

IN THE LEICESTER COUNTY
COURT

CASE NO: A53YJ800

BETWEEN :



KRISH DILIP

Second Claimant

HITISHA DILIP

Third Claimant

-and-

PAYNES DAIRIES LIMITED

Defendant

JUDGMENT

1. On 15th June 2014 I provisionally assessed the costs of the Second and Third Claimants Krish and Hitisha Dilip.
2. The Defendants have, pursuant to CPR Rule 47.15(7) requested an oral hearing. The item which the Defendants seek to have reviewed pursuant to that Rule is their general point 2, the parties having agreed the figures of the provisional assessment subject to this issue.

3. Annexed to this judgment are the submissions of the Defendant under general point 2 and the Claimants' reply. Having considered those submissions on paper the order I made was:-

"The matter was allocated to the fast track. The costs will be assessed pursuant to paragraph 3 of the Tomlin Order dated 7th July 2014."

4. At the review hearing on 10th September 2015 the Defendants were represented by Counsel Mr Turner; the Claimants by Counsel Miss Tompkinson both of whom had filed skeleton arguments. I was also provided with a bundle of relevant authorities.
5. The Claimants' solicitors were instructed to represent a mother and two children all of whom were injured as passengers in a motor car in a road traffic accident. Mother was litigation friend for the children. Liability was not admitted and the claim left the portal. Proceedings were issued on 1st March 2014 for all three Claimants. That is to say mother and the two children were named as First, Second and Third Claimants in the one claim. An acknowledgement of service was filed by the Defendant indicating an intention to defend. A defence was filed on 27th March 2014. Liability was not admitted. The Claimants were put to strict proof that they were passengers in the vehicle.
6. The parties filed directions questionnaires. On 3rd June 2014 (drawn 12th June 2014) District Judge Atkinson allocated the claims to the fast track and gave directions through to a fast track trial.

came before me on 15th June 2015 and ultimately leads to this review hearing.

12. The parties accept there is no dispute that the claims were properly allocated to the fast track by District Judge Atkinson following receipt of each party's directions questionnaire.

13. The Defendants through Mr Turner say the issues are:-

- should the children's claims which were and were always claims of a value within the small claims track have been issued at the same time as the mother's claim, and



whether,

- , having been issued the costs should be assessed on the track ordinarily relevant to the value of the claims namely the small claims track.

14. Counsel refers me to various cases in support of the submissions. In particular:-

- (i) **O-Bierne v Hudson [2010] EWCA Civ 52**. This case settled prior to allocation and is therefore on different facts to the case with which I am concerned. The **O-Bierne** case settled on payment of general damages of £400 and special damages of £719. The Defendant was ordered to pay the Claimants reasonable costs on the standard basis subject to detailed assessment if not agreed. The Defendant disputed the Claimants' bill on the basis that had the claim gone on to

7. On 7th July 2014 the parties signed a Tomlin Order settling all three claims. The relevant paragraphs of the Tomlin Order are as follows:-

“On the basis that the Defendant has offered the Second and Third Claimants £550 each for the settlement of their claims the matter be transferred to part 8 and listed for an infant approval hearing at the first available date.

The Defendant shall pay the First, Second and Third Claimants’ costs such costs to be assessed in detail by the court on the standard basis if not agreed and such costs to be paid fourteen days after assessment or agreement.”

8. The Tomlin Order was made by the court on 28th October 2014.
9. The claims of the children, the Second and Third Claimants, were duly transferred to part 8 and listed for infant approval hearings before District Judge Hedley on 11th December 2014.
10. On 11th December 2014 the settlements were approved for each of the Second and Third Claimants in the sum of £550 each and as to costs District Judge Hedley made the following order:-

“The Defendant pay the Claimants’ costs to be assessed with permission to request assessment to be dispensed with and the Claimants’ solicitor waiving any claim to further costs.”

11. It is following upon those orders for costs made pursuant to the Tomlin Order and infant approval hearings that the provisional assessment

allocation then the small claims track would apply and therefore the costs should be by reference to the small claims track.

