Costs Law Update

Summer 2019

Defective Costs Budgets

The decision of Mr Justice Walker in *Page v RGC Restaurants Ltd* [2018] EWHC 2688 (QB) provides further important guidance on the costs management process and is essential reading for those involved in costs budgeting.

The underlying case was subject to costs budgeting. The parties decided, between themselves and without consulting the court, that the budgets could be prepared on the basis that it was too soon to budget for trial preparation and trial costs. The Claimant's budget therefore included nothing for these phases.

At the CCMC, the Master concluded that the failure to serve a budget that included trial preparation and trial estimates amounted to a failure to file a budget that complied with the rules. He decided that the consequence of this was that the CPR 3.14 sanction applied and made a costs management order limiting the Claimant's budget accordingly (i.e., court fees only).

On appeal, the Master's decision that there had been a failure to file a compliant budget was upheld. However, the appeal judge ruled that the Master should have gone on to consider whether to disapply the sanction (even in the absence of an application for relief from sanctions) as CPR 3.14 specially provides that the sanction applies "unless the court otherwise orders".

The appeal judge then applied the *Denton* principles to the issue of whether the court should have otherwise ordered and did so to the extent that the sanction would not be applied to those phases of the budget that had been properly completed and agreed by the Defendant. However, the sanction would continue to apply in relation to the trial preparation and trial phases. Given the matter had been listed for a five-day trial, this represents a very serious sanction and is likely to cause a major loss to the Claimant's solicitors (or possibly professional indemnity insurers) if the matter proceeds to trial.

The obvious lesson from this decision is that it is not for parties to decide not to file complete budgets taking the matter up to trial. PD 3E para.6(a) provides that: "In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings". Any party wishing to budget for only part of the case therefore needs to make an application to the court in advance of the deadline for filing budgets.

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Interim Costs Payments

The law relating to the making of interim costs payments has become increasingly confusing.

The current wording of the relevant rules is to be found at CPR 44.2(8):

> "Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

And CPR 47.16(1):

> "The court may at any time after the receiving party has filed a request for a detailed assessment hearing –
>
> (a) issue an interim costs certificate for such sum as it considers appropriate; or
> (b) amend or cancel an interim certificate."

This distinction between an order for a payment on account and an interim costs certificate has been around (with only minor variations) since the introduction of the Civil Procedure Rules. It is therefore surprising that the extent of any tension between the two rules, if such exists, has remained unresolved for so long.

A natural reading of the two rules together would suggest there are two stages at which such an order could be made:

1. At the same time an order for costs is being made (usually following a trial);
2. After a request has been filed for a detailed assessment hearing.

If an order for a payment on account is not made when the costs order is being made, the next opportunity to obtain an order for an interim payment would not arise until after a request for a detailed assessment hearing had been made.

However, in *Culliford & Anor v Thorpe* [2018] EWHC 2532 (Ch) the High Court decided:

> "In my judgment, it is not the law that, once an order for costs has been made, drawn up and sealed, no further application can be made to the court for an order for a payment of a sum on account of those costs. … Although CPR 44.2(8) contemplates that the court will decide this question at the time of making the order for costs, to my mind this does not exclude the possibility that the court should decide it later. I see no justification in the rules or authorities for the Claimants' view that, if an application is not made at the time, the next opportunity arises only after detailed assessment proceedings have been commenced."

However, in *Finnegan v Frank Spiers* [2018] EWHC 3064 (Ch) the High Court ruled that the court has no power to order a payment of costs on account after a Part 36 offer has been accepted. This is because Part 36 is a self-contained code and it makes no provision for payments on account following acceptance of a Part 36 offer.

We now have two different principles governing interim payments on account:

1. Where the court makes an order for costs it may at the same time, or at any point subsequently, order a payment on account of those costs (pursuant to *Culliford*).
2. Where the order for costs is a deemed costs order following acceptance of a Part 36 offer, the court has no power to order a payment on account (pursuant to *Finnegan*). The opportunity to obtain an interim payment will not arise until a request for a detailed assessment has been made (applying CPR 47.16(1)).

That said, with interest on costs running at an eyewatering 8% per annum from the date of the order/deemed order for costs, a sensible paying party will agree to making a generous voluntary interim payment to reduce the amount of interest that would otherwise become payable.

How to Use CFAs to Your Firm's Advantage

Solicitors are facing a relentless battle trying to maintain market share in the face of continuous consolidation by the larger law firms combined with new entrants to the market disrupting existing business models. Law firms face the seemingly insoluble problem of trying to meet clients' demands for ever lower fees whilst simultaneously attempting to maximise their own profit margins.

The careful use of Conditional Fee Agreements (CFAs) can provide an answer.

Many solicitors are naturally wary about the use of such agreements. Concerns include:

1. Unsustainable levels of work-in-progress accumulating that cannot be billed until the successful conclusion of the matter.
2. Having to write off large amounts of work if unsuccessful outcomes are achieved.
3. Technical challenges to the enforceability of CFAs, either by the client or by opponents, potentially leading to all costs being disallowed.

