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Newsflash

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Who are the winners?

Lord Justice Jackson's 557 page Final Report on civil litigation

13 January 2010 welcomed the publication of a truly comprehensive review of the rules and principles governing the costs of civil litigation and the radical recommendations made by Lord Justice Jackson in order to promote access to justice at proportionate cost. We focus on the final recommendations and the key areas identified in our October 2009 article as being of particular interest to professional Insurers and their Insureds.

1 The end of “no win, no fee, no cost”, “no risk” litigation – success fees ATE insurance BTE insurance and contingency fees

Additional liabilities – success fees and ATE premiums

Recommendations

- **The repeal of the statutory provisions and associated rules which created the regime enabling ATE premiums and success fees to be recoverable between the parties**
- **The level of general damages for personal injuries, nuisance and all tortious civil wrongs to individuals should be increased by 10%**

This set of recommendations is perhaps the most significant and radical of all Lord Justice Jackson's proposals. He reserves some of his harshest words and most telling statistics for these sections of his report. The picture painted may be familiar to Insurers – a gross imbalance of costs inflated by success fees and ATE premiums, used tactically to pressurise Defendants to settle claims of marginal merit; widespread fraudulent claims because there is no risk of liability if Claimants lose; “cherry picking” Claimants' Solicitors who can lawfully inflate their profits by up to 300% without using those profits to fund marginal cases.

The way forward

Lord Justice Jackson does not suggest that the clock should be put back so as to prohibit “no win, no fee” agreements. Instead he suggests that the solution is to abolish inter partes recoverability of ATE premiums and success fees and to revert to CFAs as they existed before April 2000 alongside the Legal Aid fund. He argues that

those arrangements were satisfactory and increased access to justice for many individuals who were not eligible for Legal Aid.

This regime professed two crucial features:-

- **A means and merits test**
- **The requirement that assisted parties made a contribution towards costs (both their own and any adverse costs Order) in accordance with their means**

If Lord Justice Jackson's proposals are implemented it will be open for Claimants to enter into CFAs with their Solicitors such that Solicitors forego or reduce their fees if a case is lost but in turn can claim from their client an uplift if the claim is successful. Lord Justice Jackson recommends that this uplift, if taken out of damages, should be limited to 25%.

To address any imbalance this may create, Lord Justice Jackson recommends that general damages should be increased by 10% and the Part 36 regime reviewed to increase the penalties where Defendants do not beat Claimants' offers, by way of a further enhancement to Claimants' damages.

BTE insurance

Recommendations

- **Positive efforts should be made to encourage the take up of BTE insurance by householders as an add-on to household insurance policies and by SMEs in respect of business disputes.**

There is already significant take up of BTE cover as a low cost "add on" to motor or home insurance policies. Currently cover is limited in scope and extent – usually to a £50,000 costs indemnity. Premiums are not recoverable inter partes.

Whilst around 50% of UK households have BTE cover the majority of householders do not institute litigation or claim on their policies and in this way premiums are kept low by the majority subsidising the minority.

The way forward

Lord Justice Jackson views BTE insurance as a beneficial product at an affordable price which will become increasingly important in ensuring access to justice.

He advocates the active promotion of BTE cover but has resiled from the view expressed in his preliminary report that BTE cover should become compulsory.

Lord Justice Jackson also recommends the active promotion of BTE products for small and medium sized enterprises in respect of business disputes to improve their access to justice as both Claimants and Defendants.

Contingency fee agreements and the indemnity principle

Recommendations

- **Solicitors and Counsel should be permitted to enter into contingency fee agreements with their clients. However, costs should be recoverable**

against opposing parties on the conventional basis and not by reference to the contingency fee.

- **Contingency fee agreements should be properly regulated and they should not be valid unless the client has received independent legal advice.**
- **The common law indemnity principle should be abolished.**

Currently contingency fees cannot be charged by Barristers or Solicitors acting in contentious business. These fees are payable by the client if the client wins. The amount of the fee is calculated as a percentage of the damages recovered and is usually paid out of those damages.

Currently pursuant to the indemnity principle a successful party in litigation cannot recover more in costs than it is obliged to pay its own lawyers.

The continuance of this principle has led to significant satellite litigation focusing on the validity of client/solicitor retainers, especially CFAs. On occasions Defendants have received windfalls and Claimants' Solicitors have been denied recovery of legitimate and reasonable costs for purely technical reasons.

