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Issue II May 2018

TGC Costs Update

The Newsletter of the TGC Costs Team

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Editorial

By Shaman Kapoor skapoor@tgchambers.com

Welcome to the second edition of TGC's Costs Newsletter. How time has flown since our first edition and how much more we have to tell you – this could fill a whole brunch-time read rather than just a coffee! This edition is nearly twice the content of the first, such has been the activity of the costs world in the past 10 months or so. But sure enough, we bring you barrister analysis on all you should not have missed over recent months...

In this edition we bring you a round up on assignment old and new, the impact of QOCS on retainers bridging 01/04/13, we consider the recoverability of additional liabilities when you switch from legal aid to a CFA and ATE, the current climate of relief from sanctions in failing to file a notice of funding, the tennis match between the costs judges on defining what is a 'good reason' to depart from a budget, the recoverability of inquest costs after a liability admission pre-inquest, only then to return to the question of proportionality last (as now is the custom): where are we with post-LASPO ATE premiums in clinical negligence claims? How does proportionality apply to those situations – Old P or new P? And does new P mean blunt P? Finely tuned P? or big chunk P? A bit like when you get to the end of a line-by-line assessment and you feel wiped out, wait there is more! What about Part 36 in Provisional Assessment? How does that work?

And if all of the above was not enough to keep you going, we have added a new Case Digest section at the end of the newsletter. These are cases that really had to be mentioned to keep you mindfully aware on matters such as the scope of a CFA, the restriction of QOCS in an appropriate case, the continuing need for risk assessments and the actuarial skills of a costs judge (or not).

Plainly, there is much worthy reading and fantastic analysis. Much remains on the horizon and we are in little doubt that there will be plenty to report for the third edition! See you then, if not before.

Shaman

Assignment – where exactly are we?

Shaman Kapoor

Here we examine the current position on the law of assignment particularly since the dust ought to have settled in the light of the judgment of the Court of Appeal in *Budana v The Leeds Teaching Hospitals NHS Trust & The Law Society [2017] EWCA Civ 1980 ("Budana").*

Where we thought we were

Right at the very beginning, contractual rights were not historically assignable at common law without the consent of both contracting parties. Prior to 1875, the only methods of assigning contractual rights (as things in action rather than things in possession) at law were by novation and by procuring the debtor's acknowledgment that he held for the assignee. However, both novation and the procurement required the consent of the debtor.

Equity, on the other hand, did permit the assignment of contractual rights (whether those rights were legal or equitable). Whilst certain other assignments are now governed by statute, contractual rights are generally governed by the rules of equity, and, in particular, the assignment of a solicitor's retainer is an equitable assignment.

Generally, such an assignment would be by the assignor informing the assignee that he transfers the chose in action to him. But the assignment need not take any particular form and need not be in writing (unless caught by the Law of Property Act 1925, s.53(1)(c)), although plainly a written form would be best.

Further, the assignment of an existing chose in action does not require consideration, but an agreement to assign an existing chose in action in the future does require consideration as the latter is not actual assignment but a mere agreement to assign in the future and thus requires all the components of a contract in order to be enforceable. The right to be paid sums in the future under an existing contract is an existing chose in action and thus does not require consideration. But the scenario of a CFA poses different concerns: whilst there is an existing obligation, it is uncertain whether anything will become due under the terms of the CFA in the future because the obligation to pay is conditional on a 'win' or 'success' as defined. There is a chance (if one follows the Australian High Court) that the payment of fees in the future is held to be a 'mere expectancy' as the event causing it to fall due (a win/success) may never in fact occur. Consequently, for CFA assignments, this is one area for potential concern/attack.

The assignment of a CFA may be an incapable assignment if the terms of the CFA itself so declare. However, usually with such a restriction, one would expect to see the words "unless by consent" added, thus causing the need for the debtor's consent to the assignment where otherwise it may not have been required. This becomes all the more important where the assignee's claim will be based on the debtor's liability in the first place, given the operation of the indemnity principle.

And what about the benefit and burden of the contract? The general rule is that the benefit of a contract can be assigned, but subject to limited exceptions, the burden cannot be (unless by consent). That said, the burden is assignable where it makes no difference to the client which of two persons discharges it. This could be contentious as it is a matter to be decided by the court on objective grounds.

One exception to the general rule is that contracts personal in nature and involving personal skill and confidence cannot be assigned. (Whilst this is well-understood in the context of a piece of work commissioned by a particular artist, the exception is unlikely to apply in the case of work done by solicitors particularly since the contracts will be with the firm rather than an individual, although it is arguable the exception could apply to a sole practitioner with a particularly narrow expertise; similarly, there may yet be traction in the argument in relation to work done by leading counsel of particular repute, but even then it would not be an easy application of the exception.)

Another exception to the general rule is the conditional benefit principle which arises where the right assigned is only conditional or qualified, the condition being that certain restrictions shall be observed or certain burdens assumed. The question whether a contract creates a conditional benefit is one of construction and was thought to be one of the key grounds that would be at the heart of the CFA assignment litigation which seemed to gather traction as a result of the changes to the recoverability of additional liabilities which took effect from 01/04/13.

So, if that was assignment, what is novation?

Novation is where two contracting parties agree that a third, who also agrees, shall stand in relation to either of them to the other. But this is with the specific intention to extinguish the first contract and replace it with a new one. Critically, that exercise is to transfer the burden (rather than the benefit). It is an exercise that is distinct from assignment, and one that does require the consent of all three parties[1].

Where does *Budana* take us?

Firm A acted under a CFA. Firm A wrote to the client on 22/03/13 explaining that they were going to stop handling personal injury work and instead transfer such files to Firm B, a specialist, on 25/03/13 unless the client instructed otherwise. Firm A and B entered into an agreement on 25/03/13 to effect the transfer of a number of files including the client's, and they also entered in to a Deed of Assignment as between them. Consideration was stated to have been provided by the transfer itself, but in any event by Firm B assuming the liabilities of Firm A. Firm B went on the record as acting for the client on 01/04/13. In the event, the client completed a consent form to Firm B on 10/04/13, and with it a (second) Deed of Assignment, but this time as between client and Firm B with the same stated consideration. The claim settled later in the year and the costs were the subject of detailed assessment. A key issue was whether the purported assignment was effective as a matter of law.

The Court of Appeal set out the common ground as follows:

i) Whereas an unqualified benefit of a contract usually can be freely assigned, the burden of a contract usually cannot be assigned;

ii) The benefit of a personal contract cannot usually be assigned;

iii) Where a right under a contract was conditional upon, or qualified by, performance of some obligation in return for which the right has been granted, an assignee of the benefit of such right will only be entitled to exercise the right subject to performance of the burden (the conditional benefit principle).

The Court of Appeal approached the case with "an appreciation of the economic environment in which personal injury litigation is conducted today". It recognised that there was a wide variety of circumstances in which similar issues may arise, for example, where a firm may cease to act in a particular area (as in *Budana* itself); a client may wish for an individual to continue to act notwithstanding that they move firms; a client may have lost confidence in one firm and prefer another; or the firm may have become a new entity through merger or incorporation.

The Court of Appeal went on to find that there had not been a termination on 22/03/13. Even if Firm A had created a repudiatory breach, that could not amount to a termination without the client's election. The client did not so elect; indeed, she later affirmed the contract when she agreed to transfer it. It then went on to find:

a) There is no reason in principle why *rights* and *benefits* under a firm of solicitors' contracts with its clients should not be capable of assignment in today's business environment.

b) A CFA in such a case [personal injury conducted in a volume factory approach] lacks the features of a personal contract.

c) The element of consent (from the client) was crucial (neither party argued that assignment could take place without the consent of an individual client).

d) The Supreme Court's judgment in *Plevin*[2] supported three propositions:

   (i) As a matter of law, *rights and benefits* under a CFA together with the benefits of any accompanying retainer are capable of assignment, notwithstanding that a client may place trust and confidence in her solicitor;

   (ii) An original CFA can remain in existence as a contract valid as its date of creation, notwithstanding transfer between successive firms; and

   (iii) Even if a client subsequently assents to such a transfer, the client's original CFA remains in existence as a contract valid as its original date.

e) A technical transfer to a firm whose legal status had changed was not substantially different from a transfer between two wholly distinct firms.

f) The conditional benefit principle is one where an assignee of rights under a contract (or the successor in title in land) is *obliged* to perform the positive obligations of its assignor (or predecessor in title) under the relevant contract or conveyance. But the present case was not one where Firm B under the original CFA was obliged to perform the legal services under *that* CFA; rather the issue was whether the client had an obligation to pay for Firm B's legal services under the terms of that original CFA – which she did.

g) Firm A, Firm B and the client had contractually provided for the obligations under the original CFA to be performed by Firm B under the new CFA; and for Firm A to be discharged from that burden. There was no sufficient nexus between Firm A and Firm B causing the conditional benefit principle to apply.

h) If a beneficiary of the obligations (burden) agrees to an assignment of the obligations, that amounts to a novation of the contract.

i) As a matter of regulation, the Law Society would not recognise the validity of any transfer or assignment in the absence of the client's consent.

j) By the consent form and second Deed on 10/04/13, the client had entered into a new contract with Firm B. She also **transferred** the rights and obligations of the original CFA to Firm B such that the original CFA remained enforceable as between the client and Firm B. **BUT** the new contract was in accordance with the authorities on novation – and the parties had agreed that no transfer was possible without the client's consent. So, a new contract between all three parties, discharging Firm A from all obligations and the consent of the client to Firm B assuming such obligations, amounted to a novation[3].

