Update: costs

Simon Gibbs considers the potential impact of the Jackson review on the costs industry, the definition of a trial in the context of conditional fee agreements, and disclosure requirements

RECENT WEEKS HAVE naturally been focused on Lord Justice Jackson's *Preliminary Report on Civil Litigation Costs* (see *Solicitors Journal*, 153/18, 12 May 2009 and 153/22, 9 June 2009). It is beyond the scope of this update 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 move 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 Jackson LJ's 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."

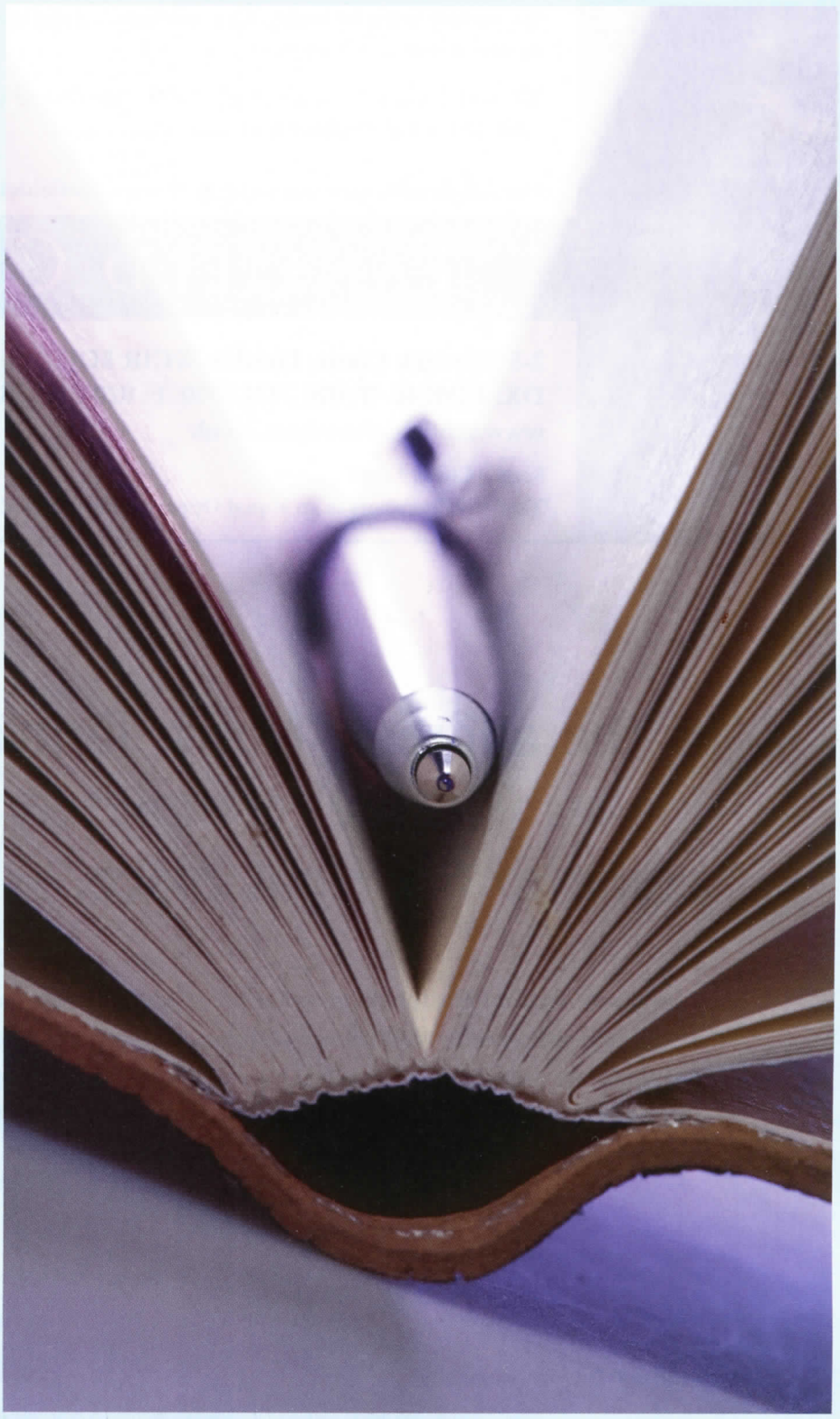
A related issue is the growing view that the new claims process for low-value road traffic accidents (RTAs) has been quietly killed off, at least until after Jackson LJ publishes his final report.