The way forward

Lord Justice Jackson recommends that contingency fee agreements should be permitted for both Solicitors and Barristers but the system should be carefully regulated. Clients should receive independent advice from a Solicitor who countersigns the agreement.

Lord Justice Jackson does not propose any changes to the two way costs shifting regime we have now and anticipates that liability for adverse costs Orders will rest with either the Claimant or his Solicitor. If the Solicitor accepts this risk then he will be entitled to claim a higher percentage contingency fee on a successful claim. However, in personal injury claims, as with success fees, contingency fees deducted from damages should be limited to 25%.

In relation to the indemnity principle Lord Justice Jackson has clearly tussled with the prospect of compromise but he admits defeat – “the quest is hopeless”. He recommends simply that the common law indemnity principle should be abolished.

Will these radical recommendations be implemented?

Despite Lord Justice Jackson's obvious personal belief in these radical recommendations the structure of his report suggests the possibility of doubt in his mind that they will be implemented. This is because he advocates an alternative set of proposals if his primary recommendations are not adopted.

Lord Justice Jackson appears alive to the lack of appetite that politicians of all persuasions may have to implementing proposals which have already been seized on by the Press as a reducing access to justice and which will severely curtail a thriving ATE industry.

An alternative interpretation is that Lord Justice Jackson considers the issues so central to his proposed reforms that he has wisely elected to set out a road map in both directions so the position is covered whatever the decision in principle.

2 Costs management as well as case management

Recommendations

- **Lawyers, barristers and judges should receive training both on costs budgeting and costs management.**
- **Rules should set out a standard costs management procedure, which judges would have discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.**
- **Primary legislation should enable the Rule Committee to make rules for pre-issue costs management.**

This issue goes to the heart of Lord Justice Jackson's aim to ensure the proportionality of costs in civil litigation. As currently, costs management would include the preparation and exchange of litigation budgets and as the claim proceeds updated budgets. However the key difference will be the involvement of the court in reviewing and setting a budget which becomes the cap on each party's costs. It is envisaged that a detailed assessment would only take place where the parties could not agree on costs recovery in excess of the budget set. Significant rule changes will be required to achieve this.

Lord Justice Jackson rightly accepts that costs management will initially generate additional costs but highlights that case management and costs management go hand in hand. As such it makes sense, where there is any doubt about proportionality, for the court to manage the two in unison.

The Way forward

The recommendations potentially affect all litigated claims and change is already being piloted on this issue at the Birmingham Civil Justice Centre.

The Birmingham Mercantile and TCC court pilot, running since 1 June 2009 is set to conclude on 31 May 2010. The feedback received in the first 6 months appears to be mixed but Lord Justice Jackson states that a full assessment will not be possible until the pilot has concluded. No case in the pilot has yet gone to trial. Initial conclusions are that the transparency of the costs management process assists the parties in making informed settlement decisions and may help to accelerate the settlement process.

Will costs management be implemented?

Conceptually costs management is central to the proposed reforms, the aim being to limit costs to proportionate sums and place the parties on an equal footing. However, it will be expensive to implement at a time when court budgets are being cut. Judges will require additional training and interlocutory hearings will be either more numerous or longer. Accordingly there is a real risk that implementation may be deferred in either the short or longer term.

The implementation of pre-issue costs management may hold the key to the success or failure of post-issue costs management especially in complex claims where much work is often undertaken pre-issue and before the protocol letter of claim. Lord Justice Jackson proposes a pilot (initially for clinical negligence cases only) on capping recoverable pre-issue costs at £30,000 which can only be exceeded with the permission of the court, requested on paper or by telephone hearing.

3 One way costs shifting and Part 36

One way costs shifting

Recommendations

- **A regime of qualified one way costs shifting to be introduced in personal injury cases.**

Lord Justice Jackson's detailed review of Claimant success rates (high) and Defendant costs recovery (low) in personal injury cases has led him to conclude that a system of qualified one way costs shifting should be introduced. The effect of this would be very similar to the costs status of a legally aided Claimant. If Claimants are unsuccessful they would not be liable to pay the Defendant's costs save to the extent that the Court found it reasonable having taken into account the Claimant's financial resources and their conduct in the dispute and any proceedings.

