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COSTS Update

News and Views
from 4 New Square

December 2011

Latest news on Legal Aid reform

Nicholas Bacon QC

In the past week Kenneth Clarke unexpectedly announced a six-month delay to plans to slice £350m out of the annual legal aid budget. It has been reported that the decision to postpone reforms was blamed on the need to reschedule legal contracts although it also comes as the reforms encounter fierce opposition in the Lords and strong criticism from senior judges and social welfare organisations as to the proposals. The abolition of the Legal Services Commission and introduction of a mandatory "telephone gateway", through which claimants will have to obtain civil legal aid advice, have also been put back to April 2013.

Nicholas Bacon QC

In a written ministerial statement, Clarke told the Commons merely: "We intend, subject to parliamentary approval of the legal aid, sentencing and punishment of offenders bill, to implement all of the legal aid reforms in April 2013. This will include the abolition of the Legal Services Commission under the bill and the creation of the new agency in its place." The previous deadline was October 2012.

The bill goes to the committee stage in the House of Lords on 20 December. At its second reading in the chamber last month, by far the majority of Peers who spoke criticised the bill. Most objected to the removal of legal aid from cases relating to debt, welfare, housing, medical negligence, employment and immigration. Not all victims of domestic violence will be entitled to help under the proposals, opponents claim.

New contracts to provide civil and family advice will be offered to lawyers in April 2013.

The Gazette reported that its understanding, however, was that the Jackson reforms of civil litigation costs will not necessarily be delayed until April 2013. Lord Justice Jackson has said previously that the reforms he initiated and which are part of the Legal Aid, Sentencing and Punishment of Offenders bill will be held 'in escrow' until the legislation takes effect. It will be interesting to see whether this original intention will withstand the delay of the implementation of the legal aid reform to April 2013. ■

We will try and keep readers of this News Letter up to date where we can.

Commentary on the Court of Appeal case of LSC v. Henthorn

Nicholas Bacon QC

Meanwhile, the Court has recently handed down its judgment in the Test Case of LSC v. Henthorn, a case all about the Limitation period in recoupment of on account payments in LSC funded cases. Earlier this year the High Court held that the Legal Services Commission (LSC) was barred from recovering payments on account if proceedings for recovery are not commenced within six years of the conclusion of the case. The LSC appealed to the Court of Appeal on the grounds that the limitation period does not commence until the LSC make a demand for payment.

The Law Society and the Bar Council (represented by Nicholas Bacon QC of 4 New Square) obtained permission to intervene in the appeal in support of the High Court judgment as the appeal was an important test case on the limitation issue.

The Court of Appeal held that the limitation period runs from the date of the final costs assessment.

The main issues arising from the judgment can be summarised as follows:

- The Court of Appeal clarified that in relation to a claim by the LSC for an alleged overpayment, time starts to run under the Limitation Act 1980 from the date of final assessment of costs under regulation 100(8) of the Civil Legal Aid (General) Regulations 1989.
- The Court rejected the LSC's principle argument that time starts to run from when it makes a demand for payment.
- The Court also rejected Ms Henthorn's argument, supported by the Society and the Bar Council, that the limitation period begins on conclusion of the work under the certificate.
- Various abuse of process arguments based on the LSC's alleged inefficiency in managing the recoupment system failed. ■

Read the Court of Appeal judgment delivered by the Master of the Rolls Lord Neuberger:
Legal Services Commission v Henthorn [2011] EWCA Civ 1415 (30 November 2011)

Trafigura part 1: some questions finally answered

Roger Mallalieu

On the 12th October 2011 the Court of Appeal handed down its judgment in the first costs appeal in the long running Trafigura dispute (Motto v Trafigura Ltd [2011] EWCA Civ 1150. The judgement dealt with a range of issues arising out of the earlier judgment of Chief Master Hurst and whilst it is fair to note that each side achieved a measure of success, the winners on balance certainly appear to be the Defendant paying parties, represented by Nicholas Bacon QC and Dan Saoul of 4 New Square (with other counsel).

The second Trafigura appeal, dealing with the thorny question of interest on costs, is to be heard by the Court of Appeal on the 30th and 31st January 2011 at the same time as another leapfrogged case on the same point, Simcoe v Jacuzzi UK Ltd. Nicholas Bacon QC and Dan Saoul will again be counsel for the Defendant on that appeal, whilst the Claimant on the Simcoe appeal (effectively opposing those two) will be represented by Roger Mallalieu of 4 New Square, alongside John Foy QC.

This article considers briefly the decisions in the first appeal and what impact those decisions will have on costs recovery in general.

