

costs update

2010 - the year of costs reform?

The coming year promises to be interesting given the potential for changes to the existing costs regime. There are numerous ongoing reviews of costs but the focus is on the imminent publication of Lord Justice Jackson's Final Report on costs and the introduction of the MOJ reforms with its new process for RTA claims.

Jackson LJ's preliminary report was published in May 2009 with the end of July set for the submission of evidence. That process continues with, as recently as two weeks ago, evidence being requested from interested parties. A pilot scheme on costs estimates has also been run in recent months in Birmingham.

The enquiry process has not been without controversy. Hoping to emulate previous industry-wide agreement on RTA/EL

fixed success fee schemes, Jackson LJ set up mediation, conducted by the Civil Justice Council, to see if agreement could be reached in respect of fixed costs for all types of fast track matter.

The decision of APIL to leave and then re-join the process was well publicised but it is understood that the process concluded with no agreement. The enquiry has been provided with an update as to how far negotiations reached and the statistical data that was being relied upon.

Equally controversial is the MOJ RTA claims process which is still stated to commence in April 2010 but in reality will probably slip at least a month or two. It will be interesting to see how Jackson LJ's proposals fit in or conflict with this scheme.

This scheme presents defendants with the chance to reduce the costs of claims if claims remain within the scheme. However, it also presents considerable

challenges in ensuring claimants do not exit the scheme if deadlines such as those for payment of costs and damages (which can be only ten business days) are not met. Bizarrely for RTA cases we will find ourselves with three processes, the MOJ scheme, the predictable costs regime and the normal litigation procedures.

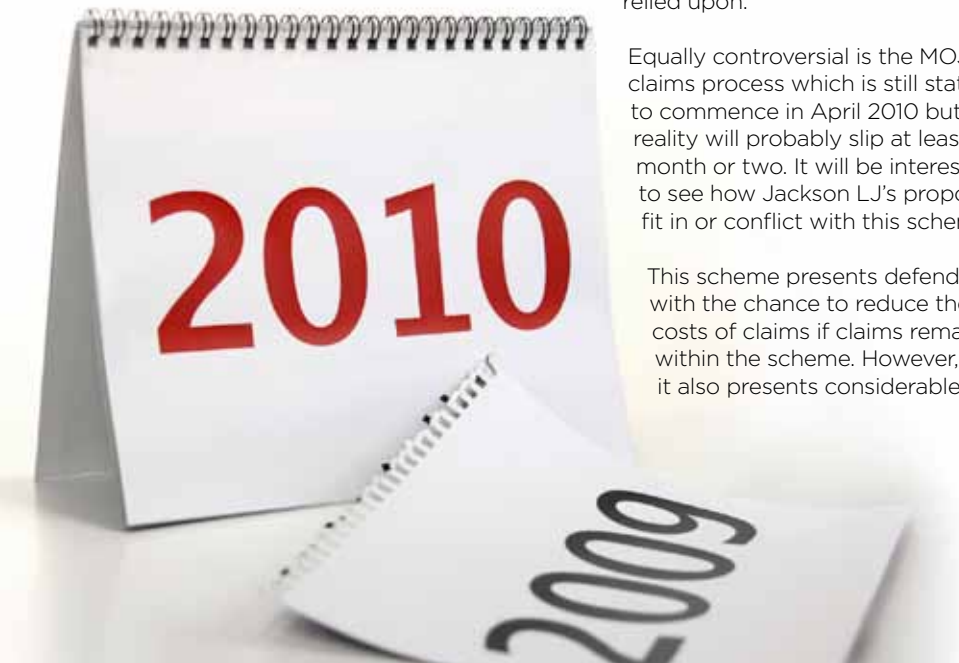
The possibilities for satellite litigation are considerable and defendants will need to quickly risk assess cases and decide on quantum without medical evidence. As for cases worth less than £2000 it may be better to let a claim exit the scheme as predictable costs would be lower.

Publication proceedings (defamation, malicious falsehood and breach of confidence)

From 1 October 2009 the costs in respect of an insurance premium will not be recoverable where the paying party admits liability and offers to settle the matter within 42 days of notification of the premium provided the matter settles pre-issue.

