APIL SCOTLAND REGIONAL MEETING - 12 DECEMBER 2013

DEVELOPMENTS IN ENGLAND AND WALES

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OVERVIEW OF THE 2013 REFORMS

Most of the 2013 reforms result from implementation of the Jackson Report.

The Jackson Report was commissioned by the, then, Master of the Rolls to consider ways of helping keep the costs of civil litigation more proportionate.

This report was prompted partly by the impact of making additional liabilities recoverable and partly by the cost of litigation generally, particularly some commercial litigation.

Other reforms have been implemented at the same time.

Consequently, 2013 saw significant changes on the following areas:

- Proportionality
- Recoverability
- Damages Uplift
- QOCS (Qualified One-way Costs Shifting)
- Part 36
- Funding
- Protocols

PROPORTIONALITY

It is intended that changes effected to the Civil Procedure Rules will make base costs, irrespective of other changes, more proportionate.

RECOVERABILITY

In addition to the impact of proportionality on base costs the implementation of the Jackson Report also means an end to recoverable additional liabilities, though not an end to conditional fee agreements, with success fees, as a means of funding claims.

The loss of a recoverable success fee is intended to be offset by an increase in general damages.

The loss of, with limited exceptions, a recoverable ATE premium is intended to be offset by the introduction of QOCS.

DAMAGES UPLIFT

The Jackson Report recommended that, to offset the loss of recoverable success fees the level of general damages should be increased by 10%.

Because the level of damages is a common law issue the Court of Appeal took the opportunity to confirm damages would increase accordingly in Simmons -v- Castle [2012] EWCA Civ 1039 and Simmons -v- Castle [2012] EWCA Civ 1288.

QUALIFIED ONE-WAY COSTS SHIFTING (QOCS)

QOCS is intended to offset the loss of a recoverable ATE premium, on the basis that this at least reduces the need for such insurance.

Scope

QOCS only applies to certain types of claim. These are:

- Any proceedings which include a claim for damages for personal injuries. (Part 2.3 (1) confirms that in the CPR "claim for personal injuries" means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death, and "personal injuries" includes any disease and any impairment of a person's physical or mental condition.)

- Proceedings which include a claim for damages under the Fatal Accidents Act 1976.

- Proceedings which include a claim for damages arising out of death or personal injury and survives for the benefit of an estate by virtue of S.I (1) Law Reform (Miscellaneous Provisions) Act 1934.

Whilst the rules provide for the "claimant" to have protection, Part 44.13 (2) confirms that for these purposes "claimant" means not only any person bringing a claim of the kind described in S.II but also an estate on behalf of which such a claim is brought as well as any person making a counterclaim or additional claim.

Effect

Adverse costs orders can only be enforced up 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".

Consequently, a claimant who does not recover any damages, whilst an adverse costs order will still be made, will not, subject to the exceptions found in Parts 44.15 and 44.16, have to pay any costs.

Where a claimant does recover any damages then those damages are at risk to the extent that, although successful, there are adverse costs orders. These might result from:

- Adverse costs orders made at interim hearings.
- Adverse costs orders, or partly adverse costs orders, made on exercise of the court's general discretion as to costs now found in, from April 2013, in Part 44.2 (formerly Part 44.3).
    - The general rule is that the unsuccessful party will be ordered to pay the costs of the successful party but the court may make a different order.
    - Relevant factors will include conduct, degrees of success and "any admissible offer to settle by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply".
- Where the claimant accepts a Part 36 offer made by the defendant after expiry of the relevant period and Part 36.10 (5) applies, leaving the claimant for the defendant's costs after the expiry of the relevant period to the date of acceptance.
- Where judgment is not more advantageous (as now defined by Part 36.14 (1A)), to the claimant than the defendant's Part 36 offer and the claimant has to meet the defendant's costs from the date the relevant period expired under Part 36.14 (2).

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

Any unpaid costs will not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

Exceptions

First Exception

Under Part 44.15, orders for costs made against the claimant may be enforced to the full extent of such orders, without the permission of the court.