The scope of the appeal was said to be 'limited' to a mere 9 issues - proportionality, vetting costs, the impact of alleged non compliance with the Pre-Action Protocol, the recovery of costs of obtaining medical reports, the recoverability of costs of parts of claims that were abandoned, the recoverability of costs incurred in finalising the settlement and distributing monies, funding costs (the thorny and long undecided question of whether the cost of setting up CFA's and arranging ATE are recoverable inter partes), the appropriate percentage success fee and the reasonableness of the ATE premium.

It is fair to say that some of these issues are very fact specific and have little if any wider impact beyond the unusual facts of the Trafigura case. However, the decisions in particular on funding costs, the costs of abandoned issue and proportionality are of some importance in either clarifying or reinforcing the law. This article will consider those three points, and the issue of the ATE premium, only.

Proportionality

Chief Master Hurst had unsurprisingly come to the conclusion that the costs claimed by the Claimants (base costs of a mere £49 million) were prima facie disproportionate and the 'necessity test' as set out in Home Office v Lownds: Practice Note [2002] EWCA Civ 365, [2002] 1 WLR 2450, should therefore apply. However, he had then gone on to rule that this did not prevent him from finding, in due course, that individual items or groups of items did not appear disproportionate and therefore that the necessity test did not apply to those items.

This approach has been referred to as the 'reverse Giambrone', by reference to a decision of Morland J (Giambrone & Ors v JMC Holidays [2002] EWHC 2932 (QB)) in which he held that a finding at the outset that the costs were not disproportionate as a whole did not prevent a judge later finding that certain items or groups of items were disproportionate. Chief Master Hurst simply flipped this approach on its head.

The Court of Appeal held that he was wrong to do so. If the costs as a whole were prima facie disproportionate, then the necessity test applied to the costs as a whole and there was no scope for then saying that a part of those costs were not disproportionate. Those costs were part of the disproportionate whole.

Accordingly, it is now clear (if there was any doubt) that the correct approach it to firstly identify if the costs as a whole appear disproportionate. If so, the necessity test applies to the whole of the costs and the question of the proportionality of individual items or groups of items does not arise. However, if the costs as a whole are not disproportionate the court must still go on to consider if items or groups of items are disproportionate and, if so, apply the necessity test to those items.

This is a victory for paying parties, though it is fair to note that Chief Master Hurst's decision appears to have been the only reported example of a judge applying the 'reverse Giambrone' in any event.

Perhaps what will be more fundamental for most practitioners will be the forthcoming revision to Civil Procedure Rules to introduce a new test on proportionality. Quite what that new test will be is not yet known. However, it appears to be widely accepted that the present approach, as identified in Lownds, does not achieve the desired aim. What the new test will be, and whether it will be any more successful, remains to be seen.

Funding Costs

It is something of a surprise that 11 years or so after additional liabilities were made recoverable inter partes, and after 11 or so years of trench warfare and litigation about costs recovery, the ostensibly simple question of whether or not the costs incurred by solicitors in complying with procedural and practical requirements to set up CFAs with their clients and in complying with similar requirements in putting in place and maintaining ATE policies can then be recovered inter partes at the conclusion of a successful claim had not been authoritatively decided.

Finally the issue has been decided, though after the long wait many may find the reasoning a little disappointing.

Chief Master Hurst had concluded, probably against the general groundswell of first instance decisions, that such costs could be recovered inter partes. The Court of Appeal disagreed.

Key to the Court's analysis was the proposition that the costs of putting in place a CFA were part of the costs of 'getting business' (paragraph 110) rather than costs of (or presumably incidental to) the proceedings. Indeed, the Master of the Rolls reasoning appears to be founded on the basis that such costs are costs which should not be charged to the client, let alone sought inter partes, on the basis that they are part of the solicitor's overheads relating to the bringing in of potential clients, rather than work done for the prospective client, who does not become a true client until the CFA has been entered into.

The analysis is perhaps open to criticism. What, for example, of the classic situation in the personal injury sphere where a client instructs a firm on a written, or notional, conventional retainer and there is then a hiatus whilst initial investigation is conducted before a CFA, often retrospective, is signed?

Can it still be said in that situation that the client was not a client at the time the costs of setting up the CFA were incurred? Can it still be said that the expense is one of 'getting business', when that business has already been got?

The analysis is perhaps even more open to criticism when it comes to costs associated with ATE. The Master of the Rolls acknowledged (paragraph 113) that such costs stand on a different footing since such costs, at least in so far as they relate, for example, to reporting to the insurer, are incurred after the ATE has been incurred (and therefore undoubtedly once the client is a client). However, he went on to conclude that they too were irrecoverable.

