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Costs Orders against Lawyers: A line in the sand

Willers v De Cruz [2019] EWHC 2183

Summary

Imagine a case where lawyers, seek damages on behalf of a client which include their unrecovered costs in earlier litigation where they acted for the same client. If the new claim fails, are they personally liable for the winner's costs? This was the startling proposition advanced in this case. Rose LJ has said that it is wrong.

Background

The facts of this case are surely unique but the scenario, as we will see, could be commonplace. Mr Willers was engaged in a bitter and acrimonious dispute with the late Mr Gubay (Mr Gubay's will designating a fund to continue the fight after his death). One front of this dispute took place when a company allegedly connected with Mr Gubay brought a claim against Mr Willers. That action failed and Mr Willers recovered some but not all of his costs. Mr Willers sought to show that the claim was a malicious prosecution instigated by Mr Gubay and so brought proceedings against his estate, a principal head of the damages being the unrecovered costs of the company action. The Supreme Court having decided that there was a cause of action for malicious civil prosecution, Rose J heard the trial and decided on the facts that there was no malicious prosecution. Thus Mr Gubay's estate was entitled to its own vast costs of the new action. Mr Willers not being good for the money, the estate sought to recover its costs from Mr Willers' lawyers. The lawyers had, in both the company action and the malicious prosecution claim, acted on a basis whereby the commercial reality was that they would not be paid more than was recovered.

In this way Rose LJ (as she has now become) had to decide whether it was right that lawyers, acting in a failed claim where the main head of loss was their own costs in a previous action, and where credit had been afforded to an impecunious client, should be personally liable to the victor. Although this scenario might seem a rare one, as explained by Jamie Carpenter (who appeared for the solicitors) analogous scenarios might readily arise.

There might be a disputed will leading to expensive litigation between beneficiaries over the terms of the will and the losing party may then sue the solicitor who drafted the will in negligence where the damages includes the wasted costs. Should the losing party's lawyers (if the same) be personally liable for the costs of the negligence action? Or imagine a negligent conveyancing of a house where there may be litigation, for example over a disputed right-of-way which the conveyancer did not notice and the same solicitors may be used in the proceedings between the neighbours and the later proceedings in negligence against the conveyancer. Should such lawyers be personally liable for the costs if the negligence claim fails?

Resolution

The Court was shown the cases involving non-party costs orders and those pertaining to lawyers. The general thrust was where lawyers, in accordance with their professional regulation and rules, extended credit to the impecunious or acted on a CFA, they would not be personally liable for the costs of the successful opponent, since to do so would deter lawyers from acting and thus diminish the right of access to the Courts. As Rose LJ put it "*there is a strong public interest in ensuring that impecunious claimants can have access to justice even if that means that successful defendants are left substantially out of pocket. Because of this, legal representatives should not be at risk of a third party costs order unless they are acting in some way outside the role of legal representative*."

The executors for Mr Gubay argued that the distinguishing factor was that in this case the primary purpose of the failed malicious prosecution claim was to recover the lawyers' fees in the company action. They were the ones who would benefit and so they should compensate the opponent when that gamble failed.

Although Rose LJ said the decision was "very difficult" she rejected this argument. The main reasons were: (1) if different lawyers had acted for Mr Willers in the malicious prosecution claim, then this allegedly distinguishing factor would not exist, yet instructing a new team would have been difficult and more expensive; (2) litigation can take many twists and turns, and it was not desirable to broaden the potential personal liabilities of lawyers acting properly; (3) the examples given above show how any liability here could rapidly develop inappropriately; (4) the lawyers were prevented by privilege from revealing the advice given to Mr Willers and it must be assumed that they gave advice unaffected by their financial interests.

Comment

This case had attracted a lot of interest and the executors are bound to seek permission to appeal. The ramifications, if it had been successful, would have been considerable since it would have considerably broadened the scope of lawyers' personal liability. But, for now, there is a line in the sand.

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Hailsham Chambers, 8 August 2019