Costs Law Update

Spring 2020

Coronavirus (Covid-19)

We wish everyone the very best of health in these difficult times.

We are continuing to offer an uninterrupted legal costs service during the current 'lockdown', including drafting bills of costs, points of dispute and costs budgets and attending remote detailed assessments, costs management hearings and costs applications.

All fee earners are remote working with our long-established, fully integrated cloud based case management system.

We would just ask clients to email or telephone ahead before sending any urgent instructions to ensure that papers are posted or couriered to the most appropriate address so that we can ensure that papers are looked at without delay.

Part 36 Offers

In *King v City of London Corporation* [2019] EWCA Civ 2266 the Court of Appeal confirmed that a Part 36 offer must be inclusive of any interest payable. An offer expressed to be "£x exclusive of interest" would not be a valid Part 36 offer and the ordinary Part 36 consequences would not flow from it. The case itself concerned an offer made in respect of costs during detailed assessment proceedings, which was expressed as:

> *"The Claimant hereby offers to accept £50,000.00 in full and final settlement of the costs detailed within the Bill only. This offer is made pursuant to CPR 36. The offer is open for 21 days from deemed service of this letter. If the offer is accepted in this time the Defendant shall be liable for the Claimants costs in accordance with CPR 36.13. The offer relates to the whole of the claim for costs within the Bill and takes into account any counterclaim, but excludes interest."*

It is clear that the same principle would apply equally to an offer made in respect of damages.

In this issue:

Reviewing & Drafting Retainer Documents

Many law firms are naturally experiencing disruption to their normal day-to-day activities. On the positive side, this does provide the opportunity to pay some attention to basic housekeeping issues that can often be overlooked under the pressure of ordinary workloads. One area that always benefits from review is that of retainer documents and this could be an ideal time to check existing retainer documents to ensure everything is in order. We have recently advised two different clients on issues that had arisen with their retainers:

- One firm's standard conditional fee agreement attached a Notice of Right to Cancel document. This provided the mandatory notification of the right to cancel the agreement in certain circumstances (usually where the agreement was entered into at or following a visit to the client's home). The relevant *Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013* requires the client to be given 14 days' notice within which to cancel the contract. The Notice of Right to Cancel in this case had been amended to 7 days. The firm did not know who made this amendment or why it was done. Nevertheless, the amendment had made its way into the firm's standard CFA and was being used in all cases. The failure to give the required 14 days' notice amounts to a potential criminal offence and opens up the possibility of the client being free to terminate the retainer at any stage up to 12 months after the 14 day period with no obligation to pay any costs to the solicitors.

- Another firm had adopted a widely used retainer document that created contingency fee agreements for use in cases that settle pre-issue. The problem was that this retainer document was designed to be used in conjunction with a conventional conditional fee agreement. The contingency fee agreement would operate pre-proceedings and the CFA would then apply, both prospectively and retrospectively for the work already undertaken, in the event proceedings were issued. Here, no corresponding CFAs had been entered into and proceedings had indeed subsequently been issued in certain cases. As contingency fee agreements are unlawful in respect of contentious matters (i.e. post-proceedings), this meant that all such retainers were unenforceable as against their clients. Equally, because of the indemnity principle, no costs could be recovered from the other side even in the event of positive costs orders being obtained.

In both these situations, it would have been possible to rectify the position *before* the conclusion of any given matter. However, if the problem is only identified after a claim has concluded, there is no remedy available. The problem for one firm was identified when they had asked us to undertake a review of their existing retainer documents. For the other firm, the problem only became apparent when we were instructed to prepare a bill of costs, by which stage it was too late.

Problems with existing retainers aside, now is also an ideal time to consider whether there are alternative funding methods you could be offering to clients. Options include:

- 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.
- 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 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.

Please contact Simon Gibbs if you are interested in us undertaking a review of your existing retainers or advising/drafting new retainer documents.

