Episode 32 - Transcript

Getting personal – limiting your exposure to personal costs orders

Intro

Claims in the practice area of litigation come up in a variety of circumstances. One of the most fraught is when a solicitor may have a personal cost order made against them. Host Julian Morrow chats with Jon Tyne, special counsel with Sparke Helmore about the circumstances where personal costs orders may be made against solicitors and practical steps lawyers can take to limit the risks of exposure to personal costs orders.

Julian: Jon Tyne is a special counsel at Sparke Helmore in its commercial insurance team. Jon often acts for solicitors facing personal liability claims. Jon, welcome to Risk on Air.

Jon: Thank you, Julian.

Julian: Now, obviously this is a topic which is the stuff of nightmares for all practitioners everywhere.

Jon: Indeed.

Julian: Could you tell us what really is the risk for practitioners and where does it tend to arise?

Jon: So, there's often a focus when you're looking at professional negligence on lawyers who do transactional work. So that's the people who tend to focus on conveyancing, on sale of business, other sort of big transactions where a little slip in a contract or an error with a timeline can cause huge financial loss to the client. And that's definitely an area of focus. But there are risks for lawyers who act in litigated matters as well. There's an immunity which applies, advocate's immunity, to lawyers who act in litigation, which relates to work they carry out connected to what occurs in court. So if you, classic case is if a barrister makes a mistake while they're on their feet before a judge, they can't be sued by their client typically. But there are circumstances where even litigation lawyers can be subject to a claim either by a client or by another party.

And there've been some cases recently in the High Court, which probably most solicitors are aware of. For example, there's risk when you're giving advice on settlement and there are other situations where you can be found liable.

Another example, which perhaps isn't as front of mind is liability for personal costs. That arises where you may be acting for a client who has lost litigation, and usually, that client would have to pay the other party's costs. But there's significant discretion which allows the Court to make a costs order that it thinks is appropriate in the circumstances.

And sometimes, either a client or another party will ask for an order that the lawyer acting for their client pay the costs instead of the client themselves, and that can create a lot of distress and embarrassment for lawyers and all kinds of difficult issues in how you manage the matter.

Julian: And in terms of how and where these issues tend to arise in practice, would you say that you see opposing parties seeking costs orders more often than clients who've fallen out with their lawyers? How does the on-the-ground mix fall?

Jon: Yeah, I would say so. In our practice, we tend to see claims by other parties that the lawyer pays their costs of the matter and those can arise sometimes in matters which are perhaps a little more heated, maybe matters where there's a history of difficulty between the lawyers or just where there's a case of misconduct or mistakes having been made. Certainly, a claim by one party that another party's lawyer should pay their costs is a pretty significant step to take. And courts have made clear in the past that those sorts of applications shouldn't be made unless there's a clear case. We've certainly seen cases where those sorts of claims have been used as a way to try to get in the way of the solicitor acting for the client, because as you can imagine, where a claim like that is made, the lawyer may have a different interest to their own client.

So imagine that a plaintiff wins litigation, it wants for some reason the lawyer for the other party to pay costs. An application it makes is going to create a separation between the defendant's lawyer and the defendant because the defendant might have a different interest to the lawyer; it has an obvious interest in wanting the lawyer to pay its costs. What that means from the practitioner is that they need to manage these sorts of claims carefully. They need to think carefully about the conflict issues that can arise, and often there's a need for lawyers to be separately represented.

Julian: Jon, could you give us an overview of the legal basis statutory or otherwise for holding a practitioner personally liable for legal costs?

Jon: Well, courts have a broad discretion on costs and it's part of their power to control their own processes which arises in the distant past. In modern court rules, courts still have an inherent power, but there are statutory provisions which apply as well. When it comes to solicitors and also barristers acting in legal proceedings, their primary duty is owed to the Court. The Court is conscious to show that it is supervising the conduct of its officers in the proper administration of justice at the end of the day. But courts have recognised that the jurisdiction to order that solicitors or barristers pay costs personally since the early days of the Courts from these cases dating back to the early 18th century when this arose.

In terms of the modern law, there's two key statutory provisions which come up at these cases often. One is section 99 of the Civil Procedure Act and that allows courts to make orders against a legal practitioner where costs have been incurred by the person's serious neglect, incompetence, or misconduct or improperly or without reasonable cause circumstances which the practitioner's responsible. So essentially it allows the Court to order that a solicitor pay costs where those costs were unnecessary or incurred due to the practitioner's conduct.

