Portal as it was envisaged that it would probably drop out shortly thereafter. Although not binding authority, I note that a similar situation was considered in **Dawrant v Part and Parcel Network Limited**, a decision of His Honour Judge Parker at the County Court in Liverpool on 28th April 2016, an unsealed copy of the approved judgment being at (B1 p217). In that case, the Claimant had failed to present the claim under the RTA Protocol even though, it being common ground, that it applied. The decision at first instance involved consideration of CPR 45.24 and the final discretion. The Deputy District Judge speculated as to what might have happened if the claim had been brought under the RTA Protocol and concluded that there was evidence that it would have exited in any event. That judgment was overturned on appeal. His Honour Judge Parker said at paragraph 36:

> "The Deputy District Judge sought to fill the void by factors that were, in my judgment, largely irrelevant together with the application of hindsight and speculation which, in my judgment, she should not have done and I refer again to the list of authorities that are set out earlier in this judgment and those passages cited in the skeleton argument of the Appellant".

28. Further in paragraph 48:

> "This, in my submission, is clear speculation using the benefit of hindsight and the Deputy District Judge was clearly asking herself the question, 'would it have made any difference if the Claimant had complied with the Protocol and served a claim notification form on the Defendant's insurer,' and arriving at the answer no. She did not

think that that would have made any difference and that was, in my judgment, dangerous speculation and she was wrong to do so."

29. Whilst not binding upon me, I agree with this analysis. The Defendant in the case before me responded in a particular way to the letter of claim and, indeed, there was not a full admission of liability. That is not to say that its' response would have been the same if reacting to a claim brought under the Protocol. To say so would be dangerous speculation.

30. Having found, therefore, that the onus is on the Claimant to satisfy me that they acted reasonably and that I should exercise the discretion under 45.24(2) and, effectively, allow them assessed costs rather than fixed costs and allowable disbursements, I am not persuaded that the Claimants' solicitors have acted reasonably in initiating the claims 'en bloc', rather than individually under the Protocol. Therefore, the Defendant will not pay more than the fixed costs in 45.18 together with the disbursements allowed under 45.19.