just costs on costs

JUST COSTS SOLICITORS
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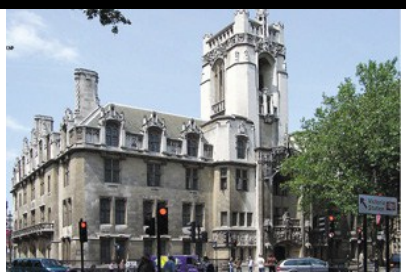

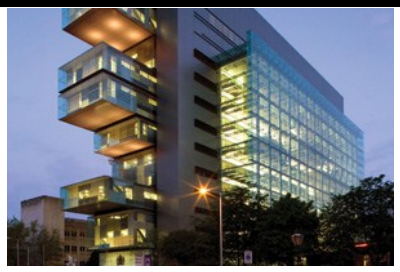

INSIDE THIS ISSUE

Paul Shenton
Managing Director

Solicitors for Solicitors

Hello and welcome to the November 2011 Commercial Litigation edition of Just Costs On Costs.

With the CJC working party currently considering qualified one way costs shifting, additional sanctions under CPR.r.36 and a new test for proportionality and with the ACL's own working party publishing their 'Modernising Bills of Costs' report, the future of costs is definitely being written as we speak. In addition to that, there is the 'Legal Aid, Sentencing and Punishment of Offenders' Bill currently at the first reading stage in the House of Lords. There is a lot going on in the world of costs!

In this issue we look at the Court of Appeal's decision in Motto v Trafigura, the application of BTE to non-panel members and the ongoing developments to the future of costs in more detail.

Enjoy!

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Freedom & Determinism

Nick McDonnell examines the recent High Court decision of Brown - Quinn & Anor v Equity Syndicate Managment LTD & Anor in relation to Before The Event legal expenses insurance.

Mr Justice Burton, in the High Court, Queens Bench Division (Commercial Court) recently handed down his judgment in ***Brown - Quinn & Anor v Equity Syndicate Managment LTD & Anor [2011] EWHC 2661 (Comm)*** (21 October 2011). This case determined whether three Claimants, bringing employment and discrimination claims, were entitled to recover, from the before the event (BTE) insurance provider, the reasonable legal costs they were liable to pay their solicitors where those solicitors were not on the BTE provider's panel.

Consideration was given to the Insurance Companies (Legal Expenses Insurance) Regulations 1990 SI 1990 No 1159 (the 'Regulations'), which brought into effect the provisions of Article 4 of EC Council Directive 87/344/EEC of 22 June 1987, which has now been re-enacted as Article 201 of EU Directive 2009/138/EC.

Regulation 6 states:-

> *'Freedom to choose lawyer.*
>
> *6.—*
> *(1) Where under a legal expenses insurance contract recourse is had to a lawyer (or other person having such qualifications as may be necessary) to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer (or other person).*
> *(2) The insured shall also be free to choose a lawyer (or other person having such qualifications as may be necessary) to serve his interests whenever a conflict of interests arises.*
> *(3) The above rights shall be expressly recognised in the policy.'*

The issue was whether the BTE provider was entitled under the policy to decline to accept the solicitors freely chosen by the insured on the basis that the firm's hourly rates were in excess of those predetermined in terms of business between the BTE provider and their panel firms.

By way of a brief background, one Claimant instructed a firm of solicitors who were not on her BTE provider's panel and two originally instructed 'panel firms' but then transferred their instructions to non-panel solicitors when their file handler moved firms. All Claimants ultimately instructed the non-panel firm Webster Dixon LLP.

Often BTE providers agree to pay panel members hourly rates which are lower than those normally recoverable in exchange for volume work. This, it is argued by BTE providers, is partly the reason for BTE premiums being so low.

