

Court of Appeal decision helps Claimants maximise costs awards in claims started under the RTA or EL/PL Protocol



Paul Gurnham



Thomas Wood

*On 23 February 2016 the Court of Appeal gave judgment in *Broadhurst v Tan and Taylor v Smith* [2016] EWCA Civ 94, an important decision for Claimants seeking to maximise the recovery of their costs in cases where they are usually limited to fixed costs.*

The Court held that where a Claimant, having started the claim on the RTA Protocol, obtained judgment which was more advantageous than the Claimant's Part 36 offer the Claimant was entitled to costs assessed on the indemnity basis from the expiry of the relevant period, as well as fixed costs to the last staging point provided by rule 45.29C.

Broadhurst v Tan and Taylor v Smith

The appeals concerned two cases both of which started as claims for personal injuries arising from a road traffic accident under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol). The Claimant in both cases made a Part 36 offer which was rejected by the Defendant, and obtained judgment which was more advantageous than the offer.

Under rule 36.14(3)(b), now rule 36.17(4)(b), the Claimant is entitled to costs on the indemnity basis from the date on which the relevant period expired.

Under 45.29B costs for claims started under the RTA Protocol are limited to fixed costs set out in rule 45.29C and disbursements in accordance with rule 45.29I.

In Ms Broadhurst's case HHJ Robinson said there was no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by Table 6 of rule 45.29C. Ms Broadhurst appealed.

In contrast, in the case of Ms Smith HHJ Freedman did not equate indemnity costs with fixed costs. The Defendant in that case appealed.

Lord Dyson MR, whose judgment was agreed by McCombe LJ and David Richards LJ, allowed Ms Broadhurst's appeal and dismissed the appeal in the case of Smith.

Rule 45.29B (limiting costs to fixed costs) is applied subject to rule 45.29F(9), which provides for the *Defendant's costs when the Claimant fails* to obtain judgment more advantageous than the Defendant's Part 36 offer and rule 36.14A (now 36.21) will apply instead of this rule. Rule 45.29F does not make provision as to what should happen where the Claimant receives judgment more advantageous than the Claimant's Part 36 offer.

Rule 36.14(3)(b), now rule 36.17(4)(b), is modified only to the extent stated by 36.14A (now 36.21). The Court held that since 36.14(3) (now rule 36.17(4)) has not been modified by rule 36.14A (now rule 36.21), it continues to have full force and effect, i.e. the Claimant is awarded costs to be assessed on the indemnity basis from the expiry of the relevant period.

The Master of the Rolls stated (at 30) that fixed costs and assessed costs are conceptually different and concludes at 31:

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.

Practical implications

This is an important decision affecting all claims which start life in the portal and a welcome decision for Claimants and those representing them.

This mixture of fixed costs and assessed costs could lead to some double recovery as the Claimant is entitled to fixed costs 'to the last staging point provided by rule 45.29C' as well as costs assessed on the indemnity basis from 21 days after the date of the offer. Lord Dyson MR accepted that this will lead to a generous outcome for Claimants but this is consistent with the policy of providing Claimants with generous incentives to make offers, and Defendants with countervailing incentives to accept them (at 31).

A Claimant who beats his own Part 36 offer is of course entitled to the other benefits under rule 36.17(4), namely interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired (36.17(4)(a)), interest on the assessed indemnity costs at a rate not exceeding 10% above base rate (36.17(4)(c)), and an additional amount of 10% of the amount awarded (36.17(4)(d)).

There is an opportunity now for Claimant solicitors to recover the larger part of their costs assessed on the indemnity basis rather than being restricted to fixed costs. To take advantage of this Claimants should be making early Part 36 offers. Before trial Claimant solicitors must prepare a full Statement of Costs covering the period from the 21 days after the date of the Part 36 offer to enable the trial judge to assess those costs.

Disbursements such as counsels' fees for advices and/or conferences after the expiry of the relevant period would be recovered Without having to show that the disbursement was incurred due to a particular feature of the dispute (rule 45.29(2)(h)) but was merely reasonably incurred.

The decision in *Broadhurst* is especially important for cases where the Defendant alleges dishonesty or puts the Claimant to strict proof as they will be unlikely to accept any Part 36 offer, even a low offer.

The decision also re-introduces an increased incentive for Defendants to settle very shortly before trial when all the costs have been incurred (similar in effect to the old staged uplifts in CFA cases). If there is an early Part 36 offer potentially giving the Claimant costs to be assessed on the indemnity basis, it is in the Defendant's interest to agree a settlement based on fixed costs rather than running the risk of paying enhanced costs.

It may be that further reforms to Civil Procedure will widen the reach of the portal and so the scope *Broadhurst* will enlarge and be of even more importance for Claimants endeavouring to recover costs which reflect the work actually done.

Paul Gurnham and Thomas Wood are members of the 42 Bedford Row Clinical Negligence & Personal Injury Team.