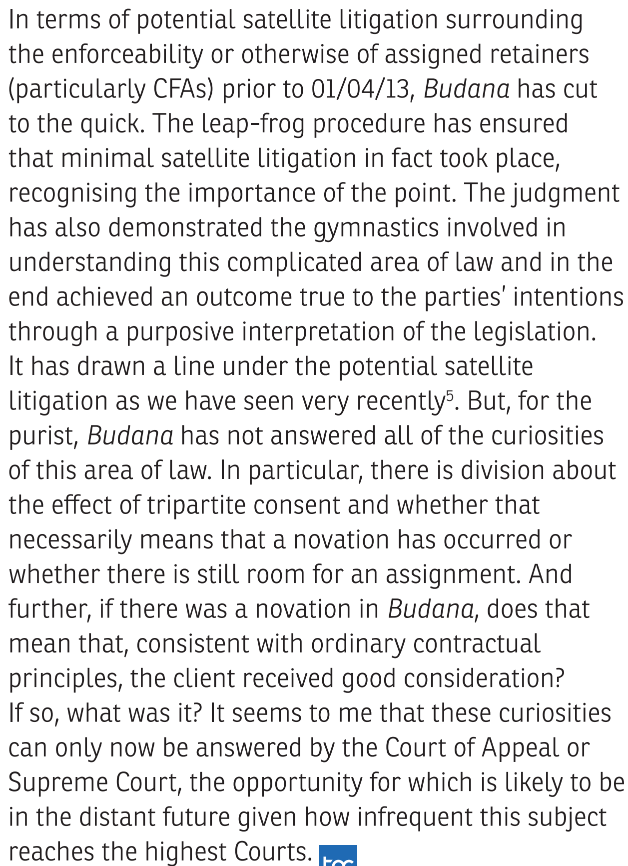
k) Despite the foregoing, a new contract did **not** mean that for the purposes of LASPO the success fee payable to Firm B did not qualify as one payable under a CFA entered into before 01/04/13.

l) Looked at in the round, the intention of the parties was to substitute Firm B for Firm A.

m) The true intention of the transitional provisions of LASPO would be defeated by an overtechnical application of the doctrine of novation so as to prevent any litigant who had begun a claim under a CFA prior to 01/04/13 from recovering costs in respect of a success fee.

n) Where the parties have expressly provided by their contractual arrangements that their vested rights and expectations under the previous CFA entered into under the previous law, should be continued, there is no difficulty in construing section 44 LASPO to give effect to that intention.

o) Davis LJ departed from the reasoning relied on by the majority of the Court of Appeal in Gloster LJ and Beatson LJ. He did not see why, if all three parties plainly intended and agreed there should be an assignment so as to preserve the original CFA and so as not to create a wholly new replacement contract, it was incapable of achievement[4].



Conclusion

In terms of potential satellite litigation surrounding the enforceability or otherwise of assigned retainers (particularly CFAs) prior to 01/04/13, *Budana* has cut to the quick. The leap-frog procedure has ensured that minimal satellite litigation in fact took place, recognising the importance of the point. The judgment has also demonstrated the gymnastics involved in understanding this complicated area of law and in the end achieved an outcome true to the parties' intentions through a purposive interpretation of the legislation. It has drawn a line under the potential satellite litigation as we have seen very recently[5]. But, for the purist, *Budana* has not answered all of the curiosities of this area of law. In particular, there is division about the effect of tripartite consent and whether that necessarily means that a novation has occurred or whether there is still room for an assignment. And further, if there was a novation in *Budana*, does that mean that, consistent with ordinary contractual principles, the client received good consideration? If so, what was it? It seems to me that these curiosities can only now be answered by the Court of Appeal or Supreme Court, the opportunity for which is likely to be in the distant future given how infrequent this subject reaches the highest Courts.

QOCS & Pre-/Post-April 2013 Retainers: Rewriting History

Paul McGrath

Qualified one-way costs shifting ('QOCS") has had a significant impact in many respects, determining how many litigants fund their claims, influencing how affected litigants pursue and manage their claims and even influencing whether a party issues proceedings at all. Therefore, with such a seismic change in the landscape one would legitimately expect that all lawyers in the affected areas would have absolute clarity as to when and how the QOCS provisions would apply to any given case.

That has not been the case. One particular issue causing some confusion was whether QOCS would apply where a Claimant entered into a pre-commencement funding arrangement of some description, but then later entered into a post-commencement funding arrangement. Indeed, this was a matter discussed by Robert Riddell in his article in the July 2017 TGC Costs Newsletter. In that article Robert mentioned two important cases of the time, *Casseldine* and *Catalano* (though both were first instance decisions). *Catalano* went to the Court of Appeal (*Catalano v Espley-Tyas Development Group Limited* [2017] EWCA Civ 1132) and this question was directly addressed.

The very brief facts in *Catalano*: a Claimant entered into a pre-commencement funding arrangement with her chosen solicitors on CFA terms. Had this arrangement persisted, then it would have been obvious that QOCS did not apply. However, what then happened is that after 1 April 2013 (when QOCS came into force) the Claimant and her chosen solicitors terminated the original CFA and entered into what purported to be a wholly new CFA arrangement. Ultimately, the Claimant discontinued her claim. The Defendant sought costs and enforcement. The question was whether the Claimant was entitled to QOCS protection?

This turned on the interpretation of the transitional provisions, which provides at CPR 44.17 that QOCS 'does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2)'.

CPR 48.2 is widely drafted and in most part defines a pre-commencement funding arrangement as an agreement for the provision of advocacy or litigation services 'in relation to the matter that is the subject of the proceedings'.

The provision is clear in relation to a standard set of proceedings with one agreement. It is less than clear when more than one agreement or firm of solicitors is involved: does QOCS still apply if a second CFA is entered into post-commencement? Does it depend on other matters, such as whether it is a different firm, whether there is a residual costs liability, whether the solicitor or client terminated the agreement, whether any costs and fees are enforceable between solicitor and client, whether it was a tactical decision or not?

On the facts in Catalano the Court of Appeal preferred the straightforward interpretation: i.e. as the Claimant had entered into a CPR 48.2 pre-funding arrangement, then QOCS would not apply to any proceedings in respect of the same matter. It mattered not on the facts of the case that the agreement was subsequently terminated and a new agreement was entered into.

It is worth pausing there to highlight that if the pre-funding arrangement is in relation to a different matter than subsequent proceedings against any particular Defendant, then additional liabilities will not be recoverable and QOCS will apply. For example, in *Corstorphine v Liverpool City Council* [2018] EWCA Civ 270 the Claimant brought a claim against the local authority, alleging that he was injured as a result of a

defective tyre-swing. The local authority sought contribution from others and the Claimant brought those others in as second and third Defendants. When the claim was dismissed, the Claimant was held liable to pay the costs of all Defendants. The Court concluded that QOCS did not apply. On appeal against the finding that QOCS did not apply to the claims against the Second and Third Defendants, the Court of Appeal concluded that the proceedings against the Second and Third Defendants were not contemplated by, or included within, the pre-funding arrangement and thus a pre-funding arrangement was not in place in respect of those claims (albeit in the same proceedings) and thus QOCS applied to those claims (though not the claim against the First Defendant).

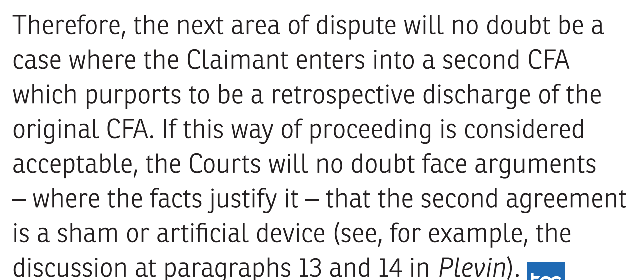
I now return to the judgment in Catalano and in particular at paragraph 28 where the Court of Appeal posed two further questions: (1) 'What then of the case where a CFA is made before 1st April 2013 but, before any work is done, a second CFA is made after 1st April 2013…'; or (2) 'the case where work is done but the retainer is terminated (whether by the solicitors or the client) before 1st April 2013 and a second CFA is made by new solicitors after 1st April 2013?'.

The Court expressed no 'concluded view' on these questions but observed that the first case would be 'comparatively rare since almost inevitably some chargeable work will be done at about the time the first CFA is made'.

In respect of the second case the Court noted that this was the position in *Casseldine*. In that case the Claimant entered into a CFA, which was then terminated by the solicitors prior to the issue of proceedings. The Claimant then entered into a second CFA and thereafter issued proceedings. The Claimant lost at trial and the Court concluded that QOCS applied because 'the proceedings' were issued pursuant to the second funding arrangement, not the first, and that there were no residual rights to costs under the first CFA (due to the solicitors' termination). Accordingly, the Defendant was not at any risk of facing additional liabilities and the Claimant should thus be entitled to costs protection. Interestingly, the District Judge in that case added that the first CFA was not a CPR 48.2 pre-commencement funding arrangement, though this reasoning appears to be based on his conclusion that an additional fee could not be recovered, which is somewhat circular. If, however, it could legitimately be said that the first CFA was not a CPR 48.2 pre-funding arrangement, then the question of whether QOCS applies never arises: there would only be one *qualifying* funding arrangement.

Again, the Court in *Catalano* did not express a concluded view on this type of case but did observe that 'if … work had been done (which is probable) we are doubtful that Casseldine can be supported on the true construction of CPR 44.17 and CPR 48.2, unless it could be said that the second CFA retrospectively discharged and extinguished the first agreement and replaced it with the second agreement. That was contemplated as a possibility by Lord Sumption (with whom the majority of the Supreme Court agreed) in Plevin v Paragon Personal Finance Ltd [2017] 1 WLR 1249, para 13 where however the second and third CFA were held on the facts to be merely a variation of the first agreement'.

Therefore, the next area of dispute will no doubt be a case where the Claimant enters into a second CFA which purports to be a retrospective discharge of the original CFA. If this way of proceeding is considered acceptable, the Courts will no doubt face arguments – where the facts justify it – that the second agreement is a sham or artificial device (see, for example, the discussion at paragraphs 13 and 14 in *Plevin*).



Flip the switch: are additional liabilities recoverable after a switch from legal aid to a CFA and ATE insurance?

Richard Boyle

Summary

In *Surrey v Barnet & Chase Farm Hospitals NHS Trust* [2018] EWCA Civ 451 the Court of Appeal considered whether additional liabilities were recoverable when Claimants had switched from legal aid to a CFA and ATE insurance. This was done shortly before additional liabilities became unrecoverable inter partes. It was held that the additional liabilities were not recoverable.

The case

The appeal considered three clinical negligence cases which resulted in very serious injury and were, as a result, of high value. The claims were initially funded through legal aid and the Defendant had admitted liability. However, in each case, the claims had been switched to funding by way of a CFA and ATE insurance. This was done shortly before 1st April 2013 when additional liabilities became unrecoverable inter partes. The Claimants' solicitors relied, *inter alia*, on the fact that there was no guarantee that the Legal Services Commission ("LSC") would increase the reserve to a sufficient level to fund the claims to an assessment of damages hearing. They relied on the fact that legal aid did not protect the Claimants' damages if the Defendant beat its own Part 36 offer. At first instance, the additional liabilities were held to be unrecoverable from the Defendant but this was overturned in the High Court.

The judgment

The Court of Appeal considered whether the switch gave rise to costs which were reasonable incurred. It considered that it was up to the receiving party to justify the decision to switch. It therefore examined the circumstances in which the switch had been made and the reasons advanced for the switch. The court noted that the advice a Claimant received was a relevant factor in considering the reasonableness of the choice to incur a cost. If the advice was unsound it may compromise the reasonableness of the choice.

