When winning isn't enough

Nothing succeeds like a success fee: not even an exaggerated claim or one funded by a non-party, says **Mark Hill QC**

IN BRIEF

- Matching graduated success fees to increasing litigation risk.
- The perils of exaggeration and baseless accusations of exaggeration.
- Caution in applying for costs against a non-party.

Sometimes winning is not enough. Costs, which traditionally followed the event, can now have equal importance to the trial itself. A few recent cases indicate the pitfalls which practitioners would do well to avoid and the tactical advantages which can result from prudent manoeuvring on issues of costs.

Staged success fees

Take *Peacock v MGM Limited* [2010] EWHC 90174 (Costs), Master Campbell, Senior Courts Costs Office, which concerned staged success fees for both solicitors and counsel which rose from 25% to 100% 28 days after service of the defence as "this is the most expensive part of an action". The claim arose from a defamatory statement in a Sunday supplement and provoked fairly fierce pre-issue inter-solicitor correspondence. Proceedings were issued and a defence was served making detailed averments of justification. An application to strike out certain paragraphs of the defence was dismissed with costs; and a subsequent costs-capping application was refused. The case settled six weeks before trial on terms favourable to the claimant. The consent order provided for the defendant to pay the claimant's costs on the standard basis. A bill was duly rendered for a figure of nearly £400,000, of which the solicitors' success fee amounted to about £150,000 and counsel's £15,000.

The defendant contended that the success fee ought to be 53% and not 100% as claimed, reflecting 70% prospects of success. It was argued that the rise in the success fee from 25% to 100% cut in at too early a stage in the proceedings. In making reference to s 11 of the Costs Practice Direction covering reasonableness in funding arrangements, the costs judge stated, "a party who contends for a high success fee in a matter that has gone a long distance towards trial … stands a better prospect of having that fee approved if a lower success fee would have been payable had the claim settled earlier". Noting that in *Ku v Liverpool City Council* ([2005] EWCA Civ 475, [2005] All ER (D) 381 (Apr)) Brooke LJ approved a high success fee which "kicked in" at the service of the defence, the costs judge had little hesitation in finding that in this instance, which afforded the defendant a further four weeks, the staged fee was reasonable and a full 100% success fee was justified.

Exaggeration 1: The greedy claimant

The Birmingham Mercantile Court was faced with a interesting issue on costs in *Midland Packaging Limited v HW Chartered Accountants* [2010] EWHC B16 (Mercantile). A claim for wasted expenditure in professional fees related to tax affairs was recast in successive amended Particulars of Claim. On obtaining judgment, the claimant sought costs on the standard basis subject to a detailed assessment. The defendant contended for a order which more fairly reflected their overall relative "success" in the proceedings and the manner in which the case had been conducted by the claimant. Part 36 offers had been exchanged in the run-up to the hearing. Judge Brown QC noted the provisions of CPR 44 whereby the court has a discretion as to costs and the general rule that the unsuccessful party will pay the costs of the successful party although the court may make a different order (44.3(2)). Following the Court of Appeal in *Straker v Tudor Rose* [2007] EWCA Civ 368, [2007] All ER (D) 224 (Apr) the judge recognised that he was required to identify the successful party and then consider whether there were reasons for departing from the general rule and, if so, to make clear findings of the factors justifying costs not following the event.

It was not disputed that the claimants had succeeded in that they had secured a substantial award of damages and an indemnity. In terms of both the money judgment and the indemnity, the claimant had beaten the express terms of the defendant's Part 36 offer and the claimant, having been "successful", was entitled to its costs, unless the defendant could demonstrate a good reason for departing from the general rule. Judge Brown accepted the defendant's arguments that

> "A high success fee stands a better prospect if a lower one would have been payable had the claim settled earlier"

the claimant's success, though substantial, was only partial. In particular the claimant recovered only one-third of its pleaded damages, lost on an issue on emigration which occupied a significant part of the hearing. In short, the defendant was successful on six out of the eight issues which the court had to determine.

It was argued that the claim was grossly exaggerated both on the pleadings and in unrealistic offers of settlement. Judge Brown concluded that there had been no real attempt by the claimant to settle the litigation. In his opinion, following a partial admission of liability by the defendant and an offer of settlement, the claimant fought the case to the bitter end substantially on exaggerated claims and overplayed his hand. The judge therefore awarded the defendant 75% of its costs from the date of the offer to be offset against the costs otherwise due to the claimant.

