

costs update

Conduct – a new approach?

A number of recent cases have shown that the courts are increasingly willing to tackle issues of misconduct or exaggerated claims. These cases seem to be softening the impact of the [Aaron -v- Shelton](#) decision where it was held that if an argument was not raised before a trial judge then it was an abuse of process to raise it on detailed assessment. Since that decision defendants have been frustrated as claimants have sought to extend its application to cases where consent orders were made.



[Drew -v- Whitbread](#) (heard by the Court of Appeal on 9 February 2010) was a personal injury claim where following a denial of liability the matter was allocated to the multi track in light of the claimant's 'Schedule of Special Damages'.

The claimant won at trial, subject to a 25% deduction for contributory negligence. The claimant failed to recover any entitlement for future losses, which had been put at £18,325. Total net damages were just over £9,000. The defendant raised various costs points including a failure to negotiate, an exaggeration by the claimant of his claim, and unreasonable conduct in relation to the agreement of the joint experts. No special order for costs was made.

The bill totalled £78,458. At detailed assessment the regional costs judge took

the view that after the date it should have been apparent that it was a fast track case; costs would only be allowed on that basis. The claimant appealed and a further subsequent appeal saw the matter referred to the Court of Appeal.

It was held that whilst the trial judge may be in a good position to help a costs judge on questions as to the unreasonable incurring of costs, the fact that such issues were not raised with the trial judge should not preclude a party raising such matters with the costs judge.

The two parts of the rules fulfil different functions. Part 44.3 enables the court, at the conclusion of the trial or hearing, to make a special order as to costs. Under part 44.5 the costs judge had to have regard to all the circumstances including conduct and efforts made to resolve

matters. Under both rules, the trial judge and the costs judge were enjoined to take into account many similar factors. The parts were intended to work in harmony and it was intended that conduct might have to be considered under both.

The fact that the trial judge had been asked to make an order in respect of exaggeration, and had declined to do so, did not stop the issue from being dealt with on detailed assessment, unless some specific finding of the trial judge bound the costs judge. In this case the defendant had not sought an order that costs should be limited to those recoverable on a fast track basis and the court was not restricted from assessing whether the case was in reality a fast track case.

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Welcome

Welcome to the Hill Dickinson costs update May 2010.

This update provides a summary of recent case law developments, details the new increased hourly rates and motor claims process, and highlights some of our costs team's recent successes.

We hope you find this update informative. We would welcome feedback on any of the articles or the update in general.

Paul Edwards
Head of Costs
paul.edwards@hilldickinson.com

Guideline hourly rates for 2010 increased



Over recent years the guideline hourly rates issued by the Master of the Rolls have been increased from 1 January of each year. This year the increases were placed on hold pending the outcome of the Jackson report which was published in January.

In light of the report the Master of the Rolls considered the recommendations and additional material from the Advisory Committee on Costs and confirmed recently that the rates should be increased (in line with inflation) by 1.7% for 2010, to be applicable from 1 April.

The new rates are:	Band A	Band B	Band C	Band D
London 1	409	296	226	138
London 2	317	242	196	126
London 3	(229-267)	(172-229)	165	121
National 1	217	192	161	118
National 2	201	177	146	111

Jackson update

Since our last update it has perhaps been a case of one step forward and two steps back. Initial signs that many of Sir Rupert's recommendations would be implemented have stalled for a variety of reasons.

The first positive step to note was that Jackson LJ has been given one day in ten of judicial sitting time to focus on his attempts to drive through some of the reforms. Secondly within a matter of days of the publication of the report Jack Straw, the justice minister, announced plans to implement the recommendations in respect of defamation and to launch an expedited consultation period. The proposals got as far being drafted into primary legislation and were recently presented to the House of Commons, however

failed to get approval before the current parliament was ended due to the general election.

The commons leader Harriet Harman said the plan was "not going anywhere", confirming that it would need to be reintroduced by the next government after the general election. The reforms ran out of time following a Labour rebellion where a number of Labour MPs voted against the proposals on the basis that lawyers would stop taking such claims on if they were not as profitable. Despite this defeat Jack Straw has committed the Government to the changes.

Obviously a change of government may have an impact though it is hoped that where the public purse is being benefited the changes will still find support.

The future of referral fees and claims management companies

Jackson LJ recommended that the paying of referral fees be banned. Claims management companies have traditionally argued that they widen access to justice as their wide promotion raises awareness of people's rights but this contention was rejected.

On the face of it a full ban whilst potentially desirable is difficult, if not impossible to implement and enforce. With legal expenses insurance funders often relying on the receipt of referral fees for income it may lead to higher after the event (ATE) premiums and will put significant pressure on the ATE market. Before the event (BTE) providers also often sell cases so the disappearance of this income stream will also create pressure and could push the cost of BTE premiums upwards.

