Butterworths Costs Service

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INTRODUCTION

Once again there has been a surprising amount of important costs cases throughout early 2012. We have reported on the most significant.

Perhaps the most important of these was *Simcoe v Jacuzzi* – the Court of Appeal's ruling on the recovery of interest on costs, and in particular whether a different approach is called for in CFA cases. The Master of the Rolls retained the status quo holding that interest on costs ran from the date of the costs award and not the date on which they are assessed. It may no difference if the receiving party was instructing solicitors under a CFA.

It is not yet known whether an application for permission to appeal to the Supreme Court will be pursued.

On the Jackson front, the government has deferred Lord Justice Jackson's civil costs reforms until April 2013 but fought off attempts to scale back the changes. Liberal Democrat peer Lord Wallace of Tankerness announced the delay during the committee stage debate in the House of Lords on Pt 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill.

Cuts to legal aid for most civil cases, included in part 1 of the bill, have already been put back until April 2013.

An MoJ spokesman said: "We are committed to reforming the 'no win, no fee' system so that legal costs for reasonable compensation claims will be more proportionate, and avoidable claims will be deterred from going to court.

"This will require changes to legal rules and regulations and we want to give sufficient time to get the complex details right."

The delay was welcomed by groups on all sides of the debate.

DIVISION A – CIVIL LITIGATION COSTS

Retainers

Fladgate LLP v Harrison [2012] EWHC 67 (QB), [2012] All ER (D) 45 (Feb)

Facts: The claimant firm of solicitors (F) acted for the defendant (H), the managing director and shareholder of a company in respect of proposed corporate restructuring. F sent a letter of retainer to H but this was not signed and returned as requested. F subsequently sent invoices to H but these were not paid. F subsequently issued proceedings to recover these fees. H maintained that these invoices were not payable by him personally as it had been agreed that the fees would be paid by the company; as there was no retainer as the retainer letter was not signed; alternatively as the retainer did not cover this work as the transaction did not proceed as set out in the letter of retainer.

Held: The suggestion that it had been agreed in advance that the company would pay for the legal advice was rejected as even after a recent change in the law, it would only have been lawful for the company to pay the bill if it was for the corporate benefit of the company and this could only be considered after the work had been carried out. The arrangement H claimed had been reached was therefore unlawful and the court held that F did not agree to these terms.

There was no requirement for a solicitor's retainer to be in writing for it to be enforceable. Although a failure to set out certain terms in writing may amount to a breach of the Solicitors' Code of Conduct 2007, this did not render the retainer unenforceable. Whether or not there was a valid retainer fell to be assessed by reference to usual contractual principles. In this case, the solicitors had carried out work as instructed and hence were entitled to be paid.

Comment: The confirmation that a failure to set out all the terms of the retainer in writing does not invalidate the retainer will doubtless come as a relief to practitioners. However, the facts of this case were relatively extreme as the client was trying to declare the entire retainer unenforceable and was also alleging that the solicitors had advised him to enter into an unlawful arrangement. Notwithstanding this decision, practitioners would still be well advised to ensure that all the terms of the retainer are set out in writing and that all variations are also set out in correspondence to avoid any debate about the terms of the solicitor's retainer.

Public Funding

Leeds City Council v Price and others [2012] EWCA Civ 59, [2012] All ER (D) 39 (Feb)

Facts: This claim relates to possession proceedings by Leeds City Council (L) against Price and others (P) that were ultimately resolved in favour of the local authority after an unsuccessful appeal to the House of Lords. P's costs were paid by the Legal Services Commission (LSC) and P was ordered to pay L's costs of the proceedings before the House of Lords out of LSC funds, the amount of such costs to be certified by the Clerk of the Parliaments in accordance with s 11 of the Access to Justice Act 1999. L submitted a bill of costs but after the expiry of the prescribed three-month period. A copy of the bill was sent to P's solicitors but not to the LSC. Further, the bill did not contain a notice stating that a costs order was sought against the LSC (as required by reg 10(3) of the Community Legal Service (Costs) Regulations 2000, SI 2000/441). A certificate was subsequently obtained and L demanded payment from the LSC. The LSC refused to pay the sum claimed. L obtained an ex parte order making the certificate an order of the High Court. This was subsequently set aside. L appealed to the Court of Appeal.

