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Case Nos:
QB-2010-000036
HQ09X04823,
HQ09X05038, HQ10X00986,
HQ10X01048, HQ09X04444,
QB-2013-005022
QB-2010-000112 &
QB-2013-005020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 21/11/2019

Before :

THE HON. MR JUSTICE TURNER

- -

Between :

IRAQI CIVILIANS	**Claimant**
- and -	
MINISTRY OF DEFENCE	**Defendant**

- -
- -

Richard Hermer QC and **Benjamin Williams QC**
(instructed by **Leigh Day & Co**) for the **Claimant**
Simon Browne QC and **Paul Joseph**
(instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 12 November 2019

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Approved Judgment

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

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THE HON. MR JUSTICE TURNER

The Hon Mr Justice Turner :

INTRODUCTION

1. On 20 March 2003, a coalition of armed forces led by the United States of America, which included a contingent of British troops, invaded Iraq. In the period which followed, a significant number of Iraqi civilians alleged that they had fallen victim to maltreatment in respect of which the defendant was legally responsible under the provisions of the Human Rights Act 1998 and the Iraqi law of tort.

2. The claims duly made by such civilians gave rise to complex issues of law and fact. They were brought in tranches the third of which involved 609 claims all issued on 27 March 2013. Although no formal Group Litigation Order was made, lead cases were selected and it was both clear and intended that the outcome of such cases would have an important impact on the fate of the non-lead claims which were stayed pending their determination. After a series of preliminary issues had been decided, the Court proceeded towards the trials of substantive issues which process also involved the deployment of lead cases. These were divided into three schedules the first two of which proceeded to trial. The lead schedule 3 claims were also listed for trial but were adjourned following the Court's direction to engage in a process of ADR. The great majority of remaining claims have since been resolved without service of Particulars of Claim. No further trials are now expected to be necessary.

3. In the lead cases which had proceeded to trial under the first two schedules, the civilians were largely successful. Leggatt J (as he then was) uncontroversially commented in a judgment on the issue of costs that the cases were of "very great legal and factual complexity".

THE CONDITIONAL FEE AGREEMENT

4. Each civilian, in respect of whose claim for costs the dispute between the parties now arises, entered into a Conditional Fee Agreement ("CFA") with his solicitors, Leigh Day, the terms of which were identical to those entered into by the other such civilians. Of central importance was clause 8 of each of the agreements which provided for the circumstances in which a success fee would fall to be paid and the levels of success fee recoverable at various defined procedural stages:

> "Our **SUCCESS FEE** is the additional charge we make if you win your claim. Our Success Fee is calculated as a percentage

> of our Basic Charges and does not (unless otherwise indicated in the Schedule at the end of this Agreement) relate to the delay in payment which results from these payment arrangements (the delay in payment is reflected by your agreement to pay us the interest which you recover on our charges). The Success Fee is payable as follows:
>
> a. If the case resolves without our needing to serve Particulars of Claim: 33 per cent of our Basic Charges.
>
> b. If the case concludes between service of the Particulars of Claim and service of the Defence: 67 per cent of our Basic Charges.
>
> c. If the case concludes after service of the Defence: 100 per cent of our Basic Charges.
>
> The reasons for setting the Success Fee at this level are set out in the Schedule at the end of this Agreement."

5. The issue which now arises relates to the proper interpretation of this clause.

6. The claimants contend that each reference to "the case" in sub-paragraphs (a) to (c) should be interpreted as referring generically to any lead case or cases. The consequence of such an approach would mean that, subject to surmounting the hurdle of reasonableness, a 100% success fee could be claimed in respect of all non-lead cases in which no individual Particulars of Claim had been served.

7. The defendants contend that clause 8 operates so as to limit the 100% uplift to all cases in which individual Defences have been served. In all other cases in which the individual claimant has achieved success without having to serve Particulars of Claim, the corresponding uplift faces a ceiling level of 33%.

THE CLAIMANTS' CASE

8. The claimants argue that it was inevitable from the outset that the claims to which the CFAs applied would be treated as a group in the same way as had those claims which had been within the earlier tranches. Accordingly, the success or failure of any individual stayed claim would be liable to hinge upon the determination of the handful of lead cases which, themselves, had been pleaded out. Bearing in mind the parasitic dependence of the fate of the stayed cases upon the uncertain outcome of the lead cases, it would, they argue, be fully expected that the rewards of higher levels of success fees would be calibrated to be referable to the pleadings in the lead cases rather than to individual claims most of which

would never reach the stage at which bespoke Particulars of Claim would be served.

