Costs in Focus

Issue 52

Welcome to the 52nd 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.

Court of Appeal sanctions mis-certified costs

Costs Lawyer, Jessica Winter-Riley considers the Court of Appeal's decision in *Gempride Limited v Jagrit Bamrah and Lawlords* [2018] EWCA Civ 1367 and misconduct in detailed assessment of costs proceedings

The claimant/first respondent represented herself as solicitor and sole practitioner at Falcon Legal Solicitors in a personal injury claim against the defendant/appellant. The claimant had before the event (BTE) legal expenses insurance but the terms of the policy limited cover to panel solicitors. The claimant instead entered into a conditional fee agreement (CFA) with her own firm. Eventually, the case was transferred to another firm and the claimant recovered damages. The claimant instructed a costs firm, Lawlords, to deal with costs under Falcon Legal.

The CFA with Falcon Legal allowed an hourly rate of £232; however, an hourly rate of £280 was claimed, even though there was no contemporaneous evidence of a rate increase, and the bill of costs was signed and certified by the claimant.

The claimant's replies to the points of dispute accepted the defendant's offer of a £241 hourly rate under Falcon Legal; the replies also stated that no alternative funding to the CFA was available.

On disclosure of the CFA and funding documentation, the defendant argued that the claimant's costs breached the indemnity principle and the replies were misleading. The defendant made an application to the court.

At first instance, Master Leonard found the claimant had certified a misleading bill of costs and gave an answer to the points of dispute about the availability of alternative funding that was untrue. Master Leonard concluded that the claimant's conduct was unreasonable and improper under CPR 44.11, and disallowed the profit costs claimed under Falcon Legal above the litigant in person rate.

The first appeal by the claimant was allowed on the basis of the claimant's not being aware of the costs hearing, so was therefore denied an opportunity to give evidence, and that Lawlords had responsibility over the costs proceedings and the claimant relied on their expertise.

The Court of Appeal restored the first instance finding of unreasonable or improper conduct by the claimant and made an order under CPR 44.11 to disallow half the profit costs under Falcon.

Comments

The Court of Appeal emphasised that solicitors must "understand that they remain ultimately responsible for the acts and omissions of those to whom they delegate parts of the conduct of litigation" [103]. The court found that the claimant's conduct in certifying a bill of costs seeking an hourly rate exceeding that permitted by the retainer was unreasonable and improper, as was the claimant's not being open about the availability of BTE insurance. This is a reminder of the importance of certifying a bill of costs as accurate (as in Bailey v IBC Vehicles).

There was also a subsidiary point regarding the claimant's claim of attending appeal hearings. The Court of Appeal affirmed that, as the claimant was legally represented, then she could not recover the costs of attending hearings, notwithstanding she was herself a solicitor.

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QOCS and multiple defendants

David Goddard considers the Court of Appeal's decision in *Jeffrey Cartwright v Venduct Engineering Limited* [2018] EWCA Civ 1654 and the circumstances when successful defendants may recover their legal costs

This Court of Appeal decision addressed two key questions regarding the application of qualified one way costs shifting (QOCS):
1) In cases with multiple defendants where the claimant recovers costs and damages from one or more defendants, can a successful defendant rely on this to recover costs from a QOCS-protected claimant?
2) Where a claimant is entitled to damages and costs under a Tomlin order, can a defendant rely on this to recover costs from a QOCS-protected claimant?

This was a claim against six defendants for noise-induced hearing loss. The claim against the third defendant, Venduct Engineering Limited, was discontinued by a notice of discontinuance, thus allowing Venduct to claim their costs up to the date of discontinuance from the claimant [CPR 38.6(1)]. The claimant's claim against three other defendants was settled by way of a Tomlin order, with the claimant's entitlement to damages and costs set out in a separate schedule.

Although this was a case where QOCS applied, Venduct claimed that their costs could be paid out of the sums due to the claimant under the Tomlin settlement by virtue of CPR 44.14(1).

The claimant argued that: 1) Venduct could not take advantage of CPR 44.14(1) on the basis of money payable by a different defendant. 2) A Tomlin order did not provide an "order for damages and interest made in favour of the claimant" as defined in CPR 44.14(1).

In the Nottingham County Court, Regional Costs Judge Hale concluded on point 1) that if the claimant's entitlement to damages had been based on an ordinary court order, then Venduct would have been entitled to enforce their costs, regardless of the fact that the entitlement was against a different defendant. However on point 2) he concluded that Venduct could not benefit from CPR 44.14(1) because the claimant's entitlement was based on a Tomlin order.

Comments

The appeal was leap-frogged to the Court of Appeal, which upheld the Costs Judge's conclusion on both points.

The decision on point 1) confirmed that in multi-defendant cases, a successful defendant can in principle recover costs from damages payable by a losing defendant to a QOCS-protected claimant.

However, the decision on point 2) established that a successful defendant cannot recover costs from damages payable to a QOCS-protected claimant if those damages were payable under a Tomlin order. It was noted that the same would apply to damages payable under a Part 36 settlement. The judges accepted that this position could lead to potentially "odd and counter-intuitive results", and is clearly something of which both claimants and defendants should be aware.

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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