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TGC Costs Update

The Newsletter of the TGC Costs Team

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Editorial

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Welcome to the very first edition of TGC's Costs Newsletter! Costs has been a huge part of our practice at TGC for as long as it has been recognised as a discrete area of law. Whilst the team has naturally changed and evolved over that time, it has retained phenomenal strength and depth from its leadership right through to its most junior members. We pride ourselves on being leaders in the field and being able to offer a client service level second to none. We remain extremely grateful for our Directory recognition, and through 2017 we've reinvigorated our energy levels as a team being ever ready to serve!

2017 has already proved to be an extremely exciting year. We launched our sell-out one day costs conference in February which was attended by more than 250 delegates and presented on a number of critical topics: retainers, assignment, ATE premiums, proportionality, budgeting, Part 36, QOCS, fixed costs and assessment. We were particularly honoured to have speakers from the Court of Appeal, the SCCO, and the QBD. In case you missed it, the materials can still be found on our website at **http://tgchambers.com/news-and-resources/seminars/retainer-recovery-journey-modern-litigation/**

We have had significant instructions in a high number of cases that continue to shape the future for the costs world. This newsletter aims to bring you the latest news (at the time of print) on the hottest topics including: how to hack through Article 10 and blag about additional liabilities (Flood/Miller/Frost), a review of New P in anticipation of BNM, substance not form on CFA retainers post-legal aid funding, a club-like search for logic in fixed costs, the Ps & Qs of QOCS, extension of pre-LASPO CFA and ATE to a post-LASPO appeal and assignment-lite (Plevin), the surviving power of set-off even in QOCS cases and, not least, the budget vs assessment battle (Harrison). In for a penny, in for a pound.

On the horizon is, of course, the long awaited Court of Appeal decision in BNM. I have prepared a skeleton argument in a parallel appellate case (Murrells) albeit at Circuit Judge level, but having had the paper fight, the parties have agreed to await the outcome of BNM. At the same time, the Court of Appeal shall be giving judgment on assignment of CFAs in Budana. No doubt those decisions will mark the trigger for our next publication.

Finally, I should take this opportunity to thank all of the contributors for their hard work, and my Associate Editors for all of their help and without whom this newsletter would not have taken off. Happy reading.

Additional Liabilities And Human Rights: Times V Flood; Associated Newspapers V Miller; Mgn V Frost & Ors [2017] Uksc 33

Simon Browne QC

The Supreme Court, in April of this year, unanimously dismissed each of the appeals brought by domestic newspaper publishers. The publishers were challenging the compliance of costs orders entered against them with European Court of Human Rights (ECtHR) law. They relied on the decision of *MGN v UK* [2011] 29 BHRC in averring that cost orders which required them to pay the Respondents' additional liabilities infringed on their Article 10 rights to freedom of expression. The Supreme Court held that the publishers' Article 10 rights were not as centrally engaged as they alleged, and further that the Respondents' own Convention rights (A1P1, 6 and 8) would be more significantly infringed if the costs orders were altered to remove their right to reimbursement of additional liabilities.

Background

In F*lood and Miller*, the first instance trials had involved allegations that the publishers had libelled the Respondents. In *Frost*, the Appellant newspaper had unlawfully obtained information by various forms of phone hacking and blagging. Each Respondent newspaper lost the first instance trial and costs orders were entered against them requiring them to pay the Respondents' additional liabilities arising from their conditional fee arrangements, namely the success fee and ATE premiums. The recoverability of these additional liabilities had been expressly reserved in publication cases by domestic law, however the ECtHR in *MGN v UK* had ruled that this regime would normally infringe on a publisher's Article 10 rights ('the rule').

Key Issues for the Supreme Court

The key issues for the Supreme Court were:

1. Should domestic law take into account the rule in *MGN v UK*;
2. If so, whether the costs orders in *Flood and Miller* ought to be amended to exclude payment by the Appellant publishers of the Respondents' additional liabilities;
3. Whether the additional liabilities would be recoverable in *Frost & Ors*.

The Court also considered whether it ought to make a declaration of incompatibility, and whether the trial Judge's decision to award Flood all his costs, despite the publisher partially succeeding with a Reynolds defence, had been a reasonable exercise of judicial discretion.

1. *MGN v UK*

The Supreme Court declined to rule conclusively on the first issue. It formed the preliminary view that it was likely that domestic law should reflect the decision made in *MGN v UK*, however this decision was heavily caveated by the statement that it would not be appropriate for the Court to express a concluded view on the matter. The United Kingdom government – the party which would be most detrimentally affected by any such decision – had not made representations on the matter, and was not before the court. No final decision on the recoverability of additional liabilities in publication cases was therefore reached. However, in order to fully address the Appellants' submissions, the Court proceeded on the assumption that the *MGN v UK* ruling was valid domestically.

2. Additional liabilities in *Flood v TNL* and *Miller v ANL*

The Court additionally considered that, even if the *MGN v UK* rule did apply, these particular appeals did not fall within the ambit of that rule and the costs orders in these appeals should stand. Further, if upholding the cost orders would involve infringing the Appellant's Article 10 rights, there were also the Respondents' Convention rights to consider.

Firstly, the Respondents' rights (A1P1) would be infringed. In the United Kingdom, citizens are entitled to act on the assumption that the law is as set out by legislation, especially when this law is further confirmed by the Supreme Court (*Campbell*). They are further entitled to assume that, when changes are made, the law will not apply retroactively. The Claimants' rights would therefore be infringed if, in reliance on a legal system, they incurred financial obligations which were retrospectively invalidated to their detriment.

Further, although the argument was not pursued by the Respondents, the court considered their Article 6 rights. In the post-legal aid world, recoverability of additional liabilities in the specific area of publication was considered by various authoritative sources to be integral to ensuring access to justice and was thus rightly preserved. The court therefore found that the Respondents' access to the courts would have been effectively denied had additional liabilities not been recoverable. Additionally, in the case of defamation proceedings, the Article 8 rights of Claimants would usually be at play, an additional countervailing right to consider.

The court held that on balance the Appellants' Article 10 rights were not as fundamentally engaged in the present cases as the newspapers contended. Next, there was the Respondents' rights to consider. The Court found that, having weighed up the injustice suffered by each party, the Respondents' suffering would be significantly greater than that of any Appellant, and therefore the appeal was dismissed.

The Justices additionally upheld the costs order made against the Appellant newspaper in Flood, finding that the judge was within the limits of her discretion in making such an order and had not erred in finding that Flood was the 'overall' winner, despite the publisher having succeeded to some degree with a Reynolds defence.

3. Additional liabilities in *Frost v MGN*

In addition to the above, the Court found a more fundamental reason why the appeal should be dismissed in the case of Frost. It found that the illegal activities undertaken by the Appellant newspaper from which the Frost claims arose, prohibited MGN from relying on the rule delivered in the ECtHR. Further, the conduct of MGN could not in any way be justified by any public interest argument.

The Court additionally ruled that it would be inappropriate to make a declaration of incompatibility, for the same reasons that it declined to rule on the applicability of *MGN v UK* domestically.

Commentary

The Supreme Court declined to rule conclusively on whether the UK Costs regime was Convention-compliant. Being alive to the policy concerns of such a decision, it preferred to leave it open to the UK government. However, what is clear is that the Court considered it unjust to disallow the recoverability of additional liabilities retroactively. Based on this, Claimants should continue to recover their additional liabilities from Defendant publishers – subject only to the strength of their competing Article rights, until a new costs regime for publication cases is in place.

The Supreme Court was however completely clear on one important issue. It delivered a scathing criticism of MGN, stating that:

"bearing in mind the persistence, pervasiveness and flagrancy of the hacking and blagging, and the lack of any public significance of the information [...] it appears to me that this is not a case where the Rule can properly be invoked" (paragraph 63).

