

LEGAL COSTS – 2011 AND BEYOND

What does the future hold for legal costs? It is a question that is receiving a lot of attention at the moment. Whilst 2010 saw the publication of Lord Justice Jackson's report on the future of [Civil Litigation Costs](#) and much comment and opinion thereon, it is 2011 which promises to be the year when its recommendations may actually start to come to fruition. The Government has already given the report its general approval and the period for interested parties to express their opinions in response to its Consultation Paper on implementation of the report's recommendations runs until the 14th February 2011. So what can we expect from the first tranche of reforms?

The main proposal relates to abolishing the recoverability, as part of between the parties costs, of success fees and After the Event (ATE) insurance policies – effectively returning personal injury funding back to the position before 1999, when a Claimant had to pay such additional costs from their recovered damages. To soften the blow of such a radical re-think, there is a proposal to increase general damages by 10%, to partially offset the additional costs to the Claimant, and limited one-way costs shifting, whereby a successful Defendant would not be able to recover their costs from the Claimant, a concession Defendants are happy to accept on the basis that they very rarely recover their costs in any event. Unsurprisingly, this proposal is widely supported, in the main, by Defendants and their insurers and, equally unsurprisingly, it is widely opposed by Claimant Solicitors, trade unions and claims management companies. The Defendant argument is, and always was, why should the Defendant have to pay higher costs just because the Claimant agrees a particular method of funding with their solicitor? That is a matter between a solicitor and their client and should not fall at the paying party's door. The Claimant's argument, by contrast, is that such a change would seriously limit access to justice. Simply put, in the absence of legal aid, Claimants of limited means will be deterred from pursuing a claim where they stand to lose a proportion of their damages to their own solicitors. 10 years of aggressive adverts guaranteeing 100% compensation have created a public expectation of personal injury solicitors' services being free, at least to the Claimant, and nothing seems less fair than being asked to pay for something that you are used to getting for free.

If recoverability of success fees and ATE premiums is the big issue in the consultation, conspicuous by their absence are referral fees and fixed costs. On the former, further research and analysis is promised and, in relation to the latter, the Government is adopting a 'wait and see' policy by reference to the new RTA Fixed Costs system. Despite the widespread belief that widening of fixed costs to cover all fast track claims would be the first big implementation post Jackson, the consultation confirms that there will be no changes in this area until at least April 2012 and, even then, only following further consultation. Assuming an average shelf life of 18 months for a fast track claim, any expansion of fixed costs is therefore unlikely to have any material effect until 2014 at the earliest and even that date is far from cast in stone. Remember that Lord Wolfe recommended fixed costs for all personal injury claims, and that was back in 1998.

So the battle lines are drawn regarding recoverability and it remains to be seen which side will prevail. An important factor in the final decision may be the benefit to the public purse of not having to pay success fees and ATE premiums on claims against the NHS, local authorities and other public sector bodies. In the same way that recoverability was initially introduced to save the public purse from the ever expanding costs of legally aid, the reversal of the policy may have more to do with public sector economics than jurisprudence.

Case Analysis – Campbell v MGN [2011] ECHR 66

In a case that may well prove to be the final nail in the coffin of recoverable success fees (see leading article), the European Court of Human Rights (EctHR) has held that the Mirror Group's right to freedom of expression under Article 10 of the European Convention of Human Rights was contravened by being ordered to pay a 100% success fee following a breach of privacy claim by the supermodel Naomi Campbell. Ms Campbell brought the claim following the publication of articles and pictures revealing that she had been visiting narcotics anonymous. The case went all the way to the House of Lords who held for the Claimant, by a majority of 3:2, and awarded damages of £3,500 together with costs. Bills of £400,000 and £100,000 for the first instance decision and Court of Appeal respectively were bad enough for the Defendant, but the House of Lords costs were nearly £600,000 and included a success fee of 95% on the solicitor's costs and 100% on Counsel's fees. Unsurprisingly, the Defendant baulked at having to pay a success fee, particularly given that Ms Campbell, it was argued, was not exactly impecunious and did not need the access to justice that success fees were introduced to permit. The House of Lords did not agree. They held that there was no means test in relation to a litigant's right to enter into a CFA and, therefore, in accordance with the ordinary rules, a success fee was payable. Not willing to let it lie there, the Defendant went to

the EctHR and they have held, after a close analysis of the competing interests of access to justice and freedom of expression, that the UK Government had breached the paper's human rights by creating a scheme that imposed a 100% success fee on them.

This case has created quite a buzz in the costs world. There is much hyperbole that the case means that all success fees will now be struck down by the Courts as infringing a Defendant's right to a fair trial under Article 6 of the European Convention of Human Rights. Whilst there is certainly an interesting argument to be made in this regard, the reality is that the Courts are still bound by the current authorities and success fees, whether one agrees with them or not, are, for the time being at least, still payable by losing Defendants. If cases do reach the Court of Appeal or House of Lords, it is reasonable to expect such arguments to be raised but, until such time as there is a higher Court consideration of the point, any rejoicing that success fees are now dead seems a little premature.