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1 October 2009

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Welcome

Welcome to the Hill Dickinson costs update January 2010.

In this edition we consider a number of recent rulings and forthcoming developments that are affecting the world of costs. Staying informed of these changes can help you become better equipped when challenging unreasonable or inflated costs.

Should you have any queries relating to the matters discussed in the newsletter, or if you have any suggestions for future articles, please do get in touch:

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50th CPR update 1 October 2009

The rules on the notification of funding, and details as to what information must be required, have been tightened and are applicable to all funding arrangements entered into after 1 October 2009. Paul Edwards discusses how these changes make the position fairer to defendants.

ATE policies

19.4 of the Costs Practice Directions now state that where the funding arrangement is an insurance policy the following detail must be provided:

- Name/address of insurer, policy number, date of policy and identify claim/claims it relates to
- The level of cover provided
- Whether the premium is staged and if so at which point the premium increases

Limits on recovery under funding arrangements

The rules on Notification of Funding Arrangements (CFA, CCFA, ATE) have been amended with the effect that if the appropriate notification is not given with any rule or practice direction then the appropriate additional liability is not recoverable inter partes. It is interesting to note that the rule now specifically points to paragraph 9.3 of the Practice Direction for Pre-Action Conduct giving it increased impact:

9.3 states that a party must inform the other parties about a new funding arrangement either with the letter of claim OR if the arrangement is entered into later within seven days.

Relief from sanction CPR 3.9

This escape clause remains in force but is likely to be harder to apply as if no notification is given then presumably the defendant can point to prejudice. Previously a notice was often never served formally but the letter of claim often referred to the CFA so no harm was done. It is hard to envisage circumstances where a success fee is allowed for work done before notification is given under this regime.

Commentary

The rule changes are desirable as they enable defendants to make informed decisions on a commercial basis in the knowledge that they can evaluate the likely claim for costs being brought more accurately, particularly in areas of costs where fixed success fees apply. It will also be possible to assess whether the claimant's level of cover is appropriate and whether commercial decisions need to be made at an earlier stage.

It is likely that many new challenges will spring up, including those relating to the requirement as the exact claim covered by the ATE policy. Challenges could be particularly relevant to claims where there is uncertainty as to the date of the accident or the identity of the defendant.

Solicitor admits to weighing file to decide how much to charge!

Whilst defendants have traditionally been concerned with the level of costs claimed by claimants a recent case before the Solicitor's Disciplinary Tribunal (SDT) featured an unusual method of charging – Trevor Hobden, a Norfolk based solicitor admitted charging clients by the weight of their file! He told the SDT he had not been properly trained to cost files and that he calculated how much to charge the estates of dead clients by weighing the files in his hand.

It was suggested that Hobden charged almost three times the proper fee and billed for thousands of pounds of work that there was no evidence had been done. Often this took any remaining funds left in an estate.

He was found guilty of taking money from a client account in respect of costs without delivering a bill, taking money that was not properly due to him, overcharging a client and failing to give clients proper information. He was struck off.

Hill Dickinson's tough negotiating leads to recovery of detailed assessment costs

On a recent claim a bill was received in the sum of circa £33,250. In December 2008 Points of Dispute and a part 47.19 offer was made at £18,500. The claimants' solicitors responded with a number of progressively reducing offers whilst the defendant, represented by Hill Dickinson, maintained its stance that the offer made was fair and would offer protection on detailed assessment.

The matter was listed for detailed assessment and as a final offer proposed the £18,500 on a drop hands basis. This was again rejected and the claimants sought £19,250 on an inclusive basis (having dropped by now from circa £25,000) offers coming down from £24,000 progressively down to £20,000.

Defendants rejected the offer and withdrew all previous offers save for the original p47.19 offer. Ultimately to avoid the hearing the claimants accepted the £18,500 and paid the defendant's costs of assessment to date.

59% saving achieved at court

The bill of costs of the first claimant was claimed in the sum of £21,767.08, interest amounted to over £3,600 and by the time the matter reached detailed assessment the claimant was seeking detailed assessment costs in the sum of £8,961.34. Overall the potential liability for the client was over £34,000.