Another key provision is Schedule 2 of the Legal Professional Uniform Law and that applies where a court forms the view that the lawyer has provided legal services to a party without reasonable prospects of success; so, without an arguable case that the client may succeed. Historically, courts were loath to order that solicitors bear the responsibility for clients having poor cases. They had the view that if a client was properly advised about their case, the lawyer shouldn't be held responsible for following the client's instructions to run it. That has changed in the modern law and solicitors now need to certify that cases, where damages are sought, have reasonable prospects of success. So there's an arguable case based on the facts in the law.

Julian: So, there's those statutory bases, and you mentioned the common law as well. Do these statutes limit or restrict the Court's inherent powers?

Jon: No. So the Court retains an inherent power beyond those. So, typically you would see an application made under all three of those bases, and the Court would make a decision based on one or the other.

Julian: So, when a court is looking at issues like this, what sort of factors does it tend to focus on and how do these applications usually play out, Jon?

Jon: So the focus is, as I said, in ultimately ensuring that the administration of justice is preserved and the Court is showing the public and the participants that it's controlling its processes appropriately. The focus is on indemnifying clients or other parties for costs that are improperly incurred or incurred due to a lawyer's conduct or mistake. However, courts have also made clear that they should only make personal costs order against solicitors in clear cases. It is a serious order to be made and it has serious consequences for a lawyer not just financial but also reputational, since you may end up having a judgment published with your name on it, the Court saying you've made a mistake.

Julian: No one wants that.

Jon: Indeed. It's probably worth a quick detail through some of the cases. An early case which is of importance is a 1940 decision in the UK House of Lords in Myers v Elman that confirmed that the Court's jurisdiction on personal costs is not the same as a disciplinary matter. It's not about the solicitor having engaged in professional misconduct. The object of the Court is not to punish but to protect the client who suffered a loss.

On the other hand, courts have recognised the public interest in lawyers not being dissuaded from taking firm positions in their client's interests. There's always a balancing between your duty to the Court, which takes priority, and your duty to act for your client and put forward arguments you're instructed to put forward. And in the UK case of Ridehalgh v Horsefield, the UK court said that lawyers should not be deterred from pursuing client's interests by fear of incurring a personal liability to their client's opponents. And also made the important point that before a court orders that a lawyer pay costs personally, they should be given a fair opportunity to defend themselves. And that's an opportunity that we'd encourage lawyers to take up where it's appropriate. Courts shouldn't be railroading lawyers into a personal costs order; they should have a full opportunity to defend themselves if they want to.

Another prescient observation, in that case, is that the remedy of personal costs shouldn't be allowed to go unchecked, become more damaging than the disease. We've certainly seen cases where applications for personal costs take on a life of their own and can take up a considerable amount of time, and costs, and also the Court's time hearing a matter that may have been decided many months ago. So, while there's certainly an important purpose to the power ensuring that clients and parties are indemnified where a lawyer on the other side engages in misconduct or serious incompetence, there's also a clear directive from the Courts that these sorts of matters shouldn't be allowed to get out of hand and be used to try and threaten other party's solicitors.

Julian: One recent case in this area is Cannon Finance v Reliance Medical Practice; that was number eight, I think (the decision), which does rather suggest as you were indicating that things can get elongated and go haywire when these costs issues arise. What happened in the case of Cannon Finance, Jon?

Jon: So the underlying case was about a contract between a medical practice and a financier to install new IT systems in the medical practice. Ultimately, the medical practice decided it didn't have the cash flow to go ahead with that and it decided not to proceed with the contract. It had to pay the financier and there was a settlement between those parties. The practice then alleged misleading and deceptive conduct against various providers of the IT services. It said they'd promised that the systems that were going to be installed would be suitable for its needs and compatible with its existing systems and so on. That part of the case failed and an application was then made by the IT providers that the lawyers for the medical practice should pay costs personally. They said that the case against them never had any basis, didn't have reasonable prospects, and wasn't properly articulated against them. So, the lawyers were ultimately responsible and should bear the cost over the clients.

So, the Court considered the application; this is one of the cases where there was a formal hearing held about the personal cost application. Sometimes the Court deals with it on the papers, but in this case, there were affidavits exchanged, submissions exchanged, on this application that the lawyers had to pay costs. The lawyers were separately represented; there was an in-person hearing. The judge decided at the end of the day not to award costs personally. There was significant analysis of what the evidence was available to the lawyers at the time they started the cross claims and the Court ultimately decided there was sufficient of a case there to justify the lawyers starting that action. The court also thought it was significant that the lawyers had engaged experienced counsel who had provided advice on the action.

