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"bumper" Legal Costs Briefing

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Welcome to our legal costs briefing

Our aim is to keep well informed of the continuing changes taking place in the legal costs sector.

Our experts will write on the key legal costs issues and make sure you are prepared for the continuing changes that are being made.

We would like to thank all those who have contributed to this edition, whose hard work has been invaluable.

2015 – What to look out for!

At this time of year, with Christmas seemingly a distant memory, thoughts always turn to the year ahead. So, in the best of traditions, here are our predictions for the next "big things" in costs for the forthcoming year.

Success Fees and Insurance Premiums

As long ago as *Callery v* Gray [2002] UKHL 28, the Supreme Court determined that additional liabilities were not a breach of Article 10 of the European Convention on Human Rights (ECHR) and many considered that the issue was thereby concluded. However, following the European Court's differing view in *MGN Ltd v UK* [2008] ECHR

1255, the Supreme Court felt it was able to review the matter and in *Coventry v Lawrence* [2014] UKSC 46, it concluded that additional liabilities may breach Article 6 of ECHR and/or Article 1 of the First Protocol of the Convention. The hearing was adjourned to allow representations from interveners and has been relisted for 9-11 February 2015.

If the court holds that additional liabilities are a breach of Article 6, it may make a declaration of incompatibility (s4 Human Rights Act 1998). This could be backdated (Schedule 2, s1(2) Human Rights Act 1998) and the court has the option to award damages, but only if such an award would provide just satisfaction (s8 (2), (3) and (4) Human Rights Act 1998). It is worth noting that such a declaration is not the only avenue available to the court, who may determine that there has, in the event, been no breach at all.

However, if the Supreme Court does consider that additional liabilities are incompatible with human rights legislation, then the following questions arise:

- Would insurers or self-insured companies who have been paying out millions in additional liabilities for the last fourteen years seek to bring claims to recoup those payments?
- What will happen to any cases still proceeding under the 'old' CFAs and for cases where additional liabilities are still payable (i.e. mesothelioma claims)?

Fixed Costs

At the Costs Law and Practice Conference, Lord Justice Jackson said that he considered the fixed costs scheme should be reviewed in much the same way that hourly rates are. He pointed out that the current levels were set by the Lord Chancellor at much lower amounts than he had recommended. However, defendants will be glad to note that there are no current plans to increase these.

Lord Jackson added that it is now time to *"take stock"* and develop a scheme for fixed costs in the lower reaches of the multi-track as well. Such a scheme would negate the need for budgets to be prepared and potentially save both the parties and the court time and costs as a consequence. In addition, it would reduce the defendant's costs liability in a greater number of cases; a particular concern for the government in cases involving government bodies.

Given their concerns over costs, it would be logical for politicians to consider this over the coming months, but with an election looming it is not yet clear whether they will actually do so.

Damages Based Agreements

The current regulations are going to be reviewed over the next year as, in Lord Jackson's words (to the Law Society Conference on *Commercial Litigation: "The Post-Jackson World"*), *"the regulations as drafted give rise to a large number of problems"*. A sentiment which was initially expressed by the Bar Council who said in February 2013 that the Regulations as drafted were not *"fit for purpose"* (Litigation Futures 25 February 2013- *Bar Council calls for changes as peers prepare to vote on new CFA and DBA rules*). It can only be hoped that the review will lead to a set of regulations which are fit for purpose some time in 2015.

Although Lord Jackson considered that there is a need for hybrid DBAs, pointing out that *"it is illogical that DBAs do not have similar flexibility"* to CFAs, the government ruled out consideration of these from the Civil Justice Council's review, which will therefore be limited to:

- Whether there should be two sets of regulations (one for civil proceedings and one for employment tribunals);
- To provide clarity as to what forms of litigation may not be used when a DBA is funding litigation;
- Whether defendants should be able to use DBAs;
- To clarify that the payment to the lawyer may only come from any damages paid and that this is to be a percentage of the sum ultimately received;
- Whether provisions for the termination of a DBA should be in the regulations.

Of course, DBAs would be far more attractive to defendants if hybrid DBAs were allowed, since such an agreement would allow defendant solicitors to be paid, even at a discounted rate in unsuccessful cases. Even if the committee decides that it is permissible for defendants to enter DBAs, it is still anticipated that the take-up amongst defendants is unlikely to be great.