Held: Although L had applied for an extension of time for filing the bill, L had not applied for an extension of time to make a claim against the LSC in breach of SI 2000/441. Further, the mere fact that the LSC were named on the face of the bill did not satisfy the requirement to give the LSC notice. Further, the bill of costs had not been served on the LSC which had therefore been deprived of the opportunity to make representations as to the amount of costs and whether or not it was equitable for an order to be made against the LSC. The certificate obtained was therefore invalid and did not bind the LSC. The judge was therefore correct not to allow L to enforce the certificate against the LSC.

Legal Services Commission v Sham Loomba and others [2012] EWHC 29 (QB), [2012] All ER (D) 58 (Jan)

These three test cases considered the validity of the unrecouped payments on account (UPOA) exercises undertaken by the LSC. For cases where a payment on account had been made more than 18 months but no final bill had been received, the LSC would send a questionnaire to the solicitors. If no response was received to either the questionnaire or the reminder, the LSC would assess the costs at zero and would then seek to recover the payment on account from the firm. The payments on account had been made up to 25 years before the nil assessment and there was no suggestion of propriety on behalf of the solicitors.

The issue was whether or not the LSC had the power to issue a nil assessment, there being no express power contained within the Legal Aid Act 1988 (the 1988 Act) and to recoup payments previously made on account. The court held that s 4(1)(b) of the 1988 Act had to be given a wide construction so as to allow the LSC to assess bills at zero and to recoup payments made on account where necessary. Without such a power, it would

be impossible to recover sums from solicitors not entitled to public funds. Further, the manner in which the policy was being pursued was flexible and the LSC were prepared to accept submissions from solicitors and issue revised final bills even after the nil assessment had been issued. The policy was not an unlawful fetter on the LSC's discretion nor could it be said that the LSC had acted in breach of its public law obligations.

Interest on Costs

Simcoe v Jacuzzi UK Group Plc [2012] EWCA Civ 137, [2012] All ER (D) 107 (Feb)

The simple (but important) issue in this claim was whether or not interest on costs runs from the date of the order (the incipitur date) or the date the costs liability was subsequently determined by the court or agreed (the allocatur date). The Court of Appeal held that the appropriate date is the date of the order.

However, quite apart from the result, the interest in this case is the reasons given by the Court of Appeal in reaching this conclusion. The Court of Appeal held that CPR 48.8 had been enacted without the concurrence of the Treasury as required by s 74(1) of the County Courts Act 1974 and hence was invalid. The relevant rule dealing with interest in the County Court therefore remained the County Courts (Interest on Judgment Debts) Order 1991, SI 1991/1184 which mandated the incipitur date. Although the court noted that this defect could be cured if consent is subsequently given by the Treasury, the court expressly did not decide whether or not this could be done with retrospective effect. The court noted that this was also the default position pursuant to CPR 40.8(1) and hence this should make little practical difference. The court also noted that the fact that the solicitors were acting pursuant to a CFA was not a reason for ordering that interest should run from a later date.

Part 36

Epsom College v Pierse Contracting Southern Ltd (in liquidation) (Formerly Biseley Construction Ltd) (Costs) [2011] EWCA Civ 1449, [2011] All ER (D) 153 (Dec)

Facts: The dining hall at Epsom College (E) flooded. E maintained that this was caused by a nail having been driven into the pipe by contractors (P) in the course of construction works. At the start of proceedings, the pipe could not be located nor had it been photographed. In the course of proceedings, E made three offers. The first offer was to accept £19,200 inclusive of interest. The second offer was to accept the sum of 12,768.50 inclusive of interest. Both offers were made pursuant to Pt 36 (with the second offer expressly stating that the first offer was not withdrawn). The third offer was costs inclusive and did not comply with Pt 36. All three offers were rejected by P. Subsequently, the pipe was located and the second two offers (but not the first) were withdrawn by E. At trial, E's case succeeded in part and E was awarded the sum of £21,075 plus interest. The judge considered that the first

Part 36 offer had not been beaten by a sufficient sum given the difficulties caused by the missing pipe. However, the judge relied upon the second (withdrawn) Pt 36 offer and awarded E indemnity costs from the date of the expiry of the relevant period. P appealed.