Case Law Update: Success Fees

The issue of what is a reasonable success fee for any given case is a very common argument in costs disputes. Three recent decisions highlight some of the important issues that can arise in this area:

Peacock v MGN Ltd [2010] EWHC 90174 (Costs) SCCO – Master Campbell

- A party who contends for a high success fee in a matter that has gone a long distance towards trial stands a better prospect of having that fee approved if a lower success fee would have been payable had the claim settled earlier. A party who enters into a CFA with an un-staged success fee which is payable at that level irrespective of whether the case settles quickly or slowly will find it more difficult to justify the fee.
- If the Claimant chooses a staged success fee, it is open to them to choose the date of staging. In particular, a stage 28 days after service of the defence was perfectly reasonable.

See also:

KU v Liverpool City Council [2005] EWCA Civ 475

McCarthy v Essex Rivers NHS Trust (13/11/09) QB (Lawtel 9.2.10) Mackay J

Barham v Barking Havering and Redbridge NHS Trust (15/6/07) Central London CC (Lawtel 24.9.07) Dean QC

Gandy v King (2010) (Lawtel 19.7.10)

SCCO - Master Haworth

- Where quantum of a minor's claim was agreed on the day of a trial and then approved by the Court at an Infant Approval Hearing, this was not a 'trial' for the purposes of determining whether a success fee of 100% applied. The hearing was a procedural matter to approve an agreement already reached.

See also:

Hosking v Smallshaw [2009] EWHC 90137 (Costs)

Dahele v Bates [2007] EWHC 90072 (Costs)

Cutler v JE Stephenson [2008] EWHC 3622 (QB)

Sitapura v Khan (10/12/07) Liverpool CC (Lawtel 3/3/08) Stewart QC

Styler v Ingham (31/7/08) Leeds CC (Lawtel 21.10.08) Spencer QC

Fortune v Roe [2010] EWHC 90180 (Costs)

SCCO – Master Campbell

- Where a CFA is taken out after judgement had been entered for the Claimant, a success fee on no more than 20% was reasonable, even taking into account the Claimant Solicitor's CFA putting them at risk in relation to any costs incurred after a successful Defendant Part 36 Offer

See also:

Haines v Sarnar [2005] EWHC 90009 (Costs)

C v W [2008] EWCA Civ 1459



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Legal Costs
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VAT Increase

With the increase in VAT to 20% from January 2011, arguments as to what VAT rate to apply to cases that include work done before that date are sure to arise. [Guidance from Her Majesty's Revenue and Customs \(HMRC\) \(June 2010\)](#) , provides that:

Section 9.5

If you are a solicitor most of your supplies are covered by the normal tax point rules including a tax point on completion of the work. Where you issue a VAT invoice or receive a payment on or after 4 January 2011 for work that was completed before 4 January 2011 you may use the special rules and account for VAT at 17.5% (see section 3.3). Where work commenced before 4 January 2011 but will not be completed until on or after 4 January 2011 you can apportion the supply between that liable to 17.5% and that liable to 20% (see section 3.4).

A Solicitor, therefore, has the option to charge the lower VAT rate for all work done prior to the change in VAT rate. The Costs Practice Direction confirms, at sections 5.7 and 5.8, that where a solicitor has the option to charge a lower VAT rate, this should ordinarily be used and any decision to the contrary must be justified to the Court.

In summary, therefore, even where a claim concludes in 2011, to include any costs agreement, any work done in 2010 should normally be charged at the lower VAT rate of 17.5%.

Provisional Assessment Pilot

From 1st October 2010, a pilot scheme for the provisional assessment of Bills of Costs will commence in Leeds, York and Scarborough County Courts. The details are set out in a new Practice Direction 51E but, in outline, for any Detailed Assessment commenced after this date, any Bill of Costs where base costs claimed (that is profit costs plus disbursement) are no more than £25,000 will normally be assessed by way of provisional assessment, that is without an oral hearing. Thereafter, following notification of the assessment, either party will have the option, within 21 days, to request an oral hearing, subject to important provisions regarding the costs of the hearing:

- If the receiving party requests the hearing, unless the costs are assessed at more than 120% of the provisional figure, costs will be awarded to the paying party.
- If the paying party requests the hearing, unless the costs are assessed at less than 80% of the provisional figure, costs will be awarded to the receiving party.

- Where both parties request the hearing, there will be no order for costs if the final figure is between 80% and 120% of the provisional figure. If the assessment is less than 80%, costs will go to the paying party and if the assessment is more than 120%, costs will go to the receiving party.

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