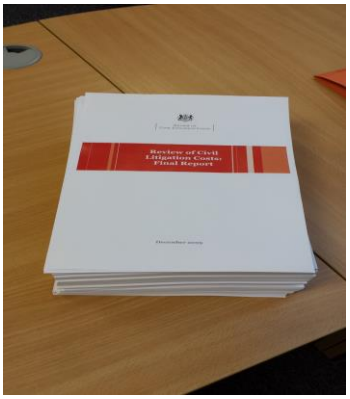
Part 36

Edward Pepperall, QC has resurrected the sub-committee considering changes to the Part 36 rules. It is expected that these changes will come in with the April CPR updates, although currently it is unclear exactly what changes are to be made. The committee's remit, though, was to consider:

- whether Part 36 offers should state that the offer will be withdrawn after a certain number of days;
- whether a pre-action Part 36 offer should need court approval;
- issues with claimants not making genuine offers;
- the position with Part 36 offers and split trials;
- the position in relation to derisory offers;
- what the position should be when a Part 36 offer is not easily available; and
- excess technicality

Whether all of these were considered and will end up in the amendments will be seen closer to the time, but it can only be hoped that any changes will reduce the need to litigate quite so frequently on Part 36 issues.

Jackson – A lasting reform!



Even as the ink dried on Lord Justice Jackson's Final Report, there was a rush by Government to introduce the reforms. This rush caused concern amongst a number of groups, including the Bar Council.

We look at how the reforms were implemented and whether "more haste and less speed" may have been appropriate.

As Dr. Mark Friston (Barrister and author of *Civil Costs: Law and Practice*) said in Litigation Futures (25 February 2013 - *Bar Council calls for changes as peers prepare to vote on new CFA and DBA rules*) that "*the situation is wholly unsatisfactory; issues of significant public interest require and deserve proper and detailed attention".* Equally, the Law Society lobbied against what it referred to in Practical Law as *"unnecessarily premature implementation"*.

The National Audit Office report *Implementing Reforms to Civil Legal Aid* recently reached the same conclusion, stating that the Government did not *"think through the impact of the changes on the wider system early enough"*.

It is perhaps for these reasons that there have been a number of problems highlighted by the reforms made. We mentioned above the problems with the DBA Regulations as drafted, but in addition, CPR Part 45.41, although written specifically to comply with the strictures of the *Aarhus Convention*, has been found to fail in doing so (*Secretary of State of Communities and Local Government v Sarah Louise Venn* [2014] EWCA Civ 1539).

The problems are not confined to the CPR itself, as the guidance for legal aid in immigration cases has been found to be unlawful (*The Queen on the* Application of *Gudanaviciene & Others v Director of Legal Aid Casework & Others* [2014] EWCA Civ 1622) as has the proposed plans to introduce a residence test for legal aid in the *LASPO Act 2012 (Amendment of Schedule 1) Order 2014* (see *The Queen on the Application of the Public Law Project v The Secretary of State for Justice & The Office of the Children's Commissioner* [2014] EWHC 2365 (Admin)).

The tightening of Legal Aid has led to what is perceived to be a lack of access to justice, particularly in the family courts, to the extent that Sir James Munby, head of the Family Division, recently handed down a judgment observing that if legal aid was not granted and Articles 6 and 8 of the European Convention on Human Rights could not be otherwise satisfied, then the HMCTs should be the ones to foot the bill for representation.

It is not only the reforms that have been implemented so far, but also future reforms that have encountered difficulty, perhaps because there is still a sense of things being rushed. In *The Queen on the application of Tony Whitston v Secretary of State for Justice* [2014] EWHC 3044 (Admin), the court held that the decision to extend sections 44 and 46 of LASPO to mesothelioma claims was unlawful; a sentiment backed in a scathing review by the House of Commons Justice Committee, who stated that the review was *"not prepared in a thorough and even-handed manner"*.

In addition, the plans to reduce the Duty Provider Work contracts from 1,800 to 525 came under criticism after the Lord Chancellor failed to disclose reports by Otterburn and KMPG with the court finding that the failure made the decision *"so unfair as to result in an illegality"* (Burton, J in *The Queen on the application of London Criminal Courts Solicitors Association and Criminal Law Solicitors Association v The Lord Chancellor* [2014] EWHC 3020 (Admin)).