- (ii) The case found its way to the Court of Appeal and on appeal the court held a costs judge had no power to alter the order for costs and to rule that the costs should be assessed on the small claims track. The costs judge could however take account of the fact that had the claim not settled the case would almost certainly have been allocated to the small claims track limiting the costs recoverable and the costs judge should give anxious scrutiny to see whether costs had been necessarily and reasonably incurred when undertaking the detailed assessment. Taking into account all the circumstances including the fact that the case would "almost certainly have been allocated to a small claims track if it had been allocated" Mr Turner submits that I as costs judge must question whether if these claims had been fought on the small claims track it would be reasonable that the paying party should pay the costs of a lawyer. He refers to paragraph 17 of the judgment of Waller LJ in this regard.
- (iii) The Defendants say the Claimants' (the minors) claims only came to be on the fast track because of "bundling" of their claims with their mother's. I am referred to paragraph 19 of the judgment of Waller LJ and Mr Turner suggests this shows a philosophy or policy that if, in effect, a claim is valued as a small claim then although a costs judge cannot vary the order for detailed

assessment the Claimants' bill should be very carefully considered and in particular as to whether it is reasonable for the Defendant to pay more than would have been recoverable in a case that should have been allocated to the small claims track.

- (iv) It is says Mr Turner only because of what he calls "bundling" that the claims were allocated to the fast track the costs he submits should be assessed with anxious scrutiny and allow the small claims costs with an additional allowance for the Claimants to have legal advice as to quantum.
- (v) **Drew v Whitehead [2010] EWCA Civ 53** is says Mr Turner authority that allocation is not determinative as to costs and that my discretion on costs should take into account that these claims would ordinarily have been allocated to the small claims track.
- (vi) The case of **Dockerill v Tullett [2012] 1WLR 2092** concerned the assessment of costs in infant approval settlements. This case addresses the issue of how in part 8 claims for infant approval settlements assessment of costs should be carried out when a claim would ordinarily have been in the small claims track. He submits that the Claimants in the case I am considering should have small claims track costs only plus the cost of legal advice on quantum (but not representation at the infant approval hearing). At paragraph 5 of the judgment of Patten LJ Mr Turner refers me to the extract which reads as follows:-

reasonable to have instructed solicitors to act generally in the approval proceedings.

- (ix) Paragraph 41 of the judgment makes it clear that it is important to note that the general guidance about the detailed assessment of costs on a standard basis does not depend on issues about allocation.

15. The assessment, says Mr Turner, is about discretion and the underlying value of the claim. The court should consider whether it was reasonable or necessary or proportionate for the litigation friend to employ solicitors throughout. He submits that in this case there were children who were passengers. They had minor injuries. There was no rush or pressing need for them to issue. Their claims should not have been issued with their mother's (who I note was also a passenger). The Defendant says there was no reason to issue the children's claims at the same time as the mother's claim. The children's claims could have been held back to await the outcome of the mother's claim and it is not reasonable for the Defendant to have to pay these Claimants' costs because of "incidental bundling" with the fast track claim.

16. For the Claimant Miss Tompkinson submits that the question on the detailed assessment being carried out pursuant to the orders for detailed assessment on a standard basis made in the Tomlin Order and the infant approval order is as to whether the costs are reasonable and proportionate in amount and reasonably and proportionately incurred. This arises from part 44.4(1)(a) CPR. The court must have regard to all

“The real issue in cases like the present where the damages would have been less than £1,000 is whether the Claimants’ litigation friend should be entitled to recover the costs of instructing a solicitor to handle the matter (including the claim for approval) or whether those costs should be limited to or by reference to what might be recoverable for a small claim ...”

