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Legal Update
30 March 2011

Government announces reform of civil litigation costs

The Government announced yesterday far-reaching changes to the costs of civil litigation, which will affect the options for funding civil litigation in England & Wales. Some, but not all, of these changes were recommended in a report published in January 2010, following a year-long review of civil litigation costs by Sir Rupert Jackson of the Court of Appeal.

Background

After years in which concern has been expressed about the increasing cost of civil litigation, in November 2008 Sir Rupert Jackson was appointed to undertake a review of the rules and principles governing the costs of civil litigation and to make recommendations that would promote access to justice at proportionate cost. Sir Rupert's report made many recommendations for change to costs rules, procedural rules and to some of the funding regimes themselves.

In November 2010, the Ministry of Justice launched a public consultation for reform of civil litigation funding in England & Wales. The consultation arose out of and was based on Sir Rupert's proposals, but attracted some criticism, notably from Sir Rupert Jackson himself, as it appeared that the Government only intended to implement some of his recommendations. The consultation closed on 14 February 2011.

On 29 March, the Government published its response to the consultation and launched a new consultation, on proposed reforms to resolution of disputes in county courts, aimed at further overhauling the civil justice system.

No timescale has been set for the implementation of any of the changes announced yesterday.

Headline Changes

A new funding option will be available, permitting lawyers to enter into agreements with their clients under which they will be entitled to a share of damages awarded if the case is successful. At present, US-style contingency fees or damages-based agreements ("**DBAs**") are unlawful in England & Wales, although DBAs are permitted for proceedings in tribunals, including proceedings before the Employment Appeal Tribunal. Regulations on DBAs for employment tribunal cases cap the amount of damages that can be taken in fees (including VAT) at 35% of the sum recovered. There is no such cap proposed in the Government's response to the civil litigation funding consultation, except for personal injury cases, where the amount of fees that lawyers can take from damages will be capped at 25%.

This leaves open the possibility of DBAs without a cap being available for other commercial cases, including professional negligence claims.

Costs will continue to be recoverable from the unsuccessful party on the conventional basis, but insofar as the contingency fee exceeds what would be chargeable under a normal fee agreement, the difference is to be paid by the successful party.

Success fees agreed between a lawyer and client under a Conditional Fee Agreement ("**CFA**") will cease to be recoverable from the losing defendant. When this change is implemented, success fees (also known as "uplifts") will have to be paid by the client either from damages awarded by the court or other means.

The recoverability of After-the-Event ("**ATE**") Insurance premiums is also to be abolished so that, in the future, premiums will have to be paid by the party taking out the insurance rather than the losing opponent.

Two changes to Part 36 of the Civil Procedure Rules ("**CPR**") both of which were proposed in the November 2008 consultation, are also going forward for implementation.

First, it is announced that the CPR will be amended to make clear that where a money offer is beaten at trial, however small the margin, the costs sanctions under Part 36 will apply. This change appears to be made in recognition of the criticism of the Court of Appeal decision in Carver v BAA plc [2008] EWCA Civ 412. The decision was said to have introduced uncertainty into the Part 36 regime and Sir Rupert recommended that the decision be reversed.

Secondly, it is announced that where a defendant rejects a claimant's Part 36 offer but fails to do better at trial, in addition to the enhanced costs and interest already available, defendants should pay an additional sanction, equivalent to 10% of the value of the claim. We will have to await publication of the revised Part 36 to appreciate fully the likely impact of this change but note at this stage that Sir Rupert Jackson accepted that this sanction might have to be scaled down in claims over £500,000. No such cap is mentioned in the Government's response of 29 March.

One of the proposals for change in the county courts is a requirement that the parties to a small claim must mediate their dispute before resorting to the courts. This development is one to watch - some commentators are already saying that the Government intends to broaden the reach of compulsory mediation over time.

Timescale

There is no fixed timescale for any of the changes announced on 29 March. The Government response states that changes to the CFA regime requiring primary legislation will follow as soon as Parliamentary time allows. It is anticipated that primary legislation will be required to legalise contingency fee agreements (DBAs) and for the amendment of CPR Part 36. Other changes will require amendment to the CPR or other secondary legislation. Further consultations on these will follow in due course as appropriate.

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