Costs in Focus

Issue
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Welcome to the 54th 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.

Part 36 uplift denied at costs assessment

Rachel Dunn considers the decision in *JLE v Warrington & Halton Hospitals NHS Foundation Trust* (December 2018, Senior Courts Costs Office), where it was held Part 36 consequences are severable

In this clinical negligence matter, the claimant sought costs of £615,751.51. The claimant made a Part 36 costs offer of £425,000 including interest, which expired shortly before the detailed assessment.

Costs were assessed by Master McCloud in the sum of £431,813.05 inclusive of interest; therefore, the claimant beat their own Part 36 costs offer. The claimant sought the prescribed consequences in accordance with CPR 36.17(4). The defendant argued that the court must consider whether it is 'unjust' to make an order for each of the consequences (a) to (d) separately. In particular, the defendant argued a ten per cent uplift would be unjust, given the claimant had beaten their offer by under £7,000, whereas a ten per cent uplift would be in the region of £40,000.

The claimant argued that, when considering the consequences arising from CPR 36.17(4), there was a single test and either all the consequences were applicable or none at all. The defendant argued that the court had discretion to determine what benefits would apply.

The court concluded that the Part 36 consequences could be considered individually and that, even though the claimant had beaten their own Part 36 costs offer, it was only by a small percentage and it would be disproportionate and unjust to award a ten per cent uplift. Master McCloud stated that the ten per cent uplift should only be waived when the uplift would be clearly disproportionate and, in this case, she considered it was.

Comments

This decision confirms the court will apply the test of 'injustice' separately to each of the Part 36 consequences under CPR 36.17(4).

CPR 36.17(4)(d) sets out the prescribed percentage uplift of ten per cent on awards up to £500,000 and five per cent on awards above £500,000, subject to an overall cap of £75,000. The Part 36 regime is there to provide certainty and can be very advantageous. It can encourage settlement given the costs consequences set out within CPR 36.17; however, this decision reduces certainty and may lead to challenges against Part 36 consequences.

A well-pitched Part 36 costs offer could result in a significant uplift for the receiving party. From a paying party point of view, it is encouraging to know that the court will use its discretion and is alert to potential injustice of awarding the uplift where a bill is reduced significantly and the difficulties the paying party could face when pitching an offer.

Agreement trumps fixed costs

Robyn Shepherd considers the decision in *Miss Seyi Adelekun v Mrs Siu Lai Ho* (October 2018, In the County Court at Central London), where it was held parties can contract out of fixed costs

This was a road traffic accident personal injury claim allocated to the fast track and therefore subject to fixed recoverable costs under CPR 45 Section IIIA. The claimant made an application to reallocate the claim to the multi-track, to which the defendant consented.

Before the application was heard, the claimant accepted the defendant's Part 36 offer in the gross sum of £30,000. The Part 36 offer stated: "If the offer is accepted within 21 days, our client will pay your client's legal costs in accordance with Part 36 rule 13 of the Civil Procedure Rules, such costs to be subject to detailed assessment if not agreed." The offer made reference to CPR Part 36.13, standard basis costs.

A consent order was agreed and filed with the court, advising that the claimant would be entitled to costs on the standard basis. The application hearing was therefore vacated and never heard.

The parties were unable to agree whether the fixed costs regime would apply; the defendant's position was that fixed costs would apply, while the claimant's position was that fixed costs should not apply by virtue of the agreement between the parties.

At first instance, Deputy District Judge Harvey held that fixed costs applied.

The claimant appealed on four grounds:

- Firstly, that the judge had wrongly varied the consent order;
- Secondly, that the judge had not considered reallocation of the matter to the multi-track;
- Thirdly, that the judge had interfered in the detailed assessment process in varying the consent order, because fixed costs should have been raised during detailed assessment;
- Finally, that if successful on appeal, the claimant should be entitled to her costs.

His Honour Judge Wulwik held that the claimant's appeal was successful on the first of the four grounds.

Comments

The appeal succeeded because HHJ Wulwik saw "no basis for the Deputy District Judge varying […] the consent order." He affirmed the comments of Lord Justice Moore-Bick in *Solomon v Cromwell*: "There is nothing in the rules to prevent parties to a dispute settling it on whatever terms they please, including as to costs."

HHJ Wulwik found the costs order agreed by the parties in the consent order was "entirely consistent with the parties' agreement that the claim should be reallocated to the multi-track."

The judge further commented that it "would have been sensible if the claimant's solicitors had included as a term of the consent order that the claim be reallocated to the multi-track", which would have made the terms of agreement clearer and may therefore have avoided the instant satellite litigation on costs.

This decision confirms that the parties can contract out of fixed costs but it remains to be seen whether higher courts will follow suit.

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.