



Hailsham Chambers Annual Costs Group Seminar

Wednesday 17th & Wednesday 24th June 2009

Andrew Post

“Yet another round in the costs wars”

CFA Update 2009

Andrew Post

CFA Update 2009

- Compliance with Regulations: ALP and a couple of other useful cases
- Level of success fees
- The Cancellation of Contracts Regulations
- Capacity and CFAs
- Liability under unlawful CFAs
- CFAs and costs caps

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Compliance with Regulations I

- Tankard v John Fredericks – the ALP appeals
- Referral schemes under attack after Garrett
- ALP vulnerable
- Court of Appeal's decision: declarable interest restricted

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Compliance with Regulations II

- Cases on other referral schemes; the courts will not be as sympathetic as to ALP:
- See Findlay and Ibberston
- But remember that paying party will require evidence to establish breach:
Overton

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Compliance with Regulations III

- Bray Walker v Silvera: unusual CFA case between solicitors and client
- Extent of duty under regulations 3(1)(a) – what detail is needed for reasons
- Regulation 4(2)(a): duty to explain definition of success

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Compliance with Regulations IV

- Ford v Birmingham
- Terms may be found outside the agreement
- Retrospective CFA with success fee may be permissible
- No quantum meruit where agreement fails

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Level of success fees

- C v W assessment of success fee where liability is not in issue
- Success fee where CFA is entered into before any investigation into the merits:
Oliver v Whipps Cross

A new headache

- Cancellation of Contracts Regulations 2008
- In force from 1 October 2008
- Apply to contracts made at consumer's home or place of work
- Written notice of right to cancel required
- Failure means contract is unenforceable and contractor is guilty of an offence

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Miscellaneous CFA points

- Capacity and CFAs: Findley v MIB
- Liability to repay disbursements: Tandara v Weightmans
- Costs caps and CFAs: R (Buglife) v Thurrock

The Jackson Review: The Future?

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*Hailsham Chambers Annual Costs
Seminar June 2009*

The Jackson Review

- **Costs Shifting:**
- i.e. the rule that the loser pays the winner's costs.
- Three options...

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Costs Shifting

- (1) **Abolition**: no costs rules operate in the Employment tribunal, the Small Claims track etc. Extend this?
- No support as yet: costs shifting seen by most as fundamentally just.

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Costs Shifting

(2) **One-way costs shifting** in favour of claimants?

- i.e. If the Claimant succeeds he/she get their costs; if the Defendant succeeds, no order for costs.
- Unfair? Not necessarily so: look at ATE premiums Defendants are paying for the privilege of their right to costs.

Costs Shifting

- (c) **Partial costs shifting** only?
- i.e. If one party succeeds, obtains a small fixed sum for costs which does not pretend to represent the actual cost.
- Avoids disproportionate costs, no satellite litigation but shortfall has to be paid for.

Fixed Costs

- Is there a case for substantially widening the regime of fixed costs in CPR 45?
- Two main types of fixed costs:
- (1) **Real costs**: e.g. that in Parts 2, 3, 4 and 5 of CPR 45, worked out on extensive evidence as to what it really costs

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Fixed Costs

- **(2) Partial costs shifting:** i.e. a fixed sum everyone knows to be an underestimate of what it actually costs:
- e.g. Part 1 of CPR 45, the German system etc.
- In any event, is it possible to work out what it actually costs?

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Fixed Costs

- Extension fast track from £15,000 to £25,000: time to implement Lord Woolf's plan for fixed fast track costs?

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Extending fixed costs?

- Should it be extended to business disputes up to £250,000 damages?
- Advantages:
 - (1) Proportionate costs
 - (2) No satellite litigation on costs;
 - (3) Putting the parties on an equal footing.

Extending Fixed Costs?

- But would it be
- (1) just and
- (2) give access to justice?

Personal Injury

- The heart of the costs war.
- Are PI damages sacrosanct?
- Can it ever be right that a claimant loses part of their damages in paying his/her own solicitors' costs which were not recovered from the other side?

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Personal Injury

- But is the “*no risk*” litigation culture a good thing?
- See the House of Lords in *Callery*.
- What are the incentives to keep down costs if the Claimant never has to pay any?

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Personal Injury – options for change

- U.S. Style Contingency Fees: i.e. the lawyer charges a percentages of the damages.
- Advantages:
 - (1) Proportionate costs;
 - (2) No satellite litigation over costs.

Contingency Fees

- But would you have to abolish costs shifting? See the Canadian system.
- Access to justice for lower value cases?
- And would you have to increase general damages to cover the irrecoverable costs?

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Contingency Legal Aid Fund?

- **CLAFs:**
- Schemes where successful claimants pay part of their damages into a fund which pays the lawyers for losing cases.
- Is that objectionable in principle?
- Or does it ensure proportionate costs without the need for success fees?

