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Berrymans Lace Mawer

It is the new year and we have already dealt with a harsh winter with the promise of more to come. With this in mind a little good news is needed and this e-bulletin brings a mixed bag. The government's consultation on the implementations of Lord Justice Jackson's recommendations on costs will take up the early part of the year with lots to consider and debate. Lord Justice Jackson made some of his own views clear in the BLM case of *Pankhurst v White and MIB*. We look at this and other BLM success stories. Finally, we look at the thorny problem of valid Part 36 offers thanks to the case of *C v D1 and D2*.

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Policy and procedure

Proposal for Reform of Civil Litigation Funding and Costs in England and Wales

After some uncertainty, the government are consulting on Lord Justice Jackson's recommendations that featured in his Review of Civil Costs. It is clear from the consultation document that it is keen to press ahead with changes in this area as this potentially provides large savings to public bodies as well as the private sector. The main recommendations are:

- additional liabilities no longer recoverable between the parties
- general damages increased by 10% to compensate claimants for having to pay additional liabilities
- amending the Part 36 rules to bring back predictability
- the introduction of qualified one-way costs shifting
- a new test for proportionality
- contingency fees, or damages based agreements, to be allowed in civil litigation.

Whilst it is clear that there is political and judicial support for the reforms there are valid concerns about the impact the recommendations may have on access to justice.

The consultation closes on 14 February 2011 and a copy of the consultation paper can be found here http://www.official-documents.gov.uk/document/cm79/7947/7947.asp.

Pre-action disclosure costs

Sattar v Kirklees Council, Liverpool County Court, 14 October 2010

This is another common sense decision that is useful when dealing with pre-action disclosure applications.

A firm of solicitors acting for various claimants brought repeat pre-action disclosure applications against the council seeking costs. Six applications were grouped together and contested at a hearing. In all cases the council had been in breach of the protocol but this had been conceded and disclosure provided. The applications were effectively unopposed excluding costs. The claimants' costs for the six applications amounted to nearly £9,000. The council offered to agree no order as to costs in line with CPR 48.1(2) but this was not accepted.

The general rule in CPR 48.1(2) is costs should be awarded to the respondent to the application but the claimant argued that failure to comply with the protocol meant that costs should be awarded to them.

The court found although there was a breach, this had been accepted by the defendant and it had subsequently provided disclosure. The applications were not being opposed and there was no good reason to deviate from the general order. The appropriate order was no order as to costs but the council was awarded its costs of the contested hearing.

BLM success stories

Hobbs v SAPA Ltd

This case acts as a reminder to check the contents of the bill of costs thoroughly. The claimant's bill totalled £23,769.39. On investigation there were numerous errors within the bill. Over 16 hours of time had been claimed twice. The narrative quoted a rate of £105 but costs had been calculated at £180 per hour. Also, a claim for a fourth stage premium of £4,830 was included when the matter had only reached stage three. Once these errors were pointed out the claimant accepted £12,800 in full and final settlement rather than risk taking the matter to detailed assessment.

Sheikh v B&Q PLC

The defendant successfully resisted a relief from sanctions application as the claimant had failed to service of Notice of Funding during proceedings. The claimant had instructed three separate solicitors during the life of the claim. The first solicitor did not have to provide Notice of Funding as their conduct was pre-proceedings, but the second and third solicitors should have done, and did not. The Notice was only served by the costs draftsman when they served the Notice of Commencement. Despite the fact that they were aware that this was too late the application for relief was not made for a further two months after this date. The court found that there was no good explanation for the failure and relief was not granted. Accordingly the claimant could not recover a success fee.

Jones v Jarmusz

The claim involved an RTA and was on behalf of the driver and four passengers. The claimant's solicitors issued five separate sets of proceedings at the same time despite liability not being in issue and the court later consolidated the same with an order that the wasted costs were paid by the claimant to the defendant. Costs were claimed in the sum of £48,274.34.

The costs claimed included a 100% success fee as an infant approval had been required for one of the claimants. The claimants' representative accepted that this was not a contested hearing and reduced this to 12.5%. Further, there were claims for five particulars of claim despite the fact that the defendant had been awarded the wasted costs of issuing unnecessary proceedings. Costs were agreed at £21,500.

Case law

Pankhurst v White and MIB

The claimant, Mr Pankhurst, was catastrophically injured by an uninsured driver. In September 2005 he obtained summary judgment against the MIB. After this he entered into a Conditional Fee Agreement (CFA) with his solicitors. Which had a two stage success fee of 22.5% if the matter settled before trial and 100% if the matter progressed to trial, this included a 10% postponement element.

The issue of his contributory negligence remained in dispute. The claimant made an offer of £3.4 million to settle by way of Part 36, as a lump sum or a smaller capital amount and periodical payments for an equal value. This was not accepted and at the contributory negligence trial the claimant was successful being awarded damages to be assessed on a full liability basis.

Before the quantum trial the defendant made a Part 36 offer of a £3 million lump sum plus £260,000 per annum as a periodical payment. While periodical payments were agreed, the lump sum remained in dispute.

In June 2008 Mr Justice MacDuff considered the point at trial. He awarded a lump sum of £2,317,612 of which £225,000 was for general damages, special damages were assessed at £884,771 and damages for future losses awarded of £1,207.841. The total award, including the capitalised periodical payment, exceeded £6 million. Both parties had bettered their own part 36 offers. The claimant was ordered to pay the defendant's costs from the last date their offer could be accepted, and was awarded his costs up until that date. A proportion of these costs would be assessed on the indemnity basis. The claimant was awarded enhanced interest on general and special damages but was not allowed enhanced interest on future losses and costs.

