

Paying in: still the way

Should local authorities follow the example of the NHS trust in *Crouch* and make a written offer instead of paying into court?

The Court of Appeal's judgment in *Peter Crouch v King's Healthcare NHS Trust* is a major triumph for NHS trusts and the NHS Litigation Authority. The Court of Appeal accepted that, when the court exercises its discretion on costs, it should treat an offer by an NHS trust in the same way as a part 36 payment, unless there is some special factor about the circumstances of the case.

Background

In *Crouch*, the NHS trust admitted liability and the claim proceeded to trial, where the claimant was awarded damages of £30,208. Before trial, the trust had made a written offer to settle the claim for £35,000. This had been rejected.

An assessment-of-damages hearing took place on 2 and 3 September 2003 before His Honour Judge Latham. Because the judgment sum had not beaten the trust's offer, the trust applied for an order that the claimant should pay its costs from the date when the offer to settle expired.

The judge held that the trust had not successfully protected its position on costs because it had not paid money into court and expressed concern that defendants making written offers might not remain solvent until they had met their obligations. He ordered the trust to pay all the claimant's costs, ignoring the written offer.

The appeal

The NHS trust appealed, saying that the judge should have made an order for costs in its favour, as if there had been a payment into court. The trust relied on part 36.1(2) of the Civil Procedure Rules (CPR), which gives the court the discretion to order that an offer to settle should lead to the same consequences as those in CPR part 36.20; it argued that the judge could and should have exercised this discretion.

Lord Justice Waller directed that, when a court exercises its discretion under part 36, it should have regard to all the circumstances of the case and ask whether it was right to apply the presumption in CPR 36.20. He thought that an NHS trust was bound to be 'good for the money' and that the offer was as good as a payment into court.

Implications of *Crouch*

Should a defendant local authority now choose to make a written offer rather than the usual payment in? This is an attractive idea for any public body; by making offers instead of paying money into court, a local authority can use the freed-up money to pay for services that may otherwise remain underfunded.

But our advice is that local authorities should avoid this approach. The NHS argued that the money paid into court could be tied up for many years; but it is rare for even complex personal injury cases to take more than three years from the issue of proceedings to a final trial – most of the work tends to be carried out under the personal injury pre-action

protocol – and there is even less delay in non-clinical injury cases, meaning that money is released more quickly.

NHS trusts and local authorities

The courts are also likely to view an NHS trust in a more sympathetic light than a local authority. An NHS trust needs money to save lives and cure the sick. Of course, local authorities provide public services but these may not be seen to be of the same type. The decision to run the argument in Crouch was driven genuinely by the NHS and therefore carried considerable conviction – something which an insurer or claims handler, with many fewer witness statements in support, would find it difficult to match.

Whereas the NHS is selffunding, for major cases, local authorities tend to be insured. In those cases when a local authority is self-funding, the sums will generally be smaller. The smaller the sum, the harder it will be to win a Crouch argument.

Some local authorities surcharge the ‘offending’ department so that, where a highways inspector is found to have been in breach of duty, a highways department may have to meet part or all of the uninsured judgment sum. If the money in question is seen to come from a particular department, this may or may not help. Most claims against local authorities relate to highways incidents and an argument that the authority should not have to pay money into court because of the impact on street maintenance will not carry the same weight as the one deployed by the NHS. This type of argument might be more attractive if a local authority care team was involved.

Finally, what pressure will a claimant be under? The effect of a well-assessed sum of money being paid into court should not be underestimated. A recent Law Commission consultation exercise found that a majority of lawyers and judges felt that payments in should be retained. Part 36 payments into court are a very persuasive device in the defendant’s toolbox. Will a simple offer to pay carry the same weight?

Advice to local authorities

It is unlikely that a local authority would be able to win a Crouch argument and there is the risk that additional costs would be generated in trying to justify the decision not to pay in. If a court found that the money should have been paid in, then a local authority would be faced with a substantial liability for costs that could have been avoided.

In local authority liability cases, the potential risks of adopting a Crouch argument more than outweigh the benefits of doing so. A decision against a local authority would have costs consequences and a potential effect on claims experience which would be less than beneficial.

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