NWL COSTS LAWYERS

NWL Costs Update – January 2022

Hankin v Richard Barrington, Ademola Adejuwon and Saracens Rugby Club - SCCO 05.01.22

Another case (at Costs Judge level only) about what is reasonable for Counsel to charge for a Brief fee when a case settles prior to Trial.

The Claimant was a professional rugby player who suffered head injuries which ended his career. He sought compensation of more than £3 million against all three Defendants who denied liability.

The case was listed for a trial on liability and quantum to commence 15.03.21 for 13 days but settled at Mediation on 24.02.21 against the First and Second Defendants.

The Claimant subsequently served a bill of costs for £876,701.99 and the matter proceeded to a Detailed Assessment.

The Judgement relates to the only item not agreed namely Leading Counsels brief fee of Mr Robert Wier QC claimed at £125,000.

Of the £125,000, £15,000 was charged for the Mediation leaving a balance in the bill for the brief of £110,000.

The Arguments

The Defendants pointed out that their own Counsel had agree a staged brief fee of £35,000, with £15,000 for the mediation and two further tranches of £10,000. The Claimant by comparison had not.

It was further pointed out that the fee had to be agree in the absence of which it could not be recovered from the Defendant. As to quantum the Defendant took issue the Points of Reply which suggested that Counsel had lost the opportunity for other lucrative work – there was no evidence of that and as a busy silk it had to be assumed he would have been able to take up other work.

The Defendants primary contention was that the fee should be nil, but otherwise that £55,000 would be reasonable, less an uncontested figure of £15,000 for the mediation and then reduced again to reflect the other work counsel would have undertaken after the case settled.

For the Claimant it was accepted that because the case did not proceed to Trial there would be 'good reason' to depart from the budget.

Whilst Counsel was pre-eminent his hourly rate was not. The case was complex, contested on liability, causation and quantum and pleaded at more than £2 million. Deducting the mediation fee left £110,000 – which was equivalent of 22 days at £5,000 a day which was reasonable and had the Trial taken place there would have been daily refreshers on top.

To reflect any possible abatement/additional other work undertaken by Counsel after settlement a reduction of 20-25% was appropriate meaning a fee of not less than £75,000-£80,000 was appropriate.

Decision

The Costs Judge usefully reviewed the relevant authorities.

It was not just a case of working out hours spent by counsel and applying an hourly rate:

The calculation is more nuanced and takes into account the factors mentioned by Hobhouse J such whether the trial is "heavy" and a booking fee. It follows that in the context of the issue before me, it is worth emphasising what Jack J said in Miller, that the brief fee will also have contained an element to reflect the reserving of Mr Weir and a recognition that by clearing his diary, Counsel in all likelihood will have turned away other lucrative work in order to devote his time to the case in hand.

The Judge was not constrained by the Budget and based on the authorities reviewed considered a brief fee of £125,000 was unsupportable. The hourly rate of £550 **did** reflect counsel's pre-eminence and was higher than allowed for these types of catastrophic injury cases:

In so far as an hourly rate has been used, it is too high and reflects a sum for pre-eminence. It is also out of kilter with a case with similarities in which Lambert J allowed £45,000 for work undertaken 8 years ago. Doing the best I can, based upon the materials before the court, the submissions and the authorities to which I have referred, I consider a brief fee of £75,000 would have been reasonable for the hypothetical leader envisaged in the judgment in Simpsons Motor Sales undertaking a high value trial in 2021 such as this.

The Judge then considered the degree of abatement that was appropriate. It had not been advanced that Counsel was working up his brief before the date of mediation, and if the brief was delivered on 22.02 and the mediation was on 24.02 then that time would have been occupied with preparing for the mediation. Against that was the fact that time had been booked in Counsels diary, he was entitled to be paid for the loss of chance to appear at the trial and for the other remunerative work that would have been turned down.

Taking all things into account the level of abatement was 50% reducing the brief fee to £37,500. This was then further reduced to reflect a degree of 'mitigation of loss' by £10,000 to £27,500 plus VAT.

Thoughts

Most cases do not proceed to Trial, but many do settle after JSM's and mediation Hearings.

Counsel's brief fees and the degree of abatement applicable continues to be an issue.

Where a case settles early practitioners should seek to agree an abated brief with Counsel – rather than simply to proceed to an assessment based on Counsels brief fee in full. It is not cost effective for a negotiated settlement of costs to be delayed simply because of Counsels Brief fee. Counsel's clerks need to be realistic and this case, albeit at Costs Judge level only, can be used to as a basis for any such discussion.

NWL can also advise on what is reasonable before the bill is finalised and served in the hope a reasonable abated fee can be agreed. Counsel also needs to be realistic about what hourly rates can be recovered – and again NWL can advise on this.

In summary – where the case settles before Trial but after delivery of the brief – it is important to try and agree a realistic abated brief fee.