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PERSONAL INJURY UPDATE - EXCEPTIONAL CIRCUMSTANCES

Lucy Coulson considers the decision of Ferri v Gill [2019] EWHC (QB) and the meaning of 'exceptional circumstances' pursuant to CPR 45.29J.

The High Court recently considered the construction of 'exceptional circumstances' pursuant to CPR 45.29J, which allows the court to award costs for a greater amount than the fixed recoverable costs under Part IIIA of CPR 45.

Claims for an amount of costs exceeding fixed recoverable costs
45.29J
*(1) 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** referred to in rules 45.29B to 45.29H.*
(2) If the court considers such a claim to be appropriate, it may—
(a) summarily assess the costs; or
(b) make an order for the costs to be subject to detailed assessment.
(3) If the court does not consider the claim to be appropriate, it will make an order—
(a) if the claim is made by the claimant, for the fixed recoverable costs; or
(b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs, and any permitted disbursements only.

Background
The claim was started under the protocol for low value personal injury claims in road traffic accidents in 2015. The Claimant changed solicitors and the protocol was no longer complied with. The Claimant failed to give notice that the matter had been removed from the protocol. The matter was settled in 2017 in the sum of £42000 and prior to the issue of proceedings.

Part 8 proceedings were started in which the Claimant sought costs. Section IIIA of CPR 45, for cases that had left the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the Protocol') applied, under which the Claimant would only be allowed fixed costs. As the claim had not yet been allocated to the multi track, the only exception to fixed costs would be pursuant CPR 45.29J.

The matter came before Master McCloud for determination. She weighed up a number of factors and considered that she had to decide if the case fell outside the general run of these types of these cases. She considered that the circumstances met the **low bar** she set for considering this case to be **outside the general run of cases in the portal** and the costs exceeded fixed costs by more than 20% (as per CPR 45.29K). She determined that CPR 45.29J applied and costs in excess of fixed costs should be allowed.

An appeal was brought on behalf

of the Defendant on the basis that the Master had erred in principle in her decision.

Appeal before Mr Justice Stewart with Senior Costs Judge, Master Gordon-Saker, sitting as an assessor

Reference was made to a number of decisions regarding the protocol, including *Hislop v Perde*. The question of 45.29J was not relevant to that appeal but Coulson LJ observed obiter:

> *54 I am anxious not to express detailed conclusions about the scope and extent of rule 45.29J because, other than acknowledging that it provides a potential escape route in an appropriate case, I do not consider that its general ambit is directly relevant to this appeal….However, two particular issues were raised as to the scope of rule 45.29J, and I address each briefly.*
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> *55 First,* ***I do not consider that a defendant's late acceptance of a claimant's Part 36 offer can always be regarded as an "exceptional circumstance".*** *On the contrary, I take the view that my reasoning in Fitzpatrick's case [2010] 2 Costs LR 115 as to why there can be no presumption in favour of indemnity costs in these circumstances (see para 37 above) is also applicable, at least in general terms, to the suggestion that there is a presumption that a late acceptance of a Part 36 offer is an exceptional circumstance for the purposes of rule 45.29J.* ***Again, what matters are the particular facts of each case. A long delay with no explanation may well be sufficient to trigger rule 45.29J; a short delay with a reasonable explanation will not.***
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> *56 Secondly,* ***I reject the argument*** *advanced by Mr Post QC…that this provision would only come into play if it could be shown* ***that the exceptional circumstances had caused the litigation to be more expensive for the claimant****. In support of this proposition, he relied on rule 45.29J and rule 45.29K which are concerned with the circumstances in which a party seeks to recover more than fixed costs. The rules make that party liable for the costs consequences if the assessment gives rise to a sum which is less than 20% greater than the amount of the fixed recoverable costs.*
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> *57 I do not accept Mr Post's gloss on rule 45.29J. His suggestion that a claimant must demonstrate a precise causative link between the exceptional circumstances and any increased costs would, in my view, lead to an unnecessarily restrictive view of the rule.* ***It goes without saying that a test requiring "exceptional circumstances" is already a high one****[14]. It is not a proper interpretation of the rules to suggest that there should be further obstacles placed in the way of a party who wishes to rely on that provision….*

Other caselaw was referred to which established the 'swings and roundabout' nature of the fixed costs regime. Fixed costs is further meant to establish certainty of costs. Even where a claim leaves the protocol, costs remain fixed until the matter is allocated to the multitrack or CPR 45.29J is applied. Stewart J concluded that **'exceptional circumstances' have therefore to be evaluated against those cases which are covered by Part IIIA** [35].

Stewart LJ concluded that CPR 45.29K and 45.29L (in that they require a claim for additional costs under CPR 45.29J to exceed fixed costs by at least 20%) do not assist in determining the meaning of 'exceptional'. The fact that increased costs are incurred on a case may well be justified but may also be insufficient to amount to 'exceptional circumstances'. There was no evidence to show that parties would be discouraged from using the Protocol where there was a risk of damages exceeding £25000 or that settlement would be discouraged if the court were to strictly enforce fixed costs.

Stewart LJ re-affirmed that **'exceptional' is an ordinary English word** and would not benefit from Judicial interpretation. Statements such as 'out of the general run', as used by the Master on this occasion, added very little. As per *R v Soneji*, 'exceptional circumstances' must take its colour from from the setting in which it appears.

Stewart LJ had to take into account that the Master herself said she was setting a 'low bar', which he held to be wrong when one took into account the context of CPR 45.29J. The Master's decision was before *Hislop* was decided so the Master was unaware of Coulson LJ's comment that the test for 'exceptional circumstances' was already a high one. The Master also did not take into account the policy reasons reiterated in Fixed Costs, which might allow for 'exceptional circumstances' for departing from the regime but also required a strict approach.

Stewart LJ concluded that the basket of cases against which a case must demonstrate 'exceptional circumstances' is the type of cases that have exited the Portal

and are subject to the Part IIIA regime. The costs that would usually apply under Table 6B is also relevant [47/50].

Further, just because the Fixed Costs regime contains swings and roundabouts, which may result in adverse consequences for litigants and lawyers, this cannot inform the court's construction of exceptionality. There are policy reasons behind the fixed costs regime.

In short, exceptionality should not be a low bar and must be measured against the types of cases that are covered by Section IIIA [52].

The appeal was therefore allowed on the basis that the Master had erred in law, as she had wrongly applied a low bar and compared this case to ordinary 'portal' cases, rather than cases under CPR 45 Section IIIA. The matter was remitted to the Senior Courts Costs office for redetermination by a different master.

On the basis of Coulson LJ's comments in *Hislop v Perde* which have been re-emphasised here, it seems unlikely that we will receive further guidance on this issue any time soon. For now this seems to be the most useful guidance available on how and when CPR 45.29J should apply. Practitioners may wish to focus their minds to these factors when making or opposing an application under CPR 45.29J. It is also worth bearing in mind that settling at a multi-track value is not necessarily enough to show that CPR 45.29J should apply.

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