

Welcome to the 61st 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.

Indemnity basis costs and costs budgeting

Costs Lawyer, Steven Leung considers the Court of Appeal's guidance in *Lejonvarn v Burgess and Burgess* [2020] EWCA Civ 114

The defendant is an architect and former neighbour of the claimants. The defendant provided assistance to the claimants' "garden project". There was a falling out and the claimant claimed for breach of contract and/or negligence. The existence of a contract was rejected at a trial of Preliminary Issues, which was upheld by the Court of Appeal.

The defendant had made an early Part 36 offer in the sum of £25,000, which was not accepted. The trial judge ordered costs to be assessed on the standard basis. The defendant appealed seeking an order for indemnity basis costs.

Lord Justice Coulson, delivering the lead judgment of the Appeal Court, held it is not a test of hindsight. The correct question for the trial judge was to consider whether a reasonable claimant would have concluded that the claims were so speculative or weak or thin that they should no longer be pursued [54].

Coulson LJ held continuing to pursue speculative and weak claims was conduct out of the norm justifying an order for indemnity basis costs in favour of the defendant: *Excelsior Commercial and Industrial Holdings Limited v Salisbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ 879.

Unlike a claimant, a defendant who beats their own Part 36 offer is not automatically entitled to costs on the indemnity basis but a defendant can apply for indemnity basis costs. Coulson LJ stated the key question is whether a claimant's conduct in not accepting the defendant's offer takes the case out of the norm [80].

It was held the defendant had acted sensibly and proportionately at the outset to spare both sides the acrimony and expense of litigation, and the claimants had not. The claimants' failure to beat the defendant's Part 36 offer would also separately justify an award of indemnity basis costs.

Comments

The basis of assessment was of particular significance in this matter as the defendant presented legal costs in the sum of £724,265 against the defendant's approved costs budget of £415,000.

Coulson LJ held that "*the assessment of costs on an indemnity basis is not constrained by the approved costs budget*" [93]. Coulson LJ went on to

state the existence of an approved costs budget could not affect whether or not the court should make an order for indemnity costs.

Costs on the standard basis must be reasonable and proportionate with any doubt resolved in favour of the paying party: CPR 44.3(2). In contrast, costs on the indemnity must be reasonably incurred or reasonable in amount with

any doubt resolved in favour of the receiving party. On the indemnity basis there is no reference to proportionality: CPR 44.3(3).

Coulson LJ reminded that, on the indemnity basis, costs still have to be reasonable and the defendant's costs of over £724,000 is likely to be found to be unreasonable.

Valuation above Protocol limit

Costs Lawyer, Steven Leung considers the Senior Courts Costs Office review of whether a case was reasonably valued above £25,000 in *Scott v Ministry of Justice* [2019] EWHC B13 (Costs)

The claimant was employed by the defendant as a senior prison officer and was injured while attempting to restrain a prisoner, sustaining a shoulder injury necessitating shoulder arthroscopy and surgical debridement.

The claimant brought a claim under the Pre-Action Protocol for Personal Injury Claims, with no reference to the EL/PL Protocol.

Liability was denied and later proceedings were issued, with the Claim Form giving a maximum claim value of £5,000. Following receipt of expert orthopaedic evidence and counsel advice, the Claim Form was increased to in excess of £30,000. The claimant made a Part 36 offer of £30,000.

Liability remained in dispute in the defendant's defence. The defendant made a Part 36 offer of £15,000, which was accepted by the claimant.

The claimant argued the EL/PL Protocol did not apply as the Prisoner was a 'vulnerable adult' within the meaning of Para 4.3(8) of that Protocol that the Protocol does not apply to a claim "for damages in relation to harm, abuse or neglect of or by children or vulnerable adults".

Deputy Master Friston, sitting in the Senior Courts Costs Office, held that it was not possible to draw a line through "abuse or neglect". The exception required "harm, abuse or neglect" to be read together as a phrase. It was held

this exception did not apply to personal injury claims.

After reviewing the full file of papers, Deputy Master Friston held the claimant reasonably valued the claim at more than £25,000 and CPR 45 fixed costs did not apply. Neither had the claimant acted unreasonably or improperly in endorsing the Claim Form at £5,000. The defendant's application for misconduct under CPR 44.11 was dismissed as there was no intention to mislead. The claimant's solicitor always intended to review and revise the Claim Form after receiving the expert report and counsel advice.

Comments

The claimant's solicitor did not notify the defendant the claim was valued at more than £25,000. This was held only to be a minor breach of the PI Protocol. On reviewing the full file, the court accepted the claimant reasonably valued the claim on a full-liability basis at considerably more than £25,000 as the claim potentially included a claim for future loss of earnings.

The witness statement of the claimant's solicitor to the court read there was no intention to mislead the court or to undervalue the claim when initially issuing the Claim Form at £5,000, when previously the claim was valued at above £25,000. The court also accepted the claimant's solicitor always had the intention to revisit the Claim Form value after receipt of the medical evidence and counsel advice.

Neither did anything turn on the claimant accepting a Part 36 offer of £15,000. The offer was accepted due to concerns over liability.

In all the circumstances the claimant reasonably valued the claim at above £25,000 and the costs were to be assessed without reference to CPR 45 fixed costs.

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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