EDITOR: **Shaman Kapoor**
ASSOCIATE EDITORS: **Richard Boyle, Matt Waszak**
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TGC Costs Update

The Newsletter of the TGC Costs Team

LONDON
1 Harcourt Buildings
Temple, London, EC4Y 9DA
T +44 (0)20 7583 1315

THE HAGUE
Molenstraat 14, 2513 BK
The Hague, Netherlands
T +31 70 221 06 50

E clerks@tgchambers.com
W tgchambers.com
DX 382 London Chancery Lane

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A note from the Editor

By Shaman Kapoor skapoor@tgchambers.com

Welcome to the third edition of TGC's Costs Newsletter.

In this edition, in order to give you a flavour of developments from retainer to detailed assessment, we start by reporting on recent considerations of the requirements of statute bills and *Chamberlain* bills in the case of *Boodia*. Just when our ink had dried, the Court of Appeal gave their judgment, and so now you have chapter and verse both at first instance and on appeal! We move on to consider that gem of a case where a solicitor entered into a retainer with her own firm and conducted the work herself, and then swiftly move to the scope of a retainer (a CFA) where the intended Defendant was named but proceedings were issued against a different party. Beyond retainer matters, we report on the applicability of the fixed costs regime where a Part 36 offer is accepted out of time but before trial.

Sorry? What was that? What the QOCS has been going on I hear you ask! We report on the effect of QOCS where the settlement of the case was reflected in a Tomlin Order and whether the application of QOCS in mixed claims is necessarily automatic. Not in this Newsletter but clearly of interest still is the case of *Ketchion v McEwan* before HHJ Freedman on 28/06/18, which determined on appeal that the Claimant's successful costs order against the Defendant was subject to QOCS because the Defendant had, albeit unsuccessfully, pursued a claim for personal injury. Whilst the Claimant's claim had no claim for personal injury, the definition of "proceedings" was to be widely construed so that the application of QOCS could be determined by the nature of the claim or the counterclaim. Sensible you think? Not so, according to HHJ Venn in Brighton in the case of *Waring v McDonnell* on 06/11/18! This arena has all of the hallmarks of testing us for some considerable time yet and we shall continue to keep you apprised of further developments.

We also report on a judgment from the Chief Costs Master where certain costs leading to a particular conclusion at inquest were costs that could be claimed in the civil claim.

Of course, where would we be without saying something about proportionality? There has been widescale recognition of the fact that it's a mug's game to opine on what will happen on proportionality (just as I've been instructed to so opine!). It seems that when a Judge (the Chief Costs Judge no less) gives a judgment and says no part of this judgment should be taken as an attempt to provide general guidance, we look even more carefully! So it is that the Newspaper Hacking Litigation comes to feature. Besides, we have to clutch for any guidance given that Master Brown spoke at the APIL Costs Conference recently and is reported to have said "*proportionality is a matter which needs to be addressed at the outset of an assessment, not the end, because the judge needs to make his or her decision as to the reasonableness properly informed as to the relevant 44.5(3) factors in the course of the item-by-item assessment*". Much as that makes good common sense, it seems to fly in the face of New-P.

And to come almost full-circle, who was the winner anyway? We review a High Court judgment which reveals that the question is an evaluative one, not a discretionary one.

Finally, we share some thoughts on the mechanics of the electronic bill. Having had the great privilege of rolling out a mock detailed assessment with the electronic bill before Master James for the Costs Law Reports Conference and the Association of Personal Injury Lawyer' Cost Conference, we felt it appropriate to share some thoughts from early use. That's got to be more than enough from me. Until the next time!

More technicalities in the path of costs recovery between solicitor and client

Mark James

Pity the poor solicitor! If a client obtains tax advice from an accountant and the accountant presents a bill the client does not like, the client may decline to pay on the merits, e.g., that the hourly rates are not the rates contractually agreed or that the work has taken an unreasonable amount of time or the accountant has unreasonably undertaken certain items of work. If the parties cannot reach an agreement the accountant may sue the client for unpaid fees. Any defence to such a claim would turn on the strength of those defences.