Exaggeration 2: the doubting defendant

Another case where a substantial issue on costs arose was *Clarke v Maltby* [2010] EWHC 1856 (QB), [2010] All ER (D) 253 (Jul), Owen J. The claimant succeeded on her claim in a personal injury action. She sought costs on an indemnity basis, as opposed to the standard basis for which the defendant contended. The defendant, in its counter-schedule had called into question the genuineness of the claimant's symptoms, implying deliberate exaggeration. This was pursued in prolonged cross-examination of her and witnesses called on her behalf. Contrary to the case advanced by counsel, the medical evidence disavowed any suggestion of deliberate exaggeration on the claimant's part. The counter-schedule implied serious professional impropriety on the part of the solicitor representing the claimant, although this was unreservedly withdrawn at the hearing. Owen J came to the firm conclusion that the conduct of the defendant was such as plainly to take the case out of the norm having regard to CPR 44.3(5)(c) and "the manner in which a party has pursued … a particular allegation or issue", was such as justify an order for costs on the indemnity basis.

Non-party costs orders

In *Dweck v Forstater* [2010] EWHC 1874 (QB), HHJ Anthony Thornton QC, the decision of Master Eyre to award costs against a non-party was quashed on appeal. Leslie Dweck had brought an action against Mark Forstater, claiming that an earlier judgment had been fraudulently obtained. The action failed and a costs order was made in Forstater's favour against Dweck. It remained unsatisfied and Dweck was duly declared bankrupt. A non-party costs order was sought against Dweck's wife, mother and one of his sons, and Master Eyre acceded to the application.

> "Pure funders of litigation with no interest in its outcome should not generally have orders for costs made against them"

On appeal to Judge Thornton QC, reference was made to ss 51(1) and 51(3) of the Supreme Court 1980 and CPR 48.2 and the authorities were reviewed (Notably *Hamilton v Al Fayed (No 2)* [2003] QB 1175, CA). It was emphasised that costs orders against non-parties are to be regarded as exceptional, the jurisdiction "fact-specific" and the ultimate question whether it is just to do so. A claimant should not be denied access to the courts through impecuniosity and a disinterested relative financially supporting a claimant's litigation out of family love and affection ought not ordinarily to be made the subject of a non-party costs order. Pure funders of litigation with no interest in its outcome should not generally have orders for costs made against them. The fact that the litigation is considered unmeritorious is not a sufficient criterion for making an order unless the matter was pursued maliciously with an ulterior motive and would not have been so pursued in the absence of non-party funding.

Judge Thornton concluded that the motives in financially supporting the fraud action were genuine, if misguided, and were not oppressive, vexatious or malicious. It was thus clear that Master Eyre had reached his decision on the basis of a series of findings and inferences which he was not entitled to make. Furthermore, the family members against whom the order was sought were denied a fair hearing in that adverse findings were made based upon witness statements without any cross-examination. The appeal was allowed and the non-party costs order quashed.

Conclusions

So what conclusions can be drawn from this clutch of recent cases? Not many perhaps, because adjudications on costs are case-specific and fact-specific. The court's discretion on costs is very broad and able advocates can be fortified in advancing increasingly more nuanced arguments in favour of departures from the basic premise under CPR 44 that costs usually follow the event. Where success fees under conditional fee agreements are concerned, the best advice is to start low and work up towards a 100% uplift expressly linking the percentage to a realistic assessment of risk at successive stages in the proceedings.

Legal advisers must commend to clients the need to be realistic about the recoverable value of their claim. They must advise that exaggeration is likely to result in a costs penalty being imposed by the trial judge. Conversely, defendants who make inappropriate and unsustainable allegations of exaggeration in relation to what transpires to be a bona fide claim are at risk of finding themselves liable to pay costs on the more draconian indemnity basis. Finally, a party who succeeds against an impecunious claimant should think twice—and then some more—before pursuing a non-party costs order. These are to be regarded as exceptional and cogent evidence of malice (or something very close to it) needs to be present before a trial judge is likely to make such an order. A speculative application is simply throwing good money after bad. In the post-Woolfian era of civil litigation, where conduct can have a significant bearing on an award of costs, it may not be enough to be first past the post: the spat on recoverability will be played out in the winner's enclosure. NLJ

Mark Hill QC of Pump Court Chambers is an honorary professor at Cardiff Law School and has recently joined the editorial board of Butterworths Costs Service