goodwin malatesta

Legal Costs Briefing

Newsletter - August 2016 Volume 2, Number 2

In This Issue

Useful Links

Axon v Ministry of Defence [2016] EWHC 883 (QB) (19 April 2016)

Parke v Butler [2016] EWHC 1251 (QB) (26 May 2016)

BNM v MGN Limited [2016] EWHC B13 (Costs) (03 June 2016)

May & Anor v Wavell Group Plc & Anor [2016] EWHC B16 (Costs) (16 June 2016)

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Welcome to the August Edition of our Legal Costs Briefing

It seems that Summer has finally arrived along with the latest edition of the Goodwin Malatesta Legal Costs Briefing.

Hopefully this edition reaches you in time to allow you some light reading if you are unable to find any good reading material at the airport bookstore.

The last few months have been extremely eventful, Leicester City won the Premier League, Ukraine won the Eurovision Song Contest; oh and the UK voted to leave the European Union!

As ever there are many legal costs issues for us to cover, including reviews of where we are with qualified one-way costs shifting and proportionality.

As ever we hope you find this briefing useful and interesting.

News in Brief

10% Hike in Court fees

On 25 July a host of new Court fees came into force, implementing a 10% increase. The full list can be found here but in relation to detailed assessment, they are:

On filing a request for a detailed assessment:

Where the party who files the request is legally aided or funded by the Legal Aid Agency (LAA): £220

Where the following applications are made, the fee payable depends on the amount of costs being claimed:

Filing a request for a detailed assessment where the party filing the request is not legally aided or funded by the LAA; or

Request for a hearing date for the assessment of costs following an order under part 3 of the Solicitors Act 1974

where the costs claimed are:

- Up to £15,000: £369
- £15,000.01-£50,000: £743
- £50,000.01-£100,000: £1,106
- £100,000.01-£150,000: £1,480
- £150,000.01-£200,000: £1,848
- £200,000.01-£300,000: £2,772
- £300,000.01-£500,000: £4,620
- More than £500,000: £6,160

Appeal against a decision made in detailed assessment proceedings: £231

Request to issue a default costs certificate: £66

Request or application to set aside a default costs certificate: £121

Application for approval of a costs certificate payable from the Civil Legal Aid Fund (only applicable if the original request for detailed assessment was filed before 1 July 2013): £50

Callum Morgan joins the team at Goodwin Malatesta

As part of the continued expansion of our costs management and advocacy teams we are very pleased to welcome Callum Morgan to the firm.

Callum has been working in legal costs since completing his Bar Professional Training Course in 2012. He will be working largely with the costs management team and will be providing advocacy and costs management services.

Callum's experience of providing advocacy in detailed assessment hearings will also be an invaluable addition to our costs assessment teams.

Part 36 v Part 45 – The Revisit

Earlier this year, we provided an update on the case of *Broadhurst v Tan* [2016] EWCA Civ 94 and the interrelationship of Part 36 with fixed costs and whether a party could claim the additional amount in costs proceedings where a Part 36 offer was beaten.

Now, in *Lowin v Portsmouth* [2016], Mrs Justice Laing has considered whether, when a Part 36 offer in respect of costs is beaten and the Claimant becomes entitled to indemnity costs, the cap of £1,500 still applies. At first instance, Master Whalan had determined that the cap should still be applied. However, on the appeal, Mrs Justice Laing considered that the conflict between Part 47 and Part 36 should be resolved in favour of Part 36, adding that dislodging the provisional

assessment costs cap would *"incentivise parties"* to accept reasonable offers in respect of their costs.

Interim Payments

Since the Jackson reforms, the wording in relation to interim payments at the conclusion of a claim has changed (see CPR 44.2(8).

With budgeting in most cases, it has proved relatively straightforward for courts to undertake this exercise, with the most common amount awarded being two thirds of the approved budget. In *Axon v MoD & NGN* [2016] EWHC 578 (Ch), the third party, NGN argued that they should be entitled to more than two thirds of the approved budget, since the budget had been approved.

