Butterworths Costs Service

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INTRODUCTION

We have reported on the most significant updates from 1 September 2012 to 14 November 2012.

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

Caps on Success Fees, Damages-Based Agreements and the Ban on Referral Fees

The Government has updated its Civil Justice Reforms website to provide further information on the caps on success fees, damages-based agreements and the ban on referral fees. The government has departed from the Civil Justice Council's recommendation (contained in its Report of the Working Party on Damages Based Agreements (Contingency Fees) dated 25 July 2012) that there should be no cap for the contingency fee for commercial cases with a commercial client: instead, there will be a general 50% cap, save for personal injury claims.

The update provides (updated on 30 October 2012 – see http://www.justice.gov.uk/civil-justice-reforms):

"25% cap on success fees in personal injury cases

- Success fees in personal injury cases will be capped at 25% of the damages, excluding damages for future care and loss.

- Lawyers will be required to provide clear information to the claimant on how the success fees have been calculated.
- The cap would not apply to appeal proceedings.

The relevant order and regulations are now being drafted and will be consulted on under the statutory requirements.

Introduction of Damages-Based Agreements in Civil Litigation

- Damages-based agreements will now be allowed in all areas of civil litigation.
- In personal injury claims there will be a 25% cap on the amount of damages, excluding damages for future care and loss, that can be taken as a lawyer's contingency fee.
- In all non-personal injury claims (excluding employment tribunal cases), there will be a 50% cap on the amount of damages.

The regulations are now being drafted and will be consulted on under the statutory requirements.

Ban on Referral Fees

- The payment and receipt of referral fees in personal injury cases will be banned, and any breaches will be subject to enforcement action by the regulators: Financial Services Authority, Solicitors Regulation Authority, Claims Management Regulator and Bar Standards Board.
- The regulators are required to have appropriate rules in place to enforce the ban from April 2013. We will work with all regulators to ensure that the ban is enforced consistently."

More information can be obtained from the publication "Full package of reforms" at http://www.justice.gov.uk/downloads/publications/policy/moj/civil-justice-reforms-full-package.pdf.

The Advisory Committee on Civil Costs Disbanded

In a written ministerial statement dated 30 October 2012, the government has also announced that:

"The Guideline Hourly Rates (GHR) for solicitors in legal proceedings are set by the Master of the Rolls. The Advisory Committee on Civil Costs (ACCC) was established in 2007 by the Ministry of Justice to provide advice on this and other issues …

… I have decided that the ACCC's remaining function of advising on the GHR should be transferred to the Civil Justice Council (CJC) from January 2013. I envisage that a sub-committee of the CJC would be established to deal with this issue. The ACCC will be disbanded forthwith, which will reduce the number of advisory bodies.

This proposal does not go so far as Sir Rupert Jackson's recommendation for a Costs Council as the new sub-committee's standing role will be limited to a

review of the GHR; other fixed costs will remain for the Lord Chancellor to consider in the first instance. However, there may be other costs issues on which the Lord Chancellor and Judiciary would welcome advice from the new sub-committee from time to time. I will liaise with the Master of the Rolls, who chairs the CJC, concerning the membership, terms of reference and work to be undertaken by the CJC within the scope of its statutory role of keeping the civil justice system under review."

Lord Dyson's Views on the Implementation of the Reforms

Lord Dyson, the new Master of the Rolls, has provided further insight into the implementation of the Jackson reforms in his Keynote Address to the Law Society at the Civil Justice Section Conference on 18 October 2012. We quote from various parts of the lecture:

"The introduction of fixed costs … which I have long been in favour of, on the fast track for personal injury claims is no more than a step towards implementing one of Woolf's recommendations. I hope to see that first step taken further and fixed costs applied across the fast track. In due course, I think that consideration may well have to be given to the possibility of introducing a fixed costs regime in certain multi-track cases …

I have heard some whispers that it may not be possible to complete the implementation process by April. Let there be no doubt about it: the reforms will come into force next April …

While it is inevitable that new rules and procedures will give rise to some satellite litigation, it is vitally important that the courts and lawyers do what they can to minimise the risk of such litigation. The new rules will need, therefore, to be drafted so as to ensure that they can provide as much certainty as possible. In that respect the role which the Civil Procedure Rule Committee has been playing has been of fundamental importance. Rule drafting is, however, only part of the story. It prepares the ground. In this respect conferences such as this one also prepare the ground. They raise practical issues. They enable, and have enabled over the past 12 months, Sir Rupert, Lord Neuberger and Sir Vivian Ramsay to explain, through the Jackson Implementation Programme, how a large number of reforms are intended to operate in practice. The 15 lectures in the series provide a detailed user-guide to the reforms, and ought to be looked at carefully by both practitioners and the courts.

