CIVIL AND COMMERCIAL COSTS LAWYERS - A FAREWELL TO LORD JUSTICE JACKSON

Patrick Toal

Costs Draftsman – Civil and Commercial Costs Lawyers

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As Lord Justice Jackson retires, Patrick Toal, of Civil and Commercial Costs Lawyers looks at a number of recent important decisions in the key areas of the Jackson Reforms which highlight why now, more than ever, it is important to ensure you instruct the right Costs Consultant to represent you.

Proportionality

Proportionality was one of the major changes to the costs regime introduced by the CPR. However, the old test of proportionality, based on Court of Appeal guidance in Lownds v Home Office [2002] EWCA Civ 365, was viewed by many as ineffective and as such its application was revisited within the 2013 Jackson reforms. Since then there has been a raft of decisions which touch on the application of proportionality.

It would appear that clarity is slowly being obtained, not least in the recent case of May & May v Wavell Group PLC & Bizarri [2016] EWHC B16 (Costs). In the first instance a bill of £208,000.00 was reduced to £35,000.00 plus VAT, applying the test on a global basis. The decision was appealed.

On appeal the assessed costs were increased to £75,000.00 plus VAT. Whilst of interest, the value of the award is not the important part of the judgment. Having considered the various strands of CPR 44.3(5), in particular looking at the generality of proceedings, HHJ Dight determined that the Costs Judge had misinterpreted and misapplied the new proportionality test.

In particular, HHJ Dight was doubtful that a proper interpretation of the rules required or indeed entitled a Costs Judge to impose substantial overall reductions at the end of an assessment without regard for the component parts. In other words any application of the new test needs to be on an item by item basis. Whilst the decision represents a partial victory for the Mays, the precise application of the new proportionality test remains uncertain and the wait goes on for conclusive guidance.

The ambiguity over how proportionality applies to additional liabilities is also reaching its denouement. The appeal in BNM v MGN Ltd [2017] EWCA Civ 1767 determined that pre April 2013 additional liabilities do not form part of the proportionality test.

Whilst this decision was to be expected, a more interesting insight could be found in the obiter. Sir Terence Etherton stated:

“In any event, I do not consider that ATE insurance premiums fall within the natural meaning of "expenses" of litigation. They have nothing to do with the cost of issuing and progressing the litigation, any more than the premiums on a householder's or car owner's insurance which contains litigation cover. Both before the event insurance and after the event insurance offset the risk of a person's financial exposure as a result of litigation but they are not expenses of the litigation itself”.

Additional liabilities

When considering issues concerning the recoverability of additional liabilities more generally, regard should also be given to the decision in Peterborough & Stamford Hospitals NHS Trust v McMenemy & Ors [2017] EWCA Civ 1941. Here, the Court confirmed the principle in Callery v Gray [2001] EWCA Civ 1117, specifically, that it is reasonable to conduct litigation by entering into a block-rated ATE policy when entering into a CFA. The Judge did, however, state that it may be possible for a Defendant to argue that it was unreasonable or disproportionate to take out a specific ATE policy over another.

We still await the definitive judgment on premium recovery, but until it is received the decision of Mr Justice Martin Spencer in Percy v Anderson-Young [2017] EWHC 2712 (QB), is certainly worth consideration. Here the High Court allowed recovery of an After the Event insurance premium of £533,017.13, overturning the previous decision of the District Judge to reduce it to just £82,513.07.

On appeal, the High Court distinguished cases where the level of cover was too high from those where the judge found the underwriting decision to be flawed. Spencer J found that in a situation where a party has over-insured, the Court can reduce the premium on a broad brush basis, as in Rogers. However, the DJ in this case should not have considered himself better placed than the underwriter to identify the financial risk which the insurer faced and it was wrong to reduce the premium to such an extent without hearing expert evidence.

Costs Management

The concept of controlling costs midway through the litigation is not a new one. When the Civil Procedures Rules were first enacted costs estimates had to be served with the Allocation and Listing Questionnaires. However, the practice direction which accompanied the Rules did not effectively allow for costs control. As a result Jackson LJ implemented costs budgeting regime, via CPR3E. Whilst it was initially met with some disapproval there is now a real judicial appetite for budgeting. The law in this area is constantly evolving and recent decisions have centred on what constitutes a "good reason" to depart (upwards or downwards) from an approved budget. CPR Part 3.18 (b) states that an approved budget can be departed from at detailed assessment only if there is a good reason for doing so.

The decisions in Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB) and Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 791 have provided guidance on how to apply the test set out in the CPR in practice. There is now no doubt that if the future costs in a bill come within the budget then these will usually be recoverable in full.

