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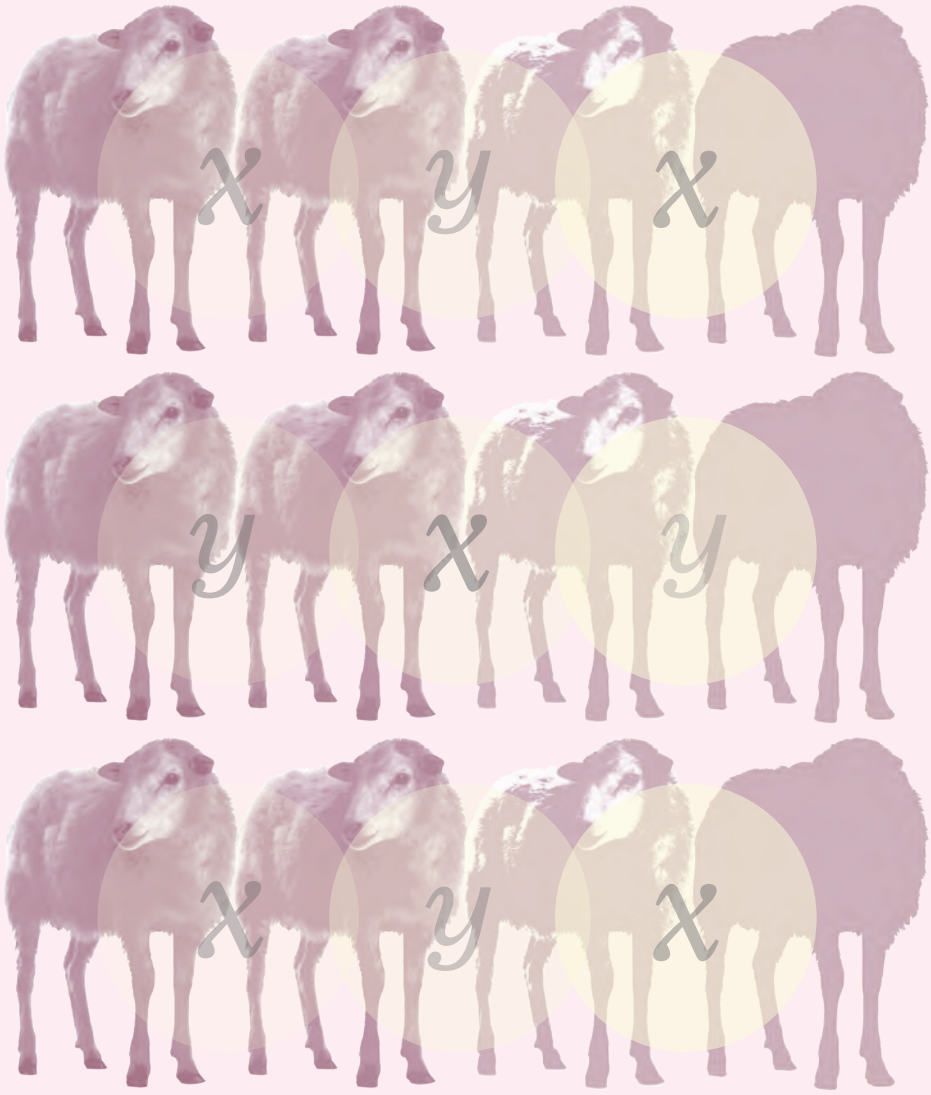

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Go figure

Recent Evening Meeting speaker Simon Miles sums up the significant changes that have occurred in the area of costs management

The past two years have been a busy time for those concerned with costs in trade mark litigation cases. In the High Court, the Jackson reforms, which came into force in April 2013, have heralded the biggest changes to how parties must conduct High Court litigation since the Civil Procedure Rules replaced the old Rules of the Supreme Court in 1999. For those involved with smaller cases, recent times have been no less remarkable. The re-constituted Patents County Court (now the Intellectual Property Enterprise Court (IPEC)) introduced a costs-capping regime, which, together with the new streamlined procedure, has made it the forum of choice for lower-value IP disputes.

Jackson

The reforms put forward by Lord Justice Jackson were intended to be "a coherent package of interlocking reforms, designed to control costs and promote access to justice". They are certainly wide reaching:

CFAs/ATE premiums

From April 2013 the attractiveness of Conditional Fee Agreements (CFAs) to claimants has been diminished, with parties no longer being able to claim either the success fees or the After the Event (ATE) insurance premium from the other side. In have come Damages Based Agreements (DBAs), which allow the successful party's lawyer to be paid an amount equal to up to 50 per cent of any damages that are awarded.

Costs management

Ensuring costs are proportionate is at the heart of the reforms. They are considered proportionate if they bear a reasonable relationship to:

- The sums in issue in the proceedings;
- The value of any non-monetary relief in issue in the proceedings;
- The complexity of the litigation;
- Any additional work generated by the conduct of the paying party;
- Any wider factors involved in the proceedings, such as reputation or public importance.

One of the main ways this is achieved is through costs management. What this means in practice is that in all cases commenced after 1 April 2013, both parties must file and serve a costs budget that sets out their anticipated costs at each stage of the proceedings, up to – and including – trial. The form for these budgets is Precedent H, which must be signed off by a senior legal representative with a statement of truth.

