Case No: DO0CT248

IN THE CANTERBURY COUNTY COURT

The Law Courts,
Chaucer Road,
Canterbury CT1 1ZA

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Before:

DISTRICT JUDGE JACKSON

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Between:

DANIEL TROY JACKSON	**Claimant**
- and -	
BARFOOT FARMS	**Defendant**

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Mr Stride for the **Claimant**
Mr Stephen Hines for the **Defendant**

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APPROVED JUDGMENT

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JUDGE JACKSON:

1. This matter in respect of which I am giving a preliminary judgment relates to the background of an unfortunate road traffic accident which befell the claimant Mr Daniel Troy Jackson. The accident itself was a serious one. My recollection is that his car may have turned over, and it was when he was in contact with a tractor or other farm vehicle. The consequence of it was that he sustained severe injuries and ultimately was invalided out of the Army. The case itself settled for an aggregate total of £350,000 together with costs (I will just use that general expression for the moment) and we are here today to deal with the detailed assessment of those costs.

2. The preliminary issues that I have raised with both counsel to assist me in relation to this matter have been, first of all, whether or not there is a particular point made about the CFA, and there is not now. It has been seen by the court and seems to be totally untoward. Therefore, the indemnity principle is not sacrificed and costs are *prima facie* recoverable and we are not therefore going to take much time over that.

3. The second issue, which has attracted the attention of the court for most of the morning, is that, in the light of the settlement which is obtained – and it is right to record without proceedings ever having been issued – whether or not this case attracts fixed costs as set out in the regime under CPR 45.29B. That provision effectively says that subject to certain rules "and for as long as the case is not allocated to the multi-track, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31 July 2013, the only costs allowed are the fixed costs in rule 45.29C; (b) disbursements in accordance with rule 45.29I." So that sets out the basis upon which the matter falls to be considered.

4. What the defendant says is that this is very straightforward. This case falls fairly and squarely within that category. The claimant submits otherwise. The essence of the claimant's basis is really on two limbs. The first one is a fairly sophisticated argument, to which I will try to do justice. The second one is a more straightforward one, namely that this case satisfies the definition of exceptionality.

5. So far as the more sophisticated position is concerned, what is urged upon me by Mr Stride on behalf of the claimant is really that the agreement that was reached between the parties was, in the certain factual matrix that obtained, one that had the effect of ousting the jurisdiction of fixed costs, because it conferred upon the parties an agreement that the costs would be the subject of detailed assessment, if not agreed, and the consequence of the detailed assessment would be that fixed costs would not have applied, and there was a clear basis upon which the agreement was entered into.

6. The background to the matter is really this. In terms of correspondence that was entered into there was an original proposal of £200,000 which was effectively a Part 36 offer, and also referred to the costs to be paid to be subject to assessment under the costs-only procedure under Part 46.14 if not agreed. That offer was not accepted, but after a conference with counsel had taken place in August 2016 the parties entered into further negotiations. The consequence was that Mr Fretwell on behalf of the claimant recorded an offer that was put forward of £350,000 gross (obviously there would be interim payments to be deducted) and costs in addition to be assessed under Part 8. I think what he really meant by that was that a procedure under Part 8 would have to be adopted to enable the court to proceed to assess costs. He then confirmed

that after taking instructions and said that his client "accepted your client's offer to pay £350,000 in full and final settlement, plus his costs to be assessed in detail by the court on the standard basis failing agreement". The contention made by the claimant is that this is absolutely fundamental and pivotal to the way in which the court has to decide it. It was a clear understanding that the costs were going to be assessed in detail by the court, and reference was made to the standard basis if no agreement were reached. The point is made that it is against that backdrop that the jurisdiction of the court to make an order for fixed costs is, for all practical purposes, ousted. There was no response from the defendant except to say that the matter was settled. Therefore there was, it is alleged, a contractually binding agreement. There was certainly a contractually binding agreement to pay the £350,000. The issue is whether there was a contractually binding agreement to pay costs which were to be the subject of detailed assessment, not fixed costs. There was a chasing-up letter asking for the bill of costs. So that is the basis upon which the parties discussed the matter.

7. It is of some interest, albeit limited, that the parties' respective solicitors have filed witness statements. I do not believe they take matters much further. I note Mr Fretwell's pride at reaching what he regards as a good settlement, and I am not seeking to diminish it. But in practice all he does is record the nature of the discussions that he had, and certainly says that fixed costs were never referred to. Miss Neill on behalf of the defendant's solicitors accepts that fixed costs were never referred to, but certainly says that she never agreed to do anything in relation to a commitment that fixed costs would in some way, shape or form be ousted. So it is that the court really has to analyse that particular issue first of all and to determine whether or not the claimant's case is made out.

