Carter-Ruck

COSTS: THE JACKSON REFORMS

Luke Staiano
Solicitor, Carter-Ruck

1. Lord Justice Jackson's Review of Civil Litigation Costs

Lord Justice Jackson's Review of Civil Litigation Costs was commissioned in November 2008, by the then Master of the Rolls, to examine the rules and principles governing the costs of civil litigation in England and Wales and to make recommendations designed to control costs and to promote access to justice.

Published in January 2010, the final report amounts to almost 600 pages. Chapter 32 of the report is of particular relevance to publication cases, but a number of Jackson LJ's proposals have a significant impact on defamation and privacy claims, especially the recommendations concerning the current conditional fee agreement ("CFA") regime.

2. The Key Proposals Impacting on Defamation and Privacy Claims

Lord Justice Jackson has proposed the following key changes:

i) Success fees and after-the-event ("ATE") insurance premiums to cease to be recoverable inter-partes.

ii) General damages to be increased by 10% in defamation and breach of privacy cases (amongst others).

iii) Lawyers (which presumably means solicitors and barristers between them) to be permitted to agree with the client to take up to 25% of any damages awarded by way of a success fee.

iv) "Qualified one-way costs shifting" to be introduced in defamation and breach of privacy cases.

v) Only "proportionate" costs will be recoverable inter-partes. The test of proportionality to trump reasonableness when assessing costs.

vi) A reform of two areas of the Part 36 regime.

Proposals (i) to (iii)

These proposals are fairly self-explanatory and the rationale is clear: to reduce the increased costs burden faced by a media defendant against a CFA backed claimant by removing any inter-partes liability for success fees. There is a serious concern, however, that the non-recovery of CFA success fees and ATE insurance premiums may deprive most members of the public (both claimants and defendants) from access to legal representation as it may make it uneconomic for lawyers to act under a CFA except in very high value monetary claims and perhaps not at all for defendants.

To counter this argument, Jackson LJ also proposes an element of contingency fee arrangement, with a limit of 25% of the amount of damages that could be taken by lawyers on a CFA by way of

a success fee over and above base costs recoverable from the unsuccessful opponent. He also proposes a small increase of 10% in the general ceiling of damages that a court may award in publication cases. It should be noted though that damages in defamation cases are generally not high, on average about £20,000, and average damages in privacy claims are even lower.

Proposals (iv) to (vi) as listed above are perhaps more novel and intricate.

(iv) Qualified One-Way Costs Shifting

Lord Justice Jackson advocates "qualified one-way costs shifting" where there is an asymmetrical relationship between the parties, for example where a claimant of modest means is litigating against a well resourced media corporation. The formula is not intended to benefit a "wealthy" claimant.

The essence of one-way costs shifting is that the claimant will not be required to pay the defendant's costs if the claim is unsuccessful. However, the defendant will still have to pay the claimant's costs if the claim is successful.

Jackson LJ's proposed new provision of the CPR is as follows:

> "Costs ordered against the claimant in any claim for defamation or breach of privacy shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including:
>
> (a) the financial resources of all the parties to the proceedings, and
>
> (b) their conduct in connection with the dispute to which the proceedings relate."

Jackson LJ does not think it should be necessary in most cases to require a detailed enforcement procedure to determine liability under this new provision and that the making of a costs order against a claimant will be the exception, rather than the rule. He envisages three specific situations where such an order would be appropriate:

a) where the claimant has behaved unreasonably (e.g. bringing a frivolous or fraudulent claim);

b) where the defendant is neither insured nor a large organisation which is self-insured; or

c) where the claimant is conspicuously wealthy.

However, the proposed amendments to the CPR may make it extremely difficult for lawyers to advise their clients (both claimants and defendants) with any sensible degree of certainty as to their clients' potential liability to costs should they lose. For example, what is a "reasonable amount" for a party to pay? In addition, how are the financial resources of the parties to be taken into account and what is meant by "conspicuously"[1] wealthy?

Furthermore, if costs are very rarely awarded against a claimant it may encourage unmeritorious and bullying claims and deny access to justice for defendants who feel blackmailed into settling such actions. Qualified one-way costs shifting may actually prove more expensive for defendants than the current system.

(v) Proportionality of Costs

Jackson LJ notes that the CPR already includes a requirement for costs in litigation to be proportionate and does not believe that this should change. However, he recommends that the approach to proportionality should be re-defined.

[1] The Ministry of Justice Consultation Paper (see below) also uses the term "sufficiently" wealthy.

The current test under CPR Rule 44.5(1) provides that the Court will have regard to all the circumstances when deciding whether costs were:

(i) proportionately and reasonably incurred; and

(ii) proportionate and reasonable in amount.

