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Appeals on Part 36 Acceptance in Fixed Costs Cases

By Matthew Hoe member of the Costs Sector Focus Team at the Forum of Insurance Lawyers

"At last, the Court of Appeal is going to settle the costs argument about the consequences of accepting a Part 36 offer after its relevant period in a fixed costs case"

The Court of Appeal has conjoined appeals in Hislop v Perde and Kaur v Committee for the time being of Ramgarhia Board Leicester and expedited them for early hearing in June 2018.

The issue

Many practitioners will be familiar with this issue which has been one of the most frequently occurring and hotly contested costs points over the last eighteen months.

It affects the very many claims that start under the RTA or EL/PL Protocols, but then exit before settlement. Where that settlement is reached by the defendant accepting a claimant's Part 36 offer after the expiry of its relevant period, claimants have argued that they should get something more than the fixed costs provided by CPR 45 Section IIIA. Generally they have sought costs on the indemnity basis. Defendants say fixed costs still apply down to the date of acceptance. The cases have turned on the construction of CPR 36.13(4) and (5), and those rules' interaction with CPR 45 Section IIIA.

It is an issue that hangs on the coat-tails of Broadhurst v Tan [2016] 1 WLR 1928, in which the Court of Appeal held that where a claimant beats his Part 36 offer at trial, he gets fixed costs down to the end of the offer's relevant period plus costs on the indemnity basis after the relevant period as provided by CPR 36.17(4), rather than the fixed costs over that period provided by CPR 45 Section IIIA.

So far

The case that marked the start of this argument was Sutherland v Khan in April 2016. In a widely reported case, Regional Costs Judge Besford decided that the claimant was entitled to indemnity costs after the relevant period. He considered there had been a sea change since Mitchell and Denton. Claimants seized on his judgment, beginning a wave of copycat applications.

Results differed across County Court first instance hearings, but generally claimants were unsuccessful and got only fixed costs down to the date of acceptance. Defendants cited the High Court decision in Fitzpatrick v Tyco Fire, which held there was no presumption of indemnity costs on late acceptance, and that the normal order was for standard basis costs (it pre-dated the fixed costs regime in Section IIIA, and would not have been a fixed costs claim). Further, Excelsior v Salisbury Hammer Aspden & Johnson was cited as authority that mere late acceptance did not justify indemnity costs and something 'out of the norm' was required.

The argument that indemnity costs applied automatically quickly lost favour. Unlike CPR 36.17, CPR 36.13 makes no mention of indemnity costs. It deals only with the incidence of costs before and after the relevant period, and saying

nothing about the basis of assessment or even whether the costs are fixed or assessed.

Circuit level decisions

There were four circuit level appeal decisions and one first instance circuit level decision which gained press coverage. These arose from applications for indemnity costs following late acceptance.

None of the circuit judges allowed indemnity costs.

However, the judges differed on the costs to allow after the relevant period. Two allowed costs assessed on the standard basis, and the other three allowed fixed costs in accordance with Section IIIA (fixed costs were allowed in all cases down to the end of the relevant period).

Richard v Wakefield Council. His Honour Judge Gosnell in Leeds allowed standard basis costs, saying *'It does not seem unfair to me that the defendant should compensate the claimant in this way and it is not a windfall to the claimant in the true sense of that term.'* The judgment does not contain any reasoning on why CPR 36.13(4) and (5) result in fixed costs down to the end of the relevant period but assessed costs thereafter. The reasoning instead sets out what the judge considers to be fair.

Anderson v Ladler & Aviva. His Honour Judge Gargan in Newcastle allowed fixed costs throughout because of a concession by the claimant. He said: *'The parties agree that if the court makes an order for costs to be assessed on a standard basis in a former RTA Protocol case the claimant will only recover fixed costs.'* Many will be familiar with that practice; it is common to conclude claims with an unremarkable order for detailed assessment on the standard basis, and to sort out the fixed costs at the quantification stage – it saves the need for 'magic' words for fixed costs to apply. This reasoning and practice probably developed out of Solomon v Cromwell [2011] 1 WLR 1048, in which the Court of Appeal held that a general right to costs on the standard basis arising on acceptance under Part 36 gave way to the specific rules for fixed recoverable costs in CPR 45 Section II. The Court of Appeal may confirm along the way in Hislop whether a more specific form of order is required.

