

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para. 6.1 no official tape recording shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Neutral Citation Number: [2008] EWHC 2909 (QB)

Case No: HQ08X01657

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th December 2008

Before :

HIS HONOUR JUDGE OLIVER-JONES QC
SITTING AS A JUDGE OF THE HIGH COURT

Between :

KR and 11 OTHERS

Claimants

- and -

EAGLE STAR INSURANCE COMPANY
LIMITED

Defendant

APPROVED RESERVED JUDGMENT

PHILIP TURTON for the Claimants
(instructed by Uppal Taylor Solicitors of 10 Bridgford Road, Nottingham: Ref: BSU/BRY 3.9)

SUZANNE CHALMERS for the Defendant
(instructed by Barlow Lyde & Gilbert LLP, Beaufort House, 15 St. Botolph Street, London EC3A 7NJ : Ref: 101652-2/MJDW/MJDW/3.13)

Hearing dates: 20th and 21st November 2008

25.2 The variety of types of order that may be made against a paying party are identified in CPR 43.3(6). In my judgment, this is not a case in which CPR 43.3(7) necessarily comes into play automatically, simply because there has been an order for the trial of a preliminary issue, although it would if I treat disclosure in (or prior to the ordering of) the preliminary issue as being ‘a distinct part of the proceedings’. The concept of ‘costs relating only to a distinct part of the proceedings’ identified in CPR 43.3(6)(f) as the trigger for what follows in CPR 43.3(7), is not, in my judgment, intended, per se, to cover a case where the court has ordered the trial of a preliminary issue; in this case the trial of the preliminary issue carries its own costs order as would a trial of all issues. CPR 43.3(6)(f) is merely allowing a judge, if in exercising discretion it is considered just to do so, to order costs relating to particular things to be paid or disallowed e.g. the cost of witness statements or exchange of expert evidence, or the costs of disclosure of documents. However, where a court considers making such an order “*it must, if practicable, make an order under paragraph (6)(a) or (c)*” viz. an order for payment of a proportion of another party’s costs or costs from or until a certain date only.

25.3 In my judgment the entire costs of the issue which was eventually identified as being ‘a preliminary issue’ worthy of being tried separately, were attributable to the claimants’ solicitors’ failure to disclose the 1973 letter in accordance with the requirements of paragraph 4.3(b) of the ‘Practice Direction – Protocols’; this, in turn, was due to the solicitors’ failure to identify the 1973 letter upon a full review of files following the judgment of Simon J and prior to the letter of claim which preceded the issuing of the current proceedings; this, in its own turn was due to the same solicitors’ failure either to read [redacted] file of papers

when his case was transferred from other solicitors or to file the 1973 letter in its own file of documents disclosable in the case of [redacted] as well as being part of generic documentation. I have no evidence of what occurred when [redacted]'s case was transferred. I find it hard to believe that his file of papers would have been ignored; if it was, it clearly should not have been. If it was not, then the importance and significance of the 1973 letter could not fail to have impressed itself upon whoever was responsible for perusal of the file. Even if I am wrong about this, then, in my judgment, once Simon J had delivered a judgment which meant that twelve claimants would not recover damages to which they were entitled, either wholly or in part, from RSA, there was an obligation upon the claimants' solicitors to fully review relevant files before launching proceedings against Eagle Star. 'Relevant' files in these circumstances would, in my judgment, clearly have included (a) any correspondence with the alleged tortfeasor notifying it of a claimant and a claim (b) any documents relating to insurance produced by a claimant individually, as well as (c) generic documentation relating to insurance (d) documents relating to insurance which might well have existed in files of social services documents relating to the arrangements for placement of children in children's homes. The 1973 letter was, in fact, in the 'correspondence file' relating to [redacted] it was one of sixteen files relating to his case exclusively, undoubtedly including files such as those I have already identified. However, given that [redacted]'s claim had been handled by solicitors by whom it was passed to his current solicitors (as 'lead solicitors' in the general litigation), the current solicitors could not, without reviewing correspondence, know whether, in early exchanges between the former solicitors and Bryn Alyn (or indeed anyone else), there had been mention of

insurance. It is usual when any claim for damages for injuries is first intimated by a solicitor, for that solicitor to enquire about relevant insurance and suggest that the correspondence be passed to insurers. Unless this is looked for there is no way of knowing whether relevant correspondence or documents exist; it can not be said that such a document would reasonably not be expected to be found in such a file.

25.4 As a matter of fact, had [redacted]'s correspondence file been read or reviewed the 1973 letter would have been found as it was, coincidentally, in August 2008. However, the matter goes much further than simply finding the letter; in my judgment, when it was first read, as I must infer it was in 2001, it would, in my judgment, have been very obviously a very important document indeed, not only for [redacted]'s claim but for all children who had been allegedly abused in or after 1972; if it was not recognised as being important then, in my judgment, it should have been. The claimants' solicitors cannot complain about the difficulty of finding a needle in a haystack when, as I have already observed, it was they who put it, or left it unmarked, in the haystack in the first place.

25.5 Thus, in my judgment, and accepting the evidence of Mr. Luck (as I do) as to the effect of the 1973 letter upon his decision to accept that there was relevant insurance cover in place at the material time, almost the entire costs incurred by the Defendant in undertaking its own searches and enquiries into the existence of an insurance policy, were caused by the failures which I have identified in the preceding paragraph. In these circumstances, in my judgment, the fair order as to costs which I make in the exercise of my discretion and **bearing in mind that the Claimants are funded by the Legal Services Commission, is that the Claimants shall pay an amount to be determined by a Costs Judge in**