Rule 44.5(3) provides that the Court must also have regard to:

(a) The conduct of all the parties including in particular -
  i. conduct before, as well as during, the proceedings; and
  ii. the efforts made if any before and during the proceedings in order to try and resolve the dispute;

(b) the amount or value of any money or property involved;
(c) the importance of the matter to all the parties;
(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;
(e) the skill, effort, specialist knowledge and responsibility involved;
(f) the time spent on the case; and
(g) the place where and the circumstances in which work or any part of it was done.

The new test proposed by Jackson LJ is as follows:

"Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:

(a) the sums in issue in the proceedings;
(b) the value of any non-monetary relief in issue in the proceedings;
(c) the complexity of the litigation;
(d) any additional work generated by the conduct of the paying party; and
(e) any wider factors involved in the proceedings, such as reputation or public importance."

In addition, the test of proportionality should be applied on a global basis.

Accordingly, it can be seen that the time spent on matters, specialist knowledge, skill, effort, the place where the work is done and the conduct of the receiving party are amongst the matters that, on the face of it, are to be dropped from the current approach to whether costs are proportionate or not.

Jackson LJ recommends that the rules should also provide that the fact that costs were necessarily incurred does not make them proportionate. In multi-track cases, in the first instance, the Court should assess costs by applying the test of reasonableness, as required by CPR Rule 44.4(1). In applying the test of reasonableness the Court will have regard to the factors set out in the new rule and that process will usually result in a total sum which is proportionate as defined above. However if the process of the assessment on the standard basis (whether summary or detailed) results in a figure which is not proportionate then the receiving party's entitlement to costs will be limited to such sum as is proportionate.[2]

At the end of the litigation the Judge conducting a detailed or summary assessment will have regard to the budget estimates of the receiving party and will generally approve as reasonable and proportionate any costs claimed which fall within a previously approved total.

Jackson LJ makes clear that the proposed new rule "will not be a charter for wealthy litigants to put their opponents to excessive and disproportionate costs by tactical manoeuvring" as such conduct could be met with an order for indemnity costs, which would substantially "free the receiving party from the shackles of proportionality."

[2] The Ministry of Justice Consultation Paper (see below) has expressed the view that Jackson LJ's definition of proportionality may generate satellite litigation because of uncertainty as to when costs would be judged disproportionate.

Even where no indemnity costs order is made, Jackson LJ considers that his reformulation of the test of proportionality would protect a "receiving party who had been put to extra expense by the tactics of the opposition."

(vi) Part 36 Offers

Jackson LJ remarks that CPR Part 36 has largely been viewed as a success. However, despite the positive effects there are two areas in which he suggests that further reform would be beneficial. First, it should be made clear that in any purely monetary case "more advantageous" in rule 36.14(1)(a) means better in financial terms by any amount, however small.[3]

Secondly, where a defendant rejects a claimant's offer, but fails to do better at trial, the claimant's recovery should be enhanced by 10%.

In publication cases, an injunction is usually a key part of the remedy sought by the claimant. In these cases the trial judge should first ascribe a monetary value to the injunction (or other non-monetary award), and then increase the damages by 10% of the nominal value of the injunction. In addition, the claimant should be awarded costs on the indemnity basis in the usual way.

If a claimant has failed to accept an "adequate offer" made by the defendant, the claimant will forfeit or substantially forfeit the benefits of one-way costs shifting as outlined above, in other words the claimant will be liable to face a costs order against him.

3. Other Key Recommendations

In addition to the above, Jackson LJ also recommends:

i) That there be strong case management.

ii) That there be strong costs management and costs budgeting.

iii) Reduced recoverable hourly rates.

iv) Claims should clearly identify a meaning in the letter of claim.

v) That the question whether to retain trial by jury in defamation cases be reconsidered.

4. What consequences are the Jackson Reforms intended to have?

Jackson LJ suggests that his reforms will have the following consequences:

i) Claimants will be able to recover more in damages from a defendant than they have to date (albeit not a vast amount more).

ii) Claimants will have a financial interest in the level of costs being incurred on their behalf (defendants have argued that under the current system, claimants have no incentive to keep a check on the level of costs being incurred by their solicitors).

iii) Claimant solicitors will continue to make a reasonable profit.

iv) Claimant costs will be significantly reduced.

v) Costs generally will become more proportionate.

[3] The rule in Carver v BAA PLC ([2008] EWCA Civ 412) to be abolished. In Carver the claimant beat the defendant's offer by only £50. The Court of Appeal upheld the ruling of the Trial Judge and ordered that the claimant had to pay the defendant's costs after the time to accept the offer had expired and no order for costs in respect of the time prior to the offer.

