The assessment of costs recoverable as damages

by ***Christopher Smith QC***, **Essex Court Chambers**

Articles | Published on 12-Dec-2017 | England, Wales

This article considers the proper method of assessing costs claimed as damages in the context of professional negligence proceedings. In particular whether, assuming the claim succeeds, the costs claimed should be the subject of assessment and, if so, whether this should be on the standard basis or the indemnity basis. It provides a summary of key decisions including *Hawksford Trustees Jersey Ltd v Halliwells plc [2015] EWHC 2996 (Ch)*, and sets out the author's views as to which basis of assessment should apply.

The dilemma

A claimant who has received negligent advice from a professional will often have to incur significant legal fees, either as a direct result of that advice or in order to mitigate the losses which it would otherwise suffer as a result of that advice. The costs incurred naturally form part of the claimant's claim against the professional involved, and this article considers the basis on which those costs should be assessed.

Litigators are all familiar with the fact that when costs are awarded at the conclusion of a trial the receiving party will rarely, if ever, be made whole. The costs which are to be recovered will be assessed by a costs judge, either on the standard or the indemnity basis. What, however, should the position be when legal costs incurred in an earlier action form part of a claimant's claim for damages? Assuming the claim succeeds, should the costs claimed be the subject of assessment and if so should this be on the standard basis or the indemnity basis?

Pre-CPR cases

In *British Racing Drivers Club Ltd v Hextall Erskine & Co [1996] BCC 727*, Carnwarth J held that professional fees incurred by the claimant as a result of the defendant's negligence were recoverable from the defendant. He went on to hold, in relation to legal fees which the claimant had incurred, that there would have to be an enquiry to "establish the appropriate amount", which would be the amount which would be recoverable on the standard basis. In reaching his conclusion, Carnwarth J referred to a number of cases that had been decided before the introduction of standard and indemnity basis costs in 1986. He also referred at some length to the Court of Appeal decisions in *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2) [1993] Ch 171* and *The Tiburon [1992] 2 Lloyds' Rep 26*.

The former case concerned costs recoverable by a mortgagee, pursuant to an expressly agreed contractual provision which provided for a "full indemnity". It was held that the costs should be referred for taxation on the indemnity basis.

The latter was a case in which the insured shipowner sued both its underwriters and the brokers who had placed the policy, in circumstances where one of the underwriters had denied liability on grounds that gave rise to a possible claim (by the insured) against its brokers. The claim against the underwriters failed, the claim against the brokers succeeded, and the brokers were ordered to pay, as part of the damages, the insured's costs of the unsuccessful claim against the underwriters. Steyn J held that those costs should be taxed on the standard basis. In doing so, he observed that taxation on the standard basis seemed "to be a reasonable measure for the assessment of damages" and that to order assessment on the indemnity basis (which involved a reversal of the burden of proof) would be

"inconsistent with the proper assessment of damages" because the "plaintiff ought to establish what is a reasonable amount in respect of all costs reasonably incurred and there should not go into the assessment of damages a reversal of the burden of proof".

In the Court of Appeal Parker LJ observed (albeit obiter) that the only difference between standard and indemnity basis costs was that the burden of proof was reversed. In his first judgment he expressed "considerable doubts" as to Steyn J's conclusion, but in his further judgment he remarked that "further argument has convinced me that these doubts were misplaced". Scott LJ reached the same conclusion, saying in terms that the "standard basis formula ... corresponds closely, in my opinion, to the yardstick that would have to be applied to a contractual or tortious damages claim".

The approach taken by Steyn and Carnwarth JJ, and also (albeit obiter) by Parker and Scott LJJ, was followed in *Yudt and others v Leonard Ross & Craig and others (1998) The Independent, 12 October 1998*. In that case, Ferris J referred to criticism of the decision in *British Racing Drivers* in the (then) most recent edition of *McGregor on Damages* (Sweet & Maxwell). Although Ferris J was "impressed" by that criticism, he nonetheless followed the decision of Carnwarth J.

Post-CPR cases

After the introduction of the CPR, the decision in *British Racing Drivers* was referred to by Hart J in *Pearce v European Reinsurance Consultants and Run-Off Ltd [2005] EWHC 1493 (Ch)*, who observed that there were strong policy arguments in favour of the approach adopted by Carnwarth J. In *Mahme Trust Reg v Lloyds TSB Bank plc [2006] EWHC 1321 (Ch)*, Evans-Lombe J referred (at paragraph 66) to *Yudt* and to the criticism of Carnwarth J's approach in *McGregor*, but concluded that he would follow the approach of Carnwarth J "willingly" because "the appropriate method of assessment is the amount which would be awarded on assessment by a costs judge on the standard basis". The decision of Carnwarth J was also followed by HHJ Behrens in *Redbus LMDS Ltd v Jeffrey Green and Russell [2006] EWHC 2938 (Ch)* and in *Dadourian Group International v Simms [2007] EWHC 454 (Ch)*, Warren J concluded that he would (if the issue had in fact arisen) have followed the same approach as Carnwarth J, but not with the same enthusiasm as Evans-Lombe J.