The Supreme Court's view on hacking and blagging is clear – where a publisher has been involved in illegal activities, reliance on Article 10 to avoid payment of additional liabilities will not be permitted.

The New Proportionality Test and Additional Liabilities

Richard Boyle

The general rule is that Conditional Fee Agreements and ATE insurance premiums taken out after 1st April 2013 are not recoverable *inter partes* (s.46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ["LASPO"]). However, there are a number of carve outs from this general rule. Claims for clinical negligence, diffuse mesothelioma, publication & privacy and insolvency proceedings have been exempted (until 6th April 2016 for insolvency proceedings).

A further change on 1st April 2013 was the amendment of the Civil Procedure Rules, including a change to the proportionality test. Under the new rule 44.3(2)(a) CPR, the court must only allow costs which are proportionate to the matters in issue. Furthermore, the court may disallow costs which are disproportionate even if they were reasonably or necessarily incurred. The courts have applied this test to profit costs in a number of well publicised judgments (e.g. *May v Wavell Group PLC & Anor* [2016] EWHC B16 (Costs)).

The impact of the new proportionality test to ATE premiums, in particular, could be significant. The old Lownds test of proportionality was that an item was proportionate if it was necessary. In Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134, the Court of Appeal stated that it was inappropriate to make broad-brush reductions to ATE premiums in this context. However, the Lownds test of proportionality is expressly disapplied by the new proportionality test because necessarily incurred costs can still be disallowed if they are disproportionate.

Lord Neuberger stated, in a speech on 29th May 2012, that *"[t]he law on proportionate costs will have to be developed on a case-by-case basis. This may mean a degree of satellite litigation while the courts work out the new law, but we should be ready for that, and I hope it will involve relatively few cases"*. So, five years down the line, one would expect plenty of guidance on how the new proportionality test is to be applied to additional liabilities. At the very least, one would expect to know what test to apply to these additional liabilties. In fact, however, it is not yet clear whether the new proportionality test applies to additional liabilities taken out after 1st April 2013, let alone how that test should be applied.

This uncertain position is partially due to a currently unexplained change in the rules. Rule 43.2(1)(a) CPR, as it was in force before 1st April 2013, defined *"costs"* as including *"any additional liability incurred under a funding arrangement"*. Rule 44.1 CPR, in force after 1st April 2013, defines "costs" with no reference at all to additional liabilities. The new proportionality test at r 44.3 CPR is stated to apply to *"costs"*.

Does that mean that the new proportionality test does not apply to additional liabilities? Was the definition changed in a deliberate attempt to exempt additional liabilities from the new proportionality test? Alternatively, could the Rules Committee have simply removed additional liabilities from the definition, forgetting that they are still recoverable inter partes in prescribed circumstances?

Recent drafting has not been without its hiccups: the Recovery of Costs Insurance Premiums in Clinical Negligence (No.1) Regulations 2013 were said to be ultra vires and quickly replaced, and the fixed costs rules required the Court of Appeal's *"clarification"* in *Qader & ors v Esure Services Ltd & ors* [2016] EWCA Civ 1109.

The issue was first considered in another case which has been well publicised, particularly for Chief Master Gordon-Saker's application of the new proportionality test to profit costs, in *BNM v MGN* [2016] 3 Costs LO 441. The Master considered that the new proportionality test applies to additional liabilities because CPR r 44.3(2)(a) requires the court to allow only proportionate costs. This is, perhaps, a slightly circular argument because the new definition of costs does not include additional liabilities.

Next was *King v Basildon & Thurrock University Hospitals NHS Foundation Trust* (unreported, Master Rowley, SCCO, 30th November 2016). Master Rowley declined to follow *BNM* and held that CPR r 44.3(5), the new proportionality test, does not apply to additional liabilities. He concluded that the word *"costs"* in the new proportionality test refers to profit costs and disbursements, not additional liabilities, because of the change in definition of *"costs"*. He felt that the provisions in relation to costs budgeting, which also does not apply to additional liabilities, supported this conclusion. He stated that this was only a transitional problem for the majority of cases and the rest remained by the express will of Parliament.

In *Murrells v Cambridge University NHS Foundation Trust* (unreported, Master Brown, SCCO, 17th January 2017), Master Brown agreed with Master Rowley in King. He concluded that the restricted definition of *"costs"* applies to the new r 44.3 CPR. He concluded that Parliament could not have intended such a radical departure from the previous approach to the assessment of additional liabilities, which would preclude the recovery of any or a significant proportion of additional liabilities reasonably incurred. He stated that if Parliament had intended such a change it would have done so expressly.

Master Simons in *Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust* (unreported, Master Simons, SCCO, 17th February 2017) did not consider the above cases but concluded that additional liabilities are subject to the new proportionality test. He stated that costs must include costs that are claimed in the bill of costs and that CPR r 44.3(2) does not make any distinction between profit costs, disbursements and additional liabilities. He did not consider the new definition of costs at r 44.1 CPR.

This leaves practitioners with four judgments of persuasive authority and conflicting dicta. Three of the cases were transitional cases where some costs were incurred before 1st April 2013 and some after. This meant that those cases also considered the transitional provisions. However, the general principles set out above arguably apply to cases in which the costs entirely post-date 1st April 2013. My experience of running the argument to post-1st April 2013 costs has yielded mixed results and a few stays pending higher court authority.

There is the prospect of some clarification on the horizon. *BNM* has been appealed and is due to be heard by the Court of Appeal but not until October 2017. *Murrells* has been appealed and was due to be heard by a Circuit Judge in August but has now been stayed behind *BNM*. The issue is therefore likely to be settled before the end of the year but, given that it is likely to affect almost all clinical negligence claims, that is a long time to wait. In the meantime, practitioners will be forced to stay claims or argue the toss over the cases cited above. *Murrells and King* certainly contain lengthier reasoning than *BNM* and *Rezek-Clarke* and support that reasoning by reference to the various rules and provisions. From the current case law, the argument that the new proportionality test does not apply to additional liabilities seems to have the upper hand.

Let's relax the formalities: the Court of Appeal's judgment in Hyde v Milton Keynes NHS Foundation Trust

Matt Waszak

On 23 May 2017, the Court of Appeal handed down its highly anticipated judgment in the case of *Hyde v Milton Keynes NHS Foundation Trust* [2017] EWCA Civ 399.

The question in *Hyde* was a discrete yet important one: is a CFA enforceable in a case previously funded by legal aid where the funding certificate has not been formally discharged? A resounding yes, said the Court of Appeal (Davis, Lewison and McCombe LJJ) on the facts of the case.

2016-2017 has seen a spate of Court of Appeal decisions in which questions of costs recovery in injury cases have been resolved in favour of claimants. Hyde is yet another.

The facts

The claimant brought a clinical negligence claim against the defendant NHS trust which was originally funded by a legal aid certificate, issued in July 2008. Liability was admitted. In July 2012, proceedings were issued and the notice of public funding was sent to the defendant. Judgment was subsequently entered against the defendant with damages to be assessed. Following an exchange of offers between the parties, proceedings were settled in the sum of £300,000 at a joint settlement meeting in November 2013.

The claimant was, throughout the proceedings, represented by different firms of solicitors – from May 2012 onwards by Ashton KCJ solicitors. The relevant legal aid certificate had been transferred to the different firms of solicitors as the case progressed. Significantly, the certificate imposed a financial limitation on the work that could be done under it – initially £25,000 excluding VAT, which was ultimately extended to £43,000 excluding VAT. Ashton KCJ complained to the Legal Services Commission that that certificate's limit was insufficient to fund the costs of work. A request was made for a further increase which was rejected. In March 2013, CFAs were entered into between both solicitors and counsel, and between the claimant and her solicitors. Both included a success fee. At no point did the claimant's solicitors seek a discharge of the funding certificate.