Referral fees are typically between £600 and £800 and they continue to rise. Referral fees were once banned but since 2004 are legal, if subject to statutory regulation. When regulation was introduced in 2007 it was anticipated that there would be circa 500 claims management companies. There are currently almost 3,400 plus unregulated ones. Traditionally such firms focused on accident claims but they are now spreading their influence. You cannot avoid advertisements for firms seeking to target the mis-selling of financial products and unlawful charges.

Jackson LJ's proposals may be too little too late. It is thought that the Conservative party may not support the ban. Additionally referral companies in the near future may not need to sell their claims. Alternative business structures will enable non-lawyers to own their own law firms and to run a case from start to conclusion. It will be interesting to see if these companies see greater profit in running the case themselves or if they remain happy to take the easy money of selling the case on.

Fraud - courts to adopt issue based approach to costs

Cheltenham Borough Council -v- Laird Court of Appeal
(4 February 2010)

A claim was brought for negligent misrepresentation against the defendant. When assessing costs the judge noted that this was a complex claim and that there had been a number of issues and sub-issues raised by the defendant, on many of which she had been unsuccessful, although she had been successful overall. The defendant was only awarded 65% of costs. The defendant appealed arguing that as fraud had been raised against it all costs should be recovered.

It was held that before the CPR was introduced in April 1999 the general rule was that if a party pleaded fraud and failed it was likely to have all the costs awarded against it. Under the CPR the court had to exercise its discretion in accordance with the rules and was obliged to take into account the circumstances of the case. There was no specific rule for fraud claims and CPR Rule 44.3(4)(b) applied permitting the court to adopt an issue based approach. The rules had to be applied to all cases where fraud was pleaded. It was held that the judge had made no error of principle and had taken into account the fact that the case involved fraud. He was entitled to take into account that the defendant had failed on a large number of points and that this should be reflected on assessment.

New motor claims process goes live

After numerous delays, renegotiations and teething problems the new motor claims process formulated by the Ministry of Justice went live at the end of April 2010. Critics are concerned that such is the state of the IT infrastructure that it may struggle with the amount of traffic received.

The new regime is intended to streamline low value claims for personal injury (£1000-£10,000) and provide fixed costs to claimant solicitors at various stages of the process. The key to the new process will be efficiency - strict timetables are applied and a failure to comply will lead to the claim falling out of the process. Many claimant solicitors will deliberately try to 'escape' the scheme as they can recover increased costs. The onus will be on defendants to fully cooperate and to make quick payments. We do have concerns as to what tactics less scrupulous claimant solicitors may employ even if payments are made on time.

One of the most interesting developments to the process comes when quantum cannot be agreed and matters are referred to the court. A claim form, the medical report and a stage 3 settlement pack are to be filed at court. As part of the process submissions on all heads of claim are to be filed and served, with best offers on quantum to be placed in a sealed envelope. Ordinarily there is to be a paper hearing but an oral hearing may be requested. If on paper the court will make its decision and notify the parties - after which damages and costs are awarded (subject to part 36 offers).



Small claims track costs awarded where case settled before allocation

O'Beirne -v- Hudson Court of Appeal (9 February 2010)

Following an RTA the claimant issued proceedings for general damages in excess of £1,000. Settlement was reached in the sum of £400 for general damages and £719.06 hire charges. The consent order provided that "the defendants do pay the claimant's reasonable costs and disbursements on the standard basis, to be subject to detailed assessment if not agreed". The defendant argued that had the case been allocated it would have been allocated to the small claims track and relied on the decision of the Court of Appeal in Voice & Script International Ltd -v- Alghafar that the costs recoverable should be small claims costs. The claimant argued that the consent order precluded the application of the small claims regime. The district judge agreed with the claimant, and the matter was appealed to Judge Stewart QC. The judge allowed the defendant's appeal on the basis that on assessment the district judge had not been precluded by the consent order from deciding whether or not the costs should be assessed by reference to the small claims track regime. The case was further appealed to the Court of Appeal. It was held there that there was a consent order providing for costs to be assessed on the standard basis and accordingly the costs judge was not therefore free to rule that the costs would be assessed on the small claims track basis.

The Court of Appeal did however rule that the costs judge was entitled to take account of all the circumstances, including the fact that the case would almost certainly be allocated to a small claims track. The costs judge would have had regard to what costs the small claims track would have awarded and that the settlement level of damages was a material circumstance in considering what costs should be payable. It was held that the costs judge should take account of the fact that the case should have been allocated to the small claims track. Provided on detailed assessment the court did not

purport to vary the order or to restrict itself to assessing by reference by the small claims track it was legitimate to give effect to the underlying philosophy of proportionality contained in Lownds -v- The Home Office.