This leaves the issue of an unsuccessful Claimant's liability for disbursements which would currently be covered by ATE insurance. Lord Justice Jackson concludes that in future in unsuccessful cases these must be borne by the Claimants or their Solicitors. He proposes that money saved by Claimants' Solicitors with the abolition of referral fees could be redirected to fund disbursements in the low percentage of unsuccessful cases. In characteristically strong terms Lord Justice Jackson states "to suggest that Defendants who have been vindicated.....should still be liable to pay Claimants' disbursements is perverse".

It is clear from his report that Lord Justice Jackson is alive to the issues of fraud which have bedevilled personal injury claims in recent years. The qualifications in the costs shifting regime he proposes should be a deterrent for the fraudsters.

The way forward

The recommendations are only in respect of personal injury claims primarily because Claimants tend to be individuals who might be deprived of access to justice if they face the prospect of unrestricted adverse costs Orders.

A significant proportion of professional indemnity claims, especially against Solicitors, are also brought by Claimants who are increasingly utilising alternative funding arrangements at significant cost to professional indemnity Insurers. It seems likely that the claims experience of professional indemnity Insurers may well be very similar to that of general liability Insurers. Professional indemnity Insurers will therefore wish to watch this development with interest in case any extension is proposed to claims brought by individuals against professionals.

Part 36

Recommendations

- **The effect of the Court of Appeal decision in Carver v BAA plc [2008] EWCA Civ 412; [2009] 1 WLR 113 should be reversed.**
- **Where a Defendant rejects a Claimant's offer, but fails to do better at trial, the Claimant's damages recovery should be enhanced by 10%.**

Lord Justice Jackson advocates certainty and recommends the reversal of Carver. He describes Carver as introducing "An unwelcome degree of uncertainty under the Part 36 regime". In Carver the Court of Appeal supported the trial Judge's view that having

regard to all the consequences of going to trial it could not be said that the final outcome which bettered the Defendant's Part 36 offer by £51.00 was "more advantageous" (as required by Part 36.14(1)(a)) to the Claimant in a personal injury claim. As a result the Claimant was penalised in costs.

The only recommended exception to the reversal of Carver is in purely monetary cases where "more advantageous" should mean better in financial terms by any amount however small.

However, currently Carver remains good law and can still be utilised by Defendants. Coupled with the reversal of Carver is Lord Justice Jackson's recommendation to increase the list of adverse consequences for the Defendant should the Claimant make an offer which he equals or exceeds at trial.

Currently a Defendant in such a position can be ordered to pay enhanced interest on damages and costs and indemnity costs from the date of expiry of the offer.

Lord Justice Jackson considers that Claimants are currently insufficiently rewarded when they make good offers. He therefore proposes that Defendants should additionally face the prospect of paying up to a 10% enhancement of damages or other sum awarded to be summarily assessed at trial. He sees the damages uplift resulting from a well judge Claimant's offer as potentially offsetting the loss of inter partes recovery of success fees.

The way forward

This is a major sting in the tail for professional indemnity Insurers. However, in contrast with success fees and ATE premiums it is an avoidable expense. With specialist legal advice and early assessment of liability and quantum, it should be rare for a Defendant to fail to "beat" a Claimant's offer at trial. Indeed, if implemented these recommendations should encourage early exchanges of offers which could lead to greater costs savings for Insurers.

Who are the winners?

If the recommendations in this seminal work are implemented in full the major winners will be any funders of the defence of litigation which has seen largescale use by Claimants of alternative funding arrangements. This includes the public purse via the NHS, Local Authorities and Central Government. The report implicitly suggests that the statutory reforms in 1999/2000 failed in their aim to reduce the public costs of funding litigation, then through the civil Legal Aid budget.

Professional indemnity Insurers are likely to be real winners if there is full implementation. The recoverability of ATE and success fees will be swept away, the imposition of qualified one way costs shifting seems unlikely to be applied to professional indemnity cases and those cases should largely escape the 10% increase in general damages. There will however be a heavy price to pay for failing to beat an early and well judged Claimants' offer at trial.

It remains to be seen whether the effect of the proposed changes in respect of success fees and contingency fees will be to inflate the value of settlements (as has happened in the US) to enable claimants' solicitors to maintain the fee margin they currently receive.

Those in any doubt about the judicial will to implement the reforms should reflect on the presence of the senior judiciary at the Press launch of the report. Implementation

is likely to be matter of “when” rather than “if”.

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