Butterworths Costs Service

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INTRODUCTION

We have reported on the most significant updates from 1 March 2013 to 15 May 2013.

INTRODUCTION

The "sea change" has occurred. We have entered the new world of civil procedure. We have addressed the proposed Jackson reforms to civil litigation in the previous bulletins (which are not repeated here). Those reforms came into force on 1 April 2013.

We address below some further developments and guidance on the changes (including perhaps the most important implementation lecture), and highlight recent case-law (some of which already concerns costs budgeting). So first, the Master of the Rolls' view on the impact of the changes.

On 22 March 2013 Lord Dyson MR gave the 18th Lecture in the Implementation Programme at the District Judges' Annual Seminar (see http://www.judiciary.gov.uk/media/speeches/2013/mr-speech-jud-col-lecture-dj-ann-seminar). While the entire Lecture deserves detailed consideration, his conclusions (primarily in relation to the new overriding objective and relief from sanctions provisions) were as follows:

> "(i) first, that the revisions to both the overriding objective and r 3.9 are designed to ensure that the courts, at all levels, take a more robust approach to ensuring that proceedings are managed so that no more than proportionate costs are incurred by the parties to those proceedings. They do so because proceedings must be managed in the public interest to ensure that individual parties do not expend more than is proportionate on their own claims; but as importantly, that they do not, through being permitted to expend more than a proportionate amount of the court's time and resources, impinge on the rights of other litigants to have fair access to the courts;
>
> (ii) secondly, that those revisions require a more robust approach to the enforcement of compliance and a more restrictive approach to relief from sanctions. This is not based on a dogmatic insistence of compliance for its own sake. It is done because, again I stress, the wider public interest demands it. The effective administration of justice requires it; and
>
> (iii) thirdly, the approach required by the overriding objective will not simply apply to questions of rule-compliance and relief from sanctions. It will apply to case management, costs management and costs budgeting. Those commentators who perceive, for instance, the decision in *Henry v News Group Newspapers Ltd* [2013 EWCA Civ 19 as some form of signal from the Court of Appeal that the new rules will not be applied robustly are wrong. *Henry* was decided under the Mark I overriding objective. As Lord Justice Moore-Bick made clear in *Henry* future decisions on costs budgeting etc will take place under the new rules that come into force on 1 April. As he put it
>
> '(Those rules) impose greater responsibility on the court for the management of the costs of proceedings and greater responsibility on the parties for keeping budgets under review as the proceedings progress.'
>
> They do and so does the Mark II overriding objective."

In light of these comments, it is clear that parties and practitioners will be at considerable risk if they do not strictly adhere to the relevant rules, practice directions or court orders.

The Law Society have also published their new "model CFA" and given guidance thereon. This generally reflects the requirements contained in Conditional Fee Agreements Order 2013. In particular, we note that the new model CFA contains:

- A cap on the recoverable success fee and explanation of that cap (and that it includes counsel's success fee for proceedings at first instance);
- Specific reference to the recoverability (or irrecoverability) of the success fee and ATE premiums inter-partes;
- Explanation of Qualified One-Way Cost Shifting and provisions relating thereto; and
- Express incorporation of the Notice of the Right to Cancel in accordance with the Cancellation of Contracts made in a Consumer's Home or Place of Work etc. Regulations 2008.

The guidance to the model CFA also contains the following interesting sections:

- Cap on recoverable success fee in personal injury cases – "Whilst it is not clear from the legislation, the Law Society considers it is likely to have been parliament's intention that the 25% cap should also include any success fee payable to Counsel and VAT";
- Sections entitled "Death" and "Minor reaching majority", which contain useful guidance on the impact on the CFA of the occurrence of those events (albeit the law is not clear in the case of minors);
- Sections entitled "Protected Party" and "Change of solicitor after 1 April", which explain the impact of a protected party gaining capacity and the consequence of an old CFA being terminated and a new CFA entered after 1 April 2013 (ie the success fee under the new CFA will be irrecoverable inter-partes).
- Calculation of damages cap – "In circumstances where a "global" offer of settlement is made by the opponent you should set out in your advice to the client details of how you calculate the amount that is attributable to general damages and past losses for the purpose of calculating whether or not any cap on the success fee payable by the client applies. If your client disagrees with your assessment you should have in place a procedure for independent resolution of the dispute (see the Law Society's model CFA for an example)"; and
- Clinical negligence claims – "The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 and Art 6 of the CFA Order deal with the recovery of ATE premiums in respect of clinical negligence claims. In those cases the ATE premium will continue to be payable by the defendant but only in so far as it relates to the

claimant's liability to pay for one or more experts reports on liability or causation and the costs of the reports are not allowed under the costs order".

The Civil Procedure (Amendment No.3) Rules 2013 came into force on 30 April 2013, and changed the prescribed recoverable costs for Stages 1 and 2 of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (as well as correcting a previous typographical error).