Further Implementation Lectures will be given over the coming months, just as further conferences will no doubt take place. The further opportunities this will provide will no doubt benefit us all. But April 2013 is not far off. The court will thereafter need to speak clearly through its judgments in explaining how the reforms are intended to operate … There will be a need for clear guidance from the Court of Appeal. With that in mind, the key will be to ensure that the court is not called on more than necessary to provide authoritative guidance. How do I envisage that this can be achieved?

The answer is consistency in approach. If the Court of Appeal fails to provide consistent guidance, no-one should be surprised if that breeds more litigation: a lack of clarity and consistency on its part will only generate confusion in the County Courts and the High Court and amongst the profession, and ultimately it will undermine the aims of the reforms.

In this regard I think the approach recommended by Sir Rupert and subsequently endorsed by Lord Neuberger was the correct one: a small number of Court of Appeal judges will be designated to deal with procedural cases. I will also sit on those appeals as will the deputy head of civil justice …We will not sit on all the appeals, nor will we form the entire constitution which hears those appeals. But at least one of the designated judges will sit on each procedural appeal …

Consistency of approach will also be important where costs management is concerned. It will be of particular importance in these areas because, to a large degree, if the reforms are to be fully effective, and costs are to become proportionate, costs management will need to be carried out effectively and consistently in all cases … It is not an exaggeration to say that, from my perspective, costs management is the key to the Jackson reform: if it succeeds the reforms will succeed. If not, we run a heavy risk that costs will unnecessarily and otherwise avoidably increase and the reforms will fail.

Guidance from the Court of Appeal, judicial training, and guidance in the form of practice notes from, for instance, The Law Society on the correct approach to costs management will therefore be of particular importance.

… Consistent and effective implementation will show whether the reforms work. They may also show unexpected flaws and consequences, not least given the potential impact which the wider reforms have on the operation of the Jackson reforms. They may show that reality does not match expectation.

If this is the case, we cannot properly maintain a slavish adherence to the reforms. If it becomes clear that further changes are necessary, then these will have to be made, but only if the need for further change is demonstrated on the basis of proper evidence …

It is going to be incumbent on the Civil Procedure Rule Committee, the Civil Justice Council, as well as the Ministry of Justice which is to review the impact of the reforms in three years time, to do two things. First, they will need to monitor the effects of the reforms from the point when they came into force. If the reforms work as they are intended to, then we should be able to obtain evidence of costs reducing over time. We need to gather that evidence. Secondly, where it is apparent that an aspect of the reforms is not working, we shall need to take steps to identify the source of the problem and rectify it …"

Next, a summary of some important cases over the last quarter.

DIVISION A – CIVIL LITIGATION COSTS

Part 36 Offers

Marcel Beasley* (*a protected party, by his litigation friend Cadell Beasley*) *v Paul Alexander [2012] EWHC 2715* (*QB*) (*Sir Raymond Jack, sitting as a Judge of the High Court*) *02/11/2012

Facts: The claimant succeeded on liability at the first stage of a split trial, with damages still to be determined. The claimant applied for an order for costs relating to the liability trial. The defendant relied on CPR r 36.13(2) and argued that the case had not been decided and, as such, the court could not be shown, or informed about the content of, any Pt 36 offers. Therefore the court could not determine costs. The claimant asserted that the court was not precluded from determining costs, as the court could be informed about Pt 36 offers.

Held: CPR r 36.13(2) provides that "the fact that a Part 36 offer has been made must not be communicated to the trial judge or to the judge (if any) allocated in advance to conduct the trial until the case has been decided". The crucial words in issue were "until the case has been decided". Those words had a clear meaning. "The case" is used in the sense of "the action" or "the proceedings". The reference to "the case" cannot be construed as referring to part of a case. As such, the court could not be informed about the Pt 36 offers as the case had not been decided, even though liability had been determined. In the premises, the court could not determine costs at that stage (*HSS Hire Services Group plc v BMB Builders Merchants Ltd* [2005] EWCA Civ 626, *AB v CD* [2011] EWHC 602, *Ted Baker plc v Axa Insurance UK plc* [2012] EWHC 1779 considered).

