MILLS & REEVE

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The Jackson Report

Lord Justice Jackson's report concluding his review of civil litigation costs does not disappoint (http://www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf). He has refined the views he expressed in his preliminary report following consultation and reaches some bold conclusions. The most significant is the need to repeal the legislation which permitted the recovery of success fees and after the event insurance premiums from unsuccessful defendants. This would be coupled with the introduction of one-way costs shifting (where an unsuccessful claimant does not have to pay the defendant's costs) in personal injury claims and some others and an increase in the level of general damages for personal injuries and other civil wrongs to help the claimant pay the success fee and premium. He would also permit regulated contingency fee agreements for both solicitors and barristers with costs being recovered on the conventional basis. Caps would apply to both success and contingency fees in personal injury claims.

There are strong views on both sides concerning these proposals and it would be foolish to imagine that the necessary legislation is going to be drawn up in the near future, even were

the proposals to have the wholehearted support of the government, whatever that will mean by the end of 2010. What we can be sure of is that we will be dealing with cases funded under the existing system for many years to come.

In these circumstances, it seems sensible to look at changes which might start happening now, either because they can be implemented by on-the-ball judges flexing their existing powers or because the rules changes required to the CPR can be made by the Civil Procedure Rules Committee. The following are a few suggestions.

Pre-action conduct

Most of the existing pre-action protocols work well but the Protocol for Constructions and Engineering Disputes needs to be reviewed to reduce the costs of compliance. The Practice Direction on Pre-action Conduct leads to unnecessary costs and should be abandoned. (Its Annex B should be retained as a new protocol for debt claims.) There should be no protocol for cases in the Commercial Court or Chancery Division which do not already fall within the scope of a protocol such as that for professional negligence claims .

The final report does not repeat the proposal in the preliminary report that parties start the "pre-action" process after the claim form has been issued, staying the action to allow the parties to comply with protocol requirements. It does, however, recommend giving judges power to make directions in the pre-action period, whether to require a party to complete a particular step or to relieve them from doing so.

Costs reforms

Jackson LJ's proposed Costs Council to decide on guideline hourly rates and fast track fixed costs will take some time to set up but many of his recommendations about more active judicial costs management could begin immediately. Acknowledging that not all High Court or Court of Appeal judges feel comfortable about summarily assessing costs at the end of "heavy" applications, Jackson LJ recommends ordering a detailed assessment coupled with a substantial interim payment in respect of costs. Once all judges have been trained to deal with costs and budgeting, this shouldn't be necessary. Whilst we can probably whistle for the development of software able to deal with time-recording, estimates and bills since it will cost money, rule changes such as permitting Part 36 offers and refusing to permit success fees to be recovered in respect of a detailed assessment, overturning *Crane v Cannons Leisure,* are likely to happen quickly.

Part 36

Following the introduction of a revised CPR 36 in 2007, the Court of Appeal interpreted CPR 36.14(1) as having changed the rule concerning defendants' offers. In *Carver v BAA* they held that where a successful claimant beats the defendant's offer by a small margin at trial, he is not necessarily entitled to his costs as he would have been under the old version of CPR 36. The Civil Procedure Rule Committee has already stated that this was not what it intended and that it is going to review this and other glitches in the drafting of the new CPR 36 and this is now endorsed in the final report.

The other Part 36 suggestion is that claimants who do better than their own offers should be entitled to an uplift of 10% on their damages as well as enhanced interest and indemnity costs under CPR 36.14. This proposal is independent of those concerning the recoverability of success fees and premiums but will be particularly needed if they are implemented. It seems unlikely to have sufficiently wide support to prompt a rule change if the other pro-defendant measures don't go ahead.

CFAs

There are several fallback proposals should the big idea be rejected. One which could be adopted fairly easily would be to allow defendants to avoid paying the success fee where they settle in the protocol period, reversing the effect of *Callery v Grey* which permits recovery even where the CFA has been entered into before the defendant is notified of the claim. Another recommendation would make any element of a success fee which provides for protection against the risk of the claimant not accepting a good Part 36 offer irrecoverable. We can expect the courts to take a more rigorous line on the reasonableness of success fees, something the Court of Appeal began to do last year in *C v W*.

