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Year of Call: 2003

Broadhurst (1) & Taylor (2) v Tan (1) & Smith (2) [2016] EWCA Civ 94

by

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The Court of Appeal's recent judgment in these conjoined cases is of assistance to Claimants, and contains some important points for practitioners on both sides of litigation.

The Court was wrestling with the consequences where a Claimant "does better" than his own Part 36 offer, in circumstances where a claim has proceeded under the Part 45 s.IIIA fixed costs regime.

Both appeals involved low value personal injury claims. There was no question in each case that the Claimants were entitled under Part 36.14(3)(b) to "*costs on the indemnity basis from the date on which the relevant period expired.*" But what does "costs" mean in such a case when ordinarily fixed costs would apply?

Does the Court favour the Defendant, and hold that the Claimant is restricted to fixed recoverable costs, or does the Claimant's tactical offer win them the benefit of indemnity costs to be assessed?

The Claimant argued that "fixed costs" and "assessed costs" were conceptually different. They argued that there was a tension between CPR 45.29B and 36.14A: the former said that the only costs to be awarded in s.IIIA cases were fixed costs, whereas the latter said that in such cases, rule 36.14 would apply subject to the modifications in 36.14A. The Claimants argued that because none of the modifications in rule 36.14A affected rule 36.14(3), they were entitled to costs on the indemnity basis, not limited to fixed recoverable costs.

The Defendant argued, in response, that such an interpretation would create practical difficulties so considerable that it could not have been the intention of the Parliamentary draftsman to draw a distinction between fixed and indemnity costs.

The Court held that, if r.45.29B stood alone, the only costs allowable in a s.IIIA case would be fixed costs and disbursements under r.45.29C. However, it did not stand alone.

Indeed, the draftsman had recognised the need to take account of Part 36 offers in s.IIIA cases; the title of r.36.14A stated as much. The effect of reading r.36.14 and r.36.14A together was that a Claimant was indeed entitled to indemnity costs where had made a successful Part 36 offer.

Since r.36.14(3) and not been modified by r.36.14A, the tension between between CPR 45.29B and 36.14A had to be resolved in favour of the latter. The effect of rule 36.14A(8) and the Explanatory Memorandum to the Civil Procedure (Amendment No.6) Rules 2013, used as an aid to

construction, emphasised this conclusion. The Explanatory Memorandum explained in terms that the claimant would not be limited to receiving fixed costs in such cases in accordance with r.36.14. The Master of the Rolls therefore confirmed that, as a starting point, fixed costs and assessed (for our purposes, indemnity costs,) costs were indeed conceptually different - as the Claimant argued. Fixed costs were awarded regardless of whether or not they were actually occurred, whereas assessed costs required an assessment of whether they were proportionate compensation for work actually carried out.

Therefore, where a Claimant made a Part 36 offer in a s.IIIA case, and it was successful, he would be awarded fixed costs to the last staging point provided by r.45.29C and Table 6B. He would thereafter be awarded costs to be assessed on the indemnity basis from the date upon which the offer become effective. This was, the Master of the Rolls said, "*a straightforward matter of interpretation*."

What are we to make of this?

The point is simple. Defendants will argue that this decision is too generous to Claimants. However, it is directly in line with the Court's policy aim: seeking to encourage early settlement wherever possible, and to discourage protracted litigation.

Claimants should make realistic Part 36 offers as soon as possible in or before litigation. A competitively pitched offer becomes of huge tactical important because it increases litigation risk against the Defendant significantly, whilst providing an uplift on successful borderline cases that is very welcome in the new fixed costs world.

Further, Claimant solicitors should keep a detailed record of time costs incurred from the date of expert of the relevant period, *and* from the date of expiry of the staging point. Moreover, they must not forget to file and serve a costs schedule in all cases where there is a live Part 36 offer at trial.

Defendants must be aware of the advantages to Claimants of such canny tactical steps, and that the fixed costs regime ceases to apply if the Claimant beats its own offer in Part 45 s.IIIA cases.

For the full judgment, click here: http://www.bailii.org/ew/cases/EWCA/Civ/2016/94.html

About Robert

Robert is experienced in a broad range of personal injury cases on the multi track and fast track. He advises on psychiatric injuries, noise-induced hearing loss, travel claims and specialised areas of road traffic law such as cycling and motorcycles. He also has a particular interest and corresponding experience in the complicated area of injuries caused by animals, for example under the Animals Act 1971 but also under other, less well-known causes of action.

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