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Legal Costs Briefing

Newsletter - December 2015 Volume 1, Number 4

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HAPPY CHRISTMAS!

Welcome to the December Edition of our Legal Costs Briefing

The last twelve months have presented many challenges to all those working in the legal costs sector.

Costs budgeting, the delayed introduction of the new format bill of costs and the debate on the extension of fixed costs has meant it is more important than ever to keep up to date on current events.

In this edition we will consider a number of the issues and factors that will no doubt make a great impact in 2016.

We hope you find this edition interesting and all at Goodwin Malatesta wish you a happy Christmas and a prosperous New-Year.

News in Brief

To mediate or not to mediate? that is the (costs) question

In the recent decision of *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21(Costs), Master O'Hare considered the appropriate order to make where an unsuccessful Defendant had refused the Claimant's offer to mediate in respect of costs.

The Master pointed out that most of the decisions in relation to a refusal to mediate, relate to cases where the successful party, rather than the unsuccessful one, has refused to mediate. The Master believed that the

Defendant's refusal to mediate was unreasonable, "*If the party unwilling to mediate is the losing party, the normal sanction is an order to pay the winner's costs on the indemnity basis, and that means that they will have to pay their opponent's costs even if those costs are not proportionate to what was at stake"*.

However, the Master did not consider that he should impose this penalty prior to when the Defendant received the Claimant's offer to mediate and therefore ordered that indemnity costs should apply from a date three days after the offer was sent.

Of course, a party cannot be forced to mediate, however, if a party does not wish to mediate, they should respond to the offer to mediate, providing reasons why they do not wish to engage in mediation. In *Halsey v Milton Keynes* [2004] EWCA Civ 576 Lord Justice Dyson held that *"…factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success…"*, although this is not a checklist.

If the refusal to mediate can be shown to be reasonable, then it is unlikely that costs sanctions will be imposed, however, that is a risk that a party takes when rejecting an offer to mediate.

Costs Budgets – Again…

The CPRC has confirmed that changes will be made to the costs budgeting process so that for cases of less than £50,000 the budget will be filed with the directions questionnaire and for cases over £50,000 it will be filed twenty one days before the CCMC. It is hoped that these revised timescales will allow the parties further time in which to negotiate the budget, rather than having to have the same set by the court, thereby reducing the current burden placed on the courts by the budgeting process.

To reinforce this, the parties will also be required to file an agreed budget discussion report not less than seven days prior to the CCMC setting out the figures which are agreed and not agreed for each phase, and a brief summary of the disputes on the phases. Although some courts currently ask for such a document in the directions, this will now be codified in the Rules.

There will also be another paragraph included in the PD intended to end the debates over whether the court should assess hourly rates when setting the budget. The minutes of the CPRC meeting record that *"It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget."*

It has not been announced when the changes will come into place and the exact wording of the same has yet to be determined.

Small Claims Limit Increase

The Chancellor recently announced plans to increase the small claims limit for

damages to £5,000 and get rid of general damages for 'minor' soft tissue injuries. The announcement has not gone down well with many practitioners; the indomitable Dominic Regan tweeted "*Neither the MoJ nor the Judiciary was told of the Treasury dabbling in PI. MOJ should retaliate and abolish tax. That will teach them*".

He also observed possible issues in relation to denying people damages for injuries they have sustained, being a fundamental principle of the justice system. If the move goes ahead, then the wording of the Rules in this regard will be crucial.

Public Funding v CFA's:

Let the Battle Commence!

Hyde v Milton Keynes Hospital NHS Foundation [2015] EWHC B17(Costs) is one of many recent decisions in relation to the change from a public funding certificate to a CFA. The questions that Master Rowley had to consider were whether the Solicitors were able to change funding from a Legal Aid Certificate to a CFA supported by an ATE premium, and whether it was reasonable for the Claimant to have made such a change.

Background

The Claimants had taken out legal aid and obtained various extensions to the same. In November 2012, however, the LSC refused to increase the funding limitation on the certificate. Despite attempts by the Claimant's Solicitor to get the LSC to change their mind, they refused and so the solicitor entered into a CFA with the Claimant.

Discharge

However, as has become commonplace, when the Claimant changed from public funding to the CFA, she failed to discharge the certificate prior to the CFA being entered into, although the Solicitor did provide a Notice of Funding.

Master Rowley considered the issues and determined that the serving of the N251 on the Defendant satisfied the need for formality in notifying the Defendant of the end of costs protection, observing that:

> "*where a party has exhausted the costs that can be claimed under a certificate so that it is 'spent', they can in principle establish a discharge by conduct in the same manner as certificates in which all of the work up to a limitation of scope has been carried out. The effect of that discharge is to end the services funded by the LSC and enable a private retainer to*

fund the remainder of the proceedings."

Interestingly, he rejected the Claimant's argument that notification was not necessary at all, meaning that a different conclusion may be made if a Claimant failed to provide any N251.