The court considered the reasons given to justify the switch, noting:

1. The Claimants' solicitor, in two of three cases, had relied on a possible shortfall in the costs paid by the LSC. It was said that the balance of costs would have to be recovered from the Claimants. The court noted that this "topping up" was unlawful under the Access to Justice Act 1999 and LASPO;
2. In one of the cases, the advice to switch was based on an erroneous premise that the cost limit for the legal aid was shortly to be reached;
3. The need for protection against Part 36 offers was no more than a risk because such an offer would have to be made and made at a level that was later beaten;

4. Importantly, the court noted that the switch had, as a certainty, prevented the Claimants from recovering a 10% uplift (as per *Simmons v Castle* [2012] EWCA Civ 1288). The court concluded that the advice to switch to a CFA had deprived the Claimant of this benefit and this called in to question the reasonableness of the switch. It noted that none of the Claimants had been informed about this consequence.

The court held that the judges at first instance had applied the correct legal test. It held that the High Court should not have interfered with the exercise of discretion at first instance, unless the conclusions were outside the ambit of reasonable decisions available. Given the shortfalls in the reasons given to justify the switch, as set out above, the decisions were not outside the ambit of reasonable decisions available. There decisions at first instance should not have been overturned.

Practical considerations

The conclusions in the case were fact specific and the court considered in detail the advice that had been given to the Claimants and the reasons for switching. The judgment therefore does not render it axiomatic that additional liabilities are unrecoverable when a switch is made from legal aid to a CFA. However, parties must be aware that courts will carefully scrutinise the advice given and reasons for such a switch. If the only justification that holds weight is for lawyers to recover a greater sum in costs, particularly to the detriment of their client, then the chances of recovery of additional liabilities will be slim to none.

Relief from sanction – failure to file a notice of funding Springer v University Hospitals of Leicester NHS Trust [2018] EWCA Civ 436

James Arney & Olivia Rosenstrom (Paralegal)

Background

Mr Neville Springer ("the Claimant"), on behalf of whose estate the instant claim was brought, died on 9th October 2009, whilst undergoing treatment for a bowel disorder. There was reason to believe that his death was the result of negligent treatment from University Hospitals of Leicester, an NHS hospital ("the Defendant"). The Claimant's father, as the representative of his estate, entered into a conditional fee agreement ("CFA") with Kirwans Solicitors ("Kirwans") on 25th June 2010, including a 100% success fee on basic charges. Kirwans were later disinstructed and the Claimant's representative entered into a CFA with DHF Solicitors ("DHF") on 15th March 2012, also with a 100% success fee on basic charges. An ATE policy was taken out on 24th March 2012.

On 28th September 2012, DHF sent a letter of claim to the Defendant, therein providing notification of the CFA entered into on 15th March 2012 as well as the ATE policy of 24th March 2012. The Defendant remained unaware of the CFA entered into on 25th June 2010.

Proceedings were issued on 29th November 2012. Particulars of Claim were not served until 30th August 2013, and the Defendant provided its Defence by 19th February 2014. Shortly after serving its Defence, the Defendant made an offer of settlement. Negotiations continued and the claim was formally compromised on 30th July 2014 for a sum of £20,000, with costs to be assessed if not agreed. The Claimant's Bill of Costs amounted to £115,880.74, and disclosed, for the first time, the first CFA of 25th June 2010. Additional funding made up £61,050.89 of the total Bill.

When the Defendant took issue with the Claimant's failure to comply with notification requirements, the Claimant made an application for relief from sanctions. The Claimant argued that there had been no failure to comply with notification requirements, and if there had been, relief from sanctions should be granted. The application was refused by an order from Deputy District Judge Elmer ("DDJ Elmer") dated 18th July 2015. Her Honour Judge Hampton ("HHJ Hampton") dismissed the Claimant's appeal on 2nd October 2015. The Claimant appealed to the Court of Appeal. Lord Justice Hickinbottom ("LJ Hickinbottom") delivered the lead judgment on this appeal on 15th March 2018.

Procedural Requirements

As the CFAs and ATE insurance policy in the instant case were entered into prior to 1st April 2013, pre-April 2013 costs provisions are applicable, thus enabling recovery of success fees and ATE premiums, subject to compliance with the notification requirements contained in paragraph 9.3 of the Practice Direction – Pre-Action Conduct and Protocols ("PD PAC"), and CPR rule 44.3B(1)(c).

Paragraph 9.3 of PD PAC

"Where a party enters into a funding arrangement within the meaning of rule 43.2(1)(k) , that party must inform the other parties about this arrangement as soon as possible and in any event either within 7 days of entering into the funding arrangement concerned or, where a claimant enters into a funding arrangement before sending a letter before claim, in the letter before claim."

CPR 44.3B

"(1)Unless the court orders otherwise, a party may not recover as an additional liability -

(c) any additional liability for any period during which that party failed to provide information about a funding arrangement in accordance with a rule, practice direction or court order;

(e) any insurance premium where that party has failed to provide information about the insurance policy in question by the time required by a rule, practice direction or court order;…".

DDJ Elmer (18th July 2015)

Counsel for the Claimant argued that the words after "*in any event*" were definitional of "*as soon as possible*", rather than constituting additional requirements. Thus, the Claimant had complied with the procedural requirements by notifying the Defendant of funding arrangements in its letter before claim. DDJ Elmer was not persuaded by this argument and was "*unable to interpret 'as soon as possible' as meaning anything other than 'as soon as possible'".*

The Claimant further argued that it had not been possible to identify the Defendant until shortly before the letter of claim was sent, and hence the notification requirements had not been breached. DDJ Elmer concluded that the Defendant was identified by the time of the breach of duty report (10th November 2011) at the latest. Partial notification of funding was not provided until over one year later in the letter of claim.

Accordingly, DDJ Elmer concluded that the Claimant had failed to provide a notification of funding as soon as possible, and proceeded to consider the application of the three-stage ***Mitchell*** and ***Denton*** test for relief from sanctions. She found that no real or satisfactory explanation for the breach had been given and that the breach was serious and significant. DDJ Elmer held that the Defendant had been prejudiced by the breach, as they had been deprived of the opportunity to consider the matter earlier and make settlement offers to avoid substantial additional liabilities. It was noted that the claim was settled soon after the notification of funding was received. DDJ Elmer refused to grant relief from sanctions on this basis, and the Claimant was therefore not entitled to recover success fees or ATE premiums incurred prior to 28th September 2012, when notification was provided.

HHJ Hampton (2nd October 2015)

HHJ Hampton concurred with DDJ Elmer's interpretation of paragraph 9.3, and concluded that the Claimant had been in breach.

As regards relief from sanctions, HHJ Hampton noted that the CPR requires a *"cards on the table approach"*, and that the additional liabilities in the period between the funding arrangement and notification far exceeded the modest settlement figure. Accordingly, the Defendant was prejudiced by not having the opportunity to take steps to limit its liability for costs. It had been correct to refuse relief from sanctions.

Court of Appeal (15th March 2018)

Proper construction of 9.3 of the PD PAC

Counsel for the Defendant argued that the words *"as soon as possible"* were *"unambiguously clear"*, albeit requiring some evaluative assessment. The words following *"in any event"*, he continued, therefore constitute a second set of criteria, involving no such evaluation, with which the party must also comply. In practice, they act as a long-stop criterion, precluding a party from contending that notice had been given *"as soon as possible"*.

On behalf of the Claimant it was submitted that this construction would produce absurd results as claimants would be required to provide funding details before the CPR obliges them to provide any details as to the nature and substance of the claim.

LJ Hickinbottom considered the court's role in giving effect to the likely intention of the legislator, when interpreting legislation. *"Primacy is ordinarily given to the language used in an instrument as an indicator of the draftsman's intention"*, but where a draftsman has *"obviously slipped up"* it is possible to make a declaration of the true meaning of the instrument. The Claimant's proposed construction of the paragraph would in effect omit *"as soon as possible"* as redundant. LJ Hickinbottom was not persuaded that "as soon as possible" constituted an obvious drafting error, and noted that paragraph 9.3 creates a discrete obligation on litigants which is not contained elsewhere. LJ Hickinbottom further compared the working of the paragraph with CPR rule 54.5(1), which is of similar wording, and is interpreted as providing for requirements additional to promptness, rather than being definitional or alternative.

LJ Hickinbottom did not consider that receiving funding details prior to other details for a potential claim constitutes an absurdity, or that the exercise is pointless; *"early notice of a potential liability for enhanced costs may be of benefit to the potential defendant, and may assist in the earlier resolution of the claim."*

The Claimant also submitted that the requirement to provide a notification of funding in the letter of claim contained in paragraph 2.2(6) of the PD PAC would be pointless if there was already a requirement to notify as soon as possible. LJ Hickinbottom was not satisfied that this was a reason for an alternative construction, noting the following:-

1. Paragraph 19.2 of the CPD requires notification of funding upon service of proceedings notwithstanding it having been given in the letter before claim;
2. There may be considerable time between funding is obtained and the letter of claim is sent; and
3. Prejudice is likely to be more limited if notification has been provided at one stage but not another, so that relief from sanction is *"very likely to be straightforward if not automatic"*.

LJ Hickinbottom concluded that wording of paragraph 9.3 should be given its ordinary meaning, and that the Claimant was in breach of this procedural rule.

Relief from Sanction

LJ Hickinbottom found that no explanation had been provided for the delay in notifying the Defendant of funding arrangements. That the Defendant could not be identified until shortly before the letter of claim was sent was on the evidence a patently bad reason. The Defendant could have been identified in November 2011, if not at first instruction in June 2010. By failing to provide notification of funding, the Claimant deprived the Defendant of *"the opportunity of taking pro-active steps towards investigating and resolving this potential claim over a two and a half year period, during which additional liabilities of over the amount for which the Claimant was prepared to settle were incurred"*. On this basis LJ Hickinbottom concluded that the lower courts had been entitled to refuse relief from sanctions.

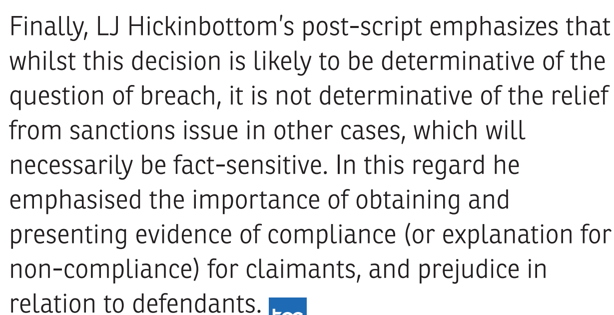
Thus, the appeal was dismissed.

Comment

As was recognised by LJ Hickinbottom, there are still numerous live cases which will fall under pre-1st April 2013 costs rules, which may be affected by the strict application of notification requirements in relation to recovery of additional liabilities. ***Springer*** will be of particular relevance in cases where the costs bill (and additional liabilities in particular) significantly exceeds the value of the claim, such that prejudice to the Defendant may be perceived as greater.