- (vii) In carrying out the detailed assessment no distinction is to be drawn between adults and minors (paragraph 19).
- (viii) On a detailed assessment on a standard basis the obligation of the court is to decide whether the costs claimed are proportionately and reasonably incurred or are proportionate and reasonable in amount and the costs judge should “look realistically at the underlying claim for damages which has been settled and consider whether the costs claimed in Rule 21.10(2) proceedings are proportionate to the issues involved.” Mr Turner submits that although the claim I am dealing with was not issued under Rule 21.10(2) as part 8 of the proceedings the principles are the same in that these claims were simple and straightforward, not involving serious injuries with no real issues about liability. He continues by reference to paragraph 38 of the judgment and submits that the Defendants as paying party are entitled to challenge not merely the amount and reasonableness of any particular item but also whether it was proportionate and

the circumstances in deciding the amount of costs and under part 44.4(3) specific factors the court will have regard to are set out in subparagraphs (a) to (g).

17. Before addressing those specific factors it is submitted on behalf of the Claimants that the overriding objective requires claims with the same facts to be heard together. This is not "bundling" as suggested by the Defendants but good practice and efficient use of court time and resources. The Defendants could have settled in the portal but did not. The claims of the mother and the children were intrinsically connected and it was reasonable and proportionate for them to be issued at the same time. This was proper and normal conduct for the solicitors to issue all claims together.
18. The Claimant submits that the costs should be assessed on the basis of the track to which the claim was allocated because it was reasonable and proportionate to incur those costs. The costs of the First Claimant were agreed at a figure similar to the provisional assessment of the Second and Third minor Claimants. It is submitted on this basis that the costs are reasonable and proportionate in amount and reasonably and proportionately incurred.
19. The Claimant makes submissions under part 44.4(3).

"(a) The conduct of all the parties including in particular:-

- (i) conduct before as well as during the proceedings; and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute."

20. On behalf of the Claimants it is submitted that the Claimants' conduct is not open to criticism. Proceedings had to be issued for all three Claimants because the Defendants neither admitted liability in the portal nor made a reasonable early offer of settlement to avoid the need for issue. As a result the claims fell out of the portal and proceedings were issued. Upon issue the Defendant did not admit liability but filed a defence putting the Claimants to proof that they were passengers in the vehicle. It was open to the Defendants to protect itself by admitting liability or making offers within the portal or prior to the issue of proceedings. The Defendant could have raised arguments about small claims track costs at the time of the Tomlin Order or in the infant approval hearing or in any correspondence but did not do so or take the point until the costs came to be assessed following the conclusion of the proceedings. In addition the Defendants knew throughout there were three claims arising from the same accident instructing the same solicitors and it was therefore foreseeable that all would be issued together for economy and for the overriding objective.

21. "(b) The amount or value of any money or property involved."

At the time of issue the first Claimant's claim was valued at fast track limits and upon allocation the claims of the children were properly allocated to the fast track together with the claim of the First Claimant. This claim is different

from O-Bierne in that it was properly allocated to the fast track whereas O-Bierne was settled pre-allocation.

22. "(c) The importance of the matter to all the parties."

The Claimant submits the matter was of little importance to the Defendant and of greater importance to the Claimant.

23. "(e) The skill, effort, specialised knowledge and responsibility involved."

The Claimants submit that the Claimants needed to make greater efforts than might have been needed had the Defendant conducted the matter reasonably. The solicitors and litigation friend had additional responsibility by reason of the Claimants' ages and ^{the need to pursue} ~~to pursue~~ claims for the Second and Third Claimants which were based on psychological damage only.



24. "(f) The time spent on the case."

The Claimants submit that this case took far too long to settle. It took two years to settle the claims that could easily have been settled quickly within the portal. This was due to the Defendant's conduct not the Claimants and led to the issue of proceedings.

25. Finally it was submitted that it was reasonable and proportionate for the Claimants to bring their cases with their mother's action. She recovered fast track costs following allocation. They should recover fast track costs following allocation.

26. As regards the cases to which the Defendant made reference, O-Bierne confirms settlement pre-allocation and can therefore be distinguished from

this matter. None of the other cases to which reference has been made cover the factual matrix of this case.

