Costs Law Update

Summer 2023

Advising Clients of Budget Overspends

The dangers of failing to advise clients about overspends in respect of approved costs budgets have again been highlighted in the case of *JXC v NIS* [2023] EWHC 1000 (SCCO).

A successful claim had been brought on behalf of a protected party in relation to a personal injury. *Inter partes* costs were agreed. The protected party's solicitors then sought to recover the shortfall between the full costs incurred and those costs recovered from the defendant.

A significant element of the shortfall was attributable to the fact the costs claimed exceeded the last approved cost budget for several phases of the litigation.

The protected party (though their litigation friend) had been advised at the outset by the solicitors that there was usually a shortfall in costs recovery, and this was usually around 20%.

During the course of the claim, the solicitors advised the protected party of the level of costs that were being incurred and the likely level of shortfall. The final shortfall was within the level of shortfall advised. What the solicitors did not do was advise that costs were being incurred in excess of the last approved budget and how this would impact the recoverable costs.

The Court concluded, in relation to the budget overspend, that as between the solicitors and the claimant, those costs were unreasonably incurred, were unreasonable in amount and were consequently disallowed.

The Court observed:

- The authorities relied on by the solicitors did not "support the proposition that a solicitor is obliged only to provide a client with general information about a likely shortfall in costs which might fail the standard basis tests of reasonableness and proportionality, without explaining anything about, for example, a substantial budget overspend and its likely consequences".

- "A costs budget sets a figure for recoverable costs. Costs incurred in excess of budget are likely to come straight out of the client's pocket, with no prospect of recovery. It follows of necessity that it is incumbent upon a solicitor to monitor accruing budgeted costs … and before budgeted figures are exceeded, to advise the client of the implications of doing so and of such options as applying for budget revision or avoiding the overspend".

- The budget overspend was unreasonably incurred and unreasonable in amount, precisely because [the solicitors], having themselves given no thought to the effect of the costs management orders, gave [the litigation friend] no opportunity to consider whether it was appropriate to incur expenditure in excess of budget that was in consequence likely to be irrecoverable".

It is imperative that solicitors monitor costs as they are being incurred as against approved costs budgets and keep clients properly informed of any potential, or actual, overspend.

In this issue:

Escaping Fixed Costs

October 2023 is due to see the extension of fixed costs (between the parties) for the vast majority of claims valued up to £100,000.

It is important to note that it is possible to contract out of between the parties fixed fees. Personal injury solicitors should be familiar with this issue given the existing fixed fee regimes. For litigators unfamiliar with the operation of the existing fixed costs regimes, this is an important issue to be aware of.

Although there may be good reasons why parties might be willing to deliberately contract out of fixed fees, there is the much greater likelihood that one party (usually the defendant) will inadvertently contract out and find themselves paying costs at a much higher level than anticipated.

The problem arises from the wording used when settlement of a claim is agreed. To the extent to which the agreement is simply to pay damages and "costs", there should be no problem.

In *Ho v Adelekun* [2019] EWCA Civ 1988 the defendant made a Part 36 offer to settle a claim, that would normally have been subject to fixed costs, and stated that if the offer was accepted the defendant would pay the claimant's costs "subject to detailed assessment if not agreed". The offer was accepted. The Court of Appeal concluded the use of the words "detailed assessment" should not be taken to imply an intention to displace the fixed costs regime and accordingly limited the recoverable costs to fixed costs.

However, in *Doyle v M&D Foundations & Building Services Ltd* [2022] EWCA Civ 927 the Court of Appeal reached a very different decision. The parties settled a claim, which would otherwise have been subject to fixed costs, by way of a Consent Order that included provision that the defendant would pay the claimant's costs, "such costs to be the subject of detailed assessment if not agreed". The offer was accepted. Here, the Court of Appeal concluded that:

> "there is no ambiguity whatsoever as to the natural and ordinary meaning of 'subject to detailed assessment' in an agreement or order as to costs. The phrase is a technical term, the meaning and effect of which is expressly and extensively set out in the rules. It plainly denotes that the costs are to be assessed by the procedure in Part 47 on the standard basis (unless the agreement or order goes on to provide for the assessment to be on the indemnity basis)."

