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Legal Costs Briefing

Newsletter – April 2016 Volume 2, Number 1

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Welcome to the April Edition of our Legal Costs Briefing

2016 is already over three months old and Spring is most definitely in the air!

Not only are we one quarter of the way through 2016 but it over three months since the last Briefing. So time for more news!

2016 is proving to be the eventful year in legal costs that everyone expected.

In this edition we will consider a number of issues and factors that are causing the greatest interest. In particular we will be looking at the changes being introduced to the costs budgeting regime and the ongoing debate into fixed costs.

As ever we hope you find this edition interesting and we hope you had an enjoyable Easter!

News in Brief

Laura Wade joins the team at Goodwin Malatesta

We are very pleased to welcome Laura Wade to our team of Costs Lawyers. Laura is a Law and LPC graduate and joins us with over 8 years' experience in civil litigation costs, largely conducting cases in personal injury and clinical negligence.

Laura's key skills involve drafting large and complex bills of costs and she will play an important role in our expanding team dealing largely with costs recovery and supporting the rest of the team dealing with points of dispute and costs budgeting.

Goodwin Malatesta Celebrates 10 years!

Goodwin Malatesta celebrated its 10th birthday with a reception on the Tower Bridge Walkways with family and friends. It was a wonderful event that allowed Malcolm and Dom to thank their families, staff and friends for all their support over the last 10 years. It was an amazing evening of food, drink and music and proved to be a very apt way to celebrate the firm's "towering" achievements!

CPR Part 36 v Fixed Costs - Broadhurst v Tan [2016] EWCA Civ 94

This is an important decision dealing with the inconsistent interpretations of the Part 45 fixed costs and Part 36 rules. In these two linked cases (Broadhurst v Tam and Smith v Taylor) heard together, the Court of Appeal has finally resolved these inconsistencies.

In Broadhurst, HHJ Robinson had determined that there was no difference between profit costs on the indemnity basis and fixed costs; therefore the amount awarded for indemnity costs was the same as fixed costs. However, in Smith, HHJ Freedman determined that fixed costs were inconsistent with an award of indemnity costs and therefore ceased to apply; therefore, costs would be allowed in the usual way. Both decisions were appealed.

Lord Dyson (with McCombe, LJ and Richards, LJ assenting) allowed the appeal in Broadhurst and dismissed the appeal in Smith.

The difficulty was caused, as the Court of Appeal pointed out, by Rule 45.29F (8) providing that, where a Part 36 offer is accepted in a case where fixed costs apply, *"rule 36.10A will apply"*.

Rule 45.29F(9) then provides that, where in such a case upon judgment being entered the Claimant fails to obtain a judgment more advantageous than the Claimant's Part 36 offer, "*rule 36.14A will apply instead of this rule*". It does not, however, provide for what should happen where the Claimant obtains a judgment that is more advantageous.

Whilst Part 36.14A applies with modifications, the court considered that rule 36.14(3) was not modified by rule 36.14A, and it therefore continued to have effect. Lord Dyson therefore concluded that the tension between rule 45.29B and rule 36.14A must be resolved in favour of rule 36.14A.

The effect of this in practice will be that where a Claimant makes a successful Part 36 offer, he will be awarded fixed costs to the last stage under rule 45.29C (Table 6B) and then costs to be assessed on the indemnity basis from the date the offer became effective.

It must also be anticipated that this judgment will have an impact in other types of proceedings involving fixed costs.

To Refuse or Not to Refuse…. Offers to Mediate

In the recent case of case *Reid v Buckinghamshire Healthcare NHS Trust* [2015] EWHC B21 (costs), the Claimant made an offer to mediate, which the Defendant refused without reason around six weeks later. Master O'Hare considered the question whether it had been shown by the unsuccessful party that the refusal to agree to mediate had not been unreasonable. As no reason at all was given, the refusal to mediate was found to be unreasonable and the Trust was ordered to pay the costs of the assessment on the indemnity basis from the date of service of the offer to mediate. Master O'Hare observed that, "*this penalty is imposed because a court wants to show its disapproval of their conduct".*

In *Bristow v Princess Alexandra Hospital NHS Trust* (Case HQ 12X02176), the Defendant again refused to mediate. This time, the Defendant stated that the refusal was due to the matter already being set down for a detailed assessment hearing. Master Simons considered the offer of mediation made by the Claimant reasonable but felt it unreasonable for the Defendant to take three months to reject the offer with no good reason. He therefore ordered the Defendant to pay all the costs of the assessment on the indemnity basis.

