

Question 1

In circumstances where a party has failed to have regard to the provision of a pre action protocol, e.g., failed to serve a schedule pre issue, and / or failed to serve a medical report pre issue, or obtained a medical other than in accordance with that protocol, at what stage should a party who feels aggrieved by such breach ask the Court to adjudicate? For example, in the Defence, at Allocation / CMC, at Trial, or at the final costs stage?

Answer:

Having spoken to the District Judges on this point, our view is that it is right to raise an issue in the Defence since a breach of Protocol may affect whether or not judgment is entered. That said, it is up to a party to decide when to issue an application. Factors to be borne in mind are:

1. If there is a breach which is material and upon which relief is capable of being given prior to trial, then there is no reason not to issue an application as soon as practicable
2. It should be remembered that anything other than the most straightforward matter cannot be accommodated in a short directions hearing and should therefore be the subject of specific application
3. A number of breaches may be relevant only to issues of costs at the end of the trial and therefore should be flagged up at the appropriate time with the other party and (if practicable) in the pleadings but should be left until trial for determination. Trial ELHs should then reflect the fact that there are these issues.

Question 2

In a pre action disclosure application relating to disclosure of sensitive third party documents (e.g. personal care plans/risk assessments/medical assessment) required in proposed litigation (e.g. assault by disabled third party service user on employee of proposed defendant) would the court be prepared to award the person (i.e. the defendant) against whom the order is sought his costs of the application and the costs of complying with that order as allowed under CPR 48.2. The costs award would be sought on the basis that the proposed defendant was not in breach of the protocol and had identified the sensitive documents for disclosure but was withholding disclosure due to confidentiality/DPA reasons and required the court order to release the sensitive documents of the third party.

If the court were not prepared to apply the general costs rule what would the reasons for this be?

Answer:

The Guidance given in Volume 1 of the White Book 2008 page 1275, para 48.1.1 reads:

"In relation to pre-commencement disclosure the court will normally award the costs of the application and the costs of complying with any order for disclosure, inspection, etc. in favour of the party against whom the order is sought. If, however, that party has unreasonably opposed the application or failed to comply with any relevant pre-action Protocol, the court may make a different Order"

I can see some force on the face of the argument put forward that the proposed Defendant was not in breach of Protocol and, if that is right, in the contention that the normal rule should apply. However: (i) Cases are fact specific and (ii) it would be wrong to give general guidance on a matter where the submissions of both parties would have to be heard and adjudicated upon if and when the situation arose.

Question 3

What sanctions will the court impose on parties who are unable to demonstrate that they have complied satisfactorily with the new "Settlement" section in the Allocation Questionnaire?

and secondly:-

How can defendants protect themselves if they intend to defend a matter to trial in terms of completing this section of the AQ without running the risk of sanctions?

Answer:

1. The court may impose the same sanctions as with any failure to mediate. This is essentially a costs penalty – see the relevant case law and in particular [Halsey v Milton Keynes NHS Trust \[2004\] EWCA Civ 576](#)
2. If there is a good reason for not mediating then this should be stated in box A4 of the AQ

Question 4

How does the panel consider Mediation is working in Liverpool and are there any plans to implement a code of best practice similar to the rehabilitation code?

Answer:

Mediation has to be considered on a Track by Track basis. The general impression of the judiciary in Liverpool is that the large Multi Track cases whether (for example) Chancery, Clinical Negligence or general personal Injury have a high rate of successful ADR. On the Fast Track this does not seem to be the case, perhaps because of the costs of mediation compared to the amount in issue. That said, we only see the cases that come to court; there will be many which settle without our knowledge. On both these tracks, therefore, there is an absence of hard evidence. If a fast or multi track case is referred to Mediation (as opposed to going through

some other ADR process) the Court uses the HMCS toolkit i.e. we contact the mediation helpline for mediation to be arranged and stay proceedings for 6 weeks. If the case has not settled we list for hearing. Looking at log and Caseman from Nov 07- July 08 there were only 8 referrals that went to mediation and they all failed.

