“New” test for proportionality applies to additional liabilities – a proportionate response?

The Courts have confirmed that pre-1 April 2013 Additional Liabilities must still be proportionate under the “new” Rules.

On 1 April 2013, there was a paradigm shift in the recoverability of Additional Liabilities, including success fees and ATE premiums. The current drafting of s.58A(6) Courts and Legal Services Act 1990 (as amended by s.44(4) Legal Aid, Sentencing and Punishment of Offenders Act 2012) removes the rights of a successful claimant to recover any success fee they agreed with their solicitors under a conditional fee agreement (“CFA”) from the unsuccessful defendant. This amendment does not apply to CFAs entered into before 1 April 2013.

Similarly, s.58C Courts and Legal Services Act 1990 prohibits the recoverability from a defendant of any After The Event (“ATE”) insurance premium where the policy was entered into on or after 1 April 2013.

There is a view that the “old style” CFAs prevented defendants from access to justice in breach of Article 6 of the European Convention on Human Rights. This was confirmed by the European Court for Human Rights in MGN v United Kingdom (Case No. 39401/04), albeit that it has not been implemented or followed in UK Courts to date (see Coventry v Lawrence [2015] 1 WLR 3485 and Campbell v MGN (No 2) [2005] 1 WLR 3394).

Legal fees and costs is an area of widely contested litigation, rife with satellite disputes. The latest of these is BNM v MGN Limited [2016] EWHCB 13 (costs). In this case, the Claimant was a primary school teacher who had been having a relationship with a successful premiership footballer. This relationship had been kept under wraps until the Claimant misplaced her mobile phone. The phone found its way into the Defendant newspaper publisher’s hands, who gained access to its personal and private messages, uncovering the relationship. On 18 April 2013, the Claimant entered into a CFA with her solicitors; she agreed two CFAs with Counsel on 7 May 2013 and 30 July 2013. On 25 July 2013 the Claimant also purchased an ATE policy. The Claimant commenced proceedings against the Defendant on 31 July 2013 seeking an injunction from using the confidential information taken from her mobile phone, together with damages and an order for delivery up of the confidential information.
Claims relating to publication and privacy proceedings are currently exempt from the post 1 April 2013 regime and thus in this case the success fee and ATE premium were recoverable from the Defendant.

The claim quickly settled and the Defendant agreed to pay damages of £20,000, together with the Claimant’s costs of the action.

The Claimant claimed costs of £241,817, which included a solicitors’ costs success fee of 60%, Counsel’s success fee of 75% and an ATE premium of £58,000 (plus IPT of £3,480).

The Defendant twice appealed the recoverability of these costs, initially arguing that they were in breach of Article 6 of the European Convention for Human Rights (which was unsuccessful), and then on grounds that the additional liabilities, including the success fees and ATE premiums, were not proportionate. Since 1 April 2013, CPR 44.3(2) has provided: “…where the amount of costs is to be assessed on the standard basis, the Court will: (a) only allow costs which are proportionate to the matters in issue…”

The High Court has held that this test for proportionality applies to “old style” CFAs.

Findings

The Courts have for some time disallowed disproportionate or unreasonable ATE premiums (see for example, Redwing Construction Limited v Wishart [2011] EWHC 19 (TCC); Kelly v Blackhorse Limited [2013] EWHCB 17 (costs); and Banks v London Borough of Hillingdon (unrep, 3 November 2014).) However, this case goes somewhat further and confirms that the old test for proportionality (which was achieved by determining whether it was necessary to incur a particular item of costs and then whether that item was for a reasonable amount (Willis v Nicholson [2007] EWCA Civ 199)), does not continue to apply, and has been replaced with the new wider test for proportionality which requires the Court to look at the costs as a whole and determine whether they are proportionate. In looking at the costs as a whole, additional liabilities are not considered separately from base costs (paragraph 35 of Master Gordon-Saker’s Judgment).

In this case, this resulted in the success fee being reduced by 50% and the ATE premium of £58,000 (increasing to £112,500 if the claim were to proceed to trial), being held to be disproportionate and cut in half.
Discussion

At first blush this may seem like a victory for the insurance industry, which has long been crippled by the success fee and ATE premiums they are required to pay to successful Claimants. However, what the Courts have given with one hand, they have taken away with the other; it is likely that solicitors will face new claims from their clients in the event that they are unable to make a proper costs recovery under old style CFAs (leaving Claimants with a larger than anticipated costs liability). Master Gordon-Saker made it clear in his Judgment that a solicitor must be prepared for the proportionality requirement (even when it is being applied retrospectively to old style CFAs) and, in particular, is required to warn their clients of the risks of low recovery of costs even in the event of a successful settlement.

By divorcing proportionality from necessity in respect of additional liabilities, the Courts have also potentially opened themselves up to a Coventry v Lawrence style claim in reverse, with Claimants alleging that they are now precluded from access to justice for low to medium value claims, in particular, in respect of those claims where personal reputation is on the line, in circumstances where they will not be allowed to recover their ATE premium which would otherwise give them the peace of mind to pursue the litigation. We do not consider that the fact that in this case the funding agreements were entered into after 1 April 2013 has any significant bearing or distinguishing features to a pre-April 2013 funding arrangement (albeit we can see an argument that applying the new test of proportionality to those agreements gives rise to a more unfair outcome).

This case may be subject to an appeal; Master Gordon-Saker previously allowed the ATE insurance premium “as claimed”, whilst still halving the success fee in an earlier decision (where arguments about human rights were advanced and rejected) on costs in the same case (paragraph 40, BNM v MGN [2016] EWHC B1 (costs)). His later Judgment does not to our mind properly reconcile this contradiction.

Otherwise, on the whole, this would appear to be a victory for professional indemnity insurers, equipping them with another weapon in their frankly depleted arsenal to try and write down liability for Claimants’ costs by arguing that the recoverability of pre-commencement ATE premiums and success fees are disproportionate when considered in conjunction with base costs.

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