With such important issues now being decided, it has otherwise been a relatively quiet period in terms of recent new costs law. Litigation over the role of costs estimates rumbled on in *Mastercigars Direct Ltd v Withers LLP* [2007] EWHC 2733 (Ch) (see *Solicitors Journal*, 153/14, 14 April 2009 and 153/17, 5 May 2009). Other developments have been more subtle but nevertheless have a potentially wide impact.

When is a contested hearing not a "trial"

The ingenuity of parties to litigation when it comes to arguments over legal costs knows no limits.

The fixed success fee regime which applies to conditional fee agreements (CFAs) in newer RTAs allows solicitors a success fee of 12.5 per cent if "the claim concludes before a trial has commenced or the dispute is settled before a claim is issued", or 100 per cent



Playing by the book: courts are getting tougher on costs, particularly when conditional fee agreements are involved

"where the claim concludes at trial" (CPR 45.16). The same rules, but with different figures, apply to newer employer's liability and employer's liability 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 maximise their success fees have tried to argue that if a matter proceeds to assessment of the costs then that is a "trial" and their costs therefore attract the 100 per cent 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. 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 per cent 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 per cent. 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 per cent 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 per cent. 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 per cent.

These two sensible decisions slap down at least some of the perverse outcomes the fixed success fee regime had potentially thrown up.

"These two sensible decisions at least slap down some of the perverse outcomes of the fixed success fee regime"

Disclosure of conditional fee agreements

We are now six years down the line from when the Court of Appeal gave, what it no doubt hoped would be, its clear guidance in *Hollins v Russell* [2003] EWCA Civ 718 on disclosure of CFAs. The court held: "A costs judge should normally exercise his discretion ... so as to require the receiving parties (subject to their right of election ...) to produce a copy of their CFAs to the paying parties in order that they can see whether or not the regulations were complied with."

It is therefore surprising that there continues to be satellite litigation surrounding this issue. For pre-November 2005 CFAs, when the Conditional Fee Agreement Regulations 2000 were still in force, a paying party has an obvious interest in seeing a receiving party's CFA to see whether there are any potential challenges to its validity. If the CFA is invalid, no costs will be recoverable for the work undertaken under the agreement. Conversely, a receiving party has an interest in trying to avoid disclosure and therefore a potential attack on their agreement.

For CFAs entered into post-November 2005 there is minimal scope for an attack of the validity of a CFA and a paying party will have less interest in seeing the agreement. On the other hand, a receiving party should have far less to fear by, and less reason to try to avoid, disclosure.

In *Abeles & Ors v Equitable Life Assurance Society* (7 April 2009, unreported, SCCO) the defendants made an application to the court for disclosure of various CFAs prior to drafting their points of dispute. Master Rogers summarised the issue: "This case raises in an acute form the question of whether it is possible for the court to direct disclosure of CFAs by a receiving party to a paying party and, if so, at what stage in the detailed assessment procedure such an order can be made." He concluded, having analysed the relevant authorities, that the application had been made prematurely given a request for a detailed assessment hearing had not yet been applied for.

This decision followed an earlier one of Master Howarth, also sitting in the Supreme Court Costs Office, in *Cole v News Group Newspapers Ltd* (18 October 2006, unreported) where he also considered an application for disclosure of a CFA as being premature where a detailed assessment hearing had not yet been requested. Master Howarth in that case, where the CFA interestingly post-dated the revocation of the CFA Regulations, concluded: "When this matter comes back before the court, as it is bound to do ... it may very well be that at that stage a disclosure of the CFA is appropriate."

Equally, in *Abeles*, Master Rogers held that: "Once points of defence [sic] have been served, either party can apply for a detailed assessment hearing and at that stage this application can ... be renewed, but I consider it premature at this stage." What was not in doubt was that a receiving party would generally be put to their election as to whether to disclose the CFA or to try and rely on other evidence.

Receiving parties should be cautious before using this decision as grounds for declining to disclose CFAs at an early stage. The Court of Appeal in *Hollins* made clear: "Although the procedure envisages that the costs judge will put a party to her election as to the disclosure of the CFA, now that it is clear from our judgment in this case that this is to be the general practice, we hope that receiving parties will disclose the CFA without more ado. It would obviously lead to further costs and delay if receiving parties were to take an unreasonable view on this issue." Failure to disclose at an early stage runs the risk of adverse costs orders being made.

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