Hedging your bets – indemnity costs awarded to a defendant

The long running and much publicised dispute between Mr and Mrs Burgess and their neighbourly architect, Mrs Lejonvarn, has been the subject of numerous court hearings and applications. This dispute has finally drawn to a close with a recent Court of Appeal decision where indemnity costs were awarded to Mrs Lejonvarn. It was held that any approved cost budget figure was irrelevant to the issue of whether indemnity costs should be awarded (Lejonvarn v Burgess [2020]).

Background

In 2013, Mrs Lejonvarn, an architect and neighbour of the Burgesses, offered to assist them with the landscaping of the garden at their £5 million London home. The Burgesses obtained a quote for construction of the works from a well-known landscape designer, Mark Enright, for £150,000 plus VAT. Mrs Lejonvarn secured the services of an alternative contractor whose work she estimated would cost £130,000 plus VAT. She charged nothing for her services.

The parties fell out a few months later, when the Burgesses claimed that the £130,000 quotation had not been discussed nor agreed. Mrs Lejonvarn stepped back from the project, although Mr and Mrs Burgess continued to use her recommended contractor. Unfortunately, there were issues with the work and, eventually, the Burgesses re-instructed Mr Enright, resulting in total costs of £396,288.

In 2015, Mr and Mrs Burgess brought proceedings against Mrs Lejonvarn in contract and tort on the basis that, despite not charging for the work, she had been engaged by them as a professional and had been negligent whilst carrying out her services.

There followed various hearings. In April 2017, we wrote about the alarm-generating Court of Appeal decision that a duty of care could arise in situations where informal, free advice was given. In December 2018, we commented on the High Court decision which ultimately rejected the claim against Mrs Lejonvarn, stating that there was no evidence that, in the services she had performed, she had been negligent. You can read about the case in more detail here and here.

Costs

In February 2020, the Court of Appeal handed down its decision on the issue of indemnity costs, overruling the earlier High Court decision that Mrs Lejonvarn’s costs should be assessed on a standard basis. The Court of Appeal awarded costs on an indemnity basis from one month after the date of the first Court of Appeal hearing on 7 April 2017 (which concerned Mrs Lejonvarn’s duty of care to the Burgesses).

The court decided:

- Mr and Mrs Burgess ought to have realised after the first Court of Appeal hearing that their claims were “at the very least, speculative/weak claims.” They “should have called a halt”, but failed to do so. As such, their behaviour was out of the norm so as to justify an order for indemnity costs.

- In making an early Part 36 offer of £25,000, Mrs Lejonvarn had acted “sensibly and proportionately” in a way that Mr and Mrs Burgess had not. Their rejection and failure to beat the Part 36 Offer was also out of the norm, and separately justified an award of indemnity costs.
Hedging your bets – indemnity costs awarded to a defendant

- Mrs Lejonvarn’s costs amounted to £724,265.63, against a costs budget of £415,000. The court decided that, where indemnity costs are awarded, any approved budget become irrelevant. Overrunning the budget would not prevent the award of costs on an indemnity basis. It was commented however, that this figure may be reduced if costs were found unreasonable at assessment, even on the indemnity basis.

Comment

The case provides useful insight as to the circumstances ‘outside the norm’ where the court will award indemnity costs to a defendant, as this is not automatic on a defendant beating its’ own Part 36 offer. This decision is also noteworthy with respect to the court’s approach in cases where costs have exceeded an approved budget figure.

As held in the underlying case, the court is reluctant to create wide-reaching tortious duties when professionals are providing services gratuitously. However, it is worth taking note that a duty of care is likely to arise in these circumstances and a professional may be found liable for any positive actions performed negligently but not for any failures to perform.

For further information please contact:

Sheena Sood
Partner
+44 (0) 20 7469 0402
s.sood@beale-law.com

Priya Thakrar
Trainee Solicitor
+44 (0) 20 7469 0432
p.thakrar@beale-law.com