- The Defendant Costs Specialists

# Costs Law Update – 14/10/08

## Costs Capping Consultation

It has been recognised for some time now that the Courts have the power to make costs capping orders that limit in advance the amount of costs that a party can incur in litigation.

The crucial question has been how readily the courts would use this power. There are two contrasting views. One being that such orders should be made as a matter of routine as part of the Court's case management powers. The other view being that they should only be made in exceptional circumstances.

In *Willis v Nicolson* [2007] EWCA Civ 199 the Court of Appeal considered whether it should provide guidance on costs capping. However it concluded that it was for the Civil Procedure Rule Committee (CPRC) to decide whether, and if so with what degree of urgency, to take up the issues that had been identified in its judgment.

A consultation has just been launched on behalf of the CPRC following their initial conclusion that:

- the court had jurisdiction to make costs capping orders;
- the approach to such orders should be conservative and such orders should only be made in exceptional circumstances when there is a particular reason for doing so, not as a matter of course; and
- costs capping orders should generally be made on application.

The key clause in the draft rule change is:

> "The court may at any stage of proceedings make a costs capping order against all or any of the parties if—
>
> (a) it is in the interests of justice to do so;
> (b) there is a substantial risk that without such an order costs will be disproportionately incurred; and
> (c) it is not satisfied that the risk in sub-paragraph (b) can be adequately controlled by—
>
> (i) case management directions or orders made under Part 3; and
> (ii) detailed assessment of costs."

If these proposals are subsequently introduced into the CPR it will largely remove this weapon in the armoury of defendants. It is very hard to imagine a case where excessive costs couldn't, in theory, be controlled by detailed assessment. However, in reality, once the costs have been incurred the damage has already been done. Very few judges on assessment every really approach a case from the perspective of trying to allow only the minimum amount of costs that would have been incurred if a claim had been run as efficiently as possible. It is also surely far better to set a budget in advance rather than trying to knock down the costs after the event. However, these proposed rules appear designed to entrench the opposite approach.

The consultation ends on 24th October 2008 and we would urge defendant representatives to respond with suggestions for the proposed rules to be amended so that these applications are made routinely rather than only in exceptional circumstances. Full details and the Questionnaire can be found: here.

## New Appointment – Emily Fraser

We are delighted to announce that Emily Fraser has joined GWS. She was called to the Bar in 2005 and was previously Costs Advocate with Legal Costs Negotiators Ltd. Emily has a strong background in dealing with technical costs matters and a broad range of advocacy experience, particularly in high value claims including clinical negligence matters. She represents a significant addition to the GWS team.

## Munich Re – Annual Claims Managers' Seminar

GWS were this year's guest speakers at Munich Re's prestigious Annual Claims Managers' Seminar.

**Contact**

If you wish to discuss the contents of this update in more detail contact:

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