Butterworths Costs Service

Bulletin Editor

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Filing instructions: This Bulletin covers material available to **1 September 2012**. It should be filed in Binder 1 behind the Bulletins guidecard, and in front of Bulletin 44. Remove Bulletin 40. Binder 1 should now contain Bulletins 41–45.

INTRODUCTION

We have reported on the most significant updates from 1 June 2012 to 29 August 2012.

First some news and updates on the implementation of the Jackson reforms.

Qualified One Way Costs Shifting (QOCS)

In a written ministerial statement to Parliament on 17 July (replacing a previous statement on 10 July to amend a glaring error) the government has announced that QOCS is to be introduced in personal injury claims, so that claimants who conduct their claim properly will not have to pay the defendant's costs even if the claim is unsuccessful. The rules will be drafted on the following basis:

"i. QOCS will apply to all claimants whatever their means; there is to be no financial test to determine eligibility;

ii. Subject to the provisions below, claimants who lose will not have to contribute towards defendants' costs (there is to be no minimum payment by a losing claimant);

iii. QOCS protection would be lost if

(a) the claim is found to be fraudulent on the balance of probabilities;

(b) the claimant has failed to beat a defendant's 'Pt 36' offer to settle; or

(c) the case has been struck out where the claim discloses no reasonable cause of action or where it is otherwise an abuse of the court's process (or is otherwise likely to obstruct the just disposal of proceedings).

iv. The principles set out in Pt 36 of the Civil Procedure Rules override QOCS, but only up to the level of damages recovered by the claimant;

v. QOCS protection would apply in relation to claims that are discontinued during proceedings (subject to iii(a) above); and

vi. QOCS protection would be allowed for all appeal proceedings as the requirement for permission to appeal controls unmeritorious appeals."

The Civil Procedure Rule Committee will consider the changes to the Civil Procedure Rules in the autumn, so that the necessary changes can come into effect for April 2013 (for implementation through the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

Part 36 Offers

In the same ministerial statement of 17 July, the government announced that: "The sanctions under Pt 36 of the Civil Procedure Rules (offers to settle) are to be reformed on the following basis in order to encourage early settlement:

i. There is to be an additional amount to be paid by a defendant who does not accept a claimant's offer to settle where the court gives judgment for the claimant that is at least as advantageous as an offer the claimant made to settle the claim. This additional sanction is to be calculated as 10% of damages where damages are in issue, and 10% of costs for non-damages claims;

ii. In mixed (damages and non-damages) claims, the sanction will be calculated as 10% of the damages element of the claim;

iii. However, the sanction under these provisions is to be subject to a tapering system for claims over £500,000 so that the maximum sanction is likely to be £75,000; and

iv. There would only be one sanction applicable for split trials."

DIVISION A – CIVIL LITIGATION COSTS

Orders for Costs

Ted Baker Plc v Axa Insurance UK PLC [2012] EWHC 1779 (Comm) (Eder J) 29/06/2012

Facts: The claimants sought a costs order following a trial of preliminary issues in which the claimants had substantially succeeded. The court had to consider whether, as it could not be told about any Pt 36 offers that might have been made, it was just to make a costs order in favour of the claimants

at that time. The defendant invited the court to reserve its decision in respect of costs on the preliminary issues until the conclusion of the trial when it could take the Pt 36 offers (if any) into account.

Held: There was no general rule that in the case of a split trial the court should ordinarily reserve the costs until the end of the case, *Weill v Mean Fiddler Holdings Ltd* [2003] EWCA Civ 1058 considered. However, CPR, r 36.13(2) prohibited the fact that a Pt 36 offer had been made being communicated to the court "until the case has been decided". There is a "real problem" with CPR, r 36.13 and there is an urgent need for it to be reviewed and possibly reformulated in order to address, in particular, the question of "split trials". It was unnecessary to determine the extent and scope of CPR, r 36.13, as the possible existence of Pt 36 offers were matters which the court could take into account under CPR, r 44.3(4). The existence of a Pt 36 offer might affect the exercise of the court's discretion in relation to the costs of the preliminary issues. As such, and due to the substantial level of costs, that the order for a split trial was essentially a case management issue, and that any prejudice to the claimants would be alleviated by the court's power to award interest on costs, the court reserved costs.

