

Costs in Focus

Issue 56

Welcome to the 56th 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 reinstated in costs appeal

Rachel Dunn considers the costs appeal ruling in *JLE (a child by her Litigation Friend) v Warrington & Halton Hospitals NHS Foundation Trust* [2019] EWHC 1582 (QB)

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.

At first instance (Issue 54), 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 Master ruled that the Part 36.17(4) consequences (a) to (d) 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 the ten per cent uplift.

On appeal, Mr Justice Stewart also held that the test of whether the costs consequences would be 'unjust' should be applied separately to (a) to (d) but overturned the decision of Master McCloud, concluding that the uplift was all or nothing and should be awarded in full.

Comments

The High Court held that it is not permissible to perceive 'injustice' on the degree of reduction to a costs bill on assessment or on the prescribed amount of the Part 36 ten per cent award.

This decision mirrors *Cashman v Mid Essex Hospital Services NHS Trust* [2015] EWHC 1312 (QB),

which was a costs appeal from the SCCO and where a Part 36 award was restored. *Cashman* was not referred to at first instance in *JLE*.

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 a well-pitched offer can be very advantageous. The fact that a claimant may only beat their own Part 36 costs offer by a small percentage or the amount of the Part 36 award is not a reason to depart from the Part 36 rules.

Application to vary costs budget refused

Costs Lawyer, Jessica Winter-Riley considers the meaning of 'significant development' in *Seekings v Moores* [2019] EWHC 1476 (Comm)

This claim arose from a business dispute in which the defendant attempted to remove the claimant from their business. The defendant's agreed costs budget was £396,327, of which £254,167 was estimated costs. The claimant had made applications in relation to requests for further information (RFIs). The defendant was ordered by His Honour Judge Worster to reply and to pay the claimant's costs of the applications. The defendant later made an application to increase his budget by £130,009, arguing that this was justified because the RFIs and consequent increased number of documents constituted "significant developments" under Practice Direction 3E, 7.6.

The issues for the court were:

1) Whether it has the power to make an order in circumstances where the

majority of the increased costs sought in the defendant's revised budget have already been incurred;

2) Whether there had been significant developments that would justify a revision.

The defendant applied to increase four phases of the budget. In disclosure, he argued that additional costs were caused by more key words and documents being stored on the disclosure platform for longer, leading to more documents being reviewed. The judge considered that the cost and extent of the work should have been anticipated.

In the expert phase, the defendant sought increased costs because of a change of expert and because the fees increased through additional disclosure documents

but HHJ Worster again held that these costs should reasonably have been anticipated.

The increase in the issues/pleadings phase arose from a direction for a list of issues and the claimant's approach to the defendant's attempts to agree that list were not budgeted for. The judge held that lists of issues were common in the Business and Property Courts, and should have been anticipated.

Finally, the defendant sought the additional costs of responding to the RFIs. The judge held the applications could have amounted to significant development but the defendant cannot recover the increased costs owing to a failure to answer the requests properly the first time and also, adverse costs orders had already been made.

Comments

The judge concluded that there had been no significant development and, therefore, the question of jurisdiction did not need to be considered.

The decision shows that if something should reasonably have

been anticipated by the party seeking to revise its budget, the courts will not consider it "significant" or a "development". Furthermore, additional work caused by the conduct of the party seeking to amend their budget will not justify a revision.

Significant developments are questions of fact and relate to circumstances in which a case develops in a way that could not have been foreseen. Therefore, it is essential budgets are prepared with care, and work that can be anticipated is included in the budget.

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.