Edisclosure

The judiciary's interest in edisclosure and its associated problems has been slow to awaken. A tiny minority of judges are interested but the majority know little about the options and technology available and the costs involved. The genesis of the Practice Direction Governing Disclosure of Electronically Stored Information has been correspondingly slow. We are expecting it this April, four and a half years after CPR 31 was amended to deal with the disclosure of electronic data. Jackson LJ says that the judiciary should have training on edisclosure and that it should form a substantial part of the Bar and Law Society's continuing professional development requirements. We can expect judges to bring up the topic at case management conferences in future.

Jurisdiction clauses

Deutsche Bank AG v Sebastian Holdings Inc – forum non conveniens

This case concerns a series of complex agreements relating to equities and foreign exchange trading concluded between the claimant, an investment bank domiciled in Germany, and the defendant company incorporated in the Turks and Caicos Islands. There are seven interrelated agreements in issue between the parties. These contain five jurisdiction clauses providing for the jurisdiction of the English courts (two exclusive, two non-exclusive with a *forum non conveniens* waiver) and one (non-exclusive) providing for the New York courts.

The defendant applied for a stay of the English proceedings on the grounds of *forum non conveniens* and *lis alibi pendens* by reference to its New York proceedings begun shortly before the English proceedings. The judge dismissed the application.

The judgment sets out a helpful analysis of the different types of jurisdiction clause available and the courts' approach to them. They are listed in hierarchical order from the most stringent to the most lenient.

1 Exclusive jurisdiction clause with waiver of *forum non conveniens*

This prescribes one jurisdiction (or perhaps two, dependent upon specified circumstances) in which the parties must litigate. It often provides for methods of service and even for special courts within the jurisdiction. It is a breach of contract for a party to issue proceedings against the other in another jurisdiction or to assert *forum non conveniens* in relation to the chosen jurisdiction.

2 Exclusive jurisdiction clause

This is the same as category 1 above but without the waiver.

3 Non-exclusive jurisdiction clause with waiver of *forum non conveniens*

This provides for one (or possibly more than one) jurisdiction in which a party may be sued by the other party. Proceedings may be issued by a party in another jurisdiction without being in breach of contract and there may be parallel proceedings giving rise to a risk of inconsistent judgments. The *forum non conveniens* waiver means that the parties agree not to assert that to be sued in the non-exclusive jurisdiction would be inconvenient, oppressive or expensive. It is a breach of contract for a party to assert *forum non conveniens* in relation to the chosen non-exclusive jurisdiction.

4 Non-exclusive jurisdiction clause

This is the same as category 3 above but without the waiver.

Effect of a *forum non conveniens* waiver

In *National Westminster Bank v Utrecht-America Finance Co* Clarke LJ thought a contractual waiver was “fatal” to any *forum non conveniens* argument, whereas in *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* Waller LJ did not treat such an agreement as decisive, but thought that it underlined the point that the jurisdiction agreement would be overridden only in exceptional circumstances. The latter approach is the one now being adopted by the courts (*Donohue v Armco Inc*).

In a category 1 case, it is still possible therefore that the court will stay proceedings on grounds of *forum non conveniens* notwithstanding the waiver but especially strong reasons will be required (*Bank of New York Mellon v GV Films*). At the other end of the scale, the court will not make a finding of *forum non conveniens* lightly even in a category 4 case. The party seeking a stay cannot rely upon foreseeable inconvenience and the interests of justice must also be engaged (*Ace Insurance SA-NZ v Zurich Insurance Co*, followed in *Import Export Metro Ltd v CSAV* and *Antec International Ltd v Biosafety USA Inc*).

