FENNERS CHAMBERS

PERSONAL INJURY GROUP SEMINAR

"RE: JACKSON – AN OVERVIEW

Speaker –

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RE. JACKSON – AN OVERVIEW

1. Success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents in civil litigation. It will be open to clients to enter into "no win, no fee" (or similar) agreements with their lawyers, but any success fee will be borne by the client, not the opponent. This is likely to mean that the success fee comes out of the damages awarded to the client.

2. Increase in general damages for pain, suffering and loss of amenity be increased by 10% and that the maximum amount of damages that lawyers may deduct for success fees be capped at 25% of damages (excluding any damages referable to future care or future losses).

3. Lawyers should not be permitted to pay referral fees in respect of personal injury cases.

4. Qualified one way costs shifting -the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful. The qualifications to this are that unreasonable (or otherwise unjustified) party behaviour may lead to a different costs order, and the financial resources available to the parties may justify there being two way costs shifting in particular cases.

5. The review purports to identify five advantageous consequences to the Claimant's advantage of the above:

a) Most personal injury claimants will recover more damages than they do at present, although some will recover less;

b) Claimants will have a financial interest in the level of costs which are being incurred on their behalf;

c) Claimant solicitors will still be able to make a reasonable profit;

d) Costs payable to claimant solicitors by liability insurers will be significantly reduced;

e) Costs will also become more proportionate, because defendants will no longer have to pay success fees and ATE insurance premiums.

6. Fixed costs in fast track litigation with £12,000 the limit for pre-trial costs. Identified advantages:

a) It gives all parties certainty as to the costs they may recover if successful, or their exposure if unsuccessful;

b) Avoids the further process of costs assessment, or disputes over recoverable costs, which can in themselves generate further expense;

c) It ensures that recoverable costs are proportionate.

7. A Costs Council be established to undertake the role of reviewing fast track fixed costs, as well as other matters.

8. Lawyers should be able to enter into contingency fee agreements with clients for contentious business, provided that the unsuccessful party in the proceedings, if ordered to pay the successful party's costs, is only required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party; and the terms on which contingency fee agreements may be entered into are regulated, to safeguard the interests of clients.

9. A working group be set up consisting of representatives of claimants, defendants, the judiciary and others to explored the possibility of producing a transparent and "neutral" calibration of existing software systems currently used by Defendants to assist in calculating general damages which could encourage the early settlement of personal injury claims for acceptable amounts.

10. Clinical negligence - one of the principal complaints that was made during the Costs Review about clinical negligence actions was that pre-action costs were often being racked up to disproportionately high levels – accordingly the response time for defendants to pre-action letters from three months to four months (to give more time for a thorough investigation of the claim), and that where the defendant is proposing to deny liability it should obtain independent expert evidence on liability and causation within that period.

11. Pre-action protocols (chapter 35). There are ten pre-action protocols for specific types of litigation - these specific protocols should be retained, albeit with certain amendments to improve their operation (and to keep pre-action costs proportionate).

12. The Practice Direction – Pre-Action Conduct, which was introduced in 2009 as a general practice direction for all types of litigation, is unsuitable as it adopts a "one size fits all" approach, often leading to pre-action costs being incurred unnecessarily - substantial parts of this practice direction should be repealed.

13. Alternative dispute resolution - has a vital role to play in reducing the costs of civil disputes, by fomenting the early settlement of cases and is under-used. An authoritative handbook for ADR should be prepared, explaining what ADR is and how it works, and listing reputable providers of ADR services. This handbook should be used as the standard work for the training of judges and lawyers. Nevertheless ADR should not be mandatory for all proceedings. The circumstances in which it should be used (and when it should be used) will vary from case to case, and much will come down to the judgment of practitioners and the court.

14. Disclosure - measures be taken to ensure that the costs of disclosure in civil litigation do not become disproportionate -solicitors, barristers and judges alike be given appropriate training on how to conduct e-disclosure efficiently - a "menu" of disclosure options available for large commercial and similar claims, where the costs of standard disclosure are likely to be disproportionate but excluding large personal injury and clinical negligence claims from this "menu" option.

