

Costs in Focus

Issue 53

Welcome to the 53rd 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.

Interim costs after an order has been made

Costs Lawyer, Richard McCarthy considers an application for an interim payment on account of costs following a trial judgment in *Culliford and Anor v Thorpe* [2018] EWHC 2532 (Ch)

This judgment arose from a claim for possession of a property, brought by claimants as personal representatives of the estate of a deceased brother and as the people who were beneficially entitled on his intestacy. The defendant was successful and His Honour Judge Matthews ordered the claimants to pay the defendant's costs on the standard basis. There was no provision for an interim costs payment in the order.

The defendant requested an interim payment from the claimants after the

judgment was sealed and sent out but it was refused; he therefore made an application for an interim payment on account of costs pursuant to CPR 44.2(8).

The defendant argued that he should be awarded an interim payment for a sum based on his approved budget. The claimants argued that the defendant had not requested payment when the order was made, that they would have opposed the request because the estate would have no funds until the property was sold and that the opportunity to obtain an order

for payment on account would not arise until a request for detailed assessment had been filed in accordance with CPR 47.16(1).

The defendant responded that the claimants' fiduciary capacity did not preclude them from arranging an interim payment because they were also beneficiaries upon intestacy who had engaged in litigation from which they would have benefitted. He further argued that he was not attempting to change the terms of an order but asking the court to make a further order.

Comments

HHJ Matthews agreed that there was nothing in an order made, drawn up and sealed that prevented him making a further order; that the failure of the defendant to ask for an interim payment was not a "good reason" for not making such an order, and that the claimants, as personal representatives, had had the right to indemnify themselves for properly incurred litigation costs in accordance with CPR 46.3(2) but had acted in their own interests

rather than those of the estate, so they should therefore be treated as ordinary litigants. The judge concluded by ordering an interim payment in the sum of £30,000, and that the claimants should pay the costs of the application.

This judgment affirms that a receiving party may still apply for and obtain an interim payment, even if the order for costs has been made, drawn up and sealed.

However, it has also been established in *Finnegan v Frank Spiers* [2018] EWHC 3064 (Ch) that the court's power to order an interim costs payment does not extend to settlement agreed under Part 36 or by a Tomlin Order, neither of which is technically "an order of the court".

Therefore when settling by way of a Tomlin Order, parties should consider an express agreement for an interim payment.

Defining the new proportionality test

Costs Lawyer, Steven Leung considers the court's application of the new proportionality test in *Reynolds v One Stop Stores Limited* (2018) Case No A79YM916 in the County Court at Norwich and at Cambridge

This appeal decision in the County Court at Norwich and at Cambridge provides further judicial interpretation of the new proportionality test. This follows the appeal decision in *May v Wavell* [2017] at the Central London County Court, considered in Issue 50.

The claimant suffered a wrist injury at work and brought a negligence claim against her employer. Damages of £50,000 were agreed. At detailed assessment, District Judge Reeves reached an initial base figure of £115,906.09. After applying proportionality, the base costs were revised down to £75,000. The claimant appealed solely in relation to proportionality.

The costs award was upheld by His Honour Judge Auerbach. In rejecting

the appeal, the judge made a number of findings:

1) The rules leave it open to the assessing judge to decide whether to focus on the proportionality of one or more elements of the overall costs or to focus on the proportionality of the overall provisional total, given the issues in the particular claim.

2) Where a matter is subject to a costs budget, proportionality at detailed assessment applies to both incurred costs and budgeted costs, notwithstanding good reason is required to depart from budgeted costs: *Harrison v University Hospitals Coventry* [2017] EWCA Civ 792.

3) Applying the proportionality test to budgeted costs is not further cutting but rather reapplying proportionality

with the benefit of different information and hindsight, which the court is entitled to do.

4) The overriding requirement is that costs "bear a reasonable relationship" to CPR 44.3(5). An assessing judge is required to reach a "discretionary value judgment". This means considering the factors against all the relevant circumstances. The discretion must be exercised judicially, in a reasoned and not arbitrary fashion.

5) The court should identify features pertinent to any of the factors and the significance attached to those factors.

6) When applying proportionality, the rules do not require the court to apply a precise or mathematical formula.

Comments

The finding that the new proportionality test requires a "discretionary value judgment" in *Reynolds* should be contrasted to the finding in the *May* appeal: determining whether costs claimed bear a reasonable relationship to CPR 44.3(5) is "a matter of judgment, rather than discretion,

and [...] requires a costs judge to attribute weight, and sometimes no weight, to each of the factors (a) to (e)".

Is this semantics or does the respective guidance in *Reynolds* and *May* set out subtly different approaches?

Five years after the introduction of the new proportionality test, the judiciary is still trying to define what it means. Despite this, the Court of Appeal declined to hear *May*. The outcome of assessment hearings therefore remains unpredictable.

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 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers 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.