The reasoning for this, at paragraph 114, is frankly almost entirely absent. It is described as a costs which was not a costs 'of the litigation', but rather one that was 'collateral to the litigation' (perhaps an unfortunate choice of words given that costs not merely of, but also incidental to proceedings are normally recoverable).

However, whatever the reasoning or lack of it, and whatever the potential grounds for distinguishing that reasoning on the facts of other cases, the bottom line appears to be that the Court of Appeal has set its face against the recoverability of such costs and courts at first instance will consider themselves bound by that judgment.

The costs of parts of claims that are abandoned

Many of the Claimants had contended that they had suffered damage of a far more substantial nature than the ultimate settlements compensated for. Many of these allegations were simply not pursued (though were not formally abandoned).

Chief Master Hurst concluded that the reasonable and proportionate costs of investigating such claims were recoverable inter partes. It was possible that the symptoms complained of had been caused by the waste and accordingly it was reasonable to investigate these issues.

The Court of Appeal essentially agreed and at paragraphs 79 to 88 provided a short, helpful and (in the author's humble opinion) correct analysis of the oft misunderstood question of the extent to which a costs judge can or should allow or disallow the costs of issues raised, but not pursued by otherwise successful Claimants.

The first point was that simply because a party agrees to pay the other party's costs of a claim on a standard basis, they are not prevented from arguing that the costs judge should disallow issues on which the otherwise winning party has failed. This is well established in Shirley v Caswell]2001] Costs LR 1 and Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91.

However, where a Claimant reasonably believes that they have suffered a particular injury as a result of the alleged harm suffered, and where that possibility reasonably and proportionately investigated, only for it to transpire that, whilst some damage was suffered, it did not include that injury or was not as extensive as initially believed, the costs of that investigation are likely to form part of the costs payable by the paying party.

Of course, if a particular claim or part of the claim is unreasonably pursued, or pursued unreasonably beyond a particular point, then the costs will be disallowed as having been unreasonably incurred.

This part of the judgment does not provide any new statement of principle. However, the reaffirmation in clear terms of the existing principles might help limit some of the inappropriate challenges that are frequently made, for example, to the recovery in principle of the costs of obtaining expert reports which are obtained as part of a proper investigation of a claimant's case, but are subsequently not disclosed or relied on.

The ATE premium

Chief Master Hurst had allowed the First Assist ATE premium claimed in the sum of £9,677,554. The Defendant appealed that decision on a number of grounds, essentially repeating the attack at first instance.

Such an attack is, perhaps, one of the few remaining avenues of attack for those seeking to challenge ATE premiums following the Court of Appeal's decision in Rogers v Merthyr Tydfil BC [2007] 1 WLR 808 and the earlier decision of Chief Master Hurst in the RSA Pursuit Test Cases (unreported) 27 May 2005. The Court of Appeal has looked very favourably on the basic methodology of the setting of such premiums and it is realistically only where the insurer has made an error in rating the risk or in choosing the figures for potential liabilities which it has then put into that methodology that a challenge is likely to succeed.

The main argument therefore related to whether or not the insurer had correctly rated the premium by assessing the prospects of success at 65%. This was, however, fairly summarily dismissed, essentially on the basis that the evaluation was within reasonable bounds.

The second attack - that the premium would have been lower had the Claimants complied with the Practice Direction on Pre Action Conduct was dismissed in light of the more general finding, upheld on appeal that the Claimants were not to be penalised for any such non compliance.

The third line of attack - that a premium with a variable premium rate should have been negotiated also failed, at least in part because there was no evidence that this would have resulted in a lower cost. Defendants generally will be well aware of the difficult of producing evidence that similarly comprehensive but lower costs ATE was available.

The fourth submission was, perhaps unfairly, summed up by the Master of the Rolls as being a submission that the premium was 'startlingly high'. Again, in the absence of evidence of alternative available policies with a lower premium such an argument failed.

As with the point in relation to 'abandoned' claims, this part of the judgment establishes no new legal principle. However, it is yet a further example of just how difficult it is to challenge such ATE premiums, even where the sum claimed reaches the stratospheric levels claimed here. Whilst the appeal on the whole was a success for the Defendants, this part will simply reaffirm the gloom paying parties generally feel when faced with ATE premiums, a gloom that will only be lifted next year when such premiums should become irrecoverable inter partes.

Conclusion

Overall, where does Trafigura leave us? On the facts of the particular appeal and in light of the impact the decisions will have on the assessment of the Claimants' costs, the Defendants must be the happier party with the outcome.

