Satellite Litigation

Satellite litigation is undesirable. It is not necessary to go beyond Part 1 of the Civil Procedure Rules to see why. Satellite litigation can take up more than an "appropriate share of the Court's resources", tends not to help with either expedition or the saving of expense and perhaps more than anything leads to disproportionality.

Recent years have seen many of the issues arising from the last significant procedural and funding reforms gradually resolved, though not without much satellite litigation on the way. It would be regrettable if further proposed changes lead to a similar period of uncertainty, cost and delay.

Following the effective abolition of legal aid for personal injury claims, and the introduction of recoverable additional liabilities, the so-called "costs war" developed, at its height taking up much Court time including the time of the Court of Appeal. This was the era of the "technical challenge" based on arcane points of law, small print and procedural technicalities, paradoxically just the kind of approach which the CPR was intended to sweep away.

The robust and pragmatic approach to this type of issue taken by the Court of Appeal is well known. Most recently, and in quite clear terms, Lord Justice Waller commented in Jones –v- Wrexham Borough Council [2007] EWCA Civ 1356 that:

> "The unsatisfactory way in which satellite litigation has mushroomed with challenges to the enforceability of CFAs, by reference to those regulations, was spelt out in the judgment of the court…….in a decision dealing with a number of cases including Hollins –v- Russell ….."
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> "The court in the above decision sought to discourage the taking of technical points by Defendants on the 2000 regulations."

Despite these sentiments many Claimant lawyers still report paying parties routinely trying to raise technical points.

It is also of concern that, it would appear as a result of disappointment on the terms of the Ministry of Justice Claims Process paper, threats have been made to re-start the costs war. For example, the Insurance Times of 24 July 2008 reported the Director of Claims for Norwich Union as stating:

> "We have been sitting down with our lawyers – we are going to make every technical point (in court, challenging costs settlement) that we can."

The prospect of a renewed costs war was discussed, by all sides, at the recent Journal of Personal Injury Law Conference. In response to the suggestion, by Defendants, costs issues would soon be back in the Court of Appeal the key note speaker, Sir Henry Brooke, observed that he would be "aghast" if that were to happen.

It is, perhaps, of even more concern that so many Claimant lawyers are reporting real problems with the scheme for predictable costs in lower value road traffic claims settled before the issue of proceedings. This scheme, agreed by both sides of the industry, was intended to provide a quick and fair system of remuneration and certainly not to generate satellite costs litigation. But what is happening in practice? Typical problems reported by Claimant lawyers include:

- Costs, despite being subject to the predictable regime, being referred to costs negotiators.

- Attempts to challenge the sums payable, despite the fixed figures.

- Requests for information about funding arrangements (despite the judgment in Butt).

- Challenges to success fees (despite the decision in Kilby).

- Failure to make prompt payment of predictable costs, with delays often amounting to months.

The Courts, in the decisions already briefly referred to, have strived to avoid this type of problem.

In Butt –v- Nizami [2006] EWHC 159 (QB) the Court, when faced with an attempt to argue predictable costs were not payable for a technical breach of the 2000 Regulations, held that the Indemnity Principle was not applicable, recognising the intention underlying the predictable costs scheme "was to provide an agreed scheme of recovery which was certain and easily calculated".

Subsequently, attention turned to the success fee, where the Claimant had a conditional fee agreement, on those predictable base costs. In Kilby –v- Garwith [2008] EWCA Civ 812 the District Judge held that a success fee was payable, at 12.5%, if there was a conditional fee agreement and the rules provided no discretion to allow a departure from that. Despite this ruling being upheld by the Circuit Judge the Defendant took the matter all the way to the Court of Appeal where the earlier decisions were upheld.

A further problem area, generating satellite issues, has concerned arguments about the premature issue of proceedings in claims which would be subject to predictable costs if settled pre-issue. The Defendants argument is usually centred upon a suggestion the Claimant is trying to "escape" predicable costs. However, as the cases already referred to illustrate, it may be the Defendant, if anyone, who is trying to effect an escape from the regime. Moreover, where terms cannot readily be agreed the Claimant must be in a position to take further steps, which is likely to involve the issue of proceedings, in order to force a resolution.

Once more the Courts have tried to take a sensible and robust approach to dealing with these problems and control satellite litigation. For example, in Ellison –v- Fairclough (Liverpool County Court) His Honour Judge Stewart QC adopted the approach to offers taken by the Court of Appeal in Straker –v- Tudor Rose (a firm) [2007] EWCA Civ 268 when holding that a Defendant who had not made an adequate offer before proceedings were issued was at risk of the extra costs then incurred. That was on the straightforward basis a Defendant always has the power to control this risk, namely by making an adequate offer at an early stage. Additionally, a party receiving an offer is entitled to assume that is the other party's best offer, hence the Court should not speculate about what might have happened if negotiations, which in fact did not take place, had taken place.

With the prospect we now have of a new process it would be extremely disappointing if that were to be blighted by further, similar, satellite litigation.

It is, to finish, worth returning to where we started; the overriding objective. This, in addition to the factors already considered, encourages the Court to ensure the parties are on an equal footing. Arguments about, for example, relatively small sums in cases involving predictable costs illustrate how the parties in a typical personal injury claim are on a very different footing. For the Claimant the issue may involve a small sum, but nevertheless costs to which the Claimant is entitled. The Defendant may say that although the sum involved is just a few pounds in the particular case large savings may be made if every Claimant takes a few pounds less on each claim brought against the particular insurer. It may be one thing if a sum not payable is challenged but another if, as the cases and examples already referred to illustrate, there is an attempt to use greater resources to avoid paying sums which are payable. The concern is that such an approach simply allows greater resources to be deployed in any particular case and that militates against a just outcome or at least a proportionate way of dealing with the issues in that case, because of the inequality in resources.

It is to be hoped, therefore, changes now on the horizon for dealing with personal injury claims do not generate further satellite litigation. It is indeed undesirable.