If the same client obtains tax advice from a solicitor and does not like the bill the position is different. The solicitor's rights to payment are curtailed by statute. If the solicitor sues the client he may be met with a plea that he has not delivered a 'statute bill', that is a bill that complies with section 69 of the Solicitors Act 1974. Such a plea is wholly technical in nature and is entirely unrelated to the merits of the work done or the charge made for that work. Thus a client may allege that the bill has not been signed and delivered in accordance with formalities prescribed by s. 69; or, that it is not a bill 'bona fide complying with this Act' within s. 69(2E), that is, a bill that contains sufficient information to enable the client to reasonably decide (on the basis of information contained in the bill and from the client's own knowledge of the case) whether to seek a detailed assessment of the bill: *Ralph Hume Garry v Gwillim* [2002] EWCA Civ 1500, [2003] 1 WLR 510. If the court holds that the bill on which the solicitor sues is not a statute bill his claim is likely to be dismissed. This is all well-established law: a consequence of statutory intervention in the remuneration of solicitors.

Nonetheless, as if the restrictions described above were not sufficiently onerous, the High Court recently added another: namely that, in order to qualify as a 'statute bill' the solicitor's bill must be complete both as to profit costs and disbursements for the period charged. In *Boodia v Richard Slade & Co.* [2017] EWHC 2699 (QB), [2018] 1 WLR 2037 the solicitors delivered 43 profit costs-only invoices and 18 disbursement-only invoices over a 3½ year period. The client paid all of them apart from the last four. Before the solicitor could sue on the unpaid bills, the client applied for a detailed assessment not just of the last four invoices but of all 61 invoices. The solicitor responded that the application was out of time in relation to those invoices that had been paid more than 12 months before the issue of the claim form; and that, in relation to those invoices that had been paid less than 12 months before the issue of the claim form 'special circumstances' had to be shown: see s. 70(3) of the Solicitors Act 1974. The client's rejoinder was that not one of the invoices was itself a statute bill because no one bill contained both profit costs and disbursements, they were delivered as part of a running account in respect of one piece of work, and that collectively they became a statute bill only when the final bill was delivered (following *Chamberlain v Boodle & King (Note)* [1982] 1 WLR 1443, CA) and, accordingly, the application for detailed assessment of all the bills was in time. Mrs Justice Slade agreed with the client.

Boodia represents a marked departure from established practice. Prior to *Boodia* it has been common practice for disbursements to be billed separately from profit costs. This is important for cash flow and is a recognition of the reality that third parties, such as counsel and experts, are often slow to send the solicitor fee notes. Hitherto it has been common practice for first instance judges to proceed on the footing that a statute bill need be complete in relation to profit costs only. If *Boodia* is right, it means that the client's time for challenging all the work done by a solicitor by way of detailed assessment will be extended to the date on which the last disbursement is paid. In some cases this may be years after the solicitor has completed his work. It is cold comfort to hard-pressed solicitors, concerned about cash flow, that the judge's solution was that solicitors should render their bills at greater intervals than the commonplace one month (i.e. while waiting for all disbursements to come in).

Worse though than the pushing back of the time limit by which the client can obtain an order for detailed assessment is the consequence that the invoices delivered by the solicitor may not be sued on should the client not pay them, until the final disbursement has been billed. On the facts of *Boodia*, the solicitor, had he sued, would have avoided this outcome because by that time all of the disbursements had in fact been billed. Further the Master held that the solicitor was able to rely on the *Chamberlain (ibid)* doctrine that, while individual bills are not themselves statute bills, they form part of a statute bill when the final bill is delivered, rather like chapters in a book eventually forming a complete book. However, the *Chamberlain* doctrine is not available in all cases (e.g. if the solicitor has not reserved the right to serve interim statute bills) with the result that some solicitors might find themselves without any statute bill at all even after the last disbursement has been charged to the client unless and until they go through the time consuming process of drafting a final bill showing all the profit costs and disbursements charged for what could be years of work. This is elevating substance over form and introducing unnecessary expense into the system of costs recovery.

Slade J's decision in *Boodia* was overturned on appeal. As will be discussed in the next article, Simon Browne QC acted for the successful solicitors before the Court of Appeal.

Court of Appeal Landmark Decision of Solicitors Act Bills – *Richard Slade & Co. v Boodia*

Simon Browne QC

Simon Browne QC, instructed by Richard Slade & Co, succeeded in persuading the Court of Appeal (Newey LJ, Coulson LJ and Haddon-Cave LJ) that Slade J of the High Court was wrong to hold that to qualify as an interim statute bill, a bill must include both profit costs and disbursements in respect of the period to which it covers.

