The legal profession awaits key decisions from the courts by way of early case law to assist with the interpretation of many of the ambiguous issues that appear to arise following the new rules and directions which came in to play on April 1; some guidance as to how the new "proportionality" test will be applied would be welcome and just how will the courts deal with relief from sanction applications and costs in excess of approved budgets from this point forward; unfortunately it is likely to be some time before post "*Jackson Day*" issues reach the stage where an appeal or appeals will be appropriate; fortunately, however, until such time there are still judgments to consider and decisions to digest.

One decision eagerly awaited by both claimant and defendant solicitors related to two matters heard together before the Court of Appeal namely ***Flatman ("F") v Germany [2013] EWCA 278*** an unconnected case of Weddall **("W") v Barchester Health Care Limited**.

Both *F* and *W* had instructed GMS Law ("*GMS*") and both cases had been unsuccessful with adverse costs orders against each claimant. Both claimants had proceeded under a CFA however neither claimant had after the event insurance.

The appeals focussed on applications for discovery of funding arrangements made by unsuccessful claimants in personal injury litigation and the extent of such discovery and to what extent solicitors acting on behalf of the claimants can fund or, as described by the COA, "prime the pump" litigation for those of limited means when proceeding pursuant to a CFA with no "after the event" insurance cover without exposing themselves to adverse orders for costs should the claims fail.

In *F*, a relatively straight forward personal injury claim following a motor cycle accident, the defendant's insurers put their costs at in excess of £14,000; enquiries quickly revealed that *F* was impecunious and absent ATE insurance the defendant's costs seemed unlikely to be recovered.

Given the fact that *F* was unemployed at the time of the accident and claiming substantial loss of earnings the defendant's suspected that the disbursements had been defrayed by *GMS* and an application was issued by the defendant seeking to add *GMS* to the proceedings, for an order revealing how the claim had been funded, and (on the assumption that their suspicions were correct) an order that *GMS* pay the defendant's costs. The application was dismissed but allowed on appeal and *GMS* were required to disclose how the claim had been funded.

W, was a more involved case wherein *W* suffered personal injuries following an attack by a drunken co-worker with proceedings brought against the employer on the grounds that they were vicariously liable for the assault. The defendant's costs were not quantified however *W*'s profit costs were, the court was advised in an estimate of costs, £23,500.00 inclusive of Vat plus success fee. Again an unsuccessful application was issued to add *GMS* as a party for disclosure and again on appeal *GMS* were ordered to disclose details of the funding of the claim.

The matter of *W* then took an unexpected turn resulting in further disclosure being provided when the defendant's solicitors wrote to *W* regarding the issue of costs and received a response from *W* who advised that he had "very little saving" had "no assets" and was in "a low paid job" *W* went on to report that he had been against the claim proceeding without insurance. *W* also included a letter he had written to *GMS* in respect of their bill to him for some £50,000. *W* advised his solicitors that he had not wanted to continue the claim following receipt of counsel's assessment of prospects at 20-25% of success; *W* expressed the view that the case had been "bulldozed" through against his wishes and on advice that he would be liable for significant costs of the Defendant.

The files of *GSM* were considered in detail as will be seen from the judgment.

In light of the disclosed documents the Court of Appeal considered there was "more than enough" to enable the defendant's insurers in *W* to decide whether it was appropriate to pursue a third party claim for costs or wasted costs against *GMS* or in the alternative to pursue *GMS* through *W* and any potential claim that he might have by way of breach of contract or other duty to recover whatever sums he is ordered to pay by what of costs.

The disclosed information had wider significance creating a need for clarity regarding the circumstances in which it is appropriate to consider third party costs against the instructed solicitor. The widely available full judgment gives an excellent summary of third party costs and matters to be considered before such an order should be considered.

The Court of Appeal was required to consider if by funding disbursements solicitors had "stepped outside the "normal role" of a solicitor"; Mummery LJ did not consider that funding disbursements alone was "sufficient to justify that conclusion" stating "costs may have to be the subject of an account to the client as a disbursement but the credit afforded to the client in respect of that cost is part of the service provided by the solicitor. As such, payment of disbursements, without more, does not incur any potential liability to an adverse costs order".

In *W*, it was arguable that the solicitors had continued with the litigation without ATE insurance contrary to their client's express instructions and in circumstances where potential costs were not insubstantial, justifying disclosure. That possibility was sufficient to equally justify disclosure in cases conducted at the same time by the same solicitor on a CFA without ATE insurance. Appeals dismissed.

In both matters the Court of Appeal recorded concern as to the level of costs incurred by the solicitors acting for F and W.

A not dissimilar issue was considered in the Court of Appeal in the matter of ***Manuel Heron and TNT (UK) limited and Mackrell Turner Garrett (a firm)*** EWCA Civ 469 (02/05/13) with the defendant's insurers seeking to recover costs of defending personal injury litigation against the claimant's solicitor either on the basis that the solicitors ought to be made the subject of a wasted costs order or, alternatively, a non-party costs order (it was later to be conceded that the wasted costs application added nothing to that of the non-party order and was not pursued).

