The Escape from Fixed Costs

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The Court of Appeal in Doyle v M&D Foundations & Building Services Ltd [2022] EWCA CIV 927 has added yet another important decision to the body of case law addressing when a party may be able to escape from the fixed costs regimes relating to lower value PI claims.

Cases such as Broadhurst v Tan [2016] EWCA 94 and Qader v Esure Services Ltd [2016] EWC Civ 1109 are well known to all practitioners. Broadhurst, of course, permits a successful claimant to recover indemnity costs on an assessed basis if they beat their Part 36 offer at trial in addition to fixed costs up to the effective date of the offer (Broadhurst itself continues to generate satellite litigation- a recent argument I have seen is that quantification of "fixed costs to the last staging post provided by Rule 45.29C and Table 6B" does not mean the last staging post as at the effective date but the last staging post full stop). Qader restricts a claimant to fixed costs until multi-track allocation in a claim started in the Portal under the MoJ Protocols and continues to generate outcomes that could never have been envisaged when the rules were implemented.

Doyle was concerned with the ability of parties to contract out of the fixed costs regime, inadvertently so as it turned out for the Defendant.

The Claimant was injured in a construction site accident. He brought a claim under the Pre-Action Protocol for Low Value Personal Injury (EL and PL Claims) by CNF. The claim exited the Portal and proceedings were commended in May 2017. The claim was defended, allocated to the fast track with conventional directions and a trial date fixed for 19th July 2018.

On 16th July 2018, and thus well within 21 days before trial, the Defendant made a Part 36 offer of £5,000 in full and final settlement (net of an agreed apportionment for contributory negligence).

The Claimant did not accept the offer but rather responded the same day citing that a consent order was necessary under CPR 36.14(3)(a) if the parties were to settle on payment of £5,000 plus costs. That provision of the CPR provides that if a Part 36 offer made less than 21 days before trial is accepted, then the liability for costs must be determined by the Court unless the parties have agreed costs. The second limb of CPR36.14(3) at (b) provides for an equivalent provision on late acceptance after expiry of the relevant period.

The consent order proposed by the Claimant provided that the Defendant was to pay the Claimants costs "such costs to be the subject of detailed assessment if not agreed". This wording, which did not reference the standard basis, was not challenged and the consent order was duly signed and filed.

The Claimant subsequently lodged a bill of costs for detailed assessment on the standard basis citing the terms of the order. The Defendant disputed that approach and maintained that the case fell within the fixed recoverable costs regime at all material times and that the reference to detailed assessment could only refer to the process of determining the amount of fixed costs and disbursements to the extent that there was any disagreement.

The Claimant succeeded at first instance and on appeal to the circuit bench but the Defendant was given permission to bring a second appeal to the Court of Appeal.

The Court of Appeal had in fact considered an ostensibly very similar set of facts as part of the Ho v Adelekun litigation (which of course went up to the Supreme Court on set off of costs and QOCS issues).

In Ho [2019] EWCA Civ 1988, the claim had been settled by Part 36 acceptance but the consent order embodying the acceptance included provision that costs would be subject to detailed assessment. In that case the Court of Appeal had construed the phrase "as not referring to conventional costs rather than fixed costs" with the result that the parties had not contracted out of the fixed costs regime.

The Defendant in Doyle naturally placed heavy emphasis on Ho before the Court of Appeal but Ho was emphatically distinguished with the Court rejecting the Defendant's arguments (at paragraph 44):-

"In my judgment, and contrary to the appellant's contention, there is no ambiguity whatsoever as to the natural and ordinary meaning of "subject to detailed assessment" in an agreement or order as to costs. The phrase is a technical term, the meaning and effect of which is expressly and extensively set out in the rules. It plainly denotes that the costs are to be assessed by the procedure in Part 47 on the standard basis (unless the agreement or order goes on to provide for the assessment to be on the indemnity basis). The phrase cannot be read as providing for an "assessment" of fixed costs pursuant to the provisions of Part 45 unless the context leads to the conclusion that the wrong terminology has been used (by the parties or by the Court) so that the phrase should be interpreted otherwise than according to its ordinary meaning."

To the extent that the Court in Ho had seemingly approved the parties' agreement that the detailed assessment provisions in CPR Part 47 applied to fixed cost disputes, this was wrong and not to be followed (at paragraphs 47 and 48).

Context was everything. Whereas in Ho the parties had settled by Part 36 acceptance and something had "gone wrong" in the offer letter (which had to be read as consistent with the provisions of Part 36), here (at paragraph 56):-

"In the present case the agreement reached was not the result of the acceptance of a Part 36 offer: the parties' intentions are not to be understood in that highly restrictive context and there is no inherent ambiguity in the reference to detailed assessment, internal inconsistency within the terms of the Order or other "indication" that detailed assessment did not bear the meaning ascribed to it under the rules. Although Adelekun appears, on its face, to be a decision on similar facts to the present case, it was in reality a quite different situation, rooted in the parties' use of the Part 36 offer and acceptance mechanism. No such fetter on the application of the natural and ordinary meaning of the agreed wording as to costs arises in the present case, where the parties reached a free-standing settlement agreement. That agreement included a simple and well-understood provision that the appellant would pay costs subject to detailed assessment, that is to say, on the standard basis."

Lord Justice Males had warned of the risks to a defendant of this very outcome in Ho:-

"It has... been unnecessary for us to consider whether the appellant's acceptance of the offer was in fact a counter offer or whether the consent order, with its reference to payment of costs "on the standard basis", operated as a variation of an agreement previously made in correspondence. I will merely say, therefore, 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."

Of course in Doyle, the wording of the consent order did not make reference to assessment on the standard basis but "subject to detailed assessment" was construed as meaning an assessment on the standard basis, not least because the Court of Appeal has clarified that detailed assessment ought not to apply to fixed costs.

There is therefore a need for caution for both sides in settling claims and the careful use of language in any consent orders (which adds to the care already needed where there are Venduct v Cartwright considerations). Doyle concerned a late settlement within 21 days of trial but the outcome would likely be no different if this was a settlement embodied in a consent order after attempted late acceptance of an expired offer under CPR 36.14(3)(b).

St John's
CHAMBERS

James Marwick
Personal Injury and Clinical Negligence
Barrister at St John's Chambers