Costs proceedings came before Master Rowley in the SCCO for detailed assessment. By a reserved judgment, the Master held that the claimant could, in principle, recover the full amounts of her costs, in particular the success fee under the CFA and the amount for her ATE premium, from the unsuccessful defendant. Though the legal aid certificate had not been discharged, Master Rowley held that "discharge by conduct" could occur where a party had exhausted the costs that could be claimed under a funding certificate.

The defendant's appeal was dismissed by Soole J (sitting with Master O'Hare as assessor) by a reserved judgment handed down on 20 January 2016: [2016] EWHC 72 (QB). Soole J held that even though the legal aid certificate has not been formally discharged, services provided under the public funding had, as a matter of substance, come to an end before the solicitors acted on a private retainer.

The law

The legal principles concerning the discharge of legal aid funding are framed by the provisions of the Access to Justice Act 1999 and supplemented by the Community Legal Services (Costs) Regulations 2000.

Insofar as they are directly relevant:

- Section 10(1) of the 1999 Act states that *"An individual for whom services are funded by the Commission as part of the Community Legal Service shall not be required to make any payment in respect of the services except where regulations otherwise provide"*.
- Section 22(1) of the 1999 Act provides that *"Except as expressly provided by the regulations, the fact that services provided for an individual are or could be funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not affect – (a) the relationship between that individual and the person by whom they are provided or any privilege arising out of that relationship, or (b) any right which that individual may have to be indemnified in respect of expenses incurred by him by any other person."*
- While Section 22(2) of the 1999 Act provides that *"(2) A person who provides services funded by the Commission as part of the Community Legal Service or Criminal Defence Service shall not take any payment in respect of the services apart from –* (a) *that made by way of that funding*, and (b) *any authorised by the Commission to be taken"*.

Submissions

The key question in the appeal concerned whether the claimant's solicitors' failure to formally discharge the legal aid certificate rendered the CFA effectively unenforceable such that the costs incurred under the private retainer could not be recovered.

The Appellant (Milton Keynes NHS Foundation Trust) argued that the CFA was to be treated as unenforceable because the legal aid certificate had not been discharged. And that by way of sections 10(1) and 22(2) of the 1999 Act, a person providing services funded by the Legal Services Commission cannot take any payment for services apart from that made by public funding – topping up, in short, is prohibited.

The Respondent argued that: (i) a funding certificate did not have to be formally discharged before solicitors acted for the same client on a CFA; (ii) under section 22 of the 1999 Act a client retains the freedom to instruct a solicitor on a privately funded basis; (iii) though the funding certificate was not formally discharged, it was effectively superseded by the CFA that the claimant entered into with her solicitors; and (iv) when the CFA was entered into, the claimant was not on any sensible view in receipt of publicly funded services.

Judgment

The Court of Appeal held that the correct approach to the issue is to take a broad view: rather than narrowly considering whether the funding certificate has been formally discharged, "to make an evidential enquiry to see whether, as a matter of substance, [the funding] certificate is to be regarded as in truth spent" (paragraph 42).

The Court of Appeal found that as "a matter of reality and substance, the CFA had for all purposes replaced the public funding" (paragraph 45). The crucial fact was that the claimant had entered into a CFA with her solicitors, the purpose of which was to supersede, in its entirety, the public funding of the claim. A further point of some significance was that at no point in the litigation was the work under the private retainer and the publicly funded work concurrent.

Conclusion

True to recent form on costs recovery in injury cases, the Court of Appeal has held in favour of a permissive approach to the issue of discharging a public funding certificate. Considering the broad evidential picture – and substance not form – is the order of the day, where appropriate.

Where a claimant enters into a private retainer covering work previously done under a public funding certificate, a failure to formally discharge the public funding certificate does not render it automatically unlawful or unenforceable. Yet practitioners should remain cautious. To a large extent, this judgment is couched on its own facts. And it remains a matter of good practice, at the very least, for a public funding certificate to be discharged before a private retainer is entered into. Seek advice.

Fixed Costs Update

Piers Taylor

It is now almost 4 years since Section IIIA of Part 45 became relevant to road traffic, employers' liability and public liability claims. Rules CPR 45.29A to 45.29L were an ambitious attempt to set out the fixed costs payable in all situations, but, perhaps inevitably, there were many situations which were not directly dealt with. The Court of Appeal has clarified some areas, but others remain outstanding.

The first clarification was in *Broadhurst v Tan* [2016] EWCA Civ 94. The uncertainty was as to how CPR 36.14(3) (allowing for costs on the indemnity basis where a Claimant matches or beats their own Part 36 offer) could sit with a system where there was never any assessment of those costs because they were at all times fixed. Despite this question posing issues at first instance, Lord Dyson MR had no doubt as to how the rules were to be interpreted: where a claimant makes a successful Part 36 offer in a Section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective.

The next development was *Qader v Esure* [2016] EWCA Civ 94. This was a much-awaited appeal. The logic of the decision under review – that of HHJ Grant (15 October 2015, Birmingham Civil Justice Centre) – had been attractive. The rules as cast did not reference track allocation as a condition for the applicability of fixed costs; the only apparent entry to section IIIA was a CNF after 31 July 2013, the only apparent exit was 45.29J (exceptional circumstances). It seemed to follow that multi-day multi-track cases were still subject to fixed costs, but this conclusion seemed unintentional. It took a year before the Court of Appeal determined that, by error in drafting, the Rules Committee had omitted the words "so long as the Claim is allocated to the multi-track" from CPR 45.29B. During that year many costs orders in claims on the multi-track had been awarded using the fixed costs formulae.

Another contest concerned disposal hearings listed under CPR PD 26 para 12.4. In such cases, there is no allocation to track, no directions for disclosure and no oral evidence heard. Whilst the matrix of increasing fixed costs at Tables 6B and 6C provides for settlement prior to allocation and fixed costs where a claim is concluded at trial, there is no direct answer for disposal hearings. The Court of Appeal had a straightforward answer when considering this matter in *Bird v Acorn* [2016] EWCA Civ 1096: CPR 45.29C(4)(c) (for RTA claims) and CPR 45.29E(4)(c) (for EL/PL claims) defines "trial" as "the final contested hearing". That included a disposal hearing. It did not matter if (as is possible) the disposal hearing turned out not to finally dispose of the claim and directions were set down for a trial on quantum instead. Nor did it matter that the disposal hearing might be uncontested.

The most recent case is *Sharp v Leeds City Council* [2017] EWCA Civ 33. This appeal concerned the costs of a pre-action disclosure application after a CNF had been sent. The question was whether such applications were "interim applications" for the purposes of CPR 45.29H (bearing a fixed cost of £250 plus VAT plus disbursements) or whether they fell outside of the fixed costs scheme (and thus attracted costs assessed on the standard basis). The Court of Appeal held that CPR 45.29H did apply. Such applications "are 'interim' in the fullest sense because it follows the institution of the 'claim' by the uploading of a CNF on the Portal, even though no proceedings under Part 7 have yet been issued, and precedes the resolution of the claim by settlement or final judgment".

There remain situations of uncertainty. Three will be outlined here. The first common issue is how the costs of a claim are calculated if there is more than one Claimant at trial – are the costs awarded on a 'per Claimant' basis? If so, does that extend to the 'trial advocacy fee'? There is persuasive authority from HHJ Pearce in *Neary & Neary v Bedspace Resource Limited* (4 December 2015, Chester Civil and Family Justice Centre) answering both questions in the positive. In relation to non-fixed cost fast track trials, CPR 45.40 provides that there is only one 'fast track trial' cost if multiple claimants are represented by the same advocate, yet there is no repeat provision concerning 'trial advocacy fees' in Section IIIA. HHJ Pearce's conclusion is the most straightforward answer to this question and thus, it is suggested, the approach the Court of Appeal would prefer. It is also consistent with practice in relation to claims settled within the Portal (whether at Stage 2 or Stage 3) and the approach to older claims that left the portal but settled pre-issue and were governed by Section II of Part 45 (see PD45 para 2.7: "Where two or more potential claimants instruct the same legal representative, the provision of the section apply in respect of each claimant").