The original application had been dismissed after a two day hearing the length of which the COA opined "rather flew in the face of the summary nature of this case".

Again the matter involved a personal injury claim brought under a CFA but without ATE Insurance in place for adverse costs.

In short, the employers' insurers argued that the case demonstrated "*a lamentable failure on the part of the employee's solicitors which caused the employee to be liable for adverse costs in circumstances where the solicitors knew full well that without 'after the event' insurance, their client could not afford them; this failure was compounded by a further failure to admit to their client the conflict that had been created"*. It was said by the defendant's insurers' solicitors that the claimant's solicitor who had conduct of the case "*promoted and controlled the pursuit of the litigation against that background with a direct financial interest in both concealing his own negligence and driving the case forward all in an attempt to secure the solicitors' own costs while at the same time causing the insurers to incur irrecoverable costs"*

Whilst offers had been made to settle the same were rejected and subsequently withdrawn with the matter destined for trial.

The claimant was advised by his then solicitors that they would be unable to attend the trial or instruct counsel unless the claimant provided monies on account to cover all outstanding disbursements.

The case then took a turn for the worse when a newly instructed orthopaedic surgeon expressed the view that the claimant's prolapsed disc (which lay at the heart of the claimant's claim following an accident at work) had been "*an accident waiting to happen*" commenting that the injury would have occurred within 5 years even without the accident. Counsel advised that the best the claimant could hope to recover was £10,000.00 and probably less. Counsel's instructions were then withdrawn and shortly before the trial the claimant's solicitors gave notice that they would not be attending the trial at which point the defendant's insurer's indicated an application for a wasted costs order or non-party order would be made.

The matter was heard at Guildford County Court 1 March 2011 whereat Mr Heron represented himself recovering only £3,000.00 for minor injuries; the award was significantly less than the first of three Part 36 offers put forward by the defendant and significantly less than the £17,700 paid on account. The claimant was ordered to meet the defendant's costs from 22 November 2006, the date of the defendant's first offer.

When dismissing the defendant's insurers' application the court below provided a lengthy and detailed judgment upon the facts of which the COA was not prepared to interfere with Leveson LJ stating:

> *"....the application has to be put on the basis that the failure by MTG to obtain ATE insurance (and the subsequent failure to admit that fact to Mr Heron) is itself sufficient not only to give rise to a breach of duty to him but, in addition, to demonstrate that MTG had become a 'real party' to the litigation, the person 'with the principal interest' in its outcome, or that it was acting 'primarily for his own sake'. If that was so, as I have said, every act of negligence by a solicitor in the conduct of litigation (thereby giving rise to a conflict) which means that an opposing*

party incurs costs which might not otherwise have been incurred would be sufficient. When pressed by Beatson LJ during the course of argument, Mr Bacon was unable to identify a principled way of drawing the line so as to avoid this consequence.

I do not accept that the law goes anything like that far. A solicitor is entitled to act on a CFA for an impecunious client who they know or suspect will not be able to pay own (or other side's costs) if unsuccessful (see Sibthorpe v Southwark BL [2011] 1 WLR 2111 at para. 50; Awwad v Geraghty [2001] QB 570 at 588; Dophin Key v Mills [2008] 1 WLR 1829 at para. 75). As far as the other side is concerned, whether the solicitor has negligently failed to obtain ATE insurance to protect his client (as opposed to not being able to obtain such insurance) does not impact on the costs they will incur unless it is demonstrably provable that the costs would not have been incurred (as in Adris). That is not the case here.

The appeal was dismissed.

Whilst attempting to anticipate the likely approach the courts will be taking when faced with applications for relief from sanctions/ applications to vary agreed budgets the recent decision of Coulson J in the matter of ***(1) Kim Murray (2) Jean Stokes and Neil Dowlman Architecture Limited [2013] EWHC 872*** *(TCC)* will be a case worthy of consideration albeit the budget in this matter was prepared for use in the case management of a matter in the TCC and predates the new budget requirements.

The claimants had begun proceedings in the TCC having entered in a conditional fee agreement with solicitors and having obtained after the event insurance.

The TCC was one of the courts in which costs management was being piloted and under the Practice Direction costs budgets were exchanged by the parties in advance of the first CMC. The claimants' budget did not fully comply with form HB and was subject to adverse comment by the judge however given that the information was "substantially" in the right form, the judge considered the budgets and made a costs management order approving the claimant's budget in the sum of £82,500.00.

At a later point in time the defendant's solicitor pointed out to the claimant's solicitors that the approved budget did not state that it excluded success fees and ATE insurance premium.

The defendant notified the claimant that it would be argued that the claimant should not be permitted to recover any sum (including the success fee and ATE premium) over and above the approved budget.

