Civil Procedure Review
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Fixed Advocacy Fees in English Civil Litigation

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Abstract: When settlement has been reached between the parties of a case in certain low value personal injury disputes but costs to be paid have not been agreed, the Civil Procedure Rules (CPR) provide a fixed-costs scheme under Part 45 to regulate the recoverability of those costs. The imprecise terminology in Part 45.29C table 6B, however, has led to some uncertainty about how costs should be allocated for a settlement that occurs on the day of trial but prior to its actual commencement. This article analyses the judicial precedent recently set by the High Court in *Mendes v Hochtief (UK) Construction Ltd*[1] on this subject.

Keywords: Civil Procedure Rules; Fixed-costs; Advocacy fee; Public Policy of Settlement

Introduction

Prior to *Mendes,* cases related to the fixed-costs regime of CPR Part 45.29A were few and far between. In the case of *Butt v Nizami*,[2] Simon J identified that the fixed-costs scheme

[1] [2016] EWHC 976 (QB).
[2] [2006] EWHC 159 (QB).

provided standardised stages of recompense which, while not idyllic in every individual circumstance, produced fairness in the overall system.[3] He further assessed that the indemnity principle, a cardinal feature of the English civil litigation costs landscape, was not intended to apply to these quantums.[4] That said, at the time of Simon J's judgment, Part 45 did not exist in its current form. As reiterated in the case of *Qader & Ors v Esure Services Ltd*., the addition of Part IIIA to the CPR was only brought into effect on July 31, 2013, dealing specifically with instances of low-value personal injury claims that no longer qualify under their relevant traffic accident or employment protocols.[5] Further, Judge Grant identified in this case that Part IIIA applies irrespective of the claim's case management track, which is determined by the value of the claim as set out in CPR 26.6.[6] Generally, because the text of Part 45.29A appears clearly drafted, its interpretation has been deemed unnecessary,[7] but this interpretation can arguably be deemed necessary in cases that fall *outside* the limitations of the drafted text. *Mendes* raised the question of whether a trial advocacy fee is recoverable under the fixed-costs scheme of Part IIIA if a case settles on the day of trial but before the trial actually begins – a scenario which Part IIIA does not explicitly account for. The court in this case was, for the first time, tasked with determining which element of the fixed costs framework was most appropriate in these circumstances.

The Rules

Part 45.29A of the CPR identifies the circumstances in which the Part IIIA rules apply and include claims started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (RTA protocol). Part 45.29C sets out a table of fixed costs where a claim no longer continues under the RTA protocol, identifying three primary scenarios and their

[3] [2006] EWHC 159 (QB), [23].
[4] Ibid, [24].
[5] [2015] EWHC B18 (TCC), [25].
[6] Ibid, [13], [26].
[7] Ibid, [38].

respective cost elements. The table provides details of the following circumstances in which fixed recoverable amounts may be claimed:

- If parties reach a settlement prior to the claimant issuing proceedings under Part 7 (section A);
- If proceedings are issued under Part 7, but the case settles before trial (section B);
- If the claim is disposed of at trial (section C); and
- Trial advocacy fees (section D).

Importantly, the table identifies that trial advocacy fees are only recoverable under section C, with the other sections being limited to recovery of a fixed amount and percentage of the damages.

Facts and Submissions

The original case pursued concerned a personal injury under the RTA protocol, rendering the costs subject to the fixed-costs regime. The parties eventually came to a settlement on the day of trial, just before the trial was set to begin, and the recorder was invited to assess costs in accordance with Part IIIA. He awarded two elements of the fixed costs in accordance with the CPR: £2,655 and 20% of the damages, which is the award allotted in Part 45.29C table 6B section B when the case is settled *prior* to the date of trial. Significantly, he refused to award the fixed trial advocacy fee that was recommended under section C of Part 45.29C table 6B for when the claim is disposed of *at* trial. The recorder's interpretation of the rule was that anything prior to the trial physically starting was covered under section B, concluding that, because the settlement occurred before the final contested hearing had

commenced, it did not qualify as having been disposed of at trial, but before. It was this decision which the claimant appealed to the High Court.