As to the Small Claims Track, there has been a free mediation scheme offered by the Court for almost a year now. Unfortunately the Mediator was ill for a number of months and only returned to work in June. During this period therefore, these Mediations were referred elsewhere (eg Manchester). Up to date statistics were given at the recent Civil Court Users' meeting. In summary, about 20% of Small Claims Track cases are now successfully mediated. The main reason for the 80% which are not successful is that in the time frame between the letter going out inviting mediation and the case having to progress to a hearing, there is a limited number of requests by the parties for the mediator's service. This aspect is now being looked into with a view to improving the take up and, we hope, thereby improving the overall success rate.

After the Judges' Forum I had the opportunity to make enquiries as to a Code of Practice. The position as I understand it is that the Civil Mediation Council is in the process of finalising a draft which will then be sent to the Civil Justice Council. It is hoped that a final version will be published in 3-6 months.

Question 5

As you know the listing of Liverpool Chancery cases is controlled by Manchester, which can cause delays. What is the rationale for this and are there any plans to take back the control of listings in the near future?

Answer 5

Chancery Court listing is the province of the Vice-Chancellor, Judges Hodge and Pelling and the District Judges. District Judge Sykes (the District Judge representative on the Chancery Court Users' Committee) is not aware of delays caused by cases being listed from Manchester. The rationale of listing in one city was to speed up the hearing of cases and to maximise the efficient deployment of judicial resources. If there are any concerns, these would best be raised by the Law Society's representative on the Chancery Users' committee. At the last meeting on 15th May the waiting times show waiting times for trials before a s9 Judge as: 1 or 2 days-immediate, 3-5 days - 5 weeks.

There are no plans to take back Chancery listing to Liverpool

Question 6

At the moment there is no requirement of either party to make a part 36 offer in a claim, although Defendants often do. In particular if liability is not in issue, it might even be considered negligent for a Defendant's adviser not to have recommended a Part 36 offer.

What is the Panel's view on Part 36 offers being made by a Claimant or Defendant? And when should a Claimant/Defendant be required to make a compulsory Part 36 offer, if at all?

Answer:

There is no compulsion on either party to make a Part 36 Offer. The Court has to follow the CPR in terms of Offers which are made. The costs consequences of acceptance of a Part 36 Offer are contained in 36.10 and the costs consequences of a Claimant failing 'to obtain a judgment more advantageous than a Defendant's Part 36 Offer' and of judgment against a Defendant being at least as advantageous to the Claimant as a Claimant's Part 36 Offer are contained in 36.14. It is right to say that there is now more discretion in terms of the Costs consequences than there was prior to the amendments introduced in April 2007 – see *Carver v BAA* [2008] EWCA Civ 412 and my recent decision in *Wilson v Ibbotson* 7BI 108110. I do not think more can be said on this point without trespassing on issues which may be fought out in Court.

Question 7

Does the Panel consider that a List of Documents for Standard Disclosure is capable of being signed by the legal representative of a party to the proceedings? Strictly speaking, the rules state that the list has to be signed by the party themselves or a representative in the case of a company, firm or other organisation. That being the case does the panel consider that lists signed by a legal representative should be rejected as being inadequate? and if so is the panel aware of any reasoning behind the fact that a Statement of Case can be signed by a legal representative, but a list of documents cannot?

Answer:

CPR 31.10 requires a list to be in the relevant practice form, which is N265. This Form, under the heading "Disclosure Statement" begins:

'I the above named Claimant/Defendant/Party (if party making disclosure is a company firm or other organisation identify here who the person making the disclosure statement is and why he is the appropriate person to make it) and

under the box "Signed" has the words: "(Claimant)(Defendant)(s litigation friend)".

This accords with the CPR 31.10 (6) & (7) and the Annex to Part 31 Practice Direction and para 4 thereof.

