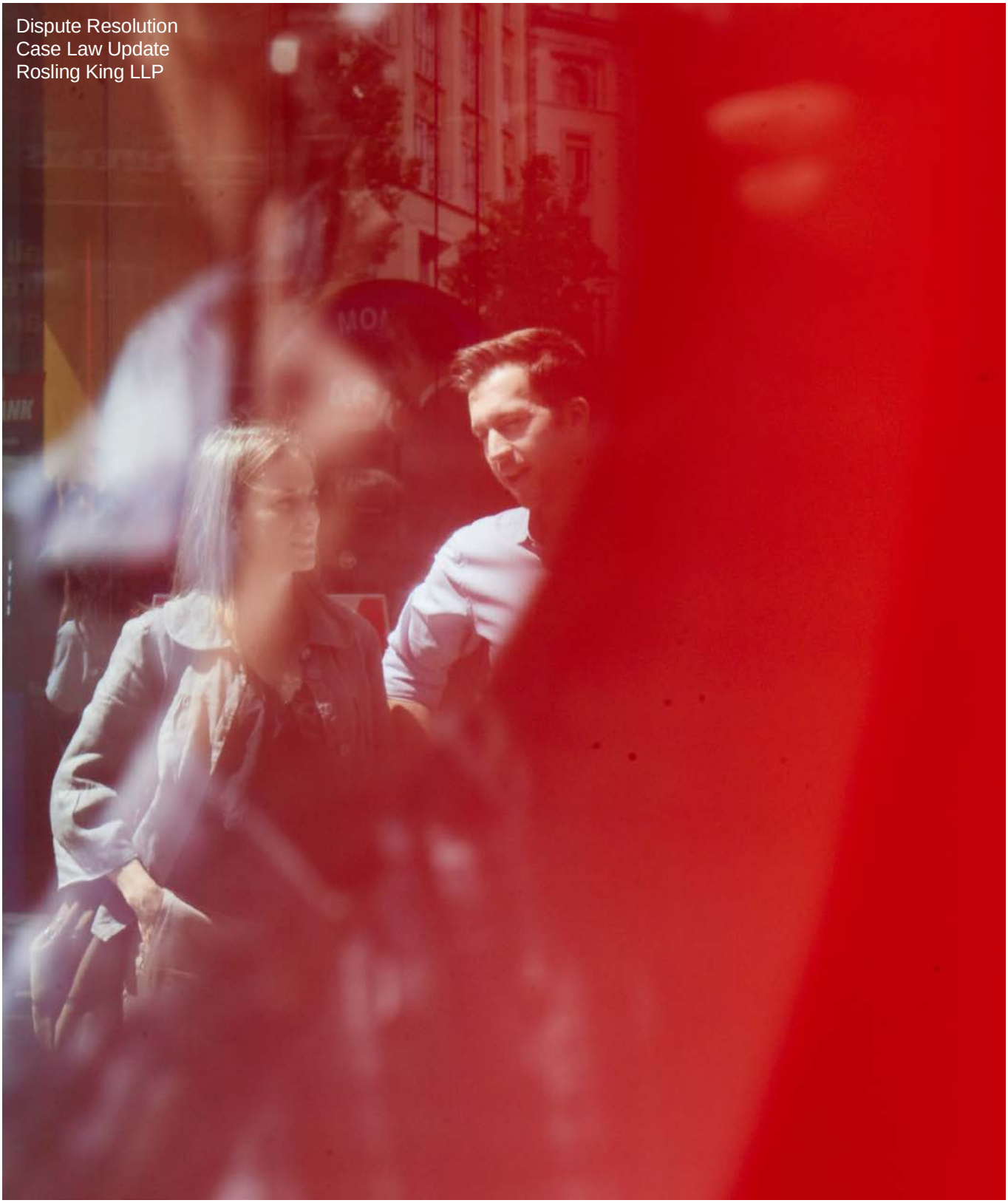
Dispute Resolution
Case Law Update
Rosling King LLP



This matter regards an appeal before Nugee J following detailed assessment proceedings regarding the costs of a professional negligence claim against a barrister that were struck out by Proudman J. Nugee J found this claim to be wholly without merit. It was also ordered that, save for the costs of the bundle to be assessed on the standard basis, the Claimant was to pay the Defendant's costs of the action on the indemnity basis.

There were five points of appeal which included allegations that the indemnity principle had been breached. One point of interest was the consideration of whether an order limited to the 'costs of the action' could extend to costs incurred pre-action.

Nugee J concluded that Sir Robert Megarry's analysis in Re Gibson's Settlement Trusts [1981] Ch 179 established that it is not necessary to use the words "and incidental to" in order for the court, when assessing the costs to be paid under the costs order, to be able to include costs incurred before the action is brought.

The Facts

The Claimant, Mrs Hurst (C) was represented by her husband solicitor, Mr Hurst (H). The Defendant, a barrister Mr Denton-Cox (D) was represented by Browne-Jacobson (BJ). The original case involved a professional negligence case brought by C against a barrister, D.

