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FOIL UPDATE 11th July 2022

Always check the wording of orders!

Doyle v M&D Foundations & Building Services Limited (2022) EWCA Civ 927

By a consent order ("the Order") the appellant was ordered to pay the respondent damages of £5,000 in respect of an injury the respondent had suffered during the course of his employment by the appellant. The Order further provided that the appellant was to pay the respondent's costs, "such costs to be the subject of detailed assessment if not agreed". This appeal concerned the proper interpretation of that provision.

The respondent lodged a bill of costs for detailed assessment on the standard basis, citing the terms of the Order. The appellant disputed that approach, contending that, as an ex-protocol low-value personal injury (employers' liability or public liability) claim (an "ex-Protocol claim"), the case fell within the fixed recoverable costs regime set out in SIIIA of CPR Part 45 and that the reference to detailed assessment, interpreted in that context, referred to the process of determining the amount of such fixed costs and disbursements (to the extent there was any disagreement).

A District Judge rejected the appellant's contention, finding that the fixed costs regime did not apply because the parties had contracted out of it, as reflected in the express terms of the Order. A Circuit Judge dismissed the appellant's appeal against that decision.

The respondent was injured whilst working on a construction site in the course of his employment by the appellant. His claim was brought

IN BRIEF

The Court of Appeal held that a consent order agreeing to pay a claimant's costs *"to be the subject of detailed assessment if not agreed*" displaced the fixed costs regime that would otherwise have applied.

within the protocol and after negotiations between the parties, the appellant made a Part 36 offer of £5,000 (taking into account a 30% deduction for contributory negligence) in full and final settlement of the claim.

The respondent's solicitors did not return the Notice of Acceptance of that offer, but instead wrote back the same day, stating as follows:

"*We confirm that the [respondent] is willing to agree quantum, on the basis that this is after and reflects the agreed apportionment on liability, at £5,000 though, for the avoidance of doubt and the reasons which follow, our client is not hereby accepting the [appellant's] Part 36 offer.*

The [appellant's] Part 36 offer has been made at a very late stage and well within the 21-day period referred to in Part 36.13(4). In these circumstances we consider an Order is required to finalise matters and enclose an Order, accordingly, for you to endorse with consent…."

The draft order contained the provision as to costs referred to above and the respondent's solicitors duly signed the draft as revised and filed it at court, resulting in the production of the Order.

Dismissing the further appeal, the Court of Appeal held that contrary to the appellant's contention, there was no ambiguity whatsoever as to the natural and ordinary meaning of "subject to detailed assessment" in an agreement or order as to costs. The phrase was a technical term, the meaning and effect of which was expressly and extensively set out in the rules. It plainly denoted that the costs were to be assessed by the procedure in Part 47 on the standard basis (unless the agreement or order went on to provide for the assessment to be on the indemnity basis). The phrase could not be read as providing for an "assessment" of fixed costs pursuant to the provisions of Part 45 unless the context led to the conclusion that the wrong terminology had been used (by the parties or by the court) so that the phrase should be interpreted otherwise than according to its ordinary meaning.

This was abundantly clear from consideration of the rules themselves:

i) First and foremost, rule 44.3(4)(a) expressly provided that, where an order for costs, or for assessment of costs, did not indicate the basis of assessment, the costs would be assessed on the standard basis.

ii) Second, rule 44.6(1), in setting out the court's power to assess costs (either summarily or by way of a detailed assessment), expressly provided that such power did <u>not</u> relate to fixed costs.

iii) Third, that same clear distinction was apparent from rule 45.29 itself. In circumstances where the court would consider a claim for an amount of costs <u>greater</u> than fixed costs under rule 45.29J, it might do so by assessing the costs (summarily or by way of detailed assessment). Again, it could not be clearer that costs assessed summarily or under Part 47 were not the same as (and could not include) fixed recoverable costs.

Notwithstanding that the natural and ordinary meaning of the relevant words was entirely clear, it remained necessary and appropriate to consider the context to determine whether, judged objectively, that meaning was truly intended by the parties in the present case, including whether they had used the wrong words.

In this case the terms of the Order were agreed by firms of solicitors acting for the parties, both specialists in this type of litigation. They reached agreement in the course of inter-solicitor correspondence in which a Part 36 offer by the appellant was expressly rejected by the respondent, but a counter-offer (not pursuant to Part 36) in the form of a draft of the order was accepted by the appellant (being returned with minor amendments which were in turn accepted by the respondent).

In so doing, the solicitors must, applying an objective test, be taken to have been aware of the relevant rules and principles, in particular, (i) that the fixed costs regime could be disapplied by agreement and (ii) that an order providing for detailed assessment (without more) entailed an assessment on the standard basis (rule 44.3(4)(a)).

In those circumstances it was difficult to see any basis on which the use of the term "detailed assessment" could bear anything other than its natural and ordinary meaning. No matter how strictly enforced the fixed costs regime might be in cases to which it properly applied, and no matter how unlikely it was that the respondent would have been able to escape that regime had the matter proceeded, the parties reached a compromise of the dispute on the basis of a provision as to costs which, on its face, would take the case out of the fixed costs regime and entail assessment on the standard basis. There was no objective reason to believe that the solicitors did not intend the term to bear its natural, ordinary (and obvious) meaning, not least because it would be impermissible (and to no avail) to speculate as to the parties' respective legal or commercial motivations for reaching a settlement on the terms they did. Indeed, the appellant had not suggested that the use of the term "detailed assessment" was a mistake or otherwise did not reflect the parties' agreement.

In the present case the agreement reached was not the result of the acceptance of a Part 36 offer: the parties' intentions were not to be understood in that highly restrictive context and there was no inherent ambiguity in the reference to detailed assessment, internal inconsistency within the terms of the Order or other "indication" that detailed assessment did not bear the meaning ascribed to it under the rules. Although *Adelekun* appeared, on its face, to be a decision on similar facts to the present case, it was in reality a quite different situation, rooted in the parties' use of the Part 36 offer and acceptance mechanism. No such fetter on the application of the natural and ordinary meaning of the agreed wording as to costs arose in the present case, where the parties reached a free-standing settlement agreement. That agreement included a simple and well-understood provision that the appellant would pay costs subject to detailed assessment, that is to say, on the standard basis.

Matthew Hoe, Director of Dispute Resolution at **Taylor Rose MW** and a member of the Costs SFT comments:

'The judgment means that unless settling by Part 36, somewhat remarkably, parties must now contract into the fixed costs that apply on the face of the rules. This introduces unwelcome opportunities for claimants to 'ransom' settlements, forcing defendants to disapply fixed costs – or if they strike lucky, to trick hapless defendants out of fixed costs with seemingly innocuous words like 'detailed assessment'. A system where fixed costs apply unless there are express words contracting out of them would be more desirable, rather than traps for the unwary. Now, any paying party who finds himself preparing points of dispute and arguing that fixed costs apply on the face of the rules is doomed to fail. In contrast, arguments invoking specific powers such as CPR 45.24 and, under Williams v SOS for Business, to limit to fixed costs where assessed costs are the starting point,

should still be available on assessment. A further issue which now needs closer attention is the wording of orders made by judges themselves, who may often order 'detailed assessment' without thought, particularly in costs-only proceedings. Where fixed costs apply, it seems applications to vary those orders must now be made promptly where the claimant wishes to take opportune advantage of the apparent disapplication of fixed costs. Fixed costs drift yet further from simplifying costs matters.'

The full judgment may be found at: Doyle v M&D Foundations & Building Services Ltd [2022] EWCA Civ 927 (08 July 2022) (bailii.org)