27. The Claimant submits that the court is entitled to have made the order it did at provisional assessment within its wide discretion and there is no reason to allow a review of that order. In the Defendant's final submissions in reply it was said that the children's claims should have been delayed until the mother's claim was resolved. In addition the Defendant does not say that this "must" be small claims track costs but that the court should exercise discretion and consider the underlying value of the claims and assess the costs on grounds of reasonableness and proportionality.

28. In my judgment these three claims were properly issued together. The three Claimants were passengers in the same vehicle, their claims were being dealt with by the same firm of solicitors. I have little doubt the Claimants would have been criticised for issuing three separate sets of proceedings with three separate court fees had they chosen to proceed in that manner. The three claims have not settled. There was no admission of liability. The claims had exited the portal and proceedings were inevitable. I take the view that the Claimants' solicitors would have been open to criticism had they not issued all claims together. It was a perfectly proper course of action which followed upon the Defendant's decision not to admit liability in respect of any of the claims. There does not seem to me to be any reason why the minor Claimants should delay issue of their claims and their claims stood or fell together.

decision not to admit liability at that stage the claims were rightly and reasonably issued. Even after issue the Defendants did not settle immediately or admit liability rather an acknowledgement of service was filed indicating an intention to defend and the defence was filed putting the Claimants to strict proof that they were passengers in the vehicle. This defence applied to all three Claimants.

31. All three claims were then as accepted by both parties properly allocated to the fast track not, in my judgment, by reason of "bundling" but by reason of the fact that the value of the mother's claim was estimated to exceed the small claims track limit.

32. I have considered the factors set out in paragraph 44.4(3) of the Civil Procedure Rules. In respect to the conduct of the parties I accept the submissions made by the Claimants and further accept that by reason of the Defendant's stance in respect of the three claims both prior to and following issue of proceedings the Claimants' solicitors properly undertook and made greater effort than might otherwise have been necessary leading as I have already found to the proper issue of all three claims together.

33. Having regard to all the circumstances I am satisfied that the Claimants' costs were proportionately and reasonably incurred or proportionate and reasonable in amount as set out in my provisional assessment. In reaching this conclusion I have had regard to the factors set out in paragraph 44.4(3) Civil Procedure Rules. I have considered the submissions made by both parties and do not consider in the particular circumstances of this case that these claims would ordinarily have been allocated to the small claims track


29. Having issued the proceedings the Defendant filed an acknowledgement of service indicating an intention to defend. A defence was later filed putting the Claimants to strict proof that they were passengers in the vehicle. Directions questionnaires were sent out by the court. Following the filing of the questionnaires the claims were properly allocated to the fast track. Settlement followed of all three claims first through a Tomlin Order and in the case of the Second and Third Claimants through an infant approval hearing. Costs issues were dealt with both in the Tomlin Order and in the order providing approval of the infant settlement. Costs were to be subject to detailed assessment on the standard basis in the absence of agreement. The Claimants have raised the issue that at no stage did the Defendants suggest that the costs of the children Claimants should be assessed by reference to the costs to which they would have been entitled to recover under the small claims track. In my judgment that does not preclude the Defendant from raising the issue at provisional assessment (or in this review hearing).

30. The costs of the Claimants are assessed pursuant to court orders. The orders provide for detailed assessment on a standard basis in the event costs cannot be agreed. The assessment is undertaken pursuant to paragraph 44.4 CPR under which the court has regard to all the circumstances in deciding whether costs assessed on the standard basis were proportionately and reasonably incurred or proportionate and reasonable in amount. In taking into account all the circumstances I have already indicated that in my judgment it was right and proper that all three claims should be issued together. I do not accept the Defendant's submission that the children's claims should be left in abeyance once the claims exited the portal as a result of the Defendant's

because these claims were properly and correctly brought alongside the claim of the mother.

34. For the reasons I have given I am not persuaded that the order I made on provisional assessment on 15th June 2015 should be reviewed. The provisional assessment stands.

Dated this 15 day of October 2015



DISTRICT JUDGE SEVERN

26 OCT 2015