Parties to older personal injury and clinical negligence claims should consider their position in relation to notification requirement compliance, as they may benefit or be adversely affected by the strict application demonstrated in the instant case. Parties who suspect that their costs recovery may be at risk due to procedural defects will need to consider making a relief from sanctions application, unless they are permitted to negotiate a satisfactory costs outcome.

Finally, LJ Hickinbottom's post-script emphasizes that whilst this decision is likely to be determinative of the question of breach, it is not determinative of the relief from sanctions issue in other cases, which will necessarily be fact-sensitive. In this regard he emphasised the importance of obtaining and presenting evidence of compliance (or explanation for non-compliance) for claimants, and prejudice in relation to defendants.



SIGNIFICANT DEVELOPMENT and GOOD REASON – ARE THEY TWO SIDES OF THE SAME COIN?

James Laughland

To what extent are the terms *"significant development"* and *"good reason"* two sides of the same coin?

The term "good reason" appears first, in CPR 3.18(b):

*"In any case where a costs management order [CMO] has been made, when assessing costs on the standard basis, the court will…(b) not depart from such approved or agreed budgeted cost unless satisfied that there is a **good reason** to do so;".*

Then, in the accompanying Practice Direction (CPD 3E), at paragraph 7.6, is the requirement that:

*"Each party shall revise its budget in respect of future costs upwards or downwards, if **significant developments** in the litigation warrant such revisions."*

As the term *"significant developments"* is one that relates to something that occurs during on-going litigation, I shall consider that term first.

Other than unhelpful statements that you know it when you see it, there is little judicial explanation as to quite what constitutes *"significant developments"*. An event that demonstrably alters a fundamental assumption upon which an existing budget has been predicated would meet the definition; but that perhaps begs the question of what is a fundamental assumption? An obvious example would be an admission of liability made after a CMO has been made, in a case where all issues had been in dispute. Ditto for a successful application to resile from an admission of liability, where previously such had been conceded.

What, though, about developments that are less obviously *"significant"*? An application by a Defendant for approval to its revised budget was considered by the Chancery Division's Chief Master Marsh in Sharp v Blank & oths [2017] EWHC 3390 (Ch). It must first be acknowledged that this was in the context of very substantial litigation. It was a class action disputing the sale of HBOS to Lloyds Bank. The costs for both sides, approved in the CMO previously made, came to over £36m. Damages and interest were claimed at over £600m.

The Defendants sought to revise their budget contending that there were seven separate significant developments justifying the need for that revision. The Claimants opposed the application on three main grounds: lateness, oppression and jurisdiction. It is the latter ground than raised issues of wider application.

Within their jurisdiction challenge the Claimants argued that the particular grounds relied upon did not amount to significant developments; that the court has no jurisdiction to deal under the costs management regime with any costs that were incurred by the Defendants prior to the date of the hearing of their application and, third, they argued that the court has no power to treat interim applications as being significant developments.

Chief Master Marsh placed weight on the fact that paragraph 7.6 is in mandatory terms ("shall revise"). If a significant development that warrants revisions to a budget occurs then, in his view, it is not simply a choice for a party whether to revise their budget or take their chances with "good reason" on detailed assessment. Put another way, a failure to seek agreement or approval for a revised budget upon the occurrence of a significant development may count against the exercise of discretion in that party's favour when considering *"good reason"* on detailed assessment. *"A claim for additional costs should not be left until a detailed assessment because the parties need to know what is their exposure to costs and the costs of detailed assessment should be minimised."*

The Master continued: *"Significance must be understood in the light of the claim – its size, complexity and manner in which the litigation has unfolded – and also from the likely additional costs that have been, or are expected to be, incurred. The amount of the additional expense is not determinative, but it is difficult to conceive that a development leading to modest additional legal expenditure, that is modest in proportion to the amount in the relevant budget phase or phases, is likely to be significant development."*

He added that although paragraph 7.6 refers to developments in the plural, that was not to be interpreted literally. Also: *"although it is likely to be helpful to consider developments by reference to the phases in the budget they affect, whether a development is significant must be looked in the way it affects the litigation as a whole."* Finally, *"the word 'development' connotes a change to the status quo that has happened since the budget was prepared"*. This paragraph is not a mechanism for rectifying a mistake made in the preparation of the original budget, or a failure to appreciate then what the litigation actually entailed. Interim applications may be significant developments, as may be the consequences that flow from an interim application.

Turning now to *"good reason"*, some guidance can be discerned from the Court of Appeal's judgment in Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792. However, the Court specifically avoided giving examples of what might constitute *"good reason"* in any given case but did make some other observations that shed light on the nature of the beast. It is not a reassuring read. The only concrete example given was if the amount spent on a phase was less than budgeted then that would be a good reason to depart from the budget, as otherwise the indemnity principle would be breached.

Of more interest is what was said about the general approach to finding "good reason". The provisions of CPR 3.18(b), which stipulate that on a standard basis assessment the court will not depart from an approved or agreed budget unless satisfied that there is a good reason to do so, is described as *"a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs Judges should therefore 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 principal purposes of costs budgeting and thence the overriding objective"*. Comparisons were drawn with the *"robustness and relative rigour of approach"* adopted in relation to CPR 3.9 relief from sanction applications. The existence of the *"good reason"* provision was said to be "a valuable and important safeguard in order to prevent a real risk of injustice": it is not a get-out-of-jail-free card to be used on a rainy day.

Consideration of "good reason" in action can also be seen in recent, and conflicting, decisions of SCCO Judges on the issue of hourly rates. In **RNB v London Borough of Newham** Deputy Master Campbell decided that the fact he had allowed hourly rates for incurred costs lower than those used for budgeted costs was a good reason to adjust the budgeted costs to apply the same rate. He accepted the argument that as rates had not been addressed at the CCMC, the detailed assessment was thus the only opportunity that a paying party would have to challenge them.

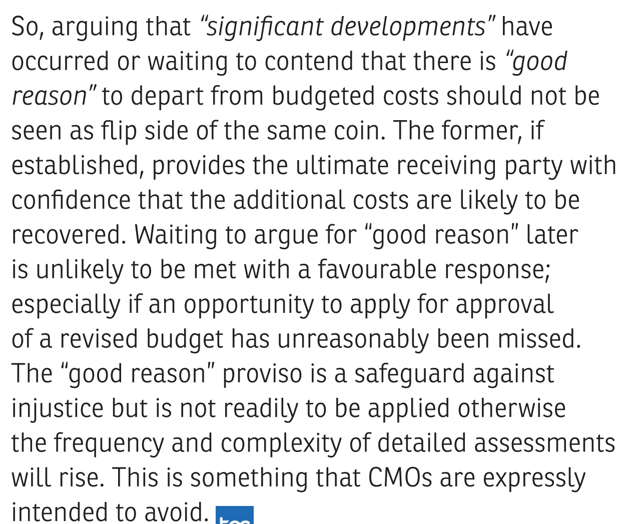
A different approach was adopted by Master Nagalingam in **Nash v Ministry of Defence** [2018] EWHC B4 (Costs). That detailed assessment began with the Claimant trying to argue that there was a *"good reason"* for an upwards departure from the amounts allowed for certain phases. Those arguments were each eventually abandoned. However, there remained the question of how to deal with phases where the amounts spent were less than budgeted. Both sides accepted, as did the Costs Judge, that where a party had spent less than the CMO allowed for in any particular phase, that was a good reason to depart from the budget downwards. However, as the Costs Judge had adopted a lower hourly rate for incurred costs than had been used to create the budgeted costs, the Defendant argued that the budgeted costs should be adjusted pro-rata to reflect the lower hourly rate. To achieve this the Judge considered there would have to be a *"good reason"* to do so. He rejected the Defendant's submissions and in doing so identified that such would identify *"a risk of double jeopardy, which would erode the certainty which the costs budgeting regime was designed to introduce"*. This risk, he felt, *"contributes to setting a high bar with respect to what constitutes a good reason"*. To accede to the Defendant's arguments would be *"to assign an elevated status to hourly rates over and above all the other constituent elements / underlying details in the budget"* when, in fact, *"rates hold no special status in the composition of a budget"*.

With the decision of Master Rowley in **Jallow v Ministry of Defence** [2018] EWHC B7 (Costs) it is now 2:1 against affording a reduction in hourly rates for incurred costs any special status when considering if there is "good reason" to depart from the amounts claimed for budgeted costs. Master Rowley reiterated what had been said in **Harrison** and added that if CMOs were to achieve *"any saving in the costs incurred overall, then these costs must be saved at detailed assessments. The only way of doing so is to reduce the time involved in detailed assessments or indeed the need for them in the first place. Those aims will only be met if the good reason test comes with a high threshold to pass."* He expressly rejected the submission that it was essentially the same test as a significant development in the litigation.

In analysing what might be a "good reason" he drew a comparison with the "genuine issue" test applied to consider challenges to the indemnity principle. In his opinion the Court's approval to the budgeted costs was comparable to the solicitor's certificate that the indemnity principle was not breached: *"in either situation, the judge at the detailed assessment is not going to entertain a challenge unless something is raised which is specific to the case before the court."* If the reduction in hourly rates claimed for incurred costs were to constitute a good reason in one case, then it would be a good reason in every case, with the costs savings intended by CMOs thereby quickly being squandered. Whilst hourly rates are one of the building blocks that helps the parties and the budgeting judge get to the phase totals, hourly rates themselves have no special status and it is the approved or agreed phase total that matters. Once that total has been set *"the budgeted part of the bill is not dealt with by a conventional detailed assessment"*. If, as was true in that case, the amounts claimed for budgeted phases was less than the amount approved then that created a strong presumption that the claimed costs were reasonable and proportionate, regardless of what hourly rates had been used to calculate them.

Master Rowley also considered, but dismissed, the Defendant's argument that the fact that a quantum-only case budgeted on the assumption it had a value of £300,000, but settled for £90,000, was a good reason to interfere with the budgeted costs. Whilst his decision on this point was fact-specific, he drew comparison with the former approach under **Lownds** and emphasised that the question is whether it was reasonable for the Claimant to believe that his case was worth the sum that he claimed.

So, arguing that *"significant developments"* have occurred or waiting to contend that there is *"good reason"* to depart from budgeted costs should not be seen as flip side of the same coin. The former, if established, provides the ultimate receiving party with confidence that the additional costs are likely to be recovered. Waiting to argue for "good reason" later is unlikely to be met with a favourable response; especially if an opportunity to apply for approval of a revised budget has unreasonably been missed. The "good reason" proviso is a safeguard against injustice but is not readily to be applied otherwise the frequency and complexity of detailed assessments will rise. This is something that CMOs are expressly intended to avoid.



