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King's Bench Walk

Court of Appeal success for Andrew Roy in fixed costs dispute

Ho v Adelekun [2019] EWCA Civ 1988 concerned the application of the fixed costs regime for ex-Protocol cases at **Section IIIA** of **CPR Part 45,** following acceptance of an ostensible Part 36 offer for damages and costs to be assessed. The Court of Appeal allowed the defendant's second appeal and held that fixed costs applied.

Andrew Roy, instructed by Matthew Hoe at Taylor Rose, appeared for the defendant. The full judgment can be found here.

Background

The underlying claim was a road traffic accident which occurred in 2012. This began under the *Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents* but dropped out when liability was not admitted. The claim was duly allocated to the fast track. Its value then increased. The claimant therefore applied to re-allocate to the multi-track. The application was due to be heard on 24 April 2017. On 19 April 2017 the defendant sent what was described as a Part 36 offer for £30,000. It provided that *"if the offer is accepted within 21 days, our client will pay your client's legal costs in accordance with Part 36 Rule 13 of the Civil Procedure Rules such costs to be subject to detailed assessment if not agreed."*

The Claimant accepted the offer via email on 21 April 2017 and attached a draft Tomlin order. This provided that the defendant pay *"the reasonable costs of the claimant on the standard basis to be the subject of detailed assessment if not agreed".*

A consent order was made on 24 April 2017 reflecting the Tomlin order. The parties subsequently disagreed as to whether fixed costs applied. If they did, costs would be limited to £14,500-£16,000 (subject to the claimant establishing exceptional circumstances under **CPR 45.29J**). The costs claimed on a conventional basis totalled c.£42,000.

At first instance, Deputy District Judge Harvey found that fixed costs applied, albeit it remained open to the claimant to argue for the exceptional circumstances escape clause. He also rejected the claimant's application to re-allocate to the multi-track in order to displace fixed costs. The claimant appealed.

His Honour Judge Wulwik allowed the claimant's appeal, holding that terms of the settlement were incompatible with fixed costs. He rejected (obiter) the appeal against the refusal to reallocated. His primary reason for doing so was that under **CPR 36.14** the claim stayed save as regards question of costs and the claimant was *"impermissibly trying to piggyback the provisions of **CPR 36.14(5)(b**) with an application to reallocate the claim to the multi-track."* The defendant appealed the decision on fixed costs. The claimant served a respondent's notice in respect of re-allocation.

The Court of Appeal's decision

Newey LJ gave the main judgment. He identified two principal issues: (1) whether the offer letter was for conventional rather than fixed costs; and (2) if not, whether the claim should have been re-allocated to the multi-track with retrospective disapplication of the fixed costs regime.

As regards (1), it was common ground that the agreement was concluded when the claimant accepted the defendant's offer. The terms of the Tomlin order referring to the standard basis were therefore not directly relevant and thefocus was thus on the terms of the offer letter.

The claimant argued that the offer was for conventional rather fixed costs by reference to the following combination of features:

- The reference in the letter to **CPR 36.13** (which provided for conventional costs) as opposed to **CPR 36.20** (which provided for fixed costs). The claimant argued in this regard that **CPR 36.5(1)(c)** requires an offeror to specify that the offer was for costs in accordance with **CPR 36.13** or **20** and thus to elect to offer one or the other.
- The reference to "assessment" in the offer letter was incompatible with fixed costs. Assessed costs being conceptually different to fixed costs (***Solomon v Cromwell Group plc*** [2011] EWCA Civ 1584, [2012] 1 WLR 1048, ***Broadhurst v Tan*** [2016] EWCA Civ 94, [2016] 1 WLR 1928), the reasonable recipient would have understood the offer to be for conventional costs.
- Given the factual matrix, an offer to pay conventional costs was entirely logical. The value of the claim exceeded the fast track limit. Re-allocation was highly likely. The claimant would also have had the option of pursuing exceptional circumstances.

Newey LJ rejected these points. He accepted the defendant's arguments that they were not sufficient to give rise to an implied intention to offer more than fixed costs, holding that:

1. **CPR 36.5(1)(c**) was concerned with the period within which a Part 36 offer was to be accepted, not the basis upon which costs were to be determined.
2. The reference to **CPR 36.13** was not of great significance. **CPR 36.20** applied to ex-Protocol claims. **CPR 36.13** itself highlighted that it was subject to **CPR 36.20** and sent the reader to that rule.
3. The defendant's clear intention was to make a Part 36 offer. A Part 36 offer in an ex-Protocol case could only be for fixed costs. An offer for conventional costs would be incompatible with Part 36. An offer that contains terms as to costs departing from the provisions of CPR Part 36 could not be a Part 36 offer; ***Mitchell v James*** [2002] EWCA Civ 997, [2004] 1 WLR 158, and ***James v James*** [2018] EWHC 242 (Ch), [2018] 1 Costs LR 175.
4. Although the reference to detailed assessment was "*was far from ideal if the* [defendant] *intended the fixed costs regime to apply*", it was not wholly inapposite. Whilst the rules did not specify the mechanism by which a dispute over the quantum of fixed costs (e.g. as to the level of disbursements) should be determined, it was common ground that this had to be by detailed assessment. Thus, as Moore-Bick LJ observed in ***Solomon v Cromwell*** at [19], the fixed costs regime "*does involve an assessment of some kind*".
5. It was inherently improbable that the defendant would have intended to offer conventional rather than fixed costs. The former were likely to be much higher than the latter. It was far from obvious that the claimant would have succeeded is escaping the fixed costs regime had the matter not settled.
6. Per Coulson LJ ***Hislop v Perde*** [2018] EWCA Civ 1726, [2019] 1 WLR 201 at 50 "*The whole point of the regime is to ensure that both sides begin and end the proceedings with the expectation that fixed costs is all that will be recoverable*". This made an offer for conventional costs more unlikely.

Newey LJ rejected (obiter) the defendant's argument that ***Solomon v Cromwell*** was binding to the effect that the fixed costs regime is not displaced by an agreement to pay costs to be assessed on the standard basis. The result nevertheless remained that the parties did not contract out of fixed costs.

As regards (2), the court agreed with Judge Wulwik that the stay imposed by acceptance of the Part 36 offer precluded re-allocation. Re-allocation was not a question of costs for the purposes of **CPR 36.14** even if it was being sought for costs purposes. The stay imposed by the Tomlin order would have precluded re-allocation in any event. Moreover, even if there was jurisdiction to re-allocate, the judges below were entitled to decline to do so. The parties having agreed that fixed costs applied, it would run counter to that agreement to displace them by re-allocation.

Males LJ gave a short but important concurring judgment. Whilst agreeing that the reference to detailed assessment was insufficient to demonstrate an intention to depart from fixed costs, he pointedly observed at [43] that it was "*unfortunate, however, that it has taken a trip to the Court of Appeal for this to be determined. If parties wish to settle on terms that fixed costs will be payable if an offer is accepted, it is easy enough to say so and thereby to avoid any scope for argument*".

In similar vein, noting that the issue of whether a reference to the standard basis would have displaced fixed did not arise, he urged at [44] that "*parties who wish to settle on terms that fixed costs will be payable would be well advised to avoid reference to assessment 'on the standard basis' in any offer letter or consent order which may be drawn up following acceptance of an offer*".

Sir Geoffrey Vos, Chancellor of the High Court, agreed with both judgments.

Comment

This decision provides welcome clarity as to the limited circumstances in which fixed costs will be disapplied by implication. In particular, it confirms that rarely if ever will the mere reference to assessment be sufficient to do so.

The court also took the opportunity to issue clear and salutary guidance as to how offers should be drafted in future to avoid such disputes.

That said, the court also left the door open to the possibility that a poorly drafted offer could be construed as offering to pay conventional rather than fixed costs. In particular, it indicated (obiter) that a reference to the standard basis might do so. Quite how far this door has been left open remains to be seen. It is suspected that it is only slightly ajar, at least in respect of offers expressed to be made under Part 36. What is not now in doubt however is that litigators need to crystal clear as to the terms any offer being made or accepted.

The other main points of interest concern allocation. It appears that it will rarely be possible to reallocate after the event in order to escape costs restrictions. Perhaps more significant is the (admittedly obiter and tentative) indication at [33] that allocation to the multi-track only disapplies fixed costs prospectively. This is an important point. It applies not just to re-allocated claims but also to ex-Protocol claims which are allocated to the multi-track from the outset. It will require a definitive ruling sooner rather than later.

Therefore, notwithstanding the clarification provided by this appeal, arguments over fixed costs seem destined to continue for the foreseeable future. Indeed, their number is liable if anything to increase.

The MoJ is proposing to extend fixed costs both horizontally to all types of claim and vertically to claims worth up to £100,000 (https://consult.justice.gov.uk/digital-communications/fixed-recoverable-costs-consultation/). It seems highly likely that these proposals will be implemented. This will increase both the number of cases to which fixed costs apply and the financial stakes in keeping cases within the fixed costs regime or excluding them from it. The volume of such claims bears emphasis. As was recorded in ***Aldred v Cham*** [2019] EWCA Civ 1780, over six million claims have been started under the RTA Protocol alone since its inception. More than 50% of these (i.e. more than three million) exited the Protocol so as to fall within the fixed costs regime **Section IIIA** of **CPR Part 45**. Further hard-fought litigation on these issues therefore seems likely.