David Bowden Law®

ideas are always in credit

Irwin Mitchell's £1million costs bill upheld on appeal even though its cruise passenger clients received less than £150k compensation

TUI UK Limited v. Tickell
[2016] EWHC 2741 (QB)

Article by David Bowden

BAR STANDARDS BOARD
REGULATING BARRISTERS

Irwin Mitchell's £1million costs bill upheld whilst its clients received only £150k compensation
TUI UK Limited v. Tickell [2016] EWHC 2741 (QB)

Executive speed read summary
205 passengers became ill after a cruise on board the MV Thomson Dream. Solicitors made compensation claims. Liability was always denied by the tour operator. Shortly before trial, compensation was agreed on all cases. A costs bill for nearly £1.8million was submitted. Master Howarth following a lengthy detailed assessment reduced this bill to a shade under £1m. The tour operator appealed against this saying the bills should be reduced further. The basis for this was that there was too much time charged for inter fee earner discussions, unnecessary costs had been wrongly allowed and that no costs should be allowed at all for those cases that fell within the ABTA scheme. The appeal was dismissed with Mrs Justice Laing finding that the cost judge was neither wrong in his ruling nor had he exceeded the ambit of his discretion. As the tour operator had always strenuously denied liability, then it was not open for it at the 11th hour in costs proceedings to refer to the ABTA scheme – if it had wanted to do so then it had to make this clear in its response to the pre-action protocol letter before action.

TUI UK Limited v. Tickell
[2016] EWHC 2741 (QB) 1 November 2016
High Court of Justice, Queen's Bench Division (Mrs Justice Laing and Master Leonard as assessor)

What are the facts of the underlying case?
205 passengers became ill after a holiday cruise of the MV Thomson Dream which TUI UK ('the paying party') operated. Some passengers' illnesses were more serious and some claimed for the disappointment cost of a ruined holiday. The paying party denied liability throughout. Court claims seeking compensation were issued separately on all cases in December 2011. All cases then settled shortly before trial listed for February 2014. The compensation awarded was:

- 116 claimants settled for around £500 each,
- 57 claimants with minor sickness settled for around £700 each, and
- 32 claimants whose illness was more serious settled for more than £1500 each.

How did the cruise passengers fund their cases?
Irwin Mitchell acted for the receiving parties on 'no win, no fee' conditional fee agreements. These sought a success fee of 100% of their base profit costs. After the event insurance was not in issue on this appeal. The receiving party is a bonded member of the Association of British Travel Agents (ABTA). It runs an alternative dispute resolution ('ADR') scheme for its members which can deal with disputes for personal injury claims for up to £1000 or breach of contract cases for under £5000. ADR was not used by the receiving parties.

What bills of costs were submitted?
The receiving parties submitted a bill seeking total costs of £1,768,011.25.

What decision did Master Howarth make on costs in the SCCO?
Master Howarth below following a lengthy detailed assessment hearing in 2015 decided the costs claimed were disproportionate and assessed the costs at £999,121.36. He assessed generic costs at £365,580 and there was no appeal against that finding. The finding in relation to the aggregated costs on the 205 case files of £630,456 was challenged appeal as being '*too high*'.

What did *Lownds* decide on the proportionality of costs bills?
In *Lownds v Home Office* **[2002] EWCA Civ 365**, Lord Woolf MR ruled as follows on proportionality:

> *'…There has to be a global approach and an item by item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which CPR r 44.5(3) states are relevant. If the costs as a whole are not disproportionate according to that test then all that is normally required is that each item should have been reasonably incurred and the cost for that item should be reasonable. If on the other hand the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary....*'

And also:

> *'… a sensible standard of necessity has to be adopted. This is a standard which takes fully into account the need to make allowances for the different judgments which those responsible for litigation can sensibly come to as to what is required. While the threshold required to meet necessity is higher than that of reasonableness, it is still a standard that a competent practitioner should be able to achieve without undue difficulty.'*

What were the grounds of appeal?
There were 4 grounds of appeal in which the paying party submitted that Master Howarth had come to the wrong result:

- Allowing 144 hours of inter-fee earner discussions,
- Failing to rule out unnecessary costs,
- The solicitors for the receiving parties were in breach of their duties in failing to advise their clients on the availability of the free ABTA ADR system, and
- Wrongly assessing one case on the erroneous basis it was a lead claim.

On the 3rd ground of appeal, the appeal judge said other subsets were merely another way of expressing the 1st ground. So other than ADR she dealt with grounds 1 and 3 together.

What did the appeal judge rule on inter-fee earner discussions?
This ground of appeal was dismissed.