Held: The judge was wrong to rely upon the withdrawn Pt 36 offer as this did not have the automatic consequences of Pt 36. However, the first offer remained open for acceptance at all times and hence once the pipe was located, it was open to P to accept the first offer and to argue that it should not be liable for the costs following the expiry of the relevant period due to the conduct of E. It did not do so. The first Pt 36 offer was therefore valid and hence the judge's decision to award indemnity costs was upheld for different reasons.

Comment: This case illustrates the importance of understanding the effect of Pt 36 offers that remain open for acceptance unless withdrawn in writing. If not withdrawn, they remain valid even if circumstances change. Litigants should not assume that arguments based on changing circumstances will carry favour with the court. The Court of Appeal here clearly considered that the better approach when circumstances changed was to accept the offer and then debate the costs rather than to undermine the efficacy of the Pt 36 regime. One other point to note is that it was accepted that an offer stating that it remained open for acceptance for 21 days was a valid Pt 36 offer (following *C v D*). Unfortunately, as is set out below, the debate about whether or not a given offer complies with Pt 36 remains unresolved.

Thewlis v Groupama Insurance Co Ltd [2012] EWHC 3 (*TCC*), *[2012] All ER* (*D*) *09* (*Jan*)

Facts: The claimant (T) was the owner of property and the defendant (G) insured the property. T issued a claim against G seeking an indemnity in respect of suspected subsidence. In September 2008, before proceedings were issued, T made an offer (that was rejected). The offer letter stated that the offer was made pursuant to Pt 36 and remained open for acceptance for 21 days after which it could only be accepted if costs were agreed or the court gave permission. It did not stated expressly that the offer was intended to have the consequences of Pt 36 as required by CPR 36(2)(b). Proceedings were issued in May 2011 and G attempted to accept the offer in October 2011. T maintained that it was not a valid Pt 36 offer and hence it could not be accepted out of time.

Held: The court reviewed recent authorities regarding Part 36 and noted the guidance given by the Court of Appeal in *C v D* [2011] EWCA Civ 646, [2011] All ER (D) 287 (May)that any ambiguity in offers should be constructed so as to comply with Pt 36 insofar as is possible, it was not possible to overlook the mandatory requirement set out in CPR 36(2)(b) that the offer must state that it is intended to have the consequences of Pt 36 (*Carillion v PHI Group* [2011] EWHC 1581 (TCC), [2011] All ER (D) 19 (Jul) followed). This offer did not and hence the offer was not a Pt 36 offer and hence was no longer capable of acceptance.

Comment: Part 36 offers are continuing to cause confusion and generate satellite litigation. Notwithstanding the collective sigh of relief when the Court of Appeal handed down judgment in *C v D*, offers that were drafted with the old Pt 36 regime in mind continue to trouble the Courts. The distinctions drawn in the various cases are hard to justify as the failure to use wording consistent with the current incarnation of Pt 36 does not take the offer outside of Pt 36 (see *C v D*) but the seemingly innocuous failure to spell out that an offer made pursuant to Pt 36 was intended to have the obvious consequences means that the offer is not complaint with Pt 36. There is no principled reason why this should be so. It is hoped that the common sense approach in *C v D* which attempts to give effect to Pt 36 where possible is to be preferred. If it is not, satellite litigation about Pt 36 offers can only increase with claims following against lawyers if offers are held not to comply with the Pt 36 regime.

Fixed Costs

Solomon v Cromwell Group plc; Oliver v Doughty [2011] EWCA Civ 1584, [2011] All ER (D) 148 (Dec)

Where a low value RTA was compromised before proceedings were commenced by way of acceptance of a Pt 36 offer, the court must assess costs by reference to the fixed costs regime if costs only proceedings were issued pursuant to CPR 44.12A. Costs did not fall to be assessed on the standard basis notwithstanding the wording of CPR 36.10(1).