In other news, Master Roberts, one of the two High Court clinical negligence masters, has sent a practice note to solicitors' firms stating that the new costs management regime will not be adopted for another six months in the QBD (for certain types of brain damage and paralysis cases) due to the Ministry of Justice's failure to appoint a third master. It remains to be seen, however, whether this practice is adopted going forward.

Now some updates on recent cases.

DIVISION A – CIVIL LITIGATION COSTS

COSTS BUDGETS

(*1*) *Kim Murray* (*2*) *Jean Stokes v Neil Dowlman Architecture Limited [2013] EWHC 872* (*TCC*) (*Coulson J, 16/04/2013*)

Facts: the claimants entered into a CFA on 26 March 2012 and incepted an ATE policy on 27 March 2012. The claimants issued proceedings in the TCC. At the time, the TCC was one of the courts in which costs management was being piloted (pursuant to Practice Direction 51G). Prior to the first CMC on 1 February 2013, the parties exchanged costs budgets. The claimants' costs budget was not in Form HB (which was subject to adverse comment by the judge). Notwithstanding that, the judge considered the budgets and made a costs management order. The judge approved the claimants' costs budget in the sum of £82,500. However, the claimants' costs budget did not identify whether it excluded the success fee and/or the ATE insurance premium. The defendant stated that the claimants were therefore limited to the costs budget (with no additional liabilities). As such, the claimants issued an application pursuant to CPR r 3.9 for relief from sanctions.

Held: allowing the revision to the costs budget: the situation which has arisen is not one to which CPR r 3.9 obviously applies. In the present case, what the claimant wants is akin to permission to revise the approved budget, or for it to be rectified, or at least clarified. The application is at least similar to an application to revise the approved budget pursuant to 51GPD.6. In an ordinary case, it will be extremely difficult to persuade a court that inadequacies or mistakes in the preparation of a costs budget, which is then approved by the court, should be subsequently revised or rectified. The courts will expect parties to undertake the costs budgeting exercise properly first time around, and will be slow to revise approved budgets merely because, after the event, it is said that particular items had been omitted or under-valued. Any other approach could make a nonsense of the whole costs management regime. The absence of prejudice alone is not sufficient (either in this case or

more widely) to justify the revision of an approved budget. It will no longer be possible in the ordinary case for parties to avoid the consequences of their own mistakes simply by saying that the other side has not suffered any prejudice as a result. However, the claimants' mistake could be characterised as merely a failure to tick the relevant box (or failure to fill out the correct form), due to the particular wording of the costs budget forms. The position is confirmed by the new form to be used in Precedent H, which contains the relevant wording. Thus, on the particular and unusual facts of the case, it would be appropriate to allow the revision, and not penalise the claimants for failing to tick a box on a form.

Comment: although the court allowed the revision, the court reiterated that, generally, mere mistakes or inaccuracies in costs budgets will not be allowed to be rectified. This highlights the importance of the first costs budget, and ensuring that the figures are accurately stated. The court also identified, in keeping with the reforms, that a lack of prejudice to the other party is not generally sufficient to allow parties to avoid the consequences of their mistakes.

ORDERS TO LIMIT THE RECOVERABLE COSTS OF AN APPEAL

The Manchester College v Hazel & Anr [2013] EWCA Civ 281 (*Jackson LJ 15/03/2013*)

Facts: the respondents had successfully pursued an unfair dismissal claim against the appellant college, which the appellant had appealed (with permission from the Court of Appeal). The respondents had obtained an order that the appellant may pursue its appeal only on condition that, if successful, it did not apply for costs in the Court of Appeal. The appellant applied for reconsideration of that order. The appellant contended that CPR r 52.9 applied and there was no compelling reason to make a costs protection order. The respondents argued that CPR r 52.3(7) gave the court an unfettered discretion, it was not just for them to litigate in the Court of Appeal (a costs-shifting jurisdiction) when they had previously litigated in a no costs jurisdiction. They could not bear the financial risk of the litigation and, in any event, the new rule CPR r 52.9A would come into force on 1 April 2013 which would offer the same protection in any event.

Held: application refused. The new rule CPR r 52.9A is intended to address the mischief which has emerged in cases such as *Eweida v British Airways Plc* [2009] EWCA Civ 1025. Where justice so requires, the court can exclude or limit costs recovery when a case passes from a "no costs" or "low costs" jurisdiction to a court with full costs shifting powers. The court did not have power under CPR r 52.3(7) save at the time of granting permission to appeal and, as such, the previous order was made under CPR r 52.9. The previous order would be upheld, as there was a compelling reason to make the order, as: (i) the respondents had a claim which has been vindicated at two tribunal hearings; (ii) the respondents will not pursue the claim further unless protected against the risk of adverse costs; (iii) the respondents could not

reasonably be expected to take the risk of £20,000; (iv) the respondents cannot count on the Court of Appeal adopting a merciful approach on costs; (v) the respondents have undertaken not to apply for costs if they win; (vi) the costs incurred by the appellant does not place it in the same financial position as the respondents; and (vii) no useful purpose would be achieved by setting aside the previous order. The respondents would be able to make a fresh application in two weeks' time under the new r 52.9A. Such an application is bound to succeed, as the present case is a classic case in which it will be appropriate for the court to make an order under r 52.9A.