Douglas v. Ministry of Justice & Anor: Recovery of inquest costs where liability is admitted pre-inquest

Sian Reeves

In *Douglas v. Ministry of Justice & Anor* [2018] EWHC B2 (Costs) the SCCO determined as a preliminary issue the inquest costs that are recoverable, in principle, in a case where liability was admitted pre-inquest.

Sian Reeves was instructed by Stephensons Solicitors LLP on behalf of the Defendants.

The facts

The Claimant's son killed himself at HMP Belmarsh. The Claimant issued a claim against the Defendants for a declaration and damages for breaches of Articles 2, 3 and 8 of the ECHR, and for damages in negligence in respect of her son's death. The stated value of the claim was £15,000.01 to £50,000.00.

An inquest into the death of the Claimant's son was opened in 2013. Thereafter, a number of pre-inquest reviews ('PIRs') took place at which the scope of the inquest, disclosure and witness evidence were identified and determined. Multiple organisations and individuals were given interested person status. An Article 2 inquest took place over a 3 week period.

Shortly (namely less than a week) before the substantive inquest commenced, the Defendants made an unqualified admission of liability in respect of the Claimant's claim as pleaded. After the inquest, the Claimant agreed to accept £13,500.00 in full and final settlement of her claim against the Defendants

The Claimant subsequently commenced detailed assessment proceedings. The Claimant's Bill of Costs claimed in excess of £147,000.00. A significant proportion of these costs (approximately 56% to 58%) related to the PIRs and the inquest.

At a detailed assessment on 9 October 2017 Master Leonard heard argument as to which 'inquest costs' were, in principle, recoverable as being costs "of and incidental" to the civil proceedings within the meaning of section 51 of the Senior Courts Act 1981. This was treated as a preliminary issue.

Recovery of 'inquest costs' in principle

The leading authority on what costs are 'of and incidental to' proceedings is the judgment of Sir Robert Megarry VC in *Re Gibson Settlement Trusts*, *Mellors v. Gibson* [1981] 1 Ch 179. Sir Megarry's review of the authorities led him to conclude (at 186H) that there were three "strands of reasoning" to be applied ('the Gibson principles')

(a) That of proving use and service in the claim;

(b) That of relevance to an issue; and

(c) That of attributability to the defendants' conduct.

Recovery of inquests costs has arisen for discussion in a number of well-known cases: (i) *Ross v. The Owners of the Ship "Bowbelle"* [1997] 2 Lloyd's Rep 196 (Note) (Clarke J) [sometimes also referred to as *The Marchioness*]; (ii) *Stewart & Anor v. Medway NHS Trust* [2004] EWHC 9013 (Costs) (Master O'Hare); (iii) *King v. Milton Keynes General NHS Trust* [2004] EWHC 9007 (TCC) (Master Gordon-Saker); (iv) *Roach & Anor v. Home Office* [2010] QB 256 (Davis J); (v) *Wilton v. Youth Justice Board*, [2010] EWHC 90188 (Costs) (Master Campbell); and (vi) *Lynch v. Chief Constable of Warwickshire Police* [2014] Inquest LR 247 (Master Rowley).

What these cases have established is that, in principle, 'inquest costs' are recoverable as costs 'of and incidental to' the civil proceedings. However:

(a) As stated by Davis J in Roach (at §62) and Master Rowley in Lynch (at §2), the extent of the recoverability of those costs depends upon the specific facts of each case; and

(b) In all but 1 of these cases (namely *Bowbelle*), liability had **not** been admitted prior to the inquest.

The parties' submissions

The Defendants submitted that applying the Gibson principles, and in circumstances where liability was admitted in full pre-inquest, the inquest costs were not incidental to the civil claim, and could not be recovered from the Defendants.

In contrast, the Claimant submitted that the costs of full and active participation in the inquest process were recoverable because she had to establish the quantum of damages, the nature of breaches and of the apology due, and to secure vindication for the Claimant. In essence, the Claimant contended that her costs of attending the inquest should be allowed as if no admission of liability had been made.

Master Leonard's judgment

Master Leonard rejected the Defendants' primary argument that the inquest costs should be disallowed in their entirety. He held (at 102) that applying the Gibson principles:

"The costs of attending the inquest will be recoverable insofar as they involve participation in the securing of disclosure from the Defendants and the obtaining of witness evidence from the Defendants"

That conclusion was, however, subject to a number of important qualifications, and which will result in a substantial reduction to the costs claimed. They are as follows:

(1) Master Leonard did not accept that the Claimant's costs of attending the inquest should be allowed as if the admission of liability had not been made (see §98);

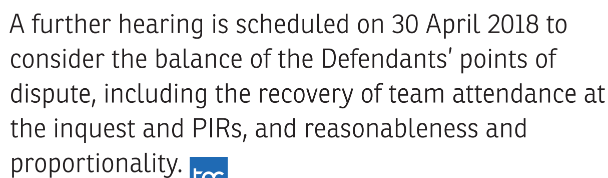
(2) To be recoverable pursuant to the Gibson principles, the work undertaken must have sufficient connection to the claim against the Defendants to justify recovery of the costs against them. Consequently, the costs relating to obtaining disclosure and witness evidence from the other interested persons would not be recoverable from the Defendants (see §99 and §100);

(3) Work undertaken in relation to the possible apportionment of liability between the Defendants and other parties does not meet the *Gibson* tests (§103); and

(4) Participation in the inquest's general procedural and "housekeeping" matters does not satisfy the *Gibson* principles (§104). This was, however, subject to one exception. Master Leonard considered that the costs of making submissions designed to secure a conclusion that would assist the Claimant's case were recoverable. However, Master Leonard held that this recovery did not extend to attendance at the Coroner's summing up or time spent waiting for the jury.

Whilst the recovery of inquest costs will depend on the specific facts of each case, this judgment is a potentially helpful tool in a defendant's armoury to limit the inquest costs recoverable as part of a civil claim.

A further hearing is scheduled on 30 April 2018 to consider the balance of the Defendants' points of dispute, including the recovery of team attendance at the inquest and PIRs, and reasonableness and proportionality.



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POST-LASPO ATE AND PROPORTIONALITY: THE CURRENT LANDSCAPE

Matt Waszak

1. Introduction

1. Since its implementation, questions have surrounded the application of the new proportionality test under CPR 44.3(5): what does it apply to, and how should it be applied? Both questions have remained undiminished despite the fifth anniversary of the test's implementation having now passed.

2. Perhaps nowhere has that uncertainty been greater than in relation to after-the-event (ATE) insurance taken out after 01 April 2013, in the limited cases (clinical negligence, mesothelioma, publication and privacy and insolvency[6]) in which ATE premiums can still be recovered as costs. Many arguments have arisen from the drafting of the post-April 2013 CPR: the fact that the new proportionality test under CPR 44.3(5) was defined to apply to "costs" and the definition of "costs" under CPR 44.1(iv) was re-cast under the new rules to exclude additional liabilities suggested that a post-LASPO ATE premium would not be subject to proportionality.

3. Through its judgments in **BNM v MGN Limited** [2017] EWCA Civ 1767[7] and **Peterborough & Stamford Hospitals NHS Trust v McMenemy; Reynolds v Nottingham University Hospitals NHS Foundation Trust [2017] EWCA Civ 1941**, the Court of Appeal has provided some *limited* guidance. The new proportionality test does not apply to a pre-commencement funding arrangement, as defined under CPR 48.2, but does apply to an ATE premium taken out after 01 April 2013 in a clinical negligence case.

4. As welcome as such guidance has been, the position remains far from clear, and the guidance far from complete. This article now considers what the post-**BNM** and post-**McMenemy** landscape entails for practitioners.

2. BNM

5. BNM was a primary school teacher who had an affair with a premiership footballer between 2008 and 2011. In 2011, she lost her mobile phone, which contained information linking her to the footballer. BNM claimed an injunction to restrain MGN from using or publishing confidential information taken from her phone, damages and an order for delivery up of any confidential information. Her claim was funded by a CFA entered into on 18 April 2013 and an ATE policy taken out on 30 July 2013. BNM's claim was compromised by way of a Consent Order dated 18 July 2014, by which MGN was ordered to pay BNM's costs, to be assessed on the standard basis subject to detailed assessment if not agreed. Costs proceedings then followed. The cost of BNM's ATE premium was £58,000 plus insurance premium tax of £3,480.

Court of Appeal judgment

6. ATE premiums taken out after 01 April 2013 in privacy proceedings remain recoverable as costs by virtue of Article 4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5 and Saving Provision) Order 2013 (SI 2013/77).

7. BNM's ATE premium was a pre-commencement funding arrangement under CPR 48.2(1)(b). That was common ground between the parties. Even though the ATE premium was taken out after 01 April 2013, it fell within the definition of a pre-commencement funding arrangement because the "relevant date" under CPR 48.2(2)(e) (the date on which sections 44 and 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force in relation to privacy proceedings), had not yet come into force. Under CPR 48.1, the recovery of a pre-commencement funding

arrangement is subject to the pre-April 2013 form of CPR 43 to 48 and the attendant practice directions.

8. At first instance, Chief Master Gordon-Saker held that the new proportionality test applied to the ATE premium. BNM's appeal against that decision succeeded. The Court of Appeal held that: *"the assessment should have been conducted on the footing that the proportionality test in the old CPR 44.4(2), and the relevant provisions in the old Costs Practice Direction, applied to...the ATE insurance premium"* (at per Etherton MR at [66]). In other words, the Court of Appeal held that the old proportionality test and not the new proportionality test applied to the assessment of the premium.

9. The Court of Appeal's judgment focused on the construction of CPR 48.1, under which the assessment of the recovery of a pre-commencement funding arrangement is subject to the pre-April 2013 form of CPR 43 to 48 and the attendant practice directions. The essence of the Court of Appeal's reasoning is best summarised at [81]:

   "Standing back from the minutiae, it seems perfectly clear that the reference to "any additional liability incurred under a funding arrangement" was deliberately omitted from the definition of "costs" in the new CPR 44.1(1) because, subject to specific saving and transitional provisions in the 2012 Act, the recoverability of success fees and ATE insurance premiums in an order for costs was abolished by the 2012 Act and, where they remain recoverable by virtue of those saving and transitional provisions, they are recoverable in accordance with the old costs rules, including those relating to proportionality, reasonableness and assessment. If it had been intended that the new proportionality test was to apply to funding arrangements to which the statutory saving and transitional provisions applied, that would have been made clear in the statutory provisions or the new costs rules or both and it was not".

10. The question of the application of proportionality to post-LASPO ATE premiums in clinical negligence cases was not a live issue in **BNM**. However, Counsel for MGN sought to rely on the provisions of the **Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2012 (SI 2013/92)** in support of the argument that the new proportionality test applied to BNM's ATE premium. Those Regulations state that *"the provisions in force in the CPR prior to 1 April 2013 relating to funding arrangements will not apply"*. While dismissing MGN's argument on that point, it was noted by the Court of Appeal in **BNM** that it was common ground between the parties[8] that the new proportionality test applies to a post-LASPO ATE premium in a clinical negligence case.

