

Costs in Focus

Issue
57

Welcome to the 57th 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.

Appeal court on ATE premiums and proportionality

Daphne U considers the Court of Appeal ruling in favour of Receiving Parties in *West v Stockport NHS Foundation Trust, Demouilpied v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220

This Court of Appeal decision gave guidance on assessing the reasonableness of block-rated ATE premiums in clinical negligence claims and provided further consideration on proportionality under the new proportionality test.

In these test cases, the claimants recovered damages from the defendant for clinical negligence, in the sums of £10,000 and £4,500 respectively. The claimants each took out a block-rated ATE insurance policy with the recoverable element of the premium in the sum of £5,088.

The claimants put a number of specific issues before the Court of Appeal, following the defendant's successful challenge to the amount

of the ATE insurance premium recoverable at first instance and after the claimants' appeal to the County Court was dismissed.

A detailed report on block-rate ATE insurance premiums (the assessors' report) was provided to the court. It enabled the judges to formulate guidance that was not open to the first instance judges and they concluded that the premium in this appeal was "fairly typical".

It was held that disputes about the reasonableness and recoverability of block-rated ATE insurance premium are not to be decided on the usual case-by-case, fact-focused basis but should be settled at a macro level by reference to the general run of the cases and macro-economics of the

ATE insurance market. Furthermore, the court does not have the expertise to decide the amount of a premium without expert evidence.

Furthermore, the court considered its approach to costs assessment in line with proportionality. It found the proportionality of the total costs figure must be assessed by reference to both CPR 44.3(5) and 44.4(1), and held that a further assessment is required only if the overall figure was considered to be disproportionate. Even then, a line-by-line assessment is not to take place but consideration should instead be given to various categories of cost.

With the above, the claimants' appeals were allowed.

Comments

With the findings of the assessors' report, guidance has been provided by the court affirming that it is not usually the individual respondent's task to assess the reasonableness of a block-rated ATE premium at a case-specific level and that an ATE premium is often a key component to access to justice. This provides reassurance to many that such a

premium was calculated with extensive information taken from the existing market and any challenges made to the premium should be backed by evidence such as a relevant expert report. A simple comparison between the claim value and amount of premium paid is not a reliable measure of the reasonableness of the ATE insurance

premium.

Finally, any reduction for proportionality should exclude from the calculation of the reduction any "unavoidable" costs, such as court fees, applicable VAT, and the reasonable element of the ATE premium.

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Appeal court reduces counsel fee on indemnity basis assessment

Hana Ghanty considers the assessment of costs on the indemnity basis in *Timokhina v Timokhin* [2019] EWCA Civ 1284

This case is an illustration of how Counsel's fees were significantly reduced even though costs were allowed on the indemnity basis. Costs awarded on the indemnity basis need not be 'proportionate' contrary to costs awarded on the standard basis, but must be reasonably incurred and reasonable in amount.

In this family law matter, the two parties, Russian nationals, were embroiled in a dispute over the relocation of their children back to Russia and a decision had been made by District Judge Gibson that the children should be relocated. The order was silent as to costs. The mother appealed the judge's order,

despite the mother knowing she was guilty of criminal charges brought against her in Russia, conduct which resulted in imprisonment following her guilty plea.

The father's representatives invited the mother's representative to withdraw her appeal. The parties entered into a series of communications which resulted in a hearing where costs only were in issue. At this hearing the Judge held that the father was entitled to costs incurred between the two hearings on the indemnity basis. Those costs were summarily assessed in the sum of £109,324 of which £67,500 were

for counsel's fees. This broke down as £30,000 for the earlier hearing and £37,500 for the final hearing. The father's representatives had instructed both leading and junior counsel. In stark contrast the mother had instructed junior counsel who had charged £1,500 for the final hearing.

The Court of Appeal, with Lady Justice King delivering the leading judgment, rejected the mother's appeal and upheld the order for costs to be paid on the indemnity basis, save that the costs of counsel's fees on the father's side were reduced substantially.

Comments

Counsel for the father reminded the court that on the indemnity basis, pursuant to CPR 44.4(1)(b), the costs do not have to be "proportionate", the test is whether they are "unreasonable". Lady Justice King held that, while the court had those principles firmly in mind, the counsel's fees for the final hearing were on any basis, unreasonable in amount pursuant to

CPR 44.4(1)(b)(ii). The court identified by the time of the final hearing there was no longer any threat to the welfare of the children and the principle of costs in favour of the father had been agreed between the parties. The only remaining issue to be resolved was whether costs were to be paid on the standard or on the indemnity basis.

Accordingly for the final hearing, leading counsel's fee was unreasonably incurred and the junior counsel fee was unreasonable in amount. The global figure was therefore reduced by £31,250 and a new order for costs was made in the sum of £78,144.

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.