The claimant believed that enhanced interest on costs and future losses should have been awarded and appeal these parts of the order. This was heard by Lord Justice Jackson, Lord Justice Leveson and the Chancellor of the High Court, Sir Andrew Morritt.

The claimant argued that the new rule 36.14 and CPR 36.2A was specifically worded so that the general indemnity provisions in 36.14(3) would apply and he should therefore be entitled to interest on the whole sum, including a capitalised amount for periodical payments at a figure not exceeding 10%. The claimant's main point on appeal was the perceived unfairness of Part 36 rules to any injured party claiming an ongoing loss. If the court could not award enhanced interest on those losses in appropriate circumstances then arguably there would be little point in an injured party making a Part 36 offer for this aspect of the claim. Further, the significant imbalance in the Part 36 rules was evidenced by the claimant failing to recover the costs of the quantum trial yet being responsible for the defendant's costs; in effect a double penalty. The claimant sought to distinguish the libel decision of *McPhilemy v Times Newspapers* (1999) and argue that the revised rules now allow the court to make an award for enhanced interest on future loss.

The defendant disagreed, arguing that the test in *McPhilemy* survives and that enhanced interest under CPR Part 36 can only be awarded on items that already merit some award of interest. The defendant contended that if the rules are perceived to be wrong it is not the court's job to change them, simply apply them as they are. Furthermore, the claimant's contention that he would be directly out of pocket for the defendant's costs was not correct. The defendant, as part of the costs order, was liable for a substantial after the event insurance premium which ultimately offset any such liability. There was therefore no prejudice suffered by the claimant as a result of failing to beat the defendant's offer.

Rejecting the claimant's arguments, the Court of Appeal agreed that it was bound by *McPhilemy*. Further, when a claimant has the benefit of an ATE premium, Jackson LJ ruled that it may distort the normal operation of Part 36.

The second limb of the appeal concerned the application of enhanced interest on indemnity costs and the effect of a success fee in those circumstances. A success fee of 90% was originally claimed between the parties. Following negotiations this the claimant had reduced the amount claimed but the success fee still totalled over £100,000. It came to light during the hearing that despite the claimant's solicitors recovering a success fee, the claimant had paid nearly £100,000 to his solicitors in unrecovered costs and for the postponement element of his success fee.

In perhaps one of the most compelling sections of his judgment, Lord Justice Jackson described the funding arrangements put in place by the claimant's solicitors as a "mockery of what is said to be justification for the present conditional fee agreement regime" and "grotesque". Ultimately the Court of Appeal agreed with the trial judge's reasoning and added that given the further information in respect of costs that had been disclosed, any award of indemnity interest on costs would be unjust.

C v (1) D and (2) D

The claimant sought a declaration that an offer purported to have been made under CPR Part 36 to settle an action against the defendants was no longer open and had not already been accepted. The claimant had brought a claim for breach of contract and made an offer headed 'offer to settle under CPR Part 36', which stated that the offer was open for 21 days from the date of the letter and set out the costs consequences of failure to accept the offer within the 21 days. Almost a year later, shortly before trial, the defendant accepted the offer. The issue was whether the reference to the 21 day period for acceptance created a time limited offer and, if so, whether this constituted a Part 36 offer. The defendant contended that, under rule 36.9(2) a Part 36 offer was capable of being accepted at any point unless it was withdrawn there and a time-limited offer was not a Part 36 offer.

The court found that as in *Gibbon v Manchester City Council (2010) EWCA Civ 726*, Part 36 was a self-contained code. The reference in claimant's letter to the offer being open for 21 days constituted a time-limited offer but the letter had to be considered as a whole and against the background of Part 36. It was a requirement of part 36.2(2)(c) that a 'relevant period' had to be specified stating the party making the offer would be responsible for their opponent's costs. The letter had been intended as a part 36 offer but the person drafting the offer had failed to distinguish between the time for acceptance of an offer and the relevant period.

Restricting the acceptance period to 21 days automatically restricted the relevant period. It did not appear that the person drafting the offer had envisaged the possibility of an acceptance after that period. This meant that it was not a Part 36 offer but was a valid time-limited offer. The offer had not been open for acceptance when the defendant purported to accept it and had not been accepted.

Carlon v Domino's Pizza Group Ltd

The claimant was an infant. Damages were agreed at £3,950 and listed for an infant approval hearing. The claimant argued that the matter fell out of the fixed recoverable costs regime as there were exceptional circumstances. The claimant had been knocked over on a zebra crossing and the driver had failed to stop. She suffered orthopaedic and psychological injuries including post-traumatic stress disorder and phobic anxiety about pedestrian travel. The parties agreed that the injuries alone did not amount to exceptional circumstances. These circumstances arose when a consultation psychologist was instructed to advise whether there was a link between the accident and the claimant's anorexia nervosa which began nice months after the accident. He suggested that the claimant's treating psychiatrist be approached and he reported that it was possible that there was acceleration but could not be precise. The claimant's condition was so severe that she was treated as an in-patient for several months.

The court found that this amounted to exceptional circumstance. As the claimant was an infant the link between her illness and the accident must be investigated if she was to be properly represented. Costs were awarded on the standard basis.

BLM costs teams

BLM have costs teams in Birmingham, Manchester, Liverpool, London and Southampton. If you have any queries about costs please contact your local department who will be happy to help.

If you have any further questions on the content, please contact the editor.

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