Much accrued about nothing

Are claimants entitled to advocate's costs when no advocacy has occurred? Thomas Herbert reviews conflicting case law

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'Where the defendant consents to the substantive application, and also accepts that it must pay the claimant's costs (ie where there is no need for any advocacy), is the claimant still entitled to half the Type B costs?'

Following the Court of Appeal's decision in *Sharp v Leeds City Council* [2017], where a claimant makes an application for pre-action disclosure (a PAD application) pursuant to CPR 31.16 in a case to which either the RTA Protocol or the EL/PL Protocol applies, costs fall to be determined according to CPR 45.29H.

This is on the basis that a PAD falls within the description of interim applications in CPR 45.29H *viz* 'an interim application… in a case to which this section applies'. According to Briggs LJ at para 35:

> The 'case' in which the application is made is, in my view, the claim for damages for personal injury, during and in the pursuit of which the PAD application is made. It is plainly an application for an interim remedy within the meaning of Part 25, and it is in my view 'interim' in the fullest sense, because it follows the institution of the 'claim' by the uploading of a CNF on the Portal, even though no proceedings under Part 7 have yet been issued, and precedes the resolution of the claim by settlement or final judgment.

In a passage of some significance to fixed-costs litigation generally, Briggs LJ opined as follows at para 41 (emphasis added):

> … 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. *The fixed costs regime inevitably contains swings and roundabouts, and lawyers who assist claimants by participating in it are accustomed to taking the rough with the smooth, in pursuing legal business which is profitable overall.*

Further uncertainty

But despite this decision there remains room for argument.

If (as is commonly the case) the defendant is ordered to pay the claimant's costs, then the order will be 'for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6 or 6A' plus the court fee. Type A costs are the legal representative's costs and Type B costs are the advocate's costs, while Tables 6 and 6A concern the RTA and EL/PL Protocols respectively.

The following question thus arises: where the defendant consents to the substantive application, and also accepts that it must pay the claimant's costs (ie where there is no need for any advocacy), is the claimant still entitled to half the Type B costs?

Context

The amount at stake is only £150 (half the Type B fixed costs plus VAT). But, as Briggs LJ observed in *Sharp* at para 26, PAD applications are commonly listed in blocks of 20 or more, each with a time estimate of five minutes. The same firm of

claimant solicitors will often be instructed on multiple applications, and the same insurer may stand behind multiple defendants.

The importance of the issue, in this wider context, is thus rather greater than the sum in dispute on an individual application would suggest.

Further, the issue is not limited to PAD applications. The argument below is applicable in any case where an interim application to which CPR 45.29H applies settles without a hearing.

The result of Hannon *and* Crawshaw *and other conflicting decisions is an unsatisfactory inconsistency of approach.*

Conflicting County Court decisions

The question has come before the County Court on a number of occasions. Different judges have reached different conclusions at first instance, and to my knowledge the point has not yet been considered on appeal.

In *Skowron v Rollers Roller Disco Ltd* [2017], DJ Middleton, sitting in the County Court at Truro, held that the claimant was entitled to Type B costs notwithstanding that no advocacy had taken place:

> CPR 45.29H(1) does not say that there has to be advocacy; it simply defines the fee in terms of calculation by it being half of Type A and Type B costs. That in itself, the fact that it refers to half, suggests to me that it is simply a mechanism to work out a fee rather than specifying that there must be both Type A and Type B costs incurred. It is all very well to submit that the rule makers did not intend something but the reality of course is that that is what the rule says... CPR 45.29H is simply a fee-setting device and therefore the appropriate fee should be half of both Type A and Type B costs.

In *Hannon v Cheshire West and Cheshire Council* [2017] (in which I appeared for the defendant), DJ Bellamy, sitting in the County Court at Sheffield, reached the opposite conclusion:

> The question turns on the interpretation of [the] word 'applicable'. Does it refer to Type A or B costs or to Table 6 or 6A? There is no difference between Table 6 or 6A. That would seem to strengthen the argument that the word refers to Type A or B costs i.e. representation or advocacy. Then I consider the Overriding Objective and what the fixed costs regime is trying to produce in terms of limited costs on applications. It would seem strange if the interpretation of CPR 45.29H meant that the amount of costs recovered was exactly the same whether or not there was advocacy... For those reasons, I favour the Defendant's argument.

The case of *Crawshaw v Alfred Dunhill Ltd* [2017], which raised the same issue, was heard by DJ Bellamy immediately after he delivered judgment in *Hannon*; unsurprisingly the judge summarily reached the same conclusion.

The result of these – and other – conflicting decisions is an unsatisfactory inconsistency of approach. For example, I understand that the common practice in Sheffield is now to disallow Type B costs where there has been no advocacy, and that a similar practice prevails in Leeds, whereas the opposite approach is taken in Truro and a number of other hearing centres.

The rules

By CPR 45.29H(1) (emphasis added):

> 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.*

CPR 45.18(2) defines 'Type A fixed costs' as 'the legal representative's costs', and 'Type B fixed costs' as 'the advocate's costs'. By CPR 45.18(3), 'advocate' has the same meaning as in CPR 45.37(2)(a): 'a person exercising a right of audience as a representative of, or on behalf of, a party'.