It is understandable, perhaps, that the Government wished to curtail the purse strings in a tight financial climate, however, as Amanda Finlay (The Low Commission vice-chair and former Legal Services Strategy Director at the Ministry of Justice) observed *"in these days of austerity, we realise hard choices have to be made. But just cutting legal aid is not the answer. The problems still remain…"*

The Justice Select Committee has now been tasked with considering the *"Impact of the Changes to Civil Legal Aid under the Legal Aid, Sentencing and Punishment of Offenders Act 2012"* and is currently gathering evidence. A pattern is emerging from the evidence given to date of increased costs and a lack of justice. Indeed, when asked whether the proliferation of litigants in person was leading to miscarriages of justice, Lord Dyson confirmed that although he could not prove it, there was anecdotal evidence to suggest this was the case.

Legal challenges to the reforms may not be the only concerns, as Ursula Brennan (Permanent Undersecretary to the Ministry of Justice) admitted to the House of Commons Public Accounts Committee that the reforms were rushed through with no time to research their impact. The National Audit Office report, however, concluded that *"there may also be costs to the wider public sector if people whose problems could have been resolved by legal aid-funded advice suffer adverse consequences to their health and wellbeing as a result of no longer having access to legal aid"*. This has been supported by a recent survey of 1,000 GPs in which many said that they are seeing patients now they would not have done before who have legal problems, particularly in the areas of benefits and housing, and of whom 88% said that their patient's health would suffer if they did not receive legal help.

It is also, therefore, not surprising that a number of recent surveys suggest that there is a lack of confidence in the reforms. IPSOS MORI, in a survey commissioned by Messrs. Hodge, Jones & Allen, found that 47% of the solicitors questioned felt that the reforms benefitted Government and business more than the individual and 83% considered that the justice system was not accessible to all. In addition, a survey commissioned by London Solicitor's Litigation Association found 74% of London solicitors thought the costs of litigation had increased, rather than decreased as a result of the reforms.

And the challenges are set to continue with the Law Society and the Criminal Law Solicitors' Association and London Criminal Courts Solicitors' Association promising that they will push for separate judicial reviews of the legal aid crime duty tender process.

As such, it would seem unlikely that these arguments will subside in the future and the question, then, that these issues raise is how long LASPO can 'stay the course' either at all or without further significant changes being necessary.

QOCS – The Devil in the Detail

As with so many other things in modern litigation, Qualified One-Way Costs Shifting (QOCS) is a child of the Jackson Reforms. In essence, QOCS was intended to do away with expensive ATE premiums and still provide a claimant with a certain level of protection from adverse costs orders where they have behaved appropriately.

Two types of order are provided for: orders against a claimant that can be enforced without permission; and orders against a claimant that can be enforced only with permission.

Orders that can be enforced without permission

CPR rule 44.14 states:

> *(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.*

So, if the claimant was awarded £5,000 in damages and interest, but the defendant had also been awarded a costs order, the defendant could only recover up to £5,000. This may occur where a claimant has won overall but lost on interim applications, or where there is a partial costs order because the claimant lost on aspects of the case or failed to beat a Part 36 offer.

CPR rule 44.15 sets out other circumstances in which permission is not required:

> *(1) Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that—*
>
> *(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;*
>
> *(b) the proceedings are an abuse of the court's process; or*
>
> *(c) the conduct of—*
>
> *(i) the claimant; or*
>
> *(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,*
>
> *is likely to obstruct the just disposal of the proceedings.*

Unlike those under 44.14, these orders are not subject to any limitations and can be enforced to the full extent of the costs awarded.

Orders where permission is required to enforce

These fall under CPR rule 44.16. The first of these is:

> *(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.*

Where the principle arguments are likely to lie with QOCS is in relation to *"fundamental dishonesty"*. Although fraud cases are likely to fall within this category, the use of the word fraud itself has not been employed, which would suggest that the drafters had a wider interpretation in mind. There is currently no definitive guidance on what this may amount to, however, although there have been no Appeal cases on the issue to date, there has been a case at County Court level.

