PREMATURE ISSUE

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The timing of proceedings. How soon is too soon?

With the introduction of predictable costs under CPR 45 II for road traffic accidents, the Defendant insurance lobby seemed to have won a major victory over Claimant solicitors in the war over costs. Costs would be quick and easy to calculate, there would be no lengthy and expensive assessment process and the level at which costs were fixed was comparatively low and not subject to inflation.

What did Defendant insurers do with this windfall? Did they reduce their customers’ premiums? They certainly did not reduce mine despite an unblemished record stretching back more than twenty years. Did they allow the beleaguered Court service some respite from battles over costs in what must be the most common class of personal injury litigation? Not a bit of it. Never an industry to let slip an opportunity for satellite litigation about costs, they launched a series of attacks on the very regime for which they had fought.

Deploying that old warhorse, the indemnity principle, Defendants sought to use challenges to the enforceability of Claimants’ conditional fee agreements to nullify any entitlement to costs¹. That argument failed on the grounds that:

“The whole idea underlying Part 45 Section II is that it should be possible to ascertain the appropriate costs payable without the need for further recourse to the Court”.

A challenge to the Claimant’s solicitor’s entitlement to a success fee in circumstances where the Claimant had before the event insurance failed for similar reasons². Unfortunately, Kilby left open the question of disbursements which has seen challenges to the amounts paid for medical reports and to the incidence and quantum of ATE insurance premiums.

One challenge which crops up quite frequently is that of premature issue. It is not uncommon to receive Points of Dispute alleging that proceedings were issued too soon, perhaps as a

¹ Nizami –v- Butt [2006] EWHC 159 (QB)
² Kilby –v- Gawith [2008] EWCA Civ 812
device to escape the predictive costs regime, and that the Claimant should be restricted to what would have been recovered under the CPR 45 II.

The first question is perhaps whether the Court has the power to do such a thing.

In a context where a case which would have been allocated to the small claims track was settled prior to allocation with an agreement to pay costs on the standard basis, the Court of Appeal has ruled that it was not permissible for the judge assessing costs to go behind the terms of the Order\(^3\). However, the Court did find that there was a “real distinction” between holding at the outset that only small claims costs would be payable and considering whether costs were necessarily or reasonably incurred, and thus whether it was reasonable for the paying party to pay more than would have been recoverable on the small claims track.

Quite whom Waller LJ was trying to convince by the addition of the adjective “real” is open to question. Indeed, in a similar appeal heard on the same day he conceded that it might be: “a distinction without a major difference”\(^4\).

Applying those principles to circumstances in which a Claimant issued proceedings prior to the full disclosure of medical evidence to the Defendant\(^5\), Master Simons was left no doubt that the Claimant had issued proceedings prematurely and that the costs were disproportionate. Having considered the judgments in _O’Beirne_ and _Drew_ and the factors to which he had to have regard under CPR 44.5(3), he concluded that the Claimant should recover no more than she would have been entitled to had she acted reasonably and that it was unnecessary for him to carry out a line by line assessment in order to decide whether it was reasonable for the Defendant to pay more than would have been recoverable under CPR 45 II. The Master found that it would create an injustice to allow the Claimant’s solicitors to profit from their unreasonable conduct and restricted their costs to what would have been payable under CPR 45 II.

More recently\(^6\) Mackay J upheld a finding of Master Leonard that a Claimant who issued proceedings on the day on which the protocol had expired had not acted unreasonably against a background of one derisory and one incoherent Part 36 offer from the Defendant, as well as the intimation of a low velocity impact defence. Although he did not have to decide the question, the Judge distilled from _O’Beirne_ and _Drew_, the principle that a Costs Judge could and perhaps ought to have regard to what could have been recovered under CPR 45 II but that could not operate as a cap on what was recoverable under a CPR 44 assessment because, if it were, then an assessment under CPR 45 would have to be performed in every case to ascertain the upper limit of the costs which were proportionate.

However, the Judge noted that the Court had the power to disallow entire tranches of costs if they were unreasonably incurred\(^7\). This was the power which Master Leonard had exercised although he had quite properly refused to cap the Claimant’s costs at the amount which would have been recoverable under the predictive costs regime.

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\(^3\) _O’Beirne –v- Hudson_ [2010] EWCA Civ 52

\(^4\) Drew –v- Whitbread [2010] EWCA Civ 53

\(^5\) _Javed –v- British Telecommunications PLC_ [2011] EWHC 90212

\(^6\) _Debbie Letts –v- Royal Sun Alliance PLC_ [2012] EWHC 875 (QB)

\(^7\) _Lahey –v- Pirelli Tyres Limited_ [2007] EWCA Civ 91
For some reason *Javed* was not cited to the Court in *Letts* though it appears likely that Mackay J would have disagreed.

So where does all this leave us? Is Master Simons’ decision in *Javed* simply Waller LJ’s distinction without a difference or an impermissible circumvention of the order made? Mackay J would probably say the latter but there is no clear answer.

In this writer’s opinion, all of this may well be a red herring in any event. Given the Court's powers under *Lahey*, as noted by Mackay J, it may well be unnecessary to even raise the argument on predictive costs.

The advent of the MoJ portal for low value road traffic accidents, with its much more prescriptive approach as to the circumstances in which a claim may exit the scheme, has not calmed things completely. The level of fees on offer is even lower than predictive costs under CPR 45 II, increasing the pressure on Claimant solicitors to find ways to escape, whereas Defendant insurers remain quick to complain that Claimants have exited the portal unreasonably and to ask the Court to use its power under CPR 45.36 to restrict them to portal costs.

What seems certain is that satellite litigation in relation to costs will continue with Defendant insurers accusing Claimants of issuing too quickly to escape the predictive or portal costs regime and Claimants in turn accusing Defendant insurers of using obstructive tactics, causing costs to be incurred, then crying premature issue when the Claimant commences court proceedings to progress their case.

If you have any queries regarding the content of this article, or regarding any costs matters, please contact us on 01228 406381 or contact Rob directly at Robert.parness@paramountlegalcosts.co.uk.

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Appointed as Litigation Consultant in January 2011, Rob is a graduate in law from Warwick University. He is a qualified Costs Lawyer who has worked in the field since 1999 and has amassed considerable experience representing both paying and receiving parties in most
areas of litigation. He regularly appears in Courts throughout the jurisdiction, including the Senior Court Costs Office.

Specialising in heavier civil cases, Rob has dealt with costs in many different types of claim, including clinical negligence and other catastrophic injury claims with damages in excess of £1,000,000.00; professional negligence actions with damages in excess of £250,000.00; judicial review, including one in a private prosecution for blasphemous libel; trademark and copyright actions; defamation claims, partnership and contract disputes; commercial disputes, including under the Isle of Man Rules of the High Court of Justice 2009; high value family disputes and civil fraud claims, as well as Solicitors Act assessments.

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