3. McMenemy and Reynolds

11. Exactly three weeks later, the Court of Appeal handed down its judgment in **Peterborough & Stamford Hospitals NHS Trust v McMenemy; Reynolds v Nottingham University Hospitals NHS Foundation Trust [2017] EWCA Civ 1941**, two conjoined appeals relating to the recovery of ATE insurance premiums in post-LASPO clinical negligence cases.

McMenemy: the facts

12. Ms McMenemy brought a clinical negligence claim against the Peterborough and Stamford Hospitals NHS Trust in relation to the treatment she received following a miscarriage in February 2013. After entering into a CFA with her solicitors, her medical records were requested from the NHS Trust. Before any medical records were received, or before expert evidence was obtained in relation to her claim, Ms McMenemy took out an ATE insurance policy with ARAG. The total premium, including IPT, came to £6,042, of which £5,088.00 (including IPT) was recoverable. Her claim settled for £2,500 before expert evidence was obtained.

13. At provisional assessment, the premium was allowed in full. At an oral hearing, requested by the Trust, the Deputy District Judge considered that it was unreasonable to have taken out the policy before Ms McMenemy's medical records had been seen to confirm the facts and before there could be any assessment of risk.

14. Permission to appeal was granted on the basis that the Deputy District Judge had been wrong to hold that she should have waited to ascertain the level of risk before taking out an ATE policy. The appeal came before HHJ Pearce. He held that the premium was recoverable in principle and remitted the case to a regional costs judge for consideration of the amount recoverable.

Reynolds: the facts

15. Mr Reynolds brought a clinical negligence claim against the Nottingham University Hospitals NHS Foundation Trust in relation to a failure to diagnose a pulmonary embolism. He instructed solicitors, took out an ATE insurance policy with ARAG, and entered into a CFA with his solicitors- all before his medical records had been obtained. As in McMenemy, the total premium was £6,042 (including IPT), of which £5,088 (including IPT) was recoverable. Following the Trust's admission of liability, the claim settled for £12,500. By the date of settlement, no expert evidence had been commissioned, and no formal Letter of Claim had been sent.

16. A Bill of Costs was served on the Trust. In their points of dispute, it was argued, amongst other things, that the premium was unreasonably and unnecessarily incurred because liability and causation were indefensible. At provisional assessment, the premium was allowed in full. At an oral hearing, requested by the Trust, the District Judge held that it was unreasonable to have insured against the cost of expert reports on liability but that it would have been reasonable to insure against the cost of reports on causation. He declined to attempt to apportion the premium and disallowed the whole of it.

Court of Appeal Judgment

17. These conjoined appeals came before the Court of Appeal. The appeal in **McMenemy** was a second appeal.

18. It is worth noting, as a point of distinction to **BNM**, that the ATE premium in **McMenemy** was not a pre-commencement funding arrangement under CPR 48.2. The recovery of an ATE premium in a post-LASPO clinical negligence claim has been preserved by **The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013.**

19. Before the Court of Appeal there were three key points:

    i. Does the recovery of ATE premiums (in post-LASPO clinical negligence cases) engage the CPR? (Paragraphs 46 to 55)

    ii. Does the principle in **Callery v Gray [2001] EWCA Civ 117**, namely that it is reasonable to take out an ATE policy at the outset of a claim when a claimant instructs solicitors[9], remain good law following the April 2013 reforms? (Paragraphs 63 to 80)

    iii. Does the new test of proportionality apply to the recovery of an ATE premium (in a post-LASPO clinical negligence case)? (Paragraphs 56 to 62)

20. The Court of Appeal held that:

    i. The CPR applies to the recovery of an ATE premium in a post-LASPO clinical negligence case. The Court of Appeal rejected the argument that the CPR is not engaged (per Lewison LJ at paragraph 52).

    ii. It remains permissible for ATE insurance to be taken out as soon as a claimant enters into a CFA (per Lewison LJ at paragraph 76). The Court of Appeal held, as had been held in **Callery v Gray**, that entering into a block-rated ATE policy at the same time as entering into a CFA was a reasonable way to conduct litigation.

21. In relation to proportionality, the Court of Appeal held that the new proportionality test, pursuant to CPR 44.3(5), applies to the recovery of an ATE premium in a post-LASPO clinical negligence case (per Lewison LJ paragraph 62). In reaching that decision, Lewison LJ appeared to rely principally on the provisions of **The Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings (No 2) Regulations 2013**, which state:

    "The regulations relate only to clinical negligence cases where a costs insurance policy is taken out on or after 1 April 2013, so the provisions in force in the CPR prior to 1 April 2013 relating to funding arrangements will not apply".

22. Rather unhelpfully, Lewison LJ declined to give any guidance on how the new proportionality test should be applied, noting that *"Questions relating to quantum are not before us and are, we were told, due to be considered by this court in another test case"* (at paragraph 78).

4. Analysis

23. Practitioners have increasingly relied on the Court of Appeal to provide guidance on the many situations which have not been caught by the changes to the post-2013 CPR. **BNM** and **McMenemy** are two further examples. However, the

situation in relation to proportionality and post-LAPSO ATE premiums in clinical negligence cases remains far from clear.

24. The most pressing question that ensues is how the proportionality test should be applied. In the context of an ATE insurance premium, the questions are threefold.
    i. What may be said to be proportionate?
    ii. How that should be determined?
    iii. In considering proportionality, should an ATE premium be aggregated with base costs, or considered separately?

25. The guidance in **McMenemy** in relation to those questions was conspicuous by it absence. The reference made Lewison LJ to "another test case" was a thinly veiled reference to the forthcoming appeals in **West v Stockport NHS Foundation Trust** and **Demouilpied v Stockport NHS Foundation Trust** (judgments of HHJ Smith in the Manchester County Court). It is understood that those appeals are due to be heard by the Court of Appeal in October 2018.

26. Those appeals are likely to provide clarification on the points which remain outstanding following **McMenemy**. The appeal in **Demouilpied** concerns how the new proportionality test should be applied in relation to ATE premiums. The appeal in **West** concerns what evidence is required to put the reasonableness of a block-rated ATE premium in issue. That point has been the subject of (recent) conflicting decisions, most notably: the decision of Foskett J in **Surrey v Barnet and Chase Farm Hospitals Foundation NHS Trust [2016] EWHC 1598** and the decision of Langstaff J in **Pollard v University Hospitals North Midlands NHS Trust [2017] 1 Costs LR 45**. The appeal in **West** also concerns, where sufficient evidence is adduced to put the reasonableness of a block-rated premium in issue, what approach the Court may take in relation to the assessment of such a premium.

27. The lack of clarity in relation to the new proportionality test is not just an ATE-specific issue but one of wider importance; indeed both the judiciary and practitioners are in urgent need of general guidance. Save for HHJ Dight's judgment in **May & May v Wavell Group Ltd & Bizarri** (22 December 2017, unreported), in relation to which permission to appeal has been granted by the Court of Appeal, there remains no guidance on how the new proportionality test should be applied generally.

28. For all those who practice in this area of law, many questions remain unanswered. With the appeals before the Court of Appeal in October looming, the message, for the moment, is to watch this space.

May v Wavell: moving away from a 'proportionality scythe'?

Lionel Stride

The case of May & May v Wavell Group Ltd & Bizarri (22 December 2017, unreported) makes interesting and reassuring reading for those in favour of a more objective application of the new proportionality test. In allowing an appeal against the scything of assessed costs from nearly £100,000 to £35,000 (i.e., 65%) in a nuisance dispute involving a well-known singer, HHJ Dight and Master Whalan advocated a more measured approach to the test of proportionality under CPR 44.3(5). The case will be of assistance in any claim that settles at an early stage for less than the statement of value, albeit that the appeal court still applied a 25% reduction to the assessed costs on grounds of proportionality.

Background

The original claim related to a nuisance dispute arising out of the construction of a super basement affecting the Mays' valuable Central London residence (it was accepted that the value of the properties concerned was in excess of £10 million). Negotiations having broken down, and the works having neared completion by the time of issue, the claim, when issued, sought compensation based on the diminution in rental value of the Mays' property rather than injunctive relief. The statement of value was pleaded at £50,000 to £100,000 but the claim settled soon after service when the Mays accepted an offer of £25,000 pursuant to CPR Part 36. They then submitted a bill of costs totalling £208,236.54 comprising £131,138 profit costs, £42,578.27 disbursements and VAT (i.e., around £173,530 exclusive of VAT). Master Rowley applied a two-stage test, first assessing the reasonableness of the individual items of costs incurred at £99,655.74; but then assessing the proportionality of the total sum so determined, leading to a reduction of the 'reasonable sum' to £35,000 plus VAT, which he considered to be the 'proportionate' sum. The Master placed particular reliance upon the settlement figure of £25,000; the fact that, in his view, the litigation was not complex; and the fact that the claim had settled at such an early stage. However, the figure was not calculated on any mathematical basis: it was based on a subjective view of the appropriate and proportionate figure, having general regard to those factors.

The Decision on Appeal

The assessed costs were not challenged on appeal. The Mays ("the appellants") confined their appeal to four specific aspects of Master Rowley's approach to the question of proportionality, which, crucially, the appeal court accepted was a matter of law rather than merely the exercise of discretion. At issue was how the Court should apply the proportionality test both generally and in relation to the five factors at CPR 44.3(5), namely the sums in issue; the value of any non-monetary relief in issue; the complexity of the litigation; any additional work generated by the conduct of the paying party; and wider factors such as reputation and public importance. The appellants specifically contended that Master Rowley had erred in how he had evaluated the sums in issue; the complexity of the litigation; the relevance of the stage reached at settlement; and the global approach adopted.