Comment: Although it is frustrating (and potentially onerous) for claimants to wait until conclusion of the entire proceedings to recover their costs, the decision does clarify the issue left undecided in *Ted Baker plc v Axa Insurance UK plc* [2012] EWHC 1779. Generally, as identified in Ted Baker, claimants will not suffer any real prejudice as any delay can be compensated for by interest on costs.

The Procter & Gamble Company v* (*1*) *Svenska Cellulosa Aktiebolaget* (*2*) *Sca Hygiene Products Manchester Ltd [2012] EWHC 2839* (*Ch*) (*Hildyard J*) *23/10/2012

Facts: The court determined a number of costs issues after giving judgment in the proceedings, being: (1) who was the "successful party"; (2) are there any factors to depart from the general rule; (3) did an offer made by the claimant on 1 July 2011 ("the July offer") constitute a Pt 36 offer; (4) according to the answer to (3), what was the appropriate basis of assessment and should any uplift or interest be awarded (and, if so, at what rate); and (5) should a payment on account of costs be ordered and, if so, in what amount. This commentary only considers (3), as the others are case-specific and do not address any particular point of principle. The defendant argued that the July offer did not comply with Pt 36 as it failed to specify a period of not less

than 21 days in which the defendant would be liable for the claimant's costs if the offer was accepted. In fact, the July offer provided that "[the claimant] *will be liable for* [the defendant's] *costs if the offer was accepted"* (ie the claimant did not seek to recover its costs prior to the expiry of the relevant period). The defendant contended that the Pt 36 consequences should not apply, as Pt 36 was highly prescriptive and a self-contained code.

Held: Distinguishing *F & C Alternative Investments* (*Holdings*) *Ltd v Barthelemy* [2012] EWCA Civ 843, that the issue was whether CPR r 36.2(2) was to be so strictly construed that it requires the offer to provide for the defendant to be liable for the claimant's costs even if the claimant expresses his offer to be a Pt 36 offer, but as part of that offer, agrees to forsake that entitlement and instead pay the defendant his costs. The issue in *F & C* was really whether an offer accepted not to be within Pt 36 could be given, by analogy, the same consequences as Pt 36. The July offer should be treated as compliant with Pt 36, as: (1) a strict construction of Pt 36 would tend to undermine a central objective of Pt 36, to encourage claimants to make sensible offers and provide an inducement to defendants to accept them; (2) such a purposive approach to construction is available in the context of Pt 36. CPR r 36.2(2)(c) only requires a claimant who seeks his costs to specify the relevant period, but not as mandating that the claimant must seek costs as a condition of his offer.

Comment: This is an eminently sensible outcome on the facts of the case, as the claimant had, in fact, made a more generous offer than would have been the case if the July offer were akin to a usual Pt 36 offer. However, the decision could have a broader application as it is not clear how the distinction between "forsaking" a benefit and failing to comply with the requirements of Pt 36 will be applied. Offerors may be able to rely on this decision to make Pt 36 offers which remove other benefits for offerors/obligations on the offeree and argue that the offers still comply with Pt 36.

Non-Party Costs Orders

Tinseltime Ltd v (1) Eryl Roberts (2) M & Jt Davies (3) Denbighshire County Council (4) Welsh Assembly Government And Gavin Edmondson [2012] EWHC 2628 (TCC) (HHJ Davies, sitting as a Judge of the High Court) 28/09/2012

Facts: The defendants applied for a non-party costs order (under s 51(3) of the Senior Courts Act 1981 and/or CPR r 48.2) and/or a wasted costs order (under s 51(6) of the Senior Courts Act 1981 and/or CPR r 48.2) against the claimant's solicitor, Gavin Edmondson ("the respondent"). The respondent entered into a conditional fee agreement with the claimant, who the respondent knew was impecunious, where there was no ATE or BTE insurance in place. The respondent also agreed to fund the disbursements necessary to enable the case to proceed. The defendants contended that the respondent thereby became the "funder" of the litigation and so could be subject to a non-party costs order. This commentary will not address the application for a wasted costs order as no interesting points of principle arose.