The Appeal

The claimant argued that the recorder was wrong in his interpretation of Part 45.29C, as the settlement had occurred on the day of trial, even if technically preceding the trial itself. The claimant referred to section B, contending that the settlement reached could not be said to have arisen under any of the circumstances covered in that section and therefore the court had to deal with costs under section C instead. The claimant argued that the claim had been disposed of at trial, and therefore all fixed cost elements awarded under section C should apply, including the recoverability of the relevant advocacy fee.

The defendant countered by arguing that the trial advocacy fee was only recoverable under section C if the trial had commenced. In support of this argument, the defendant relied on the definition of 'trial' under Part 45.29C(4)(c), arguing that, since a trial meant 'the final contested hearing', it could not, in the circumstances, be said that this claim had been disposed of at a final contested hearing. Thus, the fixed costs under section B were the only recoverable elements, and the relevant trial advocacy fee did not fall under this heading.

Coulson J conceded that there was, at the time of this trial, no legal authority to clarify which section of Part 45.29C applied in such circumstances, compelling him to make the determination on his own assessment. He agreed with the claimant's argument that consideration of the fixed costs in this case could not have arisen under section B. This case did not, Coulson J noted, settle prior to the date of trial, as required under section B for its fixed costs to apply. Even allowing for the defendant's definition of 'trial' as a reference to 'the final contested hearing', the point remained the same: the settlement did not occur prior to the date of the final contested hearing. That was always the trial date and the case did not settle prior to that date. Coulson J held: 'On that basis, as a matter of interpretation, the three stages in section B of table 6B must each be taken to have been completed by the time the recorder

came to deal with costs. That necessarily points the way to the costs being dealt with under the next section, section C.'[8]

The defendant's argument that the date on which the trial is listed to be heard may not be the date of the final contested hearing (for example, the trial may be adjourned) was dismissed by Coulson J, who held that the date of the final contested hearing is not the date the trial was listed to be heard, but the date the final contested hearing took place, or would have taken place, but for the settlement on that date. If a trial is adjourned or relisted, it will be the adjourned or relisted date that matters for these purposes, but this case was always scheduled to occur on the date on which the settlement ultimately occurred, so these distinctions simply did not apply.

The judge also rejected the defendant's argument that this element of the fee was for unperformed trial advocacy, as the case was technically settled before any advocacy was required. He held that such a suggestion made an artificial distinction between preparation of advocacy and attendance at trial on the one hand, and actual performance of advocacy on the other. His interpretation of the events was such that the issue was disposed of at trial in this case, but that this had merely been accomplished by settling rather than by judicial judgment.

Coulson J illustrated the weakness in the defendant's argument when he said: 'And what if the trial goes ahead and the judge does not call on counsel or the solicitor-advocate for the claimant because the other side's case is so poor? He or she would not perform any advocacy in such circumstances so, if the defendant is right, he or she would not be entitled to be paid. That would be an absurd result'.[9]

Coulson J also agreed with the claimant that there were legitimate policy reasons for concluding that the interests of justice would be better served if the advocate was not penalised financially for negotiating a settlement at the door of the court. To do so would put advocates in the position of having to choose between prioritising payment for their trial preparation or representing the best interests of their clients, creating a great deal of

[8] *Mendes* (n1) [11].
[9] *Mendes* (n1) [22].

uncertainty as to how day-of settlements may be approached in the future. What motivation is there for an advocate to pursue settlement up to the last possible moment when to do so will result in no longer being entitled to their trial advocacy fee? The defendant's contention that counsel would have 'skimmed off' the trial advocacy fee when it was not properly recoverable was also strongly rejected by Coulson J, who argued that recoverability of the trial advocacy fee 'hardly amounts to some sort of windfall'.[10]

Conclusion

The decision is significant both from a rule interpretation perspective and as an important example which illustrates the court's desire to continue to protect the public policy of settlement in litigation.[11] Prior to *Mendes*, the issue of whether a trial advocacy fee was recoverable under the fixed-costs scheme when settled on the day of trial had not come before the courts for judicial determination and, as the arguments raised by the advocates in the case illustrate, there was uncertainty on the matter. There was thus a need for clear judicial interpretation, application and guidance of the rules. Coulson J's considered judgment has provided that clear interpretation by confirming that a trial advocacy fee is recoverable under the fixed-costs scheme where the matter settles on the day of the trial. In particular, Coulson J's interpretation of 'final contested hearing' as being the date on which the final contested hearing actually takes place or would have taken place but for the settlement removes any artificial distinctions between the listing date and the actual date of the hearing. As a consequence, the judgment reduces the risk of any future costly satellite litigation surrounding

[10] *Mendes* (n1) [25].