H acted under what was intended to be a Thai-trading agreement (a CFA with no success fee, whereby the law firm agrees to forego all of its fees if the client loses, and will recover its ordinary costs (base costs) if the client wins).

The detailed assessment was dealt with by a costs officer. Initially, this was heard by Master Howarth at a hearing on 21 January 2013. However, Master Howarth revealed that he (along with about 3,000 other judges) had instructed BJ to act for him in proceedings regarding terms of service with the Ministry of Justice. Master Howarth, at a hearing, asked if both parties were happy with him continuing the deal with the Detailed Assessment, to which, H confirmed that C would prefer a different Judge to deal with the matter. The Detailed Assessment was adjourned as a result and relisted before Master Rowley.

H argued five separate points of appeal before Nugee J:

- A claim for travelling and waiting by a costs draftsman was in breach of the indemnity principle, as the costs draftsman had travelled to London to work on two different matters.
- D had sought to recover more than the costs in its costs schedule for the summary judgment hearing, at which the order for costs had been made, in breach of the indemnity principle.
- The costs order (which did not provide for the "costs of and incidental of the action") could not extend to D's pre-action costs.
- It was not fair that C should have to pay costs thrown away by reason of an adjournment which arose after Master Howarth explained that he had instructed BJ in a matter for himself.

- As the Thai-trading agreement that H had entered into with his wife, C, was unenforceable, D should have been required to pay costs that he had been ordered to pay, to the Access to Justice Foundation, under section 194 of the Legal Services Act 2007.

First Ground of Appeal

The costs schedule set out under “estimated future costs – travel and waiting” five hours for Laura Hackney, a costs draftsman that was employed by BJ, at £550 plus £183.25 train fare. Miss Hackney remained in London after the hearing and was involved in a two day case at Clerkenwell & Shoreditch County Court. Her hotel cost (approximately £185) was charged to the second client and travel (£183.25) was charged to D.

H argued that the claim for five hours of travel and waiting and the return train fare was in breach of the indemnity principle and therefore BJ’s signature that the statement did not exceed the costs which D is liable to pay, is false. H stated that CPR 44.14 gives the Court powers in relation to misconduct and states that it engages 44.14(1)(a): *"The court may make an order under this rule where a party or his legal representative in connection with a summary or detailed assessment fails to comply with a rule, practice direction or court order."*

H argued that the court should conclude that that statement was not true and therefore the schedule of costs, as not in the required form, was a breach of 44.14(1)(a) and therefore brought in 44.14(2): *"Where paragraph (1) applies the court may - (a) disallow all or part of the costs which are being assessed..."*

Nugee J dismissed this ground of appeal.

Second Ground of Appeal

Ahead of the summary judgement hearing, BJ provided the Claimant with a Statement of Costs. This Statement of Costs was in the sum of £9,255. It was made clear to C that the Statement of Costs was for the costs incurred in the application rather than the costs of the whole action.

H argued that it was inferred that the sum that was asked for on summary assessment was limited to the £9,255. He further argued that BJ had agreed with their clients (D and his insurers) that the costs of the action should be limited to £9,255 and to claim more than that in the detailed assessment was therefore a breach of the indemnity principle.

Nugee J saw no reason for inferring this and rejected the argument that the indemnity principle had been breached, dismissing the ground of appeal.

Third Ground for Appeal

H argued that the costs that the costs order related to were limited to the costs after proceedings were served on D, and did not cover the pre-action costs. His argument is based on the fact that the order did not specify “costs of and incidental to”.

This ground of appeal was dismissed as Nugee J referred to *Re Gibson* that confirmed that it is not necessary to use the words "and incidental to" in order for the court, when assessing the costs that are payable under an order for costs, to be able to include costs incurred before the action is brought.

Forth Ground of Appeal

As the Detailed Assessment had to be adjourned due to Master Howarth revealing that he (along with about 3,000 other judges) had instructed BJ to act for him in proceedings regarding terms of service with the Ministry of Justice, C argued that it was not fair for them to have to pay costs for the adjournment. Although the Claimant was given the option to continue with Master Howarth as costs Judge, Nugee J reduced the £15,000 assessed as the costs of the detailed assessment to £10,000.

Fifth Ground of Appeal

As the Thai-trading agreement that H had entered into with his wife was unenforceable, the Claimant argued that the Defendant should have been required to pay costs that he had been ordered to pay, to the Access to Justice Foundation, under section 194 of the Legal Services Act 2007.

Nugee J endorsed the decision of Master Rowley that a pro bono retainer requires a conscious agreement between the party and the solicitor during the proceedings, namely that the representation is to be provided without charge and without any expectation of fee, payment or reward. This does not encompass an arrangement which at the time was thought to be enforceable and to be one which could lead to monies being recovered under it, but which subsequently, due to non-compliance with statutory requirements, has been held to be unenforceable. Therefore this ground of appeal was dismissed and section 194 was not engaged.

The Decision

Four out of five of the grounds of appeal were dismissed, and ground four reduced the costs to £10,000 rather than £15,000.

Comment

This case is a clear example that a costs order does not necessarily have to state ‘of and incidental to’ in order for the Court to infer that pre-action costs are included.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.