Costs Law Update

Spring 2022

Recoverability of court fees where fee remission available – Gibbs v King's College NHS Foundation Trust

Is it reasonable for a claimant, who is or may be entitled to court fee remission, to forego that benefit and pass the costs of the court fees onto a defendant as part of a claim for costs?

HHJ Letham in *Ivanov v Lubbe* held that it was:

> "The core argument is whether it is reasonable to expect a claimant to use the scheme or alternatively whether this places a burden on the taxpayer that is unreasonable. In this respect I agree with [claimant's counsel] that there is a loss where fee remission is utilised. The public purse is depleted by the amount that would otherwise have been paid. On this basis there is less in the public purse to devote to the justice system as a whole. Thus, any suggestion that there is not a loss where fee remission is utilised is misconceived. I am satisfied that [claimant's counsel] is right to characterise the dispute as over who bears the loss, the public purse or the tortfeasor. … [There is] a formidable body of case law that allows the claimant to legitimately elect to make their claim against the tortfeasor as opposed to relying on alternative sources of funding."

In that case, it was therefore found to be reasonable for a claimant to pass on the cost of the court fee to a defendant.

In the more recent decision in *Gibbs v King's College NHS Foundation Trust* [2021] EWHC B24 (Costs), costs judge Master Rowley reached the opposite conclusion:

> "If it is assumed that mitigation in respect of damages is akin to mitigating the extent of the costs incurred, has the claimant acted reasonably in this case by not completing a fee remission form but simply paying the court? In the absence of any explanation or evidence in this context, it seems to me that inevitably the question has to be answered in the negative. The assessment of costs must then proceed as if he had acted reasonably … which would mean there being no issue fee paid because a fee remission could have been claimed."

On the facts of the case:

> "In my judgment, a party who does not consider whether they are entitled to a fee remission and, thereafter make an application if there is any doubt, risks being unable to recover that fee from their opponent. If the opponent can demonstrate that the receiving party appeared to fall within the remission scheme, the onus will be on the receiving party to justify why the court fees were incurred. If as here, there is no such justification put forward, the fee should be disallowed under CPR 44.3. Such a party has not incurred the lowest amount it could reasonably be expected to spend. At the very least there has to be a doubt which is to be exercised in favour of the paying party."

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Seeking costs from client in excess of approved budget – ST v ZY

Solicitors need to be aware of the dangers of incurring costs in excess of an agreed/approved costs budget. This may impact significantly on the costs that can be recovered, not just from the opponent, but also from the client.

CPR 46.9(3) incorporates an element of informed consent where solicitor/own client costs are being assessed:

> "Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –
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> (a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;
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> (b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;
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> (c) to have been unreasonably incurred if –
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> (i) they are of an unusual nature or amount; and
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> (ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party."

In *ST v ZY* [2022] EWHC B5 (Costs), the Court was dealing with a personal injury case where the successful claimant's solicitors were seeking to recover a costs shortfall from the claimant's damages.

At the outset, and during the claim, the claimant had been advised that there would be a shortfall in costs recovery. The claimant had also been given an estimate of the likely level of that shortfall. At the conclusion of the matter, that estimate proved to be broadly accurate. At this stage, it might be thought that the claimant must be taken to have given (at least implied) approval for those costs that were in excess of that which might be recovered from the other party.

The problem for the solicitors was that much of the shortfall was a consequence of the costs incurred by the solicitors being significantly in excess of the last approved costs budget in respect of a number of phases. During the inter partes detailed assessment, the solicitors were unable to put forward a "good reason" to depart upwards from the last approved budget. This, in part, explained a large proportion of the shortfall in recovery from the other side.

The question was, in the eyes of Senior Costs Judge Master Gordon-Saker, had the claimant been properly advised that costs in excess of the approved costs budget were being incurred and that these were therefore unlikely to be recoverable from the other side? If not, were these costs "unusual" for the purposes of CPR 46.9(3)(c)? In the view of the Master:

> "[The solicitors] submitted that 'unusual' should be read as being between solicitor and client. However that seems to me to ignore the purpose of the rule. To avoid the presumption the solicitor is required to explain to the client that the costs may not be recovered because they were unusual. 'Unusual' must therefore be read in the context of a between the parties assessment. …
>
> Were the excess costs unusual in amount? In my judgment they were. In approving the budget at £53,401.72, rather than at £147,981.50, the court arrived at the figures which it considered would be reasonable and proportionate to take the case to trial. In respect of issue/statement of case, that reasonable and proportionate figure was exceeded by over 100 per cent. In respect of witness

statements, the reasonable and proportionate figure was exceeded by over 400 per cent. In respect of ADR/settlement, the reasonable and proportionate figure was exceeded by over 150 per cent. These figures are so far over what they should be, and what the court has already decided that they should be, that they must be unusual in amount."