Effect of Brussels Regulation regime

As noted last year in *UBS AG v HSH Nordbank AG*, it is a matter of controversy whether there is any room at all under the Brussels Regulation regime for a stay on *forum non conveniens* grounds. Following the ECJ decision in *Owusu v Jackson*, the prevailing view has been that that there is no scope for the application of *forum non conveniens* to remove a case from a court which has jurisdiction under the Brussels Regulation, even where the defendant is not domiciled in a Member State. The Supreme Court of Ireland has made a

reference to the European Court as to whether the ruling in *Owusu v Jackson* applies even where proceedings have been commenced in a non-Member State prior to the proceedings in a Member State (*Goshawk Dedicated Receivables Ltd v Life Receivables Ireland Ltd*). In these circumstances, the judge sensibly refused to deal with this argument since he was able to reject the application on common law grounds alone.

Comment: the spate of jurisdictional spats in the last few years does not appear to be abating – the judge commented that he had been referred to "a positive bible" of 38 leading authorities on *forum non conveniens* alone. An earlier decision in the present case (unsuccessful application for a declaration that the English court had no jurisdiction) is apparently going to the Court of Appeal. The pending ECJ decision in *Goshawk* should resolve the issue concerning the scope of the courts' jurisdiction to entertain *forum non conveniens* arguments at all where a Member State is involved. However, experience shows that this decision is unlikely to put an end to jurisdictional wrangles. The case of *Shashoua v Sharma*, in which the parties argued over the effect of the ECJ *West Tankers* decision last year concerning arbitration clauses and anti suit injunctions, illustrates that parties always seem to be able to think up further variants on a theme (see Litigation Update May 2009 http://www.mills-reeve.com/dispimg.asp?id=2526).

On a related note, *Africa Express Line Ltd v Socofi SA* offers guidance on the incorporation of jurisdiction clauses under Art 23 of the Brussels Regulation. The court emphasized the important distinction between:

- incorporation of a jurisdiction clause contained in standard terms and conditions where the clause can be incorporated even though one party has not seen the relevant terms and was unaware of the jurisdiction clause; and
- incorporation of a jurisdiction clause contained in another related contract involving a third party, in which case only those terms which are directly germane to the parties' agreement will be incorporated.

Pre-action costs

National Westminster Bank plc v Kotonou – recovery of funding-related costs

[2009] EWHC 3309 (Ch) http://www.bailii.org/ew/cases/EWHC/Ch/2009/3309.html

The bank sought to enforce a guarantee against the defendant in proceedings (the Guarantee Claim). Mr and Mrs Kotonou charged their family home as security for the guarantee (the mortgage). Mr Kotonou defended the Guarantee Claim and tried to release equity from his home in order to obtain funding for the proceedings. A dispute arose with the bank about the sum guaranteed by the mortgage and the Kotonous began Part 8 proceedings against the bank seeking declarations as to the true construction of the mortgage (the Mortgage Claim).

The Kotonous negotiated an agreement with the bank which preserved the bank's arguments in the Mortgage Claim, whilst giving the Kotonous a further mortgage enabling them to fund the Guarantee Claim. They incurred considerable legal fees in these negotiations (the funding-related costs).

The Kotonous won the Mortgage Claim and were awarded their costs. Mr Kotonou succeeded in part in defending the Guarantee Claim. The judge in the Guarantee Claim ordered both parties to pay 50% of the other's costs but made no order concerning costs of pre-trial applications concerning the trial of both claims which had been reserved to the trial judge/ Mr Kotonou unsuccessfully appealed these orders.

At detailed assessment, an issue arose as to whether the bank should pay the funding-related costs. The costs judge held that they were part of the costs of the Part 8 Claim and so payable by the bank. The bank appealed from this decision.

The judge applied the following principles:

1 The costs of a claim do not include costs incurred by a party in seeking funding for either its prosecution or defence.
2 Pre-litigation costs incurred in the reasonable negotiation of interim solutions to problems arising between the parties in connection with issue to be decided in contemplated or pending litigation are recoverable as costs of the proceedings.