Comment: this case provides useful guidance as to how CPR r 52.9A will be applied, and shows the court (Jackson LJ no less) taking into account the future reforms. As such, this decision may apply to a number of cases, and will not be limited to the narrow application of CPR r 52.9A.

COSTS ORDERS AGAINST THIRD PARTIES

***Centrehigh Limited v Karen Amen & Ors [2013] EWHC 625* (*Ch*) (*Morgan J, 08/03/2013*)**

Facts: the claimant company sought permission to cross-examine eight witnesses in relation to its application for a third party costs order against the 4th and 5th defendants (pursuant to s 51 of the Senior Courts Act 1981 and CPR r 48.2). The claimant argued that the cross-examination should be allowed as the underlying facts had never been subject to an investigation at trial (the claim had settled). The application for a third party costs order could only be justly determined if the witnesses were cross-examined.

Held: application dismissed. The court identified that generally, as a matter of policy, applications under s 51 would not involve a full trial including cross-examination of witnesses with full pre-trial procedures. Such applications need to be kept within proper bounds. The court bore in mind that there are differences between the present case (which settled without trial) and cases where the court has tried the underlying dispute, has considered the documents relevant to that dispute, has perhaps assessed the reliability and the involvement of witnesses and officers of the various parties, and has got a very full idea of what has led to the matter up to that point. However, there were no features of the present case which exceptionally justified a full trial of the whole range of the disputed matters of fact.

Comment: this decision again shows the reluctance of courts to engage in full-blown trials in determining applications for a third party costs order, even where there has been no trial on the merits of the underlying claim.

DIVISION B – SUMMARY ASSESSMENT AND DETAILED ASSESSMENT

SCALE COSTS FOR CLAIMS IN THE PATENTS COUNTY COURT

***Azzurri Communications Limited v International Telecommunications Equipment Limited T/A Sos Communications [2013] EWPCC 22* (*HHJ Birss QC, Patents County Court, 16/04/2013*)**

***Jodie Henderson v All Around The Word Recordings Limited [2013] EWPCC 19* (*HHJ Birss QC, Patents County Court, 27/03/2013*)**

Facts: two separate decisions of HHJ Birss QC, which both address the applicability of the costs cap in the PCC. In the first case (*Azzurri*), the claimant asserted that as the trial of the action included both a determination of liability and a decision as to quantum, the claimant enjoyed the benefit of both (i) the £50,000 cap on the final determination of a claim in relation to liability; and (ii) the £25,000 cap on an inquiry as to damages or account of profits.

In the second case (*Henderson*), the claimant had entered into a CFA with her solicitors and had incepted an ATE policy. The claimant argued that the success fee and ATE premium were out with the scope of the PCC cap.

Held: in *Azzurri*, the court held that the claimant was not entitled to the benefit of both caps. The rules contemplated separate proceedings. Where there was only one set of proceedings, with one trial etc, only one cap (the £50,000 cap) applied.

In *Henderson*, the court held that: (1) the definition of "costs" within the cap (and indeed the scale costs) includes additional liabilities (ie the success fee and ATE premium); (2) the PCC has a discretion to depart from the cap, but only in truly exceptional cases; and (3) the case was not truly exceptional, and so did not justify exercising that discretion.

Comment: these two decisions help clarify the law in respect of the costs caps in the PCC.

DIVISION E – LITIGATION FUNDING

***(1) Eric Charles Walker* (*2*) *Carole Ann Scott* (*3*) *Christopher Balchin v* (*1*) *Peter Charles Burton* (*2*) *Susan Anne Burton* (*formerly Bamford*) *[2003] EWHC 811* (*Ch*)(*His Honour Judge David Cooke, 19/04/2013*)**

Facts: The appellant villagers had entered into CFAs with their solicitors. Three other villagers, who shared a common interest with the appellant villagers, also "retained" the appellant villagers' solicitors, but they were not parties to the CFAs. The adjudicator had apportioned the total solicitors' costs between those who were contractually liable to pay fees under the CFAs and those who were not (ie reducing the recoverable base costs to a half). The

appellant villagers appealed that decision. The respondent couple cross-appealed against the adjudicator's decision to allow a success fee of 60%.

Held: the appeal was allowed in part, the cross-appeal dismissed. None of the issues depended on the individual titles of any of the villagers and none of the non-CFA villagers advanced any arguments not relied upon by the CFA villagers. The adjudicator was wrong to make any apportionment of the villagers' costs. The CFA villagers were liable for the entirety of their solicitor's costs, and therefore to award the entire costs would not breach the indemnity principle. The assessment of the uplift of 60% was within the reasonable range.

Comment: an interesting (yet unsurprising) case as it demonstrates that parties can freely "piggy-back" on other parties' instructions of solicitors, and the other parties are still entitled to recover the entirety of their costs without apportionment (assuming a common interest).

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