Comment: Under the old CPR, r 36.19, there were prescribed circumstances when a Pt 36 payment could be communicated to the court including for split trials. Under the new CPR, r 36.13 the position is less apparent (and remains to be decided). However, if the CPR is not clarified (as recommended) the court is likely to take the sensibly cautious approach of reserving the costs of preliminary issues until the ultimate determination of the proceedings.

Part 36 Offers/Quasi Part 36 Offers

F & C Alternative Investments (*Holdings*) *Ltd v Bathelemy [2012] EWCA Civ 843* (*Arden LJ, Tomlinson LJ, Davis LJ*) *22/06/2012*

Facts: The appellant appealed against the trial judge's decision to award costs on the indemnity basis plus interest after the date upon which an offer which was not a Pt 36 offer could have been accepted. The respondent had made an offer which expressly, and reasonably, was not a Pt 36 offer due to the particular circumstances of the case but was similar to a Pt 36 offer. The trial judge awarded costs on the indemnity basis by applying Pt 36 by analogy. Further, the judge ordered interest on the respondent's costs at 3% above base rate up to the offer's expiry date, thereafter at 10% above base rate, rising to 40% per annum before falling to 22% in accordance with the rates of borrowing paid by the respondents on their litigation funding loans. The judge also ordered the appellants to pay 70% of the respondents' costs on the standard basis up to the last date when they could have accepted the offer. The respondents cross-appealed against the judge's order disallowing 30% of their costs.

Held: Allowing the appeal: (1) the starting point was that the respondent's offer was not a Pt 36 offer. As the offer was neither in substance nor in form

compliant with Pt 36, the judge was wrong in principle to take as directly analogous, and as applicable, the potential costs consequences had it been a Pt 36 offer.

The judge was wrong to award interest rates as analogous with the consequences of Pt 36 and, in the circumstances, there was no justification for the high awards of interest. The awards of interest on costs could not stand. Dismissing the cross-appeal, there is no requirement of exceptional circumstances for a reduction in the successful party's costs. The question of the extent to which costs of a particular issue are to be disallowed or notionally paid should be left to the evaluation and discretion of the judge, by reference to the justice and circumstances of the particular case. There was no error of principle in the judge's approach.

Comment: Yet another case addressing the consequences of offers which do not comply with Pt 36, which again emphasises the need for offers to comply with the Pt 36 if those consequences are to apply.

SG v Hewitt [2012] EWCA Civ 1053 (*Pill LJ, Arden LJ, Black LJ*) *02/08/2012*

Facts: The appellant was injured in a road traffic accident when he was six years old caused by the negligence of the respondent. He suffered facial scarring and a severe head injury with damage to the frontal lobes of the brain. Medical and other reports were obtained with a view to a claim for damages being made but the experts felt unable to predict what the impact of the injury would be until matured. The respondent made a pre-action Pt 36 offer in the sum of £500,000 on 2 April 2009, which was never withdrawn and was ultimately accepted by the appellant in 2011. The settlement was approved on 2 December 2011, but each party argued that they should receive the costs incurred after 22 April 2009 (the expiry of the "relevant period"). The trial judge awarded the respondent costs after 22 April 2009 by applying the normal costs rule in CPR, r 36.10(5). The appellant appealed the judge's order and argued that the judge should have exercised his discretion under CPR, r 36.10(5) to depart from the normal costs order in the circumstances.

Held: Allowing the appeal, the test to be applied was whether or not it would be unjust to make the usual costs order, *Lumb v Hampsey* [2011] EWHC 2808 (QB), *Matthews v Metal Improvements Co Inc* [2007] Civ 215 considered. The judge wrongly considered that "the uncertainties of prognosis are contingencies which fall within the usual litigation risks of claims of this kind". The judge should have had regard to the fact that there were difficulties of prognosis which meant that the appellant's injury could only accurately be determined by waiting until he neared or reached adolescence. The appellant would be entitled to all the costs incurred, whether before or after 22 April 2009.

