QBE European Operations

Technical claims brief

Monthly update | May 2013

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News

The Jackson reforms – a Big Bang or a Long Haul?

Lord Justice Jackson's reforms of civil litigation funding in England and Wales have, at the time of writing, been in force for nearly a month. An immediate drastic impact from the 'Big Bang' is conspicuous by its absence despite major changes having taken place.

The reality was always that the reforms would take time to be fully felt as cases initiated under the old regime are run off, new actions are raised and existing ones trigger aspects of the new rules. Judges are certainly talking tough and there is at least some anecdotal evidence that the new rules are being applied more rigorously and that more applications for relief by claimants are being turned down.

Claimant solicitors are already feeling the pinch with the Solicitors Regulation Authority (SRA) saying that they have identified about 150 firms experiencing 'very significant financial difficulty'. In the Law Gazette SRA Director Samantha Barass speaks of a 'toxic combination' of factors including civil litigation reforms, the economic climate and pressure from lenders as creating a 'perfect financial storm'.

Some insurers have seen a spike in new claims and most report a surge in funding notices for claimants wishing to take advantage of the old rules. A further spike in claims is anticipated prior to the extension of the claims portal scheme but what of the long term?

One of the major questions for insurers is whether one of the unintended consequences of the reforms will be an increase in claims frequency. This could come from claimants protected from costs recovery by Qualified One Way Costs Shifting feeling that they have nothing to lose by claiming. Or it could come from claimant solicitors seeking to compensate for smaller margins per case by increasing the number of cases they process.

The ban on referral fees was intended to reduce claims frequency. However we are seeing vertical integration of the process with solicitors buying accident management companies and insurers buying solicitors.

Over the next few years claims will be dealt with under a number of different costs regimes and it will take time for everyone involved to take stock of the new situation and for things to settle down once more. Perhaps the only certainty is that life will not be getting any simpler.

Less red tape? – The Enterprise and Regulatory Reform Bill clears the House of Lords

In the November 2012 Brief we reported on the ***Enterprise and Regulatory Reform Bill*** which was then due to be debated by the House of Lords. The Bill, once enacted, would amend the ***Health and Safety at Work Act 1974*** whereby a breach of regulation would not give rise to any civil liability unless the specific regulation involved stipulated this. The reform is intended to ease the burden on businesses by both reducing 'red tape' and the number of claims arising from breaches of regulation.

As we predicted, the Bill was given a rough passage by the House of Lords who initially voted to oppose it. It has now however emerged essentially intact (regulation governing pregnant workers may be exempted) and will move forward to Royal Assent and a statutory instrument will be introduced to bring the changes into effect. The trigger date for the reforms is yet to be set but is likely to be some time later this year.

The Enterprise Bill goes beyond the recommendations of Professor Lofsted's 2011 report for the Government on Health and Safety legislation. Lofstedt called for the removal or qualification of strict liability arising from breach of health and safety regulation. In future, breach of health and safety regulation will, in many cases, lead to possible criminal prosecution but incur no civil liability.

Claimants will have to make claims based on breach of common law duty but can still cite health and safety regulation as a guide to what is a reasonable standard of care. This should lead to some cases becoming defensible which previously were not but it is also likely to introduce greater uncertainty.

Our thanks go to DWF Solicitors for keeping us informed about this Bill's progress.

Costs

Claimants permitted late amendment of costs budget: Kim Murray and Jean Stokes v Neil Dowlman Architecture Ltd – High Court (Technology and Construction Court) 2013

The claimants' costs budget of £82,500 was approved by the court on 1 February 2013. On 8 March 2013, the defendants wrote to them pointing out that they had failed to tell the court that their budget did not include the success fee or After the Event (ATE) insurance premium and that the defendants would challenge any recovery of costs in excess of the costs budget set including any success fee or ATE.

The court permitted the claimants to revise their costs budget because the defendants had known about the error from a very early stage; they had not been prejudiced; and the error was caused by the claimants' solicitor's failure to complete the correct form and tick the box confirming that the success fee and ATE were not included. The judge said that he was unwilling to penalise the claimants (for an amount potentially in excess of £100,000) merely because of a failure to tick a box.

The judge also had in mind that the new costs budgeting form in force from 1 April 2013 does not require any boxes to be ticked to confirm that success fees and ATEs were excluded. Consequently, had the forms been completed in April, the issue would not have arisen.