Table 6 concerns claims that began under the RTA Protocol. Table 6A concerns claims that began under the EL/PL Protocol. The Type A and B fixed costs in Table 6 are each £250, as are those in Table 6A. VAT may be added in each case: CPR 45.18(6).

Arguments

The key question is the construction of the emphasised phrase above, in particular the word 'applicable'. From the defendant's perspective, the argument runs as follows:

(a) If the draftsman's intention had been that a party will always be entitled to half the Type A and Type B fixed costs, then there would have been no need for the word 'applicable'. To interpret the rule in this way would render the word redundant.

(b) Similarly, the distinction between Tables 6 and 6A is a distinction without a difference insofar as Type A and Type B fixed costs are concerned. To interpret the word 'applicable' as distinguishing between the two tables would lead to the same result as in (a) above: in every case, the party would be entitled to half of the same costs and the word would be rendered redundant.

(c) The only construction that results in the word 'applicable' having any effect is if it is interpreted as distinguishing between the 'type' of cost.

(d) It is inherent in such a distinction that there will be

> circumstances where the Type A and/or Type B fixed costs will not be applicable. By reference to the definitions set out above, where there has been no advocacy by way of a person exercising a right of audience as a representative of or on behalf of a party, the Type B costs cannot be said to apply.

At first blush, some indirect support for the above construction can be found in *Sharp*. At para 1, Briggs LJ recorded that, on the first appeal in that case:

> [His Honour] Judge Saffman concluded that the fixed costs regime applied to the PAD application, with the result that the costs payable were reduced to £305.

This figure can only be rationalised on the basis that it comprised half the Type A fixed costs (£125) plus VAT (£25) and the then-applicable court fee (£155). But the position is rather confusing because it does appear that some advocacy took place in that case. Further, the judgment of HHJ Saffman suggests that the figure of £305 was agreed between the parties: see para 13.

More persuasive support may be found by examining the costs consequences where the parties settle after Stage 3 proceedings have been issued. CPR 45.29 provides that where the parties have reached an agreement on all issues, including which party is to pay costs, but have failed to agree the amount of those costs (ie analogous to the situation here), either party may make an application for the court to determine the costs, which will be assessed in accordance with CPR 45.22 or 45.25.

CPR 45.22 deals with the situation where the claimant is a child and there will, of necessity, be a settlement hearing in any event. It is accordingly irrelevant for present purposes. CPR 45.25(2) is, however, relevant. It deals with the costs consequences where there are no CPR Part 36 consequences of the settlement. By CPR 45.25(2)(b), the defendant will be ordered to pay Type A fixed costs but not Type B fixed costs. There is no equivalent mechanism to 'costs-only proceedings' in relation to a PAD application, but the distinction drawn between Type A and Type B fixed costs – in circumstances where the matter has settled without a hearing – is instructive. (This analogy also defeats the rather simplistic argument that, by virtue of the parties attending to argue about the amount of costs, there has been advocacy after all.)

Finally, there are policy reasons why the defendant's construction ought to be preferred. The court is now enjoined to deal with cases 'at proportionate cost': CPR 1.1(1). Settlement of PAD applications prior to the hearing is to be encouraged. To require a defendant to always pay the Type B fixed costs, in cases where there is never any advocacy, would run against the grain of the CPR and would not incentivise settlement.

From the claimant's perspective, however, the rule simply provides a formula to calculate the applicable costs: half the Type A costs plus half the Type B costs plus disbursements. The only question is whether one takes the Type A and Type B costs from Table 6 or Table 6A; this depends on whether the case proceeds under the RTA Protocol or EL/PL Protocol, and it is this simple distinction to which the word 'applicable' refers.

Indeed, Tables 6 and 6A provide – though not in the case of Type A or B costs – for an increased level of costs in higher value cases, and in some instances the level of costs depends on which protocol applies. Although that distinction does not presently apply to Type A or Type B costs, the figures could be amended in the future.

There is also some modest support for the claimant's position from a policy perspective: if CPR 45.29H(1) is treated as a 'fee-setting device', without recourse to the particular features of the application, then this will increase certainty.

To require a defendant to always pay the Type B fixed costs, in cases where there is never any advocacy, would run against the grain of the CPR and would not incentivise settlement.

Some support for this proposition can arguably be gained from Briggs LJ's comments in *Sharp* at para 41, quoted above.

Conclusion: an issue of wider application

In my view, the defendant's argument is to be preferred, though there is clearly room for argument and different courts are taking different approaches.

As above, while routinely arising in the context of PAD applications, the point applies equally to any other interim application falling under sIIIA of CPR Part 45. Where such an application is compromised without a hearing, there is scope for an argument that Type B costs should not form part of any costs award.

Considering the sum at stake in any individual case, it may be some time before the argument is considered on appeal – and even longer before it is given any definitive answer. ■

Crawshaw v Alfred Dunhill Ltd
(2017) unreported, County Court at Sheffield, DJ Bellamy, 16 November

Hannon v Cheshire West and Cheshire Council
(2017) unreported, County Court at Sheffield, DJ Bellamy, 16 November

Sharp v Leeds City Council
[2017] EWCA Civ 33

Skowron v Rollers Roller Disco Ltd
(2017) County Court at Truro, DJ Middleton, 8 June