Taking aim

Ghazala Bashey on how a Court of Appeal judgment has weaponised Part 36 against fixed costs

In February, judgment was given in two appeals concerning an issue that has provoked conflict between claimant and defendant solicitors nationwide since the fixed recoverable costs regime came into force in 2013.

The judgment, in *Broadhurst v Tan and Smith v Taylor* [2016] EWCA Civ 94, confirmed that where a Part 36 offer is beaten at trial, indemnity costs are payable rather than just fixed costs.

The appeals were lodged due to an ongoing tension between the rules within Part 45 and Part 36. While the defendant accepted that where the claimants had beaten a Part 36 offer, they were entitled to costs assessed on the indemnity basis, it submitted that those costs were fixed – pursuant to Part 45. Conversely, the claimants argued that indemnity costs and fixed costs were conceptually distinct, and that indemnity costs were to be awarded in such cases rather than fixed costs.

> The case encourages early settlement by reinforcing the need for defendants to seriously consider Part 36 offers

The above judgment was handed down on 23 February, and upheld the claimants' position that indemnity costs should be awarded rather than fixed costs. This was a unanimous decision lead by the Master of the Rolls, Lord Dyson and followed by Lord Justice McCombe and Lord Justice David Richards.

The case is of huge importance to claimant solicitors, given the implementation of the fixed costs regime, and the proposed extension of fixed costs across civil litigation for cases valued up to £250,000. It also encourages early settlement by reinforcing the need for defendants to seriously consider Part 36 offers made within litigation, to avoid the penalties for failure to beat these at trial. Newcastle firm Winn Solicitors acted for the personal injury claimants in both cases.

BACKGROUND

Both cases were commenced under the MoJ Portal for low-value road traffic accident personal injury claims, but were then taken out of the portal once proceedings were issued for liability/quantum. The claimants made a number of Part 36 offers throughout the course of each of the claims, all of which were rejected by the defendants – and were ultimately beaten at trial. The claimants therefore argued on both cases that indemnity costs should be awarded from the date that the Part 36 offers expired, on an indemnity hourly rate basis – rather than fixed costs.

However, at first instance, both trial judges refused to award the claimants their indemnity costs pursuant to CPR 36.17(4), indicating that only fixed costs applied. The claimant appealed both decisions.

In Broadhurst, the claimant made Part 36 offers including a 75/25 and 50/50 offer on liability, both of which were rejected by the defendant and the claim proceeded to trial, where the district judge found 100% in the claimant's favour. The claimant therefore substantiality beat her own Part 36 offers and claimed indemnity costs on an hourly rate basis from expiry of that offer.

The first appeal in *Broadhurst* was heard before Judge Robinson at Sheffield County Court on 28 August 2015. HHJ Robinson accepted that the provisions of CPR 36.17(4) applied to a case brought pursuant to section IIIA of Part 45, but he accepted the defendant's submission on this issue, and held that while the claimant was entitled to an award of costs on the indemnity basis, the amount of such costs was nonetheless fixed by section IIIA of Part 45, as this was the overriding effect of Civil Procedurre Rule 45.29B.

In *Smith v Taylor*, the claimant made three Part 36 offers, and successfully beat two of these at trial, thereby claiming entitlement to indemnity costs as above.

The first appeal in *Smith v Taylor* was heard before Judge Freedman at Newcastle County Court on 9 November 2015. HHJ Freedman awarded in favour of the claimant and found that costs under the fixed costs regime and costs on the indemnity basis could not and should not be construed as being one and the same: they were separate and distinct and required a completely different approach when costs were being assessed.

Both of these cases were then subject to second appeals by the claimant and defendant respectively.

THE ARGUMENT

The cases were expedited by the Court of Appeal following an application by Winn Solicitors on behalf of the claimants, given the important point of principle and the conflicting views of judiciary on the issue of the interplay between the rules, which required clarity.

The argument brought by Horwich Farrelly Solicitors on behalf of the defendant was that only fixed costs should be awarded pursuant to CPR 45.29B. Defendant counsel James Laughland argued that although CPR 36.17(4) applied, in fixed cost cases there was no difference between costs assessed on an indemnity basis and the fixed costs provided in Table 6B of rule 45.29C.

By way of counter argument, Ben Williams QC on behalf of the claimants submitted that indemnity costs, as well as fixed costs, were warranted in such circumstances - and any other future cases, in accordance with CPR 36.17(4). He submitted that any tension between CPR 45.29B and CPR 36.21A was resolved by the principle that general provisions yielded to specific provisions, pursuant to *Solomon v Cromwell*. Further, it was contended that CPR 36.1 was a self-contained procedural code; that CPR 36.21 was intended to prevail over CPR 45.29B and that fixed costs and assessed costs are conceptually distinct.

JUDGMENT

Lord Dyson stated that '*CPR45.29B does not stand alone* and the need to take account of Part 36 Offers in section IIIA cases was recognised by the draftsman of the rules, as CPR 36.21 (was CPR 36.14A) is headed 'Costs consequences following Judgment where Section IIIA of Part 45 applies"' (emphasis added).

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He said: 'I do not consider that there is any doubt as to the true meaning of these rules. The tension is clearly resolved in favour of rule 36.14A'.

Outlined in the judgment, he further stated: 'The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately.'

'Where a claimant makes a successful Part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective. This does not require any apportionment.

'It will, however, lead to a generous outcome for the claimant. I do not regard this outcome as so surprising or so unfair to the defendant that it requires the court to equate fixed costs with costs assessed on the indemnity basis. *As Mr Williams says, a generous outcome in such circumstances is consistent with rule 36.14(3) as a whole and its policy of providing claimants with generous incentives to make offers, and defendants with countervailing incentives to accept them'*(emphasis added).

The claimants' appeal in *Broadhurst* was therefore allowed, and the defendants' appeal in *Taylor* was subsequently dismissed.

IMPACT FOR CLAIMANT SOLICITORS

This judgment is a significant triumph for all claimant solicitors, given the government's introduction of fixed fees in 2013 and recent proposals to extend this to cases worth up to £250,000 mooted to take effect by next year.

The decision clearly encourages the parties to settle cases early - but also provides claimants with all of the benefits of Part 36 if they are forced to proceed to trial when reasonable offers have been rejected by the defendant. This supports Lord Justice Jackson's recommendations to incentivise parties to make and accept reasonable Part 36 offers.

As a result of the judgment, instead of receiving only the fixed costs to trial, which in an RTA are typically £2,655, the claimant is entitled to claim costs on an hourly rate on an indemnity basis from expiry of the relevant Part 36 offer. This is likely to be considerably more than the fixed costs, and should therefore incentivise defendants to consider reasonable offers rather than incurring the extra costs of proceeding to trial and risking indemnity costs.

Ghazala Bashey is legal director at Winn Solicitors, which represented the personal injury claimants in the two appeals