The solicitor who acted for the Claimant in the latter of these cases subsequently said that the rulings had not altered the NHSLA's tactics in the two months that followed them, observing that "*We had this ruling at the beginning of November and we have still not had one mediation. Insurers have been slow on the uptake but have accepted mediations in some cases. They care about the bottom line".* It may of course be the case that none of the subsequent cases were suitable for mediation.

It is quite clear that any refusal to mediate in costs proceedings should be made only when good reason can be provided. What amounts to good reason will, of course, be somewhat subjective and may be a short list, but the fact that a hearing has already been listed will not be on it!

Incurred costs may not escape costs budgeting

SARPD Oil International Ltd v Addax Energy SA and another [2016] EWCA Civ 120 is the Court of Appeal's first decision focusing on the distinction between incurred costs and future costs in costs budgets. It was held that there is little difference between the practical effect of the Court's comments on incurred costs and its approval of estimated costs. This is because a costs management order not only approves the estimated costs but also allows comments on the incurred costs.

The conclusion from this judgment is that when the Court has commented on incurred costs during the costs management process, a Costs Judge should give the same weight to those comments as is given to the Court's approval of estimated costs in the costs budget.

It was also held that where parties have agreed a costs budget and the agreement is recorded in a costs management order, a Court assessing costs on the standard basis will not depart from either the estimated costs element or the incurred costs element unless satisfied there is good reason to do so.

This finding may come as a shock to some parties who have not raised arguments with regard to incurred costs during the costs management process. If the incurred costs are "agreed" that may be deemed to be the "approval" of that amount.

It is therefore vitally important to ensure that any objections that exist regarding incurred costs are raised with the Court during the costs management process and recorded in the costs management order when possible.

All change again for Costs Budgets!

As of 6 April 2016, the rules in relation to budgets are all change again.

The changes, which apply to proceedings commenced on or after 6th April 2016, address a number of issues that have become apparent since the introduction of costs budgeting as well as revising the Precedent H and introducing a Budget Discussion Report.

Amongst the rule amendments is the provision that only the first page of the Precedent H is required to be filed and exchanged where the value of the case is under £50,000 or the costs are less than £25,000. Previously, this requirement only applied to cases where the costs were less than £25,000 and this addition of "value" is no doubt intended to relieve the Court's burden by reducing the number of full budgets required to be assessed.

This will also be assisted by a further addition that claims made by or on behalf of a child where proceedings are commenced on or after 6 April 2016 will be excluded from the budgeting regime. If the Claimant reaches majority during the claim, the exception will continue to apply unless the Court orders otherwise.

In cases where a Claimant has a limited or impaired life expectancy, the Court will now ordinarily not apply costs management, although the option will remain for costs management if the Court considers it appropriate.

The new rules also change the point at which a costs budget is to be filed. For cases where the value of the claim is under £50,000 the budget must be filed with the directions questionnaire. For all other cases, it must be filed not less than 21 days prior to the first CMC. The parties must then file an agreed budget discussion report (Precedent R) no less than 7 days prior to the first CMC.

Alongside the new rules, the budget document has also been updated and a new guidance document has been prepared to accompany it. This now advises that any party may apply to the Court if it considers that another party is behaving oppressively in seeking to cause a party to incur costs disproportionately and the Court will grant such relief as may be appropriate.

Since the introduction of costs budgeting there has been a variable approach to costs draftsman's fees. Although they are not supposed to be in the budget, many include them anyway, seemingly out of fear that if they are not included they may not be allowed on any future standard basis costs assessment. The new guidance document provides a more definitive answer as to how these are dealt with; they are not to be included in the budget, but will be inserted after the final figure has been approved by the court.