One aspect of this case, which is interesting, is that the lawyers didn't provide a copy of any advice from counsel. There was no written advice given in evidence and any privilege over that advice had been waived. So, ordinarily, a lawyer facing one of these sorts of applications, particularly from another party, gets the benefit of the doubt when they can't put forward evidence to defend themselves where it's privileged. So, for example, the lawyer may not be able to put forward evidence in support of their case, which is advice they've given to their client because that would be privileged in the case brought by another party. Here, that was an issue, but the Court was still prepared to give the lawyers benefit of the doubt that they had received counsel's advice orally, that there were prospects.

It also took into account the fact the lawyers were younger, had less experience, and in the circumstances didn't award the serious order of personal costs.

Julian: Yeah, that was interesting in terms of the Court's preparedness, in that case, to assume that counsel had given the evidence. I suppose though, every one turns on their own facts, don't they?

Jon: That's right.

Julian: So you probably wouldn't want to be relying on that assumption too much.

Jon: Yeah, that's right. And certainly, if a lawyer faced with an application like this needs to consider first if they wish to defend it, they need to put forward any evidence they want to rely on, and that can be advice they've obtained from counsel if it's appropriate to do so, given any privilege over the documents, and it can be any actions that they've taken. The lawyer may often wish to express contrition to the Court if they've made a mistake and explain whatever the circumstances were that led to that mistake being made, and that can often be a matter of significance for the Court.

Julian: Well, while of course, we wish that your practice continues to be busy, Jon, for anyone listening at the moment, we hope that they don't find themselves faced with this situation. But if it does happen and you're in that very uncomfortable position, what can solicitors do and what should they do when they're faced with a claim for personal costs?

Jon: The first step we always recommend is that they notify their indemnity insurer, usually Lawcover, and that should be really as early as these issues arise. Often they get raised in correspondence between the solicitors before there's a formal application and the earlier it gets brought to Lawcover's attention, the better. There's often a need for lawyers facing these sort of applications to be represented separately because there can be difficult conflict issues between lawyers and clients which have to be worked out. Sometimes the client also needs to have separate advice and the earlier that can be arranged for lawyers, the better.

Second step is that, as I said, take advantage of the ability to file evidence and submissions in support of their own position. Applications of this sort do have serious consequences and solicitors should be given the opportunity to defend them if that's appropriate to do. And that can be requiring detailed particulars of the claim that's made, especially if it alleges serious misconduct, and putting forward detailed evidence to respond to it.

Julian: The conflicts issues that arise can be very tricky. Have you got any particular thoughts about how to approach those?

Jon: Practitioners need to be aware of them, and to take them seriously when these claims are raised. They need to, obviously, the client's interests are the foremost, and if there's any risk of conflict to think carefully about how that's going to be managed whether the lawyer's interests are going to be managed by a separate law firm or whether the client needs to be sent to a different law firm altogether, and the lawyer cease acting. Sometimes these issues arise when the lawyer's no longer acting for the client,

such as at the end of litigation, they can arise in the middle of a litigation while a solicitor is trying to defend or prosecute a case, which does raise all sorts of complicated issues. And that's another reason why these sorts of claims need to be brought in only clear cases because they can be very disruptive to the running of a case.

Julian: Of course, the best type of medicine is preventive medicine, Jon. So to try and avoid having to take any of the advice you've just given, how can solicitors minimize the risk of those sorts of situations happening in the first place?

Jon: Often these situations come up in ways that are very difficult to predict, but one area that solicitors can take steps to protect their interests is at the very start of a matter when they're assessing evidence, building a case. It's always good practice to, if you are obtaining advice from counsel on prospects, to have that in writing or record the advice in a file note in detail; record whatever instructions you have from the client in a written form. We see plenty of cases where solicitors have a recollection of getting instructions or advice and it just, unfortunately, isn't recorded in a document, it makes defending matters more difficult, so, attention to those requirements.

Then the other point to make is that courts are clear that the requirement to certify proceedings as having reasonable prospects isn't just a "tick box" exercise, the lawyer really does need to turn their own mind to this matter. It's actually not even enough to have advice from counsel that a matter has reasonable prospects, the lawyer has to give their own consideration to that question. So you'd want a lawyer to have gone through that exercise of forming a view and be able to, if necessary, give evidence about it.

Julian: Jon, thank you so much for running us through those very important matters. And I suppose that key takeaway as well that if the issue does unfortunately arise, make sure you get in touch with Lawcover as quickly as possible.

Jon: Thank you Julian, it's been a pleasure.

Outro

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