- The Defendant Costs Specialists

Costs Law Update – Lamont v Burton

The Court of Appeal's decision last week in *Lamont v Burton* [2007] EWCA Civ 429 is likely to have serious costs implications for defendants and impact on the way personal injury claims are conducted.

The case concerned the application of the fixed success fee regime under Part 45. Although the case itself concerned an RTA the Court recognised that it had equal relevance to EL and EL disease claims that are also subject to fixed success fees.

The claim related to an accident on 10th September 2004 being conducted under a CFA and was therefore subject to the fixed success fees allowed for under CPR 45.15:

> "…the percentage increase which is to be allowed in relation to solicitors' fees is –
>
> (a) 100% where the claim concludes at trial; or
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> (b) 12.5% where –
>
> (i) the claim concludes before a trial has commenced; or
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> (ii) the dispute is settled before a claim is issued."

The Defendant admitted liability early and subsequently made a Part 36 payment in the sum of £1,800 which was not accepted. The matter proceeded to a disposal hearing where the Court awarded damages of £1,774.32. The Claimant was therefore awarded his costs only up to the last date he could have accepted the Part 36 payment without needing the Court's permission and was ordered to pay the Defendant's costs from that date onwards.

As the matter had concluded at "trial" the Claimant sought a 100% success fee on his costs.

The Defendant argued before the trial judge, and on appeal, that the Claimant should have accepted the Part 36 payment within the time for acceptance; and that had he done so, the claim would have concluded before trial, so that the percentage increase for solicitors' fees prescribed by CPR 45.16(b)(i) would have been 12.5%. Accordingly, it was argued that the trial judge should have exercised his discretion to allow the Claimant an uplift of 12.5% rather than the 100% claimed.

This argument was rejected by the trial judge and by the Court of Appeal on the grounds that the wording of CPR 45 is mandatory as to what success fee should be

allowed and the Court has no discretion, either directly or indirectly, to award a different amount to that provided for by the rules. The wide discretion as to the order that a court can make under CPR 44(3) does not extend to making an order which circumvents CPR 45.

The Court of Appeal observed:

> "Section III of Part 45 contains a carefully balanced scheme for the award of success fees in road traffic accident cases. The object of the scheme is to provide certainty and avoid litigation over the amount of success fees to be allowed to successful parties. … It is inherent in the scheme that in some individual cases, the success fee will be unreasonably high and in others unreasonably low. But that is the price that has to be paid for achieving certainty and avoiding litigation over the amount of success fees. Rule 44 cannot be invoked to circumvent the careful structure of rule 45 and to undermine its objective of achieving certainty.

One issue not considered in the judgment is the effect of CPR 44.3B which states:

> "(1) A party may not recover as an additional liability –
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> …
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> (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;
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> (d) any percentage increase where a party has failed to comply with –
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> (i) a requirement in the costs practice direction; or
>
> (ii) a court order,
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> to disclose in any assessment proceedings the reasons for setting the percentage increase at the level stated in the conditional fee agreement."

Do either, or both, of these rules apply to Part 45? Is the combined effect of 44.3B(1)(c) or 43.3B(1)(d) and Part 45 that although the percentage success fee that applies is fixed the period that it will be recoverable for, or whether it is recoverable at all, still requires appropriate disclosure? Alternatively, do neither of these sections apply where the success fee is fixed? Is the success fee recoverable regardless because of the mandatory nature of Part 45?

The possible impact of *Lamont* on future litigation tactics is significant. The following two examples give an indication of the potential issues:

Example 1

A Claimant is involved in a fast-track RTA conducted under a CFA. A month

before trial the Defendant makes a Part 36 offer of £10,000 which represents a reasonable settlement. The Claimant's solicitors have incurred base profit costs to date of £6,000. To take the matter to trial will require a further £1,000 base profit costs to be incurred by the solicitors. The Claimant's counsel's trial costs will be fixed at £500. The Claimant solicitors will recover the following costs if they advise the Claimant to accept the offer now:

Base profit costs	- £6,000
Success fee (12.5%)	- £750
Total recovered	**- £6,750**

If the solicitors advise the Claimant to reject the offer, and the offer is not beaten, they will recover the following:

Base profit costs	- £6,000
Success fee (100%)	- £6,000
Total recovered	**- £12,000**

This example ignores VAT and other disbursements. Of course, the solicitors will have "lost" £1,000 of profit costs (assuming the Claimant is not liable for the shortfall) and the £500 brief fee. In addition, there will be an adverse costs order in respect of the Defendant's costs. Assuming that these are at the same as those of the Claimant (ie profit costs of £1,000 and counsel's fees of £500) and assuming that the solicitors are prepared to cover the third party costs themselves this still results in a balance in their favour of £9,000 (ie £12,000 less £1,500 own "lost" costs and less £1,500 third party costs). This is £2,250 more than if they had advised their client to accept the "reasonable" offer.