McKeown v Yenton. His Honour Judge Graham Wood QC sitting with Regional Costs Judge Jenkinson as assessor in Liverpool said Part 36 did not spell out that fixed costs applied because *'it was within the specific contemplation of those drafting that CPR Part 45 contained a sufficiently clear and concise matrix of applicable costs to enable the claimant, whose claim was brought to an end by the defendant's acceptance (whenever that might be) to determine easily the costs entitlement under the appropriate tables.'*

Hislop v Perde. In this case now proceeding to appeal, Her Honour Judge Walden-Smith in Central London said that on late acceptance: *'costs will be fixed within the relevant period and the court will make an order as to costs if those costs are not agreed between the parties and the "offeree [either Claimant or Defendant] will be liable for the offeror's costs [either Defendant or Claimant] for the period from the expiry of the relevant period until date of acceptance." Whether those costs are standard or indemnity is a matter for the discretion of the judge.'* It is not clear from the judgment what in the rules applies fixed costs before the expiry of the relevant period but not after.

Parsa v Smith. In a comprehensive judgment, His Honour Judge Tindall in Birmingham held that the specific provisions in Section IIIA applied and said *'as "costs" in CPR 36.13(5) can either mean assessed costs or fixed costs, and CPR 36.13(3) does not require costs under CPR 36.13(5) to be assessed on the standard basis, and CPR 36.13(5) does not distinguish between the basis of "costs" in (a) and (b), the logical interpretation of CPR 36.13(5) in a case to which fixed costs applies under CPR 45.29A/B (as here), is that "costs" in CPR 36.13(5) means "fixed costs".'* There is an appeal pending before the High Court, in which the claimant seeks a leapfrog to join Hislop and Kaur, although with the expedition in those appeal this case may be too late to join them.

Regional Costs Judge Besford has also changed his views. In *Whalley v Advantage Insurance*, he allowed only fixed costs, holding that there must be exceptional circumstances or conduct 'out of the norm' per the Excelsior case to depart from fixed costs.

In a related development, Sir Rupert Jackson in his report on fixed costs addressed consequences of a claimant beating his offer at trial (he prefers a percentage uplift), but did not suggest any further provision for late acceptance. That may mean he did not consider it necessary or appropriate, or may simply be because there was no case such as *Broadhurst v Tan* that he had to confront.

The issues for the Court of Appeal

As is apparent from the circuit level decisions, the main issue for the Court of Appeal is whether a claimant should get standard basis costs or fixed costs after the relevant period. More specifically, is there any discretion in CPR 36.13 to depart from fixed costs?

At present, *Hislop* is a platform to decide whether costs after the relevant period are fixed or should be assessed on the standard or indemnity basis. The claim for indemnity costs has been renewed by way of a respondent's notice in which permission is sought to make that argument. The appellant's main argument is that the court has no discretion to depart from fixed costs other than as stated expressly in the rules (e.g. where there are exceptional circumstances). Alternatively, if there is discretion to depart from fixed costs the court should only do so where indemnity basis costs are justified.

The issues in *Kaur* are slightly different. The claimant made a Part 36 offer which was not accepted within its relevant period. Later in the claim, when new information came to light, the claim increased in value. The defendant made a Part 36 offer for a greater sum which was accepted by the claimant within its relevant period. The judge allowed costs on the standard basis after the relevant period of the claimant's offer under the exceptional circumstances rules. The court will decide whether non-acceptance of a lesser offer is an exceptional circumstance, or whether only fixed costs should be allowed.

If the court decides fixed costs apply in these cases that is all the clarity required. If the court decides that costs should be assessed on the standard or indemnity basis that may be addressed in the expansion of fixed costs. Just as Sir Rupert Jackson has proposed a percentage uplift to simplify the *Broadhurst* outcome, the outcome could be simplified by way of a (lesser?) percentage uplift on the fixed costs.

The appeal is fixed on 20 and 21 June 2018.

Matthew Hoe member of the Costs Sector Focus Team at the Forum of Insurance Lawyers and Director of Dispute Resolution at Taylor Rose TTKW