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Before the event vs After the Event

- 2 types of BTE:
- (1) “**BTE 1**” – the traditional model where the insurers pay the solicitors to act for the insured on a paid win or lose basis
- (2) “**BTE 2**” – where insurers “sell” to solicitors claims in return for referral fees and the claims proceed on a CFA/CCFA

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BTE – is it the answer?

- **BTE 1** is favoured, **BTE 2** is not.
- The advantages of **BTE 1**:
 - (1) Reduces costs because the insurer has an incentive to keep costs down;
 - (2) Reduces costs as no success fee or ATE;
 - (3) The many pay a little for the few.

Compulsory BTE?

- How do you go about it?
- Easier said than done...

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ATE

- Perceived disadvantages:
- (1) The insurer has no control over costs;
- (2) The size of the premiums can be prohibitive;
- (3) The courts are held to ransom by the premiums: see *Rogers v Merthyr Tydfil*
- But do they serve a real interest in access to justice?

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Group Actions

- Problems:
- (1) Funding: expensive and public funding disappearing;
- (2) High costs faced by Defendants
- Sir Rupert's proposed solution....

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Group Actions

- **Abolish** costs shifting in group actions.
- But how does that help access to justice, particularly in the lower value claims?
- And what are the disincentives to bring speculative claims and/or poor conduct?

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Main Action Court Procedure

- Wider brief than just CPR 43-48.
- **Disclosure:** obligation in England and Wales to disclose unfavourable documents unusual in other jurisdictions.
- Abolish that rule?

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Expert Evidence

- (1) Sequential exchange of reports?
- (2) Presumption that all quantum experts would be joint?
- (3) “Hot tub” expert evidence?

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Recovery of Additional Liabilities

- CFAs look to be here to stay:
- “*absorbed into our litigation culture*” over the past 14 years.
- But was **recoverability** in 2000 a disaster? Unusual if not unprecedented.
- Would abolition of recovery bring back market forces on costs?

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Abolition of Recoverability?

- But the same problems arise: will abolition reduce access to justice?
- Will it make litigation once again the preserve of the very poor and the very rich?
- What will replace it?

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Costs Capping and Costs Management

- New rules on **costs capping**: CPR 44.18 to 44.20:
- Only cap in “*exceptional circumstances*”
- Sir Rupert agrees:
- “*Costs capping must not be used as a shortcut or treated as a sword to cut through the Gordian knot of civil costs.*”

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Costs Management Instead

- **BUT:**
- Litigation is like a project to be managed:
- The Court sets the budget for each party at each stage:

Costs Management

- *“So when giving directions for disclosure...etc the court would attach a price tag to each activity. These price tags could either be agreed by the parties or fixed by the court after agreement. The maximum recoverable cost of each stage of the litigation would be that specified by the court in advance.”*

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Costs Management

- Perceived advantages:
 - (1) Each party would have **certainty** about the extent of its costs liabilities if it loses;
 - (2) The parties and the lawyers would have an **incentive** to keep the costs down at each stage.

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Costs Management

- But are the Judges equipped to do this?
- And will it not just generate more satellite litigation?

- Sir Rupert says that its OK because Judges decide things they know little about all the time.

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Hourly Rates

- (1) How is the solicitor's hourly rate to be calculated? With the abolition of the A+B method, it has become “anything goes”.
- (2) Why are defendants' hourly rates so much less than the guideline rates/claimants' rates?

Hourly rates

- But the Advisory Committee on Civil Costs headed by Professor Nickell was appointed to look into hourly rates in 2007: 2008 survey of what solicitors charge informed the 2009 guideline rates.
- Will Sir Rupert step on the professor's shoes? Watch this space...

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Assessment of Costs

- Summary assessment:
- (1) Carried out by judges with little knowledge of the subject matter;
- (2) On the basis of limited information;
- (3) In a rush at the end of the hearing.

Summary Assessment

- More sparing and focussed use of summary assessment?
- Higher payments on account of costs instead?

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Detailed Assessment

- (1) Too expensive
- (2) Old fashioned (e.g. Form of bill, lack of electronic transfer)
- (3) Fails to achieve fairness in costs:
Perception:
 - if you charge unreasonably high figures, you will get more than if you charged reasonable figures in the first place.

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Detailed Assessment: Solutions?

- Cut down on Points of Dispute?
- Provisional Assessment?
- Spared down broad brush half-way house between summary and detailed assessment?

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Make your voice heard!

- Sir Rupert is very willing to hear from everyone with an interest:
- Get your views in by the end of July.