The second issue commonly arises where damages for different heads of loss are agreed at different stages of the claim. For example, in a RTA claim, a Defendant may have paid vehicle damages prior to issue and yet require a Claimant to prove causation of injury to trial. Is the 20% reference in the costs calculation at Table 6B to be applied to the litigated damages or to all of the losses that have been recovered by the Claimant? The Claimant cannot realistically hope for a costs order if he fails to prove his litigated losses and his claim is dismissed, so why should a costs order on success take into account non-litigated losses? On the other hand, we are to understand from the Sharp case that fixed costs apply to claims from the moment they enter the protocol; indeed, Table 6B refers to damages "agreed or awarded". There is no obvious answer. It is suggested that the crucial questions may be whether the earlier settled loss was included or mentioned on the CNF and the timing of the earlier settlement (i.e. was it compromised before or after the claim left the relevant Protocol and fell within the remit of Section IIIA).

Finally, there is no direct provision for the cost of an application under CPR 21.10 to approve a proposed settlement on behalf of a child or protected party whose claim has already left the RTA or EL/PL Portal. Had such a claim settled at Stage 2 or 3 inside the relevant Portal, Section III provides for the costs of a Stage 3 hearing to seek approval of any compromise (both in terms of solicitors' costs and the advocate's costs). Where Section IIIA governs, it is not clear that an approval hearing is an interim application for the purposes of CPR 45.29H (as the approval of the settlement should end the claim), nor that the approval hearing is the 'final contested hearing' such that it is treated as a trial (as the very fact of a proposed compromise suggests there is nothing contested).

Readers may recall Turbridy's appeal in *Dockerill v Tullett* [2012] EWCA Civ 184. In that case, the child's claim had left the portal but had then settled subject to court approval. Section II applied to the costs, making them £800 plus 20% of the damages. Turbridy sought counsel's fees for attending the approval hearing as being "necessarily incurred by reason of one or more of the claimants being a child or protected party" (CPR 45.12(2)(b)). It was held that this did not apply to all infant settlement applications, and that, "the convenience of having counsel attend the hearing has, I think, to be borne by the solicitors as part of their costs just as they would have had to meet the costs of instructing a local agent". The outcome was that there was no additional cost for attending an approval hearing, despite the fixed costs being the same for any adult who would not require one. It remains to be seen whether similar logic is applied to infant approval hearings in Section IIIA claims. tgc

The £400 Club – the Recovery Stage 1 Fixed Costs under the MOJ Portal

Piers Taylor

Most claims (of the appropriate qualifying value) settle in the MOJ portal, or leave it and are resolved elsewhere. Some, apparently, enter at Stage 1, are admitted by the relevant insurer and go no further. In *JC & A Solicitors v Iqval & EUI & others* [2017] EWCA Civ 355 an insurer sought repayment of Stage 1 costs where claimants had failed to pursue their claim to an award of damages within the limitation period.

Prior to changes in 2013, the costs payable by an insurer on admitting a claim at Stage 1 were £400 plus VAT. These costs were payable by the insurer within 10 days of the admission. There were reportedly many cases where this £400 had been paid but nothing further had been done by the claimant, and such cases were collectively referred to by the insurers as the "£400 club".

In the *JC & A appeal*, the insurers had brought small claims for the recovery of Stage 1 costs in three cases where the claims had not been progressed beyond Stage 1 and were statute-barred. They were successful at first instance, but this was comprehensively overturned on appeal.

Briggs LJ held that a Stage 1 payment could not be considered as a payment on account. There was no express provision for repayment of Stage 1 costs; it was implicit from the rules that the claimant was entitled to them outright. The Protocol is a precise code requiring payment in stages and Stage 1 costs were a recognition that something 'solid' had been achieved (namely an admission of liability).

Dealing with the '£400 club' title, Briggs LJ stated there was no evidence of lawyers using this entitlement to Stage 1 costs in an abusive manner in order to obtain costs for admissions in cases they knew would never advance to Stage 2.

This case is largely of historical significance. Since 2013 the Stage 1 costs are less (£200 for RTA claims and £300 for EL/PL claims) and those costs are not payable until 10 days after the Stage 2 pack was submitted (rather than 10 days after the admission). Claimants must now pursue their claims to Stage 2 to receive any costs payment. It is noted that CPR 14.1B permits the withdrawal of a causation admission during the Stage 2 'initial consideration period' (15 days after receiving the pack) without the consent of the claimant. That would be a reversal of the admission made at Stage 1. This scenario did not arise in *JC & A*, but in light of the reasons given by Briggs LJ it seems unlikely that Stage 1 costs can be retrospectively recovered in cases where it has already been paid. A '£200 club' is not anticipated.

QOCS transitional provisions: putting the Q into QOCS

Robert Riddell

The principle of one way costs shifting was presented in the Jackson Report expressly as a counterweight to proposals depriving personal injury claimants of their ability to recover success fees and ATE premiums from defendants. Given that claimants would no longer be insured against adverse costs orders, the new regime was designed to shield individuals from the potential consequences of doing battle with deep-pocketed defendants. But what about those claimants who signed up to the benefits of an old-style CFA?

Provision for these individuals is set out in CPR 44.17. The rule states:

"This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2)".

On the face of it, this transitional provision appears to deny a claimant with a golden ticket funding arrangement the full protection afforded under QOCS. In itself, this is uncontroversial; if the claimant succeeds at trial, she will still recover her success fee and costs of her insurance. But what about claimants who have entered different arrangements at different times, and for different purposes?

One aspect of this issue was disposed of in the decision of Master Haworth in Landau v The Big Bus Company, LTL 20 November 2014. In that case, the claimant entered a CFA with ATE insurance in 2011. His claim was dismissed at a trial on 7 October 2013. It was accepted that he did not have QOCS protection at first instance. The claimant then appealed, and because his original ATE policy did not cover the costs of that appeal he entered a second, new-style CFA on 23 November 2013. The question was as follows: did the claimant's second CFA provide him with QOCS protection for the costs of the appeal (at which he was also unsuccessful)?

The claimant built his case on the use of the word "proceedings" in CPR 44.17. In his submission, the claim at first instance and on appeal were different "proceedings", and, as no pre-commencement funding arrangement had been entered into for the appeal, the transitional provision was of no application.

The defendants' primary argument was that CPR 44.17 established that QOCS does not apply if there is a relevant pre-commencement funding arrangement in place. Such arrangements are defined by CPR 48.2(1)(i)(aa) as:

"agreement[s] entered into before 1 April 2013 specifically for the purposes of the provision to the person to whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made".

The defendants' case was that the relevant funding arrangement was defined not by reference to *"the proceedings in which the costs order is to be made"* but by reference to *"the matter that is the subject"* of those proceedings. "Matter" was a singular concept which could give rise to more than one set of proceedings.

The Master accepted this submission. In his judgment, it was Parliament's clear intention that a pre-commencement CFA entered into in respect of the "matter" would disapply QOCS in any "proceedings" arising out of that matter. In this case, there was only ever one "matter": a claim for personal injury arising from an accident – a single claim for damages to be determined either at first instance or appeal. Although as a result of this finding the Master did not consider it strictly necessary to deal with the issue of whether an appeal constituted separate "proceedings" for the purpose of CPR 44.17, he found that it did not following the guidance of the Court of Appeal in *Wagenaar v Weekend Travel Ltd* [2014] EWCA Civ 1105.

Accordingly, even though the claimant had entered into a new funding arrangement to cover the costs of his appeal, the existence of a previous, pre-commencement funding arrangement brought him within the scope of the transitional provision. The Master acknowledged that the decision may be "unreasonable, unfair and inconvenient" – but he considered the alternative conclusion would give rise to an absurd result in which a claimant who won at first instance and then lost at appeal, and who had no pre-commencement funding arrangement in place for that appeal, would have QOCS protection for the costs of both hearings.

