Qader v Esure Court of Appeal decision:- fixed costs do not apply to ex-protocol cases that are allocated to the multi-track

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Matthew White, a member of our personal injury team, provides an update in the much awaited judgment in *Qader v Esure and conjoined appeal* [2016] EWCA Civ 1109 which the Court of Appeal has handed down today.

CPR Part 45 section IIIA deals with cases which start life within an EL/PL/RTA protocol (what you probably think of as "portal" claims). Section IIIA defines itself as the fixed costs regime for cases that start life as a protocol/portal claim but exit the process.

A question arose in relation to cases which started life as protocol/portal claims, but were allocated to the multi-track. In Qader itself, for example, value was modest (and well within fast-track value), but due to allegations that this was a deliberate "slam on" accident (i.e. the Claimant's car deliberately braked so that the Defendant could not avoid a collision), the claim was allocated to the multi-track (and a 2-day trial was anticipated). The District Judge and (on first appeal) Circuit Judge both held that CPR Part 45 section IIIA means what it says, and since the case started life as a protocol case, only fixed costs were recoverable even though it was allocated to the multi-track and a trial lasting more than 1 day was expected. In other words, fixed costs which were intended for fast track cases lasting a day or less would have to be made to stretch to cover more significant litigation (not an enticing prospect for the lawyers).

The big news is in the heading of this piece. The Court of Appeal determined that CPR Part 45 section IIIA is automatically dis-applied in any case allocated to the multi-track.

How they got there is interesting. Giving the leading judgment (with which the others agreed), Briggs LJ said that "*no ordinary process of construction or interpretation of the wording of the relevant rules could lead to that result* [that fixed costs were dis-applied on allocation to the multi-track]". Nor would it be irrational were the rules to be that fixed costs apply even when portal claims were allocated to the multi-track. However, an analysis of the historic origins of the fixed costs regime shows that that was not what was intended, and the court would add words to the CPR to achieve the legislative intention.

I did not expect that reasoning myself. I rather expected the Court of Appeal to observe that fixed costs "top out" at £25,000 (since costs are a percentage of damages, the top band being where damages are "more than £10,000 but not more than £25,000" – the inference (to my mind) being that if damages were more than £25,000 the fixed costs regime would not apply). That was not, in the event, the route taken.

The result here will bring sighs of relief from claimant solicitors who were facing arguments from defendants to the effect that if the claim started life in the portal, fixed costs would apply even if the claim was re-valued at well in excess of fast track limits.

It seems to me inevitable that this decision will impact on litigation. I can foresee the following:-

1. Claimant advisers might well be keen to beef-up the complexity of what might otherwise be regarded as relatively ordinary fast track litigation with a view to persuading a court to allocate to the multi-track (and trigger assessed rather than fixed costs). Briggs LJ said that "*I consider that this is a risk best addressed by relying upon the good sense and vigour of case management judges in furthering the overriding objective, and in penalising those who seek to abuse the opportunity to which the allocation stage in such a claim gives rise.*" Whilst I follow the sentiment behind that, the opportunity to "penalise" is relatively limited given that one would expect a costs penalty only, and the size of the costs penalty would be limited by the fixed costs regime itself unless the court found there to be exceptional circumstances so as to trigger 45.29J. That is, if a claimant were to take a punt on allocation to the multi-track for a borderline spurious reason, that claimant might calculate that the likely extent of the risk is the low fixed costs of a failed application which might be regarded as a gamble worth taking when set against the potential benefits of allocation out of the fixed costs regime.
2. Defendant advisers might be deterred from running arguments which would (or might) lead to cases being allocated to the multi-track. This decision might be a disincentive to argue fraud.

Note what the decision does and does not do. Part 45.29B has been amended as follows (new words added by the Court of Appeal shown with underlining):-

Subject to rules 45.29F, 45.29G, 45.29H and 45.29J<u>and for so long as the claim is not allocated to the multi-track</u>, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—

(a) the fixed costs in rule 45.29C;

(b) disbursements in accordance with rule 45.29I.

The decision does nothing in relation to cases not allocated to the multi-track. Thus if the claim settles for over £25,000 without being allocated, fixed costs apply: the anomaly of the £25,000 ceiling on damages remains.

We also have the problem of costs incurred before allocation. Suppose that a claim is in the portal and it becomes apparent relatively early that it will exceed £25,000 in value. It is not hard to imagine a case in which the claimant's solicitor would want/need to spend a reasonable amount pre-issue. What of those costs? Is that solicitor compelled to issue to secure allocation to the multi-track to recover those costs? That will pressure such a claimant solicitor into an unwanted court timetable and into doing more work after the budget is set than claimant solicitors generally like (given the common approach of getting a good part of the preparatory work done before budgeting). Or can that solicitor expect the court to award pre-allocation costs as though the allocation were to the multi-track (even though the language added to the rules by the Court of Appeal does not seem to suggest that)?

Such problems will need to be worked out in practice. In the meantime, rules changes designed to save costs continue to cause problems and generate satellite litigation.

Matthew White
16th November 2016

Download judgment: *Qader v Esure and conjoined appeal 2016* EWCA civ 1109

If you would like to instruct Matthew on a related matter please contact his clerks on