What constitutes good reason is less clear and unfortunately these decisions offer little in the way of general guidance. Deputy Master Campbell offered his opinion on what constitutes such a reason in the case of RNB v London Borough of Newham [2017] EWHC B15 (Costs). Here, he applied hourly rates that he deemed appropriate to the incurred costs, only to then apply them to the budgeted costs deeming that to be a good reason. Given the wording of CPR 3 PD 7.3 and 7.10 it would appear that the decision seems to be circular reasoning and may not stand up to closer scrutiny. In fact the unreported decision of Bains v Royal Wolverhampton NHS Trust (DJ Lumb) and other unreported decisions in the SCCO go against the decision of the Deputy Master.

Relief from Sanctions

The benefits of getting your budget right are apparent for all to see, but as was seen by the decision in Mitchell v News Group Newspapers Limited [2013] EWCA Civ 1537 failure to comply with the strict time limit as set out within CPR3 can have a draconian effect - in this case a budget of £506,425.00 was reduced to Court fees only.

The case of Denton v White [2014] EWCA Civ 906 set out the rules surrounding a relief from sanctions application should a breach occur. Relief can be required for a number of reasons, such as failing to provide a Notice of Funding (Tim Yeo v Times Newspapers [2014] EWHC 2853 (QB)) to failing to advise a Claimant of a CFA entered into (Jackson v Thompsons Solicitors & Ors [2015] EWHC 549 (QB)). The rules are clear and relief is never guaranteed.

Last year saw two further decisions which dealt with failure to serve a budget, Lakhani v Mahmud [2017] EWHC 1713 (Ch) and Intellimedia Systems Ltd v Richards & Ors [2017]. In both cases relief was sought, due to the late filing of Costs Budgets, with the applications yielding different results. In Lakhani the defendant filed their budget one day late. They maintained that it was correctly served and failed to make their application for relief until the eleventh hour.

Despite the parties discussing costs, and exchanging Precedent R reports, relief was not granted in the first instance. In particular the Judge commented that the impact of late service had created an environment which was not conducive to agreement and was more conducive to the defendant's presenting the costs as highly contentious. On appeal the decision, described to be on the tougher end of the spectrum as to substance and on the leaner end of the spectrum as to analysis, was upheld. Mr Alexander QC confirmed that the Claimants had not used the rules as a tripwire. They had correctly and promptly pointed out the Defendants' error and that without an application for relief the consequences of 3.14 would follow. He made it clear that they were not obliged to consent, in advance, to an application for relief which was neither made nor provided to them until the day before the hearing.

By contrast in Intellimedia the budget was served late due to sickness of the conducting solicitor. Having been alerted to the breach the Partner promptly applied for relief from sanctions. Despite finding the breach to be not trivial the Court allowed relief on the basis the sanction was not proportionate, although in doing so they did penalise the Claimant for being inefficient by ordering the costs of the instant hearing be paid on the indemnity basis.

The decisions in these matters are fact specific, however, closer inspection confirms the need for adopting a collaborative approach to litigation, making any applications for relief in a timely manner, but more importantly that the Denton test is still good law.

New Bill of Costs

The 92nd Amendment to the CPR confirmed that as of 6 April 2018 multi-track bills for work undertaken after this date must be in an electronic format. Lord Jackson stated that the intention behind this is to create a more streamlined process which in theory would increase the transparency of a bill, provide a more user friendly synopsis and make a bill more inexpensive to produce.

The requirements of the new bill make it essential that time is claimed in tasks, phases, activities and that routine items are individually identified. All of the costs claimed in the bill will now appear in a fully chronological summary. While this introduces an extra layer of complexity into the drafting process, the new format bill will allow the Costs Judge to more fully understand how and where the highest volume of expenditure occurs.

Although the new format bill will represent a significant change in how claims for costs are presented (and potentially, disputed), the need for bills of costs to be drafted efficiently and expeditiously has not changed. Whilst technological advances must be embraced, they offer an incomplete solution without the expertise of an experienced costs consultant to assist in transitioning to the new format.

Conclusion

The law of costs remains an arcane area and the costs management and detailed assessment processes, in particular, are fraught with risks; costs practitioners are best equipped to ensure all work undertaken is compliant and every possible step is taken to achieve the desired outcome.

Considering that the fees associated with instructing a costs professional are usually recoverable from the other side, there is little downside to taking this approach.

About The Author

Patrick Toal is a Law Costs Draftsman/Trainee Costs Lawyer at Civil and Commercial Costs Lawyers Ltd in their Manchester office. Civil & Commercial is one of the UK's leading costs consultancies, dedicated to providing complete costs solutions for both receiving and paying parties alike.

For further information,
visit www.civilandcommercial.com
email london@civilandcommercial.com
call 0207 842 5950