Specifically here, the Claimants argued that a BTE provider could not refuse to accept the policyholder's chosen solicitor if that solicitor did not agree to the lower rates outlined in the terms of business offered as this would be a '*substantial fetter on his freedom to choose….*'

The Defendants originally argued that they were entitled to decline an indemnity but changed their position to accept that they indemnified the policyholders but only to the extent of the rates offered to panel members and that costs should be assessed in accordance with CPR.r.48.3 with the lower rates forming the starting point when determining reasonableness. CPR.r.48.3 states:

> ***'Amount of costs where costs are payable pursuant to a contract***
>
> ***48.3***
>
> *(1) Where the court assesses (whether by the summary or detailed procedure) costs which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which –*
>
> *(a) have been reasonably incurred; and*
>
> *(b) are reasonable in amount, and the court will assess them accordingly.*

Mr Justice Burton found that, in the absence of an agreement on costs between the Claimants and their BTE provider, the costs should be assessed with reference to CPR.r.48.3 rather than be limited to the lower rates offered by the BTE provider to their panel members. However, whilst it would not be appropriate to consider the lower rates as a starting point when considering reasonableness, it would be appropriate to take them into account and in particular whether or not any other suitable firms, who would have completed the work for lower hourly rates, were available, when assessing the costs. This, Mr Justice Burton concluded, left open '*…a sufficient ambit for the interplay…between the recovery of "reasonable fees" and the requirement that the insured keep the costs "as low as possible."'*

Accordingly, a BTE provider cannot seek to automatically limit the indemnity of the policyholder's liability for their solicitors' reasonable legal costs to the lower rates on offer to panel firms but rather those costs must be assessed pursuant to CPR.r.48.3 with consideration being given to the availability of lower rates, the impact of which will, of course, be seen on a case by cases basis.

Court of Appeal Approve Trafigura Decision on ATE

The Court of Appeal has recently handed down its widely anticipated judgment in Motto v Trafigura Limited [2011] EWCA Civ 1150 and have upheld the decision to reduce Leigh Day's 100% success fee to 58%. After reaching a settlement on behalf of 30,000 Ivorian residents who suffered harm from the dumping of toxic waste, the matter was subject to a Group Litigation Order and the Claimants' served bills totaling approximately £105 million. The Bills contained over 55,000 Items and the costs included base costs of £49 million; 100% success fees for both Solicitors and Counsel, and a £9 million ATE premium.

It is interesting to note that although Leigh Day's success fee was reduced significantly, the sizeable ATE premium was confirmed to be at a suitable level and was recoverable in full.

What surely has to be considered is that if the Defendant had approached this case sensibly there would have been no need for ATE insurance in the first place? Presumably the prospects of recovering their legal costs from the Ivorian nationals were slim to none and so if the Defendant had agreed to waive their right to recover costs at the outset, there would have been no costs risk for the claimants and no ATE requirement. As it was, the Defendant's solicitors submitted a costs estimate of around £14 million and so ATE became essential. When considering the amount of exposure to the ATE insurer if the case was unsuccessful, the £9million premium was, of course, reasonable and so the Court had little choice but to allow it in full.

In terms of the success fee, the reason given by Chief Master Hurst for the reduction was that during the course of this litigation the claimants' chance of winning gradually improved from 50% to 68% and therefore, as the claimants were added to the litigation, the success fee ought to have been amended to reflect this.

A further issue raised in this case and one important point determined was whether or not the costs incurred when setting up Conditional Fee Agreements or ATE insurance policies are recoverable. The court decided that costs could not be recovered in the particular circumstances where the litigants did not become clients until they had actually signed up to the CFA.

By Steve Ruffle, Temple Legal Protection

The Future of Costs

The CJC's Working Party

The Civil Justice Council has announced a working party which is to be headed up by Alastair Kinley, CJC member and head of policy development. In addition, the working party will consist of:

- Janet Tilley - Coleman Tilley
- John Usher - USDAW
- Colin Stutt - formerly of the Legal Services Commission
- Mark Harvey - Hugh James
- Nick Bacon QC - 4 New Square
- Howard Grand - Aviva
- David Fisher - AXA
- David Bott - (APIL President) Bott & Co
- David Marshall - The Law Society
- Don Clarke - (FOIL Vice President) Keoghs
- Judith Gledhill - Thompsons
- Hardeep Nahal - McGuireWoods
- Graham Huntley - Hogan Lovells
- Mandy Knowlton - Rayner Norfolk County Council
- Kay Majid - Tesco plc
- Kathryn Mortimer - DAS
- Rocco Pirozzolo - QBE
- Hilary Homfray - Birmingham City Council

The working party will consider:-

- Qualified one way costs shifting – atypical cases and behavioural aspects;
- The introduction of an additional sanction under CPR.r.36 – perhaps in line with Jackson LJ's proposed amendment to CPR.r.36.14(3)(d):
- *'(d) an additional sum comprising 10% of (i) the damages or other sum awarded and (ii) the financial value, as summarily assessed by the court on the basis of the evidence given at trial, of any non-monetary relief awarded.'*
- A new test for 'proportionality.'

