



FEDINAS & OTHERS vs FAYAO & OCTAGON INSURANCE (18.6.2015) DJ Shepherd, Leeds County Court.

Introduction

- 1. One might have thought with the intense scrutiny that has been brought to bear upon the proportionality of costs in civil litigation over recent years, that the relevant civil procedure rules would be drafted in such a way so as to remove ambiguity, and the new Fixed Recoverable Costs (FRC) regime of CPR 45.29A, would be a shining example of certainty. You would be wrong. This recent case is this first decision of which I am aware, where the Defendants have argued that despite the case being allocated to the Multi track, the regime of FRC still applies. The Defendants sought a declaration to that effect which the Court has now rejected.*
- 2. The Issue: How can CPR 45.29A and B ('FRC') apply to a Multi-Track Case?**

Background

In a low-value Multi-Track case, proceeding in the Leeds County Court, the parties attended for a Costs and Case Management hearing in April 2015. At that hearing, the Defendants submitted, for the first time, that despite a previous order allocating the matter to the Multi-Track, 'FRC'

applied to the claim regardless. The case was adjourned for Skeleton arguments and further submissions.

3. The case involved a road traffic accident that occurred on the 22nd February 2014. There was a driver and 4 passengers within the Claimant's vehicle. Each Claimant gave notification to the Defendants' insurers of their individual claims via the Portal, on 25th February 2014. The claim fell out of the portal and in due course proceedings were issued on 20th October 2014 with all 5 Claimants named within the pleadings. A Defence was filed conceding negligence but putting the Claimants to proof in relation to damages.
4. Each of the four passenger Claimants only sought to claim for general damages based upon a prognosis period of an 18 month whiplash-type injury to the spine. The driver had a similar claim for personal injury and a modest claim for special damages, namely, credit hire, repair costs and recovery/storage in the pleaded sum of £6,486.
5. It was accepted by the District Judge that each personal injury claim had a reasonable prospect of achieving an award of £4,000. Taking into account, the special damages claim, the total value of the claim was in the order of £26,500.
6. However, value was not the reason for the previous allocation (on the papers) to the Multi Track, rather, it was the number of Lithuanian Claimants involved and the potential time taken up for cross-examination. The case was allocated to the Multi-Track with a time estimate of 1½ days.
7. Part of the January 2015 Allocation Order expressly stated, "*That the hearing [CCMC] is listed for further active Case Management by the Court, including the making of a Costs Management Order.*"
8. At the adjourned hearing in June 2015, the Defendants sought a declaration that 'FRC' applied to the case despite the allocation to the Multi-Track. The Defendants focused on the fact that the nowhere within Part IIIA of the 'FRC' scheme is there even a reference to the effect of allocation to the Multi track and since the triggering provisions of 45.29A

and B were fulfilled in this case, then, pursuant to 45.29B, “the only costs allowed are the fixed costs in rule 45.29C”. Read in conjunction with CPR 3.12(1)C, costs management did not apply to the circumstances of this case.

9. The Defendants further submitted that this was a simple P.I. claim with typical credit hire issues, and the only reason for it to have been allocated to the Multi-Track was the length of hearing. Applying ‘FRC’ to this case would keep all costs matters in proportion to the amount claimed which was a fundamental consideration of the new Overriding objective, at CPR 1.1(1).
10. The Claimants conceded, on the face of it, that CPR 45.29A and B could apply to the circumstances of this case since the triggering provisions had been met **BUT that the Fixed Recoverable Costs Regime was implicitly restricted to Fast-Track cases below £25,000.**
11. Table 6B, set out at page 1504 of the current White Book, provides 3 columns of fixed solicitor’s costs, the highest value being claims worth more than £10,000 but not more than £25,000. The Claimants made the point, if the Defendants were correct, where was the column for claims exceeding £25,000, as in this case. What about claims worth over £50,000, or £100,000 etc? Was the Court to pluck a figure out of the air when making an award at the end of the case?
12. Furthermore, the Claimants submitted that the fixed trial advocacy fee, set out at section D of Table 6B, did not appear to cover cases lasting more than 1 day. In this case, the Defendants’ costs budget itself had claimed a fee of £3,000 for their advocate for a 1½ day trial. The point was embellished to demonstrate that in cases which have been given a longer time estimate, for example, alleged RTA fraud cases of 3 to 5 days length, the Claimants would be unlikely to obtain the services of any counsel for the trial on these fixed ‘FRC’ fees since it would not represent a proper fee for the work involved and the Cab rank rule would therefore be disapplied.

13. The Defendants countered this argument by submitting that the, 'exceptional circumstances' Rule at CPR 45.29J, could be used by the Court to award an additional amount of costs which was greater than the Fixed Recoverable Costs Regime in more complex cases.
14. The Claimant referred the Court to the MOJ Consultation Paper and Response, dated 27th February 2013, whereby the Government stated its intention that the new Fixed Recoverable Costs Regime would apply only to those cases in the Fast Track and if a case was judicially determined to be suitable for the Multi track, normal multi track costs rules would apply.
15. Finally, the Claimants submitted that the Court Order of January 2015 had set aside the Fixed Recoverable Costs Regime of 45.29A and B because it had stated, '*..the hearing is listed for further active case management by the Court **and the making of a costs management order.***' In effect, this was a deeming Order under CPR 3.12(1A) which had supplanted the general exclusionary rule of CPR 3.12(1)C.

Judgment

16. The District Judge accepted that there was no express guidance within the rules for the circumstances of this case. She was, though, not persuaded by any of the Defendants' submissions and agreed with all points put forward by the Claimants. She had some regard to the MOJ position. Proportionality and costs control would be achieved through the normal exercise of costs budgeting. Relying upon the 'exceptional circumstances' of CPR 45.29J would be an unsatisfactory ex post facto decision, potentially, lacking costs control and certainty. Furthermore, her Allocation Order of January 2015 had supplanted the fixed costs regime. The Defendants declaration was refused. The case was to be cost budgeted in the normal manner.
17. The Defendants were also strongly criticised for failing to raise the point before the April 2015 hearing. The District Judge pointed out that they should have applied to set aside or vary the January Allocation Order and, instead, they had allowed the parties to incur the costs and expenditure of

preparing for costs budgeting. Such inaction was against the Overriding objective. Permission to appeal was refused.

Comment

18.It does not matter which side of the litigation fence one practises from, any lacuna within the rules which leads to satellite litigation will not further the Overriding objective and will waste the court's resources. This case has flagged up an issue which requires urgent clarification. Perhaps, the Civil Procedure Rules Committee can bring the required clarity, simply, that the Fixed Recoverable Costs Regime do or do NOT apply to cases allocated to the Multi track.

19.However, if they do reconsider the 'FRC' scheme of CPR 45.29A and B, I wonder whether they could also clarify, if the fixed costs to be awarded (had FRC applied here) to the 5 Claimants, are intended to be recovered by each Claimant individually or, whether, just one award of fixed costs should be recovered between the 5 of them on 'the claim'.

20.I have a hearing coming up shortly where the Defendant has taken the point and the interpretation of the wording to the FRC is again in dispute.

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