15. Witness statements and expert evidence - in some cases the cost of litigation is unnecessarily increased because witness statements and expert reports are unduly long - recommends two measures (in appropriate cases) for curbing litigants' over-enthusiasm for prolixity, being (i) case management measures to place controls on the content or length of statements; and (ii) cost sanctions.

16. Case management - judges should take a more robust approach to case management, to ensure that (realistic) timetables are observed and that costs are kept proportionate including:

a) where practicable, allocating cases to judges who have relevant expertise;

b) ensuring that, so far as possible, a case remains with the same judge;

c) standardising case management directions; and

d) ensuring that case management conferences and other interim hearings are used as effective occasions for case management, and do not become formulaic hearings that generate unnecessary cost (e.g. where directions could easily have been given without a hearing).

17. Costs management - lawyers and judges alike receive training in costs budgeting and costs management. Rules be drawn up which set out a standard costs management procedure, which judges would have a discretion to adopt if the use of costs management would appear to be beneficial in any particular case.

18. Part 36 offers – In order to provide greater incentives for defendants to accept settlement offers then where a defendant fails to beat a claimant's offer, the claimant's recovery should be enhanced by 10%.

19. The procedure for the summary assessment of costs should be retained but for detailed assessments a new format for bills of costs be developed.

CIVIL PROCEDURE UPDATE

Service:

Varsani v Relfo Ltd (In Liquidation) (2010) Court of Appeal [2010] EWCA Civ 560

V was a British citizen who had a business in Kenya. His family lived in a property owned by him and his wife in London and he visited as work permitted, staying between 27 and 53 days in each of the previous few years. R served the claim form at the London address. V unsuccessfully applied for service to be set aside on the ground that the London address was not his usual or last known residence within CPR r.6.9. The judge found that the property in London was his "usual" residence. V appealed against the decision.

HELD: The judge had been correct to hold that the property in London was V's usual residence for the purposes of CPR r.6.9. It was possible to have more than one usual residence. The test to be applied was not one of merely comparing the duration of periods of occupation, taking little account of the nature or quality of use of the premises, and ignoring altogether the fact that the premises were occupied permanently by the defendant's family and that the premises could be described as his family home. The critical test was the defendant's pattern of life. The settled pattern of V's life was to visit his family home in London regularly each year, albeit not at the same time each year, for reasonably extensive periods.

Admissions:

Roberts v Historic Royal Palaces Enterprises (2010) CC

In 2006 R, who was 63 at the time, had tripped and fallen whilst at Hampton Court Palace. As a result of her fall, she suffered serious injuries. H's insurers had admitted liability prior to the commencement of proceedings and, as a result, R's solicitors had ceased to investigate issues of liability. When H's solicitors assessed the claim they took a different view on the issue of liability and sought to withdraw the admission. H submitted that there would be gross prejudice to a defendant if it was obliged to meet a claim that it was not, in principle, liable for, even if such a state of affairs was the result of its own erroneous admission of liability and that as H was entitled to rely on contributory negligence the court was going to have to investigate liability issues anyway.

HELD: Having regard to all the circumstances of the case including the factors set out in CPR PD 14, permission would not be given to H to withdraw its admission of liability. R's solicitors would have vigorously continued their investigations into liability if the admission had not been made. R would not be adequately compensated by an order for costs given that some three years had elapsed since the admission had been made. No new evidence had come to light. H had simply realised that the claim was worth more than originally expected and had changed its mind on liability. Such considerations did not amount to financial prejudice. In any event, H's application was

made too late. It was over three years since the accident had occurred and, although proceedings were at a relatively early stage, the court had to look at the time scale as a whole. CPR r.14.1A did not exist to allow defendants to withdraw admissions simply because they had changed their mind when nothing new had emerged and they were in possession of all the relevant information. The rule, as a whole, was designed to encourage appropriate admissions and allowed defendants to withdraw an admission in appropriate cases, such as when fraud was discovered or where there was new evidence. H's cross-application to withdraw the admission was refused and accordingly, R was entitled to summary judgment. The clear admission was sufficient to deprive H of an opportunity to argue contributory negligence.

