goodwin malatesta
Legal Costs Briefing

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http://www.gm-lcs.com

info@gm-lcs.com

Welcome to the December Edition of the Goodwin Malatesta Legal Costs Briefing

HAPPY CHRISTMAS AND A PROSPEROUS NEW-YEAR TO ALL OUR READERS!

2016 flew by with a bit of a bang!

Whilst the world of legal costs was fairly quiet with what seemed to be a few minor rule changes in 2016, the world as a whole was going through seismic upheavals!

Not only did the UK vote to leave the European Union but the United States voted for Donald Trump to be President. Had you bet on that double at the beginning of the year you would have been celebrating a very nice win! Had you included Leicester City winning the Premier League in a treble you could be looking to buy a place in the sun!

2017 is also going to be a massive year, but this time not only politically and in sport but also in the world of legal costs with the likely introduction of fixed recoverable costs and the new formal bill of costs. As ever, we will be ready to face all the challenges that the new year will bring!

We hope you enjoy this final legal costs briefing for 2016 and we look forward to reporting on all the events to come in 2017!

News in Brief

New Format Bill of Costs

Plans are in place for the revised new bill format that was introduced on 3 October 2016 along with a year-long extension to the pilot in the Senior Court Costs Office, to be mandatory for all work done after 1 October 2017.

According to the Civil Procedure Rule Committee (CPRC) group that approved the recent changes to PD 51L, the revised new bill of costs should "greatly facilitate the process of detailed assessment", allowing the paying party and costs judge to "see the big picture summaries but then drill down into the detail".

Newly published papers from the July meeting of the CPRC included the background paper and approved recommendations on the bill from the sub-committee, chaired by Mr. Justice Birss, which followed a major speech by Lord Justice Jackson in April, in which he called for the J-Codes to be decoupled from the new bill.

The new bill format is very different to the one used today which has been in use for many years. It is essentially an electronic spreadsheet with calculations embedded in it that are automatically performed. The new bill format can be found on the Justice website and there is a link to the website on the left hand side of page one of this briefing.

It is fair to say that the new bill format and the use of J-Codes within that format has not been greeted with universal approval, however there is a clear determination to see the widespread use of J-Codes and to use the data provided by those J-Codes to simplify the costs recovery process. We will have to see the results of the extended pilot scheme to determine whether this new process and new format bill of costs is an improvement on what already exists.

Budgets… Again!

Master Fontaine, speaking at a Law Society Conference said that, *"it's very important to hold prior discussions with your opponents and be realistic about the figures".* She went on to indicate that some judges, so frustrated with parties not discussing their budgets and are making orders compelling parties to make offers in respect of particular phases. Further, if they do not make offers for a phase then they cannot make submissions in relation to that phase at the hearing.

At the same conference, DJ Etherington acknowledged that there was *"broad inconsistency"* in which proportionality is considered with budgets. He considered that there should be a *"consistent baseline from which the discretion can be exercised"*, but felt that this should come from a rule change, rather than a Court of Appeal authority, saying that *"I think everybody would welcome a more concrete definition, or at least a better interpretation of the phrase"*.

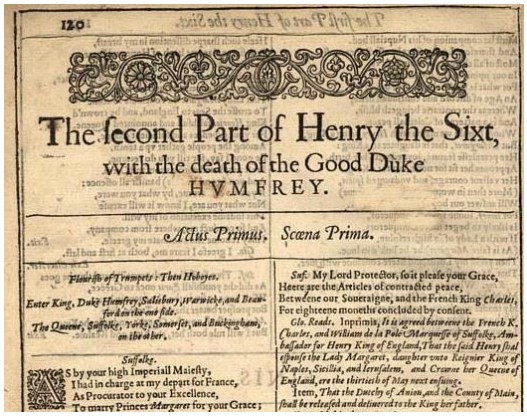
Goodbye Callum; hello John!

After too brief a stay, Callum Morgan left Goodwin Malatesta to pursue a career as a barrister with the Crown Prosecution Service. It was well known that a career at the Bar was Callum's ambition and we wish him every success with the CPS.

John Alexander has joined as Callum's replacement and we welcome him to the team. John has over six years' experience working in legal costs, largely based in the City of London. John will be assisting on all areas of legal costs and in particular with regard to costs budgeting and costs management.

"The first thing we do, let's kill all the lawyers"

Henry VI, Part 2 Act 4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The second Part of Henry the Sixt,
with the death of the Good Duke
HVMFREY.