Held: Dismissing the application for a non-party costs order (and the application for a wasted costs order for different reasons), that: (1) the starting point in any case is whether in all the circumstances is it just to make a non-party costs order; (2) the starting point when considering the position of a solicitor is that it must be shown that he has in some way acted beyond or outside his role as a solicitor conducting litigation for his client to make him liable for a non-party costs order; (3) the starting point when considering the position of a solicitor acting under a CFA is that the fact that he stands to benefit financially from the success of the litigation, in that otherwise he will not be able to recover his profit costs or his success fee, does not of itself mean that he has acted in some way beyond or outside his role as a solicitor conducting litigation for his client; (4) the starting point when considering the position of a solicitor acting under a CFA who has agreed to fund disbursements under the CFA should be no different from the case of a solicitor who has not, since both arrangements are permitted and are regarded as meeting a recognised legitimate public policy aim. The position is no different where the solicitor knows that the client is impecunious and that there is no ATE policy in place. There must be something beyond those factors to justify making a non-party costs order: in the present case there was nothing more. *Dymocks Franchise Systems* (*NSW*) *Pty Ltd v Todd* (*Costs*) [2004] UKPC 39, [2004] 1 WLR 2807 considered, *Myatt v National Coal Board* [2007] EWCA Civ 307, [2007] 1 WLR 1559 followed, *Germany v Flatman* [2011] EWHC 2945 (QB) doubted.

Comment: This is welcome relief for solicitors who assist impecunious clients without insurance. However, solicitors should bear in mind that it does not prevent a non-party costs order when additional factors are present, such as undertaking the case for their own financial self-interest and/or controlling the litigation.

DIVIDER E-LITIGATION FUNDING

Fixed Success Fees

Patterson v Ministry of Defence [2012] EWHC 2767 (QB) (Males J) 12/10/2012

Facts: The claimant, a soldier, sustained a non-freezing cold injury ("NFCI") while serving in Norway. The claimant brought a claim against the defendant for negligence and/or breach of statutory duty. The claim was settled with an agreed order that the defendant pay the claimant's costs. The claimant's costs were agreed, save for the appropriate success fee. The claimant sought a success fee of 62.5% on solicitor's and counsel's fees, on the basis that NFCI is a "disease" within the more generous fixed success fee regime contained in s V of CPR Pt 45. The defendant maintained that NFCI is not a disease, and thus fell within s IV of CPR Pt 45 which provided a fixed success fee of 25%. The master determined that the NFCI is not a disease, and the claimant appealed.

Held: Dismissing the appeal that NFCI was not a disease within the meaning of s V of CPR Pt 45. The following three points were considered important:

(i) "disease" must if possible be construed in a way which does not result in the exception taking up most of the room occupied by the basic or default rule in s IV; (ii) the starting point must be the natural and ordinary meaning of the words used, in their context; and (iii) if there is to be a departure from or extension of the natural meaning, it must be at least reasonably clear what extended meaning the term "disease" was intended to have. Further, whether NFCI is or is not a disease must be determined having regard to the language and purpose of CPR Pt 45, and is not affected by the particular circumstances in which the particular claimant came to suffer from the condition. It is of some relevance to take into account the way in which NFCI typically occurs. It is appropriate to apply the natural and ordinary meaning of the word "disease", as opposed to some extended meaning: the Pre-Action Protocol for Disease and Illness Claims is not a reliable guide to the meaning of "disease", and the specific extensions to the meaning of "disease" in s V do not demonstrate an intention to have a more expansive interpretation of "disease". In the circumstances, on a natural and ordinary meaning of "disease", NFCI is not a disease.

Comment: Although this decision only determines whether or not NFCI is a disease, it lays down important general principles which can be applied in the many cases where the issue arises.