The parties have an obligation to try to agree their budgets, but ultimately it is for the court to approve the budgets at the cost management conference (CMC). Experience so far appears to indicate that this is placing a larger administrative burden on the courts and has led to long waits for CMCs to be listed, and cases being delayed. This may, however, improve as both the courts and the parties become

Costs budgeting needs to be taken extremely seriously by the parties. Its potential impact on litigation is huge

more experienced in dealing with costs budgeting.

Costs budgeting needs to be taken extremely seriously by the parties. Its potential impact on litigation is huge. Parties will not be able to recover significantly more than their approved budgets unless developments in the litigation warrant such increases and where those increases are approved by the court or agreed between the parties. Failure to pay close attention to costs, to prepare sensible budgets and to review and update them regularly will, therefore, lead to a significant shortfall between what a successful party can recover from the unsuccessful party and what it must pay its legal advisors.

Relief from sanctions

The Jackson reforms also heralded an important change in the way that the courts dealt with the question of relief from sanctions, for example for non- or late compliance with a procedural step. The amended rules stress the need to deal with cases in a just manner, to take account of proportionate cost and to enforce rule compliance.

This approach probably reached its high-water mark in the now infamous case of Mitchell v News Group Newspapers [2013] EWCA Civ 1537, when the Conservative MP Andrew Mitchell was prevented from claiming any more than court costs

in his high-profile defamation dispute with News Group Newspapers because his solicitors filed his costs budget a few days late.

Subsequently, the Court of Appeal has retreated from Mitchell and in three joined appeals heard together in July 2014 (Denton v TH Ltd and another, Decadent Vapours Ltd v Bevan and others, and Utilise TDS Ltd v Davies and another [2014] EWCA CA Civ 906) set out the following three-stage test for the courts to adopt when considering applications for relief from sanctions:

- Stage 1 – Identify and assess the seriousness of the non-compliance. Is the breach "serious or significant"?
- Stage 2 – If it is serious, why did the default occur?
- Stage 3 – Consider all the circumstances of the case in order to deal with the application "justly", including (a) the need for litigation to be conducted efficiently and at proportionate cost and (b) the need to enforce compliance with rules, directions and court orders.

As a result of these new rules, it seems clear that trivial breaches will not be punished, but that if parties wish to escape the consequences of more serious breaches then they will need to demonstrate good reasons why they occurred.

IPEC

IPEC is not subject to the costs management regime now in place in the High Court. Instead, it has its own costs-capping regime, in place since October 2010 with maximum costs of £50,000 and £25,000 available for the liability and quantum stages of the proceedings, respectively.

New rules

Recent changes have increased the maximum costs allowed at each stage for cases commenced or transferred into IPEC after 30 September 2013, while leaving the overall caps unchanged. The updated rules have also taken Court fees outside of the cap and the caps do not apply on costs incurred pre-transfer, where there is an abuse of process or a certificate of contested validity.

Exceeding the cap

The principles on which the Court will approach costs assessments in

If parties wish to escape the consequences of more serious breaches then they will need to demonstrate good reasons why they occurred

IPEC have remained largely unchanged from the early cases of Westwood v Knight [2011] EWPCC 11 (general approach to assessment of costs) and BOS v Cobra [2012] EWPCC 44 (approach when not all issues are decided in one party's favour). More recent cases have underlined the warning given in Westwood that only in rare and exceptional cases will the Court exceed the cap on costs. In Henderson v All Around the World Recording Ltd & Anor [2013] EWPCC 19 the Court did not feel that a serious imbalance between the financial resources of the two parties took the case into exceptional circumstances. Similarly, in Brundle v Perry [2014] EWHC 979 a letter that Mr Brundle had represented as coming from the Judge and some colourful language from Mr Brundle did not justify exceeding the cap. The Court did, however, indicate that the circumstances in which it would contemplate exceeding the cap for individual stages needed to be less exceptional than the circumstances that would be required to exceed the cap overall.

Multiple defendants

IPEC has also taken a similarly robust approach to the cap on costs in cases in which there were multiple defendants, indicating that such cases would not justify each defendant seeking a separate £50,000 costs limit (Liversidge v Owen Mumford Ltd [2012] EWPCC 40) – even in circumstances in which the defendants had been separately represented or raised different defences – or allow the claimant to claim a separate £50,000 worth of costs against each defendant (Gimex International Groupe Import Export v Chill Bag Co. Ltd [2012] EWPCC 34).

Part 36

Also noteworthy is the Court's approach to Part 36 offers. It has confirmed that the rule stipulating that costs are assessed summarily at the end of a trial applies equally where a Part 36 offer has been accepted (PPL v Hamilton [2013] EWHC 3967). It has also made it clear, in Abbot v Design & Display & Anor [2014] EWHC 3234, that there is no reason why it should not apply the new Part 36.14(3)(d), which is designed to encourage defendants to accept claimant Part 36 offers by penalising those who do not accept such offers and then fail to do better at trial. This rule, brought in by Jackson, allows the Court to order the defendant to make an additional payment of 10 per cent of the damages awarded and IPEC has ruled that such a payment is neither costs nor damages so can be ordered in addition to the damages and costs caps in place.

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