Costs Law Update
7th January 2010

- The Defendant Costs Specialists

Jackson Report

We are now just a few days away from publication (due 14th January 2010) of Lord Justice Jackson's final report on the Review of Civil Litigation Costs. There are sure to be a number of proposals included that will, if implemented, radically change the legal costs landscape. With this Update we are also sending a copy of our summary of Jackson LJ's Preliminary Report and our Response.

We will be providing news and comment on the final report on our Legal Costs Blog. Some of you will notice that a number of the updates below were first published on the Legal Costs Blog. Since being launched in February 2009 this has rapidly established itself as the leading source of news and information on legal costs.

The Death of Costs Capping Orders?

There used to be two conflicting judicial approaches to the making of costs capping orders (an order limiting the amount of costs which a party may recover). The first approach was proactive and interventionist in nature and supported such orders being commonly made in appropriate cases. The second approach was far more restrictive and suggested that such orders should only be made rarely.

Following a consultation by the Civil Procedure Rule Committee, new rules were published last year that formalised the restrictive approach to costs caps.

One of the first decisions under the new rules was that of *Peacock v MGN Ltd* [2009] EWHC 769 (QB). The case concerned a defamation claim. The judge hearing the costs capping application was of the view that: "there is a substantial risk that costs will be disproportionately incurred and that, accordingly, it might well be in the interests of justice at this stage to make a costs capping order". However, applying the new rules he considered "whether the reasonableness or otherwise of instructing two counsel, and the appropriateness or otherwise of City hourly rates, are matters which can be adequately addressed retrospectively on a detailed assessment. It is difficult to see why they cannot. These are matters dealt with regularly by experienced costs judges".

He concluded: "If I had a free hand … I should be strongly inclined to impose a costs cap … . I am inhibited both by the 'exceptionality' principle and by the fact that I am satisfied that the risk of disproportionality could be adequately controlled by a costs judge at the stage of detailed assessment". He therefore declined to make a costs capping order.

In two further cases (*Barr v Biffa Waste Services Ltd* [2009] EWHC 2444 (TCC) and *Eweida v British Airways plc*) a similarly restrictive approach was adopted.

It appears that only in the most exceptional cases will costs capping orders now be made and what was, at one stage, seen as a useful tool in controlling excessive legal costs has now been lost. Interestingly, the Ministry of Justice's response to the *Controlling Costs in Defamation Proceedings* consultation refers to the case of *Peacock* and questions whether the 'exceptionality' test in the new rules has gone too far and raises the possibility of reviewing this in light of any recommendations made by Jackson LJ.

Negotiating trap

Negotiating settlement of legal costs can be difficult at the best of times. However, the last thing one wants at the end of a difficult negotiation is to discover that there has been no settlement at all or, at least, not on the terms that you thought.

In the case of *Amer v London Borough of Barnet* [2009] EWHC 90146 (Costs) the Claimant served a bill of costs totalling £15,816.45. After points of dispute were served by the Defendant, the Claimant wrote to the Defendant with the following offer: "I would be prepared to agree a reduction in the amount of the bill from £15,816.45 to £14,800".

The Defendant replied: "In the interests of resolving this matter my client has agreed your proposals. I have requested cheque and will forward asap".

The Claimant then requested payment of interest in addition to the £14,800, which the Defendant opposed on the basis that the sum proposed by the Claimant's solicitors and accepted by the Defendant should be regarded as a sum inclusive of any interest.

When the dispute reached court, the costs judge concluded that the key words in the original offer were: "I would be prepared to agree a reduction *in the amount of the bill* from...". He held: "I do not accept that the failure to mention in that email either interest or the costs of assessment should be treated as an implied inclusion of those sums in the £14,800 proposed. ... Interest on costs and the costs of assessing costs are incidental extras to the amount of the costs claimed in the bill. The email expressly refers to a reduction in the amount of the bill only and I do not accept that it should be treated as impliedly referring to the incidental extras I have described"". He therefore allowed interest in addition to the amount agreed.

