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King's Bench Walk

Success for Andrew Roy in High Court costs appeal

In ***NJL v PTE*** [2018] EWHC 3570 (QB) Martin Spencer J set out the proper method for quantifying the risks associated with Part 36 offers for the purposes of assessing success fees. Andrew Roy, instructed by Chris White at Plexus Law, appeared for the Defendant.

Background

The Claimant was a car passenger who suffered catastrophic injuries on 14 May 2010. These rendered him a protected party. Liability was never in dispute. The claim settled slightly less than three months before trial for a £1,150,000 gross lump sum, £34,000 p.a. periodical payments and costs.

The Claimant's solicitors entered into a CFA (CFA (1)) on 19 July 2010. Following a change of litigation friend they entered into a second CFA (CFA (2)) on 20 August 2012. These both provided for a 25% success fee if the claim settled more than 3 months before trial and 100% thereafter. The terms of the CFAs were conventional. "Success" was defined simply in terms of recovering any damages. If the Claimant rejected an effective offer to settle on advice, no fees were recoverable for the relevant period thereafter. CFA (2) was a "CFA lite"; any costs not recovered from the Defendant would be waived. The risk assessments in support of the CFAs were largely pro forma and did not set out any arithmetical basis for the success fees.

The effect of pre-April 2013 rules was that (a) the default position was that the success fee was fixed at 12.5%; (b) the Claimant could apply for higher figure; (c) if the Claimant established that the correct success fee was more than 20%, he would recover that higher figure; (d) if not the default of 12.5% applied.

The Claimant applied for success fees of 100%, although at the assessment hearing itself reduced figures of 67% were sought. District Judge Searl held that in respect of CFA (1) he was limited to 12.5%. However, she allowed 65% in respect of CFA (2). She did so by reference to the fact that between CFA (1) and CFA (2) further information about the Claimant's history had come to light which made causation more complex.

Appeal

The Defendant appealed. He argued that the Claimant's solicitors, and in turn the District Judge, had failed to quantify the relevant risks. The only real risk was in respect of Part 36. Given the nature of the claim, this was a relatively low risk and one which would only apply to small proportion of the solicitors' overall fees given that any potentially effective offer was likely to be towards the end of the case.

The judge carried out a thorough review of the relevant authorities at [15-24]. He set out at [32-36] in detail the correct approach to calculating the success fee in such cases. The solicitor was required to quantify two factors: (a) the likely timing of a Part 36 offer (which was necessary to identify the likely proportion of fees which were at risk); and (b) the likely risk of such an offer being rejected but then not bettered at trial. Thus, if the likely timing of the offer was such that 25% of the fees would be at risk (i.e. 75% of fees would have already have been incurred), and there was 50% chance of rejecting an offer which was then not bettered, the combined risk to the total fees would 50% of 25% = 12.5%. This would translate into overall prospects of success of 87.5%. This would justify a success fee of 14.29%.

Against this background the judge held at [34] that "essentially for the reasons relied on by Mr Roy for the Defendant, the decision of the District Judge was plainly wrong and must be overturned". He rejected the

Claimant's submission that the fact that CFA (2) was a CFA lite could justify an increased success fee. He held that the Claimant had clearly failed to achieve a success fee of 21% or more. The default figure of 12.5% therefore applied.

Comment

Inter partes success fees were of course largely abolished by the **Legal Aid, Sentencing and Punishment of Offenders Act 2012.** However, the reasoning in ***NJE*** remains relevant to four classes of cases:

(1) Longstanding claims where a pre-LASPO CFA was entered into. ***NJL*** itself was one such.

(2) Mesothelioma claims. The pre-LASPO funding regime continues to apply to these.

(3) Clinical negligence claims. ATE premiums continue to be partially recoverable inter partes in these. Similar questions of quantifying risk and reward arise in respect of such premiums. They continue to generate litigation. See for example ***Demouilpied v Stockport NHS Foundation Trust*** [2016] 11 WLUK 128, ***Coleman v Medtronic Ltd*** [2016] 10 WLUK 503, ***Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust*** [2017] 2 WLUK 512, ***Pollard v University Hospitals of North Midlands NHS Trust*** [2017] 1 Costs L.R. 45, ***Mitchell v Gilling-Smith*** [2017] 8 WLUK 235 and ***Percy v Anderson-Young*** [2017] EWHC 2712 (QB); [2018] 1 W.L.R. 1583. ***Demouilpied*** is due to be heard by the Court of Appeal in June 2019, ***Percy*** on a date to be fixed.

(4) Claims giving rise to solicitor-client costs disputes. Even in respect of majority of cases, LASPO did not abolish additional liabilities. It merely prohibited inter partes recovery. Such arrangements remain lawful and additional liabilities can (with certain restrictions) be recovered from the client. Disputes as to additional liabilities have thus now, to a degree at least, been displaced from inter partes assessments to solicitor-client assessments. Issues such as those in ***NJE*** are liable to arise in such assessments. See ***Herbert v HH Law Ltd*** [2018] EWHC 580 (QB); [2018] 2 Costs L.R. 261 (due to be heard by the Court of Appeal in March).

The important practical point which emerges from ***NJE*** is that a receiving party should be in a position to justify any additional liability by reference to an arithmetically informed risk assessment.

Any such calculation, if properly grounded, will be difficult to challenge. As was observed in ***NJE*** at [37]: "if a solicitor could show that he had at least attempted to make a judgment of those matters and had devised his success fee accordingly, a District Judge would be slow to say that the solicitor had got it wrong and that the success fee should not be allowed".

Conversely, where such support is lacking an additional liability is likely to be highly susceptible to challenge. ***NJE*** is a clear example of this.

Click here for the full judgement.