On the face of it, therefore the legal representative cannot sign the statement but has a duty to endeavour to ensure that the person making the disclosure statement understands the duty of disclosure (see PD para 4.4). The Disclosure statement reflects the fact that there is a positive duty on the party disclosing to give full standard disclosure.

The court is unlikely of its own motion to raise this issue but if the parties raise it, then the point will have to be judicially determined, having heard argument from both sides.

Question 8

Where do “Cost Lawyers” fit in the fee earner grade system?

And does the court see some ATE Insurers almost routine refusal to pay out when a Claimant is unsuccessful as an impediment to justice and a threat to consumer protection?

Answer:

1. The fee earner grade system is the same in costs issues as in any other issue and the four categories of fee earners (A-D) apply. Thus, a person who is not qualified as a solicitor or legal executive can be no higher than C or D. Subject to that, what is allowed by way of the appropriate category of fee earner is case dependant and therefore within the discretion of the Judge

2. As to the stated refusal of ATE Insurers to pay when a Claimant is unsuccessful:

- i This is not something that has been brought to our attention previously. Nor are we aware of any of the facts or background relating to this suggestion.
- ii Unless there is litigation on the point, it is not something in which Judges could become involved in a judicial capacity
- iii If there is a real concern as expressed then there are other official channels through which the matter could be addressed

Question 9

Following the Lamont and Kilby cases is the judiciary content that they have no discretion with regard to dealing with fixed Success Fees. Have any thoughts been raised with the Rules Committee to changing the same?

Answer:

I am not sure whether it is appropriate for the judiciary to be ‘content’ or not ‘content’ with any provision. It is for us to interpret & administer the Law as best we can. I can see that these decisions have caused various issues to arise in the Insurance market but it is for those affected to make their views known through the official channels so that any changes which are thought to be necessary can be fully debated having heard both sides of the argument. The local judiciary have not, as far as I am aware, raised the cases with the Rules committee.

Question 10

Could the panel please clarify the correct interpretation of rule 45.10 (2) c which states that:-

The Court may allow a disbursement of a type mentioned in paragraph (2). This includes under 2(c) a disbursement “necessarily incurred by reason of one or more of the claimants being a child or protected party as defined in Part 21.”

Answer:

The wording of rule 45.10 may be seen as ambiguous and it is often argued under 45.10 that the word “necessarily” means in context whether the fee for Counsel was necessarily incurred and that Counsel’s fees should be considered on the facts of each individual case. We would be interested to learn of the panel’s views on the interpretation on the necessity of Counsel’s fee at an infant approval. Does the panel agree the wording of the rule is uncertain and requires clarification or is the panel of the view a child or protected party under the rules is entitled to be represented at the infant approval by Counsel by reason of the very fact that he is under a disability and therefore requires representation.

This question is definitely one which may be the subject of litigation and upon which it would be entirely inappropriate to comment without hearing full argument from both sides. The only thing I would add is that in the case of *Coles v Keklik* 7LV51214 I rejected the submission that every personal injury case involving a minor was entitled to costs not limited to the Small Claims Track amount.

Question 11

In relation to the recent publicity that has surrounded the potential Court closures due to a shortfall in the collection of fees. Local courts already appear to be under significant pressure in terms of turnaround from issue to hearing and this will only increase if further courts close due to cut backs. I wondered what the experience is of Liverpool county court in terms of fee income and the potential effects of further cutbacks in funding to court users.

Answer:

I have put this question to the Court Manager, Jean Martin-Hall, who responds as follows:

“HMCS has to find savings from our budget, not just this financial year but also for the next two years. The amount of savings HMCS has to find this year is linked to fee income which is currently not as high as anticipated. There are currently no plans to close any of the county courts in the area. However, in relation to the two smaller courts in Merseyside, St Helens and Southport County Courts, plans are being put forward to integrate the county courts with the magistrates’ courts. These are still in the planning stages but look to be feasible propositions.

As to the impact of the cut backs to court user, the area is looking at ways to make savings that have the minimum impact on court users and the top priority remains running the courts effectively and efficiently. This is our core business and where we will focus our energy and effort.”