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The construction & energy law specialists
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Welcome to the April edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we take a look at the cost reforms and their implications for the construction and engineering industry.

Insight

Jackson Cost Reforms:

A summary of the key changes to civil litigation costs

Lord Justice Jackson's cost reforms came into force on 1 April 2013. Though primarily aimed at personal injury litigation, the reforms will affect construction and engineering litigation. The reforms deal with how litigation is funded, how litigation is conducted and, more importantly, how costs are dealt with.

In this 20th issue of *Insight* we take a look at Lord Justice Jackson's cost reforms and provide you with a quick guide to the key reforms and their implications for the construction and engineering industry.

The Jackson cost reforms

Lord Justice Jackson's Civil Litigation Costs Report of January 2010 was the biggest review of civil procedure in England and Wales since Lord Woolf's Access to Justice Report in 1996. The Report made a number of important recommendations, which have resulted in significant changes to civil procedure. The legislation introducing these changes, the Legal Aid, Sentencing and Punishment of Offender Act 2012, was passed in May 2012 and most of the relevant provisions came into force on 1 April 2013.

Summary of the key changes

The key objective of the Jackson Report was "to promote access to justice as a whole by making costs of litigation more proportionate". It is hoped that the changes will make the dispute resolution process quicker and easier, and will discourage unnecessary or unmeritorious claims. For the first time, those using "no win, no fee" conditional fee agreements (CFAs) will have an interest in controlling the costs that are incurred on their behalf. The previous regime, with recoverable success fees and after the event (ATE) insurance premiums, allowed claims to be pursued with no real financial risk to the claimants and with the threat of excessive costs to the defendant. The Government believes that "access to justice" depends on costs being proportionate and unnecessary cases being deterred.

Fees

Success fees

Success fees will no longer be recoverable from the losing side. In future any success fee will be paid by the CFA funded party (out of any recoveries it makes) rather than by the other side.

ATE insurance premiums

ATE insurance premiums under any insurance policy taken out after 1 April 2013 will no longer be recoverable. In future the insured party, rather than the other side, will be expected to pay any ATE insurance premiums.

Now that the success fee is no longer recoverable, smaller claims may no longer be viable as damages will need to be off-set against the success fee/ ATE premium. The result being the successful party may not recover any damages at all.

Damage-based agreements (DBAs)

DBAs will be allowed in civil litigation for the first time and will provide a further funding option for claimants. DBAs are a type of "no win, no fee" agreement between a client and a solicitor under which the solicitor is paid by an agreed percentage of the client's damages if successful, but will receive nothing if unsuccessful. The proportion of damages that can be taken as a contingency fee will be capped on a similar basis to CFAs so, for example, the amount of payment solicitors can take from damages will be capped at 25% for PI claims, 35% for employment matters and 50% for commercial and other claims.

Cost management

The "new" rules on cost management were piloted in the TCC some 18 months ago and have now come into force for all claims that commenced on or after 1 April 2013 where the sums in dispute are under £2 million. Under the new rules parties are required to file and exchange detailed cost budgets before the first case management conference. The court may then make a cost management order which will record the extent to which budgets are agreed or approved. Importantly, when assessing costs the court will not depart from the agreed budget

Insight

without there being a good reason why further costs should be allowed.

It will of course take time for the new regime to evolve, especially with so many cases being unaffected by the changes. However, for those cases which do fall within the scope of the new rules it will be essential for parties to prepare and regularly update accurate cost budgets, otherwise the parties may find, to their cost, that their recoverable costs are restricted to the last approved or agreed budget.

Proportionality

The overriding objective in the Civil Procedure Rules has been updated so that all cases should be dealt with "justly and at proportionate cost". The court will not allow parties to incur costs that are disproportionate to the value, complexity and importance of the claim, even if they are reasonably or necessarily incurred.

Whilst this aspect of the Jackson reforms has not been given the headline attention of some of the other points, the concept of proportionality will undoubtedly underpin the way the courts (and litigants) will deal with costs in the future. At present however, how this change will work in practice remains unclear and, as it stands, there is very little guidance available to the courts so unfortunately we will need to await further guidance in the form of decided cases.

Experts

Parties seeking permission to reply on expert evidence will be required to provide a cost estimate and identify the issues the evidence will address at an early stage. The court will also have greater scope to direct the experts to give concurrent evidence and/or undertake "hot tubbing" in order to increase efficiency and curtail costs. It will be interesting to see how this works in practice, with experts in particular needing to familiarise themselves with the concept of concurrent evidence.

Witness statements

Courts now have express powers to direct and limit the content and format of factual evidence, including identifying which witnesses may give evidence and restricting the length of witness statements.

Disclosure

Disclosure often represents a significant proportion of the costs associated with litigation. However, the new rules seek to control the cost of disclosure by imposing an obligation on the parties to file a report on disclosure describing what documents exist and the likely costs of giving standard disclosure. It is expected that the courts will take greater control of the disclosure process generally and will be required to limit the level of disclosure to what is necessary to deal with the case justly and at proportionate cost.

Claimant's Part 36 offers

Part 36 of the Civil Procedure Rules has been amended to equalise the incentive between the parties to make/accept reasonable offers. This change will apply to all civil cases. Where a money offer is beaten at trial (by whatever amount) the costs sanctions applicable under Part 36 will continue to apply (i.e. indemnity costs and enhanced interest). Additional sanctions equivalent to 10% of the value of the claim (subject to a maximum of £75,000.00 for claims of £1 million or more) will also be payable by defendants who do not accept a claimant's reasonable offer where that offer is not subsequently beaten at trial.

Whilst the sanctions are unlikely to act as a deterrent in high-value cases, they are expected in the majority of cases to act as a further incentive for defendants to seriously consider reasonable offers.

Conclusion

The main aim of the Jackson Report was to deal with the escalating costs of personal injury cases. However, the report and the subsequent reforms have had a much wider effect on litigation generally and will undoubtedly have an effect on how construction and engineering litigation is conducted in the future.

Only time will tell whether the Jackson reforms will have their desired impact and actually reduce the cost of litigation. Much will of course depend on the courts and whether or not they embrace the opportunity to actively manage their cases. There is no reason to suggest that this will not happen, so whether you are a solicitor, expert or litigant the message from the courts is be prepared.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Chris Shilvock.
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