An interim statute bill under the Solicitors Act 1974 must be (1) signed, (2) delivered, (3) complete and self-contained, and (4) have sufficient narrative. Costs Judge Master James held in the first instance and Mrs Justice Slade of the High Court on appeal, that by billing disbursements at a later date to the monthly profit cost bills (a practice provided for in the solicitor-client retainer), the monthly bills could not be considered "complete and self-contained". As payments on account as opposed to interim statute bills, the time for the client to apply for assessment did not start to run until the rendering of the final bill. The 12 month period had not yet expired and therefore the clients were entitled to apply for assessment of each of the bills rendered by the firm over a period of several years.

The Appellant firm appealed both judgments of the lower courts, contending that a bill for profit costs or disbursements alone can constitute an interim statute bill within the meaning of the Act. Time to request assessment of the monthly bills had therefore expired.

In determining the application, the Court of Appeal considered the wording of the 1974 Act, the case of Bari v Rosen, and issues pertaining to practicality and policy.

The Court of Appeal unanimously held that the 1974 Act says nothing about whether a bill must, or must not, include both profit costs and disbursements to constitute an interim statute bill. The fact that the Act defines "costs" as *including* "fees, charges, disbursements, expenses and remuneration" gives no indication as to whether each must be billed together.

The Court further held that Slade J of the High Court had misunderstood the meaning of the phrase "complete self-contained bill of costs" used in the case of *Bari v Rosen* [2012] 5 Costs LR 851. The phrase had first been used by Roskill LJ (as he then was) in the Case of *Davidsons (a Firm) v Jones – Fenleigh* [1980] CA Costs LR 70. *Bari* itself was not concerned with the issue of whether an interim statute bill had to include both profit costs and disbursements. Rather, the point being made was that to constitute a statute bill it must be apparent to both parties that the sum in question is final in the sense that it cannot be revisited or revised - in other words, the bill goes beyond a request for payment on account. It was erroneous to hold Bari as authority for the position that all costs relating to the relevant period must be included for it to be considered a "complete and self-contained" bill.

In the Courts below the Court had been informed that there was no authority on the point. Simon Browne QC, for the Appellant on appeal but not in the courts below, relied upon the case of *Aaron v Okoye* [1998] CA 6 Costs LR 2 which had not been cited to either the Costs Judge or the High Court Judge. The Court of Appeal agreed with the Appellant's argument that *Aaron* is inconsistent with the case being put forward by the Respondent that profit costs and disbursements in one time period must be billed together.

Finally the Court considered the practical implications of requiring solicitors to include all disbursements incurred during the relevant billing period of profit costs bills. The court held that the approach taken in the lower courts would have unsatisfactory implications: "A solicitor could not, it seems, raise a statute bill until he had himself been invoiced for all disbursements incurred during the relevant period, leaving the solicitor dependent on the cooperation of third parties."[1] Allowing separate billing of disbursements and profit costs as interim statute bills is paramount to providing both parties with finality.

1. [2018] EWCA Civ 1367

Misconduct: (Not) passing the buck when things go (horribly) wrong

Richard Wilkinson

In *Gempride Limited v Bamrah & Lawlords of London Limited* [1] the Court of Appeal recently examined the Court's powers in relation to misconduct pursuant to CPR 44.11 by which the Court can disallow all or part of the costs which are being assessed if the conduct of a party or that party's legal representative was "unreasonable or improper".

Much about this sorry saga of a case is extraordinary. If the old adage about learning from mistakes is true, this case provides a rich seam of educational opportunities...

On 3 July 2008 Ms Bamrah went into practice as a sole practitioner under the name Falcon Legal Solutions. A week later she tripped over and injured herself whilst visiting a client. She sued the owner of the block of flats where her accident occurred. Although she had a household insurance policy with BTE cover she instead chose to handle her claim through her own firm (because she would have had to have used a panel firm under the BTE policy prior to proceedings being issued). To that end she entered a CFA agreement which she signed both as the solicitor and the client! The alarm bells should have been ringing loudly at this early stage. If so, they were either not heard or ignored.[2]

In due course Ms Bamrah advanced a claim for £900,000. In April 2013 she accepted a P36 offer of just £50,000. And so the process of assessing the costs of the claim began. For this purpose, Mr Bamrah engaged the services of a firm of costs consultants and draftsmen (Lawlords) to whom she delegated the task of preparing a Bill.

