Neutral Citation Number: [2016] EWCA Civ 94

Case No: (1) A2/2016/0085 &
(2) A2/2016/0149

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
(1) SHEFFIELD COMBINED COURT CENTRE
HIS HONOUR JUDGE ROBINSON
A16YM728
(2) NEWCASTLE-UPON-TYNE COUNTY COURT
HIS HONOUR JUDGE FREEDMAN
A00YX710

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2016

Before :

THE MASTER OF THE ROLLS
LORD JUSTICE MCCOMBE
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

(1) BROADHURST **(2) TAYLOR**	**Appellant**
– and –	
(1) TAN **(2) SMITH**	**Respondent**

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- -

Benjamin Williams QC (instructed by **Winn Solicitors Ltd**) for the **First Appellant & Second Respondent**
James Laughland (instructed by **Horwich Farrelly Solicitors**) for the **Second Appellant & First Respondent**

Hearing date: 08/02/2016

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Judgment

Master of the Rolls:

1. These appeals are concerned with a point of construction which arises from the apparent tension between the rules fixing costs in most lower value personal injury cases (found in section IIIA of Part 45 of the CPR) and the provisions in Part 36 which specifically apply to such claims. The present case concerns the version of Part 36 which applied before 6 April 2015. Although the relevant rules have been renumbered and modified, the provisions applicable to this appeal remain substantially the same. Therefore, apart from numbering, the same issue arises under the current version of Part 36. I shall refer to the version of Part 36 which applied before 6 April 2015.

2. The issue concerns the interplay between the fixed costs prescribed by section IIIA of Part 45 (to which I shall refer as "section IIIA") and the provision in Part 36 for a claimant to recover assessed costs on the indemnity basis where she obtains a judgment against the defendant which is at least as advantageous to her as the proposals contained in her Part 36 offer. I shall refer to a claimant's Part 36 offer made in such circumstances as "a successful Part 36 offer".

3. The details of the facts in the two appeals are not material. It is sufficient to say that in both cases, the claimant (i) started a claim for damages 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"); (ii) made a Part 36 offer to try to obtain settlement and the offer was rejected by the defendant; and (iii) obtained judgment which was more advantageous than the offer she had made.

4. In the case of Ms Broadhurst, HH Judge Robinson (sitting in the County Court at Sheffield) held that rule 36.14(3) applies in a section IIIA case where a claimant makes a successful Part 36 offer. But, he said, in such a case there is no difference between profit costs assessed on the indemnity basis and the fixed costs prescribed by Table 6 of rule 45.29C, subject to the possibility of awarding a greater sum than fixed costs in exceptional circumstances pursuant to rule 45.29J. Ms Broadhurst's case is that the judge was wrong to equate indemnity costs with fixed costs in this way.

5. In the case of Ms Smith, HH Judge Freedman (sitting in the County Court at Newcastle-upon Tyne) held, like Judge Robinson, that rule 36.14(3) applies in a section IIIA case where a claimant makes a successful Part 36 offer. But, unlike Judge Robinson, he did not equate indemnity costs with fixed costs.

The Rules

6. The fixed costs regime for low value personal injury cases was introduced on 31 July 2013 by the Civil Procedure (Amendment No 6) Rules 2013 (SI 1695 of 2013) ("the 2013 Amendment Rules"). It introduced section IIIA, which was to apply to all claims which had started under the RTA or the EL/PL Pre-Action Protocols but were no longer continuing there.

7. Rule 45.29B provides that if, in a section IIIA claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31 July 2013, "the only costs allowed are—(a) the fixed costs in rule 45.29C; (b) disbursements in accordance with

rule 45.29I". Rule 45.29C provides that the amount of fixed costs for cases in the RTA Protocol is set out in Table 6.

8. The 2013 Amendment Rules also introduced changes to Part 36 to take account of section IIIA. A new rule 36.10A legislated for the treatment of costs in section IIIA where a defendant's Part 36 offer was accepted by the claimant. The effect of this provision was that the claimaint would receive the fixed costs provided for by section IIIA. This disapplied the usual rule, contained in the pre-existing rule 36.10, that where a Part 36 offer is accepted, the claimant is entitled to costs assessed on the standard basis to the point of acceptance.