[11] In *Ofulue v Bossert* [2009] UKHL 16; [2009] 1 A.C. 990 (HL) the House of Lords dismissed arguments to extend the exceptions to the without prejudice rule which protects the use and disclosure of documents used in settlement negotiations in subsequent court proceedings. The court recognized the potential dangers of creating exceptions to the rule and thereby undermining the public policy of settlement. As Lord Neuberger argued, creating further exceptions to the without prejudice rule would, "severely risk hampering the freedom parties should feel when entering into settlement negotiations". For a critical discussion of this case, see M. Ahmed 'Protecting the without prejudice rule' (2009) 28(4) CJQ 467-469. Also see *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2010] EWCA Civ 79 in which the Court of Appeal considered the issue of whether evidence of without-prejudice communications and discussions could be given as evidence if there is a dispute about the interpretation of a written settlement agreement. For an interesting case which may be considered as potentially harming the policy of settlement see *Quiet Moments Ltd, Re* [2014] EWCA Civ 1536.

this issue. Further, from a practical perspective, Coulson J's judgment allows advocates to continue pursuing the best interests of their clients up to the last possible moment without fearing potential financial penalisation for doing so.

The courts have always been wary of any submissions raised in argument which may have the undesired effect of undermining, whether directly or indirectly, the public policy of consensual settlement in the civil justice process and *Mendes* is an interesting illustration of the court seeking to uphold that policy.

Lord Simon succinctly explained the benefits of settlement in *D v National Society for the Prevention of Cruelty to Children* when he said:

> 'Many potential disputes, civil especially, are obviated or settled on advice in the light of the likely outcome if they had to be fought out in court. This is very much in the interest of society; since a lawsuit, though a preferable way of settling a dispute to actual or threatened violence, is wasteful of human and material resources. . . Since litigation is wasteful and disruptive, society benefits if disputes can be settled out of court through negotiation between the parties.'[12]

Further, successive civil justice reforms have reiterated the need to protect and uphold the policy of consensual settlement. As Lord Woolf made clear, 'the philosophy of litigation should be primarily to encourage early settlement of disputes'[13] and this led to the formal integration of alternative dispute resolution processes within the CPR.[14] Similarly, Sir Rupert Jackson's reforms of civil litigation costs[15] recognised and reinforced the importance of

[12] [1978] AC 171.
[13] The Rt Hon Lord Woolf, Access to Justice Interim Report (Lord Chancellor's Department 1995) ch 2, para 7(a). See also the Rt Hon Lord Woolf, Access to Justice Final Report (Lord Chancellor's Department 1996).
[14] For example, CPR 1.4 (2)(e) provides that the case management duties of the court include: 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'.
[15] Lord Justice Jackson, Review of Civil Litigation Costs Final Report (14 January 2010) (Final Report) Chapter 36.

settlement as an important mechanism in controlling litigation costs. More recently Briggs LJ's recommendation for the introduction of a revolutionary on-line court for low value civil claims is premised on the philosophy of settlement.[16] Briggs LJ's proposal envisages a three-stage court process. The first stage will require parties to provide details of their claim and supporting documents and to upload these onto the online court. The second stage, which will involve case officers managing the dispute, will integrate alternative dispute resolution processes which the parties may explore in an attempt to settle their dispute failing which the matter will continue to stage three for judicial determination.

Similarly, *Mendes* illustrates the court's commitment to the public policy of consensual settlement. It recognises the very real tensions and conflicts of interests which may arise for advocates in having to further their client's interests in negotiating a settlement and not being entitled to recover their advocacy fee, despite preparing for trial. Interpreting the rules so that fixed advocacy fees are recoverable allows advocates to continue pursuing the best interests of their clients up to the last possible moment without fearing potential financial penalization for doing so, and thereby, ultimately, upholds and protects the public policy of consensual settlement.

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