Part 44.15 will apply where the proceedings have been struck out on the grounds stated in the rule.

The grounds in Part 44.15, leading to the strike out, largely reflect those found in Part 3.4 (2), namely lack of reasonable grounds for bringing the proceedings,

abuse of the court's process or conduct, by on behalf of the claimant, likely to obstruct the just disposal of the proceedings.

The terms of Part 44.15 may lead to more applications to strike claims out. However, it is important to remember that when the court decides whether there are reasonable grounds for bringing proceedings this is not a trial and the risk of summary injustice must be avoided. Recent helpful authorities include: Selwood -v- Durham County Council [2012] EWCA Civ 979; Petrou -v- Dunstable Hang-gliding and Paragliding Club [2012] EWHC 2286 (QB).

An issue may be whether the grounds of "conduct" are wide enough to cover strike out for, for example non-compliance with court orders in the sense that this may be caused by "conduct". It is important to remember that concurrent with the introduction of QOCS is the new, tougher, Part 3.9 which is likely to make it more difficult for a party to obtain relief from sanctions and hence at greater risk of strike out if court orders, particularly unless orders, are not complied with.

For this exception to apply the claim must be struck out rather than summary judgment entered for the defendant.

Second Exception

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.

Section II Costs Practice Direction provides in paragraph 12.4 that when considering a claim alleged to be fundamentally dishonest:

> "(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."

It remains to be seen whether use of the phrase "fundamentally dishonest" is treated as being any different from fraud.

Moreover, use of the word "fundamentally" suggests that the whole basis of the claim would need to be dishonest, rather than a severable part of the claim.

Third Exception

Under Part 44.16 (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 is considers just, where:

- The proceedings include a claim which is made for the financial benefit of a person, other than the claimant or a dependant within the meaning of S.I (3) Fatal Accidents Act 1976 (except claims for gratuitous care, earnings paid by an employer or medical expenses); or

- A claim is made for the benefit of the claimant other than a claim to which this section applies.

Where the proceedings include a claim which is made for the financial benefit of a person other than the claimant (or a dependant) the court may 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.

Paragraph 12.2 of the Costs Practice Direction gives, as examples of claims made for the financial benefit of a person other than the claimant, subrogated claims and claims for credit hire.

Paragraph 12.3 of the Costs Practice Direction defines “gratuitous provision of care”.

Appeals

The Civil Procedure (Amendment) Rules 2013 introduce a new Part 52.9A concerning the operation of QOCS in appeals.

In any proceedings in which costs recovery is normally limited or excluded at first instance an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

The court will have regard to the means of both parties, all the circumstances of the case and the need to facilitate access to justice as well as assessing whether the appeal raises an issue of principle or practice upon which substantial sums may turn.

An application for such an order must be made as soon as practicable and will be determined without an hearing unless the court otherwise orders.

PART 36

History

Pre-CPR

Before the advent of the Civil Procedure Rules in 1999, whilst both claimant and defendant were likely to make offers, it was usually only a Defendant’s offer, in the

form of a payment into Court, which had costs consequences. Those consequences were to shift the risk on costs to a Claimant who, though successful, failed to beat the Defendant's payment in.

Both parties could make offers "without prejudice except as to costs" (a "Calderbank" offer). Such an offer might have costs consequences but would not generally carry such consequences if made by a defendant who could have, but did not, make a payment into court.

The CPR

An important development introduced by the Civil Procedure Rules was the opportunity afforded to a Claimant to put the Defendant at risk, in this instance of indemnity costs and interest, by making an offer under the newly introduced Part 36.

The original version of Part 36 preserved the payment into Court, now in the form of a Part 36 payment, to be made by the Defendant in a money claim if the costs benefits of the rule were sought.

The potential use of Calderbank offers was preserved by Part 44. The current version of Part 44.3 (4) (c) requires the Court, when deciding what order if any to make about costs, to have regard to an "admissible offer to settle….which is not an offer to which costs consequences under Part 36 apply".

