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Dispute funding in England from 2013 – the implications of the Jackson reforms

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Simmons v Castle clarifies 10% increase in general damages – but uncertainty remains

In July of last year, the Court of Appeal ruled in Simmons v Castle [2012] EWCA Civ 1039 that a 10% increase in damages should apply to all applicable cases decided after 1 April 2013 in accordance with the recommendations of Lord Justice Jackson's Final Report on Civil Litigation Costs.

Following this decision, the Association of British Insurers (ABI) issued two applications in which it asked the Court of Appeal to reconsider its position. The Association of Personal Injury Lawyers (APIL) and the Personal Injuries Bar Association (PIBA) joined ABI as interested parties.

The basis for ABI's application was its concern that if the 10% increase in damages applies to cases where judgment is given after 1 April 2013 and the claimant has entered into a Conditional Fee Agreement ("CFA") before this date, then a disparity would emerge whereby, if successful, such claimants would enjoy both the 10% uplift and the ability to recover any CFA success fee from the defendant. For more information on CFAs please see our recent bulletin Dispute funding in England from 2013 – the implications of the Jackson reforms.

PIBA's key submission related to why the 10% increase should not be limited to damages in tort. PIBA argued that the increase should be extended to cover contractual damages and, further, that the heads of damage should be broadened to include "non-pecuniary loss for suffering, inconvenience or distress to individuals."

APIL's stance, quite simply, was that ABI's application should be dismissed on the grounds that allowing the application would lead to satellite litigation; that it was not the Court's place to make transitional provisions such as these and that Lord Justice Jackson had put forward his recommendations as a coherent, interrelated proposal and to 'pick and choose' between them would weaken the impact of the reforms.

After consideration the Court of Appeal took the opportunity to alter its position and its judgment was handed down in October (Simmons v Castle [2012] EWCA Civ 1288).

The Court of Appeal decided that:

- From 1 April 2013, the level of general damages in all civil claims for (i) pain and suffering, (ii) loss of amenity, (iii) physical inconvenience and discomfort, (iv) social discredit or (v) mental distress will rise by 10%; but
- The uplift will not apply to cases where the claimant has entered into a CFA before 1 April 2013.

The later decision in Simmons v Castle is the Court of Appeal's second stab at implementing this element of Lord Justice Jackson's recommendations. That a strong Court of Appeal needed two stabs to implement this discrete and seemingly uncomplicated element of the Jackson reforms only goes to highlight that the reforms to civil litigation costs and funding remain shrouded in uncertainty. With only a matter of months to go before the reforms are implemented on 1 April 2013, it is likely that there will be considerable uncertainty for some time to come. The publication on 21 January 2013 of various regulations/orders is welcome clarification (the details of which will form the foundation for our next article shortly), but the question remains whether the rush to implement the reforms will end in disaster.

If you require advice on any of the matters raised in this paper, please get in touch with any of our lawyers listed below or your usual Shepherd and Wedderburn contact.

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