"Good Reason to Depart" from Costs Precedent H Costs Budget

There remains very limited case law as to what circumstances, under CPR 3.18(b), amount to "good reason to depart" from an approved budget made by a costs management order. It is often argued that the fact a given phase within a budget has not been completed at the time of settlement would amount to a "good reason". However, the approach adopted by Regional Costs Judge Lumb in *Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust* (CC at Birmingham, 4/2/20) was a restrictive one:

> *"Very clear evidence of obvious overspending in a particular phase would be required before the Court could even begin to entertain arguments that there was a good reason to depart from the budgeted phase figure if the amount spent comes within the budget. If it were otherwise, one of the principal purposes of costs budgeting would be lost, namely the certainty of the parties of the amounts that they are likely to be able to recover or pay respectively. …*
>
> *There is nothing in the present case that indicates to me, having considered the totality of the Claimant's solicitors' file of papers, that there has been a substantial overspending on work done in the experts and ADR phases even though the experts phase was not completed. …*
>
> *It is not the role of the Costs Judge at Detailed Assessment to carry out a calculation of what, in his view, is the level of the proportion of a budgeted phase that a prudent receiving party would have incurred where that phase has not been completed."*

Further, he expressly disagreed with the approach taken in *Barts Health NHS Trust v Salmon* (CC at Central London, 17/1/19):

> *"In so far as HHJ Dight at paragraph 36 of his judgment in Salmon has concluded that if a party has not spent the totality of the budgeted figure for a phase that amounts to a good reason per se and the door is therefore open for the paying party to make further submissions on an appropriate figure for the phase, I respectfully disagree."*

Payments on Account of Costs

There has previously been considerable uncertainty as to the circumstances in which the courts may order interim costs payments to be made. CPR 44.2(8) itself is drafted in mandatory terms:

> *"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."*

What of the situation where the application for a payment on account is made *after* the order for costs is made or where there is a deemed order for costs rather than one made by the court following a hearing?

The position has now been clarified by the Court of Appeal in *Global Assets Advisory Services Ltd v Grandlane Developments Ltd* [2019] EWCA Civ 1764. In that case, the receiving party's entitlement to costs arose from a deemed costs order following acceptance of a CPR 36 offer. The Court concluded:

> *"I can see no reason why the power to make an order under CPR 44.2(8) should be restricted to circumstances in which the court has physically made the order as opposed to circumstances in which an order of the court is deemed to have been made. In both circumstances, it is the court which has ordered the party to pay the costs and accordingly, it seems to me that the circumstances fall within the wording of CPR 44.2(8). A deemed order is no less an order of the court. … It seems to me that the current wording [of 44.2(8)] cannot form the basis for a distinction between cases in which the application for an interim payment is heard by the trial judge and those in which it is not. It seems to me that it applies whether or not the trial judge hears the application for an interim payment."*

Disclosure of Information Concerning Funding Arrangements

Where a matter is funded with a conditional fee agreement and/or ATE policy, and the success fee and/or ATE premium is potentially recoverable, there is a duty to advise the opponent of the funding arrangement; failure to provide this information will render the success fee/premium irrecoverable. However, there are now only limited categories of case where success fees/premiums remain recoverable. Where the additional liability is not recoverable, no such duty to notify exists.

What about the position relating to funding by way of Damages Based Agreements or Third Party Funding?

There is no provision within the CPR or case law imposing an obligation to advise an opponent of the existence of such funding. Nevertheless, the existence of such funding may well come to the attention of the other side. To what extent will the courts order the provision of specific information about such funding where its existence is known?

In *Jalla v Royal Dutch Shell Plc* [2020] EWHC 738 (TCC) the Defendants, having been made aware of certain aspects of the Claimants' funding, requested further extensive information to enable them to better understand how the claims were being funded:

> *"the Defendants reiterate their requests for clarity regarding the following points: (i) the exact role played by the Claimants' legal representatives, Johnson & Steller, particularly in light of the Damages Based Agreement entered into with the Claimants (in relation to which we reiterate our request for further information); (ii) the exact role played by Johnson & Steller's 'agents', the law firm Rosenblatt Limited, particularly given that they were to be remunerated from 'Johnson & Steller's share of its DBA in the event of success' (Letter from Claimants dated 8 October 2019); and (iii) any third party funding arrangements, including the extent to which (a) any third party funders stood to benefit from a favourable outcome, and (b) any third party funding included funding to cover adverse costs orders against the Claimants."*

Mr Justice Stuart-Smith ruled:

> *"The information is relevant both to questions of costs and to settlement and, in my judgment, should be provided in order that the Defendants and the Court may understand what the risks to which the Defendants are exposed may be and the extent to which the playing field is, in this respect, not level. This Court is prepared to take judicial notice of the fact that settlement of large litigation is rendered virtually impossible in the absence of reasonable transparency about these matters."*

Admittedly, this was where the Claimants did not appear to have argued that such information was not disclosable and the judgment did give the Claimants the opportunity to raise subsequent objections as to the provision of this information. Nevertheless, it does suggest that the courts are likely to look sympathetically upon applications for disclosure of such information, although the first hurdle to overcome is discovering whether such funding even exists.

Contact Us …

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

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