Costs on Discontinuance:

Whitney v Monster Worldwide & MSL Group (2010) EWHC 1298 (Ch)

W brought a claim against M. After issuing proceedings W was advised that there was a potential claim against MSL and he successfully applied to join it as a defendant. After MSL served a defence W offered to drop the proceedings against MSL on a no costs basis. Before MSL and W could enter into a formal settlement agreement and only a few weeks before trial M discovered and disclosed a substantial quantity of new documents which had been retrieved from archives. Those documents weakened W's case against MSL who declined to continue the settlement negotiations. W then discontinued against MSL. W contended that there should be no order as to costs as between him and MSL.

HELD: The burden was on W to show some good reason to depart from the normal order under CPR r.38.6(1) that a claimant who discontinued paid the defendant's costs up to the date on which the notice of discontinuance was served. The further disclosure was part and parcel of the litigation process. The grounds relied on by W were insufficient to amount to a good reason to depart from the normal consequence of discontinuance. W should pay MSL's costs to the date of discontinuance on a standard basis. The new disclosure was part of the continuing duty of disclosure. The fact that it occurred at a critical time in the negotiations between W and T was part and parcel of the changing circumstances of litigation and not a result of any breach by M of its disclosure obligation. It was not appropriate to make a Bullock order.

Part 36:

Carver v BAA PLC (2008) 3 All ER 911 CA (Civ Div)

C had suffered an injury to her ankle when she fell into a defective lift on premises for which B was responsible. B conceded liability. After seeing C's initial medical reports B made a global settlement offer of £3,486 on a CPR Pt 36 basis. C instructed a further medical expert and brought her claim for damages in excess of £5,000. B then made a further Part 36 payment into court so that the total offer came to £4,520. C did not make any counter offer to B's Part 36 offer. C rejected the offer and filed a claim in excess of £19,000. A further medical opinion then reduced C's claim back to a sum in excess of £2,700. No agreement was reached and the matter went to trial. Judgment

was entered for C for £4,686.26 inclusive of interest. The judge found that in relation to costs, the claim was one in which C had not succeeded in obtaining a judgment more advantageous than B's Part 36 offer and made no order for costs.

HELD: The primary question for the instant court was whether the change in the language of Part 36 resulted in a change of approach. Under the old rule, C would have recovered her costs. In the context of the new Part 36 more advantageous was an open-textured phrase which permitted a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment was worth the fight. The CPR, and Part 36 in particular, encouraged both sides to make offers to settle. Money was not the sole governing criterion. The judge was right to look at the instant case broadly and was entitled to take into account that the small amount extra gained was more than offset by the irrecoverable cost incurred by C in continuing to contest the case for as long as she did. He was entitled to take into account the added stress caused to C as she waited for the trial and the stress of the trial process itself. No reasonable litigant would have embarked on that campaign for such a small gain. The judge was fully justified in marking his displeasure by making no order for costs. The manner in which the litigation was pursued struck the judge as worthy of condemnation. The Part 36 offer was relevant and was a reasonable and not a derisory one. The claim was an exaggerated one and C must bear ultimate responsibility for the manner in which her claim was conducted on her behalf.

Hiscocks v Dietrich (2010) Norwich County Court

Before proceedings were issued D had offered to settle for £2,552, and H had offered him £2,200. The judge awarded £2,262 to D. He also ordered H to pay costs summarily assessed at £5,480. H submitted that the judge had misinterpreted the law and should have awarded her costs following the date of her CPR Pt 36 offer, because that offer was as advantageous as the damages awarded. She submitted that in purely financial terms her offer was worth as much as and possibly more than the judgment, made some eight months later.

HELD: It would be a difficult exercise to calculate which sum was worth more. In any event, the judge had approached the matter on the basis that H's offer was marginally short of the judgment sum, and that finding of fact should not be disturbed. The difference between the figures was very small. There was nothing wrong with the judge's approach, looked at from a purely financial basis. However, there were matters beyond a purely financial consideration - Carver considered. The first question was whether a reasonable litigant should have gone on to contest the matter. In the instant case the margin was so small that a reasonable litigant would not have continued after the offer was made. Bearing in mind the stress and irrecoverable costs of litigation, D should have accepted the offer of £2,200. That argument became stronger when it was accepted that £2,200 was worth more when it was offered than eight months later when judgment was given. The second question was what was just, in which the reasonable conduct of the litigation came into play. Sanctions on costs and interest were appropriate for someone who had behaved in a way open to criticism. However, that second stage was not reached in the instant case because there was no criticism of the way the litigation had been conducted. It came to court promptly and appeared to have been conducted professionally by both sides. If it was right to consider whether D should have stopped litigating when H offered £2,200,

then it was right also to consider if H should have stopped when D offered to accept £2,552. In simple money terms the difference between that offer and the award was small, but as a percentage it was more significant, approaching a 15 per cent over-estimate. Therefore H had acted reasonably in rejecting that offer. D should have his costs up to 21 days from the date of his offer of £2,200 and H should have her costs thereafter.

