Changes to the Rules governing litigation in England

The Jackson Reforms

On 1 April 2013 new rules will come into effect in England and Wales which will have a significant impact on litigation.

Whilst the reforms look very much as though they affect mechanical aspects of the litigation process, they actually go to the root of the dispute resolution process.

As England is a jurisdiction where the prevailing party usually recovers its costs (including attorneys' fees), costs have always been one of the drivers in determining the risks and rewards of making or defending claims and the likely commercial outcome. Particularly in cases where the amount at stake may not be great, costs play a more significant part of the decision-making process at all stages of the procedure.

The main changes are set out below.

1. Contingency fees or damages-based agreements (DBAs)

Clients will be able to instruct lawyers on a no-win no-fee basis (a US-style contingency agreement). The lawyers will be paid an agreed percentage of the damages actually recovered, up to 50% including VAT. In personal injury cases the cap will be 25% and in employment cases 35% of the damages.

Costs on the normal time basis will be recoverable from the Defendant and the Claimant will be responsible for the balance of the costs from the damages.

This is a huge change.

2. Conditional fee agreements (CFAs) and after the event (ATE) insurance

From 1 April 2013 the success fee element of a CFA and the ATE insurance premium will not be recoverable. A CFA is an agreement by which lawyers are paid on a no-win no-fee basis, or on the basis of lower fees with a mark-up of a percentage of the fee, up to 100%.

ATE is insurance to pay the opposing party's legal costs if ordered to by the court.

The change will not apply to cases insolvency related litigation brought by office holders on behalf of the estate of insolvent parties until April 2015. There will also be a delay in relation to privacy and defamation claims.

This does not mean that CFAs will necessarily disappear. The fee arrangement for each case must be considered at the outset, along with the merits, prospects for recovery, and other commercial factors.

3. 10% increase in general damages

General damages for claims in contract and tort will be increased by 10% for non-pecuniary loss (e.g. pain and suffering). This will apply primarily to claims for personal injury, nuisance and defamation. It is unlikely to be a common feature in commercial cases.

This is to assist claimants who are paying an uplift on a CFA. There is an exception where the Claimant has the benefit of a CFA with recoverable success fees.

4. Costs management

In multi-track cases (all but the smallest or simplest claims) the parties will have to exchange costs budgets early on in the proceedings. The budgets will be considered at the first Case Management Conference - a hearing at which the court will set the timetable for the action and make directions for the conduct of the proceedings. The court may make orders relating to costs management and parties will have to notify other parties and the court if the estimate is going to be exceeded. When assessing costs after the case has been concluded, the court is likely to hold parties to their estimates.

This will not apply to claims over £2 million in the Chancery Division, Technology and Construction Court or Mercantile Court. It will not apply in the Commercial Court regardless of the size of the claim.

The court may also cap the costs of a party early on in the proceedings.

In small claims or fast track cases, fixed fees will be lower than previously.

5. Proportionality

There will be a new test of proportionality. Costs will have to be reasonable in comparison to the amount of the claim, taking into account complexity and other factors such as public importance or reputation. The conduct of the paying party will also be taken into account. Costs will not necessarily be considered proportionate just because they are reasonable and necessary (unlike at present).

6. Qualified one-way costs shifting (QOCS) for personal injury claims

Claimants will recover costs if successful, but will not have to pay the defendant's costs if they lose, unless the claim is fraudulent or otherwise an abuse of the process of the court. The defendant may be able to get some costs protection by making a Part 36 offer.

7. Part 36 offers

If a claimant makes an offer to settle in compliance with Part 36 of the Civil Procedure Rules, and the defendant fails to keep the amount awarded below the amount of the

offer, the defendant will have to pay extra damages, with 10% extra on the first £500,000 and 5% on the next £500,000 making an extra £75,000. This is significant, but may not be as important in the context of large commercial claims.

8. Disclosure

What used to be called discovery is now called disclosure. This is made by provision of a list of documents and the recipient is then entitled to inspect the documents or call for copies. Documents include electronic documents, databases, e-mails, texts and other electronic communications. The current rule is that a party must give disclosure of

> (a) the documents on which he relies; and
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> (b) the documents which –
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> > (i) adversely affect his own case;
> >
> > (ii) adversely affect another party's case; or
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> > (iii) support another party's case; and
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> (c) the documents which he is required to disclose by a relevant practice direction.