Master Howarth below had allowed 95 hours of generic time and 144 hours on the 205 individual case files. He noted that most of the work had been conducted by paralegals and that '*qualified solicitors and partners had been involved sporadically'*. Master Howarth commented that the time charged for discussions between fee earners '*worked out at 40 minutes on average per claimant per year*'. The appeal judge noted that '*it was unrealistic to say there should have been no inter-fee earner discussions*'.

She was complimentary of the receiving party's solicitors saying that this had been '*a well-run and well-documented piece of litigation'*. The appeal judge ruled that it was '*necessary from time to time to have discussions between the fee earners*'. The appeal judge ruled that the Master below had not erred and had taken the *Lownds* test properly into account because his judgement expressly referred to it and the allowance he made for it.

What did the appeal judge rule on unnecessary costs?
This ground of appeal was dismissed.

The appeal judge was taken to various disputed items in the bills. The receiving parties' solicitors had charged for their time in units of 6 minutes. The paying party tried to challenge this for time spent on checking a form on the basis that this task had taken 6 seconds not 6 minutes. This challenged failed and the appeal judge ruled that the Master below was *'making the obvious point that since the minimum unit for assessing costs is a six-minute unit, there is scope for a unit to be claimed when the underlying work has taken less, sometimes, significantly less, than six minutes to do'.*

Similarly challenges about the length of time taken by a paralegal to peruse quantum documents also failed.

What did appeal judge rule on ADR?
This ground of appeal was dismissed too.

The paying party said that no costs should be due at all for claims that fell within the ambit of the ABTA scheme. The receiving parties said that the paying party had never invited them to use this ADR scheme and that because the paying party denied liability throughout ABTA mediation would have failed. The paying party had offered to settle all claims for £70,000 (less than half the amount subsequently awarded) but this offer was rejected.

The appeal judge considered the decision of Master James in *Briggs v First Choice Holidays and Flights Limited* (**Case no: HQ11X02646**) in which she held that those 152 claimants who had not used the ABTA scheme should not recover their base costs of £456,000. However the appeal judge ruled that this case had no application on the facts here because she said that '*if a Defendant wishes to rely at the stage of a detailed assessment on the availability of an industry specific ADR scheme*' that they '*must make that clear in its pre-action protocol response*'. The paying party had not done this as it had always robustly contested liability.

What did the appeal judge rule on the costs of the lead claim?
This ground of appeal was also dismissed.

One claimant (Bullen) was a minor whose compensation was assessed at £599 and base costs of £2307 were claimed. The Master below had looked at the file and ruled that he would allow 2 hours time for producing his witness statement. He noted that such detailed witness statements had been produced on only '*a limited number of cases'*. The issue of Bullen being a lead claimant or not was a red herring. There were no grounds for disturbing the Master's ruling below on costs.

What lessons can be learned from this case?
These were all pre-LASPO cases and so the solicitors were able to claim success fees of up to 100% of their base costs from the other side. For claims issued after April 2013, then no such success fee is recoverable from the other side. The time record keeping detailing what had been done on individual case files appears to have been immaculate and diligent.

It backfired on the paying party to have denied liability so strenuously and for so long. The appeal judge was right not to allow it to try and wriggle out of costs liability at the 11th hour by saying the cruise ship passengers should have used the free ABTA scheme. If that was what was proposed, then it needed to be spelled out.

This was a poor case to run on appeal for 2 reasons.

Firstly counsel for the paying party submitted that the costs claimed were too high and should be reduced to 60-70% of the amount claimed rather than the 80% it said should be the norm. However even on this basis, that would only reduce the base costs the Master assessed from £630k to somewhere between £470k to £550k. As the paying party would be responsible for its own costs as well as the receiving party's costs (including a success fee on those of up to 100%), then the exercise cannot be economically justified.

Secondly, an appeal is not a re-hearing of the detailed assessment before the Master. The appeal judge can only interfere where a decision is plainly wrong or outside the wide ambit of discretion given to a costs judge. An appeal judge cannot overturn a costs judge's decision because (s)he prefers one imperfect solution to an alternative imperfect solution. Dr Mark Friston in his book on costs says that *'...appeals concerning the amount of costs are… notoriously challenging from the appellant's point of view'*. This case provides a paradigm example.

At the end of the day the tour operator thought it could deny liability and the claims could go away. They did not. It could have admitted liability leaving only the quantum of claims to be assessed. It didn't to this either. As well as a compensation bill in 6 figures, it now has to pay legal costs of £1million, its own legal costs and the costs of both sides of this appeal. This can hardly be said to be on any basis the 'Thomson Dream'.

1st November 2016

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.