This is another lesson in the need to be very careful in the wording of any negotiations on costs. As a general rule, always make clear that any offer is to be treated as fully inclusive of interest and the costs of detailed assessment.

Tranter v Hansons (Wordsley) Ltd - Duty to investigate BTE

Under the, now revoked, CFA Regulations 2000 there was a duty to advise a client whether the legal representative considered that the client was insured under an existing contract of insurance (BTE) before the CFA was entered into (Regulation 4(2)(c)). Failure to do this would render the CFA invalid.

Since the Court of Appeal decision in *Sarwar v Alam* [2001] EWCA Civ 1401, if not before, it has been common knowledge that motor policies commonly contained BTE cover available for the benefit of passengers, even if the potential claim is against the insured driver. Therefore, failure to consider whether a passenger may have the benefit of BTE cover available through the defendant driver may amount to a breach of the Regulations.

A subtle variation of this issue arises where the claimant was a passenger on a bus and the accident was caused by the negligence of the bus driver. It has been common, for a number of years, for such BTE cover to also be attached to bus companies' motor insurance.

There have now been a number of decisions covering this issue and exploring whether a failure to make appropriate enquiries of the defendant bus company as to whether such cover was available would invalidate the CFA.

In *Cochrane v Chauffeurs of Birmingham* (Central London CC) 22/6/07, *Donaldson v Four Square Coach Company* (Huddersfield CC) 11/6/07 and *Robinson v Doselle* (Milton Keynes CC) 19/12/05 the courts held on each occasion that there had been a material breach of the Regulations.

The one case that went against the flow was the decision of Master Rogers in *Dole v ECT Recycling Ltd* [2007] EWHC 90086 (Costs). In that case the Claimant's solicitors put forward witness evidence that stated: "I confirm that as at the date when the CFA was signed in this case (15/07/2004) it was not common knowledge that the bus companies would have been covered by Before the Event Legal Expenses insurance which would have been available for passengers to sue the bus company for the negligent driving of its own drivers". The Defendant did not put forward any evidence to counter this claim. Master Rogers held: "I accept the clear conclusion from Mr Bennett's uncontradicted evidence that the state of knowledge of solicitors specialising in this field in the summer of 2004 was not that the defendants to a claim of this nature might have passenger cover, and in particular that such cover would be dealt with independently of any claim made against them by the passenger". He therefore concluded that the reasonable enquiries that a solicitor was expected to undertake would not have extended to considering whether BTE cover was available in this situation as they would not have known such cover might be available.

The latest decision on this issue is that of *Tranter v Hansons (Wordsley) Ltd* [2009] EWHC 90145 (Costs). The Claimant's solicitors produced a witness statement that stated: "I confirm that as at the date when the CFA was signed in this case (14/04/05) and based on my experience in the personal injury field, it was not common knowledge in the industry that a bus company would have applied Legal Expenses Insurance to the passengers on a bus to sue itself".

Master Wright nevertheless concluded: "In my judgment the Defendant has raised a genuine issue and I consider that the Claimant's solicitors in this case have failed to comply with Regulation 4(2)(c) of the CFA Regulations 2000. Whether or not it was common knowledge in the industry at the date the conditional fee agreement was signed that a bus company would have applied legal expenses insurance to the passengers on a bus to sue itself, it certainly was common knowledge that motor insurance policies

frequently provide insurance cover for passengers to enable them to sue the driver. This is clear from *Sarwar v Alam* where the judgment of the Court of Appeal was given in 2001. In my judgment there is no justification for making a distinction between private motor insurance policies and insurance policies taken out by the operators of public vehicles such as buses. ... In the present case the Claimant's solicitors knew (or ought to have known because of the Court of Appeal's decision in *Sarwar*) that private motor insurance policies often contained provisions which protect passengers. They ought also to have anticipated that in the case of public vehicles (such as buses) there could be similar provisions in the insurance policies taken out by the operators of such vehicles. They should have taken reasonable steps (a letter or two would have sufficed) to enquire. However they did not do this".