8. The defendant's case is that the matter is very straightforward. None of the words used against the backdrop in question are sufficient to oust the basic structure of the Rules. There is no reference whatsoever to fixed costs and their being excluded. Neither party mentioned it, probably because it never occurred to them. One of the reasons why it did not occur to them, of course, was that the backdrop to this matter was the way in which the table had been listed. The table had been listed in such a way that a framework of costs was set out which took cases at certain damages levels, and one of the damages levels was £10,000 to £25,000. It did not go beyond that in terms of how the overall costs were to be calculated. I think Morpheus only awoke from his slumbers when we had the case of *Qader* about a month or so later, when the point was made to Briggs LJ in that appeal that for all practical purposes cases which were allocated to the multi-track still on the face of it seemed to attract fixed costs. I think there had been a conventional industry understanding that it only applied to fast-track costs because of the reference to the £25,000, but it was noted that there was this lacuna. In the event, Briggs LJ went into some detail to stress the basis upon which the matter had been anticipated, how the wishes arising from the Jackson Report and onwards had not been carried out satisfactorily by the Civil Procedure Rules Committee, and stated that he could interpolate the basis that if a case was allocated to the multi-track, then under those circumstances the provision for fixed costs would not obtain.

9. The consequence of all that was that there was a Court of Appeal ruling, but no doubt the Civil Procedure Rules Committee, chastened as it was by that observation, decided to amend the Rules, and it did so in April 2017 by 2 amendments. First of all,

by making a specific reference to the exclusion, which I think I have already referred to, "for so long as the case is not allocated to the multi-track", and so that was extended, and in addition to that the "more than £10,000" was kept, but the limit of £25,000 was deleted, so the calculation carried on so that if it was more than £10,000 there would be a total £19,030 and 10% of damages over £10,000, and it is that calculation that the defendant adopts in relation to the matter.

10. What the defendant says in relation to those issues is that really the observations made in *Qader*, supported by *Sharp* – which was a reference to CPR 36 and the like – meant that absent any clear agreement between the parties, there was no way in which the jurisdiction could be ousted, and Briggs LJ certainly kept for another day the issue of the figures over and above that £25,000. If anything, the view was taken that it would be an arid debate to work out whether a claim was more than £25,000, and that was not to be encouraged. So it is that that issue was raised.

11. So those are the arguments put forward by the defendant. What does the claimant say in response? We have already heard the claimant's submissions made on the observations and the correspondence that passed between the solicitors. What he says is that a combination of references to costs to be assessed on the standard basis, a reference to Part 45 (which is the mechanism whereby an order is produced so that costs can be assessed by the court) all militate strongly in favour of the suggestion that the agreement that was reached precluded completely the issue of fixed costs, and that the practical effect of it is that the defendant, by acquiescing in the observations made by Mr Fretwell, created a scenario in which there was an acceptance that detailed assessment would be the appropriate venue in the event that no agreement were reached. That is the argument that has been put forward forcefully and I respect how it is being set out. I do, however, take into account the fact that the court really does need to examine these matters very carefully before effectively the argument is put forward that that agreement reached has the effect contended for. The court has to see whether or not there was a clear agreement, or what the background to it is.

12. I do not think there is any point in going into enormous detail with regard to the case law that has been put to me, because ultimately this is centred upon the particular facts of this case. The first observation I would make about the expressions that were used is that they are in fairly common badinage between solicitors. Expressions such as "costs to be assessed on the standard basis" are really to be seen in the vast majority of Tomlin orders and the like which are seen by the court. Those expressions, therefore, whilst I appreciate that they produce perhaps an unsophisticated analysis, create a structure whereby it could be argued that the fixed costs are exempted. It does to the court's mind not achieve that objective. The problem is that there are two issues to be raised. First of all, whilst I accept the different philosophical basis upon which fixed costs are produced, namely, as per Barfoot, the idea that they are awarded regardless of how much effort you put into a case compared with the costs which are assessed, nevertheless it has never occurred to the court that the argument that fixed costs cannot be contended for in a detailed assessment is one that is beyond the purview of a claimant to argue. For all practical purposes that is one point. The second point is that disbursements in any event will fall to be assessed if no agreement is reached, and that assessment will take place usually by way of detailed assessment in any event.