9. A new rule 36.14A was also introduced to prescribe the costs consequences following judgment in section IIIA cases. While it modified some aspects of rule 36.14 (which set out the cost consequences following judgment) in fixed costs cases, it left rule 36.14(3) unmodified. Rule 36.14 provided, so far as material:

> "**36.14 – Costs consequences following judgment**
>
> (1) Subject to rule 36.14A, this rule applies where upon judgment being entered…
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's part 36 offer.
>
> …
>
> (3) Subject to paragraph (6), where rule 36.14(1)(b) applies, the court will, unless it considers it unjust to do so, order that the claimant is entitled to –
>
> (a) 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;
>
> (b) costs on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate and
>
> (d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below…"

10. Rule 36.14A provided, so far as material:

> "**36.14A – Costs consequences following judgment where Section IIIA of Part 45 applies**

> (1) Where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1), rule 36.14 applies with the following modifications.
>
> (2) Subject to paragraphs (3),(3A) and (3B) where an order for costs is made pursuant to rule 36.14(2)-
>
> (a) the claimant will be entitled to the fixed costs in Table 6B, 6C or 6D in section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and
>
> (b) the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of the judgment.
>
> (3) Subject to paragraphs (3A) and (3B) where the claimant fails to obtain a judgment more advantageous than the defendant's Protocol offer -
>
> (a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and
>
> (b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to be made to the date of judgment; and
>
> …
>
> (6) Fixed costs shall be calculated by reference to the amount which is awarded.
>
> (7) Where the court makes an order for costs in favour of the defendant –
>
> (a) the court will have regard to; and
>
> (b) the amount of costs ordered shall not exceed,
>
> the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2) or (3).
>
> (8) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them."

The claimants' case

11. The following is a summary of the submissions of Mr Benjamin Williams QC. The starting point is that "fixed costs" and "assessed costs" are conceptually distinct. There is a tension between rule 45.29B and rule 36.14A. The former says that the only costs to be awarded in section IIIA cases are fixed costs; whereas the latter says that, in such cases, rule 36.14 will apply subject only to the modifications stated in rule 36.14A and following, and none of those modifications affects rule 36.14(3). The

rule that claimants are entitled to an indemnity basis assessment of their costs where they have made a successful Part 36 offer is thereby preserved.

12. The tension between rule 45.29B and rule 36.14A is resolved by the principle that the general provisions yield to specific provisions: see *Solomon v Cromwell Group* [2012] 1 WLR 1048 at para 21. Rule 45.29B contains the general rule which applies to all section IIIA cases. But rule 36.14A contains the specific rule, which prescribes the costs consequences following judgment where section IIIA of Part 45 applies. Rule 36.14A(1) expressly states that rule 36.14 will apply to section IIIA cases as a whole and makes no modification of rule 36.14(3), with its provision for an indemnity basis assessment of costs where a claimant makes a successful Part 36 offer in such cases. Furthermore, rule 36.1 is a self-contained procedural code: this indicates that Part 36.14A is intended to prevail over rule 45.29B which is a rule of a more general nature.

13. This interpretation is consistent with the wider scheme of Part 36, as amended by the 2013 Amendment Rules. Where fixed costs are intended to prevail, Part 36 says so. First, rule 36.10A is introduced to disapply the right to costs assessed on the standard basis which would otherwise arise where a Part 36 offer is accepted by a claimant in a fixed costs case. Secondly, rule 36.14A makes specific provision for fixed, rather than assessed, costs in situations other than those where a claimant makes a successful Part 36 offer. Thus, if a defendant's offer is successful, rule 36.14A provides for the claimant only to recover fixed costs until the effective date of the offer, in place of the usual rule that the claimant will recover standard basis costs until that date. Thereafter, the defendant is also limited to fixed costs (rule 36.14A(7)). Thirdly, regard should be had to rule 36.21, which deals with offers made within the Ministry of Justice portal process. Here again, the rule specifically provides for fixed, rather than assessed, costs to be payable in such cases, even where the claimant has made a successful Part 36 offer (rule 36.21(4)).

