



Civil litigation costs review

Dispute Management - May 2010

A briefing from our Dispute Management team

Impact on business disputes

On 14 January 2010 Lord Justice Jackson published his final report following his year long review of civil litigation costs. Since the publication of the report Lord Justice Jackson has been asked to perform, and indeed has accepted, a major role in the implementation of his recommendations. However whilst the judiciary are firmly behind the reforms it appears that the reforms are not at the top of the new government's agenda. With many of the recommendations requiring primary legislation, the extent and timescale of the implementation remains uncertain.

Whilst the review and in particular its recommendations have caused consternation in certain parts of the legal profession, most notably amongst personal injury and defamation practitioners, the general view is that it has left business disputes virtually untouched. However, whilst the recommendations in relation to commercial claims may not immediately grab the headlines, it is clear that the implementation of the recommendations are likely to have a profound effect on the manner in which commercial claims are funded and litigated, particularly for SMEs and those engaged in litigation outside the Commercial Court.

The major recommendations which will impact upon the funding and costs of business disputes are set out here:

Conditional Fee Agreements (CFAs) and After the Event Insurance (ATE)

Whilst take-up was originally low CFAs and ATE have found an increasing prominence in low to medium value business disputes over recent years. In particular many SMEs, and indeed larger businesses, have found them a particularly valuable method of sharing the risk of litigation with solicitors and insurers. One of the

major benefits to date has been the fact that the success fees and premiums only become payable upon success, in which case they were payable by the opposing party.

Lord Justice Jackson has recommended the abolition of recovery of success fees and ATE premiums meaning that if a party (normally the claimant) wishes to instruct his solicitor on this basis (and insure against his exposure) he should bear this additional burden.

In relation to personal injury, clinical negligence and defamation disputes, this has been tempered by a recommendation to introduce one way costs-shifting (effectively meaning claimants would not normally be liable for opponent's costs even if they lost) and an increase of 10% in general damages which would go towards paying these additional costs. However in commercial cases there are no such recommendations with Lord Justice Jackson suggesting that businesses and particularly SMEs should be encouraged to take out Before the Event Insurance (BTE) to cover legal costs.

BTE insurance

Traditionally businesses have been reluctant to incur the premiums in taking out suitable legal expenses insurance. Lord Justice Jackson however believes that the premiums are modest compared with the benefits and recommends the wider take-up of legal expenses insurance by SME, particularly micro-businesses. There is no recommendation as to how this may be implemented other than through campaigns by insurers and the Department for Business, Innovation and Skills.

Contingency fees

Traditionally contingency fees, where the lawyers are remunerated by way of a percentage share of a client's damages, have been illegal. Lord Justice Jackson recommends the introduction of contingency fees based on the model which has developed in Ontario. He recommends that agreements for contingency fees should be the subject of independent advice (and signed off by an independent solicitor) and that recovery from the other side should be based on normal principles (e.g. hourly rates). A similar system

has been operated by some lawyers in high value employment tribunals in the UK (where contingency fees are not currently banned).

Lawyers have traditionally objected to such a system which many feel would see a move towards a “litigation culture” similar to that in the United States. However it is clear that such a system benefits commercial clients looking for flexibility in payment structures and may be attractive to lawyers and clients in cases where the chances of success are lower than 60% (where currently solicitors are reluctant to act on a CFA and insurers reluctant to provide ATE cover).

Third party funding

Another recent development, third party funding operates by a third party paying a business’ legal costs in return for a share of the damages. Subject to tighter regulation of the funders Lord Justice Jackson supports such arrangements.

At present, funders will only consider cases where damages are in excess of £1 million (or £3 million in some cases) and it may be that other funders will come into the market at a lower level, particularly if the reforms see the end of the ATE industry.

Without Prejudice or “Part 36” offers

At present where a defendant rejects a claimant’s offer but fails to do better than that offer at trial, he can be penalised in costs (paying indemnity costs and interest on them at 10% over base rate). Lord Justice Jackson recommends taking this one step further in suggesting that damages should also be increased by 10%. This would obviously be a significant encouragement to defendants to accept a reasonable offer by their opponents but could, in some instances, lead to injustice where a defendant, for sound legal and commercial reasons, has defended a case or a specific issue to trial.

Active costs management

The current rules require the parties to litigation to serve costs estimates twice during proceedings (at the case management conference and pre-trial review). These estimates are not particularly detailed and parties have tended to pay little attention to them, and judges even less. Lord Justice Jackson has recommended a far more thorough procedure where estimates are scrutinised by the court so that they can decide whether certain steps (such as expert evidence) are necessary for the disposal of the case.

This is one reform that is already being implemented with judges attending training in costs management and more active control of cases in which they act. A pilot scheme is also being run in the Birmingham courts and it is likely that more detailed rules will be drawn up after that has ended in the Summer of 2010.

Case management

In addition to the above, Lord Justice Jackson has made some recommendations into how changes in the process may be implemented to see the costs of the process itself reduce. These include:

Pre-action protocols: Lord Justice Jackson recommends the repeal of the general practice direction on pre-action conduct replacing it simply with an obligation that pre-action correspondence and exchange of information is appropriate.

Disclosure: Lord Justice Jackson has recommended a “menu” approach for more complex commercial cases where the parties and the court agree in advance the extent of disclosure.

Witness evidence: Whilst consideration was given to the abolition of witness statements in favour of summaries it is recommended that they are retained with the court having more say over the content of statements at an early stage and the power to penalise parties who produce lengthy and unnecessary statements.

Expert evidence: Lord Justice Jackson has encouraged the courts to require costs estimates before experts are instructed and use powers to penalise those parties who provide lengthy and unnecessary expert evidence.

Summary

The costs management and case management suggestions by Lord Justice Jackson represent sensible and appropriate reforms which build on the changes implemented in the last major reform of civil litigation in 1999 by Lord Woolf.

If implemented, the changes to funding are radical. They will certainly address the growing imbalance between claimants (funded by CFAs and ATE) and defendants but may lead to some claimants, particularly micro businesses and SMEs, being deterred from legitimate claims by the costs and risk of bringing such disputes. It remains to be seen whether contingency fees and a growth in BTE insurance or litigation funding will be able to address those concerns.

More information

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