The implication of *Landau* appeared to be that the existence of any relevant pre-commencement funding arrangement took claimants outside of the protective influence of the QOCS regime. However, that was not found to be the case on the facts of *Casseldine v The Diocese of Llandaff Board for Social Responsibility (A Charity)*, LTL, 3 August 2015, a decision of Regional Costs Judge Phillips sitting at Cardiff County Court.

The claimant had initially instructed solicitors on a CFA basis in 2012. On 30 January 2013, that arrangement was terminated by the solicitors. The claimant subsequently instructed a second firm of solicitors and entered a new CFA agreement on 6 August 2013. Proceedings were issued on 19 December 2013 and the claimant's claim was dismissed at a trial on 1 December 2014. The question for the court was whether the defendant's costs were enforceable against the claimant.

The claimant argued that the relevant provisions of the CPR had to be interpreted within the context of the Jackson reforms. The introduction of QOCS was a quid pro quo for the abolition of recoverable success fees. In the claimant's case, the proceedings were conducted solely in accordance with the second CFA; had the claimant won at trial, the defendant would not have been liable to pay any additional liabilities. As such, the claimant should be entitled to QOCS protection. Further, *Landau*, on which the defendant relied heavily, could be distinguished: that case involved two sets of proceedings and two CFAs, whereas the instant case involved only one set of proceedings which were commenced following a CFA agreement (with the previous one having been terminated).

The costs judge accepted these submissions. He was particularly persuaded by the element of quid pro quo, which in his view was supported by reference to *"the person by whom the success fee is payable"* in CPR 48.2. In his judgment, the word "matter" did not entitle the court to order the claimant to pay the defendant's costs in light of the fact that no proceedings were ever issued in relation to the first CFA. The district judge did not find that the claimant had entered a pre-commencement funding arrangement as defined, and therefore was protected from enforceable costs.

Although permission to appeal was granted in *Casseldine*, it was not pursued. However, another recent County Court decision – *Catalano v Espley-Tyas* – has been granted a leap-frog appeal to the Court of Appeal to determine the question as to whether a losing claimant who terminates a pre-commencement funding arrangement is deprived of QOCS protection under the transitional provision. An important residual question for defendants is whether a losing claimant who switches from a pre-commencement to post-commencement CFA in order to obtain a tactical benefit from QOCS protection should be shielded from costs enforcement.

While only a first instance decision, *Casseldine* is likely to be of persuasive value given the purposive approach taken by the court. For the moment, at least, in circumstances where a pre-commencement CFA is terminated and proceedings are issued only under a separate funding arrangement, a claimant is likely to benefit from QOCS protection.

Plevin V. Paragon Personal Finance Limited: How far did The Supreme Court really go?

Sian Reeves

In *Plevin v. Paragon Finance Limited [2017] UKSC 23* the Supreme Court considered whether the respondent's success fee under a conditional fee agreement ('CFA') and top-up after the event ('ATE') insurance were recoverable from the appellant. This recoverability depended upon the interpretation of transitional provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ('LASPO'). By a majority of 4 to 1, the Supreme Court decided that the success fee and ATE premium were recoverable from the appellant.

The Supreme Court's decision is unarguably an important one in so far as it relates to the interpretation of the transitional provisions of LASPO, and thus the continued recoverability of success fees and ATE premiums inter-partes post-LASPO. However, this Article considers the reach of the Supreme Court's judgment, and whether it really does extend as far as some commentators have suggested.

The facts

In 2006 the respondent was sold payment protection insurance when she entered into a credit agreement with the appellant. To pursue a claim for recovery of that PPI, in 2008 the respondent entered into a CFA with her original solicitors, Miller Gardner, and an ATE policy was also taken out. In 2009 and 2012 the firm underwent organisational changes, namely Miller Gardner reconstituted as an LLP, and later transferred is business into a limited company, Miller Gardner Limited. On both occasions, specified assets (including the respondent's CFA) were transferred by written agreement from the old to the new firm.

The original CFA covered all proceedings up to and including trial, and all steps taken to seek leave to appeal an adverse decision at trial. After the Court of Appeal granted leave to appeal the dismissal of the appellant's claim, in August 2013 the respondent and Miller Gardner Limited entered into a deed of variation extending the CFA to cover her appeal to the Court of Appeal. After the appellant was granted leave to appeal to the Supreme Court, in January 2014 a similar deed of variation was entered into extending the CFA to cover the appeal to the Supreme Court. The ATE policy was 'topped up' to cover the appeals to the Court of Appeal and Supreme Court.

After the appellant's appeal to the Supreme Court was dismissed, costs of the appeal were assessed at £751,463.84. This included £31,378.92 for the solicitors' success fee and £531,235 for the ATE insurance premium.

Pursuant to rule 53 of the Supreme Court Rules 2009, the appellant applied for a review of costs on 3 questions of principle, which are discussed below.

(1) Assignment of the CFA

The appellant's first challenge to recovery of the success fee was that the CFA was not validly assigned on each occasion when the respondent's solicitors underwent reorganisation, with the result that there was no valid retainer at the time costs were incurred in respect of the appeal in the Supreme Court. By the time of the cost review by the Supreme Court, it was common ground that the CFA was in principle assignable [5]. Interestingly, the appellant's challenge was instead premised on the wording of the transfer agreements, and specifically the term "Work in Progress", which it argued included only work already done at the transfer date.

This argument was given short shrift by Lord Sumption who stated [4] that *"I can deal with this point shortly, for in my view it has no merit and was rightly rejected"*. The Supreme Court unanimously agreed that:

"If this were correct, it would mean that the only right of the successor firm was to bill the clients for work done before the transfer date, leaving them with no solicitor to act for them other than the defunct shell of the old firm. This plainly cannot have been intended. The point about work in progress is that it is in progress..." [6].

The fallacy of the appellant's argument was further exposed by Lord Sumption [8] with reference to the fact that shortly after both transfers, the new firm wrote to the respondent, referring to the CFA and stating they would continue to represent her on the same terms and conditions as previously, and that the respondent continued to instruct them.

Recoverability of the success fee

The appellant's second argument as to the recoverability of the success fee was that the variations of the CFA in August 2013 and January 2014 were new agreements for the provision of litigation services entered into after 1 April 2013, and as such they were not covered by the transitional provisions of section 44(6) of LASPO (with the result that the success fee could not be recovered from the appellant).

This argument turned on the meaning of section 44(6)(a) of LASPO, which provides that a success fee may still be recovered between the parties if the CFA was entered into before 1 April 2013, and that CFA was in connection with *"the matter that is the subject of the proceedings in which the costs order is made."*

The appellant did not enjoy any more success in respect of its second argument. The Supreme Court rejected the appellant's argument as being *"a bad point"* because the *"matter that is the subject of the proceedings"* in section 44(6)(a) means the underlying dispute, and *"The two deeds of variation provided for litigation services in relation to the same underlying dispute as the CFA, albeit at the appellate stages"* [12].

The Supreme Court also gave consideration as to whether a variation of the CFA amends the original agreement or discharges and replaces it, which depends on the intention of the parties. Here, both deeds were expressly agreed to be a variation of the CFA, rather than to discharge it [13]. Further, the *"faint suggestion that the deeds of variation were an 'artificial device' designed to avoid the operation of section 44(4) of LASPO"* was also rejected [14].

Recoverability of the top-up ATE premiums

The recoverability of the ATE premium turned on the meaning of section 46(3) of LASPO, which is worded slightly differently from section 44(6). Section 46(3) refers to an insurance policy *"in relation to the proceedings"* and not to the subject matter of the proceedings.