On whether to adopt a two-stage or global approach to proportionality, paragraph 58 of the judgment in May makes compelling reading: -

"The rules do not specifically state that the assessment has to be undertaken in two stages but they do require the costs judge to apply two tests, namely reasonableness and proportionality, and **it is open to the costs judge to have an eye to both as he or she undertakes an item by item assessment** having

in mind a figure or range of figures which would be proportionate **but it is equally open to the judge to apply the tests sequentially. I suspect that in practice a costs judge will have both tests in mind when undertaking the item by item assessment but he or she will undertake a form of cross-checking** when the total is ascertained to see whether it falls within the range of proportionate totals and then undertake an adjustment if it does not. ***I respectfully disagree with the learned Master*** **insofar if it is right that he used his description of the *new proportionality test as a blunt instrument* as a reason to make a substantial reduction in the reasonable *costs to bring them down to a rough and ready but proportionate amount. The rules*, difficult as they may be to apply in practice, *require the specific factors in CPR 44.3(5) to be focused on and a determination to be made as to whether there is a reasonable relationship between them.* I doubt that the rules committee intended that a costs judge could or should bypass an item by item assessment and *simply impose what he or she believed to be a proportionate global figure.*** *In my judgment the tests of reasonableness and proportionality are intended to work together, each with their specified role, but with the intention of achieving what is fair having regard to the policy objectives which I have identified above."*

It follows that there was express criticism of any approach that results in the arbitrary imposition of a 'proportionate' sum as part of a two-stage approach: the better approach is to have regard to both the test of reasonableness and proportionality throughout assessment; and to ensure that the specific factors under CPR 44.3(5) are considered in appropriate detail. In substituting the 'proportionate sum' of £35,000 with £75,000 (plus VAT), the following reasoning in the judgment of the appeal court is of particular relevance:

(a) Sums in issue: whilst regard should be had to the settlement figure, looking at the 'sums in issue' requires a broader assessment. As stated at paragraph 67 of the judgment: "… ***the task of the court is…to undertake an objective evaluation of the sums which are in issue having regard to all the material before it,*** including the highest figure put on his claim by the claimant and the lowest figure, if any, admitted by the defendant. ***The task of the court is, it seems to me, to determine what realistically is in dispute*** because it is unlikely that a reasonable relationship exists between costs and a figure (whether claimed or admitted) which is simply plucked from the air… ***A paying party ought only to be expected to pay the price of an objectively realistic case advanced against it.***" On this basis, the appeal court found that the Master should have concluded that the 'sums in issue' were the pleaded value of £50,000 to £100,000 rather than the settlement figure. This is plainly of relevance to any claim that settles for less than the statement of value, provided that range is capable of some objective justification.

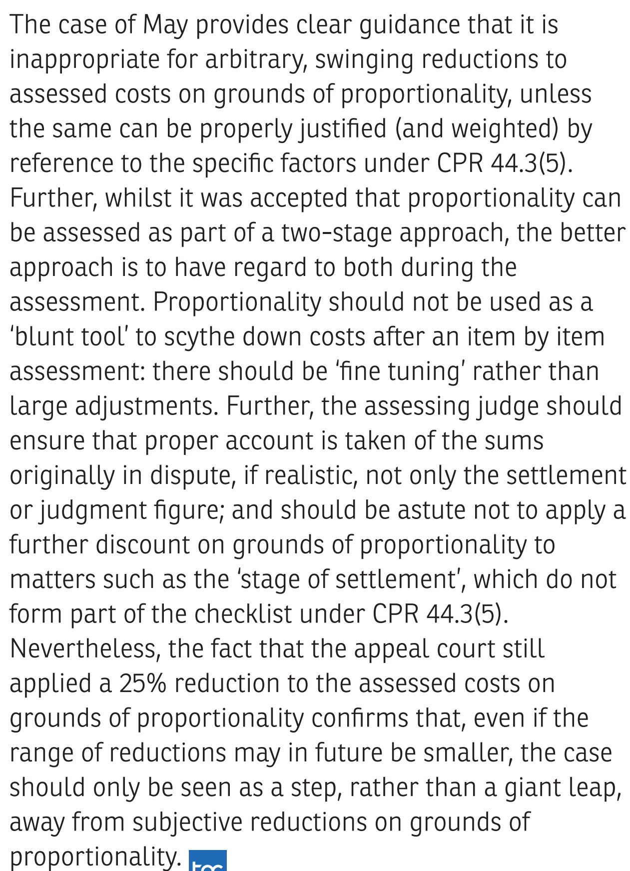
(b) Complexity of the litigation: the appeal court found that, when assessing complexity, regard should be had to the range of claims of similar value (£50,000 - £100,000) made in the county court; and that a claim in nuisance was at the more complex end of the scale, justifying the use of a certain degree of legal expertise.

(c) Stage at which the claim settles: the appeal court accepted that it was wrong to reduce the costs further on grounds of proportionality simply because the case settled at an early stage. This is not one of the factors listed under CPR 44.3(5); and would be taken into account more appropriately when assessing whether the costs incurred were reasonable.

(d) Holistic approach: the appeal court re-iterated its criticism of any approach that would lead at the end of an item by item assessment to the imposition of *"a very substantial reduction on the overall figure without regard to the component parts [of CPR 44.3(5)]"*. It was emphasised that the rules required the judgment to achieve a 'balance', 'reasonable relation' and/or a 'correlation' that may necessitate a certain amount of 'fine tuning' but not a hammer blow, such that there should not be a significant range of conclusions on what is a proportionate sum. Given that the final figure allowed in May had not been *"based on any specific mathematical calculation"* and that there had been no *"specific explanation of how the weighting of the various factors resulted in the final figure"* the appeal court therefore adjusted the figure.

Conclusion

The case of May provides clear guidance that it is inappropriate for arbitrary, swinging reductions to assessed costs on grounds of proportionality, unless the same can be properly justified (and weighted) by reference to the specific factors under CPR 44.3(5). Further, whilst it was accepted that proportionality can be assessed as part of a two-stage approach, the better approach is to have regard to both during the assessment. Proportionality should not be used as a 'blunt tool' to scythe down costs after an item by item assessment: there should be 'fine tuning' rather than large adjustments. Further, the assessing judge should ensure that proper account is taken of the sums originally in dispute, if realistic, not only the settlement or judgment figure; and should be astute not to apply a further discount on grounds of proportionality to matters such as the 'stage of settlement', which do not form part of the checklist under CPR 44.3(5). Nevertheless, the fact that the appeal court still applied a 25% reduction to the assessed costs on grounds of proportionality confirms that, even if the range of reductions may in future be smaller, the case should only be seen as a step, rather than a giant leap, away from subjective reductions on grounds of proportionality.



Bust a cap: are Part 36 offers worthwhile in provisional assessment proceedings?

Richard Boyle

Summary

In *Lowin v W Portsmouth & Co Ltd* [2017] EWCA Civ 2172 the Court of Appeal held that indemnity costs are not recoverable when a Part 36 offer is beaten in provisional assessment proceedings. Costs remain subject to the cap of £1,500 (plus VAT, court fees and the costs of preparing the bill) set out at r 47.15(5) CPR.

The legal framework

The assesse Since 1st April 2013, the courts must provisionally assess bills of up to £75,000 (r 47.15 CPR). The court will assess the bill on the papers following receipt of Points of Dispute and Replies.

Rule 47.20(4) CPR provides that Part 36 applies to detailed assessment proceedings subject to four express modifications which are irrelevant for these purposes.

Rule 36.17(4) CPR sets out a number of consequences where a Claimant beats their Part 36 offer. Rule 36.17(4)(b) CPR states that the Claimant will recover costs on the indemnity basis from the date on which the offer expired.

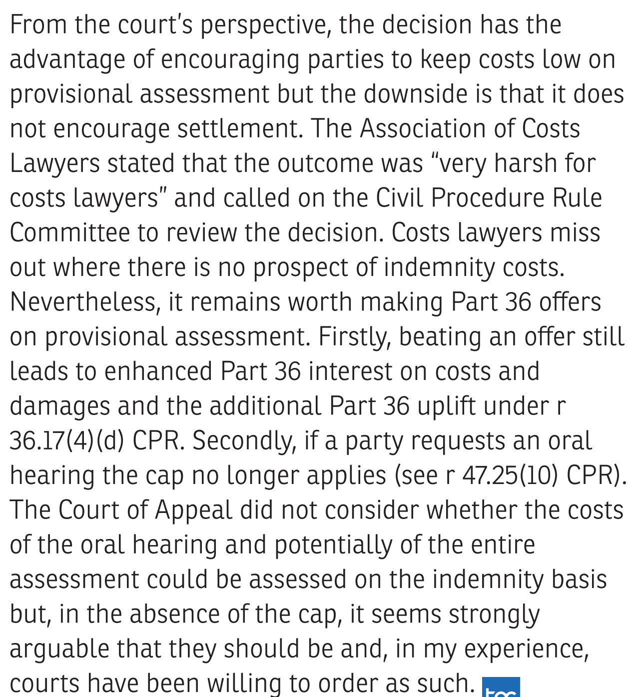
Rule 47.15(5) CPR provides that, in proceedings which do not go beyond provisional assessment, the maximum amount of costs recoverable is £1,500 plus VAT, court fees and the costs of drafting the bill of costs ("the cap").

The case

The claim in *Lowin* was for damages arising out of the death of the Claimant's mother from mesothelioma. The claim was settled and the Claimant made a Part 36 offer of £32,000 for the costs of the claim. On 8th December 2015, Master Whalan provisionally assessed the costs payable to the Claimant at £32,255.35. When informed of the Part 36 offer, he ordered the Defendant to make payments in line with the usual Part 36 consequences but held that the cap applied and limited the Claimant's costs to £2,805 (£1,500 plus VAT and a court fee of £1,005). The Defendant appealed to the High Court and Laing J allowed the appeal, holding that the Part 36 consequences applied without a cap and indemnity costs were recoverable.

The judgment

Lady Justice Asplin gave the unanimous judgment of the Court of Appeal. She considered *Broadhurst v Tan* [2016] 1 WLR 1928 which held that indemnity costs were recoverable where a Part 36 offer had been beaten in a case subject to the fixed costs regime at section IIIA of Part 45 CPR. Asplin LJ held that *Broadhurst* was not directly applicable because it concerned different provisions of the CPR and applied to fixed rather than capped costs. The court held that, because the costs under r 47.15(5) CPR were capped rather than fixed, there was no conflict in the CPR which needed to be resolved. The cap did not prevent costs being assessed on the indemnity basis but merely inhibited the amount which could be awarded after that assessment had taken place. Although highly unlikely, if the party's costs assessed on the indemnity basis were less than the cap, the full sum would be awarded. The judge relied on the fact that r 47.20(4) CPR, which provides that Part 36 shall apply to detailed assessment, does not mention or modify r 47.15(5) CPR in any way.



