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LORD JUSTICE JACKSON'S PAPER FOR THE CIVIL JUSTICE COUNCIL WORKSHOP ON "TECHNICAL ASPECTS OF IMPLEMENTATION"

THIRD LECTURE IN THE IMPLEMENTATION PROGRAMME

31 OCTOBER 2011

"Cultivate simplicity, Coleridge."[1]

1. INTRODUCTION

1.1 Today's workshop. The Civil Justice Council is today holding a workshop on four technical aspects of implementing the Civil Litigation Costs Review Final Report ("FR"), namely: proportionality, Part 36, qualified one-way costs shifting and the 25% cap.

1.2 This lecture. This lecture sets out my brief comments on issues raised in the workshop materials. I use the following abbreviations:
"C" and "D" mean claimant and defendant.
"J" means a costs judge or district judge or costs officer who is assessing a bill of costs.
"QOCS" means qualified one-way costs shifting.

1.3 General point. No procedural code can achieve in every case the twin objectives of perfect justice and certainty of outcome. Despite all the arguments and attacks which have been directed at me over the last two years, I remain of the opinion that the FR proposals represent a balanced package and the best way forward, given the position from which we are starting. Any attempt to unpick that package distorts the balance and has knock-on consequences.

2. PROPORTIONALITY

2.1 No need for elaborate practice direction. The proposed proportionality rule is set out in FR chapter 3 para 5.15. Subject to any drafting improvements which may be made by the Rule Committee, the rule is sufficiently clear. Apart from making the amendments to the Costs Practice Direction proposed in chapter 3 paras 5.22 to 5.23 (which result in overall shortening) there is no need for any further practice direction.

2.2 Operation of the proportionality rule. The rule will have to be applied in a number of different situations. There will be cases in which it is obvious at the outset that the costs claimed are proportionate. In such cases the only issue to consider under rule 44.4 is the reasonableness of individual items. There will be cases where it is obvious at the outset that the costs claimed are disproportionate. J will have to consider the reasonableness of each item in the bill. He will also have to consider how to reduce the bill to a proportionate level.

[1] Charles Lamb's advice to Samuel Taylor Coleridge in 1796

He may do this by reducing particular items or by reducing the overall total in order to achieve proportionality. There will be borderline cases where it is unclear whether the bill is disproportionate until after J has dealt with the reasonableness of individual items. J should not be constrained by a practice direction to approach his task in a particular way. One size does not fit all.

2.3 Satellite litigation. Any major civil justice reform is followed by litigation in which parties test the boundaries of the new rule. A few robust Court of Appeal decisions are needed to deal with the points raised. If the rule is supplemented by an elaborate practice direction, opportunities for satellite litigation will increase exponentially, as practitioners explore the relationship between the provisions, possible interstices in the language and so forth. One lesson from the Costs War is that lawyers leave no stone unturned when it comes to arguing about costs.

2.4 Rarity. There is comment in the workshop materials that the proportionality rule will rarely lead to cutting down costs. I only agree with this comment if all the other FR recommendations are implemented: fixed costs across the whole fast track; effective costs management in the multi-track; ending recoverable success fees and ATE premiums; etc. If the rest of the FR package is not implemented, the proportionality rule will bite more often.

2.5 Costs Practice Direction. The Cost Practice Direction is currently too long and complex. The Senior Costs Judge and I hope to put before the Rule Committee proposals to shorten and simplify it, once the main reforms have been finally approved.

3. PART 36

3.1 Claimant's reward for effective Part 36 offer. It is an integral part of the package which I have recommended that the claimant's reward should be a percentage of damages, not a percentage of costs. This is a reward which should go to the claimant, not his lawyers. Any percentage addition to recoverable costs has a perverse incentive and tends to drive up costs (as Professor Chalkley pointed out at the recent CLAF seminar).[2] The current Bill contains a provision which will enable the claimant's reward to be an addition to damages.

3.2 Personal injury cases where C makes an effective Part 36 offer. In personal injury cases C will lose up to 25% of his damages (excluding damages referable to future losses) in the success fee which he must pay to his solicitor. C will be assisted in paying this sum this by means of (a) a 10% uplift on general damages + (b) an uplift of 10% on the total damages as a reward for his effective Part 36 offer.

3.3 Don't pull the package apart. The package of FR reforms is intended to remove the current perverse incentives, to provide protection for both parties and to encourage reasonable litigation behaviour. The proposed tapering means that C's maximum Part 36 reward will be £75,000. This strikes a proper balance between the competing policy objectives and should apply in all categories of litigation. Part 36 should not be complicated by incorporating different rules for PI and non-PI cases.

