

# It is possible to escape fixed costs, if parties contract out by agreement (Turner v Cole)

14/02/2020

**Dispute Resolution analysis:** The court agreed with the Court of Appeal decisions in *Solomon v Cromwell* and *Ho v Adekun* that there is nothing in the rules preventing the parties settling on whatever terms they please and therefore it was possible for parties to agree to contract out of fixed costs. Further the claimant's response to the defendant equated to a counter-offer, therefore satisfying that in this claim the parties had agreed to contract out of fixed costs. Written by Mark Holloway, costs lawyer, at Paragon Costs Solutions.

*Turner v Cole* [\[2019\] Lexis Citation 462](#)

## What are the practical implications of this case?

It is possible for the parties of a dispute to settle on whatever terms please them including the ability to contract out of fixed costs.

This decision reiterates the importance of considering all of the terms contained in an offer. If a party responds to an offer accepting the same but varying the terms, this is not an acceptance but a counter-offer. If you do not respond clarifying or rejecting the terms but instead consider this an acceptance of your original offer and comply, you will be held to the terms of the counter-offer.

## What was the background?

The main action arose from an road traffic accident (RTA), the claim commenced in the portal and but dropped out at a later stage. The defendant's insurers' underwriter's department made two offers on the same date. One was a Part 36 offer and the other offer, relevant to these proceedings, was a time limited offer in the sum of £60,000.00 net of CRU and interim payments. The offer was open for 14 days and the offer letter concluded 'In addition we will pay your reasonable costs, to be assessed if these cannot be agreed'.

The claimant responded accepting the time limited offer but stated that:

'Acceptance of the offer is strictly predicated on the basis as follows:

1. The Claimant does accept the offer of being paid £60,000 net of CRU and interim payments and this payment will be made within 21 days in relation to her claim for personal injury and loss.
2. In addition, the Defendants will pay the Claimant's legal costs to be (sic) detailed assessment if not agreed on the standard basis (and it is strictly accepted by the Defendants that costs will be paid on the standard basis and not in accordance with any portal, fixed costs or predictive costs basis). In terms of costs it is also requested that in (sic) interim payment on account of costs be made for the sum of £40,000[...]

The defendant's insurers' file handler responded as follows:

'Thank you for your letter indicating acceptance, I confirm I will forward a cheque for £60,000 payable to your client immediately.

With regard to your costs, in view of the amount of the interim request, I will be instructing costs draughtsmen (sic)—I would suspect they would want more detail and I will leave the question of any payments on account of costs to them. If you send me details and I will instruct them at that point.'

Following service of the bill of costs the parties were not able to agree to the basis of costs. The claimant issued [CPR 8](#) proceedings and the defendant disputed the basis for costs and argued that the fixed costs regime was applicable.

At the hearing Mrs Robson, counsel for the defendant, contended that it is not open for parties to contract out of fixed costs as to do so would be contrary to ethos of fixed costs and would ignore the wording of the rules.

Mr Roy, counsel for the claimant relied on *Solomon v Cromwell* [\[2011\] EWCA Civ 1584](#), para [22], [\[2011\] All ER \(D\) 148 \(Dec\)](#) where it states 'There is nothing in the Rules to prevent parties to a

dispute settling it on whatever terms they please, including as to costs... there is no reason in principle why, if parties choose to agree different terms, the agreement should not be enforceable by ordinary process'. The later decision of the Court of Appeal in *Ho v Adelmum* [2019] EWCA Civ 1988, [2019] All ER (D) 139 (Nov), approved this approach.

### What did the court decide?

District Judge Baldwin considered that the intention of fixed costs was to offer certainty to the parties, however he was persuaded by the judgments in both *Solomon* and *Ho* that it is open to the parties to contract out of fixed costs by way of agreement. Mrs Robson's submissions in relation to the application of these decisions on Section IIIA was not agreed with as the difference between the sections were materially indistinguishable.

As Baldwin DJ had decided that it was possible to contract out of fixed costs he was required to decide if he was satisfied that there was an agreement to contract out of fixed costs.

Baldwin DJ applied the reasonable person test and propositions derived from *Arnold v Britton* [2015] UKSC 36, [2016] 1 All ER 1 and disagreed with Mrs Robson's submission that the first paragraph of the claimant's letter accepted the offer in the sum of £60,000.00 and the subsequent paragraph sought to vary the agreement but has no effect as the first paragraph concluded the proceedings.

Baldwin DJ instead favored Mr Roy's submissions to take the letter as a whole, that the claimant would agree to a damages figure of £60,000.00 subject to the agreement on costs. This was in effect a counter-offer which the defendant accepted in their response. If this was not the case it would have been expected that the defendant would have raised concern and rejected the prospect of the claimant recovering anything other than fixed costs.

### Case details

- Court: County Court
- Judge: District Judge Baldwin
- Date of judgment: 16 December 2019

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