Comment: A rare example of the circumstances in which the usual costs order following Pt 36 offers does not apply. Claimants will seek to rely on this in analogous circumstances, particularly given the relatively strong dicta in Pill LJ's judgment.

Security for Costs and Conditional Fee Agreements

Mengi v Hermitage [2012] EWHC 2045 (QB) (Tugendhat J) 20/07/2012

Facts: The defendant obtained an order for security for costs by way of instalments totalling £610,500. However, the Master below did not allow any sum to reflect the potential success fee in the defendant's conditional fee agreement and only allowed 75% of the expected base costs. The defendant appealed on the basis that: (1) the Master was wrong not to take into account the potential success fee; and (2) the Master should not have reduced the sum awarded to only 75% of the expected base costs.

Held: Allowing the appeal: there was no illegitimate speculation involved in the court taking into account that if a costs order were made in the defendant's favour, such costs would involve an uplift for the CFA. The CPR provided that there was no requirement upon the defendant to specify the amount of additional liability separately (which it had not done), nor to state how it was calculated, until it fell to be assessed. The court could not draw adverse inferences from the defendant exercising her right not to disclose the success fee. The defendant was entitled to have an order for security for costs up to the full amount permitted for a CFA, being a success fee of 100%; and the Master was also wrong to reduce the security for costs to 75% of the expected base costs.

Comment: Orders for security for costs could therefore conceivably include a success fee which is subsequently held not to be contractually payable by the party or ultimately recoverable from the other side.