Wasted Costs:

Patel v Air India (2010) EWCA Civ 443 CA (Civ Div)

H's client (P) had made a disability discrimination claim against an airline (X) which she alleged had, contrary to their agreement, not provided her with a wheelchair. P, who was also suffering from senile dementia, had no memory of the incident and she died before the trial. The circuit judge decided that H's failure to conduct a review of the evidence in view of P's lack of recollection had been unreasonable and negligent. She ordered H to personally pay the costs of the action, to include X's costs at trial.

HELD: Under the Senior Courts Act 1981 s.51(7), wasted costs were those incurred as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative. The circuit judge had only found that P's claim had a less than 50 per cent chance of success; she had not found that it was hopeless, which would have been necessary for a wasted costs application. Furthermore, not only had the claim to be hopeless but there had also to be a breach of the solicitors' duty to the court or something akin to an abuse of the process of the court. Nowhere had the circuit judge said that there had been a breach of the solicitor's duty to the court by H, nor did she say that there was anything akin to an abuse of process. Moreover, it could not be said that any unreasonable or negligent conduct which there might have been had caused costs to be wasted.

Gregson v Hussein & CIS Insurance (2010) EWCA Civ 165 CA (Civ Div)

The claim arose out of a road traffic accident caused by H's negligent driving. H did not defend the proceedings and made a written admission of liability at the time of the accident. The second respondent insurers of H (C) asserted that the claim was fraudulent and the case was moved from fast track to multi-track. C did not concede that the accident was genuine until the conclusion of its submissions. G was awarded damages of £2,000 for pain, suffering and loss of amenity. He was also awarded special damages but his claim under that head was reduced from £16,413 to £4,357 after the judge heard evidence about the sums claimed. The judge held that, whilst G had succeeded on liability, C had been more or less successful on the issue of damages. He ordered that C pay 40 per cent of G's costs and that C should recover 60 per cent of its costs.

HELD: The starting point, as provided by the CPR, was the general rule that the unsuccessful party would be ordered to pay the costs of the successful party. In the instant case, G succeeded in establishing liability and in recovering damages. He was unquestionably the successful party and ought to recover his costs unless the court was properly to make a different order. Under CPR r.44.3(4) it was appropriate to

consider C and G's conduct, and the making of any Part 36 offer. It had been unreasonable for C to allege and pursue, to the conclusion of the hearing, a very serious allegation of fraud, even in the face of H's written admission. As a result the case had been assigned to the multi-track whereas C could have limited the loss by admitting liability and setting the matter down for assessment of damages, which would have taken a day on the fast track. G had exaggerated his special damages claim and that action had extended the time of the trial and caused a waste of costs. However, on the issue of damages G was wholly successful because he had recovered damages under every head claimed. The judge was wrong to hold that C was largely successful on that issue. The making of a Part 36 offer was the way a defendant could protect himself against an exaggerated claim. C did not make such an offer and should have done so. The court exercised its own discretion and, endeavouring to achieve the overriding objective of dealing with costs justly, ordered C to pay 75 per cent of G's costs.

Assessment of Costs:

O'Beirne v Hudson (2010) CA (Civ Div)

O was involved in an RTA with H. Costs of repairs to O's vehicle were paid prior to the issue of proceedings. O issued proceedings claiming general damages exceeding £1,000. Prior to the case being allocated to any track, settlement was achieved in the sum of £400 general damages and £719.06 hire charges and payment of costs. The settlement was recorded in a consent order, which provided for H to pay O's reasonable costs and disbursement on the standard basis, to be subject to detailed assessment if not agreed. H disputed O's bill of costs and on the assessment took a general point that if the case had gone to the allocation stage it ought to have been allocated to the small claims track. The costs judge held that having regard to the wording of the order consented to, costs should be assessed on a standard basis, and any fixed cost regime was excluded. The judge reversed that ruling.