The first myth to dispel is that the only type of CFA available is a straight "no win, no fee" agreement. Most lawyers, whether claimant or defendant, will have memories of the "costs wars" and the endless technical challenges to CFAs, often linked to questionable claims management companies. In truth, there are a very wide variety of CFAs available to solicitors, including:

- Hourly rate, no win, no fee agreement without a success fee: Solicitor charges normal hourly rate if successful but nothing if the case is lost.

- Hourly rate, no win, no fee agreement with a success fee: Solicitor charges normal hourly rate plus a success fee (of up to 100%) if successful but nothing if the case is lost.

- Discounted hourly rate agreement: Standard hourly rate charged if successful (with or without a success fee) but discounted hourly rate charged if unsuccessful.

- Discounted fixed fee agreement: This can be structured so that standard hourly rates are charged if the case is successful but a discounted fixed fee is payable if the case is unsuccessful. The fixed fee can be staged with the amount payable varying depending on the point the case settles at.

Although the business model of many personal injury firms has been based on the "no win, no fee" CFA combined with a success fee, the above examples show that suitably structured CFAs can be equally appropriate for a much wider category of case.

For those firms undertaking defendant insurer panel work, all work should be undertaken on the basis of some form of discounted CFA (unless you are in the fortunate position of being able to charge full hourly rates). This enables firms to continue to offer reduced hourly rates (or fixed fees) to the insurer client but allows for recovery of full hourly rates (in line with at least Guideline Hourly Rates) where there is a successful outcome and costs are recovered from the other side. These agreements can include a cap such that where there is a successful outcome the amounts charged to the client are limited to the amounts recovered from the other side. Because this type of agreement does not cost the insurer client anything more than they would have to pay in the absence of the CFA, most are more than happy to enter into them. If your firm does not already have such agreements in place for all insurer work, you should take immediate steps to remedy this.

In the context of commercial litigation, discounted CFAs, with or without success fees, can be an ideal method of funding for claimants. Unlike the straight "no win, no fee" CFA, where all the risk rests with the solicitor, discounted CFAs share the risk between client and solicitor. The discounted charges payable in the event a claim is unsuccessful make many claims affordable to clients that otherwise would simply never get off the ground. This increases the amount of available work for firms but reduces their costs exposure, compared to "no win, no fee" CFAs, as they are guaranteed payment of part of their normal charges if the claim fails. This type of CFA also helps avoid part of the cash flow problems created by the "no win, no fee" model. The solicitor can raise interim invoices based on the discounted charges as the matter progresses.

The attractiveness of CFAs for potential claimant clients can be increased further if the solicitor is prepared to offer additional safeguards for the client. Options to consider for the structuring of CFAs include:

- Client liable for any shortfall in costs recovery from opponent.
- Costs limited to level of costs recovered from opponent.
- Shortfall in costs recovery capped by reference to level of damages.
- Success fee not capped by reference to damages recovered (except where required by statute).
- Success fee capped by reference to level of damages.
- Costs and success fee payable in addition to those recovered from opponent capped by refence to level of damages.

The suitability of CFAs is not limited to traditional civil litigation. Many other areas of legal work can be dealt with using CFAs. For example, they work very well for judicial review in immigration matters. Although a number of different types of CFA can be used, discounted fixed fee CFAs have an obvious appeal to both solicitor and client with the fixed fee being linked to the stage at which the matter concludes. The client benefits from knowing from the outset what their maximum liability will be. The generally predicable level of work that is required from such judicial reviews means the solicitor can set the level of fixed fee with a considerable degree of confidence.

An increasing amount of work that we undertake at GWS involves advising solicitors on their existing CFAs and in the drafting of new agreements.

This work has highlighted some very real problems.

Many of the existing CFAs that firms have in place appear to have been adapted from existing precedents. The problem is that these precedents were often designed for entirely different types of case and it is plain that they have often been adapted by those unfamiliar with the intricacies of costs case law. There are clearly dangers for solicitors seeking to draft these agreements themselves unless they also specialise in costs. However, a number of the agreements we have seen appear to have originated from respected costs drafting firms. At best, many of the agreements are problematic and contain clear drafting errors. At worst, we have seen agreements that are not fit for purpose and expose the solicitors to serious risk of non-recovery of fees if a challenge is made, either by the client or by the opponent.

Firms with existing CFAs need to be confident these do not contain significant drafting errors and need to keep them under regular review to ensure they comply with the latest rules and regulations.

GWS have drafted CFAs and advised on existing agreements in areas as varied as:

- Claims against the police
- Immigration
- Personal injury
- Product liability
- Professional negligence claims
- Property damage

GWS's reputation has been built on running technical challenges to receiving parties' CFAs. We therefore know the areas of vulnerability and how to avoid them. Please contact Simon Gibbs if you would like to find out more.

Contact Us …

If you wish to discuss the contents of this update in more detail, please contact:

Simon Gibbs

Tel: 020 7096 0937
Email: simon.gibbs@gwslaw.co.uk
Address: Gibbs Wyatt Stone, Unit 5, 58 Alexandra Road, Enfield EN3 7EH

DX: 142502 Enfield 7

Website: www.gwslaw.co.uk
Legal Costs Blog: www.gwslaw.co.uk/blog