It had never been in question that the claimant had provided the appropriate notice of funding however the claimant issued an application pursuant to CPR 3.9 seeking relief from sanction

Coulson J considered this was not a matter to which r 3.9 obviously applied. There was no sanction as such from which the claimant required relief; there had been no failure to notify the defendant with regard to the success fees and ATE. Indeed the matter was more akin to an application for permission to revise the approved budget pursuant to 51GPD.6 which was applicable at the time.

Consideration was given to *Henry v News Group* in particular paragraph 28 of the judgement dealing with good reason to depart and reflecting on courts being less likely to be persuaded to allow costs in excess of approved budgets.

Coulson J in providing his decision reflected on the fact that the format of the budget (HB) had been changed and was now known as *Precedent H* and no longer contained the various tick boxes that had been included in HB to specify that certain costs had been excluded from the budget Precedent H now simply states:

"This estimate excludes VAT (if applicable), court fees, success fees and ATE insurance (if applicable..."

The judge stated that had the budget been prepared in April 2013 rather than February 2013 there would have been "*no mistake: there would have been no failure to exclude success fees and ATE premiums, because such exclusion is not the default setting on the new version of the costs budget form itself*".

Coulson J found suggested one view was that the difficulties in which the claimants found themselves arose out of the costs management pilot scheme and the particular court form (with tick boxes) that were used in the pilot scheme and it was not "*appropriate to penalise a party to litigation because, at worst, he or she failed to tick a box on a form, which form has in any event now been superseded so as not to include the box at all*".

The judge found that "*on the particular and unusual facts of this case*" it was appropriate for the approved budget to be revised/rectified, or at least clarified to the effect that success fees and ATE had been excluded.

Many may argue that this represents another example of budgets not being enforced however as with *Henry* I would submit that the Court has arrived at the right decision whilst giving a clear indication that future applications for relief/to vary approved budgets will be granted rarely and then only with (very) good reason.

At paragraph 17 of his judgment, Coulson J, having considered argument from the defendant that a mistake should not be capable of being remedied by an increase in the approved budget as if that were a cure for every mistake "*costs management would become irrelevant or meaningless, because all parties could seek to revise their approved after the event on the basis that they had forgotten to include particular items originally (or had included them, but at too low a figure"* stated:

"I consider that those submissions have considerable force. In my view, in an ordinary case, it will be extremely difficult to persuade a court that inadequacies or mistakes in the preparation of a costs budget, which is then approved by the court, should be subsequently revised or rectified...." "The courts will expect parties to undertake the costs budgeting exercise properly first time around, and will be slow to revise approved budgets merely because, after the event, it is said that particular items had been omitted or under-valued. I also agree that any other approach could make a nonsense of the whole costs management regime".

The judge went on to add:

"The whole basis of the recent amendments to the CPR is the emphasis on the need for parties to comply with the CPR, and the court orders made under it. It will, I think, no longer be possible in the ordinary case for parties to avoid the consequences of their own mistakes simply by saying that the other side has not suffered any prejudice as a result".

Clear warning shots have now been fired across the bows of the legal profession and a much stricter adherence to the rules should be anticipated post 1 April 2013 I would suggest.

Briefly elsewhere:

In ***Street & Anor v Larkins & Anor*** *(2013*) Gaunt J QC awarded the defendant a wasted costs order as the claimant had unreasonably refused to consent to an adjournment of the trial date where it was virtually impossible for the case to have been prepared in time.

The defendant's solicitors had written to the claimant's solicitors explaining that the time table allowed very little time to consider an expert's report and suggesting the hearing be re-fixed. The claimant failed to consent and the defendant was required to instruct counsel for trial.

Travel & Holidays LLC V HAJJ Charter Ltd & Ors *(2013)* – Leggatt J held that where a claimant had not complied with an unless order by making a payment of costs to the opponent one day late it was in the interests of justice to grant relief from sanction of striking out the claim so that it could be considered on the merits of the claim.

The judge considered that it would be "wholly disproportionate" for the entire claim to be forfeited for failure to pay a small sum compared to the substantial value of the claim, and in circumstances where the delay was only one day.

Webb Resolutions Ltd v JV Ltd (T/A Shepherd Chartered Surveyors) *(2013*) – Edwards-Stuart J found that if a party was charged with drawing up a court order it was the duty of its solicitors and counsel to produce a draft that reflected what they thought had been decided or directed by the judge; in this matter the claimant's solicitors had produced an order that reflected the directions the claimant would have liked to have had and not the directions ordered by the court. "*That was wholly unacceptable: it was not just unreasonable, it was verging on the contumelious*" The defendant was not to pay the costs unnecessarily incurred.

Royal Devon & Exeter NHS Foundation Trust v Margaret Acres *(2013)* – It had been reasonable to instruct London solicitors, held Cranston J, after local solicitors had declined to take the matter further. On the circumstances at the time the decision had been made the local solicitors had made it clear that they believed the claim would not succeed on the merits. In light of the assessment undertaken by reputable solicitors the approach to solicitors in London was reasonable.

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