In a fix

Marcus Coates-Walker describes Sharp v Leeds CC *where it was decided that fixed costs apply to the costs of a PAD application in ex-protocol cases*

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In the case of *Sharp v Leeds City Council* [2017] the Court of Appeal (COA) determined a 'short but important point' in relation to pre-action disclosure (PAD) application costs.

The issue in *Sharp v Leeds CC* was whether the fixed costs regime in sIIIA of Part 45 for claims which started but no longer continue under the EL/PL Protocol, apply to the costs of a PAD application under s52 of the County Courts Act 1984 in connection with such a claim.

PAD application costs are ordinarily governed by the general rule and exceptions in CPR 46.1:

> 2) The general rule is that the court will award the person against whom the order is sought that person's costs:
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> (a) of the application; and
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> (b) of complying with any order made on the application.
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> (3) The court may however make a different order, having regard to all the circumstances, including:
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> (a) the extent to which it was reasonable for the person against whom the order was sought to oppose the application; and
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> (b) whether the parties to the application have complied with any relevant pre-action protocol.

CPR 45.29H(1) makes provision for fixed costs of interim applications in ex-protocol cases in the following terms:

> Where the court makes an order for costs of an interim application to be paid by one party in a case to which this Section applies, the order shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6 or 6A.

In essence, that amounts to £250 plus VAT.

The facts of *Sharp v Leeds CC*

Miss Sharp (C) tripped on a footpath and injured her wrist. She brought a claim against Leeds City Council (D) through the Portal under the EL/PL Protocol. The claim ceased to continue within the EL/PL Protocol and thereafter fell within the PI Protocol. D failed to give pre-action disclosure and C made a PAD application. By the time of the hearing at Wakefield County Court, D had given the necessary disclosure, but DJ Heppell awarded C the costs of the PAD application and summarily assessed them at £1,250. On appeal Judge Saffman concluded that the fixed costs regime applied, with the result that payable costs were reduced to £305.

The COA decision

LJ Briggs (with whom LJ Jackson and LJ Irwin agreed) held that the fixed costs regime 'plainly applies to the costs of a PAD application' in cases which started, but no longer continue under the protocol. He stated that the starting point in these cases is to limit the recovery of costs to the fixed rates, subject only to a very small category of clearly stated exceptions. He continued:

> To recognise implied exceptions in relation to such claim-related activity and expenditure would be destructive of the clear purpose of the fixed costs regime, which is to pursue the elusive objective of proportionality in the conduct of the small or relatively modest types of claim to which that regime currently applies.

During what were described as 'excellent and well-focussed' submissions, there were four areas of battle.

Is a PAD application part of a 'claim' for the purposes of the protocols and rules?
C argued that it was not part of such claim. Rather it is, and has always been treated as, a separate and self-contained application, with its own separate jurisdiction, procedural rules and costs regime. The COA agreed that it was self-contained and separate from the claim. However, they held that in a PI context the connections between a PAD application and the claim for damages to which it relates are 'particularly close'. Above all, they considered that it powerfully contributes to early settlement (a stated aim of the protocol).

Should a PAD application be regarded as an 'interim application' within the meaning of CPR 45.29H?
C argued that it is not an 'interim application' because it is not made 'in a case to which this Section applies' within the meaning of sub-paragraph (1). Rather, it is separate from any such case. The COA held that it is plainly an application for an interim remedy and is 'interim' in the fullest sense. It follows the institution of the 'claim' by the uploading of a CNF on the Portal and precedes the resolution of the claim by settlement or final judgment.

Are the costs rules for PAD applications in CPR 46.1 incompatible with the regime for defendants' fixed recoverable costs in CPR 45.29F?
The COA agreed that it would be hard to fit the provision in CPR 46.1 within the 'straightjacket of Part 45.29F and H'. Nevertheless, they held that a defendant which successfully resisted a PAD application would stand to recover fixed costs under CPR 45.29F (albeit much less than the expenditure actually incurred). They considered that, in a practical PI context, any supposed incompatibility is likely to be 'more apparent than real'.

Is confining a claimant to fixed recoverable costs an inadequate sanction for widespread procedural misconduct by defendants?
In contrast to the first three points, the COA saw 'some real force' in the argument that limiting costs recovery to claimants who succeed in PAD applications will largely deprive such applications of their value as a spur to proper compliance by insurance-backed defendants with their protocol disclosure obligations.

A defendant which successfully resisted a PAD application would stand to recover fixed costs under CPR 45.29F (albeit much less than the expenditure actually incurred).

Unfortunately for C, this was still not enough. LJ Briggs stated that:

> ... to throw open PAD applications generally to the recovery of assessed costs would in my view be to risk giving rise to an undesirable form of satellite litigation in which there would be likely to be incentives for the incurring of disproportionate expense, which is precisely what the fixed costs regime, viewed as a whole, is designed to avoid.

However, LJ Briggs did allude to two potential avenues for claimants:

- Exceptional circumstances: He suggested that one answer may lie in the availability of an application under CPR 45.29J if exceptional circumstances can be shown. He stated that he would not regard a defendant's deliberate disregard of protocol disclosure obligations as unexceptional merely because it was frequently encountered (however he did acknowledge the difficulty this may cause in passing the exceptional circumstances hurdle).
- The Rule Committee: He conceded that it may be that the very limited recovery of expenditure on a PAD application under the fixed costs regime means that such applications are not as effective as they should be in sanctioning breaches of protocol disclosure obligations. He stated that if there is appropriate evidence then a review into a more generous, but still fixed, recovery of costs of such applications would be justified.

This is good news for defendants as the costs of PAD applications in ex-protocol cases will be limited to the fixed costs in CPR 45.29H (£250 plus VAT). However, claimants should be alert to the opportunity to access greater costs if exceptional circumstances can be demonstrated. Albeit, it is less than clear as to what is sufficient to pass that hurdle.

In any event, both parties should keep a keen eye on the Rule Committee in case, following LJ Briggs, they gather enough evidence to suggest the recoverable fixed cost for PAD applications should be higher.

It can fairly be said that 2016 was a year for claimants in the context of costs in low-value personal injury cases. The Court of Appeal's decisions in *Broadhurst v Tan*, *Bird v Acorn* and *Qader v Esure* will have given claimant solicitors some welcome reprieve from the fixed costs regimes. However, the start of 2017 and the decision in *Sharp v Leeds CC* has seen the pendulum swing back slightly in favour of defendants. Only time will tell what the remainder of the year brings to this (often hotly contested) area. ■

Bird v Acorn
[2016] EWCA Civ 1096
Broadhurst v Tan
[2016] EWCA Civ 94
Qader v Esure
[2016] EWCA Civ 1109
Sharp v Leeds City Council
[2017] EWCA Civ 33