Costs Law Update
25th June 2009

- The Defendant Costs Specialists

Jackson Review

The legal press has naturally been focusing on Lord Justice Jackson's *Preliminary Report on Civil Litigation Costs* in recent weeks. It is beyond the scope of this Costs Law Update to try to comment in any detail on that report. However, the two proposals that seem most likely to emerge in the final report are fixed costs for fast track cases and a shift to one-way costs shifting for certain litigation. These would have major ramifications for costs draftsmen and other costs professionals. Vast volumes of work would disappear entirely if these proposals see the light of day. The possibility of certain groups suffering as a result of his final proposals is one he recognises and sees as no bad thing in itself: "The personal injury litigation industry is populated by numerous interest groups and middlemen, all of whom have to meet their overheads and make a profit on top. If any layer of activity can be removed from the process … it may be thought that this will serve the public interest".

It will be interesting to see how the costs world responds to the final proposals.

The Legal Costs Blog

In February we launched the The Legal Costs Blog.

What is a blog? Delia Venables' website gives a helpful definition: "A **blog** is a website designed for frequently added news items which can be set up using various templates and where the detailed work of running a website is done for the blogger by the blogging service provider. This enables interesting (or indeed, uninteresting) people to give us their views without delay, generally on a particular topic. There are lots of legal blogs (sometimes called blawgs) in the USA but very few in the UK or Ireland."

This blog was designed to compliment these Costs Law Updates and enable us to provide more regular news and comment on this important area for defendants, insurers and their lawyers.

Since its launch The Legal Costs Blog has attracted considerable interest and a growing readership (including a surprising number of claimant law costs draftsmen).

If you haven't already done so, please pay the blog a quick visit. For those of you with a particular interest in this area, there is a link on the site to enable you to very quickly and easily subscribe to the blog contents via email and avoid the need to keep revisiting the site to see if there have been any new posts.

Here is the link:

www.gwslaw.co.uk/blog/

For those of you who still can't get enough costs law news, GWS also write regularly for the *Solicitors Journal* and *Claims Management* magazine.

When is a contested hearing not a "trial"

The fixed success fee regime which applies to Conditional Fee Agreements (CFAs) in newer RTAs allows solicitors a success fee of 12.5% if "the claim concludes before a trial has commenced or the dispute is settled before a claim is issued" or 100% "where the claim concludes at trial" (CPR 45.16). The same rules, but with different figures, apply to newer EL and EL disease cases. A "trial" is defined as being "the final contested hearing or the contested hearing of any issue ordered to be tried separately".

Some claimant solicitors seeking to maximize their success fees have sought to argue that if a matter proceeds to assessment of the costs then that is a "trial" and their costs therefore attract the 100% success fee even if the substantive claim settles pre-trial. This was the situation that arose in the case of *Thenga v Quinn* [2009] EWCA Civ 151. Judgment was entered in default for the Claimant in relation to the substantive claim. The matter was listed for an assessment of damages hearing but quantum was agreed before the hearing and the Defendant agreed to pay the Claimant's costs. The matter was proceeding in Bury County Court where a practice has apparently developed of cases not being removed from the list but remaining listed to enable a summary assessment of costs to take place. (Considerable doubt was expressed by Lord Justice Wilson as to the appropriateness of this practice given summary assessment is only meant to be conducted by a judge who has heard the actual case.) The case therefore proceeded to a summary assessment where the judge at first instance was persuaded that this therefore amounted to a "final contested hearing" and a 100% success fee applied.

On appeal, the circuit judge disagreed with this conclusion and held that the summary assessment was not part of the "final contested hearing"; the claim had been settled before a trial had commenced and the success fee was limited to 12.5%. Lord Justice Wilson, refusing permission to appeal, agreed with the circuit judge and concluded that it was clear that "final contested hearing" relates to the substantive claim (although would include a disputed hearing as to whether to award a party costs in principle).

A similar issue arose in the case of *Hosking v Smallshaw* (25 March 2009, unreported, SCCO). The case concerned an RTA to which the fixed success fee regime applied. By the morning of the trial (listed for 28 January 2008) the parties had agreed settlement but were unable to agree as to whether the periodical payments that formed part of the settlement were to be paid annually or monthly. The Claimant's solicitors therefore made an application asking the Court to determine the frequency of the payments. That application was heard by a judge on 15 May 2008 and a final Order was then drawn up.

The Claimant's solicitors sought a 100% success fee on the basis that the final hearing was a "contested hearing". The Defendant argued that the claim was listed for trial on 28 January 2008 and the claim had settled before trial and the solicitors' success fee was

therefore limited to 12.5%. Master Simons accepted the Defendant's submissions and concluded that the hearing on 15 May 2008 "dealt with the fine tuning of the settlement agreed between the parties". The success fee was therefore limited to 12.5%.

Hourly Rates and the RPI

A common clause in many CFAs, and this follows one version of the Law Society's Model CFA wording, is: "We will not increase the rate by more than the rise in the Retail Prices Index". Despite this clear and unambiguous wording, bills are routinely presented where the hourly rate increases year-on-year by more than the RPI increase. When challenged, the response from some claimants is that they wrote to the client informing them of the purported increase and because the client did not challenge the RPI-busting increase it is therefore binding on the client and can be recovered from the paying party. Not so said the Senior Costs Judge in *Findley v Jones and MIB* [2009] EWHC 90130 (Costs) (reaching the same conclusion as the judge in *Puksis v Brumby* [2008] EWHC 90095 (Costs)). Any increase allowable is limited to the rise in the RPI given the clear terms of such CFAs.

In recent years the increases in the Guideline Hourly Rates have been based on the Average Earnings Index for private sector service industries. This has tended to have a higher annual increase than the RPI, hence the problem created by the RPI clause. But matters have now become more interesting. In February the RPI fell to 0%. In March it was -0.4%, -1.2% in April and -1.1% in May. If the RPI remains in negative territory, those firms who have the RPI clause will be unable to increase the hourly rates on any of their cases, regardless of whether the Guideline Hourly Rates increase. The only consolation to claimant lawyers is that these are not "tracker" clauses, otherwise firms would potentially be finding themselves having to reduce their rates in coming months. Defendant lawyers have been used to this prospect for years but this would come as something of a shock to the system for claimant solicitors.

Complimentary Costs Training

GWS are now currently offering a limited number of complimentary in-house costs law training sessions to defendant panel solicitors and insurers. These typically focus on the proactive steps that can be taken during the life of a claim to control third party costs but can be tailor-made to your requirements.

Please contact Simon Gibbs if you would like to find out more.

Out with the old

It is with regret but with warm wishes that we announce the (very early) retirement from GWS of partner Harriet Stone. Having finished her six months sabbatical she (bizarrely) decided that there was life outside the world of costs. She is now living in Cornwall and renovating her new home.

Harriet played a crucial role in the early success of GWS and we wish her every happiness for the future (but secretly hope to tempt her back at some stage).

In with the new

We are delighted to announce that Emily Fraser has accepted partnership in GWS. This is a very exciting and challenging time for the costs world and Emily will be playing a crucial role in GWS's continued growth and expansion.

Contact

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