In this case, applying the first principle, the funding-related costs could not form part of the costs of the Guarantee Claim. However, applying the second principle, they were properly recoverable as costs of the Mortgage Claim even though they arose in the context of a funding negotiation.

Comment: the principles concerning the recovery of pre-action costs are of general and increasing importance given the scale of pre-action expenditure on legal fees in most cases. The limits on the scope of what constitutes costs "of and incidental" to the proceedings under s51 of the Senior Courts Act 1981 have been debated several times since the introduction of the CPR.

Abandoned claims

One important limit for defendants concerns recovery of pre-action costs relating to heads of claim abandoned by the claimant before he begins proceedings. The defendant cannot generally recover his costs relating to abandoned heads of claim (*McGlinn v Waltham Contractors Ltd*). To do otherwise would penalise the claimant for abandoning claims which the defendant has demonstrated are not going to succeed, which is the very thing which the protocol was designed to achieve.

Related proceedings

A difficult question arises when deciding whether preparation for proceedings of one type can properly be regarded as giving rise to costs "of and incidental to" subsequent proceedings of a narrower scope. In *Re Gibson* the court held that costs can be recovered where earlier disputes "are in some degree relevant to the proceedings as ultimately constituted, and the other party's attitude made it reasonable to apprehend that the litigation would include them". Such costs were recoverable in *Newall v Lewis*, a case concerning the meaning of a settlement agreement, where the proceedings ultimately brought by the claimant beneficiaries against the trustees of family settlements were more confined in scope and form than those originally threatened. A recent attempt to recover expert costs in

related aborted proceedings failed in *Crest Nicholson Operations Ltd v Apex Roofing Services* since the issue to which the evidence had been directed in the related proceedings would have never have been in issue in the proceedings in question.

Inquests
Where civil proceedings follow an inquest, a claimant can recover costs incurred in relation to the inquest as "costs of and incidental to" the civil proceedings in so far as the costs relate to gathering evidence for the subsequent proceedings (*Roach v Home Office*). This is so even though coroners have no jurisdiction to award costs. It makes sense that the costs of attending the inquest to note their evidence should be recoverable as incidental costs when this course might well be cheaper and more effective than interviewing the witnesses after the inquest.

Setting aside default judgments

Mullock v Price (t/a the Elms Hotel Restaurant) – default of lawyer or agent

[2009] EWCA 1222 http://www.bailii.org/ew/cases/EWCA/Civ/2009/1222.html

In general, the action or inaction of a party's legal representatives must be treated under the CPR as the action or inaction of the party himself. A party should not be able to hide behind his representatives. When considering an application to set aside a default judgment under CPR 13.3(2), where the court must have regard to "whether the person seeking to set aside the judgment made an application to do so promptly", the defendant cannot excuse his inaction by saying he was relying on his insurance brokers to act for him.

The defendant owned a hotel. The claimant, described by Ward LJ as "a lady who will not like my revealing that she is 69 years of age", was injured when the barman's Labrador knocked her over in the hotel car park after a convivial evening with her friends from the Willows Nursing Home. The defendant referred the claim which followed to his insurance brokers, the inaptly-named Ideal Insurance Services Ltd, currently under investigation concerning fraudulent insurance policies.

The defendant passed all communications to do with the claim to Ideal Insurance which failed to deal with it properly. Judgment was entered against him in August 2006. An order for an interim payment was made in November 2006, and when the bailiffs came to enforce it against him, Ideal Insurance paid it. The disposal hearing took place in January 2008.

The defendant was aware of the judgment against him but took no steps to set it aside for almost two years. The Court of Appeal said that it was his obligation to deal expeditiously with the matter and that his understandable reliance on his brokers did not absolve him from this responsibility. The application to set aside the judgment failed.

Comment: the question of whether a party can enjoy greater leniency from the court where he has relied on lawyers or others to act in his interests has been long debated. It arises most frequently in the context of applications for relief from sanctions under CPR 3.9 because one of the relevant factors for the court is whether the failure to comply was caused by the party or his legal representative. This suggests that a failure by the legal representative may provide an adequate excuse but was held not to by the Court of Appeal

Training in Compliance Ltd v Dewse (2000). The Court of Appeal agreed with this approach in the present case, both as a general rule under CPR 3.9 and particularly under CPR 13.3.