2013 Amendments

Additional Amount

Paragraph 14 of The Civil Procedure (Amendment) Rules 2013 provides that:

> "In Part 36, in rule 36.14(3)—
>
> (a) in subparagraph (b)—
>
> (i) omit "his"; and
>
> (ii) at the end, omit "and";
>
> (b) in subparagraph (c), for the full stop substitute "; and"; and
>
> (c) after subparagraph (c), insert—
>
> "(d) an additional amount, which shall not exceed £75,000, calculated by applying the prescribed percentage set out below to an amount which is—
>
> (i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or

(ii) where the claim is only a non-monetary claim, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	*Prescribed percentage*
Up to £500,000	10% of the amount awarded;
Above £500,000 up to £1,000,000	10% of the first £500,000 and 5% of any amount above that figure"

Transitional provisions

Paragraph 22 (7) of the rules, dealing with transitional provisions, provides:

> "The amendments made by rule 14 of these Rules do not apply in relation to a claimant's Part 36 offer which was made before 1 April 2013."

Costs Consequences

Part 36.14 deals with costs consequences of a Part 36 offer "upon judgment being entered", unless that would be "unjust", where:

- a claimant fails to obtain a judgment more advantageous than a defendant's Part 36 offer; or
- judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.

The presumption in Part 36.14 is that the costs consequences when this rule applies are:

- For a Defendant where the Claimant fails to obtain a Judgment more advantageous than the Defendant's offer:
    - costs from the date the relevant period expired; and
    - interest on those costs.
- For a Claimant who obtains Judgment on at least as advantageous terms as the Claimant's own offer:
    - interest on the whole part of any sum of money (excluding interest) awarded at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

- costs on the indemnity basis from the date on which the relevant period expired;

- interest on those costs at a rate not exceeding 10% above base rate; and (for offers made on or after 1 April 2013)

- An additional amount.

FUNDING

From 1 April 2013 civil litigation may, as an alternative to being funded by a Conditional Fee Agreement (CFA), be funded by a Damages Based Agreement (DBA).

The Damages-Based Agreements Regulations 2013 allow use of DBAs to fund various types of litigation.

The cap, for personal injury claims, is set at 25%, lower than other areas of work such as employment (35%) and commercial (50%).

Furthermore, as with the success fee in a CFA, the costs payable are limited to 25% of general damages and past losses.

Moreover, the indemnity principle still applies, where the claim is funded by a DBA, so far as recovery of costs from the opponent is concerned.

DBAs work on the "Ontario" model. This is reflected in the terms of the new Part 44.18 which provides:

> **44.18.**—(1) The fact that a party has entered into a damages-based agreement will not affect the making of any order for costs which otherwise would be made in favour of that party.
>
> (2) Where costs are to be assessed in favour of a party who has entered into a damages-based agreement—
>
> (a) the party's recoverable costs will be assessed in accordance with rule 44.3; and
>
> (b) the party may not recover by way of costs more than the total amount payable by that party under the damages-based agreement for legal services provided under that agreement.

Consequently, the maximum payable will be the percentage payable under the DBA, with an offset to the extent of those costs so far as these are payable on assessment.

If the sum payable under the DBA is limited that will benefit the opponent. Conversely, if a limited amount of work is done in a high value claim the client may end up paying substantially more than with a conditional fee agreement (even allowing for a capped success fee).

The Ministry of Justice appear to recognise there are difficulties with the present regulations and anticipate the introduction of new regulations in 2013.

PROTOCOLS

A protocol for dealing with low value personal injury claims arising out of road traffic accidents was introduced in April 2010, with a sealing of £10,000.

Under the protocol fixed costs, agreed as a result of negotiation between representatives, were payable.

In 2013 the government reduced those fixed costs and extended the upper limit of the protocol to £25,000.

In 2013 the government also introduced a new protocol for dealing with Employers' Liability and Public Liability claims, again up to a level of £25,000 with fixed costs.

Fixed costs are, at least usually, applicable to ex-protocol claims even if litigated to trial.