Actus Primus. Scæna Prima.

Flourish of Trumpets: Then Hoboyes.

Enter King, Duke Humfrey, Salisbury, Warwicke, and Beau-for on the one side.
The Queene, Suffolke, Yorke, Somerset, and Buckingham, on the other.

Suffolke.

AS by your high Imperiall Maiesty,
I had in charge at my depart for France,
As Procurator to your Excellence,
To marry Princes Margaret for your Grace;

Suf. My Lord Protector, so it please your Grace,
Heere are the Articles of contracted peace,
Betweene our Soueraigne, and the French King Charles,
For eighteene moneths concluded by consent.

Glo. Reads. Imprimis, It is agreed between the French K. Charles, and William de la Pole Marquesse of Suffolke, Ambassador for Henry King of England, That the said Henry shall espouse the Lady Margaret, daughter vnto Reignier King of Naples, Sicilia, and Ierusalem, and Crowne her Queene of England, ere the thirteenth of May next ensuing.

Item, That the Dutchy of Anion, and the County of Maine, shall be released and deliuered to the King her father.

Although suggested as a joke by Shakespeare, many pessimists are predicting precisely this in the light of further reforms proposed by the Government. A new policy paper by the Lord Chancellor, Lord Chief Justice, and the Senior President of Tribunals sets out further aims for reform.

The paper - Transforming Civil Justice System - published on 15 September sets out the shape of proposed future reforms. As has become routine, rather than focusing on a single aspect of the law for reform, the document sets out reforms across civil, family and criminal law and for the tribunal system, all of which are underpinned by a number of technological reform proposals.

The policy paper is accompanied by a consultation paper. At the current time, that consultation paper is only addressing part of the proposed reforms, namely assisted digital facilities; online conviction and statutory fixed fine; and panel composition in the tribunals.

However, the comments therein suggest that further consultations on the other issues are likely to follow, although no indication has been given as to when. In this article, we have looked at the proposals in relation to the proposed technological and fixed costs reforms.

Technical Reforms

Following on from the Briggs report, the paper states that the intention is to develop *"a single online system for starting and managing cases across the criminal, civil, family and tribunal jurisdictions"*. The ultimate aim appears to be for *"all cases to be started online"* and for some cases to be *"completed entirely"*

online. Further the vision is that "as *new technologies bed down, we anticipate that more and more cases or parts of cases will be carried out virtually or online"*.

This vision includes, wherever possible, for hearings to also be undertaken either virtually or by telephone rather than the parties attending in person.

It is also intended that there will be a new, highly simplified procedural code for online cases, with an online form guiding people through the process. It is hoped that this new code will *"promote more conciliatory approaches to dispute resolution"* and will be *"understandable to non-lawyers"*. The aim, as set out by Lord Briggs in his report, is for litigants to be able to conduct litigation themselves with only limited input from Solicitors. The emphasis for Solicitors will thus be on providing unbundled services, rather than the current cradle-to-grave approach to advice.

Even the Rules Committee is not beyond removal, with the simplified Rules for the online process to be prepared by a *"new, streamlined Rules Committee"* whose aim will be to *"keep the process simple"*.

Fixed Costs

Although the current consultation does not deal with this aspect, the comments made both in the policy document and the consultation itself make it clear that this is very much still on the cards as part of the long-term reform, as does the recent announcement that Lord Jackson himself will head this aspect of the reforms.

The policy document contends that *"more needs to be done to control the costs of civil cases so they are proportionate"* and goes on to add that *"we will look at options to extend fixed recoverable costs much more widely… our aim is… people will be able to make more informed decisions on whether to take or defend legal action"*.

The document goes on to say *"we are keen to extend the fixed recoverable costs regime to as many civil cases as possible*".

And there comes the positive note for many as, since the announcement that Lord Jackson will be undertaking the review, it has also been announced that the consultation *"will follow the review after consideration of its recommendations"*. Lord Jackson will begin his review in January 2017 and has said that, *"There is a great deal to be done on the detail of the review"*. This means that any consultation is likely to be at least a year, possibly two, away.

That is not to say that all fixed fee schemes are years away, as recent musings among the profession – yet to be confirmed – suggest that plans are being formed to introduce clinical negligence fixed costs up to the value of £25,000. However, this is very much still a rumour at this time and formal announcements are awaited.

Other

Whilst it is not yet clear until the consultation is launched, there is a suggestion of moving civil cases to the system that are currently pursued in family cases where parties have to undertake compulsory mediation prior to parties being able to issue proceedings.

