The great escape

Andrew Hogan examines four ways to avoid fixed costs

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The bane of solicitors practising in the field of personal injury has, since at least 2013, been the application of fixed costs to personal injury claims which formerly would have attracted an award of assessed costs. The purpose of this article is to consider to what extent the chances of obtaining an award of assessed costs, whether on the standard basis or the indemnity basis, can be enhanced. In particular terms, there are four options which might be usefully explored.

ASSIGNMENT TO THE MULTI-TRACK

The scheme of fixed costs is intended to apply not just to claims which are valued at £25,000 or less, but also to claims which commence under a relevant protocol and which are not allocated to the multi-track. Hence an allocation to the multi-track disapplies the scheme of fixed costs in part 45 CPR. It follows that when considering the proper allocation to track, even in a modestly valued case worth less than £25,000, the arguments for allocation to the multi-track based on non-monetary factors should be scrutinised very carefully.

In *Qader and others v Esure Services Ltd (Personal Injury Bar Association and another intervening)* [2017] 1 WLR 1924 the Court of Appeal noted: '18. The third example, and the one which led to these appeals, arises where a claim is properly started in the RTA Protocol but is met by an allegation in the defence that the claim has been dishonestly fabricated. Sometimes the allegation is simply that the claimant slammed on the brakes to cause the accident, and the issue simply requires the cross-examination of the drivers of the two cars, easily achievable within a one-day fast track trial. But some cases involve the allegation of a sophisticated conspiracy to engineer a multi-car incident, the cross-examination of numerous witnesses and the deployment of sophisticated engineering expert evidence about the collision. Furthermore, the consequences for a claimant of being found to have been party to the fraudulent contriving of a road traffic accident may well include the inability to obtain vehicle insurance in the future, criminal proceedings or punishment for contempt of court. Such proceedings are therefore inherently likely to be pursued and defended on the basis that no stone is left unturned, and therefore at very substantial cost.'

Although it is by no means impossible to litigate a fraud case on the fast track, it is not advisable: and if an allegation of fraud, or low-velocity impact or some other issue than a straightforward liability and quantum dispute is raised, allocation to the multi-track should be sought. Defendants will doubtless rely on the further views of the Court of Appeal in *Qader*: '55. By contrast, I do not consider that the Rule Committee would have carried back to a pre-allocation stage a policy to disapply fixed costs, merely because a claim properly started in the Protocols had grown in value beyond £25,000, or had become the subject of a pleaded defence of fraud or dishonesty. As I have said,

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it by no means follows that every such case would be inappropriate for management and determination in the fast track.'

USE OF RULE 45.29J

Should a case involving issues other than straightforward matters of liability or quantum not be allocated to the multi-track, there is an escape route in part 45 itself. Rule 45.29J provides as follows:

(1) 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 referred to in rules 45.29B to 45.29H.

(2) If the court considers such a claim to be appropriate, it may –

(a) summarily assess the costs; or

(b) make an order for the costs to be subject to detailed assessment.

(3) If the court does not consider the claim to be appropriate, it will make an order –

(a) if the claim is made by the claimant, for the fixed recoverable costs; or

(b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,

and any permitted disbursements only.

The use of the word 'exceptional' is causing problems: most district judges regard an award of costs under rule 45.29J as being reserved for the angels. But this is not what, in context, the word means. In the case of *Costin v Merron* [2013] 3 Costs LR 391, Leveson LJ observed:

'11. In my judgment the phrase "exceptional circumstances" in the context of 45.12 speaks for itself. It cannot possibly mean anything other than that, for reasons which make it appropriate to order the case to fall outside the fixed costs regime, exceptionally more money has had to be expended on the case by way of costs than would otherwise have been the case.'

It follows that the focus of the application of the rule should be the reason why the costs had to be expended, rather than seeking something novel or ground breaking in the circumstances of the case itself.