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Costs Caps, Protective Costs Orders and Estimates

Hailsham Chambers Costs
Group Seminar

Joshua Munro & Jamie Carpenter

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Costs Caps – The Story So Far (1)

- The theory
 - Jefferson v National Freight Carriers [2001] 2 Costs LR 313
- The power
 - S. 51 Supreme Court Act 1981
 - CPR 3.1(2)(m)
 - AB & Ors – Nationwide Organ Group Litigation [2003] EWHC 1034
 - King v. Telegraph Group Limited [2005] 1 WLR 2282

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Costs Caps – The Story So Far (2)

- Two rival Judge-made approaches:
 - Smart v East Cheshire NHS Trust [2003] EWHC 2806
 - Gage J
 - Restrictive approach
 - Sheppard v Essex SHA [2005] EWHC 1518 (QB)
 - Hallett J
 - Liberal approach
- All bets are off
 - Willis v Nicolson [2007] EWCA Civ 199

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Costs Caps – The New Rules (1)

- CPR 44.18-20 & CPD s. 23A
- Essentially the smart approach
- Only in “exceptional circumstances”
- List of factors to take into account (44.18(6))
 - Includes whether costs of determining cap proportionate, stage of proceedings and relative financial positions

Jamie Carpenter & Joshua Munro

Costs Caps – The New Rules (2)

- Can apply to whole claim or issue to be tried separately
- Not additional liabilities
- Power to vary a cap
 - Only if “*material and substantial change of circumstances*” or “*some other compelling reason*” (44.18(7))

Costs Caps – Practical Considerations

- Apply early
 - NB Henry v British Broadcasting Corporation [2005] EWHC 2503 (QB))
- Takes time and money
- May still be detailed assessment
- No use if case settles before trial

Protective Costs Orders (1)

- Pre-emptive costs order
- May protect from all adverse costs or cap them
- Power to make them under s. 51 Supreme Court Act 1981
 - R v Lord Chancellor ex p. CPAG [1999] 1 WLR 347

Protective Costs Orders (2)

- The criteria (R (Corner House) v Secretary of State for Trade and Industry [2005] EWCA Civ 192):
 - Issues raised must be of general public importance
 - The public interest must require that the issues be resolved
 - The applicant must have no private interest in the outcome (latterly less strictly applied: Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107).
 - Having regard to the financial resources of the parties and the amount of costs that are likely to be involved it must be fair to make the order;
 - If the order is not made the applicant will probably and reasonably have to discontinue

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Protective Costs Orders (3)

- Will only be made in exceptional circumstances (see ex p. CPAG)
- Attempts to rely on the Aarhus Convention:
 - Does not affect test to be applied on application for a PCO (Compton v Wiltshire PCT [2008] EWCA Civ 749)
 - The application of the Convention generally should be left to the Rules Committee (Morgan v Hinton Organics (Wessex) Ltd [2009] EWCA Civ 107)

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Protective Costs Orders (4)

- Apply at the outset of the case
- Relatively informal procedure
- A failed attempt to obtain a pseudo-PCO in private litigation: Belcour v Wheeldon (23 January 2009, HHJ Faber, unreported)

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Protective Costs Orders (4)

- Apply at the outset of the case
- Relatively informal procedure
- A failed attempt to obtain a pseudo-PCO in private litigation: Belcour v Wheeldon (23 January 2009, HHJ Faber, unreported)

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Costs Estimates – Inter Partes (1)

- Leigh v Michelin Tyre plc [2003] EWCA Civ 1766
 - What degree of reliance is required?
 - Must be some
 - Need not amount to an estoppel: Mastercigars v Withers
 - An example of reliance in practice
 - Tribe v Southdown Gliding Club [2007] EWHC 90080
(costs)
- Jamie Carpenter & Joshua Munro

Costs Estimates – Inter Partes (2)

- The new PD – a damp squib?
 - S. 6.5A and 6.6 Costs Practice Direction
 - Apparent power to reduce costs simply because unexplained wrong estimate given
 - But see Woolley v Haden Building Services [2008] EWHC 90111 (costs)
- Cannot plead reliance on “without prejudice” estimate
 - Dadu Ltd v Barrowfen Properties Ltd [2008] EWHC 90110 (costs)

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Costs Estimates – Solicitor-Client (1)

- Have we all been going *Wong*?
- Mastercigars Direct Ltd v Withers LLP
 - No. 1 [2007] EWHC 2733 (Ch)
 - No. 2 [2009] EWHC 651 (Ch)
- Leigh provides authoritative guidance
- Wong a decision on its own facts

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Mastercigars in practice (1)

- *“What in all the circumstances is it reasonable for the client to pay?”*
- Estimate not generally a fixed quotation, but may be a useful yardstick
- Must be reliance
- Court must decide how to give effect to reliance
 - Margin permissible if justified but not mandatory
 - See Reynolds v Stone Rowe Brewer [2008] EWHC 497 (QB)

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Mastercigars in practice (2)

- Explanation for difference not directly relevant to question of reliance
- But then where does it come in?
- What if no estimate at all?
- The “creeping estimate”: Reynolds

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Practical advice

- Be realistic
- Make the scope of the estimate clear
- Update the client regularly and as soon as anything changes
- Ensure evidence of reliance
- Have a good reason for any proposed method of giving effect to the estimate
- Ask for a full reasoned decision

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Questions

Thank you for coming

Please join us for drinks