The critical question for the Supreme Court to resolve was whether the two appeals constituted part of the same 'proceedings' as the trial (as the respondent argued) or distinct 'proceedings' (as the appellant argued) [17]. The Supreme Court again found in favour of the respondent on this point.

In determining this question of principle, the Supreme Court accepted that for some purposes, such as awarding and assessing costs, the trial and successive appeals do constitute distinct proceedings [18]. However, the Supreme also held that the meaning of 'proceedings' must depend on its statutory context and the underlying purpose of the provision [19]. In the present context, the starting point was that *"as a matter of ordinary language one would say that the proceedings were brought in support of a claim, and were not over until the courts had disposed of that claim one way or the other"*, i.e. it was synonymous with an action [20].

The majority of the Justices held that *"The purpose of the transitional provisions of LASPO, in relation to both success fees and ATE premiums, is to preserve vested rights and expectations arising from the previous law"*, and that *"That purpose would be defeated by a rigid distinction between different stages of the same litigation"* [21].

The majority considered that the difference in language between sections 44(6) and 46(3) was not significant in this regard, and that there was no "rational reason" why the legislature should have wished to limit the transitional provisions in section 46(3) to a particular stage in the litigation, while extending the transitional provisions in sections 44(6) to arrangements relating to the underlying "matter" [22].

Lord Hodge dissented on the interpretation of the transitional provisions of LASPO. Lord Hodge interpreted the transitional provisions as protecting only the pre-existing contractual rights in place before LASPO came into force [26]. Lord Hodge recognised the force of the majority's view, however his difficulty was *"in seeing that intention in the words which Parliament has used"* [37].

Comment

The important point of principle that has been established by the Supreme Court is that for ongoing cases where the original funding arrangements were entered into pre-LASPO, a claimant may be able to: (i) extend her CFA and top up her ATE insurance post-1 April 2013 to cover the conduct of later appeals; and (ii) recover those additional liabilities from the defendant pursuant to the LAPSO transitional provisions.

There are, however, two important limitations in respect of such recovery:

First, there must be a clear intention to vary the CFA, rather than to discharge and replace it. This means that any written agreement extending the coverage of the CFA must be carefully worded.

Second, in *Plevin* the additional ATE insurance cover was by way of top-ups to the original policy with the same insurer, rather than fresh contracts of insurance with a different insurer. The Supreme Court did not determine whether a claimant may recover the cost of a premium for top-up ATE cover with a different insurer (for example if the original insurer was unwilling or unable to provide top-up cover). Whilst the Supreme Court's decision arguably provides a sound basis for claimants to argue such recoverability (see, for example [21] and 23]), it remains open to defendants to argue that fresh contracts of insurance with different insurers are not covered by the transitional provisions.

Finally, in relation to the issue of the validity of the CFA assignment, it was common ground between the parties that a CFA was in principle capable of assignment. The issue for the Supreme Court was not (as it is in many of the cases where defendants challenge the validity of such assignments) whether the benefit and burden of a CFA, being a contract for personal services, are capable of being validly assigned as a matter of law. Rather, the issue turned on a question of construction that arose out of the wording of the particular transfer agreements in that case. In other words, the Supreme Court's decision is limited to the particular facts of *Plevin*, and it is unlikely to constitute an effective weapon in claimants' armoury in the ongoing CFA assignment war. Some commentators have cited *Plevin* as being authority for the proposition that CFAs may, in principle, be validly assigned. For all of the reasons set out above, such citation is patently incorrect. However, an authoritative answer to that legal conundrum is due from the Court of Appeal later this year, when it hears the leapfrogged appeal in *Budana v. The Leeds Teaching Hospitals NHS Trust.*

Set Off

Paul McGrath

Where the standard provisions of QOCS apply, they do not bar an order for costs in the favour of the Defendant, nor does it prevent an assessment of such costs taking place. It bars enforcement of the costs. This latter bar usually discourages any assessment taking place at all, but it is important to remember that the bar on enforcement does not in any way prevent the costs being ordered and the amount of costs being assessed.

CPR 44.12 provides as follows:

(1) Where a party entitled to costs is also liable to pay costs, the court may assess the costs which that party is liable to pay and either –

(a) off the amount assessed against the amount the party is entitled to be paid and direct that party to pay any balance; or

(b) delay the issue of a certificate for the costs to which the party is entitled until the party has paid the amount which that party is liable to pay

Consider the following situation: a Claimant wins his claim for personal injury damages and receives a costs order partially in his favour. The Defendant receives a costs order partially in his favour (whether because of a CPR 36 offer, an issue based order or for any other reason). The Claimant's costs are assessed at £10,000. The Defendant's costs are assessed at £8,000. Ignoring QOCS for the moment, CPR 44.12 recognises the power that a Court has to set-off one costs order against another, leaving only one party with a balance to pay. In our example, the Defendant would have £2,000 to pay in relation to costs. The Claimant would not have to make any payment to the Defendant. The provision avoids multiple payments and provides clarity.

However, now consider this power in light of the QOCS provisions. Let's consider three scenarios: (i) the Claimant wins his claim for personal injury damages and gets a costs order against the Defendant in the sum of £10,000; (ii) the Claimant loses his personal injury claim and is ordered to pay the Defendant's costs in the sum of £10,000; and (iii) the Claimant wins his claim for personal injury damages (but only recovers £2,000 in damages) and gets a costs order in the sum of £10,000, but the Defendant also gets a costs order in his favour in the sum of £8,000.

In scenario (i) the Claimant would receive £10,000 for costs without deduction or set off for obvious reasons. In scenario (ii) the Defendant would have an order for his costs in the sum of £10,000 but, unless an exception applies, CPR 44.14 would bar any right to enforce the costs order. The Defendant would thus receive nothing in relation to his costs.

However, with scenario (iii) it becomes more complicated. The Defendant would certainly be entitled to set-off against damages (see CPR 44.14(1)) but what about the remaining amount? If the Court makes an Order, without any set-off, then the Claimant would be able to enforce his own costs order but the Defendant would not be able to enforce its costs order over and above the level of damages (CPR 44.14(1)). The Defendant would thus have to pay £2,000 in damages and £10,000 in costs, and would only be entitled to enforce £2,000 of his own costs order. The overall balance is that the Defendant would pay £10,000 to the Claimant and receive nothing in return.

Now consider the position if the Court ordered a set off against costs, then the Defendant would be entitled to set off his £8,000 in costs against damages (CPR 44.14(1)) and costs (CPR 44.12) meaning that the Defendant would end up paying an overall balance of £4,000, with nothing in return.

The argument about set-off is thus worth £6,000 even in this modest example.

The question thus becomes: is it appropriate to order a set-off where QOCS applies?

I only know of one decided case, directly on point, and following argument on the issues (which I refer to below), but there is some guidance available elsewhere.

In *Lockley v National Blood Transfusion Service*, [1992] 1 WLR 492 the Court of Appeal considered set-off in the context of a legally aided claimant. In that case the Claimant had been ordered to pay the Defendant's costs of an interlocutory hearing not to be enforced without leave of the Court 'save by way of set-off as against damages and costs'. The Claimant appealed, arguing that a set-off offended against the statutory provisions in place.

Scott LJ started his judgment considering the nature of a set-off as a defence, rather than as a cross-claim. He stated that the 'operation of a set-off does not place the person whose chose in action is thereby reduced or extinguished under any obligation to pay. It simply reduces or extinguishes the amount that the other party has to pay. The operation of a set-off, in respect of the liability of a legally assisted person under an order for costs does not require the legally aided person to pay anything. It does not lead to any costs being recoverable against the legally aided person' (@ 495 F-G).

Scott LJ concluded that the power to order a set-off was available against damages and costs and was 'no different from and no more extensive than the set-off available to or against parties who are not legally aided' (@ 496 G). Whether to order a set-off was said to be based on equity, its not purely a discretionary matter (though see below), and the broad criterion being whether the claim is so closely connected to the Defendant's claim / defence that 'it would be inequitable to allow the [claimant's claim] without taking into account the defendant's claim...'