What is certain is that there will be an increase in *"signposting"* to mediation and ADR services in an effort to reduce the number of claims reaching the court.

Conclusion

The policy document contends that the proposed reforms will make the vision of its drafters a reality and that, *"in making these changes, we will establish a just, proportionate and accessible system that is fit for modern times and provides a better experience for everyone who needs it"*.

The key to any success with these proposed reforms will be that the costs are fixed at a realistic level and the damages threshold to which they would relate is also set at a sensible limit. The fact cannot be ignored that should fixed costs extend to the Multitrack there will also be the issue that 'one size does not fit all' given the multitude of cases dealt with under this track.

Funders in the Spotlight

We look at recent judgments dealing with litigation funding issues

Funder Identity

There was good news for Defendants in *Wall v Royal Bank of Scotland* [2016] in which a Claimant was ordered to disclose the identity of its litigation funders so that the Defendant could make an application for security for costs against them. It should be remembered, however, that *Reeves v Sprechter* [2007] confirmed that the funding agreement itself could not be requested.

Costs of Obtaining Funding

A successful claimant in an ICC arbitration has been awarded their costs of arranging the funding with the funder. In *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* [2016], the Claimant had arranged funding with Woodsford Litigation Funding which was repayable at either 300% of the sum advances or 35% of the damages, whichever was the greater. At the conclusion of the case, the successful Claimant sought the amount owed to Woodsford from the Defendant on the basis that they were "other costs" within the remit of s59(1)(c) of the Arbitration Act 1996 and the Judge agreed.

The Defendant challenged this decision before HHJ Waksman, who upheld the decision, saying that, *"As a matter of justice, it would seem very odd and certainly unfortunate if the arbitrator was not entitled under section 59(1)(c) to include the costs of obtaining third party funding as part of 'other costs'…"*

Whilst it is a positive result for anyone pursuing costs in the arbitration tribunal, it is wholly confined to that area of law; this being because the wording of the Arbitration Act 1996 is not the same as other Acts that give rise to an entitlement to costs. The decision is, therefore, confined to cases that are pursued under that Act.

Liability of Funders

In another case involving funders, this time in the civil arena, the Court of Appeal held that funders can be held liable to pay indemnity costs awarded against their funded client even where they have not been guilty of any *'discreditable conduct'*. In *Excalibur Ventures v Texas Keystone & Others* [2016], the litigation was funded by five funders to a total of £21.75m, including £17.5m provided as security for costs.

Under the *Arkin* principle, the funder's liability is limited to the equivalent amount it put into the litigation. The funders argued that their liability should be reduced because the amounts that were provided security should not count towards the *Arkin* cap.

Tomlinson, LJ however, held that it would 'seldom' be necessary for a judge to consider whether the funder knew or ought to have known the 'egregious' features of the case that gave rise to indemnity costs as by providing funding for the litigation, the funder takes a risk. He therefore determined that the funders were liable for the costs on the indemnity basis.

In respect of the funder's arguments on security, he concluded that "money provided to Excalibur [for] security for costs was an investment in the claim just as much as money provided to pay Excalibur's own costs and should count equally towards the *Arkin* cap".

Not only is the decision good news for Defendants, but also provides clarity on how security for costs sums will be dealt with at conclusion, leaving Defendants free to pursue such applications without being concerned that any amount awarded would then be discounted.

Whiplash Reforms Back on the Table

Reforms to low value whiplash claims are being considered and we look at those possible changes

Recently, Liz Truss put the reforms to low value damages back on the table, saying that *"for too long some have exploited a rampant compensation culture and seen whiplash claims an easy payday, driving up costs for millions of law-abiding motorists*. *These reforms will crack down on minor, exaggerated and fraudulent claims. Insurers have promised to put the cash saved back in the pockets of the country's drivers"*.

The Government in their press release announced that they intend to cap the compensation for whiplash to a maximum amount of £425. It is intended that this will stop the compensation culture that has grown around such claims.

Other measures include: raising the small claims limit for personal injury to £5,000; introducing tariffed compensation for claimants with more significant injuries and banning offers being made before medical evidence is obtained.

The Law Society has said that these plans will *"completely undermine"* a person's right to compensation and some claimant groups are warning of mass redundancies and law firm closures if the changes are made. Labour are using the opportunity to score points, with the shadow justice minister reportedly telling claimant lawyers that they will oppose any attempts to raise the small claims limit.