Gosling v Hailo (1) & Screwfix Direct (2) concerned a claim for the use of a defective ladder made by the First Defendant and sold by the Second. Surveillance evidence obtained showed a different picture to that painted by the Claimant to the expert and in his witness statement and his pleaded case of £80,000 settled against the First Defendant for £5,000 and was discontinued against the Second Defendant. It was the Second Defendant who applied for the adverse costs order to be enforced against the Claimant on the grounds that the claim was fundamentally dishonest and was successful in doing so.

The principle set down in *Shah v Ul-Haq* ([2009] EWCA Civ 542) should be regarded as still being good law, and thus conduct would be limited to the Claimant's own case, and not, for example, where a Claimant fraudulently supported another's claim (i.e., providing evidence in support of a phantom passenger).

PD 12.4 sets out the time at which a finding of fundamental dishonesty will be made:

> *(a) the court will normally direct that issues arising out of an allegation that the claim is fundamentally dishonest be determined at the trial;*
>
> *(b) where the proceedings have been settled, the court will not, save in exceptional circumstances, order that issues arising out of an allegation that the claim was fundamentally dishonest be determined in those proceedings;*
>
> *(c) where the claimant has served a notice of discontinuance, the court may direct that issues arising out of an allegation that the claim was fundamentally dishonest be determined notwithstanding that the notice has not been set aside pursuant to rule 38.4;*
>
> *(d) the court may, as it thinks fair and just, determine the costs attributable to the claim having been found to be fundamentally dishonest.*

There is no current case law or guidance on what might amount to '*exceptional circumstances'* in PD 12.4(b). This will, therefore, be something that will need to be tested and formed through case law.

Fundamental dishonesty is not the only order for which permission to enforce is required. CPR rule 44.16 goes on to state:

> *(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where—*

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependent within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

Guidance is provided in Practice Direction 12.2 as to a claim made for the *'financial benefit of another person'* under 44.16(2)(a) and includes "*subrogated claims and claims for credit hire"*, but not claims by relatives for personal care (PD 12.3). The PD goes on to illustrate the costs orders that may be made by the court in such a claim:

12.5 The court has power to make an order for costs against a person other than the claimant under section 51(3) of the Senior Courts Act 1981 and rule 46.2. In a case to which rule 44.16(2)(a) applies (claims for the benefit of others)—

(a) the court will usually order any person other than the claimant for whose financial benefit such a claim was made to pay all the costs of the proceedings or the costs attributable to the issues to which rule 44.16(2)(a) applies, or may exceptionally make such an order permitting the enforcement of such an order for costs against the claimant;

(b) the court may, as it thinks fair and just, determine the costs attributable to claims for the financial benefit of persons other than the claimant.

12.6 In proceedings to which rule 44.16 applies, the court will normally order the claimant or, as the case may be, the person for whose benefit a claim was made to pay costs notwithstanding that the aggregate amount in money terms of such orders exceeds the aggregate amount in money terms of any orders for damages, interest and costs made in favour of the claimant.

As with other proceedings, the court has free reign to order costs on the indemnity or standard basis and either by summary or detailed assessment (PD 12.7).

When can a defendant enforce its order?

If the defendant has obtained the order and either does not need, or has obtained permission, it can only be enforced at conclusion, as set out in CPR rule 44.14(2):

> *Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.*

To what cases does QOCS apply?

QOCS applies to proceedings where damages are claimed for personal injury, under the FAA 1976 and includes claims for the benefit of an estate. It does not include applications for pre-action disclosure, which are therefore subject to the usual two-way costs regime (44.13(1)).

The only Appeal case to date has been that of *Wagenaar v Weekend Travel Limited t/a Ski Weekend & Others* [2014] EWCA Civ 1105. One of the issues considered in that case was whether QOCS was retrospective.

The court pointed to the well-established principle that legislation concerned with matters of procedure "*are to be construed as retrospective unless there is a clear indication that that was not the legislature's intention"* (Lord Vos – para 30). Lord Vos went on to conclude that there was nothing in the rules relating to QOCS that would indicate they were not intended to be retrospective. There is only one exception set out in CPR rule 44.17. Thus, all claims, whether commenced prior to or after 1 April 2013 fall under the QOCS regime unless there is a pre-commencement funding arrangement in place.