Example 2

A Claimant is involved in a high value EL claim conducted under a CFA. A month before trial the Defendant makes a Part 36 offer of £100,000 which represents a reasonable settlement. The Claimant's solicitors have incurred base profit costs to date of £50,000. To take the matter to trial will require further costs of £20,000 to be incurred, to include profit costs, counsel's fees and disbursements by the Claimant. The Claimant solicitors will recover the following costs if they advise the Claimant to accept the offer now:

Base profit costs	- £60,000
Success fee (25%)	- £15,000
Total recovered	**- £75,000**

If the solicitors advise the Claimant to reject the offer, and the offer is not beaten, they will recover the following:

Base profit costs	- £60,000
Success fee (100%)	- £60,000
Total recovered	**- £120,000**

This example ignores VAT. The solicitors will have "lost" £20,000 own costs

> and disbursement (assuming the Claimant is not liable for the shortfall). In addition, there will be an adverse costs order in respect of the Defendant's costs. Again, assuming that these are at the same as those of the Claimant (ie £20,000) and assuming that the solicitors are prepared to cover the third party costs themselves this still results in a balance in their favour of £80,000 (ie £120,000 less £20,000 own "lost" costs and less £20,000 third party costs). This is £5,000 more than if they had advised their client to accept the "reasonable" offer.

Of course, different examples will produce an endless number of different outcomes but the potential problems are obvious. This will often create a clear conflict of interest between a claimant's and a solicitor's interests. Further, a claimant solicitor only needs to succeed on a small number of cases at trial to significantly adjust the figures in their favour. Different potential conflicts arise because of the various fixed success fees that counsel in entitled to depending on the stage a case settles.

Evidence has already emerged that there has been a 37% increase in claimant solicitors issuing proceedings in low-value road traffic accident cases so as to avoid the fixed-fee payment scheme (according to a study for the Civil Justice Council). It will therefore hardly be surprising if the decision in *Lamont* has a significant impact on the advice given to claimants as to whether to accept late Part 36 offers. It will become increasingly important for defendants to make reasonable offers at as an early a stage as possible to give some protection. Extreme caution is needed before proceeding to trial simply on quantum.

The Court of Appeal did recognise that their interpretation of the rules was not without problems:

> "…although we accept that there may well be a case for deciding that, where a claimant fails to better a Part 36 offer or payment, he should be allowed the same success fee that he would have recovered if he had accepted the offer. For the reasons that we have given, that is not the effect of the rules in their present form. It will be a matter for the Rule Committee and the Civil Justice Council to consider whether to amend Part 45 to make special provision to deal with the Part 36 issue."

Where, for a variety of reasons, a defendant has not made a strong Part 36 offer at an early stage the only option appears to be to make an overly generous offer in settlement. If accepted, any overpayment on damages is likely to be less than the higher success fee that would otherwise be recoverable. If the offer is generous enough, then the Claimant's solicitor may be vulnerable to a claim in negligence by his client if he does not recommended acceptance. However, whether paid out in increased damages or success fees it will produce the same result – greater cost to defendants.

This case highlights a potentially much bigger danger to defendants that does not yet seem to have been widely appreciated. The fixed success fees apply regardless of the stage at which the CFA is entered into. There is therefore nothing within the rules that prevents a claimant solicitor waiting until liability has been admitted and then entering into a CFA and claiming the fixed success fee. In RTA cases to which the

fixed-fee scheme applies the success fee will apply to the full fixed fee. In other cases it will only apply to work conducted after the CFA is entered into but this is likely to represent the majority of the work if liability is admitted at an early stage and the solicitors promptly enter into a CFA. There appears to be a very real danger that even where claimant solicitors are accepting referrals under BTE insurance policies they will now routinely enter into CFAs from the stage that liability is admitted leading to significant additional costs liabilities to defendants with no corresponding risks to themselves.

The problems with the rules that this decision has highlighted requires urgent attention.

Contact

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