5. How would the Jackson Reforms work in practice?

Case examples illustrating the key proposals:

i) Mr Smith (the claimant) wins his case (and no effective Part 36 offers were made)

ii) Mr Smith wins his case but fails to beat the defendant's Part 36 offer

iii) Mr Smith wins his case and beats his own Part 36 offer

iv) Mr Smith wins his case and beats the defendant's Part 36 offer, but only by £50

v) Mr Smith loses at Trial

6. Lord Justice Jackson's Fallback Positions

ATE Insurance

If ATE insurance premiums remain recoverable Jackson LJ's alternative proposals are:

i). No ATE insurance premium to be recovered if liability is admitted within the protocol period.

ii). No ATE insurance premium to be recovered for Part 36 risks.

iii). A cap on the premiums of 50% of the damages awarded.

iv). In cases where the ATE insurer is entitled to avoid the policy, to allow recovery from the insurer with rights against the policy holder preserved.

Recoverable Success Fees

Jackson LJ strongly recommends that recoverability of success fees should be abolished, but if it is concluded that it is too late to turn back the clock he recommends:

i). No success fee should be recoverable from the paying party (or chargeable to the client) for the protocol period.

ii). Any element of a success fee which provides for protection against the risk of the claimant not accepting a good Part 36 offer should not be recoverable from the paying party.

iii). No success fee in detailed assessment proceedings.

iv). Fixed staged success fees. Such success fees should be based on research into the likely outcomes from CFA backed cases in particular areas.

7. Ministry of Justice Consultation

In November 2010 the Ministry of Justice published a Consultation Paper entitled "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales, Implementation of Lord Justice Jackson's Recommendations." The Consultation sought the views of the legal profession, judiciary and other interested parties on implementing the Jackson recommendations and in particular those relating to CFAs.

The Ministry of Justice stresses that the aims of its anticipated reforms are generally to "strike the right balance between access to justice in civil cases for all parties," and in relation to CFAs "to [reduce] the disproportionate costs of civil litigation." There are a few subtle differences between Jackson LJ's proposals and the MoJ Consultation Paper. For example, regarding the claimant's financial position in qualified one-way costs shifting, the MoJ uses the term "sufficiently" as an alternative to "conspicuously".

The consultation closed on 14 February 2011 and apparently received approximately 600 responses.

The Law Society's Response

The Law Society has referred to "the potentially devastating consequences" of Jackson LJ's proposals and that, if implemented, there could be a "serious reduction in access to justice".

The Bar Council's Response

The Bar Council submitted a lengthy response to the Consultation which, whilst supporting the principle of reducing costs, raises a number of concerns about the impact of Jackson LJ's proposals on access to justice.

Central to the Bar Council's position is that with the exception of larger commercial cases "CFA success fees should be recoverable in all other cases, and in particular personal injury cases, defamation and public law cases", and that ATE insurance premiums should also remain recoverable from opponents.

The Bar Council makes the following submissions in relation to the costs of defamation proceedings:

a) The majority of claims in defamation and privacy and probably the vast majority of litigation in this area concerns claims brought by private individuals against hugely wealthy newspapers.

b) Defamation litigation is also the only really effective means of regulation of a press that can often commit serious wrongs against individuals, and as such is in the public interest.

c) The use of CFAs is not confined to claimants. CFAs have been an important means by which "bullying" defamation claims by wealthy individuals/corporations have been defended.

d) Human rights considerations are involved. In addition to the Article 6 rights of claimants and defendants, other human rights are in issue: a claimant's Article 8 right to reputation/privacy and a defendant's Article 10 right to freedom of speech.

e) Actions in defamation and privacy have no impact upon the taxpayer. Taxpayer funded bodies are rarely defendants.

f) Damages in defamation cases are generally not high, and often not the most important remedy: injunctions and apologies are of great importance. General or aggravated damages are very low - on average about £20,000. Damages in privacy claims are even lower.

g) Defamation claims are highly fact sensitive; as are privacy claims in some cases, particularly where the public interest defence is involved. It is therefore difficult to gauge the merits of claims with certainty in advance.

The Bar Council concluded that the proposals contained in the Consultation Paper would be unworkable in defamation cases. In particular, the quantum of damages in libel cases (even if increased by 10%) would be insufficient and defendants who needed access to justice would be unlikely to find lawyers willing to act for them on a CFA.

The Bar Council proposed a system of staged success fees with a low recoverable success fee of 10% to 25% recoverable in proceedings concluded up to 35 days after disclosure, rising to 50% if the case continued thereafter.