Nicol, J, however considered that whilst *"some acknowledgement should be paid to this argument"*, in the particular case he felt that NGN's costs were high, that some of the costs had already been incurred by the CCMC and it was not for the Judge at that hearing to therefore approve or disprove them and that some of the costs in the budget related to work that NGN had not, in the end, undertaken. He therefore awarded two thirds of the approved budget as an interim payment.

QUALIFIED ONE-WAY COSTS SHIFTING

WHERE ARE WE NOW?

QOCS has now celebrated its third year but how much impact has it had? In this article we look at the various judicial decisions into how the rules should be interpreted and whether the system may be extended.

Discontinuance is no escape

In *Rouse v Aviva* (Bradford CC 2016), the Claimant filed a Notice of Discontinuance in a claim where the Defendant had raised fundamental dishonesty. No doubt the Claimant hoped that this would circumvent the application of QOCS.

However, HHJ Gosnell held that the introduction of QOCS did not alter the existing principle that the service of a Notice of Discontinuance *"is not the end of the matter for a Claimant"* and went on to say that if a Defendant believed that they could satisfy the court that the claim was fundamentally dishonest, *"they can ask the court to direct that an issue arising out of that allegation be determined"*.

The Claimant had not offered any reason to the Defendant for the decision to file a Notice of Discontinuance and it would therefore be possible for the Defendant to ask the court to draw an inference, but HHJ Gosnell pointed out that such a decision could not be taken on paper and a hearing would be required.

Although only a County Court decision, it is still a useful one in the absence of higher authority on this issue and will likely come as a relief to Defendants that in cases where they believe that they can show the claim is fundamentally dishonest, the Claimant cannot hide behind a Notice of Discontinuance to avoid paying costs.

QOCS and partially dishonest claims

Hughes, Kindon and Jones v KGM, whilst only a County Court decision, is still interesting. The Defendants defended a claim for personal injuries brought by three Claimants following a road traffic collision.

At trial, the Court found that the Claimants had exaggerated their injuries and awarded two of them £750 in damages and costs. The Defendant appealed, relying on s57 of the Criminal Justice and Courts Act (as amended) which allows a case to be found to be struck out for fundamental dishonesty even if part of the claim is genuine.

On the appeal, DDJ Eaton-Hart struck out the claims in their entirety, holding that the two claimants had *"presented a deliberate inaccurate position to the medical expert for financial gain"*. He therefore struck out the claim and awarded the Defendant their costs.

QOCS on Appeals

In *Parker v Butler* [2016] EWHC 1251 (QB), the Claimant appealed the dismissal of his personal injury claim. That claim had the benefit of QOCS protection and the costs that were awarded to the Defendant in principle on dismissal therefore could not be enforced.

On the appeal, Mr Justice Edis considered that the claim should be dismissed, but for alternative reasons to those given by the original Judge and provisionally awarded the costs of the appeal to the Defendant. The question that he was then asked to answer was whether the Claimant also had the protection of QOCS on the appeal, which would mean that the costs order could not be enforced.

Mr Justice Edis ultimately concluded that *"…for the purposes of CPR Part 44.13 an appeal between the claimant and the defendant in a personal injury claim is part of the proceedings which include a claim for personal injury… it more justly achieves what is plainly the purpose of the regime as divined from the Rules"*. This meant that the Claimant continued to have the benefit of QOCS protection in respect of the costs of the appeal.

Extending QOCS?

In another development on QOCS, a CJC Group Chaired by Rachael Mulheron has recently reported on their review of a number of discrete topics in relation to civil litigation, including the possible extension of QOCS to other areas, namely actions against the police, environmental claims and negligence claims against solicitors.

In relation to environmental claims, following the outcome of Compliance proceedings against the UK Government that found the regime in relation to environmental claims introduced by LASPO contravened the Government's obligations under the Aahaus Convention, the Government launched a consultation. The results of that consultation and the Government's response are still awaited and as such, the CJC replied to the consultation but undertook no further consideration. Whilst Lord Jackson in his final report had commented that in the event that the costs regime for environmental proceedings was in breach of the Aahaus convention and therefore prevented access to justice, then the solution would be to introduce QOCS into those proceedings. However, no steps have been taken by the Government so far to extend QOCS into this area.