The argument arose as CPR 36.10(1) does not mention fixed costs and hence there was a tension between the provisions of Pt 36 and the fixed costs regime in Pt 44. The court held that where there was a tension between general rules and specific rules, the specific rules (set out in CPR 45, Pt II) must prevail. Given the expansion of the fixed costs regime and the importance placed on early resolution of claims, this is an unsurprising result as the fixed costs regime would have been substantially undermined if accepting a Pt 36 offer made before proceedings started circumvented the regime.

Recovery of Costs of a Third Party Adviser

Nap Anglia Ltd v Sun-Land Development Co Ltd (Costs) [2012] EWHC 51 (TCC)

This claim relates to the assessment of costs following a successful summary judgment application to enforce an adjudication award. However, the case is of wider interest as the court provided guidance when costs incurred by a third party advisor (such as claims consultants in construction disputes) can be claimed inter parties. Edwards-Stuart J stated (at para 20):

(1) Sums paid to a third party incurred solely for the purpose of advancing or assisting with the prosecution or defence of a claim may in principle be recoverable as costs provided that the third party is not doing any acts that only a solicitor can do and/or does not do any act whilst purporting to act as a solicitor.

(2) It does not matter that the work done by the third party, even if it employs non-practising barristers or solicitors to do it, is work of a type commonly done by solicitors.

(3) The costs of a third party engaged in these circumstances may be assessed by the court. To be recovered, they must have been reasonably incurred and be reasonable in amount

Detailed Assessment of Costs by a Third Party

Tim Martin Interiors Ltd v Akin Gump LLP [2011] EWCA Civ 1574, [2012] All ER (D) 02 (Jan)

Facts: The claimant (T) appealed against the assessment of legal fees said to be due and owing to the defendant (A). A did not act at any time for T but acted for a bank who had loaned money to T secured by way of legal mortgage over several properties, guaranteed by two directors of T. A, acting on behalf of the bank, took a number of steps to enforce the debt, including bankruptcy proceedings against the directors. The bank paid A's legal costs in full and then sought to recover the costs paid from T. T applied to assess the costs claimed by A pursuant to s 71 of the Solicitors Act 1974 (the 1974 Act). The costs judge treated this application as an assessment of the costs reasonably payable by T pursuant to the terms of the mortgage and substantially reduced the sums claimed.

Held: The approach taken by the costs judge was wrong as a matter of principle as a third party seeking assessment of a bill pursuant to s 71 of the 1974 Act could only raise issues that would have been open to the client had the client applied for an assessment pursuant to s 70 of the 1974 Act. In this case, the assessment was of limited use to the third party as the client had paid the charges in full. The jurisdiction of the costs judge was therefore limited to determining items that fell outside of the third party's liability to pay (ie, outside of the terms of the mortgage) or items that were only allowed as between client and solicitor as the solicitor had advised the client that the costs would not be recoverable from the third party (pursuant to CPR 48.8(2)(c)). It was not therefore open to the costs judge to reduce an item as excessive, the client having agreed the amount and having paid it. Items could only be disallowed in full if the item was not chargeable to the client at all.

Comment: Although the analysis in this case is entirely conventional, the established practice of this costs office was to carry out assessments on this basis and hence the judgment of the Court of Appeal marks a major change to the practice of the SCCO. If a borrower wishes to dispute the amount of costs charged to him by his bank, the prudent course is to apply for an account of the sums due and owing pursuant to the mortgage and not for the costs charged to be assessed. If the bank has paid its solicitors excessive sums, the borrower's remedy is against his bank and not its solicitors.

Criminal Litigation Costs

Lord Chancellor v Ian Henery Solicitors Ltd [2011] EWHC 3246 (QB), [2011] All ER (D) 92 (Dec)

This case considered the meaning of the words "proceeded to trial" in the Criminal Defence Service (Funding) Order 2007, SI 2007/1174. For the purposes of SI 2007/1174, it was necessary for the trial to have started "in some meaningful sense". On the facts before the Court, the swearing of a jury did not amount to the start of trial as the trial was adjourned immediately overnight as the judge was not available until the following morning. As the defendant pleaded guilty before any submissions were made, the matter had not proceeded to trial. However, it is a matter of fact and degree, as there could be some cases in which the swearing, or possibly even the selection, of the jury could be the beginning if trial if the court was dealing with matters affecting the course of the trial.

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