Costs in Focus

Issue 45

Welcome to the 45th 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.

New proportionality test in lower value claims

Bryony Goldspink considers the recent case of *May & May v Wavell Group Plc & Dr Bizarri* [2016] EWHC B16 (Costs), in which the High Court issued guidance on the new proportionality test in lower value claims.

In this matter, the defendant was undertaking work within a building that neighboured the claimant's home, in order to develop a 'super basement'. The claimant alleged that this was causing them a significant nuisance. Negotiations were initially entered into between the parties but they failed, resulting in the claimant issuing proceedings against the defendant for private nuisance.

Following issue and shortly before a defence was filed, settlement of £25,000 was reached between the parties, by way of a Part 36 Offer, leaving the issue of costs to be agreed between them.

The claimant commenced detailed assessment proceedings, filing a bill of costs totalling £208,236.54 inclusive of VAT. The costs were strongly disputed by the defendant, who argued that the claimant's costs should be reduced to a proportionate level in accordance with the new test of proportionality, as set out in CPR 44.

At assessment, Master Rowley assessed the costs on the standard basis in accordance with CPR 44.3 (2), applying the two stage test. Primarily, he assessed the costs that were deemed reasonable on an item-by-item basis, advising that a reasonable sum in the circumstances would be £99,655.74, inclusive of VAT. It was held that such a large reduction was in part due to the representation held by the claimants in instructing a QC who used the assistance of other barristers and a solicitor as required, instead of simply instructing a firm of solicitors to act.

Following consideration of the costs that were deemed reasonable, Master Rowley considered whether the costs incurred were proportionate in accordance with the stages contained in CPR 44.3 (5). On consideration of these stages, he reduced the claimant's costs to £35,000 plus VAT, noting that this was a significant reduction as against the costs claimed, which were undoubtedly disproportionate.

Comments

The courts, in following the new proportionality rules, have actively demonstrated that even where costs have been reasonably and necessarily incurred, they can be reduced if considered disproportionate, which can ultimately result in harsh outcomes for successful claimants who see their costs slashed.

In summarising, Master Rowley held: "There is also some superficial attractiveness in the separation of the costs involved in the proceedings from the costs effectively relating solely to the detailed assessment proceedings. It may be that in some cases such a separation is useful to the court when considering whether the costs claimed are both reasonable and proportionate. But if this case is anything to go by, in my view, it is an unnecessary refinement [...] A concluding global assessment of proportionality as envisaged by the new approach involves the court wielding a blunt instrument rather than a precision tool."

Low velocity impact claims

Steven Leung considers the case of *Whiting v Gordon* (2016, Bristol County Court), in which the court considered the recoverability of counsel fees in an RTA claim where the defendant raised an LVI causation dispute.

Low velocity impact (LVI) road traffic accidents are where a defendant insurer will argue that the road collision in question was of such low speed that no personal injury could possibly have occurred. It is not necessary for a defendant to plead fraud when raising LVI: it is sufficient for the court to be satisfied that the claimant could not have sustained injury in the road traffic accident.

In this matter, the claimant sought damages for personal injury and losses arising from an RTA. The defendant raised a defence of LVI. The defendant later compromised and damages were recovered. The defendant disputed a counsel conference fee incurred during the course of the main action. Meruit Costs was instructed for the claimant.

It is helpful to consider the relevant chronology: having raised a medical causation dispute because of LVI, the defendant insurer later disclosed a statement from their insured and reiterated the LVI defence. A GP medical report was obtained for the claimant and disclosed to the defendant. The defendant insurer maintained the LVI defence and suggested that the claimant had "exaggerated" her symptoms to the expert.

In view of the defendant's maintained stance, the claimant arranged a conference with counsel. Following the conference, the defendant insurer entered settlement negotiations and damages were agreed.

The counsel fee dispute eventually proceeded to costs assessment. The court awarded the counsel fee in full, together with Meruit's assessment costs.

Comments

Low velocity impacts are one of the most common types of defences to RTA claims but are nevertheless difficult to resolve. For the claimant, Meruit Costs submitted that:

– Counsel's fee was incurred due to the LVI defence, which is a "particular feature of the dispute" and thus recoverable, pursuant to CPR 45.12(2)(c);
– It was crucial to confirm the veracity and consistency of the claimant's evidence, particularly in light of the defendant rejecting the medical evidence;
– In support of the previous submission, in the Court of Appeal's judgment in *Armstrong v First York Ltd* [2005] EWCA Civ 277, Lord Justice Brook stated that the credibility of a claimant is critical to resolving LVI disputes.

The defendant costs draftsman countered that:

– An external counsel is not necessary in a low value RTA;
– An LVI defence does not fall under the category of a "particular feature of the dispute" under CPR 45.12(2)(c);
– An LVI defence is a medical causation dispute and accordingly, the claimant's solicitor should have instead put CPR Part 35 questions to the medical expert;
– In the alternative, the counsel fee is excessive and 50% was offered.

The court preferred Meruit Costs' submissions. The costs assessment outcome confirms that, in principle, it is reasonable and proportionate to instruct counsel in LVI dispute cases.

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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The purpose of this newsletter is to highlight some of the recent developments and changes in costs law. It should not be taken as legal advice and should not be relied upon as such.

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