Under the new rules, the court may dispense with disclosure, order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party, direct disclosure on an issue by issue basis, or make any order appropriate to the case.

9. Witness statements

In England, the usual procedure at trial is for witness statements, which have been exchanged between the parties and provided to the Court, to stand as evidence in chief, and the witness when called to give evidence simply verifies his signature, that the contents of the statement are true and is then cross-examined. The new rules will provide more control over the length and content of the witness statements, by

> (a) identifying or limiting the issues to which factual evidence may be directed;
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> (b) identifying the witnesses who may be called or whose evidence may be read; or
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> (c) limiting the length or format of witness statements.".

Whilst in theory, this may not be much different than the current position, the court may under the new regime be more willing to order evidence targeted at the issues and limit the number and/or length of witness statements.

10. Experts

There will be more control over the issues in relation to which expert evidence is allowed. Parties will have to give a costs estimate for the expert evidence when seeking permission to call expert evidence.

Concurrent expert evidence may be ordered at the judge's discretion.

11. Case management

The court will inevitably be more active in managing cases, and parties and their lawyers will have to be prepared to comply with stricter directions and timetables for various stages of the proceedings. The court is likely to be less tolerant of non-compliance with orders and time limits than has been the case previously.

Overview

With the virtual abolition of Legal Aid in civil cases, funding of litigation for individuals has changed beyond recognition. Litigation can be disproportionately costly in relation to claims which are not for very large amounts of money. Given the lowering of fixed fees for some types of case, cases will have to be run on a very efficient basis.

In relation to larger commercial cases, clients are aware that legal costs are not insignificant, but, above all, they do not want any unpleasant surprises. With the new costs management regime, costs should be more certain, although good lawyers have been managing costs, at least in relation to clients, if not necessarily opponents, without external pressure from the court.

It is likely that there will be frequent amendments and clarifications of the rules, as various questions about the new procedures reach the court. There are a number of issues which will arise in relation to the interpretation of the new rules, and during the first few years after they come into effect there will, no doubt, be a number of cases which go to the Court of Appeal for clarification.

Consolidation in the market for the provision of legal services is growing apace, particularly in the volume market, with external investment now allowed through the means of Alternative Business Structures.

Litigation funding is also likely to become more prevalent.

Steven Loble
steven.loble@sherrards.com

STEVEN LOBLE

Consultant, Dispute Resolution and Commercial Litigation

Steven has been in practice as a solicitor in London for 28 years.

Chambers' Global Directory 2012 states: "Steven Loble offers a wide-ranging international dispute resolution practice. He speaks German, French and Italian, as well as *"offering extraordinary expertise in the intersection of US and UK law."* In addition, he is *"a hard-working and accessible individual, and as clients we are very happy with the results that he has achieved."*"

Steven is described in the 2010 edition of **Legal 500** as "*extremely knowledgeable and efficient."*

He has acted in over 50 reported cases and has wide experience of international and commercial litigation. He has been involved in a number of the leading cases on enforcing foreign judgments, obtaining evidence for foreign proceedings, privilege, interest rate swaps, legal costs, and financial disputes. Many of Steven's clients are based outside the United Kingdom. With years of experience acting for foreign clients, he has substantial expertise in dealing with the issues which arise in cross-border litigation - choice of law, jurisdictional disputes, enforcement of judgments, obtaining evidence for foreign proceedings, dealing with questions of foreign law and sovereign immunity. He frequently advises in relation to public and private international law and represents the government of a friendly foreign state in litigation in England on a regular basis. Steven has expertise in the use of the latest technology, to manage cases with large numbers of documents both efficiently and cost-effectively. Steven uses alternative dispute resolution where appropriate.

Recent work includes:

- advising Citigroup in obtaining vital evidence in England in connection with an $8 billion claim against it by Guy Hands' Terra Firma private equity group arising out its purchase of EMI music
- a case which clarified the rules on Part 36 offers to settle;
- obtaining evidence in a number of cases brought against banks in the United States for facilitating terrorism by maintaining accounts for terrorist organisations
- advising a foreign regulator in relation to a case against an English company which is alleged to be in breach of the regulations of the foreign country
- acting for an investment bank in relation to the Lehman Brothers' bankruptcy
- other credit-crunch related litigation
- enforcing a judgment of a United States court for over $100m.

steven.loble@sherrards.com

+44 (0)20 7478 9012