Costs in Focus

Issue 47

Welcome to the 47th issue of Costs in Focus. This edition is going to consider a number of recent developments in costs law and the impact they will have on Costs Drafters and Practitioners.

The proportionality of premiums

Rachel Dunn considers proportionality in the claim of *Rezek Clarke v Moorfields Eye Hospital.*

In *Rezek-Clarke v Moorfields Eye Hospital* [2017] EWHC B5 (Costs), the Senior Courts Costs Office considered the costs in a clinical negligence claim that settled for £3,250. The claimant claimed costs of £72,320.85.

The claimant requested an oral hearing, where costs judge Master Simons upheld the decision he made on provisional assessment, that the £72,320.85 costs claimed were disproportionate and should be reduced to £24,604.40, including an ATE premium of £31,976.49, which was reduced to £2,120 following provisional assessment. At this stage, the claimant conceded that the ATE premium had been incorrectly calculated and should have been £22,255.23. Master Simons criticised the claimant's solicitors for not planning the necessary work to ensure their costs would have been proportionate, given that they knew it was a low-value claim, which at its highest was £5,000.

The costs judge examined the claimant's file and said that he could see no evidence of any planning or consideration of the costs to be incurred in conducting the claim. He also commented on whether additional liabilities should be included when undertaking the proportionality test, by coming down on the side of those judges who say they should be.

Comments

From 1 April 2013, ATE premiums have ceased to be recoverable by the successful party, if the insurance policy was issued on or after that date, except for the part of the ATE premium that relates to expert liability and causation reports in clinical negligence.

Where the emphasis is on proportionality, it is important for litigation that the parties make an assessment at the outset of the likely value of the claim, including profit costs and disbursements, and its importance and complexity. Thereafter, consideration should be given in advance to the necessary work, appropriate level of person to carry out the work, overall time that will be necessary and appropriate to spend on the various stages in bringing the action to trial. When assessing the premium, the court is likely to consider the overall cost of the premium but all of the factors mentioned will be dealt with when considering reasonableness. It is therefore beneficial to consider self-insured recoverable policies in clinical negligence proceedings.

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Technical breaches and overriding objectives

Shaquille White considers the sanctions of a technical breach when withdrawing a part 36 offer in the case of *Thompson v Reeve & Ors*.

In the matter of Thompson v Reeve & Ors [2017] QBD, the claimant sought to recover damages for personal injuries sustained as a result of a road traffic accident, which were later complicated by negligent treatment. The claimant's claim was initially valued at around £347,000 and, on the 25 August 2016, the claimant's solicitor made a Part 36 offer to settle the whole of the claimant's claim for £340,000.

On the 27 February 2017, the Lord Chancellor set a new statutory discount rate of -0.75% in England and Wales, a huge reduction from the previous 2.5% that had been in place since 2001. As a result of this adjustment, the claimant's claim significantly rose in value to roughly £602,500.

Following the announcement, on the 28 February, the claimant's solicitors sent an email to those acting for the second and third defendants withdrawing all previous offers to settle the claim, including the Part 36 offer of £340,000. However, at a telephone CMC on the 2 March, the defendants' solicitors advised that they had accepted the claimant's Part 36 offer that day by fax and DX, and that the case was essentially stayed.

The claimant filed an application to allow withdrawal of the Part 36 offer in accordance with CPR 36.9, which was heard by Master Yoxall. The claimant relied on CPR 36.9, claiming that the correct notice to withdraw was filed to the defendant. In their defence, the defendant referred to CPR 6.2, which permits service by email only when the receiving party has indicated that it is willing to accept service by this method. Master Yoxall allowed the application, exercising his rights provided under CPR 3.1.

Comments

By attempting to withdraw the Part 36 offer by email, the claimant's solicitor failed to comply with the Civil Procedure Rules. However, Master Yoxall allowed the claimant's bid to withdraw their Part 36 offer on the basis that the technical breach should not impede the overriding objective and the proper assessment of the claimant's damages.

The change is one of great significance, which will substantially increase sums for future loss for seriously injured claimants. It is important that case handlers review past offers in light of the new discount rate and withdraw or accept them where applicable. If Part 36 offers are withdrawn or accepted, then they will need to continue to be mindful of service rules.

However, be warned, withdrawal of a Part 36 may mean any costs consequences are lost later down the line so be clear on the value of withdrawal for your client.

Services we provide

We deal with all aspects of costs including the preparation of Bills of Costs, Schedule of Costs, Points of Dispute, Points in Reply, negotiating settlement, solicitor own client disputes, auditing, providing estimates, costs budgeting and costs advocacy.

Our dedicated costs team is made up of 50 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers, Solicitors and members of the ACL.

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