Fixed costs not applicable to RTA cases allocated to the multi-track (Qader v Esure Services Ltd; Khan v McGee)

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Personal Injury analysis: The Court of Appeal has decided in Qader v Esure Services; Khan v McGee that fixed costs are no longer applicable to routine road traffic accidents (RTAs) initiated in the Court Service portal and which have subsequently been allocated to the multi-track. Matthew Smith, barrister at Kings Chambers in Manchester, notes the key findings and what lessons can be learned from this case.

Original news

Qader and others v Esure Services Ltd; Khan and another v McGee [2016] EWCA Civ 1109, [2016] All ER (D) 156 (Nov)

What are the practical implications of this case?

There are two practical implications.

The first, and most obvious, is that, contrary to the clear wording in the rules, the fixed recoverable costs provided for by Section IIIA of CPR Part 45 do not apply when a claim no longer continues under the pre-action protocol for low value personal injury claims in road traffic accidents (RTA protocol) or the employers' liability/public liability pre-action protocol but is allocated to the multi-track rather than the fast-track.

The second practical implication is that arguments about the effects of the rules clearly do not end with arguments about purposive interpretation and filling gaps in words in order to achieve such an interpretation. There is a further power in the court to go beyond mere interpretation so that, while exercising considerable caution, the court may correct obvious drafting errors by adding, omitting or substituting words.

In order not to stray into 'judicial legislation' the court must be sure:

- of the intended purpose of the rule
- that by inadvertence, the provision does not give effect to that purpose, and
- crucially, as to the substance of the provision Parliament would have made had the error been noticed

What issues did this case raise?

The court was required to determine whether the fixed costs regime continued to apply to a case which no longer continued under the RTA protocol, but which was allocated to the multi-track. The conjoined appeals related to RTA claims which had started under the RTA protocol but had then been allocated to the multi-track following allegations of the dishonest contrivance of the accidents. The result was that the trials would last longer than one day in resisting these dishonesty allegations but would be under a fixed costs regime suitable for fast track cases.

In the first appeal, HHJ Grant below had concluded that CPR 45.29A provided for the fixed costs regime to apply notwithstanding allocation of the case to the multi-track. He ruled that the claimant might ultimately obtain relief under CPR 45.29J but only at the end of the proceedings. In the second appeal, the defendant appealed against the ruling made below by Rich DJ that the case could proceed on the multi-track basis where costs would be assessed.

To what extent is the judgment helpful in clarifying the law in this area?

The judgment is extremely helpful in clarifying the law. However in circumstances where it is increasingly common to have the purpose of legislation discussed before it is made, there is clearly scope that further arguments may arise. This is due to an awareness of the court's power to correct obviously mistaken legislation—even though this power is not new.

What are the implications for practitioners? What will they need to be mindful of when advising in this area?

It is clearly not safe to bank on the black letter or indeed purposive interpretation of legislation in circumstances where it could be argued that the legislation contains an obvious failure to implement a clear intention on the part of Parliament. For that reason, it is more important than ever for practitioners to have regard to the purpose underlying the legislation insofar as it may be gleaned from parliamentary debate, consultation reports or other similar respectable sources of information as to the will of Parliament.

Are there still any unresolved issues practitioners will need to watch out for? If so, how can they avoid any possible pitfalls?

The mechanism adopted by the Court of Appeal in this case is of universal application. There must be a huge number of provisions of both primary and secondary legislation where there is a very respectable argument that the legislation is obviously mistaken and fails to implement the will of Parliament.

Practitioners concerned about any such legislative mistakes would be well advised further to investigate to what extent there is material to support an argument that the legislation is inadvertently mistaken. If there is reliable and robust information as to the effect of the provision Parliament intended, then an argument to bring about the intended meaning by insertion, omission or substitution of words into the provision may be available.

Any party embarking upon such an argument will need to have well in mind the uncertainty of the prospects of success due to the caution that must be exercised by the court. Plainly, the making and consideration of appropriate offers in such circumstances will be of heightened importance.

Interviewed by David Bowden.

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