An interesting change to the budget layout is in relation to the PTR stage. Provision remains for updated budgets to be prepared at the PTR stage, however, unlike the old Precedent H, the new precedent budget does not include any incurred costs for that phase.

Currently, the budget is often updated at the same time as the parties are discussing directions and in some cases, the parties have already prepared a draft of the PTQ. If the budget no longer provides for incurred costs at the PTR stage, then it appears that the only option will be to include any incurred costs in the estimated section within that phase to ensure that those costs are not lost.

Goodwin Malatesta have a dedicated costs budgeting team who are already well versed with the new rules and are fully prepared for the use and completion of the revised precedent forms with new templates ready for use.

To fix costs or not to fix costs? – The Multi-Million Pound question

The debate on fixed costs is in full swing with various people wading into the fray.

But what has been said and by whom?

The introduction of fixed costs in clinical negligence is still an issue, but in light of Lord Jackson's recent speech calling for fixed costs in all cases with a value up

to £250,000, fixed costs generally is also very much on everyone's mind. In this article we will summarise the debate so far.

In its response to the pre-consultation document, the Law Society stated that it did not oppose the introduction of fixed costs for clinical negligence, providing that it was for "*truly simple, straightforward and genuinely low value cases*" (i.e., those where the value is £25,000 and where causation and breach are admitted). They went on to suggest that "*instead of rushing to introduce a fixed costs scheme on the basis of inadequate, unpublished and premature data, there should be a proper, robust and transparent independent review of the impact of LASPO on the volume of claims received, the value of damages awarded and the associated actual legal costs recovered*".

Master Cook has also expressed his views on fixed costs in clinical negligence and has suggested that there should be further research into the current regime, pointing out that budgeting in clinical negligence appears to be working as the Senior Costs Judge, Master Gordon-Saker told him that the Senior Court Costs Office have very few assessments in budgeted clinical negligence cases.

Constitutional Arguments

The Law Society also raised an issue with the constitutional implications of the Department of Health introducing such a scheme, saying *"…It is crucial that the already significant inequality of arms is not further exacerbated by the Government changing the costs rules in such a way that places itself in an even more privileged position in relation to people who bring justifiable actions against it for clinical negligence"*. This was then expounded on further in an article in the Law Society Gazette, in which John Hyde made the observation that *"the government is both defendant and reformer, and is fundamentally conflicted"*. He also considered that it was *"unconstitutional to make claims harder to bring"*.

However, Parliamentary Under-Secretary of State for Health Ben Gummer announced at the beginning of the year that the intention remains to introduce fixed costs in October 2016, notwithstanding that the consultation has still not yet been published although this is expected in May.

Despite the Government's intention to introduce a fixed costs regime as soon as possible, Lord Jackson called for the clinical negligence implementation to be stayed, although not for further research to be undertaken. He maintained that there should be a "*coherent structure*" to fixed costs and rather than implementation by case, concluding that fixed costs should be introduced universally and concurrently. He suggested that such a regime could still be implemented by the end of the year.

Access to Justice

People have also raised the issue of access to justice, with somewhat differing opinions. Lord Jackson believes that "*high litigation costs inhibit access to justice… We must therefore establish a fixed costs regime for all non-personal injury cases in the fast track*".

Lord Neuberger appears to agree, saying in a recent speech that "*the increased cost and complexity of litigation coupled with the shrinking of legal aid means that access to justice is very much at risk. Steps are being taken in England and*

Wales in the form of… increasing… those [claims] where only fixed costs are recoverable from the loser…"

In response to Lord Jackson's fixed costs proposal, Bar Council Chair Chantal-Aimée Doerries QC, said that, "*there is also a risk that access to justice will be restricted… lawyers may not take on complicated, low value cases, thus preventing legitimate claims from being pursued*".