Parties need to be very careful with the wording used when making, or accepting, offers to settle.

Contact Us …

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

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Qualified One-Way Costs Shifting – The New Regime

Major reforms were introduced to the Qualified One-way Costs Shifting (QOCS) regime from 6 April 2023.

The previous rules, as interpreted by the courts, had been viewed as being overly generous to claimants and these reforms were designed to produce a more level playing field.

The Court of Appeal's decision in *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654 severely limited the circumstances in which a defendant could off-set a costs order in their favour against a claimant's damages. CPR 44.14(1) provided:

> "orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant"

The Court of Appeal concluded:

- Acceptance of Part 36 offer in time did not constitute an order for damages and interest.
- A Tomlin Order, with the damages provision contained within schedule of the order, was not an order for damages and interest for these purposes.

Consequently, in neither of these circumstances was there an "order for damages" and there was therefore nothing for the defendant to off-set any costs order against. For practical purposes, this meant that the only circumstances where a defendant would be able to off-set a costs order was where the case had proceeded all the way to trial and an order for damages was made by the court.

In *Ho v Adelekun* [2021] UKSC 43 the Supreme Court ruled that defendants could only off-set costs orders in their favour up to the amount of damages and interest ordered in the claimant's favour. In other words, where no damages are awarded, there could be no off-setting against any costs orders the claimant has already obtained.

The amended CPR 44.14 reads (with amendments underlined):

1. Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for, *or agreements to pay or settle a claim for, damages, costs* and interest made in favour of the claimant.

2. For the purposes of this Section, orders for costs includes orders for costs deemed to have been made (either against the claimant or in favour of the claimant) as set out in rule 44.9.

3. Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

4. Where enforcement is permitted against any order for costs made in favour of the claimant, rule 44.12 applies.

5. An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

The Explanatory Note to the Civil Procedure (Amendment) Rules 2023 introducing the new rules summarises the changes:

> "(i) to allow the court in cases falling within the scope of the qualified one-way costs regime to order that the parties' costs liabilities be set-off against each other, *Ho v Adelekun* [2021] UKSC 43 having previously found that this rule, properly construed, did not allow the court to do so; and
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> (ii) to include within this rule, as well as deemed orders, agreements to pay damages or costs, so to allow the off-setting of costs orders made in favour of a defendant and ensure that offers made under Part 36, and, for example, settlements concluded by way of a Tomlin Order, come within the rule"

As always with such changes, the transitional provisions are crucial. The new rules apply:

> "only to claims where proceedings are issued on or after 6th April 2023"

PD 7A deals with the meaning of "issued". There is a distinction between the date of issue and the relevant date for limitation purposes:

> "Proceedings are started when the court issues a claim form at the request of the claimant (see rule 7.2) but where the claim form as issued was received in the court office on a date earlier than the date on which it was issued by the court, the claim is 'brought' for the purposes of the Limitation Act 1980 and any other relevant statute on that earlier date."

The date the court issues the claim form is therefore the trigger for the new QOCS rules, even if a different date may be relevant for limitation purposes.

Are Your Retainer Documents Ready for the Fixed Fee Extension?

Section 74(3) of the Solicitors Act 1974 states that, on assessment, a solicitor may only recover from their client the costs which would be recoverable on a between the parties' assessment. This limitation only applies to contentious business in the County Court. This limitation can be disapplied by rules of court and CPR 46.9(2) does disapply s74(3) if there is a written agreement between the solicitor and the client that allow this.

With the extension of fixed costs for most claims with a value of up to £100,000, this means that for contentious County Court matters (i.e. County Court claims where proceedings are issued) solicitors will be limited to the fixed costs figures unless they have set out in writing that s74(3) is not to apply to the retainer. Solicitors must ensure their retainers allow for this. Further, to the extent to which solicitors wish to seek any shortfall in costs recovery from the client, the possibility of the shortfall should be clearly set out in the retainer documents.

Now is the time to be reviewing retainer documents.

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