These decisions were all referred to by Colman J in *National Westminster Bank plc v Rabobank Nederland [2007] EWHC 3163 (Comm)*. The issue before Colman J arose in different circumstances, in that the question which he had to consider was whether the assessment of costs incurred by the claimant in defending proceedings wrongfully commenced by the defendant in California, in breach of a contractual choice of jurisdiction clause, should be on the standard or the indemnity basis. Colman J referred to *Gomba Holdings*, *The Tiburon* and to *British Racing Drivers*. He then referred to the fact that these cases were all decided prior to the introduction of the CPR, and to the fact that under the CPR the amount recoverable on the standard basis was differently defined, such that the receiving party had to establish that the costs were "proportionately and reasonably incurred". Colman J considered (at paragraph 19) that "the introduction of the component of proportionality into the definition of the standard basis calls into question the perpetuation of the conceptual basis of decisions such as British Racing Drivers" and concluded that the costs recoverable by the claimant should be assessed on the indemnity basis.

In *Herrmann v Withers LLP [2012] EWHC 1492 (Ch)*, the issue arose again, but this time in the context of the claimant's claim against its former solicitors. Newey J referred to the decision of Colman J and also to various other first instance judgments which had (with varying degrees of enthusiasm) followed *British Racing Drivers*. Newey J agreed with Colman J that the changes to the standard basis introduced by the Civil Procedure Rules were "significant" and held that the costs which the claimant was entitled to recover as damages should be assessed on the indemnity basis.

The issue arose again in *Hawksford Trustees Jersey Ltd v Halliwells plc [2015] EWHC 2996 (Ch)*, in which HHJ Pelling QC concluded that the approach of Newey J was to be preferred, such that the amount of the claimant's costs that should be recoverable was "that portion that would have been allowed had they been subjected to a detailed assessment on the indemnity basis".

Which approach is correct?

Any first instance judge considering whether costs recoverable as damages should be assessed on the standard basis or the indemnity basis is in a difficult position. There are a number of first instance authorities in favour of the assessment being on the standard basis, but a growing number in favour of assessment on the indemnity basis. The only Court of Appeal decision is based on the old Rules of the Supreme Court and was, in any event, obiter. The confusion arising from these conflicting decisions is all the more acute because it can also be argued that a claimant seeking to recover costs as damages should (provided it was reasonable to bring or defend the relevant proceedings) recover the full amount of the costs in fact incurred, without the need for any assessment.

In *Dadourian* Warren J observed (at paragraph 38) that there were "serious policy issues here which would benefit from consideration by a higher court". HHJ Pelling QC gave permission to appeal against his decision on the assessment of costs recoverable as damages in *Hawksford v Halliwells*. Regrettably for practitioners advising clients going forwards, the appeal was settled and the Court of Appeal has not, therefore, had the opportunity to consider which approach is correct under the Civil Procedure Rules.

Off the fence: does the CPR in fact alter the position?

The writer's view is, with the greatest respect, that the decisions of Colman and Newey JJ and of HHJ Pelling QC are wrong, and should not be followed, for two principal reasons.

Firstly, the reasoning behind the decision in *British Racing Drivers* and (albeit obiter so far as the Court of Appeal is concerned) in *The Tiburon* is that the standard basis of assessment (as it then was) placed the burden of proof on the receiving party. That reflects the fact that the claimant (the receiving party in relation to a claim for damages) also bears the burden of proof.

In *The Tiburon"* the reason Steyn J gave for rejecting the indemnity basis of assessment was that it involved "a reversal of the burden", which would be "inconsistent with the proper assessment of damages". In that respect the changes made by the Civil Procedure Rules are not, it is submitted, "significant": they in fact made no difference at all; the burden of proof remains the same. If the indemnity basis was inappropriate under the RSC because it involved the paying party bearing the burden of proof, it is equally inappropriate under the CPR for exactly the same reason.

In *National Westminster Bank v Rabobank* Colman J suggested (at paragraph 25) that, under ordinary damages rules, "the burden of proof of failure to mitigate rests on the party in breach just as the burden of proof of unreasonableness rests on the paying party under the indemnity basis of costs assessment". Whilst correct so far as it goes, this observation does not, it is submitted, meet the point set out above, both because the costs which the now claimant seeks to recover are not always incurred as part of an attempt to mitigate and because, if costs have been incurred in mitigation, the issue is not whether there has been a failure to mitigate, but whether the costs incurred in mitigation were reasonably incurred, in relation to which the burden is on the party claiming those costs as damages (not the paying party).