Conclusion

Whilst QOCS may serve its primary function to protect a claimant from adverse costs orders, it is likely that at least in the near future, there will be an increase in litigation whilst concepts like 'fundamental dishonesty' and 'exceptional circumstances' are ironed out.

J-Codes Deconstructed

In his Final Report, Lord Justice Jackson considered the system of billing used in America would have benefits in England and Wales. But what does it mean?

From a technical perspective, J-Codes are Uniform Task Based Management System codes (UTBMS). In more layman terms, they are simply a code to define an item of work done (such as attending client, or reading medical report).
The J-codes have three layers:

The Phase Code - This is not required for time entry and its purpose is to contain a series of predefined task-steps. In order to input the correct task code, fee earners will need to be aware of the Phase Code.

The Task Code - This is the first code in the two-part entry system and records *what* work was performed.

The Activity Code – This is the second code in the two-part entry system and records *how* the work was done.
A separate set of codes has been produced for expenses recording.

So, as an example, if a solicitor was to record an attendance on a medical expert, it would be entered as JH10 (Task Code) A114 (Activity Code) and the medical report fee would be X144.

However, it becomes more complicated when the codes are considered in more detail. Although it would apply in a number of circumstances, as an example, this article focuses on attendances on the client.

If a solicitor wishes to record an attendance to discuss the medical report, they would record JH10, A106. If the solicitor then wishes to record an attendance to take a witness statement, it would be JG10, A106; an attendance relating to the Particulars would be JE10, A106 and so on, with the task code changing each time.

Problems arise when, for example, a solicitor wants to record an attendance with client to discuss liability issues alone. There is no relevant task code to record this, so what is the solicitor to put it under?

It is also not yet clear what would happen if there was a conference with counsel, say, relating to more than one issue (part 36 offers/settlement (JD20), medical evidence (JH10) and an application relating to evidence (JJ40)). Will solicitors now have to record each segment of the conference separately so that they can then transpose to the J-Code system?

The idea is that the new format bill will be more informative and provide more detailed information as to what the solicitor was doing. It is also intended to assist with budget preparation, with the task-codes being designed to harmonize with the budget headings so that, in theory, a single button can be pressed to produce a complete budget, statement of costs for trial, schedule, or bill. Thus, it is intended that there will be an ease of comparison between the budgets and the bills and that it will be easier to justify the solicitor's time.

For defendants, they may consider using the system in the way the Americans do – for solicitor and own client billing. Applying the aims of the codes in this alternative usage, it would be hoped that this would provide clients with greater detail, thus preventing many solicitor and own client disputes. Further, it would make it more difficult for a client to argue that they did not have enough information to determine whether the solicitor's charges were reasonable.

The J-Codes are not currently in use, but as the LEDES Oversight Committee has recently approved them, they are one step closer to inception. There is no evidence, however, that they will ever be compulsory.

At face value, then, this appears to be a more cumbersome system than the one that most solicitors currently use and is likely not to be welcomed by busy and over-worked practitioners. However, for those who embrace the J-Codes, they could have many advantages.

For some the catchphrase from the 1970's sitcom "*Soap*" may seem appropriate: "*Confused? You will be!*"

Meet The Team – Ebuwa Uwubamwen

Ebuwa is the newest member of our team, joining us as our specialist advocate to attend Costs Management and Detailed Assessment hearings.

Ebuwa answers a few well-chosen questions about herself.

Why a career in law?

I've always had an argumentative streak and strong sense of right and wrong so as a high minded 18 year old the decision to study law was as much a moral one as an intellectual one.

What do you enjoy about being an advocate?

When preparing for a hearing, it's deploying the intellectual gymnastics required to argue those cases which could go either way, and finding that one line in a judgment that means you have an outside chance. At the hearings themselves it's the feeling you get when the judge walks in ready to be against you and you see their mind slowly changing as you put forward your arguments. And of course winning! That's my favourite thing in the world!

Career high

Working in the European Court of Human Rights in Strasbourg, responding to applications against the UK and Irish governments.

Favourite:

Book

A good Ian McEwan

Film

It changes based on my mood but right now I'll say Little Miss Sunshine

TV Programme

On a highbrow day Mad Men, on a lowbrow day The Mindy Project!

Holiday Destination

Lausanne in Switzerland