The crucial problem for the solicitors was:

"I have found nothing to suggest that [the claimant] was told about the budget or about the effect of the budget.

To avoid the presumption applied by CPR 46.9(3)(c), the solicitor must tell the client that as a result the costs might not be recovered from the other party. That must mean as a result of their unusual nature or amount. Telling the client that some costs might not be recovered from the other side is not sufficient. [The claimant] should have been told that the budget was being exceeded by a wide margin and that, as a result, those costs might not (and, indeed, almost certainly would not) be recovered from the other side.

Accordingly, in my judgment, the costs in excess of the budget and in excess of the caps imposed by CPR 3.15(5) are to be presumed to have been unreasonably incurred."

Where a costs management order is in place, it is crucial that the amount of work in progress is monitored during the life of the case, both overall and by each phase, as against the approved figures. If there is a danger that costs in excess of the budget may be incurred, the client must be advised of the costs consequences and their agreement sought for those additional costs to be incurred.

Counsel's brief fee where case settles early – Hankin v Barrington

There used to be a very old rule whereby counsel was entitled to their full brief fee once the brief had been delivered even if the case settled before the date fixed for the hearing.

This is no longer the case. A recent example of the correct approach is to be found in the decision of Deputy Master Campbell in *Hankin v Barrington & Ors* [2021] EWHC B1 (Costs). Where a case settled early there would "need to be a re-negotiation between counsel's clerk and instructing solicitors".

A brief fee of £125,000 plus VAT had been agreed by the Claimant's solicitors with their Leading Counsel in respect of a matter listed for a 13-day trial. The claim concerned a severe head injury pleaded at over £3 million with liability and quantum in dispute.

The trial was listed to commence on 15 March 2021. The brief was delivered to Leading Counsel on 22 February 2021. The claim settled by way of mediation on 24 February 2021 (although the Consent Order was not approved until 2 March 2021).

£15,000 of the £125,000 was attributed to Leading Counsel's fees for attending the mediation. This amount was not disputed by the Defendant paying party. The balance of £110,000 was claimed in full as the brief fee.

The matter had been subject to a cost management order. At the detailed assessment, the Claimant conceded (by way of what was described by the Deputy Master as a "sensible concession") that the fact the matter had settled pre-trial amounted to a "good reason" under CPR 3.18(b) to depart downwards from the last approved budget.

The brief fee had been calculated, at least in part, on Leading Counsel's hourly rate of £550. The Deputy Master was of the view that such a rate was "higher than that allowed for these types of catastrophic injury cases which come before the Costs Judges" and was "too high". The deputy Master decided that the starting point as to what would have been a reasonable brief fee was £75,000.

The Deputy Master then decided what further reduction should be made to that amount to reflect the fact that the trial did not take place. The Deputy Master was of the view that it was unlikely that much time at all would have been spent on trial preparation prior to the matter settling given Leading Counsel would have been getting ready for the mediation. The correct starting point, in the Deputy Master's view, was that the brief fee should be reduced by 50% to £37,500 plus VAT to reflect the early settlement.

A further issue arose in that there was evidence before the Court that Leading Counsel had been able to undertake some alternative paid work for

the period that had been booked for the trial. The evidence was that the earnings for this period amounted to £11,000. The Deputy Master approached this issue on the basis that much of this work would represent Leading Counsel properly attempting to "mitigate his loss" for the fact that the trial had not proceeded. He attributed £10,000 of these earnings to such "mitigation". He therefore deducted this further figure of £10,000 from the £37,500, to leave a total payable by the Defendant therefore of £27,500 plus VAT.

Completing Precedent H

Much confusion remains in terms of the completion of costs budgets. Where should work in relation to preparation for, and attendance at, the first CCMC be placed? At the time of completing the costs budget, this work will be future estimated work. But, by the time the costs management order is being made, these will have become incurred costs.

The answer is to be found in CPR 3.17(3)(a):

> "the court may not approve costs incurred up to and including the date of any costs management hearing"

It is therefore clear that work in relation to preparation for, and attendance at, the first CCMC should be included within the "incurred" columns of Precedent H even if it relates to work that has yet to be completed.

In terms of any subsequent CMCs, the table at the end of PD 3E states that the CMC phase of Precedent H should include:

> "Any further CMC that is built into the proposed directions order"

In the (relatively rare) situation where a further CMC is built into the proposed directions, then work for this further CMC would be correctly placed in the "estimated" column of Precedent H.

Contact Us …

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

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