The Devil's in the Detail(ed Assessment)

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The Claimant in *Doyle v M&D Foundations & Building Services Ltd* [2022] EWCA Civ 927 was injured on a construction site in May 2014. His claim was, in the usual way, entered on the MoJ's EL/PL Portal and dropped out when no liability response was received within the prescribed time limit. Proceedings were subsequently issued and allocated to the fast track. There can be no doubt that they fell within the auspices of the fixed costs regime and that, had they proceeded to trial, the Claimant would only have recovered fixed costs unless a Part 36 offer had been beaten.

On 16 July 2018, only three days before the claim was due to be heard at trial, the Defendant made a Part 36 offer to settle the claim for £5,000. Rather than simply accept the offer, the Claimant's solicitor returned to the Defendant, indicating that they were happy to accept a settlement of £5,000 but stating that they considered that an order was required. A consent order was enclosed which stated that the Defendant would pay the Claimant's costs, "*such costs to be the subject of detailed assessment if not agreed*".

The Defendant took no issue with the wording of the costs order and, after some inconsequential amendments to recitals and other sections, the consent order was filed at court, approved and sealed. When the Claimant's solicitor lodged a bill of costs for detailed assessment, the Defendant's solicitor sought to argue that the fixed costs regime applied and that the refence in the order to the detailed assessment of costs was simply a reference to the process by which the fixed costs would be calculated.

The Defendant's assertion on paper as to the application of the fixed costs regime was rejected by DJ Rogers, who maintained his position following an oral hearing. An appeal to HHJ Ingram failed and the Defendant appealed, for a second time, to the Court of Appeal.

The Applicable Law

The following provisions of the CPR were recited by the court as being relevant to its consideration.

CPR 44.6 provides:

(1) Where the court orders a party to pay costs to another party (other than fixed costs), it may either –

(a) make a summary assessment of the costs; or

(b) order detailed assessment of the cost by a costs officer,
unless any rule practice direction or enactment provides otherwise …

(2) A party may recover the fixed costs specified in Part 45 in accordance with that Part.

CPR 44.1 defines "*detailed assessment*" as the procedure by which the amount of costs is decided by a costs officer in accordance with CPR Part 47.

CPR 47.6(1) provides that detailed assessment proceedings are commenced by the receiving party serving on the paying party (a) a notice of commencement in the relevant practice form; (b) a copy or copies of the bill of costs, as required by Practice Direction 47; and (c) if required by Practice Direction 47, a breakdown of the costs claimed for each phase of the proceedings.

CPR 47.9 provides for the paying party to dispute any time in the bill of costs by serving points of dispute. If the paying party does so, CPR 47.14 sets out the procedures for convening a detailed assessment hearing.

The court also noted that:

[19] The rules do not make provision for the parties to contract out of the fixed costs regime, but it is recognised that there is no bar on them doing so: see Solomon v Cromwell Group plc *[2011] EWCA Civ 1584, [2012] 1 WLR 1048 per Moore-Bick LJ at [22], cited in* Adelekun v Ho *[2019] EWCA Civ 1988, [2019] Costs LR 1963 by Newey LJ at [11].*

Analysis

The parties were agreed that the principles applicable to the interpretation of contractual provisions also applied to the court's interpretation of the order, the central question being whether or not the parties had contracted out of the use of the fixed costs regime. In that regard, the Appellant sought to argue that the order was ambiguous because the reference to detailed assessment was intended by the Appellant to mean the process by which the quantum of fixed costs and disbursements would be ascertained.

The court squarely rejected the Appellant's submission in that regard, with Phillips LJ, who gave the leading judgment, stating that:

[44] In my judgment, and contrary to the appellant's contention, there is no ambiguity whatsoever as to the natural and ordinary meaning of "subject to detailed assessment" in an agreement or order as to costs. The phrase is a technical term, the meaning and effect of which is expressly and extensively set out in the rules. It plainly denotes that the costs are to be assessed by the procedure in Part 47 on the standard basis (unless the agreement or order goes on to provide for the assessment to be on the indemnity basis). The phrase cannot be read as providing for an "assessment" of fixed costs pursuant to the provisions of Part 45 unless the context leads to the conclusion that the wrong terminology has been used (by the parties or by the Court) so that the phrase should be interpreted otherwise than according to its ordinary meaning.

It is clear that, in reaching its decision, the court placed significant emphasis upon the fact that those conducting the negotiations were solicitors who were specialists in personal injury work and fully conversant with the fixed costs regime. That played heavily into the question of whether the meaning of the contractual agreement was actually intended by the parties:

[49] Notwithstanding that the natural and ordinary meaning of the relevant words is entirely clear (for the reasons set out above), it remains necessary and appropriate to consider the context to determine whether, judged objectively, that meaning was truly intended by the parties in the present case, including whether they had used the wrong words.

[50] In this case the terms of the Order were agreed by firms of solicitors acting for the parties, both specialists in this type of litigation. They reached agreement in the course of inter-solicitor correspondence in which a Part 36 offer by the appellant was expressly rejected by the respondent, but a counter-offer (not pursuant to Part 36) in the form of a draft of the order was accepted by the appellant (being returned with minor amendments which were in turn accepted by the respondent).

[51] In so doing, the solicitors must, applying an objective test, be taken to have been aware of the relevant rules and principles, in particular, (i) that the fixed costs regime can be disapplied by agreement and (ii) that an order providing for detailed assessment (without more) entails an assessment on the standard basis (rule 44.3(4)(a)). In those circumstances it is difficult to see any basis on which the use of the term "detailed assessment" could bear anything other than its natural and ordinary meaning as discussed above. No matter how strictly enforced the fixed costs regime may be in cases to which it properly applies, and no matter how unlikely it was that the respondent would have been able to escape that regime had the matter proceeded, the parties reached a compromise of the dispute on the basis of a provision as to costs which, on its face, would take the case out of the fixed costs regime and entail assessment on the standard basis. There is no objective reason to believe that the solicitors did not intend the term to bear its natural, ordinary (and in my judgment, obvious) meaning, not least because it would be impermissible (and to no avail) to speculate as to the parties' respective legal or commercial motivations for reaching a settlement on the terms they did. Indeed, the appellant has not suggested that the use of the term "detailed assessment" was a mistake or otherwise did not reflect the parties' agreement.

The appeal was therefore dismissed.

Conclusion

The decision serves as a warning to those engaged in low-value personal injury litigation to consider carefully the wording of agreed orders. Notwithstanding the court's analysis at [49]-[51], it does seem overwhelmingly likely that the Defendant did not, in fact, intend to contract out of the fixed costs regime at all. However it is abundantly clear that the courts will have little sympathy for those who make such mistakes, especially when they concern the use of technical legal terminology.