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The high bar escape fixed recoverable costs: "Exceptional circumstances" and CPR 45.29J

By Kate Wilson

Mr Justice Stewart recently considered the issue of "exceptional circumstances" and the fixed recoverable costs regime. CPR 45.29(J)(1) states "if it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs…"

When a claim is commenced in the MOJ Portal (following the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents) however the case no longer continues in the Portal, Part IIIA of CPR 45 applies and fixed costs are awarded. A claim which is then allocated to the multi-track is an exception to this rule (Qadar v Esure Services Ltd [2016] EWCA Civ 1109 and the now amended CPR r 45.29B). Where a case settles for a sum in excess of £25,000 and therefore the value typically of multi-track claims, but prior to allocation, does this give rise to "exceptional circumstances" such that the court should allow costs to be assessed an award a sum greater than those provided for under the fixed costs regime pursuant to CPR 45.29J(1)?

In Ferri v Gill [2019] EWHC 952 (QB), the Claimant's first set of solicitors commenced his claim in the Portal. The Claimant's symptoms continued beyond the prognosis period of the original medico-legal report. He suffered a serious shoulder injury with two years of symptoms which only resolved after a substantial operation. With the assistance of an alternative set of solicitors, the Claimant's claim settled for £42,000 pre-issue. The Claimant's solicitors applied for costs to be assessed on the basis that there were exceptional circumstances making it appropriate to consider a claim for costs exceeding fixed recoverable costs.

At first instance, Master McCloud found that there were exceptional circumstances on the basis that:

(i) Value might be a factor but it is not going to be determinative per se;
(ii) There has to be exceptionality in the sense that the case is taken out of the general run of this type of Portal case by reason of some circumstance;
(iii) The test for exceptionality is a low bar of simply being "outside the general run" of these cases.

The Defendant successfully appealed that decision, with the High Court providing useful guidance on the threshold for "exceptional circumstances". The matter has been remitted for reconsideration on the facts of the particular case.

Mr Justice Stewart noted the Court of Appeal decisions of Qadar v Esure, Sharp v Leeds City Council [2017] EWCA Civ 33 and Hislop v Perde [2018] EWCA Civ 1726 in which it variously made the following important observations of the fixed costs regime:

- The intended purpose of the fixed costs regime is that it should apply as widely as possible, but not to cases which had been allocated to the multi-track. However, it was not the intention of the Rules Committee to have carried back pre-allocation guesswork simply based on value or a defence of fraud/dishonesty as this would have introduced a damaging and unnecessary degree of uncertainty [Qadar para 54/55].

- It is the plain intention of the fixed costs regime to limit the fixed recoverable costs regime to a very small category of clearly stated exceptions;

- Certainty was essential to the regime, which depended upon its predictability for its contribution towards the proportionate, speedy and effective disposal of civil proceedings;

- The regime invariably contains swings and roundabouts for lawyers assisting claimants;

- The Defendant's late acceptance of the Claimant's Part 36 offer should not always be regarded as "exceptional". There is no presumption in favour of indemnity costs in this situation. The facts of each case must be considered. [Hislop v Perde]

- There is no need for the Claimant to demonstrate a precise causative link between the exceptional circumstances and any increased costs.

- Further, Mr Justice Stewart examined the meaning of "exceptional circumstances" in other legal contexts, such as in R v Kelly where the Court of Appeal considered an exception to the statutory requirement to pass a life sentence, and defined "exceptional" as "an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary, or usual, or special or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rate, but it cannot be one that is regularly or routinely or normally encountered."

In concluding that Master McCloud had applied the wrong test, Mr Justice Stewart determined that:

- "Exceptional circumstances" takes its colour from the setting in which it appears. Considering the context of the fixed recoverable costs regime and the importance or very few exceptions and certainty, this tests requires a strict approach. As per the Court of Appeal in Hislop, "It is goes without saying that a test requiring "exceptional circumstances" is already a high one". Master McCloud was wrong to consider the question through the prism of a low bar. [44]

- "Exceptional" should be given its ordinary meaning as per R v Kelly. Is this a case which is "outside of the general run of cases?".

- However, the cases used for comparison should not be those subject to the Protocol The basket of cases for comparison should be those which are covered by Part IIIA (i.e. those that have left the online portal). Master McCloud had therefore compared the present case with the wrong "basket" of cases by referring to portal cases generally [47]

- How the regime may impact on a particular litigant or lawyer cannot inform the construction of exceptionality [52]. Arguments therefore based upon assumptions of effects that shortfalls in recovery of costs have were rejected.

This judgment provides welcome guidance for defendant lawyers and will no doubt be added to the arsenal of cases relied upon to limit claims for costs and when considering disputes arising out of the Protocol.

It serves as a useful lesson to claimants to consider the timing of the intimation of their claim and whether to send this via the Portal in claims which there is a prospect of the value increasing to beyond the Portal's £25,000 limit. Claimants may justifiably consider that in such cases they are stuck between the rock and a hard place of CPR rules 45.29J and CPR 45.24 (where a claimant fails to commence a claim in the Protocol, or removes a claim from the protocol and this is deemed to be unreasonable) with a claim of borderline value, however it is clear that certainty of the regime prevails and courts will generally be reluctant to create additional exceptions in order to award increased costs given the "swings and roundabouts" of the Protocol.

Kate Wilson is a member of Part Square Barristers Personal Injury and Civil Fraud teams and is regularly instructed in disputes concerning the application of fixed recoverable costs and technical disputes arising out of the RTA, EL/PL Protocols.

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