



Costs – issue at your peril

May 2016

A recent decision re-emphasises the costs risks a claimant faces if it issues proceedings but does not serve them.

The facts

Webb Resolutions Limited v Countrywide Surveyors Limited, was a standard professional negligence claim in which Webb alleged that Countrywide had negligently overvalued a property which was to form security for a loan.

In May 2011, Webb’s solicitors, Rosling King, sent a Letter of Claim alleging that Countrywide had negligently overvalued the property, based on a “preliminary retrospective valuation” which Webb had obtained but was “not prepared to disclose”. The loss claimed was £31,148.

Countrywide’s solicitors disputed liability and sought disclosure under the Pre-Action Protocol for Professional Negligence. Further correspondence passed between the solicitors but the claim did not settle, Countrywide maintaining that it had not been negligent.

On 25 July 2013, Webb’s solicitors wrote noting that primary limitation was due to expire on 7 August 2013 and stating that, as the claim had not settled, they expected to commence proceedings. Proceedings were issued on 7 August 2013 but were not served. Instead, Webb’s solicitors wrote saying that Webb was satisfied with the strength of its claim and making a Part 36 offer to accept £12,500 plus costs. Webb threatened to serve Particulars

of Claim if Countrywide did not settle but Countrywide said that it had no proposals to make.

Nothing further happened until April 2014 when Countrywide’s solicitors asked where proceedings had been issued. Webb did not respond but Countrywide’s solicitors found out where the proceedings had been issued and wrote seeking payment of Countrywide’s costs following on from Webb’s failure to serve the proceedings. Webb disputed that Countrywide was entitled to its costs and Countrywide issued an Application seeking an Order for payment.

The Court’s decision

The Application was heard by Deputy Master Nurse, who noted that the issue before him was not whether he had a discretion to order Webb to pay Countrywide’s costs (he clearly did), but rather how he should exercise his discretion particularly as regards Countrywide’s pre-action costs. This was significant as most of the costs had been incurred pre-action.

Webb submitted that its failure to serve the proceedings was a commercial decision based on the claim’s low value and that it should not be penalised for taking this decision. It appears that the Deputy Master was sceptical

Any comments or queries?

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of Webb's explanation for non-service and viewed the issue of proceedings as a tactical manoeuvre to encourage Countrywide to settle a claim it considered unmeritorious. The Deputy Master referred to the offers Webb had made, all of which sought payment of significant costs to Webb ranging from £20,000 when its first offer was made (7 September 2011) to over £60,000 when its last pre-action offer was made (13 May 2013).

In arguing against having to pay pre-action costs, Webb relied on *McGlinn v Waltham Contractors Limited* which decided that a defendant's pre-action costs in persuading a claimant to abandon part of its claim were not recoverable. The Deputy Master gave Webb's argument short shrift on the basis that Webb could not identify any issue debated during the pre-action phase which would not have been part of the litigation, if pursued.

Webb also argued that it should not have to pay pre-action costs because if it had not issued it could not have any liability for Countrywide's costs. Again, the Deputy Master was not impressed by this argument. Essentially, Webb had taken a calculated risk that by issuing it would encourage Countrywide to settle. That tactic had not succeeded and Webb was faced with either pursuing a claim which may fail or not serving and facing the consequences which flowed from that.

The Deputy Master stated that the issue of proceedings fundamentally changed the costs position, as it engaged the Court's jurisdiction

to award costs under section 51 of the Senior Courts Act. The failure to serve was only one factor to be considered when deciding what order to make. In this case, costs had quickly become disproportionate because the quantum of the claim was so small. By July 2013, Webb knew that its options were to issue, with the attendant costs risks, or to walk away from the claim. Webb was in no different position after issue and could have taken the decision it eventually did before issuing. Instead, it gambled, hoping that Countrywide would give in to the pressure which issuing created. That gamble had failed.

The Deputy Master held that it would be wrong, when exercising his discretion, to ignore the expense that Countrywide had incurred and Webb's awareness of the disproportionate expense of the course it was pursuing. He concluded that it would be unjust if Countrywide was not awarded its costs, including pre-action costs.

Lessons to be learnt

Claimants should not view the issue of proceedings as a tactic which they can use with impunity to encourage defendants to settle. As soon as a claimant issues, it puts itself at risk of having to pay the defendant's costs if it does not pursue the claim. This is so whether the claimant serves the proceedings or not. Even if a claimant does not tell the defendant that it has issued, if a defendant subsequently finds out that a Claim Form has been issued, it should be able to recover its costs from the claimant.

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