Currently, actions against the police do not fall under the ambit of QOCS unless they include a claim for damages for personal injury. In his final report, Lord Jackson identified actions against the police as a class of claim in which the parties have an asymmetric relationship and one which, therefore, would benefit from the application of QOCS. The report observed that the CJC *"experienced difficulties in engaging with police force lawyers"* and that although comments were sought on several occasions from the Association of Police Lawyers, they did not respond. In contrast, the Police Action Lawyer's Group (PALG) provided what the CJC referred to as a *"strongly-argued submission"* as to why QOCS should be extended into police claims.

The CJC concluded that there were *"strong, if not compelling, arguments of principle… weighing in favour of extending the scope of QOCS protection… to claims against the police"* and that *"principled arguments for not doing so do not appear to have been made out"*. The accepted, however, that if this was to happen that a consultation would be required and it was, therefore, for the Government to take this forward if they chose.

However, there is a concern by the police that extending QOCS in this way will lead to more people being willing to bring claims, which, if true would consequently also increase the burden on the public purse. It seems doubtful, therefore, if any consultation will be forthcoming.

The particular negligence claims envisaged in the CJC consideration are those where a Claimant alleges that their PI claim was under-valued/under-settled by their solicitor. Whilst the argument to extend QOCS into this area was not made by a particular group, such as PALG with police claims, the CJC concluded that there was a *"fair case"* that would support the extension of QOCS to these types of claim. However, they also pointed out that very little data was available to them in relation to these types of case and that this is something that would need to be considered further if the matter was taken forward. Again, they observed that if QOCS was to be extended in this way that a consultation would be required and that it was for Government to take the next steps, although they also observed that the Government's "*appetite to do so is unknown"*.

Proportionality – What does it all mean?

Of all the Rule changes that were implemented in 2013, the redefining of proportionality has taking the longest to bed in. However the picture is starting to become much clearer.

In BNM v MGN [2016] EWHC B13 (Costs) Master Gordon-Saker had undertaken a line-by-line assessment of a bill and assessed it at £167,389.45, which included an ATE premium of £58,000. Although he considered that the ATE premium was not unreasonable and that it was necessary for the Claimant to have purchased it, he concluded that it was disproportionate, observing that "costs may be disproportionate even though they were necessary".

Master Gordon-Saker maintained that "it is clear that the new test of proportionality was intended to bring about a real change in the assessment of costs" and therefore considered that a premium of the amount claimed in a case which was worth £20,000 and which did not cover the whole of the claim was entirely disproportionate and therefore ruled that only half the premium was proportionate.

However, the old thorn in the Defendants' side of Rogers may be re-rearing its head. In *Banks v London Borough of Hillingdon, Master Gordon-Saker slashed the £24,694 premium in a claim worth £6,890 by 60% on the basis that it was disproportionate.*

DAS appealed and HHJ Karen Waldon-Smith overturned the Master's decision, holding that "there is not a determination of risk on a case-specific basis but on a 'basket of risk' with the successful cases supporting those that are lost." She concluded that it was therefore not for the Master to re-calculate the premium without access to the whole of that 'basket of risk'. She added that evidence was needed to challenge a premium.

There appears to be some disparity in the approach to take on reducing premiums. In Martin v Queen Victoria Hospital NHS Foundation Trust, the Defendant appealed the allowance of the ATE premium on assessment. HHJ Belcher also said that there should be evidence to challenge a premium, however, still reduced the premium from £3,843 to £2,500 under the umbrella of proportionality, holding that the Judge's determination that it was open to the Claimant to utilise a cheaper policy was within the context of proportionality rather than whether the premium amount was reasonable for a block-rated policy. HHJ Belcher went on to say that "I am conscious that the use of proportionality in this

could be said to undermine the principle that the use of block-rated policies cannot be said to be unreasonable. However, that is the result of the amended rules and the express difference between the issue as to whether a cost is reasonably or necessarily incurred, and the issue as to whether costs are proportionate…"

Defendants have been arguing for years that many premiums bear no resemblance to the claims and often bear no reasonable relationship to the amount sought. Whilst proportionality has always applied to premiums, historically, Judges have been reluctant to reduce premiums, especially following Rogers v Merthyr Tydfill. Defendants may therefore be hoping that the new proportionality test continues to have the 'teeth' that the old one lacked.

