Fixed recoverable costs extension—the great escape?

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Kris Kilsby considers various 'escapes' that might emerge when the fixed recoverable costs regime is extended

IN BRIEF

- The extension of the fixed recoverable costs regime is likely to be less than a year away.
- The new regime will likely ensure that assessing costs at the end of a case will be a thing of the past.
- Practitioners will need to get to grips with a new regime around how the costs associated with cases involving vulnerable clients and witnesses are dealt with.

The extension of the fixed recoverable costs regime is now highly likely to be introduced in less than 12 months' time with April 2023 being the likely date of introduction. The Civil Procedure Rule Committee is working on the final draft of the new rules to be introduced which will govern the finer details of the extension. The new rules will need to be scrutinised by civil litigation lawyers as all parties will need to be well versed in the technical points and figures to ensure that cases are run profitably.

It will be necessary to be able to assess the likely costs that are to be recovered at each stage of a case so that work can be planned and delegated effectively. Furthermore, it will be beneficial for all lawyers to be aware of the potential 'escapes' outside of the fixed recoverable costs regime.

A recent Court of Appeal case has potentially provided a 'great escape' for many cases previously thought to be subject to the fixed recoverable costs regime. There are also potentially other 'escapes' to be considered by lawyers in particularly exceptional cases or with cases involving parties that are vulnerable.

Contracting out

A recent decision of the Court of Appeal has provided a clear 'escape' from the fixed recoverable costs regime by holding that parties are free to contract out of the regime through the inclusion of 'costs to be subject to detailed assessment' within the terms of a consent order.

The case of *Doyle v M&D Foundations & Building Services Ltd* [2022] EWCA Civ 927, [2022] All ER (D) 30 (Jul) related to an employers' liability claim for an injury on a construction site. The claim settled for £5,000 outside of the portal shortly before trial. The defendant had made a Part 36 offer in the sum of £5,000, however the claimant indicated they would not accept the offer but would be willing to settle the claim in the sum of £5,000 pursuant to a consent order. One of the terms within the consent order provided for the defendant to pay the claimant's costs with 'such costs to be the subject of detailed assessment if not agreed'.

The claimant prepared a bill of costs for detailed assessment on the standard basis and the defendant disputed the approach adopted and considered that the claim fell within the fixed recoverable costs regime as set out in section IIIA of CPR Part 45. The dispute was addressed twice with both findings in favour of the claimant before the claim reached the Court of Appeal.

The defendant had argued that the phase 'detailed assessment' referred to the assessment of fixed costs and not of costs on the standard basis. However, Lord Justice Phillips found 'there is no ambiguity whatsoever as to the natural and ordinary meaning of "subject to detailed assessment"…The phrase uses 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'.

Phillips LJ rejected that the phrase could be interpreted as meaning an 'assessment' of fixed costs pursuant to the provisions of Part 45. When setting out his reasoning Phillips LJ referred to the default position that costs are to be assessed on the standard basis where no basis for detailed assessment is provided (CPR 44.3(4)(a). He said that rule 44.6(1) expressly provides that while the court has power to assess costs either summarily or by way of a detailed basis, that power does not apply to fixed costs, and made reference to rule 45.29 which clearly sets out the difference between 'assessed costs' and fixed costs.

With the meaning of the phrase 'detailed assessment' unequivocally dealt with, Phillips LJ proceeded to consider the context of the order and whether there was an agreement reached between the parties. It was noted that in the particular circumstances the claimant had rejected the defendant's Part 36 offer and had instead sought to agree a consent order that contracted out of fixed costs.