Other Issues

Lord Jackson suggested in his speech a table with a set of figures for a possible fixed costs regime. To this table was added the proposal that the fixed cost for any stage would be payable only if a work stage is completed. Also, 50% of the fixed cost would be payable if proceedings were issued and the work stage has been substantially started.

He has also commented that, under his proposed regime that fixed costs will not apply in respect of any stage in respect of which the court has awarded indemnity costs. This is something that was overlooked in previous fixed costs regimes, although recently resolved in Broadhurst v Tam (see above for commentary). This will also have the potential to introduce uncertainty, with a defending party being unaware what their outlay will be if a Claimant's Part 36 offer is successful.

In addition, Lord Jackson suggested that "*the Court may add a percentage uplift to fixed costs for part or all of the case, if it considers (1) that the claim involved exceptional complexity or (2) substantial additional work was caused by the conduct of the other party*". It is possible that this will, in the early stage, also give rise to a high number of assessments and/or further satellite litigation as parties seek to define what amounts to '*exceptional complexity*' and again, would appear to undermine the intention of '*certainty*'.

What Level Fixed Costs?

Whether any fixed costs regime will be set for cases up to £250,000 is still up for debate, with Ben Gummer recently suggesting that any regime may be set for lower value cases: "*that limit was not arbitrary, but drawn from the original intentions of Lord Jackson's review on civil litigation costs in 2010… That is, however, subject to consultation*".

Lord Jackson suggested that the figures "*could be index linked. Alternatively, a review of the fixed costs might become an annual item on the Rule Committee's agenda. The Committee would require proper evidence for that purpose*". This view appears to be shared by Master Cook, having said that there should be "*a robust and predicable mechanism to update rates paid to lawyers linked to actual costs in the real world"* adding that there should be *"suitable uplifts … for difficult and complex claims such as clinical negligence…*"

However, Lord Jackson has also been calling for a review of the current fast track fixed costs regime almost since its inception (especially since those figures were set at lower than those recommended by Lord Jackson in his final report). It is a call that has been ignored by the Ministry of Justice to date.

Master Cook suggested in respect of Lord Jackson's proposed figures for all multi-track claims up to £250,000 that they "*do not seem to me sufficient to enable the necessary work to be undertaken on breach of duty and causation with the*

required experts in clinical negligence claims", which does not bode well for the smooth introduction of a fixed costs regime.

We can assume that a successful Defendant will also be limited to the figures set out in the tables if Qualified One-Way Costs Shifting does not apply. However many may consider that where they have worked hard to overcome a claim, they, too should be entitled to reasonable and fair remuneration, rather than a token sum.

Conclusion

It is likely that a fixed costs regime of some description will be introduced; the Government seems determined in this respect. However, whether this is extended into other areas of the multi-track, or to what level, has yet to be seen.

Justice Minister Lord Faulks has said that the Ministry of Justice is already considering areas in which fixed costs might be "*appropriate and workable*" which suggests that the debate on the introduction of fixed costs is to rage on for a good while yet.

Changing Funding – The New Black

Defendants have had a recent run of successes in arguing that it was unreasonable for a solicitor to change from public funding to a CFA pre-Jackson.

In *Surrey v Barnet & Chase Farm Hospitals NHS Trust* [2015] EWHC B16 (Costs), the advice given to the Claimant was not comprehensive, particularly in relation to the 10% uplift that was charged on his damages by changing to a CFA, even though the CFA in this case was a CFA Lite. In light of this, the change from Public Funding was ruled by Master Rowley to be an unreasonable one and the additional liabilities were, therefore, not recoverable.

In *Yesil v Doncaster & Bassetlaw Hospitals NHS Foundation Trust* [2015], the Claimant's solicitor again failed to give comprehensive advice, in particular in relation to the 10% uplift that would be charged on his damages by changing to a CFA. District Judge Besford held that, *"In my judgement it is inconceivable that a client would not consider the option of an additional 10% uplift on general damages a material factor. The omission to raise this factor, even if the claimant immediately rejected it, seriously calls into question the adequacy of the advice given".* The additional liabilities were therefore disallowed.

