# Costs in Focus

Issue 59

Welcome to the 59th 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 Cost Drafters and Practitioners.

## Part 36 settlement and interim costs

Rachel Dunn considers *Global Assets Advisory Services Ltd v Grandlane Developments Limited* [2019] EWCA Civ 1764 and the Court of Appeal's ruling that interim costs may be ordered following settlement by Part 36.

The Court of Appeal confirmed that the court can make an order for an interim payment on account of costs after a claimant has accepted a Part 36 offer within the relevant period. This reverses the decision made in Finnegan v Spiers [2018] EWHC 3064 (Ch), which stated that an interim cost order can only be made when a matter settles by a Court Judgment, therefore if a matter settled by Part 36, an order for an interim payment could not be made.

In this case the claimant accepted the defendants' Part 36 offer in time and consequently the defendants were liable for the claimants' costs. The Trial Judge declined to make an interim payment for the claimants' costs on the grounds that he should follow the decision in Finnegan.

The claimants appeal was granted. The Court of Appeal held that the court has the power to order an interim costs payment in circumstances where a claimant had accepted a Part 36 offer in time.

Although Part 36 is described as a self -contained procedural code, Lady Justice Asplin held there is nothing in the terms of Part 36 which suggests that it is entirely freestanding and that all cost consequences of the acceptance can be found within "four corners of the CPR".

The court's power to order an interim payment on account of costs applies whether an order of the court under 44.2 or is a deemed order under 44.9.

### Comments

This is a welcomed decision as it means that an application for a payment on account of costs can be made if a case has settled by Part 36 and only in matters that concluded under a court order. A Part 36 offer is a deemed order for costs so the decision in Finnegan v Spiers 2018 did not seem logical and paying parties will no longer be able to rely on this.

This decision means paying parties should be cautious to decline voluntary interim costs payments as the receiving party is likely to be successful on application, which will incur further costs of dealing with an application.

Also prompt interim payments can limit the costs exposure to a paying party as it reduces the amount of interest they are liable for so it is always best practice to raise an interim payment as early as possible.

# Protracted litigation and interim costs

Hana Ghanty considers *RXK v Hampshire Hospital NHS Foundation Trust* [2019] EWHC 2751 (QB) and the circumstances when the court will order payment of interim costs during on-going claims.

This case considers interim payments on account of costs in protracted on-going litigation. The action is a claim in clinical negligence for neurological injury due to a delay in the claimant's delivery at the time of her birth in 2013. It is expected the claimant will be between 12 and 22 years of age before a final prognosis can be given.

The claim was issued on 2 November 2016 and judgment was entered for damages to be assessed by way of an order dated 25 July 2017, which also provided for an interim payment on account of damages in the sum of £100,000 and an interim payment on account of costs of liability in the sum of £50,000.

The claimant applied for a further interim costs payment in the sum of £150,000 pursuant to the court's discretion under CPR Part 44.2. At this point in the claim there had already been two interim payments totalling £100,000. Should the further interim be granted the requested amount would be £250,000, representing sixty per cent of the statement of costs of £410,136 annexed to the application. The statement of costs was not apportioned between liability and quantum costs.

The claimant submitted that quantum would not settle for another 3 or 4 years, possibly longer, by which time costs would likely be significantly higher.

Master Cook agreed with His Honour Judge Robinson's judgement in X v Hull & East Yorkshire Hospitals NHS Trust (2019, unreported) that 44.2 (1), relating to whether costs are payable, the amount and when costs are to be paid, and 44.2 (2), relating to the general rule that the unsuccessful party pays the costs of the successful party, were wide enough to allow the court to make an order of this nature.

## Comments

Master Cook further commented that the meaning of "successful party" or unsuccessful party" cannot be confined only to the outcome of the whole case. The application which should be made in these circumstances is for a costs order down to a specific date and an interim payment on account of those costs.

He also listed relevant considerations to take into account when making such an order, such as the type of funding agreement and a realistic valuation of the likely damages to be awarded at Trial. Master Cook stated the need for solicitors in protracted litigation to expect adequate cash flow was now established in the rules (44.2.12 of the White Book). As the witness statement of the claimant's solicitors did not adequately address those issues and amounted to no more than a cri de coeur for more money the parties were ordered to file one further witness statement each and to apply to re-list the application.

## 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.