USE OF PART 36 OFFERS TO TRIAL

The decision of the Court of Appeal in *Broadhurst v Tan and another* [2016] EWCA Civ 94 is well known. It reflects the clear public policy in ensuring that Part 36 offers are taken seriously, and as many cases settle as possible. Should a defendant now take a case to trial and lose, they will now suffer what have been termed penal consequences.

The real question is how each part of the personal injury industry systematically addresses its use of Part 36. For claimants and those representing them, the challenge is now to calculate and issue a Part 36 offer as early as possible.

It will not be lost that as Part 36 offers can be made on liability only, a Part 36 offer of 95% would be effective to set the ball rolling, and place the defendant minded to defend a claim on liability at risk.

The balancing act required a little later down the process is that, when a solicitor is instructed, there will often be a continuing loss accruing, such as hire charges in a credit hire claim. At this point more skill will have to be deployed to judge when to make an offer, as well as what that offer should be. For defendants, a different set of challenges arises. It is well known that many insurance companies use software to value claims, particularly at the bottom end of the scale, and often on the basis of a database which includes all data for settled cases, and skews the value of any Part 36 offer downwards.

As a seasoned common law barrister observed to me many years ago, insurers like to pay 70 pence in the pound by way of settlement, judged against the true value of a claim.

The effect of the *Broadhurst* decision should be to alter the dynamics of that calculation, and the variables used when calculating a settlement offer. If a defendant's Part 36 offer is beaten, and the claimants' Part 36 offer exceeded at a hearing, then the cost of losing the claim will now increase dramatically.

Thus in my view, *Broadhurst* should have a double impact in terms of the inflation of claims: first the cost of losing an individual claim at trial will now be higher, and second, across the board, insurers when looking at the book of claims which constitute their exposure, will have to adjust their overall offers upwards, if claimants' solicitors start systematically making well pitched and early Part 36 offers. However, there are many, many cases which still go forward to a hearing, where no effective Part 36 offer is in place.

In the longer term, given that fixed costs for noise induced hearing loss and clinical negligence costs are on the horizon, there may well be scope for the impact of those regimes to be blunted. If, for example, every time a solicitor is instructed in a clinical negligence case, it is open to them to make a Part 36 offer on liability to the tune of 95%, then straightaway the defendant is on the horns of a dilemma, with its fixed costs protection at risk.

LATE ACCEPTANCE OF PART 36 OFFERS

A further incentive to use Part 36 offers as early as possible in cases which would otherwise attract fixed costs concerns the practice by some defendants of accepting claimants' Part 36 offers months or even years out of time. In the intervening period, substantial costs may have been incurred which might have been avoided: who should pay for the luxury of the delay?

In the case of *Whalley v Advantage Insurance Company* (5 October 2017 County Court at Kingston upon Hull) District Judge Besford – having set the hare running as to whether mere late acceptance of a claimant's Part 36 offer would warrant an award of indemnity costs in the case of *Sutherland v Khan* (21 April 2016 County Court at Kingston upon Hull) – reconsidered his position and limited the claimant to fixed costs, after considering a raft of decisions of circuit judges reached on the point.

One of these decisions, of HH Judge Walden-Smith in *Hislop v Perde*, has now been fixed to be heard in the Court of Appeal on 20 June 2018. In the decision being appealed, a Part 36 offer made in 2014 was accepted in 2016 within a week of trial: the judge found that fixed costs applied to the end of the relevant period and standard basis costs thereafter. Although in a sense, anything can happen once a case reaches the Court of Appeal, the arguments that after the relevant period the court has an unfettered discretion to award costs are quite compelling and, if upheld, may force a more rigorous evaluation of Part 36 offers.

CONCLUSIONS

In summary, careful marshalling of the arguments at allocation, a scrutiny of boilerplate defences to see whether fraud, LVI or something out of the norm is alleged, and above all, well-judged use of Part 36 will go a long way to blunt the impact of fixed costs.

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