Civil procedure rules for interlocutory appeals

Unless there is a change to the way that interlocutory costs are dealt with, **Seamus Smyth** foresees a return to pre-CPR summary assessment

You have succeeded on an interlocutory application lasting less than a day. You seek your costs. You are quite likely to be allowed only 50 per cent (which means your client pays half despite "success"), or to be refused summary assessment (which means your client has to wait for detailed assessment at the end of the case – which may be worse). Why?

Before the CPR was introduced in 1999 interlocutory applications were very frequent. The Bear Garden buzzed. Applications were, admittedly, often used quite cynically to prolong litigation and defer trials. The costs of interlocutory applications were payable only at the end of the case when all costs orders would be dealt with. Summary assessment was unheard of, costs schedules were not required, and argument about interlocutory costs was infrequent and costs battles before conclusion of the case were very rare.

The impact of Woolf

As part of the attack on delay, the CPR dealt with interlocutory applications in two ways. First, trial timetables were to be set at an early stage in the procedure, and adhered to. This has been eminently successful; since then the CPR's robust adherence to the trial timetable has resulted both in earlier trials (almost always within the prescribed trial window), and in removal of applications intended only to delay.

Woolf also imposed the requirement that the costs of any interlocutory application lasting less than a day be paid immediately (CPD 44PD7, paragraph 13.2). Summary assessment was introduced, with costs schedules. Unlike the trial timetable however, summary assessment has not been successful.

It seems to have been assumed in 1999 that preparing a costs schedule would be easy and quick, that judges would always have the time, inclination and experience or training to assess costs, and that the successful party would be adequately rewarded by the costs so assessed – at least as adequately as he would on a detailed assessment. Sadly none of these assumptions has been justified. Preparing a proper schedule can be a time-consuming task; judges frequently lack experience and will all too often disallow an arbitrary third or half of the costs claimed; and, with a frequency which seems to be increasing and – for the winner – depressing, judges often decline to assess costs summarily on the grounds that there is no time for the argument, or that the amount is large, or that the costs are complicated. In the absence of a specific (and unusual) order for immediate detailed assessment these costs have to go to detailed assessment at the conclusion of the case anyway (CPR 47.1), as they did before 1999. A payment on account can be sought, but that application requires some analysis of the costs claimed (and therefore a schedule) anyway, and a payment on account does not in any event remove the need for the balance to be dealt with as part of the overall detailed assessment at the end of the case.

This is unsatisfactory in many ways. The cost of preparing the schedule is totally wasted if there is no summary assessment; the difficulty in recovering proper costs penalises the successful party unduly; and the combined effect of the risk of the loser having to pay and the inability of the winner to recover adequately, are too great a disincentive for those contemplating an interlocutory application. Proper interlocutory applications are good for case management, obviously. Interlocutory hearings also have an indirect benefit, as they expose the parties' cases to neutral judicial scrutiny. The Bear Garden today is empty and litigation is the worse for it.

> **"There is no need for further discouragement of interlocutory applications by what has become an expensive, arbitrary and unpredictable costs regime"**

Looking ahead

The trial timetable on its own prevents cynical delaying applications. There is no need for further discouragement of interlocutory applications by what has become an expensive, arbitrary and unpredictable costs regime.

Interlocutory costs would be better dealt with in one of two ways: abandon the principle of immediate payment, schedules and the post-application argument about costs, and leave all costs to be dealt with, together, at conclusion – as happened before 1999. Or oblige judges in every case of no more than a day to summarily assess costs regardless of size, apparent complexity or perceived lack of time.

Without some change to the way in which interlocutory costs are actually dealt with, clients and practitioners will increasingly be burdened with all the disadvantages of summary assessment without the intended advantages, and the interlocutory costs practice will by default revert to what it was before the CPR.

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