This is an important detail to be noted and distinguishes the case from *Adelekun v Ho* [2019] EWCA Civ 1988, [2019] All ER (D) 139 (Nov). *Adelekun* related to the contents of a Part 36 offer and the reference to the term contained within. In *Adelekun* it was noted that CPR Part 36 contained provisions that explicitly stated that fixed costs apply if the offer is accepted. Phillips LJ stated that in the circumstances of *Doyle* there was no restrictive interpretation to be applied and the wording of the order should reflect the ordinary and normal meaning. Furthermore, Phillips LJ considered that the manner in which both sides' legal representatives had negotiated and agreed on the contents of the consent order and the terminology used was further evidence that there was an agreement for the claimant's costs to be subject to a detailed assessment and not limited to fixed recoverable costs. As such, the defendant's appeal was dismissed.

This demonstrates the importance of ensuring that the terms within a final consent order are carefully considered and that parties are aware of the consequences of using the phrase 'costs to be subject to detailed assessment'. For receiving parties this could become another escape from the fixed recoverable costs regime but will likely to be met with stiff opposition from paying parties.

Exceptional circumstances

A current 'escape' from the fixed recoverable costs regime is through an application under CPR 45.29J which allows a court to either summarily assess the costs or make an order for the costs to be subject to detailed assessment, if it considers there are 'exceptional circumstances' to do so.

This has been a part of the fixed recoverable costs regime and provides the regime the flexibility to avoid significant injustice through the strict application of the regime.

This provision therefore offered a potentially fruitful escape mechanism away from fixed recoverable costs. However, the interpretation of the term 'exceptional circumstances' and the applicable test to be passed was considered in *Ferri v Gill* [2019] EWHC 952 (QB) where it was held to be a 'high one' and, therefore, this provision's use has been significantly reduced.

Furthermore, there is a further bar to clear when seeking costs in excess of the fixed recoverable costs in that costs that are recovered need to be assessed at least 20% more than the amount of the fixed recoverable costs. If the 20% amount is not exceeded the court will make an order for the party to be paid the lesser amount of either the fixed recoverable costs or the assessed costs. Furthermore, the court may award the paying party their costs of assessment in addition. A high price to pay when the sums are likely to be relatively limited in amount.

The introduction of vulnerability

A new 'escape' from the fixed recoverable costs regime could be through the introduction of vulnerability. In June, the Ministry of Justice launched a consultation regarding the proposed introduction of the concept of vulnerability into the sphere of fixed recoverable costs as a mechanism for ensuring that vulnerable parties and witnesses are not disadvantaged in bringing claims.

Under the proposal, the concept of vulnerability would be assessed retrospectively at the end of the claim where costs incurred exceeded 20% of those which would be allowed under the fixed recoverable costs regime. It would work similarly to the 'exceptional costs' test currently found at CPR 45.29J, although the proposal did not reference the need to show the costs had been incurred in exceptional circumstances but would be based on an assessment of the vulnerability of the party or witness.

The removal of the high bar of the 'exceptional circumstances' test means there is an increased chance of a finding of vulnerability. However, this is currently countenanced by the proposal not including a definition in respect of what constitutes vulnerability. It is clear that guidance in support of what amounts to vulnerability will be required to assist lawyers when dealing with cases. Without such guidance it could ultimately result in lawyers being found in an unfortunate 'catch-22' scenario, where a lawyer acting on the legitimate belief that they are dealing with a vulnerable client and incurring the additional costs necessary to address that parties vulnerabilities must still act with an eye on the level of fixed recoverable costs that are likely to be recovered in the event they are unable to establish their client is vulnerable pursuant to the definition.

Conclusion

With the extension of fixed recoverable costs on the horizon, and affecting large areas of law which have to date been untouched by the concept, it will be necessary for all lawyers to be awake to costs issues and its application throughout the course of each and every case. No longer will it be acceptable for the issue of costs to be considered once a case has settled. The issue of costs will now be an integral consideration at the outset of the claim, throughout its course and in how a case is settled. With proper care, attention, and advice, a lawyer will avoid being left with a significant shortfall as a result of fixed recoverable costs. **NLJ**

Kris Kilsby is a council member of the Association of Costs Lawyers and a Costs Lawyer at Paramount Legal Costs (*www.associationofcostslawyers.co.uk*).