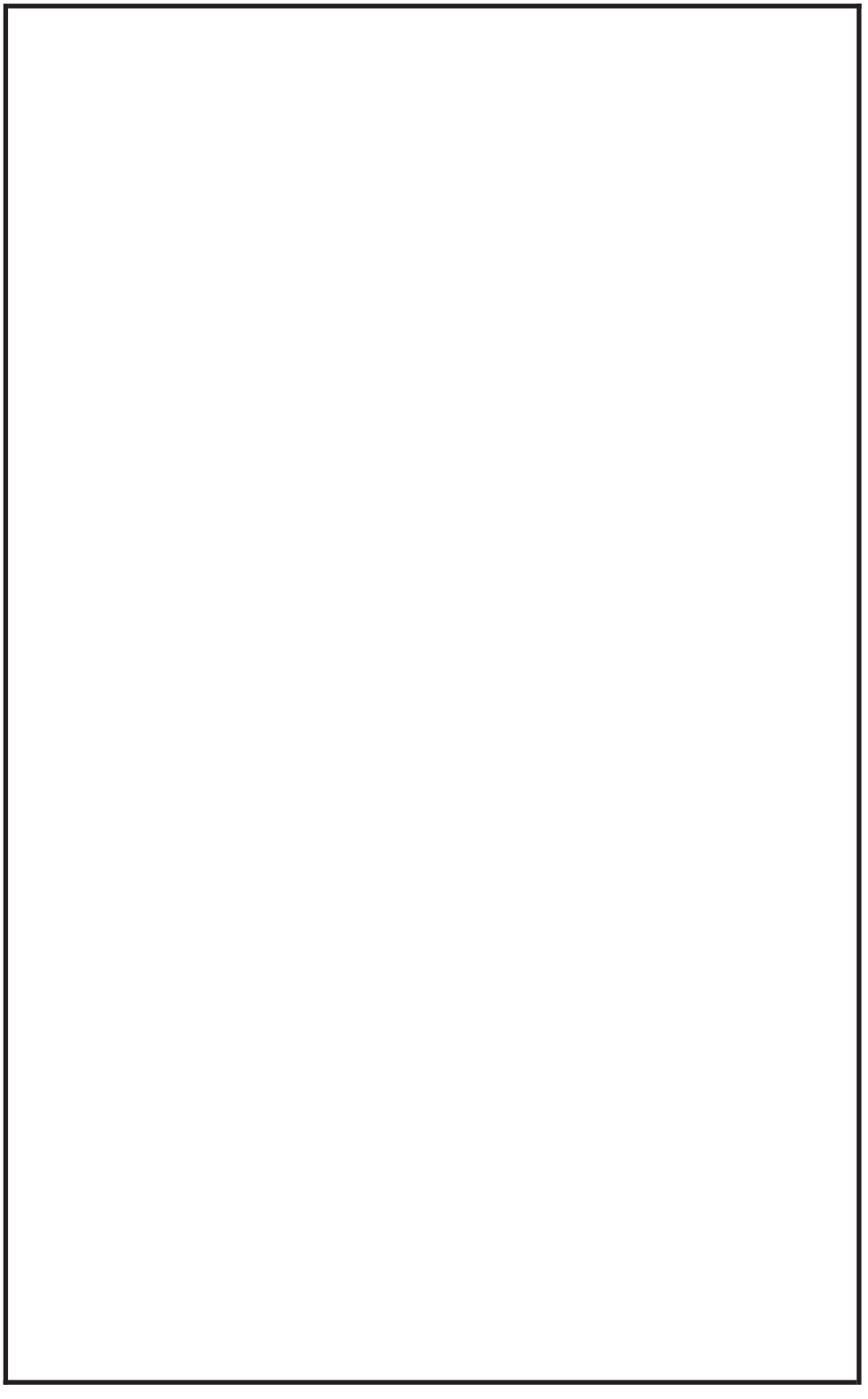
Loizou v (*1*) *Nathan Gordon* (*2*) *Yianni Patsias* (*unreported*) (*Master Leonard*) *21/08/2012*

Facts: The claimant brought a claim for damages as a result of a road traffic accident. The defendants disputed liability between themselves, and the claimant's damages. A liability-only trial was listed for 21 July 2011. The first defendant and his witness did not attend the hearing. The first defendant briefly opened the case and applied to adjourn the hearing, which was refused. After a short adjournment, the first defendant conceded liability. The Recorder gave judgment for the claimant against the first defendant, dismissed the claim against the second defendant, and ordered the first defendant to pay the costs of the claimant and the second defendant. The second defendant sought to recover a fixed success fee of 100% under CPR Pt 45 s III. The first defendant argued that the second defendant was only entitled to a success fee of 12.5%, as the claim had concluded "before a trial had commenced" in accordance with CPR r 45.16.

Held: Allowing the 100% success fee, that: (i) the question was whether the claim had concluded, whether by settlement or judgment, at or after a contested hearing, whether that hearing is final or of any issue ordered to be tried separately (CPR r 45.5(6)); (ii) a contested hearing had commenced as (a) the relevant provisions do not refer to the stage that the hearing had reached; (b) a contested hearing must commence before evidence is heard or submissions made. It does not become a contested hearing only when that happens; (c) the first defendant's application for an adjournment was in the context of the contested hearing; and (d) there is no valid distinction to be drawn between commencement of the hearing of the claim and commencement of the "contested" hearing of a claim (*Thenga v Quinn* [2009] EWCA

Civ 151 followed, *Sitapuria v Khan* (unreported) and *Amin v Mullings* [2011] EWHC 278 (QB) considered). The master granted permission to appeal.

Comment: Parties should bear this in mind when a trial (whether full or liability-only) is approaching. If the parties attend the trial in order to seek an adjournment or other directions, knowing that if the application fails they will capitulate, they could face a significantly higher liability for costs.



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