It is also not strictly accurate to say that Insurers generally have promised to put the cash back in the pockets of drivers as only some insurers have so far confirmed that they will do so. In any event, it is said that it will amount to a saving per person of around £40 (already less than the £50 previously stated when the reforms were first proposed). Many are skeptical of any reduction, bearing in mind that the insurers also said they would reduce insurance premiums by £50 per person if fixed costs were introduced to RTA claims. Instead, City AM reported that the average has instead increased by 17 per cent year-on-year. A £40 reduction will make little, if any difference.

On the other side, there is no doubt that a compensation culture exists and fraud gangs have been exploiting the system. There is no doubt that this needs to be tackled, even if some disagree about how. Whilst the move may be seen as unpopular by some and whilst it is unlikely that it will actually result in any savings to the public, there is also no doubt that some reform in this area is required.

Case Law Update

Qader & Others v Esure Services Ltd [2016]

We reported on the earlier decision in a previous bulletin. The case has now gone to the Court of Appeal and the decision has now been handed down. The question for them to answer was whether when a case is started within the portal but then allocated to the multi-track, fixed costs or standard basis costs should apply.

As Lord Briggs, in handing down the unanimous judgement observed, *"the application of the detailed provisions of Part 45.29A and B, read together with other relevant provisions in the CPR, lead clearly to the conclusion that fixed costs apply to all cases properly started within the RTA Protocol… regardless whether allocated to the fast track, to the multi-track or, indeed, not allocated at all but dealt with at a disposal hearing"*. However, after some consideration, he concluded that *"section III A of Part 45 should be read as if the fixed costs regime which it prescribes for cases which start within the RTA Protocol but then no longer continue under it is automatically dis-applied in any case allocated to the multi-track, without the requirement for the claimant to have recourse to Part 45.29J, by demonstrating exceptional circumstances*".

His reasoning came down to *"careful analysis"* of the historic origins of the fixed costs scheme and the consultation that resulted in that scheme, which he considered, *"demonstrate that it was not in fact the intention of those legislating for this regime in 2013 that it should ever apply to a case allocated to the multi-track"*. He went on to say that *"it should normally be possible to understand procedure rules just by reading them in their context, but this is a rare case where something has gone wrong, and where the court's interpretative powers must be used, as far as possible, to bring the language into accord with what it is confident was the underlying intention"*.

This has now resolved the error originally present in the CPR. Although fixed costs were intended to bring clarity, it is clear from this, yet another case in respect of the regime, that it continues to provide satellite litigation and that whilst this issue has been resolved, others are no doubt surfacing.

Bird v Acorn Group Limited [2016]

The long-awaited appeal on this matter has now been heard. The question being considered by the court was which fixed fee should apply in cases where the matter is started under the RTA portal, subsequently issued and listed for a disposal hearing.

The Defendant's position was that such cases fell into the 'post-issue, pre-allocation' fixed fee stage, whereas the Claimant's position was that they fell into the 'post-listing, pre-trial' stage, which attracts a higher success fee.

At the crux of the matter was the definition of 'trial' as 'the final contested hearing'. As disposal hearings are to determine damages and are sometimes used for directions, the Defendants did not consider such hearings to be contested and therefore did not fall within the definition of Trial.

However, the Court of Appeal unanimously considered this was not the case and a disposal hearing fell within the definition of Trial. The Court of Appeal also held that the stages did not have to follow sequentially, allowing the allocation stage to be skipped to reach the trial stage.

The Court also rejected the Defendant's arguments that if the disposal hearing was subsequently used for directions (including allocation) and then settled, the earlier fixed costs should apply. The Court held that a claim could not move backwards through the parts. In other words, once the later stage is engaged, an earlier stage can no longer be applied if circumstances change.

Meet The Team – Zoe Kruppa

Zoe is our office manager and has been with Goodwin Malatesta from the very beginning and plays a vital role in the smooth running of the practice.

Zoe celebrated ten years with the firm in 2016 and we have asked her to take part in our “Meet The Team” section.

What do you enjoy about your work

I enjoy the variety of work and in particular the atmosphere of the office when we are really busy. I also enjoy interacting with clients and assisting with their queries.

Career high

Starting at Goodwin Malatesta as office junior and now being office manager

Favourite Book

Girl on the Train

Favourite Film

The Notebook or Aristocats (I just love cats!)

TV Programme

Game of Thrones

What is your ideal way to spend Christmas

With friends and family sharing a box of chocolates, a bottle of Prosecco and listening to cheesy Christmas Carols!