DIVISION E- LITIGATION FUNDING

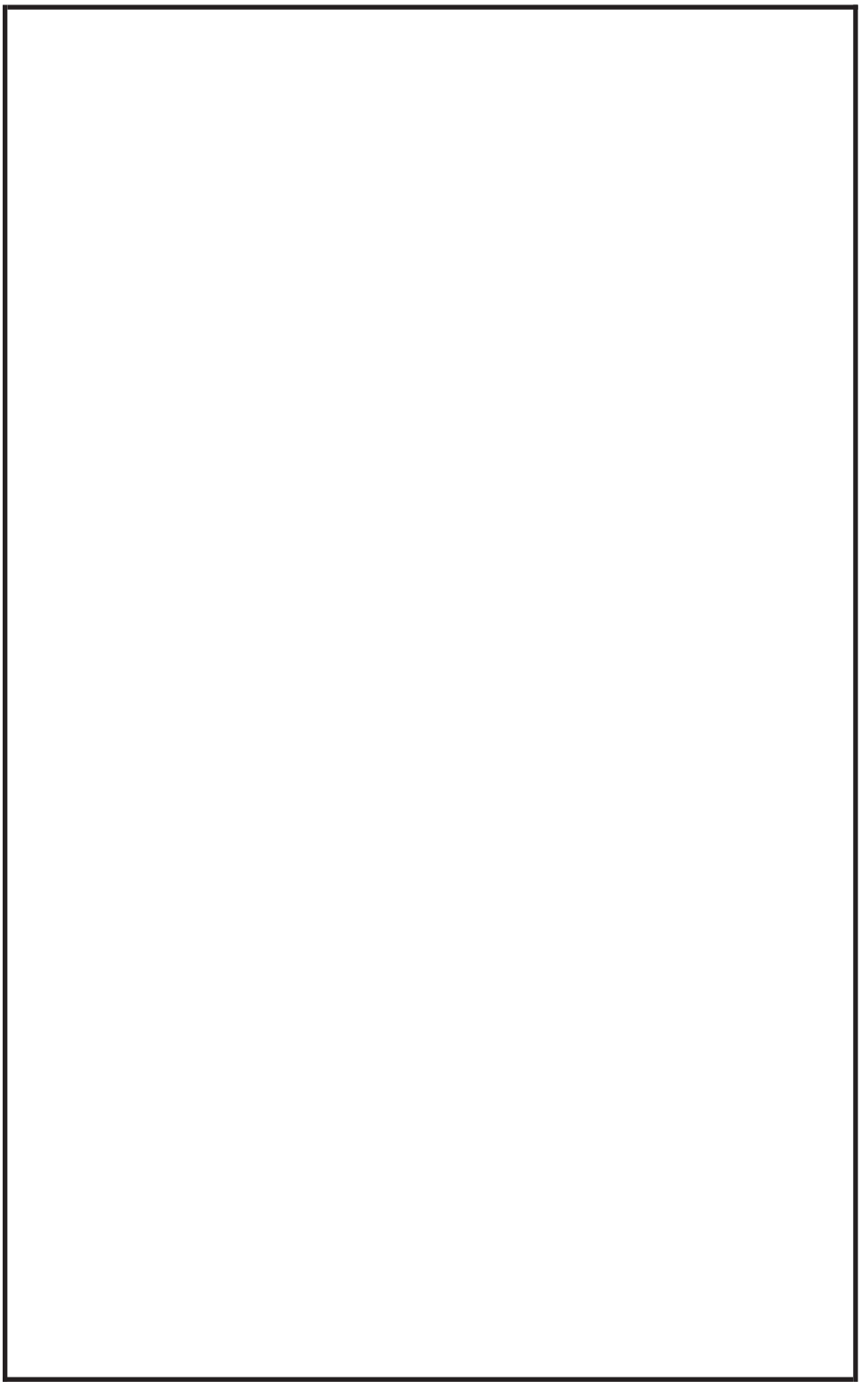
Recoverability of ATE Premium

Hawksford Trustees Jersey Ltd (Trustee Of The Bald Eagle Trust) v Stella Global UK Ltd [2012] EWCA Civ 987 (Rix LJ, Etherton LJ, Patten LJ)

Facts: The respondents had been unable to obtain ATE insurance prior to the trial at first instance. Having succeeded at trial, the respondents obtained ATE insurance to cover, among other things, the risk of adverse costs orders made on appeal both as to the costs of the appeal and the costs at first instance. The respondents succeeded on the appeal and obtained an order for costs. The appellants challenged the recoverability of the ATE premium insofar as it related to the risk of having to pay the costs of the claim up to and including the trial. The appellants conceded that the premium relating to the risk of having to pay the appellants' costs of the appeal was recoverable. The appellants argued that the meaning of "proceedings" in s 29 of the Access to Justice Act 199 in which the relevant costs order falls to be made are the appeal and the recoverable premium is therefore limited to cover for the risk of incurring a costs liability in those proceedings.

Held (Patten LJ dissenting): It appears from the words "in those proceedings" in s 29 of the Access to Justice Act 1999 that the "costs order" has to be made in the same proceedings as the proceedings in which a costs liability may arise, the risk of incurring which has been insured against. The question therefore arose as to whether or not the trial and an appeal are the same proceedings or different proceedings. The broad interpretation that the trial and the appeal are the same proceedings is unnecessary to achieve the object of the statute, runs counter to a well known distinction, made in the context of costs liability, between costs of trial and costs of appeal where trial and appeal are spoken of as different proceedings, leads to a result which was clearly not contemplated by the ancillary practice directions, and undermines the fairness of the regime. As such, the word "proceedings" in s 29 should be given its traditional meaning which distinguishes between proceedings at trial and on appeal. The risk that the incidence of costs at trial might be changed by the costs order of the appeal court may be a new risk of the appeal, but the costs liability and costs order in question remain those of the trial: the risk insured against is a risk of incurring a liability in the trial proceedings not in the appeal proceedings. Further, the costs liability in respect of which the premium has been taken out remains a costs liability in the trial proceedings, not in the appeal proceedings. As a result, the costs concerned, which can only be, if anything, costs in the appeal, under the statute are justifiable as neither costs of the appeal nor as costs of a trial which had already terminated and are irrecoverable for the appellants.

Comment: Parties who seek to obtain insurance premiums for appeals should carefully consider the extent of cover which is recoverable from the other side if successful and, in the circumstances, whether it is worthwhile obtaining cover at that stage.



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Published by LexisNexis

ISBN 978-1-4057-6729-3