The CFA was therefore held to be invalid.

Notification

The latest update to the Civil Procedure Rules has made important amendments concerning the rules relating to providing information about the funding of a claim. These changes came into force on 1st October 2009.

The old CPR 44.3B read:

> "(1) A party may not recover as an additional liability –
>
> (c) any additional liability for any period in the proceedings during which he failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order"

The new wording of CPR 44.3B is:

> "(1) Unless the court orders otherwise, a party may not recover as an additional liability –
>
> (c) any additional liability for any period during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;
>
> …
>
> (e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order.
>
> (Paragraph 9.3 of the Practice Direction (Pre-Action Conduct) provides that a party must inform any other party as soon as possible about a funding arrangement entered into before the start of proceedings.)"

These changes fall into three categories:

1. The wording "in the proceedings" is deleted and the reference to the new wording of the Practice Direction (Pre Action Conduct) makes it clear that notice must now be given pre-proceedings.

2. The insurance premium provision deals with the consequence of not giving the information discussed below.

3. The addition of the new wording "unless the court orders otherwise" is perhaps surprising. It was previously clear that failure to comply with the notification provision produced an automatic sanction in that the additional liability was not recoverable (in the absence of a successful application for relief from sanctions). It now appears to be in the general discretion of the court as to whether to allow the additional liability despite the breach, although the starting point is obviously non-recoverability. What is strange is that the new wording is followed by the same note that previously appeared: "Rule 3.9 sets out the circumstances the court will consider on an application for relief from a sanction for failure to comply with any rule, practice direction or court order". If the court now has a general discretion there would be no need to formally make an application for relief from sanctions. Or, is the wording "unless the court orders otherwise" meant to refer to the situation where a successful application has indeed been made, but not otherwise? We'll no doubt have to wait for the first decisions on the correct interpretation.

Paragraph 9.3 of the Practice Direction (Pre-Action Conduct) now reads (amendments underlined):

> "Where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k), that party must inform the other parties about this arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim."

I am of the view that these changes clarify, rather than change, the requirements concerning pre-proceedings notification (although the corresponding transitional provisions might suggest the contrary).

An important change has been made to the Costs Practice Direction in respect of staged After-the-Event (ATE) premiums. CPD 19.4(3) now reads:

> "Where the funding arrangement is an insurance policy, the party must –
>
> (a) state the name and address of the insurer, the policy number and the date of the policy and identify the claim or claims to which it relates (including Part 20 claims if any);
>
> (b) state the level of cover provided by the insurance; and
>
> (c) state whether the insurance premiums are staged and, if so, the points at which an increased premium is payable."

This finally formalises the guidance given by the Court of Appeal in *Rogers v Merthyr Tydfil CBC* [2006] EWCA Civ 1134.

It should be pointed out that none of these changes affect those acting under discounted CFAs\CCFAs without a success fee (usually defendants). There is no need to provide notice of funding in this situation because the full hourly rate payable in the event of a win is not treated as being an additional liability (see *Gloucestershire CC v Evans* [2008] EWCA Civ 21).

Guideline Hourly Rates 2010

In recent years the Guideline Hourly Rates have been reviewed annually. The latest news is that the Master of the Rolls has decided to wait until after publication of Jackson LJ's report of his review of Civil Litigation Costs before deciding whether to make any changes to the current Guideline Hourly Rates.

Complimentary Costs Training

GWS are currently arranging a limited number of complimentary in-house costs law training sessions for 2010 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. We will also be covering the final Jackson report and its implications.

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

Contact

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

Simon Gibbs
Tel: 020-7096-0937
Email: simon.gibbs@gwslaw.co.uk
Address: Gibbs Wyatt Stone, 68 Clarendon Drive, London SW15 1AH
DX: 142502 Enfield 7
Website: www.gwslaw.co.uk
Legal Costs Blog: www.gwslaw.co.uk/blog

Gibbs Wyatt Stone
Dedicated to providing the level of expertise expected from specialist costs counsel and the range of services provided by traditional costs draftsmen.