This was also reflected in *AH v Lewisham Hospital NHS Trust* [2016] EWHC B3 (Costs), where the advice in relation to the 10% uplift was, again, lacking, with Deputy Master Campbell deciding that, "*What the client should have been told*

was that "if you move to a CFA you will forfeit immediately the right to an additional 10% of the general damages you recover, which we estimate could be £175,000, so as much as £17,500". It was therefore advice that was unreasonable".

In *Ramos v Oxford University NHS Trust* [2016] (SCCO), Master Leonard observed that, as a principle, *"A decision to choose a CFA/ATE arrangement rather than LSC funding (where available) must have been a reasonable decision. If it was, then the additional cost attendant on that choice will (insofar as reasonable in amount) be recoverable from the paying party. If not, then CPR 44.4 will preclude recovery of the additional costs unreasonably incurred"*. In the Ramos case the Master considered that the Claimant had not been given the proper advice and therefore disallowed the success fees.

Likewise, in *Davies v Wiltshire Primary Care Trust* [2016] (SCCO), the solicitor changed from Public Funding to a CFA in 2009, however, Master Leonard again considered that there was insufficient advice provided to the Claimant in relation to their liability for the additional liabilities in the event of a shortfall. Therefore, the decision had not been a reasonable one and the additional liabilities were disallowed.

However, there is always at least one fly in the ointment and here it comes in the form of *AMH v The Scout Association* [2015] (SCCO). Master Leonard again considered the issue of the change from Public Funding to a CFA Lite and even though he considered that the advice given to the Claimant was incomplete, he ultimately concluded that the decision to change from Legal Aid to a CFA was reasonable. The reasoning appears to be that as the client was transferred to a CFA Lite, there was no risk of deduction from damages and whilst the advice was brief, it was accurate and focused on preserving the client's damages. Therefore, the additional liabilities were allowed.

And it is not alone, in *LXM v Mid Essex Hospitals Services* [2010] EWHC 90185 (Costs), the change from legal aid funding to a CFA was also considered a reasonable one. In that case, the Claimant was provided with appropriate advice in respect of the change and Master Gordon-Saker concluded that, "*the conditional fee agreement route would be obviously more advantageous to the Claimant because the only impact of costs on her damages will be the unrecovered Legal Aid costs in Leigh Day's bill"*.

Likewise, in *Hyde v Milton Keynes Hospital NHS Foundation Trust* [2015] EWHC B17, the Solicitor chose to change from Legal Aid to a CFA because the funding on the certificate had been exhausted and the LSC refused to extend it. Master Rowley considered that, in the circumstances, such a change was entirely reasonable and allowed the additional liabilities. That decision was recently upheld by Mr Justice Soole on appeal (*Milton Keynes Hospital NHS Foundation Trust* [2016] EWHC 72 (QB)).

Whilst it would appear that Slater & Gordon and Irwin Mitchell (the main two firms against whom many of the decisions so far have been made) have at times failed to give proper advice, it is not necessarily the case that every solicitor has.

Further, there are more factors in question as to whether the advice was adequate, and not all the decisions are uniform – for example, the contradictory way in which the courts dealt with the cases involving CFA Lites. It is therefore

not clear whether the trend of disallowing the additional liabilities will continue, or whether only some firms will be adversely affected.

What is clear, however, is that the challenges where such a funding change has taken place will continue and at times will succeed, no doubt resulting in further appeals involving these issues in the future.

Meet The Team – Andrew Cleave

Andrew joined Goodwin Malatesta 2009 as a costs consultant and has since qualified as a Costs Lawyer.

This month we have asked Andrew to take part in our “Meet The Team” section.

What do you enjoy about your work

I enjoy working with my colleagues, in particular joining Mark and Kevin to debate not only the most recent legal costs issues but also whether Arsenal or Spurs are the best football team in North London!

Career high

Being presented with my Costs Lawyer Certificate by Master Campbell in his kilt!

Favourite Book

A Shropshire lad

Favourite Film

Enemy at the Gates

TV Programme

The Night Manager

What did you do over Easter

Just the usual Easter relaxing with family and friends