Jackson's proposals for before the event (BTE) reform

Throughout the enquiry process Sir Rupert was impressed with the concept of BTE insurance. He has liked some of the European models, particularly in Germany where the sale of standalone BTE products is far more common than anywhere else. He recommends that BTE cover should be promoted and says that even where the scope of the cover (typically up to say £100,000) is limited it is at least better than nothing.

The biggest criticism of BTE cover at present is the use of BTE providers insisting on the use of panel solicitors with choice only being available once proceedings are issued. This can be several years after an initial instruction and frustrates litigants who wish to use their own choice of trusted and often more local legal representative. Jackson suggested that there be an amendment of regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 to allow greater freedom before proceedings are commenced.

Success stories

85% saving costs of assessment recovered

A robust and frank strategy in this case ultimately forced claimant solicitors to accept that both their costs were grossly excessive and that their conduct in the detailed assessment process was inappropriate. Costs were claimed at over £15,000 with the bill being originally submitted in 2007. Costs were eventually agreed at only £2,100 subject to an offset of £1,600 for defendant's application and detailed assessment costs. This resulted in a net payment of only £500 to claimant solicitors.



62% saving achieved

On a straightforward RTA claim which settled before trial for only £1,375 the claimant served a Schedule of Costs totalling £14,581.41 claiming a success fee of 100%, grade A rates for Manchester (despite it being a straightforward matter with the claimant residing in Bury) in addition to counsel's fees for trial. The claimant lowered their expectations to £8,500 however following a tough stance being maintained, the defendants received confirmation that the claimant accepted our offer of £5,500 which represents a saving of over 62% against the amount claimed.

Robust defence of bill results in good costs recovery

Two bills which totalled £26,847.65 and £18,633.02 were claimed from an unsuccessful claimant. Matters were fully contested and points of dispute totalling 52 pages were received. The matter was heard in the SCCO on 10 March 2010 where the amounts recovered to include costs of assessment/ interest on behalf of defendant clients amounted to £29,218.61 and £19,257.45.

Recent case law

Fattal -v- Walbrook Trustees (Jersey) Ltd (2009) [EWHC] 1674 (Ch) is a potentially very useful decision to be used against claimant solicitors and costs draftsmen who both overstate their costs by presenting exaggerated bills and by pursuing aggressive tactics. In the case it was held that where over 60% was disallowed from the bill on assessment it was reasonable to disallow costs of assessment. As a matter of policy Hill Dickinson's costs team has already starting raising the argument where such large arguments are achieved on negotiation.

Megantic Services Ltd -v- Dorsey and Whitney (2008) [EWHC] 2662(QB) The term 'partner' when applying to the signature of a bill was to be interpreted liberally, and the requirement was directory, not mandatory. This decision anticipated the amendment recently made to section 69 by the Legal Services Act 2008; the new subsection (2A) provides that a bill must be "signed by the solicitor or on his behalf by an employee of the solicitor authorised by him to sign".

Blackmore -v- Cummings (2009) [EWHC] June 10 2009 There is no legal presumption that a receiving party is entitled to an interim payment of costs. The district judge's decision to refuse an application for an interim costs certificate was upheld where an interim payment had previously been ordered and paid, the paying party was not impecunious and the receiving party had delayed the detailed assessment by 29 months.

Barr -v- Biffa Waste Services Ltd [EWHC] 1033 (TCC) Disclosure of an ATE policy may be ordered pre-trial if it is relevant to any issue that can only be determined pre-trial such as if a costs capping order should be made or a group litigation order. In the majority of cases the actual details of the ATE policy do not need to be provided, save for those details that must be provided on the notice of funding.

Oliver -v- Whipps Cross University Hospital NHS Trust [2009] EWHC 1104 (QB) It was held that solicitors are entitled to assess a single stage success fee for a clinical negligence claim at 100% if, on the basis of information supplied by the claimant at the outset, the claim might reasonably be assessed as having no more than a borderline prospect of success.

SCCO new listing procedures

Historically, if a matter was to be transferred to the senior courts costs office (SCCO), the relevant court would forward the detailed assessment documents on appropriately.

A change in costs practice direction 31.1A now means that if a detailed assessment is needed for a case conducted in any of the these courts:

- Barnet
- Bow
- Brentford
- Bromley
- Central London
- Clerkenwell
- Croydon
- Edmonton
- Ilford
- Kingston
- Lambeth
- Mayors and City of London
- Romford
- Shoreditch
- Uxbridge
- Wandsworth
- West London
- Willesden
- Woolwich

the application must be sent straight direct to the SCCO.

Contact

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

Paul Edwards
Head of Costs
paul.edwards@hilldickinson.com
+44 (0)151 242 3455

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