13. I have considered the mater carefully. It is a well argued case and indeed there are some logical observations to be made about the lack of awareness of the parties' solicitors in relation to those issues which caused them to use that expression. But I do not calculate that using fairly common expressions in the way they did, which produced the order that was made under the Part 8 proceedings, effectively got rid of the ability of the defendant to argue for fixed costs. With respect to that argument, the Rules, as I have already indicated, altered in April 2017. *Sharp* was a case, I appreciate, on a narrow point, *Solomon* was another one, where there was the potential to argue that you can contract out of an arrangement for fixed costs. But it does seem to the court that we need a bit more than what we have before the court today. What we do not have is the parties saying "Whilst we appreciate that ordinarily fixed costs would apply, we agree that in this particular case they will not do so". There is nothing to that effect, but just certain assumptions. Ultimately it seems to the court that the assumptions were predicated on the basis that the CPR would obtain with regard to any assessment that was made.

14. Overall I have considered the matter in some detail. I have considered the issue in *Broadhurst*, which as I say deals with indemnity costs, but I am satisfied that fairly careful and detailed wording is sufficient and is needed in a case of this nature. I appreciate the context in which the matter arises, I appreciate the history of the matter and I appreciate everything else, but having regard to all these issues I am not prepared to accept that there was a binding agreement to oust the jurisdiction of the court in relation to the normal provisions for fixed costs, and to that extent that application is rejected.

15. The next issue that falls to be considered is 45.29J. This is the argument in relation to the question of exceptionality.

> "If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs."

The starting point is that the figures as drawn are greater than the original fixed costs would be and so the court has the ability to consider it, but only if it considers that there are exceptional circumstances. The word *exceptional* does feature in a lot of costs jurisprudence and it is not an enormous hurdle to surmount. Exceptional means out of the ordinary, not commonly encountered, having unusual aspects to it. In this particular case there are a number of matters where exceptionality can be argued. The first one is in fact to endorse part of the argument that was put forward in support of the first limb of the claim, which I have already rejected, which is that there was an anticipation and an awareness, throughout the profession one suspects, that in cases of this nature, especially when a reference is made to a limit of £25,000, that fixed costs only apply to that level. That was challenged and the parties were made aware after the agreement was reached in October 2016. In April 2017 the rules altered and the reference to the £25,000 was deleted as well, and therefore the position from that point onwards has been much clearer. So that is a very unusual feature of this particular case, namely that the parties, whilst I have reached the conclusion did not create a legally binding agreement to oust the jurisdiction of fixed costs, operated in a vacuum of lack of knowledge.

16. The second issue that I can deal with is the question of the nature of this case. Whatever else one can say about fixed costs, their genesis was the Jackson Report and his view that enormous costs were being incurred in comparatively small claims. The consequence of his recommendations was that certainly for fast-track claims a fixed costs regime should operate, in particular in personal injury claims, and the consequence of it was that tables were produced for both road traffic cases and public liability and employer's liability cases separately. The reference and the emphasis – and it is certainly seen in the case reports – is that it was intended for comparatively modest cases. The rules do not put an upper limit on it, for the reasons I have already alluded to, namely that we do not want to have a forensic analysis of whether it was worth over £25,000 or not, and in those circumstances, where claims are not issued, one will never quite know except for the settlement figure perhaps, or arguments of that nature. But the point about this particular case is really that nothing could be further than the conventional modest type claim. This is a case in which the individual concerned sadly lost his Army career and had originally comparatively limited injuries, which presumably were the reasons why the initial fee-earner was seduced by the blandishments of the insurance company of the defendant, to submit it through the portal, but which grew and grew. Whilst there is anticipation that cases grow somewhat, this grew exponentially. Views were taken from pain consultants, neuropsychologists, neurologists, orthopaedic experts and the like, and I think there were going to be care reports as well eventually, and employment reports if necessary. This was a very complicated case. It was a case where counsel had to advise. It was a case where there was considerable uncertainty as to how much would be proven. It was a case which settled ultimately prior to exchange of the majority of the defendant's expert evidence, but which was likely to have given rise to a very substantial dispute between the parties. It is probably for those reasons that a view was taken by both parties, and that figure, which is probably somewhat less than what he might get if everything was proven, but somewhat more than if the basis of his case were to be rejected, was reached.

17. There was no point in the Civil Procedure Rules putting in the expression "exceptional circumstances" if they cannot be applied. I do not take the view for one moment that the court has to have regard to what another £350,000 case would be like. All we are talking about here are exceptional circumstances against a matrix of, first of all, the legal position as it obtained in September 2016 and, secondly, the considerable complexity of this particular case.

18. Having regard to all the circumstances, I am satisfied that there are indeed exceptional circumstances of the case. It is difficult to think of a more clear-cut case of exceptional circumstances, and in the ordinary event these cases, of course, would never have been referred to the portal in the first instance. It was only because of the way in which the matter unfolded that that circumstance arose.

19. On that basis, therefore, I am satisfied that the exception under section 45.29J is made out and the claimant can proceed to have his costs assessed without specific reference to fixed recoverable costs.

This Judgment was approved by the Judge.

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