Startling features to emerge from the ensuing cost process include the following:-

a. In the 2008 CFA the hourly rate was set at £232 per hour – though Mrs Bamrah undertook to notify (herself) in writing if that rate changed. In about March 2012, Falcon's computerised time recording system began to record an increased rate of £280 per hour for work done on the case, although the change in rate was not formally documented. However, when Lawlords prepared the Bill of Costs they applied the increased hourly rate of £280 per hour throughout. They notified Ms Bamrah that they had done so. She subsequently signed the Bill and it was then served on the paying party. The CFA was not served with the Bill. In their PODs, the paying party offered £241 per hour throughout, an offer which the Claimant promptly accepted.

b. In their PODs the paying party queried what other methods of funding were available and why they were not used. In a Reply it was asserted simply that "BTE cover was not available...". No attempt was made to explain the restrictions under the available BTE cover. In consequence, the paying party subsequently confirmed that they would not pursue any point on alternative funding.

By now the sound of those alarm bells should have been deafening. Indeed against this unpromising background, you may ask how on earth this case ended up in the Court of Appeal some five years later.

Briefly, the paying party eventually obtained copies of the Claimant's CFA (which confirmed the original hourly rate) and a Funding Options Checklist (which revealed the existence of the BTE cover). They applied for sanctions to be imposed on the grounds of misconduct under CPR 44.11. That application came before Master Leonard, sitting as a DDJ. In March 2014

1. [2018] EWCA Civ 1367

2. By the time the case reached the CA it was common ground that the contract was void because Ms Bamrah could not contract with herself.

he ordered that Falcon's costs be limited to Litigant in Person rates, having found misconduct by the Claimant in respect of both a misstatement of the hourly rates and the position in relation to BTE.

In December 2016 Ms Bamrah's appeal was allowed by HHJ Mitchell following hearings which extended over an extraordinary 13 days. The Judge expressly exonerated Ms Bamrah of any intent to mislead or dishonesty in relation to hourly rates and the BTE issue. On the latter, he accepted her answer as to the availability of BTE as "true and accurate". So successful was the Claimant's appeal that she was awarded her costs of the hearings on an indemnity basis. These were claimed at an astonishing £950,000, and included Ms Bamrah's time in attending the appeal hearing at full 'solicitor' rates.

Dear reader, you may not be surprised to learn that (1) the paying party was not happy about this; and (2) the Court of Appeal subsequently allowed their appeal (even though the paying party was not given permission to challenge the Judge's rejection of any dishonesty by Ms Bamrah).

The Judge below had concluded that Ms Bamrah had not been responsible for any errors in relation to the hourly rates and/or the BTE position because these were the result of her agents, Lawlords, acting contrary to the instructions she had given them. Thus he concluded that she had not been culpable of any personal misconduct. (On this basis, no finding of misconduct could be made under 44.11 because Lawlords did not come within the definition of legal representative).

Unsurprisingly, the Court of Appeal held this approach contravened long-standing (and basic) principles on ostensible authority relating to agents and principals. In short Ms Bamrah could not hide behind any failings by the costs lawyers she had authorised to act on her behalf. The Court of Appeal therefore restored the finding of unreasonable conduct, but imposed a reduced sanction, limiting the Claimant to a recovery of a maximum of one half of the profit costs claimed in the Bill.

Observations

The key points to note from the Judgment include:-

(1) Solicitors remain responsible for the conduct of anyone to whom they subcontract work that the solicitor is retained to do [paras 26(i), 97 and 103]. This is particularly important where the subcontractor is not a 'legal representative' as defined in CPR 2.3(1) and so does not owe an independent duty to the Court. In the present case, Falcon Legal were authorised litigators and 'on record'. Lawlords were not and could only work as agents of Falcon. It is for precisely this reason that the work done by such a sub-contractor can be charged out as a profit cost by the principal [para 104].

(2) Conduct does not have to be in breach of any formal professional rule nor dishonest to come within the definition of misconduct in 44.11 [para 26(iv)].

(3) The flip side of the Bailey principle is that mis-certification of the Bill is, for obvious reasons, a serious matter [para 127].

