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The Cost of Change: Reforms to Civil Litigation Costs and Funding in England and Wales

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Publication Date: April 05, 2011

Introduction

On Tuesday 29 March 2011 the Rt Hon Kenneth Clarke QC MP published the Government's proposals for the legislative reform of the current costs and funding system for civil litigation in England and Wales.

The proposals follow Lord Justice Jackson's year long review of the system, which was published in January last year. These proposals are the product of a consultation process which began in November 2010 whereby the Government posed 60 questions concerning Lord Justice Jackson's recommendations for reform. These questions produced 600 formal responses from a wide range of stakeholders including the legal sector, the insurance industry, the media and public bodies. A summary of these responses is included in the proposal document. The Government proposals reflect Lord Justice Jackson's view that the current costs system has lost sight of proportionality and accordingly the proposals implement his recommendations more or less intact.

Key Changes

The proposals largely affect personal injury, clinical negligence cases and lower value claims, which are not the focus of this article. However, the proposals concerning Part 36 offers and the introduction of damages-based agreements particularly will impact on commercial litigation and going forward should be borne in mind by client and lawyer alike.

The key changes are as follows:

— the amendment of Part 36 of the CPR on offers to settle to equalise the incentives between claimants and defendants to make and accept reasonable offers;

- the removal of restrictions on contingency fees or "damages-based agreements" (DBAs);
- the abolition of the general recoverability of the CFA success fee from the losing side;
- the abolition of the general recoverability of after the event (ATE) insurance premiums;
- 10% increase in non-pecuniary general damages in all tort cases, including defamation proceedings;
- qualified one way costs shifting in personal injury cases; and
- an explicit proportionality test for costs assessment.

Part 36 Offers

The proposals introduce two changes in an effort to equalise incentives between claimants and defendants to make and accept reasonable offers:

- A defendant that does not beat a claimant's Part 36 offer is already liable to pay the claimant's costs on the indemnity basis and interest on those costs and damages awarded at a rate of up to 10% above base rate. Now, an additional costs sanction of 10% of the value of the claim will be paid by defendants who do not accept a claimant's Part 36 offer that is not beaten at trial. The Government will explore an alternative sanction (linked to costs rather than damages) for claims where a remedy other than damages is sought.
- If a money offer is beaten at trial, even by a small margin, the costs sanctions under Part 36 will apply. This reform reverses the uncertainty introduced by the *Carver* case, where the court determined that all the circumstances of the case, rather than simply a bottom line figure, should be taken into account when deciding whether the judgment was "more advantageous" than the other party's Part 36 offer.

Removal of Restrictions on Contingency Fees or DBAs

DBAs are a variation on CFAs, but the lawyer's fee is calculated by reference to the damages awarded, rather than the work done. This is the first time that a lawyer will be allowed to take a proportion of a client's damages in payment of their fees. Successful claimants will recover their base costs (the lawyer's hourly rate fee and disbursements) from defendants as with claims

funded under a CFA or otherwise, but in the case of a DBA the costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the claimant to any shortfall between the costs recovered and the DBA fee. In personal injury cases DBAs will be subject to a cap of 25% of damages (excluding for future care and loss). In all other cases no cap will apply.

CFAs, Success Fees and ATE Premiums

CFAs were introduced to promote access for justice to all claimants, regardless of their means. However, the reality of the current "no win no fee" model in which a success fee, of up to 100% of the claimant's costs incurred, is borne by the defendant, has meant risk free litigation for claimants and the threat of excessive and disproportionate costs for an unsuccessful defendant.

The proposals put an end to success fees and ATE premiums being recoverable from the unsuccessful party. Instead, if a success fee is charged by a legal representative, this will now have to be paid out of the successful party's damages. However, success fees will remain chargeable at 100%, in all but personal injury cases, in spite of calls for a cap. The Government is hopeful that these reforms will incentivise claimants to keep a check on costs and reverse what has been described as the "chilling" increase in cases which are settled at the early stages by defendants to avoid paying excessive fees, regardless of the merits of the claim.

10% Uplift in Non-Pecuniary Damages for Tort Claims

Non-pecuniary general damages such as pain, suffering and loss of amenity will be increased by 10%. The motivation for this is to assist successful claimants to meet the success fee and ATE premiums that will no longer be recoverable from the losing party so that a claimant's net damages remain, in practice, more or less at current levels. Whilst this proposal is aimed in the main at personal injury and clinical negligence cases it will apply to all cases including defamation. It remains to be seen whether this proposal will translate into an actual 10% uplift in the damages awarded in practice.

Qualified one way costs shifting (QOCS)

Under these proposals an individual claimant will not be at risk of paying the defendant's costs should the claim fail (except in limited prescribed circumstances), but the defendant would have to pay the claimant's costs should the claim succeed. The exceptions will be: (i) on behaviour

grounds - where the claimant has acted fraudulently, frivolously or unreasonably in pursuing proceedings - so a reasonable claimant will not be at risk of paying the other side's costs on behaviour grounds; and (ii) on financial means grounds - only the very wealthy would be at risk of paying any costs.

QOCS will not be extended beyond personal injury at this stage, so the normal costs shifting rules will continue to apply in other cases.

Proportionality Test for Costs Assessment

The rules on costs already refer to proportionality. However, currently costs that are thought to be disproportionate are nonetheless recoverable if deemed reasonable and necessary. It appears to be the intention now that proportionality will prevail and be the yardstick by which it is decided what amount of its costs a winning party is entitled to recover. Even where costs are deemed reasonable and necessary, they will not be recoverable unless they are proportionate; that is they bear a reasonable relationship to:

- the sums in issue;
- the value to the claimant of any non-monetary relief;
- the complexity of the litigation;
- additional work generated by the conduct of the paying party; and
- wider factors involved such as reputation or issues of public importance.

This signals a stricter approach to costs control, which will be present throughout the litigation process, from the pre-action stage to trial. Judges will also expect parties to exchange detailed and accurate costs estimates at frequent stages in the case.

When are these proposals likely to be implemented?

The changes contained in the proposals will involve not only the creation and passing of primary legislation, but also involve the repeal of various parts of the 1999 Access to Justice Act. This process will not be swift. However, the opposition and the judiciary will likely have no real objection to the proposals and so the passage of the legislation should, in the main, be smooth. Accordingly it is anticipated that the proposals should be in force by Autumn 2012.

In spite of the time lag of 18 months we are being advised that judges will expect parties to be mindful of the proposals and behave accordingly from today. Little sympathy will be given to parties arriving at trial next autumn who have taken no notice of the proposals and proffer the excuse, "Our case began before the proposals were in force". These changes have been seen and heard a long way off, so the advice is to adhere to the spirit of them now.

About Reed Smith

Reed Smith is a global relationship law firm with more than 1,600 lawyers in 23 offices throughout the United States, Europe, Asia and the Middle East.

This Client Alert was compiled up to and including April 2011.