

## **Fixed Costs, Small Claims & Children**

**Kilby v Gawith** [2008] EWCA Civ 812 and **Lamont v Burton** [2007] EWCA Civ 429 saw off the last of the broad 'enforceability' type challenges to fixed costs recovery under CPR 45 Part II for those acting on CFA's. However, since that time there has been an increasing focus on attacks on individual cases, particularly those falling towards the bottom end in terms of value. There have been a number of interesting cases recently on the subject, in particular:

**Keklik v Coles** (Liverpool County Court, HHJ Stewart QC, 30<sup>th</sup> June 2008)

**Aurangzeb v Walker** [2008] EWHC 90134

Both of these cases were ones where the Claimants were children and where a low value settlement of a personal injury claim had been agreed before the issue of proceedings. In each case a parental indemnity was given and therefore no court approval under CPR 21.10 was sought for the settlement. In each case agreement on costs could not be reached. The reasoning in *Aurangzeb* essentially followed that in *Keklik*. In each case, the paying party succeeded in arguing that the costs recoverable should not be assessed by reference to CPR 45 Part II but rather by analogy to costs on the Small Claims Track. The building blocks of the paying party's successful arguments were as follows:

- (i) Under CPR 45.7(2)(d) the fixed costs rules did not apply if the claim was one for which the SCT would have been the 'normal' track if a claim had been issued for the amount of the agreed damages
- (ii) In each case, the amount of the agreed damages was within the SCT limits
- (iii) Neither case was exceptional and in each case the only 'unusual' factor relied on was that the Claimant was a child
- (iv) Neither CPR 26.6, 26.8 nor 27.1(2) indicated that the fact a Claimant was a child was in and of itself a reason not to allocate a claim to the SCT (indeed, CPR 26.6 made it clear that the SCT was the 'normal' track for a claim within the financial limits without any exception for child claims)

- (v) A child's restriction, in terms of lack of majority is remedied by the appointment of a responsible litigation friend and thereafter a child (with litigation friend) should be as capable of pursuing a case on the SCT as a non legally qualified adult should be

It is important to note that the decisions did not rule that the SCT applied to such cases, but that the costs should be assessed by reference to the costs which would have been allowed on the SCT. This therefore allowed the court to allow additional costs if it considered them reasonable.

This is based on well established case law that the court can look at the 'true' value of the case and can assess costs by reference to the SCT whether allocation has taken place or not – see **Ford Motor Co v Afzal** [1994] 3 All ER 720 and **Voice and Script International Ltd. v Alghafar** [2003] EWCA Civ 736.

In Aurangzeb, Master Rogers went further than Stewart HHJ and held that his conclusion would have been the same even if proceedings had been begun under CPR Part 8 on the basis that a court approval was sought. In that regard, the provision under CPR 8.9(c) allocating Part 8 claims to the Multi Track does not prevent a paying party pursuing this argument since the argument is not that CPR 27.14 actually applies, simply that the court must have regard to the value of the case when assessing costs under CPR 44.5.

Are the decisions correct and, if so, what may be done to limit their scope? The following points may be made:

- The use of the parental indemnity procedure did not help. The court will be more inclined to make a ruling of this kind where court approval is not sought.
- Each case turns on its own facts. The principles are probably correct but courts are reluctant to make orders of this kind and a well prepared case by the Claimant may well lead to a favourable ruling which might be difficult to appeal
- Even if the court is inclined to make such an order, it must be remembered that the costs which can be allowed are not absolutely limited to SCT costs. If the CPR 21.10 approval procedure has been

used, and an opinion provided to the court, then the costs allowable may well include the costs of obtaining or preparing that opinion, the expert report, the costs of at least a brief consideration of the papers and report(s) and the costs of attending and preparing for the settlement approval hearing. Given the low value of these claims, these costs may be similar to or exceed the costs under CPR 45.9 & 10

- The Alghafar / Afzal principles have not been tested in the higher courts in cases involving children and the outcome of such a case is unknown. Neither side could be certain of success.

Other arguments (such as the Byrne v Richwood (Stewart HHJ, Liverpool County Court, 25<sup>th</sup> January 2008) point) rumble on in relation to the fixed costs rules. In particular, paying parties are keen to take the argument that certain items were never in 'dispute' and therefore should be disregarded from the calculation of damages for the purposes of CPR 45 Part II. A clarifying amendment to the Rule or authoritative precedent would be very welcome to avoid the plethora of first instance cases being decided in different ways and to reduce the uncertainty that exists.