(4) Any sanction applied under 44.11 must be proportionate to the misconduct [para 26(vii)]. In some respects it is hard to imagine a more flagrant / serious example of misconduct given that the paying party relied to its potential detriment on inaccurate information provided by the receiving party. Despite that, the Court only deprived the receiving party of 50% of its profit costs.

(5) Had the Claimant been entitled to her costs of the 'misconduct' hearings, she still would not have been entitled to her costs of personal attendance because by that stage she had other solicitors representing her and she was attending the hearings qua client, not as a solicitor [para 144].

The Court was (understandably) concerned at the apparently disproportionate nature of the enquiry into misconduct which had occupied many days of Court time and generated hundreds of thousands of pounds in costs. It emphasised that, as with wasted costs applications, the procedure should be "as simple and summary as fairness permits" [para 167–169].

Naming the Defendant in a CFA – *Malone v Birmingham Community NHS Trust* [2018] EWCA Civ 1376

Paul F. McGrath

In *Law v Liverpool City Council and anor* [2005] EWHC 90020 (Costs) (actually a decision from May 2006), HHJ Stewart QC (as he then was) was asked to consider the scope of a CFA that recorded that it covered 'Your claim against Liverpool City Council for damages for personal injury suffered on 26th March 2003', when ultimate success was achieved against a Housing Association (a party added at a later stage). The Court concluded that the CFA was restricted to the claim made against Liverpool City Council, not the Housing Association, and that accordingly the claim for additional costs relying on the CFA failed. Whilst recognising that there was no obligation to specifically name a Defendant in the CFA, the Court concluded that the meaning of this agreement was clear: it only covered work against the Defendant that had been so named. Of particular note was the Judge's comments at paragraph 20 and 21, and in particular: 'If the CFA as drafted is such that it can include a claim against any potential Defendant, then the present problem would not arise…'

In *Engeham v London and Quadrant Housing Trust and Anor* [2015] EWCA Civ 1530 the Court of Appeal were considering whether the Claimant had 'won' her claim, and thus whether she was able to rely on the terms of a CFA to recover costs against a Defendant added to the claim at a later stage. The Court of Appeal noted, in passing, that the Court below '… held that the CFA was limited in its operation to the action against L & Q. That was because of the express words of limitation in the "What is covered by this agreement" clause to, "Your claim against the defendants L & Q for damages". Those words were not wide enough to encompass an action against anybody else. On this further appeal, Ms Engeham does not seek to challenge those conclusions, and I consider that she was right to do so.'

What can be seen from both of these decisions is that the Courts considered that had the wording been wider in its scope, then the result might have been different.

The Court of Appeal, in *Malone v Birmingham Community NHS Trust* [2018] EWCA Civ 1376 had another opportunity to address this question and the judgment of Hamblen LJ is perhaps the most illuminating of the jurisprudence in this area. The Claimant, a prisoner at the time, alleged that there had been a failure to diagnose testicular cancer by the prison or the prison's health providers. The scope of the CFA was described as follows: 'All work conducted on our behalf following your instructions provided on [left blank] regarding your claim against Home Office for damages for personal injury suffered in 2010'.

In due course proceedings were issued against a number of Defendants but ultimately only served on Birmingham Community NHS Trust. The Claimant settled the claim with the Defendant with costs to be assessed. The Defendant took the point that the scope of the CFA did not cover the claim against the Defendant, given that the wording made it clear that the claim envisaged was against the Home Office. This argument succeeded before the regional costs Judge in Wales and the appeal was dismissed by HHJ Curran QC. The Court of Appeal considered whether, in fact, the wording of the CFA did cover the claim ultimately made and pursued to settlement.

The Appellant argued, relying on a number of the leading contractual interpretation cases, that the wording was merely 'descriptive' of the work to be undertaken, rather than 'prescriptive' of the work that could be undertaken. The Appellant also argued that 'Home Office' was merely a label to cover the public authority / authorities responsible for the Claimant's welfare.