9. As a matter of construction, the claimants draw attention to the fact that clause 8 refers to the success of "your claim" as being the condition upon which any success fee is to be payable whereas the level of the uplift is, in contrast, expressed to be contingent upon the state of pleadings with respect to "the case". It may thus be concluded, they argue, that a distinction was intended to be drawn between "your claim" and "the case" with the former referring to the individual claim and the latter to the generic case advanced through the lead cases.

10. The attraction of this argument of textual construction is, however, diluted by a consideration of the other terms in the CFA which do not maintain any such distinction between the concept of "case" and "claim". A stronger argument would, perhaps, emphasise the use of the definite article "the" in front of the word "case" as opposed to the possessive adjective "your" in front of the word "claim". However, even this approach falls foul of other terms in the CFA.

11. It is to be noted that clause 22 provides:

> "In many cases Leigh Day act for groups of clients pursuing claims of a similar nature. Where this is so, it may be necessary for arrangements to be made between clients to share liability for legal costs of the agreement."

12. I do not doubt that, as a matter of fact, it was overwhelmingly likely that any given Iraqi civilian with sufficient prospects of success would find himself to be one member of a tranche of claimants. Nevertheless, the terms of the individual CFAs do not mandate this and so each individual CFA was capable of having full contractual effect even if there were no such group. The fact that any given CFA was able to operate as a standalone contractual document tells against the suggestion that the levels of success fee as therein defined fell to be determined by the stage of the pleadings in other cases the existence of which was not legally essential to the efficacy of that individual CFA.

13. Putting the matter another way, on the claimants' interpretation, the reference to "the case" in clause 8 would be rendered meaningless in the event that the individual claimant did not form part of a group despite the fact that the rest of the contract was otherwise perfectly coherent and capable of performance on both sides. Alternatively, the meaning of "the case" would have to differ according to whether or not the claimant became one of a group. Self-evidently, neither of these approaches holds much attraction.

14. A further difficulty lies in that fact that clause 8 expressly states that the reasons for setting the Success Fee at the levels cited therein are set out in the Schedule at the end of the Agreement. The Schedule referred to, however, makes no reference to the suggestion that the staged levels of success fee are either based on or justified by a gradation linked with the progress of any lead cases. Indeed, the contents of the Schedule are entirely consistent with an assessment of the risks inherent in the claim of the individual without reference to the fate of any other cases in a group. The Schedule refers to "generic risks of your case" but these risks, although generic, are applicable to the individual claim. For example, one of the generic risks listed in the Schedule is worded thus:

> "If the MoD elect to contest your case through the English Court, they are likely to fully contest the allegations and put you to strict proof."
>
> [Emphasis added]

Any individual claim brought by an Iraqi civilian would be likely to face the generic risks inherent in the process regardless of the existence of lead cases.

15. The claimants rely upon the authority of ***Antaios Compania Neviera v Salen Rederierna*** [1985] 1 AC 191, 201 to the effect that "…if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common-sense, it must be made to yield to business common-sense" and ***Wood v Capita Services*** [2017] AC 1173, para. 11 to the effect that "Interpretation is… a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common-sense."

16. This line of authority does not, however, permit any party who regrets the terms of an agreement into which they have entered to impose retrospectively an unorthodox interpretation of its terms to make good any perceived economic deficit. I readily accept that if the CFAs had linked the levels of success fees with the procedural stages of lead cases then this arrangement could well be found to have been consistent with what would be expected by the application of business common-sense. This does not mean, however, that linking the levels to the pleadings in the individual cases therefore lacks business common sense despite the fact that such an arrangement was distinctly disadvantageous to Leigh Day.

17. Furthermore, it is to be noted that each CFA ran to fourteen pages in length and was proffered, as one would expect, to each individual

claimant in standard and formal terms on behalf of the solicitors. It would have been simplicity itself to have drafted the agreements to provide for that which Leigh Day now seek to achieve through what I have found to be an impermissible level of interpretative creativity. I accept that the individual claimants under the CFAs would not be required to pay Leigh Day more in costs than had been recovered from the defendants but this factor does not entitle me to depart from what would otherwise be the clear and natural meaning of clause 8.

CONCLUSION

18. It must follow from my analysis that I reject the interpretation which Leigh Day seek to put on clause 8 of the CFAs and conclude that the reference therein to the pleading stages apply to the individual pleadings covered by each such CFA.