In terms of broader considerations, again it will probably be paying parties who have more to celebrate. The funding point has finally been decided, if somewhat unsatisfactorily, in their favour. The proportionality point changes little, but prevented receiving parties establishing a small inroad into the existing test. The 'abandoned claims' and ATE points are favourable to receiving parties but in reality do no more than affirm the existing position.

However, the wider reality is that it will be the forthcoming legislative and procedural changes to issues such as the recoverability inter pates of additional liabilities and to the test on proportionality, all of which this judgments heralds, which will have the greater impact on future liabilities. ■

Costs and late acceptance of Part 36 Offers: stay or be damned

Daniel Saoul

Two recent decisions, arising out of similar circumstances, have addressed the vexed question of the costs consequences of late acceptance of Part 36 offers. In both cases the Courts refused to depart from the usual order, namely ordering the claimant to pay the defendant's costs from the date the offer period expired, despite coherent arguments against this outcome. This emphasises just how high the threshold is for persuading a Judge that such an order is unjust.

Both decisions were given on 11 October 2011: they are Cooksey v Amor, decided by Master Leonard sitting in the Senior Courts Costs Office (by written judgment, Case No. 9MC03091), and Lumb v Hampsey, decided by Mr Justice Lang sitting in the High Court, Queen's Bench Division (extempore, case analysis available on Lawtel / Westlaw).

Although the decisions necessarily arise out of different facts and consequently raise certain distinct legal issues (which will not be explored in detail here), they do share common threads. Both cases arise out of serious personal injuries suffered in road traffic contexts. In each case the claimant suffered significant head injuries as a result of the accident. Liability was admitted or agreed at a relative early stage, with quantum remaining at large. Both defendants then promptly made Part 36 offers. Those offers were made at a time when the precise nature and extent of the claimants' injuries were (on the claimants' cases at least) not known: medical investigations into and treatments of the brain / psychological injuries suffered were ongoing, and it was not clear how severe those injuries were or how long it would take to recover from them (if indeed full recovery was possible at all). In the circumstances both claimants rejected the Part 36 offers that had been made.

After further medical assessment it transpired that the injuries were not as severe as first feared. Both claimants therefore subsequently accepted the earlier Part 36 offers, out of time (in the Cooksey case in the form of a judgment by consent rather than written acceptance of the Part 36 offer). On the question of costs, the claimants argued that the normal rule (under CPR 36.10(5)(b) or CPR 36.14(2)(a)) that they should pay the defendants' costs from the date on which the relevant offer periods expired should not be followed since (in essence) the offers had been made at an early stage when the claimants were unable properly to assess them, since they did not know how serious their injuries were at that time or what recovery they might make. They said they were entitled to wait and see. The defendants, they argued, should not be allowed to benefit from the equivalent of what turned out to be an early and lucky "stab in the dark".

In response, the defendant in each case argued that this was a simple case of the normal rule applying, in accordance with the Court of Appeal's decision in Matthews v Metal Improvements Co Inc [2007] EWCA Civ 215. On their case, whether the claimants had behaved reasonably or not in rejecting the offers made was irrelevant: the test was whether it was unjust to depart from the usual order, and they submitted that it was not.

In short, both Courts agreed with the defendants' submissions. In the Lumb case, the Court felt that the claimant did have sufficient information at his disposal to form a view of the merits of the Part 36 offer made to him – it is clear from this conclusion that the Courts will scrutinise extremely closely any suggestion to the contrary. In the Cooksey case, the Court also took a sceptical view of this submission – although the Costs Judge did not reject the claim that at the time of the offer, the claimant had insufficient information on which to make a decision about it, he concluded that the true reason for the subsequent acceptance of the offer was not the newly available medical information, but the claimant's desire to avoid an imminent trial. This illustrates the difficulty of succeeding with arguments of this kind. Notably, in both cases, the Court considered it important that at no stage had the claimants sought an extension to the Part 36 offer period from the defendant, nor had they sought to stay the case generally pending the availability of further expert medical evidence. Such steps could, in theory, have offered the claimants extended protection against a liability for the defendants' costs after the expiry of the offer period.

The lesson seems to be this: claimants in similar situations will need to handle any early Part 36 offers they receive with great care: if it is simply too early to tell whether the offer is a good one or not, every effort should be made to make this clear to the other side, and to avoid rejecting the offer if at all possible, instead seeking to extend the relevant period for CPR 36 purposes and to discourage the other side from incurring any further costs until the factual position is more certain. Absent such careful handling Master Leonard and Mr Justice Lang's recent judgments make it clear that claimants are going to face a real uphill battle in persuading a Judge not to apply the usual consequences following acceptance of a Part 36 offer out of time. ■

Daniel Saoul