Quantum Meruit

A further issue arose in that the Defendant argued that the signing of the Claimant to a CFA whilst public funding was in place, contrary to the legislation and case law so the CFA was unenforceable and therefore Parts 15 and 16 of the bill should be assessed at nil.

Master Rowley did not need to determine the issue, having held that the decision to enter a CFA was a reasonable one, but provided his comments, considering that in the absence of any misconduct (such as that in *Merrick v Law Society* [2007] EWHC 2997), the parts of the bill relating to the CFA could be assessed as if they had been done under the certificate.

Distinguishable

This case can be distinguished, however, from the other similar cases where claimants have changed funding in or around March 2013. Master Rowley commented that *"the arguments are very much fact specific and the reasonableness of the decision to change funding here was only coincidentally close to the change in regime"*. Thus, this case very much turns on its own merits.

Alternatively…

It is particularly clear, when considering another of Master Rowley's decisions - *Surrey v Barnet & Chase Farm Hospitals NHS Trust* [2015] - that each case is fact-specific.

Unlike in *Hyde*, the decision to change to a CFA in *Surrey* appeared to have little or no connection to the financial limit having been reached or exceeded, indeed, the Master commented that *"…there is no indication in the witness statement or the letter that the costs in this case had got away from the fee earner and the situation needed to be remedied"* indeed, he went on to say that the limitation had been *"ignored"*.

Rather, the Solicitors for the Claimant contended that the reason for their move from public funding was due to the abolition of legal aid for most clinical negligence claims, but the Master was critical of such a contention, stating that, *"the position in respect of other cases cannot be of any relevance to the claimant in the decision he had to make*".

The Claimant's Solicitor also argued that the change was due to the Claimant having to *"make up the shortfall of any costs not recovered from the Defendant"*. Mr. Hutton, for the Defendant, argued that such an argument made no sense as any attempt to use damages to pay for costs would amount to the 'topping up' frowned on in *Merrick* (above). The Master agreed, stating *"to the extent that MS Stanford-Tuck thought that her client was in danger of having to pay costs to his solicitor, other than by way of the statutory charge, she was wrong to do so and any advice of that nature would be flawed*".

Although the Master considered that the issue of reasonableness in changing funding was *"a relatively low hurdle for the claimant to surmount"*, he pointed out that the most obvious reason to do so was because the costs limitation had been reached and the solicitor is concerned about proceeding when they will not recover the disbursements, in particular, if unsuccessful.

Furthermore, the Master held that the Claimant had entirely failed to give any advice to the client in relation to what the post-LASPO landscape would mean for the Claimant, and in particular, failed to advise the Claimant in light of the decision in *Simmons v Castle* [2012] EWCA Civ 1039. In the absence of this information, the Master held that the change from public funding to a CFA was not a reasonable one to have made in that case.

Conclusion

Whether the court will consider the change from public funding to CFAs was a reasonable one will very much depend on the individual circumstances of the particular case and the advice given to the Claimant.

Modernisation or the new Gordian Knot?

The new format bill of costs has now been revealed and opened up for consultation.

Can the problems with the new bill format be untangled?

The new format bill of costs has now been revealed and opened up for consultation. The reason for changing the bill of costs was in response to the comments in Lord Jackson's report that the current bill does not utilise technology efficiently and is based on a Victorian pocket book account and is therefore outdated. Lord Jackson envisaged a bill which was easier to read and provided information compatibly with the budgets. Regular readers will remember the article in relation to deconstructing J-Codes, which are designed to feed into the new bill format.

Although the theory of the new bill and the reasons for changing it may have made sense, the reality of the new format bill does not live up to Lord Jackson's imagining. The Association of Costs Lawyers put the new format bill out for consultation amongst its members and received comments like: '*labour intensive*'; '*logistical nightmare*'; '*cumbersome*' *and* '*format is confusing*'.

In reality, the new bill format causes a number of issues:

Solicitors will need to engage by obtaining J-Code software (for some at considerable expense), something many who have already felt the pinch from

Jackson are unwilling (or unable) to do. Furthermore, solicitors would have to be much more particular about the way in which they time record for the system to work; something that seems unlikely in a busy solicitor's practice.

The bill itemises the work down to setting out every letter individually. This does make the bill large, and somewhat cumbersome to consider. It also means that it is too big to print. There will be two versions of the bill; a shortened version which will be printable and the longer version, which will have to be served electronically. Of course, that means that if a Solicitor will not accept service by email, the Costs Lawyer will have to purchase CDs on which to serve the bill, increasing overheads.

It is the longer version on which points of dispute, replies and the assessment will be undertaken. Not only is that likely to prove difficult for county courts who are already under-resourced and struggling with basic technology, but will also mean that advocates, who will also need an electronic copy of the bill before them, will need laptops; something not all costs companies currently have.

Another effect of the new format bill is that it is likely to take longer to assess. Courts are already overburdened with provisional assessments, with many courts taking six months or more to deal with the assessment. The new format bill is only likely to make this worse. Further, detailed assessments for bills over £75,000 are also therefore likely to take longer, increasing costs further.

