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Recoverability of Costs

The impact of the 2013 CPR reforms

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Outline of the Talk



- Costs Management
- Proportionality
- CFAs
- DBAs
- QOCS and ATE

Costs Management

- Applies to all multi-track cases commenced on/after 01.04.13 in County Courts or the QBD
- Unless...
 - It is a Commercial Court case
 - It is a TCC or Mercantile Court case worth more than £2m
 - The Court orders otherwise

Costs Management cont.

- Parties are to file budgets by 7 days before first CMC (unless Court orders otherwise)
- Failure to file means budget treated as comprising court fees only!
- Court can approve budgets by a 'costs management order'

Costs Management cont.

- Budgets will impact on case management decisions
- When assessing costs on standard basis, court will not depart from agreed/approved budget unless satisfied there is good reason to do so

Costs Management cont.

- *Henry v. News Group Newspapers*
 - Successful appeal from decision of Senior Costs Judge Hurst
 - Result: C not held to her costs budget of £381K (she claimed costs of £650K)
 - But
 - A fairly narrow decision
 - Not a panacea
 - On a differently-worded scheme

Proportionality

- The 'old' way
 - *Lownds v. Home Office*
 - The two-stage test:
 - Proportionality on a 'broad brush' basis
 - Reasonableness item by item (or necessity)

Proportionality cont.

- The new way
 - CPR 44.3(2): *Where the amount of costs is to be assessed on the standard basis, the court will only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.*

Proportionality cont.



Proportionality cont.

- Is this *Lownds* in reverse? (per Lord Neuberger)
- A proportionality 'long stop'?
- Impossible to predict or plan for?
- Satellite litigation waiting to happen...

CFA's



CFAs cont.

- An end to the recoverability of success fees
- Not to the recoverability of base costs under CFAs
- No cap on uplift by reference to damages in TCC-type work
- Success fees to be recovered from clients

QOCS and ATE

- QOCS not applicable in TCC-type cases
- So, potentially a need for ATE cover
- But ATE premiums no longer recoverable, even though no QOCS protection in this type of claim
- An end to the days of 'self-insuring' premiums?

DBAs

- The basic principle: contingency fees
- An agreement providing that:
 - The recipient of legal services is to make a payment to the provider if he obtains a specified financial benefit in the matter in which services are provided and
 - The amount of that payment is determined by reference to the amount of the financial benefit obtained

DBAs cont.

- Key requirements of a DBA
 - In writing
 - Certain T&Cs
 - Made after any requirements about provision of information
 - Maximum 'payment' is, at first instance in TCC-type work, 50% (inc. VAT = 41.66% plus VAT) of sums ultimately recovered

DBAs cont.

- Recoverability *inter partes*
 - New CPR 44.18
 - Recoverable costs assessed ‘in the normal way’
 - Cannot recover more than total amount payable under the DBA (i.e. indemnity principle)

DBAs cont.

- The DBA itself can provide only for client to pay
 - The ‘payment’ – net of ‘costs’ recovered from opponent
 - Any expenses, i.e. disbursements – net of expenses recovered from opponent

DBAs cont.

- So, must there still be an ordinary retainer of some sort in place?
- There must at least be some basis for recording and charging hours in normal way
- That is what the Court will be assessing *inter partes*

DBAs cont.



DBAs cont.

- A claim for defective design
- A DBA providing for 50% 'payment' plus expenses
- The claim is settled for £1m
- Expenses amount to experts' fees of £10K
- So...

DBAs

- Under the DBA solicitors entitled to £500K plus £10K
- They had spent 1000 hours at a rate of £300/hour
- Maximum recovery *inter partes* is £310K
- Over to the costs judge...

DBAs cont.

- No reduction on assessment
 - D pays £310K
 - Client pays £200K

- A bad day at the office
 - D pays £190K
 - Client pays £320K