- The Defendant Costs Specialists

Costs Law Update – Reducing costs on the grounds of conduct

Three recent Court of Appeal decisions have done much to clarify the powers of a costs judge, during detailed assessment, in relation to disallowing costs on the grounds of the conduct of the receiving party.

The difficulties in this area were largely caused by a High Court decision, *Aaron v Shelton* [2004] EWHC 1162. That authority seemed to indicate that if a paying party were going to rely on the conduct or misconduct of the non-paying party in order to seek a reduction in the costs to be paid, the time to raise that factor was at the end of the trial, or at the time of the making of the consent order, and not before the costs judge at the time of assessment.

This decision has caused particular difficulty for defendants. Often, little or no consideration is given to the conduct of the other party, or the extent to which they have abandoned heads of claim, when the final order is made. This is not entirely surprising in the eagerness to settle the substantive claim. The application of *Aaron*, which was largely followed by the judiciary, and leapt on by claimants, precluded defendants from raising conduct issues at detailed assessment even where the conduct of the claimant cried out for some reduction of costs.

The judgment in *Ultraframe (UK) Ltd v Fielding* [2006] EWCA Civ 1660 has now overturned the principle formulated in *Aaron* on the basis that it was too broadly stated. The correct approach was held to be, as per Waller LJ:

> "34. It seems to me that consideration of a party's conduct should normally take place both at the stage when the judge is considering what order for costs he should make, and then during assessment. But the court will want to ensure that dishonesty is penalised but that the party is not placed in double jeopardy. Ultimately, the question is one of the proper construction of the order made by the judge. Thus it will be important for the judge, who is asked to take dishonesty into account at the end of a trial when considering the order as to costs, to consider what is likely to occur on assessment. Where dishonest conduct is being reflected in an order made by the trial judge, it must be wise for the future for judges to make clear whether they are making the order on the basis that, on the assessment, the paying party will still be entitled to raise the dishonesty in arguing that costs incurred in supporting the particular dishonesty were unreasonably incurred. Judges may also want to consider whether to make an order under rule 44.14 and it would be wise to do that before considering precisely what order to make in relation to the costs of a trial generally."

Although the case concerned a positive finding by the trial judge of serious dishonesty by the successful party to the litigation, the principle has wider application to other issues of conduct.

A second decision that touched upon this issue is that of *Jackson v Ministry of Defence* [2006] EWCA Civ 46. This case concerned a claimant who had abandoned significant heads of claim pre-trial and was found to have exaggerated his injuries during the trial. The Court of Appeal approved the trial judge's view as to the powers of the costs judge:

> "15. …What is more, the judge made it clear that it was open to the defendant to challenge specific items relating to the abandoned claims, such as the costs of the experts which were not relied on at trial, at the detailed assessment, where of course the claimant will only be able to recover costs which were reasonably incurred. This is in fact what has happened here, as can be seen from the defendant's points of dispute to the large bill of costs filed on behalf of the claimant.
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> 16. The reduction which the judge made -- and the reduction which we can anticipate the costs judge is likely to make -- must act as a considerable disincentive to claimants and their advisers against making exaggerated claims…"

In *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91 the Court was concerned with a case where the Defendant, before proceedings were issued, made an offer of £5,000 to settle which was rejected. Proceedings were issued and the claim was quantified at approximately £150,000. The Defendant made a Part 36 payment of £4,000 which was accepted and therefore gave the Claimant an automatic order for costs up to the date of serving the notice of acceptance. At the detailed assessment the Defendant asked the judge, as a preliminary issue, to award the Claimant only 25% of the assessed costs. The Court of Appeal held that the judge was correct to conclude that he did not have the power to make such an order.

However, and importantly, the Court held that such an order was not necessary to produce a just result:

> "24. It is, in fact, quite unnecessary to give the costs judge the jurisdiction for which Miss Ayling contends. The premise on which her argument is based is that, without such a power, the costs judge cannot arrive at a fair result in certain situations. Mr Roussak concedes (rightly) that in an appropriate case, the costs judge can disallow entire sections of a bill of costs. If the costs judge considers that the claimant acted unreasonably in refusing an offer to settle made before proceedings were issued, he is entitled to disallow all the costs post-issue on the footing that they were costs "unreasonably incurred": rule 44.4(1). Similarly, where he decides that a party was unreasonable to raise and pursue an issue, the costs judge is entitled to disallow the costs relating to that issue on the grounds that they were unreasonably incurred."

Further, the Court held that the words "unnecessary" and "unreasonable", as they appear in CPR 44.4(1) do not have to be given the narrow meaning of being categorised as "misconduct", unlike "unreasonable" in CPR 44.14. This is a crucial distinction as it hopefully clarifies the powers of a judge on assessment as to whether a party must have deliberately exaggerated the claim to have the associated costs disallowed. This appears to extend to detailed assessment the courts' powers that

exist when making an order for costs under CPR 44.3, as per Potter LJ in *Dudley Fleming v Chief Constable of Sussex* [2004] EWCA Civ 643:

> "36. The principles are too well known to require to be set out in detail. The pre-CPR working rule to be found in the judgment of Nourse LJ in *Re Elgindata Ltd (No 2)* 1 WLR 1207 was modified by the observations of Woolf Lord in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* to the effect that it is no longer necessary for a party to have acted unreasonably or improperly to be deprived of his costs on a particular issue on which he has failed."

This would certainly seem to suggest that a claimant who has failed on, or discontinued, a head of claim, in whole or in part, can have such costs disallowed on detailed assessment even in the absence of a specific costs order to that effect and regardless of the reason for the failure/abandonment.

These cases, when taken together, considerably strengthen the armory of defendants when seeking to reduce third party costs.

Contact

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