HELD: The consent order provided for costs to be assessed on the standard basis; the addition of the word "reasonable" added nothing to the order that costs were to be assessed on that basis. It followed from that that the costs judge was not free to rule that the costs would be assessed on the small claims track basis. However, in making an assessment the costs judge was entitled to take account of all circumstances, in accordance with CPR r.44.5(1), including the fact that the case would almost certainly have been allocated to a small claims track if it had been allocated. In so doing the judge would have regard to what could or could not be recovered if the case had been so allocated. At that stage the costs judge had to consider whether, if it could have been fought on the small track, it was reasonable that the paying party should pay the costs of a lawyer. The costs judge would not be bound only to allow the costs as per a case on the small claims track but it would be a highly material circumstance in considering what by way of assessment should be payable. It was quite legitimate to give items on a bill very anxious scrutiny to see whether costs were necessarily or reasonably incurred, and thus whether it was reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the small claims track.

Drew v Whitbread PLC (2010) EWCA Civ 53 CA (Civ Div)

D had fallen off a ladder in the course of his employment and was injured. He brought a claim for personal injury alleging negligence and breach of statutory duty. He pleaded that the financial value of his claim exceeded £15,000 and included a claim for personal injury in excess of £1,000. His schedule of special damages totalled some £30,000. The case was dealt with on the multi-track. The judge found W liable subject to 25% contributory negligence. The total damages were £9,291.56 which exceeded a payment in by W. The judge ordered W to pay D's costs on the standard basis if not agreed. W disputed D's bill of costs as disproportionate and said that D's claim had been exaggerated. The costs judge held that the case should have been pursued as a fast track case and costs would be assessed on that basis. The judge upheld that decision.

HELD: It would not be consistent with the express provisions of CPR r.44.3 and r.44.5 and with the court's duty to see that costs were proportionate and reasonable to preclude a party raising a point highly material to that question because it had not been raised before the judge under r.44.3. If what was sought was a special order as to costs which a costs judge should follow that obviously should be sought from the trial judge. If it was clear that a costs judge would be assisted in the assessment of costs by some indication from the trial judge about the way in which a trial had been conducted, a request for that indication should be sought. But there was no rule that a failure to raise a point before the trial judge would preclude the raising of a point before the costs judge. The question of exaggeration was raised before the trial judge but he made no special order. The fact that no special order had been made did not preclude the costs judge in assessing costs considering whether the conduct of a party should preclude an award of costs for some particular item. There was no reason why the costs judge should not consider the effect of such conduct unless some specific finding of the trial judge bound him. Similarly, W did not seek an order from the trial judge that costs should be limited to those recoverable on a fast track basis, and in particular did not seek a ruling that only one day's costs should be allowed even though the case had gone into a second day. It might have been helpful to the costs judge if some indication had been given by the trial judge on that question. But the fact that it was not raised did not prevent the question whether the case was in reality a fast track case from being raised before the costs judge. The costs judge was not entitled simply to rule that she was going to assess the costs of trial as if the case were on the fast track. That would be to rescind the trial judge's order. The permissible approach was to assess costs on the standard basis taking into account that the case should have been allocated to the fast track. It could not be said that the costs judge had dealt with the instant case on that basis.

ATE Insurance:

Lamb v Gold Travel Ltd (2010) Macclesfield CC

Whilst on holiday L had suffered an injury. He entered into a conditional fee arrangement and an after the event insurance policy was taken out. The schedule to the policy stated that the opponent was "to be advised". The travel agent (X) was notified of the existence of the ATE policy and L was informed that Gold Travel (the

tour operator) was handling the claim. Proceedings were issued and the proper notification of the funding arrangements were given. The schedule to the policy stated that it was an amended policy and described the opponent as the travel agent X. The claim was settled by G who was ordered to pay L's costs. The issue for determination was whether the insurance premium was payable by G.

HELD: The ATE premium was not recoverable. On the true construction of the contract of insurance, had Gold Travel won and the Claimant sought to enforce or collect an indemnity for costs that he was ordered to pay, the claim on the policy would have failed as G was not the named opponent.