Secondly, the introduction of a requirement of proportionality (the key difference between the RSC and CPR standard basis) does not make the CPR standard basis less appropriate. If anything, it makes the CPR standard basis more appropriate for the assessment of damages than the RSC standard basis. In practice it is probably unlikely that there will ever be a case in which costs could be incurred by the now claimant which were reasonable but which would fail the CPR test of proportionality. If that is correct then the introduction into the standard basis of a requirement to establish proportionality makes no difference, and the reasoning relied on by Colman and Newey JJ falls away. If, however, costs were incurred that were reasonable (for the purposes of a costs assessment) but not proportionate, the consequence of assessing damages on the indemnity basis would be not only that the paying party bore the burden of proving that costs incurred were unreasonable, but also that the receiving party would be entitled to recover costs expended even if they were disproportionate. It is difficult to see how costs which were disproportionate to the harm being mitigated could be said to have been reasonably or foreseeably incurred or, therefore, why they should be recoverable.

In short, the introduction of a requirement to show that costs incurred were proportionate does not detract from the observation of Scott LJ that assessment on the standard basis "corresponds closely ... to the yardstick that would have to be applied to a contractual or tortious damages claim". If, however, the issue of proportionality really does mean that the standard basis as now defined in the CPR is no longer appropriate, the better approach would, it is suggested, be to order that costs be assessed on the RSC standard basis (that is to say without regard to proportionality), rather than adopting the CPR indemnity basis and thereby reversing the burden of proof. On either basis it would not, it is suggested, be correct to allow the receiving party to recover the whole of its expenditure without any assessment.

In *Hawksford v Halliwells* HHJ Pelling QC gave a further reason for ordering that the costs which had been incurred should be assessed on the indemnity basis, which was that that was also the basis on which (by CPR 46.9(3)) costs would be assessed as between a solicitor and his own client (*Hawksford, paragraph 164*). The problem with this point is that the fact that, as between the now claimant and the solicitor acting for him, a particular part of the costs incurred were reasonably incurred, does not (without more) mean that they were reasonably incurred for the purpose of claiming damages against the now defendant. The fact that (as against his own solicitor) the now claimant would bear the burden of proving that costs incurred were unreasonably incurred is not a reason for holding that the now defendant should (as against the now claimant) also bear that burden.

Reality cross-check

Legal fees recoverable as damages are, in principle, no different to any other head of damages. In *Herrmann v Withers* Newey J referred to a passage in *McGregor* which observed that there was "nothing anomalous in allowing the now claimant, provided he has acted reasonably, to be made whole, in relation to the action into which he has been forced by the now defendant's breach of contract or tort". That may be correct, but it rather begs the question of how the question of whether the now claimant acted reasonably is to be assessed. Is it sufficient for him to establish that the decision to incur legal fees was reasonable or does he have to establish that the legal fees incurred were reasonable in amount?

The conclusion suggested above is that the now claimant must establish both, and can be further supported by considering other claims in tort or in contract. By way of analogy, a motorist or shipowner whose car or ship is damaged, as a result of a collision caused by the defendant's negligence, would not expect to be entitled to recover the full costs of repairs without any scrutiny whatsoever as to the amount of expenditure incurred. It would never be sufficient merely to establish that it was reasonable to repair the car or ship. He would expect to have to obtain and consider at least one quote before placing his order to have the repairs carried out. He would then expect to have the final repair bill checked against the quote and to recover only those costs that he could (as claimant) establish were reasonably incurred. If he incurred significant expenditure to repair (say) damage that was purely cosmetic,

it may well be held that such expenditure was disproportionate and could not be recovered, even though the cost was a reasonable cost for the repair in fact carried out. There is, it is submitted, no reason why a claimant seeking to recover legal fees should be treated any more generously, particularly in circumstances where he may seek to maintain privilege over the bills in question and other documents relevant to the question of reasonableness.

Conclusion

The reasoning in *The Tiburon* and in *British Racing Drivers* is not in fact affected by the introduction of the CPR, and costs recoverable as damages should be assessed on the standard basis. The introduction of the requirement to establish proportionality does not affect this conclusion, but if it does this can and should be accommodated by assessing, without the need to establish proportionality (but without also reversing the burden of proof by adopting the indemnity basis).

Put another way, it might be safest of all to avoid altogether the word "assessment" used in the title of this article, since that word by definition connotes assessment pursuant to CPR 44.3. If the question is redefined to refer to the quantification of costs recoverable as damages, the conclusion that the now claimant must establish that the costs he seeks to recover as damages have been reasonably (and arguably even proportionately) incurred is, perhaps, less controversial.

END OF DOCUMENT

Related Content

Topics
Costs - Litigation
Remedies

Practice Note: Overview
Damages for breach of contract: an overview•Maintained

Practice Notes
Detailed assessment: what it is and the basis of assessment•Maintained

Articles
Handle with care: summary judgment and striking out in professional liability cases•Published on 15-Feb-2017

Legal Update: Case Report
Confirmation of proper method of assessing costs claimed as damages (High Court)