14. In these circumstances, it is all the more telling that rule 36.14A makes no modification to rule 36.14(3). Where there is an intention for only fixed costs to be recoverable under Part 36, Part 36 has been modified to make this clear. In short, the specific provisions of rule 36.14A prevail over the general terms of rule 45.29B.

15. Mr Williams submits that, if there is any doubt as to this conclusion, it should be resolved in the Claimants' favour by the Explanatory Memorandum to the 2013 Amendment Rules which was laid before Parliament to accompany the draft statutory instrument. It is admissible as an aid to the construction of the rules: see per Lord Nicholls in *R v Secretary of State for the Environment ex parte Spath Homes Ltd* [2001] 2 AC 349, 397C-398D. The Explanatory Memorandum states at para 7.1(e):

> "New rules 36.10A and 36.14A make provision in respect of the fixed costs a claimant may recover where the claimant either accepts or fails to beat a defendant's offer to settle made under part 36 of the CPR. Provision is also made with regard to defendants' costs in those circumstances. If a defendant refuses a claimant's offer to settle and the court subsequently awards the claimant damages which are greater than or equal to the sum they were prepared to accept in the settlement, the claimant will not be limited to receiving his fixed costs, but will

> be entitled to costs assessed on the indemnity basis in accordance with rule 36.14."

16. In short, Mr Williams submits that the reasoning of Judge Freedman, which substantially reflected his submissions, is to be preferred to that of Judge Robinson.

The defendants' case

17. Mr Laughland's primary submission is that Judge Robinson reached the right conclusion for the reasons that he gave. At para 42 of his judgment, the judge said:

> "Thus I am driven to conclude that rule 36.14(3) must apply to a case where a claimant makes a Part 36 offer to settle in a case where Section IIIA of Part 45 applies, and where the judgment is at least as advantageous to the claimant as the proposals contained in the offer."

18. Thus far, the judge accepted the arguments advanced by counsel who appeared below on behalf of Ms Broadhurst. But he then identified certain practical difficulties that would arise if the claimant's interpretation were correct. He said that these were so great that it could not have been the intention of Parliament in relation to section IIIA cases to draw a distinction between the fixed costs specified in Table 6B and costs assessed on the indemnity basis. First, rule 36.14(3) speaks of the expiry of the "relevant period" (i.e. the period during which the defendant is permitted to accept the claimant's offer). The expiry date is bound to fall within one of the stages specified in Table 6B in rule 45.29C. At paras 47 to 50, the judge identified the difficulties that would occur in such circumstances. At para 51, he said:

> "I find these dilemmas, and the absence of any clear resolution to them, so extraordinary that I conclude it cannot have been the intention of Parliament to draw a distinction between the fixed costs specified by Table 6 and costs assessed on the indemnity basis. Had that been the intention, I would have expected some clear guidance of the sort provided by rule 36.21(4)."

19. As I have said, Mr Laughland adopts this reasoning. The judge added that the costs judge undertaking the assessment exercise was entitled to have expected clear guidance on how to apportion the fixed costs applicable to the stage during which the relevant period expired. Any potential uncertainty would be eliminated by concluding that "within the fixed costs regime, there is no difference between fixed costs and costs assessed on the indemnity basis."

20. At para 55, he set out his conclusions. These included:

> "(3) Rule 36.14(3) does apply in a case to which section IIIA of Part 45 applies where a judgment against a defendant is at least as advantageous as the proposal contained in a claimant's Part 36 offer.