3.4 Claims for non-monetary relief. It has been suggested that the 10% uplift on damages is not appropriate in claims for non-monetary relief, because of the difficulty of putting a value on the claim. I disagree. District judges have no difficulty in valuing claims every day of the week for the purpose of allocation to tracks. Moreover, according to my sources, the German courts are able to make reasonable evaluation of non-monetary claims for the purpose of

[2] See http://www.judiciary.gov.uk/media/speeches/2011/lj-jackson-speech-contingency-legal-aid-fund at para 2.7

assessing costs under the *Gerichtskostengesetz* (Court Fees Act). Furthermore, perfection is not essential. Under my proposals C is only getting 10% of the valuation figure (or 5% on value over £500,000) subject to an overall cap of £75,000. There are many situations in which an element of rough justice is the best approach (e.g. summary assessment of costs at the end of a one day trial) and this is one of those situations.

3.5 Late acceptance of claimant offers. It is pointed out in the workshop materials that there is no penalty for late acceptance of claimant offers. I can see the good sense of (a) imposing a permission requirement for late acceptance and/or (b) awarding a proportion of the 10% damages uplift, depending upon the stage at which the offer is accepted. This provision need not be unduly complicated. It could be included in a re-write of Part 36. Part 36 is somewhat convoluted and I would be happy to assist with re-drafting Part 36 as part of the FR implementation programme.

4. QUALIFIED ONE WAY COSTS SHIFTING

4.1 Extent of QOCS. The Government intends to introduce QOCS for personal injury litigation in the first instance and then to consider extending QOCS later. I hope that QOCS will be extended in the manner recommended in the FR, but that is not on the agenda for today's workshop.

4.2 Interaction with Part 36. If C recovers a lesser amount of damages than D had previously offered to pay under Part 36, the starting point is that D pays C's pre-offer costs and C pays D's post-offer costs. However, C's costs liability will be constrained by the QOCS rule. The court will only order C to pay such sum in costs as is reasonable, having regard to all the circumstances including (a) C's financial resources and (b) the parties' conduct. C's financial resources will have been augmented by the award of damages and C's conduct will have been unreasonable in that he rejected a sufficient offer. The judge will therefore order C to pay either all or part of D's post-offer costs, depending on the circumstances.

4.3 What conduct will deprive C of costs protection? This issue is discussed in the workshop materials. I agree that if C's claim is fraudulent or is struck out as abuse of process, C should forfeit costs protection. However, I do not believe that either litigants or the court would be assisted by a practice direction which gives guidance on borderline cases. Any such guidance is likely to generate increased satellite litigation, for the reasons set out in para 2.3 above. There is a whole Costs Bar out there,[3] just waiting to sink its teeth into the new provisions.

4.5 Claimant's means. If an unsuccessful claimant has BTE cover from an insurer or a union there is no reason why he should not be ordered to pay costs up to the limit of his cover. BTE insurers have always been liable for adverse costs. Trade unions were funding litigation and meeting the occasional order for adverse costs long before the introduction of the present CFA regime. There is no reason why these bodies should suddenly be let off the hook. The reality is that the great majority of cases which trade unions or BTE insurers fund are successful. They get costs when they win. They should pay costs when they lose.

4.6 When should the claimant's means be assessed? I suggest that this is only done if and when an order for costs is made against C. Such an order is made in a very small proportion of personal injury cases. It is wasteful of time and resources to carry out an unnecessary enquiry in all the other cases. If at the end of a trial C[4] loses and is ordered to pay costs the judge could (a) make a modest (usually very modest) order against C there and then on a summary basis or (b) refer the matter to a costs judge to make an assessment of what C

[3] Established a few years ago in order to fight the Costs War: see Preliminary Report chapter 3.
[4] Not being supported by BTE insurance or a trade union

should pay.[5] In most cases it will not be worth D's while to seek such an assessment. Since D almost inevitably faces a shortfall in costs recovery (that being the whole purpose of QOCS), in practice he will not recover his costs of the assessment proceedings. It may be sensible to add a provision that unless D recovers a sum which is 20% or more higher than the summary assessment indicated by the judge, D must pay C's costs of the assessment proceedings.[6]

5. THE 25% CAP

5.1 The *Ancien Régime.* The 25% cap worked satisfactorily pre-April 2000. It was fair to both litigants and lawyers and did not generate complaint on either side. See Preliminary Report, chapter 16, paras 3.1 to 3.2.

5.2 The future. The 25% cap should work even more satisfactorily under the FR reforms since (a) general damages will be increased by 10% across the board and (b) C may achieve a further damages increase by an effective Part 36 offer.

5.3 What the 25% cap should cover. In my view this should be an overall cap, including VAT. I can see a case for regulations permitting a limited departure in appropriate cases, as has been suggested. Indeed that might be said to replicate the pre-April 2000 arrangements, under which the 25% cap was a guideline which permitted limited exceptions in appropriate cases.

Rupert Jackson 31st October 2011

[5] The judge already has this choice in legal aid cases.

[6] This would be consistent with the approach to provisional assessment which is being piloted in the Leeds, Scarborough and York County Courts. In the first year of the pilot there have been 88 cases provisionally assessed on paper and only 8 requests for an oral hearing. This indicates that in 90% of the cases neither party fancied its chances of achieving a 20% improvement on the initial figure.