Modernising Bills of Costs

The Association of Costs Lawyers' Jackson Working Group has published its first report entitled "*Modernising Bills of Cost*" on 14 October 2011. The report is the first step in achieving the 'core remit' which is to design a model Bill of Costs that:-

- Will assist the Court and further the overriding objective;
- Is capable of being drafted without the need for expensive software;
- Can be easily described in the Costs Practice Direction;
- Easy to draft and use;
- Allows costs to be recorded in a way that facilitates integration with existing case management systems;

The report can be accessed at http://alcd.org.uk/sites/default/files/11.10.11%20Report.pdf

The Costs of Funding

Nick McDonnell considers the Court of Appeal's decision in Motto v Trafigura.

The Court of Appeal handed down its decision in Motto & Ors v Trafigura Ltd & Anor (Rev 2) [2011] EWCA Civ 1150 on 12 October 2011. The Court heard arguments concerning the appeal of a number of preliminary issues originally heard by Master Hurst in December last year. The preliminary points which were the subject of the appeal are helpfully summarised at the conclusion of the judgment and I repeat these below.

By way of a brief outline, the main matter concerned a group action brought by approximately 30,000 Claimants who suffered illness as a result of the alleged fly-tipping of chemical waste by the Defendants around the Ivory Coast. The claim settled for £30 million (with a further $200 million being paid to the Ivory Coast government to assist dealing with the clean up).

Legal costs of approximately £105 million were submitted in a bill of costs. These included success fees, VAT and an ATE premium of approximately £9 million. The 9 key issues are outlined below. The Defendant was successful in appealing 2 of them with the remaining 7 being upheld. Whilst 8 of the preliminary issues are case specific to some extent, the first one concerning the costs of funding is likely to have an impact on those cases funded by CFAs.

The Master of the Rolls found the following:-

> *'Cost of funding: Contrary to the Judge's conclusion, I do not consider that the claimants can recover the costs of preparing and advising on the CFAs, nor do I consider that they can, recover any costs incurred in discussing the litigation with,, or taking instructions from, with the ATE insurers;*
>
> *Proportionality: I would allow the defendants' appeal, and would hold that it follows that any item on the Bill is only to be allowed if it was necessary;*
>
> *Vetting costs: I agree with the Judge's conclusions, save that the necessity test must be satisfied before any item is recoverable, and any specific (as opposed to generic) item can only be recovered if it falls within the grasp of the relevant claimant's CFA;*
>
> *Pre-Action Protocols: I would dismiss the defendants' appeal against the Judge's finding that there should be no disallowance or reduction in respect of any sum claimed in the Bill on the ground of the claimants' failure to comply with any protocol or the PDPAC;*
>
> *Medical reports: Subject to the point that the cost of these reports should not be recoverable if it was unnecessary to obtain them, I would uphold the Judge's conclusion on this issue.*
>
> *Abandoned claims: Subject to satisfying the requirement of necessity in relation to an item, the claimants can recover costs in respect of the "abandoned claims" in so far as it was reasonable and proportionate to plead, investigate and pursue them;*
>
> *Settlement and distribution: I would uphold the Judge's conclusions, save I would discharge his imposition of the 26 October 2009 cut-off date;*
>
> *Success fee: I would uphold the Judge's determination of 58% uplift for both Leigh Day and counsel;*
>
> *ATE premium: I would uphold the Judge's decision to fix the premium of £9,677,554 by reference to a 65% prospect of success.'*

The Costs of Funding

As you will no doubt be aware, there is currently a bill passing through Parliament (the Legal Aid, Sentencing and Punishment of Offenders Bill) which, if enacted will remove the recoverability of success fees and After the Event (ATE) insurance premiums from an opponent. The Court of Appeal's position on the costs of funding, or as we refer to it, regulatory compliance, is consistent with what the government is attempting to achieve. If the Court of Appeal had not reached this decision and allowed recoverability on an inter partes basis, there would potentially be a situation where a Claimant could not recover a success fees and/or an ATE premium from an opponent but could recover the costs of the work carried out in entering into them. The decision has clearly been made with the bigger picture in mind.

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