

## ***Mr Terrance Bird v Acorn Group Limited* [2016] EWCA Civ 1096**

### **A disposal hearing is a trial within the meaning of the RTA and EL/PL fixed costs rules.**

#### **Edward Ross, Personal Injury Law Barrister**

#### **The Decision**

1. The Court of Appeal delivered judgment in the long awaited leapfrog appeal in *Bird v Acorn* on Friday 11 November 2016. The judgment addressed a specific, yet highly important point. Since the introduction of the fixed costs rules for RTA and EL/PL cases there has been an argument about the costs recoverable when a case is listed for a disposal hearing pursuant to CPR26 PD12.2(1)(a).
2. In a unanimous decision the Court of Appeal held that a disposal was a trial within the meaning of Rule 45.29E(4)(c) (so this will also apply to RTA claims under Rule 45.29C(4)(c)). Therefore a case that no longer continues under the RTA or EI/PL pre-action protocols and is listed for a disposal will attract the fixed costs in column 3 of Tables 6B/C/D.

#### **The Facts**

3. Mr Bird suffered personal injury when a spanner was dropped on his hand at a garage owned by Acorn. The case was withdrawn from the portal and issued on 7 April 2014. On 7 May 2014 Mr Bird was granted judgment in default. The case was transferred to Birkenhead County Court where it was listed for a “*Disposal Hearing under paragraph 12.4*” of CPR26 PD12.
4. The case settled and a Tomlin Order was filed on 15 July 2014. Costs were provisionally assessed and Acorn sought an oral review. District Judge Campbell decided that column 3 applied. Acorn appealed and the matter was leapfrogged to the Court of Appeal.

#### **Acorn’s Arguments**

5. Mr Turner argued:
  - 5.1. Under Rule 45.29E(4)(c) “*a reference to “trial” is a reference to the final contested hearing*” but because a disposal might be used for directions it could not be said at the date of listing that it will be final or contested.
  - 5.2. Allocation to the fast track would transfer the claimant back to column 2. This would be a disincentive to settlement.
  - 5.3. The Court should apply the reasoning in *Forcelux Limited v Binnie* [2009] EWCA Civ 854.
  - 5.4. Jackson LJ’s interim report suggested the three columns should be sequential.

## Mr Bird's Riposte

6. Mr Williams QC countered what the Court felt was the Appellant's strongest argument, submitting:
  - 6.1. The three columns were sequential. A Claimant would have done all the work necessary to obtain finality at a disposal and so there would be no need for 'back-tracking' to column 2. Further Rule 28.2(2)(a) provides for allocation to the fast track and listing for trial simultaneously.

## Judgment

7. Briggs LJ with whom the rest of the Court agreed gave the following reasons for dismissing the appeal:
  - 7.1. The purpose of listing for a disposal was, if possible, to finally dispose of the case at first instance. [13]
  - 7.2. The arguments that the hearing might turn into one for directions, or might be uncontested were not conclusive. That could happen at a full trial. [14] and [15]
  - 7.3. The Court was entitled to give weight to DJ Campbell's observation that a disposal triggers the preparation and service of evidence. Restricting the costs to column 1 would be wrong. [16]
  - 7.4. *Lamont v Burton* [2007] 1 WLR 2814 gave a useful pre-history to the formulation "*final contested hearing*" and it is likely the Rules Committee had it in mind when drafting the portal fixed costs rules. [17]
  - 7.5. *Forcelux* was a decision with respect to the first hearing of a possession claim. That was a very different type of claim and involved the general meaning of the word trial, not the specific meaning under the portal fixed costs rules. [18]
  - 7.6. There was still an incentive to settle because trial advocacy fees would be saved. [20]
  - 7.7. Mr Williams QC's 'back-tracking' argument was "*entirely persuasive*." [21]
  - 7.8. Whilst parts of Jackson LJ's Interim Reports suggests the columns were intended to be "*steps in a ladder*" that did not detract from the Court's interpretation of the rules. [23]

## Impact

8. The judgment brings a welcome clarity to an argument that had conflicting first instance decisions and an inconsistent approach by the lower courts. It signifies a 'win' for Claimants and whilst the case by case effect is reasonably small, in a market already being squeezed from all angles, the "*cumulative effect is substantial*". [1]

**Edward Ross**

**14 November 2016**

**3 PB Barristers**