Savings were made regarding the hourly rates claimed but issues centred around whether the claimants' solicitor had claimed the costs relating to a separate claimant, costs that should not have been claimed.

It transpired that the bill did include costs of the additional claimant despite the claimant confirming on three separate occasions that the costs claimed related to one claimant alone. The bill was assessed on an item by item basis and significant reductions made to the costs claimed. Disbursements such as court fees were all apportioned on a 50/50 basis.

The bill was therefore assessed at £10,739.97, and when adding in severely reduced detailed assessment costs the overall amount allowed was £13,937.47, a saving of 59%.

VAT increase confirmed

Chancellor Alastair Darling confirmed on 9 December 2009 that VAT would rise and revert to its previous rate of 17.5% on 1 January 2010. Whereas the previous VAT change was retrospective this is not the case with this rise.

Where the invoice was issued or work completed before 1 January an invoice with VAT at 15% may be issued. Where work commenced before 1 January but was not completed until afterwards it is possible to apportion the VAT between the two applicable rates.

This will inevitably complicate dealing with costs as schedules and bills will all need to be split into parts relating to the different VAT rate (see Costs Practice Direction 4.2(2)), the first time since 1991 that bills will need to be split in this way.

Reducing the cost of costs

- Hill Dickinson has saved £3 million over a recent sample of 500 files, an average of £6,000 and 38% of the amount claimed
- Our results are ahead of those identified in the Jackson report which cited 30% by negotiation and 23% on detailed assessment

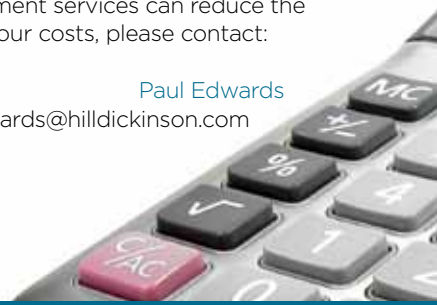
We have recently refined our cost management services, including training and audit services, with new and flexible pricing options.

As a fully integrated costs service, we deliver a simplified process that runs throughout the lifecycle of a claim. We manage all aspects of costs and the associated issues from small claims, to referrals, up to the House of Lords, now Supreme Court, and across a range of claims type.

We take our analysis of bills seriously, choosing carefully which cases to fight. Our experience shows that co-ordinating and focusing our challenges can change the behaviour of claimant solicitors and costs draftsmen to the advantage of our client.

For further details of how our costs management services can reduce the cost of your costs, please contact:

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Retrospective application to vary cost cap too late

Hill Dickinson received instructions to act on behalf of the NHSLA on an application issued by the claimant's solicitors to remove a costs cap that had been imposed over two years previously. At a contested CMC in April 2007, a cost cap of £31,500.00 had been applied to include all costs to be incurred up to and including trial, to avoid the risk of excessive and disproportionate costs being incurred.

The matter settled and in May 2008 a detailed Bill of Costs was formally served. The claimant's solicitors had exceeded the cost cap by over £20,000.00. In May 2009 the claimant's solicitors issued an application seeking to remove the cost cap. The claimant argued that it was in the interests of justice and that there had been substantial and material changes in circumstances since the cap was imposed. It was argued that special damages became more difficult to assess in light of new evidence.

At the hearing the defendants were able to show many of the arguments raised were not a substantial change in circumstances. The court did however rule that the change in the special damages position did amount to a substantial change as it dramatically increased the value of the claim.

The court agreed with the defendant's main objection that the application had been issued far too late. The defendant argued that the application had been issued approximately 15 months after

the matter had settled and even after the detailed assessment process had commenced.

While there was nothing in the rules that imposed a time limit it was entirely prejudicial to the defendant for the cost cap to be removed at such a late stage. The defendant successfully argued that there were parallels with the position regarding arguments of conduct. Aaron -v- Shelton highlighted the fact that it was an abuse of process to raise issues of conduct after a matter had settled when those arguments should have been put before the court. At the time the defendant settled the matter they knew what damages had been agreed and had a reasonable expectation as to the costs position.

The claimant's application was dismissed and the defendant was awarded costs of the application.

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For further details of how our costs management services can reduce the cost of your costs, please contact:

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About Hill Dickinson

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