The problem with this approach is that it ignores the wording of CPR 3.9(1)(f). To avoid confusion, this part of the rule should be deleted to reflect what is now the law. There has been some dispute about the effect of this rule in the past. In *Daryanani v Kumar* (2000) the Court of Appeal approved the *Training in Compliance* stance and discouraged attempts to distinguish between the fault of the party and their lawyers in all but exceptional circumstances. However, in *Whittaker v Soper* (2001) the Court of Appeal held that where the fault is the solicitor's alone, this makes relief more likely, but the court did not refer to the decisions the year before. The present decision is therefore the third from the Court of Appeal to say that parties cannot hide behind their lawyers, their remedy being a professional negligence claim where they suffer loss as a consequence of their lawyers' negligence. Where the fault is that of an expert and the party's lawyers have done their best to avoid delay, *Lowther v Kapur* indicates that the court is more likely to give relief. This will not be the case though where the fault is that of the party's representative, whether it be a lawyer, broker or insurer.

In brief

Civil Law Reform Bill

This Bill and consultation paper propose changes to the recovery of damages under the Fatal Accidents Act 1976 and reforms concerning the distribution of estates where an inheritance is forfeited or disclaimed. The most wide-reaching proposal is the amendment of s17 of the Judgments Act 1838 so that the post-judgment rate (which has been 8% since April 1993) can be set by reference to the base rate. Responses are sought by 9 February 2010 (http://www.justice.gov.uk/consultations/docs/civil-law-reform-bill-consultation-paper.pdf).

Consent orders and fraud

Where a party agrees to a consent order on costs following the determination of liability, the court will set aside the order where a fraudulent claim is presented at the hearing on quantum. The party had no option but to agree to the consent order given that they only had suspicions that the claim might be fraudulent at that stage (*The Ariela and The Kamal XXVI* http://www.bailii.org/ew/cases/EWHC/Comm/2009/3256.html).

Disbursements and counsels' fees

According to a recent report in the Law Gazette, solicitors will for the first time be able to profit from instructing barristers following rule changes agreed by the Bar Standards Board. A solicitor's firm will in theory be able to treat the barrister's fee as a cost that they can mark up when billing the client to generate a profit. At the moment a barrister's fee is treated as a disbursement.

Freezing order

The Commercial Court granted a worldwide freezing order in terms that went beyond those in the standard form published in CPR Practice Direction 25. The order permitted the defendants to deal with all their assets abroad so long as their assets in (the standard form

says *in or outside*) England and Wales remained above £175 million. This amendment to the standard form was necessary to restrain the removal of assets, many of which were held abroad in an "indirect manner" to a jurisdiction where enforcement of a judgment would be difficult (*JSC BTA Bank v Ablyazov* http://www.bailii.org/ew/cases/EWHC/Comm/2009/3267.html).

New Lugano Convention

The new 2007 Lugano Convention entered into force as between Norway and the European Community on 1 January 2010. The effect of this is that issues of jurisdiction and enforcement of judgments as between EU member states and Norway will now be governed by the 2007 Lugano Convention. The 2007 Lugano Convention has not been ratified by Switzerland or Iceland. Questions of jurisdiction and enforcement as between EU member states, Switzerland and Iceland will therefore continue to be governed by the 1988 Lugano Convention.

Recommendations for the Bar

The Bar Standards Board has given approval for barristers to supply legal services through the legal structures known as lLegal Disciplinary Practices (LDPs). In particular, barristers will be allowed to become managers of LDPs regulated by the Solicitors Regulatory Authority which include up to 25 per cent non-lawyer managers without having to re-qualify as solicitors. They will be permitted to act both as independent practitioners and managers of LDPs at the same time. The cab-rank rule will still apply (http://www.barstandardsboard.org.uk/news/press/774.html).

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