Practical considerations

From the court's perspective, the decision has the advantage of encouraging parties to keep costs low on provisional assessment but the downside is that it does not encourage settlement. The Association of Costs Lawyers stated that the outcome was "very harsh for costs lawyers" and called on the Civil Procedure Rule Committee to review the decision. Costs lawyers miss out where there is no prospect of indemnity costs. Nevertheless, it remains worth making Part 36 offers on provisional assessment. Firstly, beating an offer still leads to enhanced Part 36 interest on costs and damages and the additional Part 36 uplift under r 36.17(4)(d) CPR. Secondly, if a party requests an oral hearing the cap no longer applies (see r 47.25(10) CPR). The Court of Appeal did not consider whether the costs of the oral hearing and potentially of the entire assessment could be assessed on the indemnity basis but, in the absence of the cap, it seems strongly arguable that they should be and, in my experience, courts have been willing to order as such. tgc

Endnotes

1. At the TGC Costs Seminar 2017, I presented on this topic and my notes can be found on our website. In those notes I consider the case of *Webb v London Borough of Bromley 918/02/16), SCCO, Master Rowley*, and I queried whether the Court had jumped too quickly to the conclusion that because there was tri-partite consent, that necessarily meant that a novation had occurred.
2. *Plevin v Paragon Personal Finance Limited [2017] UKSC 23*, and previously considered by the 1st Edition TGC Costs Newsletter.
3. The majority decision appears to support the views expressed by Master Rowley in *Webb*.
4. This view appears to support my previously expressed view at the TGC Costs Seminar 2017 querying why tri-partite consent necessarily meant a novation had occurred. Davis LJ found support for assignment in the case of tripartite consent in the Court of Appeal case of *Pan Ocean Shipping Co Limited v Creditcorp Limited [1994] 1 WLR 161*, at p.166 B-D; and support for the benefit and burden of a CFA being capable of assignment from *Plevin*.
5. In *Warren v Hill Dickinson LLP, SCCO, 26/03/18, Master Leonard*, the Court felt compelled (as it rightly should have) by *Budana*. Attempts to factually distinguish *Budana* failed.
6. The exemption for insolvency proceedings was removed from 06 April 2016.
7. The successful appellant was represented by Simon Browne QC, leading James Laughland, both members of Temple Garden Chambers' Costs Team.
8. Per Sir Terence Etherton MR at paragraph 68.
9. See the Court of Appeal's Judgment at paragraph 100.

Case Digest

Receiving parties' work outside scope of their CFA: no entitlement to recover costs

Anthony Lenanton

In Radford & Anor v Frade & Ors [2018] EWCA Civ 119 the Court of Appeal upheld the earlier decisions that lawyers could not recover costs from the paying party for work done outside the terms of their CFA.

The parties were involved in a project to make a film. They fell out and the claimants sued the defendants (a group of individuals and corporations). The defendants initially instructed solicitors under a conventional retainer, but shortly thereafter a CFA was agreed. On 23.05.12, the substantive proceedings against the individual defendants were concluded by consent on the basis of invalid service. The solicitors continued to bring the claims against the corporate defendants and obtained summary judgment in early 2014.

Master Haworth decided that the scope of the CFA was limited to arguing procedural points about service and jurisdiction. The consequence was the defendants had obtained a 'win' with the consent order on 23.05.12. The CFA had come to an end on that date and the defendants were unable to recover costs from the claimants for work done by solicitors or counsel thereafter.

Warby J upheld the Master's decision on appeal. He rejected an argument by the defendants that work done outside the scope of the CFA remained covered by the original retainer. He found any implied retainer as there might have been was on implied CFA terms, which were of course unenforceable for not be in writing.

The Court of Appeal granted permission to the defendants to appeal on the grounds that the work done after 23.05.12 was subject to an enforceable conventional retainer. The Court held, on the facts, that it was unrealistic to suppose the solicitors and clients envisaged the original retainer continuing on the 'off chance' that the terms of the CFA did not cover all the work that was actually being done. The only sensible interpretation of the parties' intention was that the CFA superseded the original conventional retainer.

The defendants argued a separate point in relation to counsel's fees. The names of the corporate defendants were omitted from the CFA between solicitors and counsel, meaning they were not liable to pay. A deed of rectification was entered into to correct the error, but this was done only after the costs order was made. The Court of Appeal upheld Warby J's decision (which itself followed a Privy Council decision in a different case) that it was not open to defendants to add to the liabilities of the paying parties after the making of the costs order.

Siddiqui v University of Oxford [2018] EWHC 536

Ellen Robertson

The High Court has considered the application of QOCS where a Claimant is unsuccessful in a hybrid claim for personal injury and related losses in addition to losses unrelated to personal injury. In a widely publicised case, the Claimant pursued a claim in negligence and breach of contract against his former university, arguing that his degree result was caused by inadequate teaching. He claimed to have suffered psychiatric injury and economic loss as a result of his lower than anticipated degree classification, arguing that his degree classification had left him unable to pursue his intended postgraduate degree in the US.

The claim was unsuccessful and it was agreed that the Defendant was entitled to its costs; however, the Claimant submitted that QOCS protection meant any order would be unenforceable.

Foskett J considered the application of CPR r.44.16(2)(b) which provides that orders for costs may be enforced up to the full extent of such orders, with the Court's permission and to the extent that the Court considers to be just, where;

"a claim is made for the benefit of the claimant other than a claim to which this Section applies".

Foskett J followed the approach of Morris J in *Jeffreys v The Commissioner of Police for the Metropolis* [2017] 4 Costs LQ 409, finding that the common evidential basis between the economic loss claim and the personal injury claim did not prevent the disapplication of QOCS, as there was no requirement under the rules for the claims to be "divisible". He noted that it was an important objective to ensure that QOCS provisions were not abused by Claimants "dressing up" non-personal injury claims in the clothes of a personal injury claim to avoid the usual costs consequences of unsuccessful litigation. The essential question is whether the claims being advanced are for different forms of loss, one attributable to personal injury and the other not. Overlap in evidential basis is a consideration relevant to the quantum of the enforceable costs but it is not a barrier to enforceability.

He noted that the alleged effect of the poor degree on the Claimant's ability to obtain his intended postgraduate place was a not insignificant issue at trial and in preparations for trial, and although the issue of breach of duty was relevant to both heads of loss, in principle some of that time could be reflected in the enforceable costs.

Foskett J gave permission to enforce 25% of the Defendant's costs. He noted that his initial view had been that one third would have been appropriate, but he had reduced the proportion further to ensure that the legitimate QOCS protection was not lost.

25% CAP on success fee does not obviate the need for a risk assessment – HERBERT v HH LAW LIMITED [2018] EWHC 580 (QB)

Robert Riddell

Can a client reduce their liability for their solicitor's costs due under a new style Conditional Fee Agreement (CFA) after their claim has been resolved? This was one of the questions for the court in *Herbert*.

The Claimant entered into a CFA with the Defendant solicitors for recovery of damages for personal injury which she had sustained in a rear end shunt RTA in October 2015. The claim was subsequently compromised. According to the terms of the retainer, the Claimant was liable for the Defendant's success fee and her ATE premium. The success fee was set at 100%, albeit capped at 25% of general damages, which were to be paid from the recovered damages. However, the Claimant subsequently and successfully instructed solicitors to contest the Defendant's bill of costs, leading to a reduction of the success fee to 15%.

The Defendant argued that the Claimant had given her express or implied consent by signing the CFA and was accordingly bound to its terms. The Defendant also contrasted the pre-1 April 2013 CFA regime, where the success fee was calculated on the degree of risk in the particular case, with the LASPO regime, in which (the Defendant submitted) the risks formed no part of either the inter-parties or solicitor-client assessment. A witness statement on behalf of the Defendant noted that the funding model adopted in the wake of the LASPO reforms was commonplace across the personal injury marketplace.

Nonetheless, the judge concluded that for the purposes of CPR 46.9 (solicitor-client assessment) mere approval by the client of the solicitors' incurred costs was not sufficient; following *Macdougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118, approval required "informed consent". Nor was this limited, as in *Macdougall*, to circumstances where it was alleged the solicitors had seriously misled their client. Further, the judge did not accept that the new style CFA regime removed the requirement for a risk assessment at a solicitor-client assessment. Instead, he considered it likely to be the "primary factor" of interest to a court when faced with an application to reduce the success fee. Put differently, the judge found that where a firm (for commercial reasons) applies an automatic 100% uplift for all cases, this would need to be clearly explained to the client before she entered the agreement.

While it is not uncommon for a court to reduce the proportion of a success fee sought as a deduction for costs in infant PI settlements (or refuse it altogether: *A v Royal Mail Group* [2015] EW Misc B24(CC) and B30(CC)), it remains to be seen whether this decision heralds the prospect of a rush of similar challenges to CFAs by seemingly satisfied clients.

Costs Judge v Actuary: Percy v Anderson-Young [2017] EWHC 2712

Ellen Robertson

The High Court has warned against the dangers of costs judges second guessing decisions of underwriters in the absence of expert evidence, allowing the recovery of an After the Event (ATE) insurance premium of £533,017.13.

The Appellant brought a claim for personal injury arising out of an accident in 2005 which caused serious head injuries. Her claim was funded through a Conditional Fee Agreement. The Claimant entered into an ATE policy providing an aggregate level of indemnity of £50,000. Following a Pre-Trial Review and two unsuccessful Joint Settlement Meetings, the Claimant entered into a further top up policy which gave total cover of £500,000. The premium was £319,315.07, increasing to £533,017.13 within 45 days of trial. As the policy was entered into less than 45 days before the trial, only the higher premium was ever applicable.

The claim was settled at mediation shortly after, contrary to the expectations of the parties, for a lump sum of £1.4 million, which was approved. Following the approval, the Defendant was then informed that the new ATE premium was £533,017.13. The parties then reached agreement on all matters except the ATE premium. At the hearing, the District Judge held that it was reasonable of the Claimant to have increased the cover at that stage in the proceedings and to do so without first notifying the Defendant; that finding was not appealed. The District Judge went on to find that the premium did not properly represent the risks to the Claimant and therefore took a "broad brush" approach, reducing the premium to £82,513.07.

On appeal, Mr Justice Martin Spencer distinguished between cases where a judge considered that the level of cover was too high and where, as in the present case, the judge considered the underwriting decision to be flawed. The District Judge had found that it was reasonable to take out such a policy and so the only remaining question was whether the premium was reasonable in amount. The type of "broad brush" approach adopted by the District Judge was an approach that the Court of Appeal in *Rogers v Merthyr Tydfil* had in mind in relation to assessing the level of cover rather than to second-guess the underwriter's decision. The District Judge had fallen into the trap identified by the Court of Appeal in Rogers; he had set himself up as better placed than the underwriter to identify the financial risk, particularly given the lack of any expert evidence. The premium was reasonable in amount.

The Court also noted that it was perfectly permissible for an ATE premium to be insured so that it was not payable by the Claimant in the event the case was lost.

Mr Justice Martin Spencer also commented on the role of the Defendant, who was not given an opportunity to settle the case before the premium was incurred. The judge considered that any sympathy for the Defendant would be misplaced; he had given every indication to the Claimant that he intended to proceed to trial. An experienced Defendant should have known that the Claimant was likely to take up additional cover and that the premium would be significant. The Claimant was entitled to recover the full ATE premium of £533,017.13.

The Court of Appeal has granted permission to appeal.