> (4) However, in such a case there is no difference between profit costs assessed on the indemnity basis and the fixed costs provided in table 6B of rule 45.29C, subject always to rule 45.29J "

21. Although Mr Laughland supports the judge's reasoning as to the equiparation of fixed costs and costs assessed on the indemnity basis, he also submits (in agreement with Mr Williams) that there is indeed a tension between rule 49.29B and Part 36.14A But he submits that this should be resolved in favour of the fixed costs regime prescribed by the former. First, rule 36.14(3)(b) (costs assessed on the indemnity basis) is the general provision and rule 45.29B (fixed costs) is the specific provision. The latter should, therefore, prevail over the former. Secondly, Mr Laughland relies on the fact that rule 45.29B is expressed to be subject to a number of rules, but none of these is concerned with the situation which arises where a claimant makes a successful Part 36 offer. All the exceptions to the application of rule 45.29B retain what he calls the fixed costs methodology for determining what profit costs may be recovered.

Discussion

22. I would allow the appeal in the case of Broadhurst and dismiss the appeal in the case of Smith largely for the reasons stated by Mr Williams.

23. If rule 45.29B stood alone, then subject to various rules in Part 45 which are immaterial, the only costs allowable in a section IIIA case to a claimant who was awarded costs following judgment in his favour would be "(a) the fixed costs in rule 45.29C and (b) disbursements in accordance with rule 45.29I". But rule 45.29B does not stand alone. The need to take account of Part 36 offers in section IIIA cases was recognised by the draftsman of the rules. Indeed, rule 36.14A is headed "costs consequences following judgment where section IIIA of Part 45 applies". Rule 45.29F (8) provides that, where a Part 36 offer is accepted in a section IIIA case, "rule 36.10A will apply instead of this rule". And rule 45.29F(9) provides that, where in such a case upon judgment being entered the claimant *fails* to obtain a judgment more advantageous than the claimant's Part 36 offer, "rule 36.14A will apply instead of this rule". Rule 45.29F does not, however, make provision as to what should happen where the claimant makes a successful Part 36 offer.

24. Mr Laughland submits that, since rule 45.29F makes no such provision, the basic or general rule in rule 45.29B that the only costs allowable are fixed costs and disbursements carries the day. But that is to ignore rule 36.14A which is headed "Costs consequences following judgment where section IIIA of Part 45 applies". Rule 36.14A(1) provides that in a section IIIA case "rule 36.14 applies with the following modifications". As we have seen, rule 36.14(3) provides that, where a claimant makes a successful Part 36 offer, the court will, unless it considers it unjust to do so, order that the claimant is entitled to four enhanced benefits including "(b) his costs on the indemnity basis from the date on which the relevant period expired".

25. The effect of rules 36.14 and 36.14A when read together is that, where a claimant makes a successful Part 36 offer, he is entitled to costs assessed on the indemnity basis. Thus, rule 36.14 is modified only to the extent stated by 36.14A. Since rule 36.14(3) has not been modified by rule 36.14A, it continues to have full force and effect. The tension between rule 45.29B and rule 36.14A must, therefore, be resolved

in favour of rule 36.14A. I reach this conclusion as a straightforward matter of interpretation and without recourse to the canon of construction that, where there is a conflict between a specific provision and a general provision, the former takes precedence. As we have seen, there is disagreement as to which is the relevant general provision in the present context. Mr Williams submits that it is rule 36.14; and Mr Laughland submits that it is rule 45.29B. I do not find it necessary to resolve this difference.

26. Rule 36.14A(8) provides further support for my conclusion. This provision states that in a section IIIA case the parties (i.e. claimant as well as defendant) are entitled to disbursements allowed in accordance with rule 45.29I in any period for which costs are payable to them. This reflects rule 45.29B(b). If, as Mr Laughland contends, rule 45.29B prevailed over rule 36.14A in any event, this provision would have been unnecessary. It is significant that rule 36.14A does not contain a provision which reflects rule 45.29B(a) and 45.29C. In my view, the fact that rule 36.14A contains provision for payment of disbursements in accordance with rule 45.29B(b), but not for payment of fixed costs in accordance with rule 45.29B(a) confirms that the interpretation that I have adopted above is correct.

27. I find yet further support for the conclusion that I have reached in the wider contextual points made by Mr Williams to which I have referred at para 13 above which it is unnecessary to repeat.