Master Rowley was also invoking the new proportionality test to slash the costs incurred in a private nuisance claim that was concluded when the Claimants accepted a Part 36 offer of £25,000 prior to the Defence being entered. In May & Anor v Wavell Group Plc & Anor [2016] EWHC B16 (Costs), the Claimants initially claimed £208,000 for their costs and this was reduced on a line-by-line assessment to around £100,000.

Master Rowley then went on to consider the proportionality of that sum, concluding that "the amount that can be recovered… is not the minimum sum necessary to bring or defend the case successfully… It is not the amount required to achieve justice in the eyes of the receiving party but only a contribution to that…" In the circumstances of this case, and the modest amount achieved by the Claimants, he therefore slashed this sum again to just £35,000.

Meanwhile, in the Competition Appeal Tribunal, Mr Justice Roth was considering proportionality when looking at applying a costs cap. In Socrates Training Limited v The Law Society of England and Wales, the Law Society claimed £600,000 in their budget and the Claimant £220,000. Mr Justice Roth pointed out that "there is no magic formula which produces an objectively 'correct' figure" , but considering the factors relevant to proportionality, he considered the amounts claimed were too high and therefore set the cap at £200,000 for the Claimant and £350,000 for the Law Society.

Online Courts and Unbundling

Mr Justice Briggs has recently announced that whilst the intention is that the online court will deal with all cases up to the value of £25,000, when it is first introduced, it will likely only deal with cases up to £10,000 in order to *"get past its teething troubles"*.

Briggs, J insists that the proposal for an online court does not mean the end of lawyers altogether, advising that there should be a *"very limited recovery of costs"* with the idea that this will cover an assessment by a lawyer at the outset and possible further assistance where required. He added that it will mean that the system will need *"more unbundling by lawyers".*

Whilst in *Minkin v Lesley Lansberg* [2015] EWCA Civ 1152 Lord Justice Jackson held that solicitors do not have a wider duty of care beyond their client retainer when offering unbundled services, the decision in *Sequence Properties Ltd v Kunal Balwantbhal Patel* (unreported), has potentially dealt a blow to solicitors providing unbundled services. In *Sequence Properties*, the Defendant filed an appeal bundle late and failed to serve the bundle on the opponent. The Defendant made reference to a solicitor assisting in the preparation of the bundle.

The Defendant was issued a costs order as a consequence of the late filing and he appealed relying on the fact that the order had not specified that the bundle had to be served on the opponent. Mrs Justice Aspin refused the appeal, relying on the fact that although there was no solicitor on record, the Defendant had had the assistance of a solicitor, the implication being that the solicitor would have known this and should have advised the Defendant accordingly.

The full judgement is not available, but the Law Society have commented that, if accurate, it could *"present difficulty"* for solicitors offering unbundled services. The Law Society Chief Executive, Catherine Dixon said that *"we are concerned about the potential consequences of the ruling and we invite government to consider the introduction of statutory protection for solicitors delivering unbundled services…"*

If *Sequence Properties* has been determined in the way suggested, then it could leave many practitioners reluctant to provide any unbundled services regardless of the limitations of their retainer with the client. This could also have consequences for the online court process, which is designed to operate cooperatively with unbundling. If solicitors cease to offer unbundled services, then the individuals will be left to deal with the online court system with no assistance from or assessment by a solicitor.

Meet The Team – Kevin Thurley

Kevin joined Goodwin Malatesta in 2010 and he will not mind admitting that he has many years' experience working in legal costs!

Kevin specialises in the opposition of high value and complex claims for costs and this month we have asked Kevin to take part in our "Meet The Team" section.

What do you enjoy about your work

Negotiating with other experienced Costs Lawyers (not costs negotiators!)

Career high

Lasting 35 years as a Costs Draftsman/Costs Lawyer

Favourite Book

John Grisham's The Firm

Favourite Film

The Deer Hunter

TV Programme

Homeland

What is your ideal way to spend Summer

Sun and Golf in the Algarve