A voluntary pilot scheme is running in the SCCO from October 2015 to October 2016 for assessments of bills in the new format. However, given the apparent widespread dislike of the new bill and the small number of solicitors who are currently set up for J-Codes, it is unclear how many people will volunteer, or what will happen if the pilot produces little or no data. One thing is certain is that the report of the pilot which will be produced in October 2016 will make for interesting reading.

Fixed costs in Clinical Negligence: Will it make a difference?

Regular readers will remember in the August issue, we mentioned that the government had announced plans to cap costs in clinical negligence cases worth under £100,000. In fact, in the pre-consultation document issued by the Department of Health it appears that they want to increase that level to £250,000. In this article, we will consider the fixed costs regime (FCR) for RTA and EL/PL and consider what the effects of that FCR regime may have for any future clinical negligence regime.

Whilst there are those that do not disagree in principle with the introduction of a

fixed fee regime for clinical negligence cases, the Law Society argues that it is too early for such a change as, with the Jackson reforms still bedding-in, many of the effects of the changes have yet to be fully seen and a number of organisations (Action Against Medical Accidents, National Voices, Birth Trauma Association, Sands and Meningitis Now) have said that the current proposals fail to take into account unintended consequences of fixed costs.

The arguments in favour of fixed costs are that such a scheme provides certainty, as the parties know what the costs are, and that it reduces costs overall. There can be no question regarding the benefit of bringing certainty to the costs recovery process however, experience and anecdotal evidence of the FCR regime as it stands has shown that a reduction in the overall cost is not always the case.

For example, under the current regime, payment of the fixed costs must be made within 10 days. This deadline has been difficult for many Defendants to comply with, leaving them exposed to having further proceedings issued against them, which in turn increases the costs they are liable for.

Additionally, arguments often arise as to the level of disbursements, necessitating the issue of Part 8 costs-only proceedings for payment of the same, also exposing the Defendant to the additional costs of the assessment and the Part 8 proceedings.

In some cases, arguments have arisen as to whether a matter was properly removed from the portal, or in relation to the stage at which the case settled/should have settled, which will then also necessitate further proceedings and an assessment, once more exposing the Defendant to additional costs (particularly as such arguments are often listed for on detailed assessment, rather than a provisional one).

Following the decision in *Tasleem v Beverley* [2013] EWCA Civ 1805, the Part 8 costs are generally considered separately to, and payable in addition, to the assessment costs. The mechanism by which these are paid is under debate, although some courts will summarily assess for ease, technically, these should be subject to a provisional assessment in their own right, increasing the costs exposure further still.

A further issue arising is that in the RTA and EL/PL FCR, the levels that were set for the recoverable costs were lower than those recommended by Jackson following an assessment of the evidence. If the level of cases to which fixed costs applies was set at £250,000 and if the fixed costs were perceived by Claimant lawyers to be under-valued in clinical negligence as they have been in RTA and EL/PL cases, then the Law Society has warned that there may be a reluctance by Solicitors to take on those cases. This may, in turn, lead to an increase in litigants in person, which not only places a greater burden and cost on the already over-stretched courts, but also generally means an increase in costs for the Defendants themselves in dealing with litigants in person.

Some also wonder if the Department of Health or the MoJ will take note of experiences in the current voluntary fixed fee scheme for clinical negligence cases in Wales. That scheme applies to cases where the damages are lower than £25,000. However, some Claimant lawyers say that the scheme is not working alleging that most cases end up being removed from that scheme because of delays by the Defendants.

We must expect that some form of fixed costs regime will be introduced, however, unless lessons are learned from the current regimes there is a genuine risk that any such regime would be unlikely to reduce costs, and in fact, may lead to an increase in costs.

Meet The Team – Mark Kirby

Mark is the longest serving member of the team, joining Goodwin Malatesta in 2007.

He can be regularly found doing battle in the Senior Court Costs Office and is one of our key advocates dealing with both Detailed Assessment and Costs Budgeting hearings.

Marks tells us a bit about himself.

Why a career in law?

Sadly my dream of being a professional footballer never materialised and therefore an alternative career path was necessary! Following my time as a barrister's clerk my interest in the law grew and once the opportunity for a career in costs presented itself I seemed to find my perfect vocation in life.

What do you enjoy about your work

I enjoy the challenge of analysing a case in the whole and thereafter identifying the key or novel arguments in order to obtain the desired outcome for the client.

Career high

The 8th floor of the Thomas Moore Building! On a serious note, whenever a successful outcome is achieved for those I am representing, it gives me a great sense of satisfaction.

Favourite Book

The Civil Procedure Rules or anything on sports!

Favourite Film

JFK, as numerous people will tell you I am a bit of a conspiracy enthusiast!

TV Programme

My current favourites are Game of Thrones and Boardwork Empire.

What are you doing for Christmas?

Home with the family to recharge the batteries ready for whatever the New Year may bring.