28. For all these reasons, I do not consider that there is any doubt as to the true meaning of these rules. The tension is clearly resolved in favour of rule 36.14A. If that were wrong, then it would be legitimate to use the Explanatory Memorandum as an aid to construction (this was not the Explanatory Note to the statutory instrument). That is because the three conditions specified by Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 would be satisfied. First, the rules would, in material part, be obscure and/or ambiguous. Secondly, the Explanatory Memorandum was prepared by the Ministry of Justice (the promoter of the rules) and was laid before Parliament together with the 2013 Amendment Rules. I can see no difference in principle between a statement made in Parliament by a Minister or other promotor of a Bill and an explanatory memorandum laid before Parliament by the promotor of rules. The Rules are subject to the negative resolution procedure. Parliament has no power to amend the Rules, but could have annulled them if it had wished to do so. Thirdly, the statement in the Explanatory Memorandum relied on by the claimants is clear on the issue which arises on this appeal. It states in terms that, if a claimant makes a successful Part 36 offer:

> "the claimant will not be limited to receiving his fixed costs, but will be entitled to costs assessed on the indemnity basis in accordance with rule 36.14."

29. As I have said, Judge Robinson seems to have accepted that rule 36.14(3) must apply in a section IIIA case. I must now deal with his decision that in such a case there is no difference between profit costs assessed on the indemnity basis and the fixed costs provided for in Table 6B of rule 45.29B, subject always to rule 45.29J.

30. The starting point is that fixed costs and assessed costs are conceptually different. Fixed costs are awarded whether or not they were incurred, and whether or not they

represent reasonable or proportionate compensation for the effort actually expended. On the other hand, assessed costs reflect the work actually done. The court examines whether the costs were incurred, and then asks whether they were incurred reasonably and (on the standard basis) proportionately. This conceptual difference was accepted in *Solomon* at para 19.

31. As we have seen, Judge Robinson considered that Parliament could not have intended that a claimant should recover indemnity costs in a section IIIA case because of the practical difficulties that such an interpretation would entail. I accept that there are bound to be some difficulties of assessment where the costs are partly fixed and partly assessed. But I also accept the submission of Mr Williams and the written submissions of Mr McQuater on behalf of the Association of Personal Injury Lawyers that these were overstated by Judge Robinson. 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. This does not require any apportionment. It will, however, lead to a generous outcome for the claimant. I do not regard this outcome as so surprising or so unfair to the defendant that it requires the court to equate fixed costs with costs assessed on the indemnity basis. As Mr Williams says, a generous outcome in such circumstances is consistent with rule 36.14(3) as a whole and its policy of providing claimants with generous incentives to make offers, and defendants with countervailing incentives to accept them.

32. Judge Robinson also suggested that assessment on the indemnity basis would lead to windfalls because solicitors and counsel inevitably act in fixed costs cases on terms that they will be paid fixed costs. As Mr Williams says, there was no evidence to support this statement. He says that the way in which lawyers are typically engaged in this part of the market is heavily reliant on CFAs and legal expenses insurance. Both forms of funding typically provide for lawyers to charge on a conventional hourly basis, but may cap their right to enforce payment with reference to the amount recovered. He adds that it is still very common for costs beyond fixed costs to be deducted from claimants' damages. There is no evidence before us to support this statement either, although I have no reason to doubt it.

33. To summarise, I am not persuaded that the problems identified by Judge Robinson, if they exist at all, are so serious that they cast doubt on the interpretation which I favour or that they justify the surprising conclusion that fixed costs are to be equated with assessed costs. For the reasons given by Mr Williams, these are conceptually different. In my view, the problems identified by Judge Robinson on which Mr Laughland relies do not suggest that Parliament could not have intended to create a scheme which is to be interpreted in the way that I have described.

Conclusion

34. For all these reasons, I would allow the appeal in the case of Broadhurst and dismiss the appeal in the case of Smith.

Lord Justice McCombe:

35. I agree.

Lord Justice David Richards:

36. I also agree.