In *R (on the application of Burkett) v LB of Hammersmith and Fulham*, [2004] EWCA Civ 1342 Brooke LJ reviewed the authorities relating to set-off and concluded, contrary to what Scott LJ had said in Lockley, that the Court had a discretion (within the wide power set out in s51 Senior Courts Act 1981) to order a set-off and that this was not dictated (but might be influenced) by the position at equity. At paragraph 50, Brooke LJ approved of the reasoning in Lockley that a set-off was not akin to an obligation to make payment, but was instead merely reducing the amount that he could recover. As such, it was not seen as 'contrary to the spirit of costs protection'.

In *Vava v Anglo American South Africa* [2013] EWCA 2326 (QB); [2013] Costs LR 805 Andrew Smith J considered a case where the parties had entered into a contractual agreement that a form of qualified one way costs shifting would apply. The question before the Court was whether a set-off could be ordered notwithstanding the contractual agreement. The Court summarised the cases cited above and decided that given the terms of the agreement between the parties, it would be unfair to order a set-off. The case very much turned on the agreement that was reached, as opposed to a different approach to the legal analysis.

I turn now to a QOCS specific case. This very question arose in the first instance decision in *Nathanmanna v UK Insurance Limited* (unrep. DJ Avent, the judgment setting out the reasons for the strike out is available on Lawtel, but the judgment on costs was ex tempore). For those of you who read the TGC Fraud Update, you may have seen the report of this case in Issue IV (November 2016). In that case the Claimant's claim was struck out, but he received a costs order in his favour in relation to a part of proceedings. The Defendant received an order that the Claimant be otherwise liable for the costs of the action. The costs had not, as yet, been assessed but clearly the Defendant's entitlement would dwarf the Claimants. I was representing the Defendant and submitted that the correct costs order was to set off one costs liability against another, with the effect that the Defendant had nothing to pay and the Claimant's remaining liability for costs, which was to be assessed, was not enforceable due to the operation of QOCS.

The Claimant resisted and argued that the Claimant's costs order was enforceable in the ordinary way but the Defendant's costs order was not enforceable pursuant to QOCS and that a set-off was an impermissible sidestep to the operation of QOCS.

The parties referred the Judge to Vava v Anglo American South Africa [2013] EWCA 2326 (QB); [2013] Costs LR 805, Lockley v National Blood Trafusion Service [1992] 1 WLR 492, R. (Burkett) v London Borough of Hammersmith & Fulham [2004] EWCA Civ 1342 and the commentary in the 2nd edition of the costs supplement to the White Book at page 189 (see now the 3rd edition at page 259).

The District Judge held that it was appropriate to order a set-off between costs, leaving the Defendant with nothing to pay (and thus depriving the Claimant – or perhaps more accurately his solicitors – of payment of costs). The Judge distinguished Vava on the basis that the case largely turned on the meaning of a contractual agreement, whereas the present case turned on the exercise of a discretion within the scope of CPR 44. The Judge held that the bar on enforcement operated only after the Court had decided who was entitled to costs and in what amount (whether assessed now or later); see Lockley and R (Burkett). It was only the outstanding balance of costs that would be subject to the bar on enforcement.

Therefore, the long-standing discretionary power recognised by CPR 44.12 is very much a viable and important option where costs orders are made both ways. No doubt this important issue will merit consideration at a higher level in due course. The Judge in Nathanmanna gave permission to appeal, but it went no further.

Defendants should have CPR 44.12 well in mind whenever costs orders are made going both ways.

Cost Budgeting Or Detailed Assessment? Game Of Thrones (Parts 1 And 2)

Lionel Stride

The extent to which approved or agreed budgets can be challenged has been the main issue of contention on assessments in the last twelve months, particularly after the observations of the Court of Appeal in Sarpd Oil International Limited v Addax Energy SA [2016] EWCA Civ 120 on the effect of agreeing (or failing to challenge) incurred costs or hourly rates in a costs budget. The new wording of CPR 3.15 and 3.18 (outside of the scope of this article) largely settles the debate on those matters: budgeted costs are distinguishable from incurred costs and remain capable of challenge unless agreed[1]. The primary focus of this article is therefore the extent to which budgeted costs can be challenged at detailed assessment where *they do not exceed the amounts allowed in the budget*. The High Court decision of *Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB)*, handed down in February 2017, was the first time that this issue had been addressed directly at this level. That decision has now been affirmed by the Court of Appeal in the leap-frog appeal of *Harrison v University Hospitals Coventry & Warwickshire Hospital NHS Trust [2017] EWCA Civ 792*. Both decisions could reasonably be described as a 'boon' for receiving parties where their final bill is lower than their previously budgeted costs: costs budgeting now perhaps has the best claim to the costs throne. However, detailed assessments are far from usurped – there remains significant scope to challenge costs.

Merrix: background

In Merrix, the appellant ('A') had been the successful party in a clinical negligence case against the respondent ('R') where a Costs Management Order ('CMO') under CPR 3.15(2) (as it then was) had been made. By the time of settlement, lay and expert evidence had been exchanged but the case had not been prepared for trial. *This meant that the bill ultimately served by A was, unsurprisingly, less than the total approved budget.* A preliminary issue therefore arose for determination, which was formulated by the Costs Judge at first instance as follows[2]:

'To what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of the costs judge at a detailed assessment of costs under CPR Part 47?'.

A contended that, where a receiving party claims costs *at or less than the budgeted figure*, his or her costs should be assessed as claimed, unless the paying party establishes good reason to depart from the budgeted figure. This argument drew directly upon the (old) wording of CPR 3.18 (now revised clearly to distinguish between budgeted and incurred costs), which provided that *'in any case where a costs management order has been made, when assessing costs on the standard basis, the court will…(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so'.*

By contrast, R contended that the paying party was entitled to benefit from a full detailed assessment, with the costs budget being but one factor in determining reasonable and proportionate costs on detailed assessment.

At first instance, the Costs Judge found that the powers and discretion of a costs judge should not be fettered by the costs budgeting regime, save that the budgeted figures should not be exceeded unless good reason can be shown. He made clear that this was still not (as R wanted) 'open season' on the costs bill because the budget, though not binding, would still be a strong guide to what would be allowed on assessment. Nevertheless, A chose to appeal this decision.

The decision on appeal

By the time of the appeal, the first instance decision in Merrix, though followed in some other cases, had been subject to criticism by such budgeting luminaries as District Judge Middleton and Senior Costs Judge Master Gordon-Saker, the latter having reached a different decision in *Collins v Devonport Royal Dockyard Limited*, handed down on 8 February 2017. The resolution of A's appeal in the High Court was therefore keenly anticipated.

In a carefully reasoned judgment, Carr J held that the starting point for any analysis must be Section 11 of CPR Part 3 and the wording of CPR 3.18 (as it then was) that the court will have regard to the receiving party's last approved or agreed budget and *'not depart from such approved or agreed budget'* without good reason. In her view these words were 'clear' and mandatory: the court will not depart from a budget without good reason – i.e., that the agreed or approved cost budget should be treated as binding whether or not the costs exceed, or end up lower than, the budget. *Carr J held that the 'obvious intention' of CPR 3.18 was to reduce the scope of and need for detailed assessment*, leaving no room for R's argument that the budget should merely be used as a guide or factor to be taken into account in subsequent assessment (as with cost estimates of yore). She further reasoned (amongst other factors) that:

(a) Cost budgeting already involves the determination of reasonableness and proportionality (as set out at paragraph 7.3 of Practice Direction 3E and paragraph 3 of the Guidance Notes to Precedent H);
(b) The budgeting judge is not identifying the maximum amount by way of future costs that are reasonable and proportionate but the overall level of costs that are reasonable and proportionate;
(c) The proposed approach was consistent with the obiter comments of the Court of Appeal in Sarpd Oil, which, read as a whole, made clear that once a budget was agreed or approved CPR 3.18(b) applied (i.e., allowing a costs judge on assessment only to depart from the budget for good reason); and,
(d) The clear intention of the cost management process was to reduce the cost of the detailed assessment process by the treatment of agreed or approved costs budgets as binding, absent good reason to proceed otherwise.