> *This is the second time that a senior court has looked at the issue of claimants not sticking to their initial costs budget under the costs budgeting pilot scheme (see Henry v News Group Newspapers in the March 2013 Brief). Once again, the court has refrained from penalising the claimants for a breach. In both cases, the courts expressed their full support for strictly enforcing costs budgets but went on to find that the facts of the case deserved an exception.*
>
> *Now that the pilot is over and the full scheme is in force, it remains to be seen whether we will start to see strict enforcement of costs budgets.*

Defendants entitled to disclosure of claimant's funding arrangements: Flatman v Germany; Barchester Health Care Ltd v Weddell – Court of Appeal (2013)

The defendants in both of these cases had successfully defended the claims and had obtained costs orders against the claimants. The claimants however had no funds to pay the costs orders. They had funded the actions by way of Conditional Fee Agreements (CFAs) but had not taken out After the Event (ATE) insurance.

The two claims were not connected except that they were both represented by the same solicitors and the two defendants coincidentally had the same insurers. The insurers suspected that the claimants' solicitors had funded the actions and sought a disclosure order against the solicitors to compel them to disclose the funding arrangements. Depending on the basis of the funding, the defendants might be able to obtain a third party costs order against the claimants' solicitors.

At first instance, the applications for disclosure were rejected on the basis that they could undermine the whole CFA system and that, for similar reasons of public policy, the defendants had no realistic prospect of obtaining third party costs orders.

The defendants successfully appealed to the Court of Appeal (CA). The CA held that the defendants were not trying to make third party costs orders the norm, rather they were just trying to find out if the claimants' solicitors had exceeded their proper role and become funders of litigation in the way of business. This would apply to solicitors who had paid for litigation on the basis that they would recover the money from the other side only if the claim succeeded. The court had the power to make a third party costs order against a solicitor if they considered it just in the circumstances.

The defendants were entitled to disclosure to investigate whether they had grounds for pursuing a third party costs order.

> *Qualified One Way Costs Shifting (QOCS) protection does not extend to solicitors and where a successful defendant is prevented from making a recovery from a claimant by QOCS they might well consider attempting recovery from the claimant's solicitors.*
>
> *Defendants are now likely to be permitted to investigate funding arrangements but the Court of Appeal has made it clear that third party costs orders would not be justified where the claimant's solicitor has done no more than fund disbursements even where it was improbable that the claimant would ever refund the cost to them.*

Liability

Householder not liable for diving accident: Cockbill v Riley – High Court (2013)

The claimant, who was 16 years old, was rendered tetraplegic when he severed his spinal cord after jumping into a paddling pool in the defendant's garden. The defendant had been hosting a barbeque party at the time to which the claimant had been invited by the defendant's daughter.

The paddling pool had been brought by another guest. The defendant positioned the pool away from obvious hazards and filled it with water. Six or seven teenage boys took turns jumping into the pool all landing on their feet or bottoms with no one attempting to dive or somersault. The party guests, including the claimant, had consumed modest amounts of alcohol but there was no evidence of drunken or disorderly behaviour. When the party became more boisterous the defendant served food to calm things down.

Whilst other guests were eating, the claimant dived into the pool intending to 'belly-flop' but misjudged the angle and struck his head on the bottom of the pool.

It was common ground that the defendant had a duty of care to keep an eye on the children and to intervene to moderate their behaviour if necessary.

The court held that the use of the paddling pool by the defendant's children and their friends did not realistically warrant a formal risk assessment nor did it present a foreseeable risk of significant injury. Allowing the guests to consume modest amounts of alcohol did not make the risk of injury foreseeable. The defendant had not been under any legal duty to tell the party guests not to run or jump into the pool and there was therefore no breach of duty of care. If there had been a breach of duty, the court would have found two-thirds contributory negligence on the part of the claimant.

> *The courts remain reluctant to impose onerous duties of care on domestic householders especially where this might discourage normal recreational activities.*

Completed 29 April 2013 – written by and copy judgments and/or source material for the above available from John Tutton (contact no: 01245 272 756, e-mail: john.tutton@uk.qbe.com).

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QBE European Operations Plantation Place 30 Fenchurch Street London EC3M 3BD
tel +44 (0)20 7105 4000 www.QBEeurope.com

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