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INCREASE IN DAMAGES AFTER 1 APRIL 2013

Simmons v Castle [2012]

Readers will be aware that one of the proposals of the Jackson Report (which has been publicised heavily since its publication) was that General Damages should rise by 10% to partly compensate Claimants for having to pay Conditional Fee Agreement (CFA) success fees themselves from any award of damages.

The Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO) abolishes recoverability of success fees from a date to be determined by regulations. The Government has since made it clear that the said date will be 1 April 2013 and that the provision will apply only to CFAs signed on or after this date.

Where a CFA is entered into before 1 April 2013, the success fee will still be recoverable, even if the case ends after 1 April 2013.

It was unclear, however, until the recent case of *Simmons v Castle [2012] EWCA Civ 1039*, as to how the suggested 10% increase in General Damages would be effected.

Implementing the 10% Increase

In *Simmons*, Lord Judge (the Lord Chief Justice), sitting in the Court of Appeal, declared that *"with effect from 1 April 2013, the proper level of General Damages for (i) pain, suffering and loss of amenity in respect of personal injury, (ii) nuisance, (iii) defamation and (iv) all other torts which cause suffering, inconvenience or distress to individuals, will be 10% higher than previously"*.

Not only has the Court of Appeal widened the matters to which the 10% increase will apply, but has decided that the increase will apply to all cases where Judgment is given after 1 April 2013, whether or not the matter is being conducted under a CFA and irrespective as to when that Agreement was signed.

Taking into account the combined effects of LASPO and the decision in *Simmons*, success fees in relation to CFAs pre-dating 1 April 2013 will remain recoverable and there will be a 10% increase in damages in those cases, providing Claimants with something of a 'windfall' in such matters.

Effects on Part 36 Offers

Unfortunately, the Judgment in *Simmons* does not deal with the potential problems associated with Part 36 Offers, thereby intensifying the problems already foreseen between Part 36 Offers and 'Qualified One-Way Costs Shifting', which was commented upon by Peter Bennett in his recent article:

Qualified One-Way Costs Shifting – Its Interaction with Part 36 of the CPR from April 2013' (Dolmans Insurance Bulletin – July 2012).

The decision in *Simmons* highlights even more potential conflict between the 'new regime' and Part 36 of the Civil Procedure Rules (CPR).

For example, if a Claimant offers, at current rates, £10,000.00, and a Defendant offers £9,500.00, but the Trial Judge in the case, sitting from 1 April 2013, awards £9,200.00, up-rated by 10% to £10,120.00, has the Claimant beaten the Defendant's offer? The Claimant will, no doubt, argue that the Defendant should have increased its Part 36 Offer by 10%. However, if the Claimant accepted such an offer before 1 April 2013, the Defendant would have effectively overpaid the Claimant by 10%.

The situation is not made any simpler by the fact that the 10% increase will apply to General Damages, not Special Damages, and Part 36 Offers have historically encompassed both General Damages and Special Damages. It is inevitable, therefore, that the Courts will be required to dissect such Part 36 Offers before being in a position to consider the costs consequences of the same.

The ministerial statement issued in July 2012, reported in Peter Bennett's article referred to above, includes reference to the introduction of a 10% uplift in damages, where a Claimant equals or beats its own Part 36 Offer. This uplift is wholly separate from the 10% uplift in General Damages, as discussed above, and adds another dimension to the Part 36 situation, which is already far from simple.

Simplicity and Clarity? – Not Quite!

In *Simmons*, Lord Judge stated that *"early notice was being given to enable all parties engaged in or contemplating litigation to be aware of the impending change and prepare accordingly"*. Although it is, of course, useful for everyone to be aware of such changes from an early stage, it would be equally useful to have some clarity of accompanying issues, such as Part 36 Offers, at the same time.

Unfortunately, despite Lord Judge's comments that the decision *"has the great merits of ….. providing simplicity and clarity"*, it is evident that this is unlikely to be the case and that there will be extensive satellite litigation, surrounding the costs consequences of Part 36 Offers for example, after 1 April 2013.

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