On this basis, Carr J answered the preliminary issue as follows:

'where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted'.

Live to the fact that the case of Harrison v Coventry NHS Trust (an appeal against Master Whalan's decision) was due to be heard by the Court of Appeal, Carr J suggested that any further appeal in Merrix might be heard alongside that matter. In the event, R decided against appealing this decision to avoid delaying the appeal in Harrison. This was handed down on 21 June 2017.

Harrison: background

Harrison was a clinical negligence case that had settled shortly before trial for £20,000 with an order for costs payable on the standard basis. At a detailed assessment before Master Whalan, costs were assessed at £420,168 (including success fee and ATE premium). This was in large part on the basis that good reason had to be shown to depart from the budgeted costs and incurred costs; and that the claim had commenced prior to 1 April 2013, such that the *Lownds*[3] proportionality test should be applied to the costs (inevitably resulting in a much more favourable outcome than under the new proportionality test). There were therefore three main issues to be addressed by the Court of Appeal, which can be framed as follows:

(a) Where a CMO has been made, whether good reason is needed on detailed assessment to go below the budgeted amount.
(b) Whether good reason is needed on detailed assessment to reduce the incurred costs claimed if they are within the amount set out in the approved costs budget.
(c) When has a case commenced in the context of assessing proportionality.

The decision on appeal

The decisions on the first two issues are of greatest significance for budgeting and assessment. In this respect, three main principles can be distilled:

(a) As to the first issue, the Court of Appeal emphatically agreed with the decision of Carr J that, where a CMO has been made and estimated costs have been agreed or approved, the court should not depart from that budget without good reason. Davis LJ (giving the lead judgment) was particularly exercised by the lack of reciprocity in the appellant's argument to the contrary (i.e., that the budget should act as a cap but not otherwise fetter the costs judge on assessment): it would mean that a receiving party could only seek to recover more than the approved or agreed budget where good reason is shown; but the paying party could seek to pay less than the budget without showing good reason. Davis LJ pointed out that this paid *'scant, if any, regard to the position of the receiving party'*, who would no doubt *'have placed a degree of reliance on the CMO'*. This should therefore be seen as the final word on this issue: good reason must be shown to reduce estimated costs if that amount is within the estimated phase costs in the CMO.

(b) As to the second issue, the Court of Appeal held that it was wrong to include incurred costs within the ambit of CPR 3.18 (now amended in any event): such costs should be subject to detailed assessment in the usual way without the need to show 'good reason' for any departure from the approved budget, albeit that any comments made by the budgeting judge should still be taken into account. The dicta of Sales LJ in Sarpd Oil were also disapproved, with Davis LJ noting that they had been 'unexpected' by the Civil Procedural Rule Committee and led to swift changes to the wording of CPR 3.18.

(c) The consequence of the decision on the second issue is that, even where estimated costs remain within budget, the Court must still look at matters 'in the round' and consider whether the resulting aggregate figure (i.e., the global figure of budgeted and incurred costs) is proportionate, having regard to CPR 44.3(2)(a) and (5). This means that proportionality must still be considered on a global basis after assessment.

On the third issue, the Court of Appeal found that the claim had as a matter of law been commenced after 1 April 2013, such that the new proportionality test should have been applied. On this basis, having found in favour of the appellant on the second and third grounds (above), the matter was remitted to the costs judge for a further assessment on the revised basis (to assess the incurred costs and apply the new proportionality test).

Merrix and Harrison: overview

It is undoubtedly the case that the decisions in Merrix and Harrison assist receiving parties where their final costs fall below the estimated costs in the budget: they should not fall to be reduced without good reason. However, as has been made clear by Carr J and/or the Court of Appeal, costs outside the budget still fall to be assessed, including any incurred costs that remain in dispute; the costs of interim applications which were reasonably excluded from the budget; costs that fall to be assessed on the indemnity basis (and which exceed the amounts allowed in the last budget); and where the costs judge finds there to be good reason for departing from the costs budget. Further, following the decision in Harrison, where there are significant incurred costs, costs judges must still undertake a global assessment of proportionality even when estimated costs have been allowed as claimed on the basis that they were within the budgeted figures. The only way to avoid this approach would be where the claim is issued and budgeted at an early stage, such that incurred costs are minimal and all the estimated costs within budget.

What constitutes a good reason to depart from estimated costs?

The question of what amounts to a 'good reason' to depart from the last agreed or approved costs budget assumes even greater relevance in light of the decisions in Merrix and Harrison.

On this issue, Carr J noted that *spending less than the agreed or approved budget* was an 'obvious' reason to depart because awarding full budgeted costs would then offend the indemnity principle. However, she also cited with approval the judgment of District Judge Baldwin in *Jones v Harding* (unreported, 29 September 2016) that, *where costs are lower than the budgeted costs* ***'a high burden would remain upon the paying party to show a good reason to award less than the lower figure. The raising of such an argument would only exceptionally... be a proportionate or appropriate use of scarce court resources...'.***

It goes without saying that, if a test of 'exceptionality' is applied, final costs that are lower than the budgeted sums would almost always be allowed in full. Nevertheless, costs will invariably be budgeted on the basis of a series of assumptions as to how the claim will develop and what evidence will be required. It is easy to imagine scenarios where claims settle with overall costs that are within budget but where many of the assumptions underpinning those figures were not borne out during the litigation. For example, where a sum is allowed in the witness statement phase on the basis of ten witnesses where only three statements are prepared; or where budgets are set to include the cost of further experts that are not required. On the reasoning of Carr J, such sums would not easily be challengeable on detailed assessment. Moreover, effective challenge to hourly rates may also be precluded where the costs bill is within budget overall.

Davis LJ in Harrison only briefly dealt with this issue. He expressly declined to give any 'generalised… guidance or examples' but made clear that the 'good reason' provision under CPR 3.18 was a 'very important safeguard' and went a long way to answering the appellant's complaint in Harrison that detailed assessments would become 'mere rubber stamps of CMOS'. Moreover, he appeared to encourage appropriate challenge to 'in-budget' estimated costs by observing that ***'Costs judges should … be expected not to adopt a lax or over-indulgent approach to the need to find 'good reason': if only because to do so would tend to subvert one of the principle purposes of costs budgeting …'***. This suggests a test that is much less onerous than 'exceptionality', as mooted by Carr J.

How can a potential paying party best protect its position at a CCMC?

Given the need to show good reason to depart from budgeted costs, appropriately challenging budgets at a CCMC will still be the best form of protection for potential paying parties. Other than a realistic but robust approach, practical considerations should therefore now include:

(a) Ensuring that the assumptions on which the budgeting judge allows a particular sum are clearly recorded in the Costs Management Order ('CMO') (e.g., the number of factual witnesses or experts assumed or allowed); and,

(b) Asking the budgeting judge to record matters that he has not considered and/or might be (in his/her view) good grounds for departing from the budget that has been set (i.e., making clear on the face of the CMO that there has been no consideration of hourly rates in determining the reasonableness or proportionality of the budget).

It remains to be seen whether such precautions will have a practical effect on assessment, although there is no question that such an approach would make justifying a departure from the budget at detailed assessment all the easier. The danger (for paying parties) is that it may also assist when the receiving party seeks an upwards revision…

Footnotes

1. A view now reinforced by the Court of Appeal's decision in Harrison (see above).
2. District Judge Lumb sitting as Regional Costs Judge in Birmingham District Registry.
3. Lownds v Home Office [2002] EWCA Civ 365