The Court of Appeal accepted the first argument, and thus did not determine the second argument. The Court of Appeal's reasoning was as follows:

(i) That 'textualism and contextualism' are both tools to be used to ascertain the objective meaning of the words used;

(ii) The importance of one over the other may be influenced by the 'quality and expertise of the drafting' (i.e. context might become more important where the drafting is poor);

(iii) The drafting in the instant case was poor, brining contextual analysis to the fore;

(iv) The wording meant that it covered all work that naturally followed from the instructions to pursue a claim against the Home Office, but this was not prescriptive to cover only work against the Home Office. Rather it was wider: 'the reference to "Home Office" is descriptive of the instructions received rather than of the work to be done. It relates to past instructions rather than future work' (paragraph 28).;

(v) If the agreement had been limited to work against one particular Defendant, then the Court would have expected greater care and precision to make such a limitation clear;

(vi) The 'broader' context also supported this interpretation, such as the fact that the CFA was entered into at an early stage before the ultimate Defendant was clear and 'In such circumstances it is intrinsically unlikely that a reference to a named opponent in the description of the claim would be intended to limit the CFA to proceedings against the opponent, rather than simply to serve to describe the claim' (paragraph 30). The Court also noted that it was in neither the Claimant nor solicitor's interest to tightly define the work to be covered, especially at such an early stage.

The Court dismissed the relevance of *Law* holding that there were a number of differences, including that the coverage of the agreement was tightly defined in that case. Interestingly, however, the Court noted that 'the argument that the wording used was meant to be merely descriptive rather than prescriptive does not appear to have been raised. HHJ Stewart QC's starting point bypassed that issue'.

The Court added that 'little assistance is to be derived on issues of constructions such as this from different cases, on different facts, involving materially different wording' (paragraph 33). Ultimately, whether a CFA covers work undertaken is a question of contractual construction. As a result, the answer will depend on the facts. *Law* is likely to be confined to its facts whereas *Malone* provides some wider guidance. The coverage of a CFA is a point that is unlikely to go away.

Receiving parties should, of course, be aware that there are other potential scenarios where different arguments might come to their aid: such as arguing that an original retainer persists (which would depend on the wording used in the retainer and CFA: see e.g. *Radford and Anor v Frade and Others* [2018 EWCA Civ 119). Perhaps the most important thing to take from cases such as *Law* and *Malone* is that prevention is better than cure: spending time on the initial wording of the scope of the CFA is likely to pay dividends.

Hislop v Perde [2018] EWCA Civ 1726: Late acceptance of a Claimant's Part 36 offer in fixed costs cases – the rough or the smooth?

Richard Boyle

Summary

The Defendant accepted the Claimant's Part 36 offer out of time. It was held that the Claimant was entitled to fixed costs only until the date of acceptance. The Claimant was not entitled to assessed costs between the expiry of the offer and the date of acceptance.

The case

These were two conjoined appeals arising out of claims that were subject to the fixed costs regime for low value road traffic accidents, set out at Section IIIA of Part 45 CPR. In each case, the Defendant had accepted a Part 36 offer out of time but before trial. Having already been called upon to determine what happens when a Part 36 offer is accepted in time (fixed costs apply: *Solomon v Cromwell Group PLC* [2012] 1 WLR 1048) or beaten at trial (the Claimant offeror is entitled to indemnity costs from the date of expiry of the offer: *Broadhurst v Tan* [2016] EWCA Civ 94; [2016] 1 WLR 1928), the Court of Appeal's input was also needed to clarify this issue. As noted by the Court of Appeal, this will affect the costs outcome in many cases and, as a result, the court received written submissions from the Association of Personal Injury Lawyers and the Forum of Insurance Lawyers.

In *Hislop*, the Claimant's Part 36 offer of £1,500 was initially rejected by the Defendant, however, it was eventually accepted 19 months later: a week before trial. The costs judge refused to grant costs on the indemnity basis and awarded costs on the fixed basis throughout. On appeal, this was overturned by the Circuit Judge and costs after expiry of the offer were awarded on the standard basis.

In the conjoined appeal, *Kaur v Committee of Ramgarhia Board Leicester*, the Claimant made a Part 36 offer of £2,000 which was rejected. Five months later, in a rather creative attempt to avoid Part 36 consequences, the Defendant made a higher offer of £3,000 which the Claimant accepted. However, alive to the Defendant's sleight of hand, the Claimant sought indemnity costs from the date of expiry of her offer. The costs judge agreed with the Claimant, saying it would be *"frankly perverse"* if the Claimant was worse off in the circumstances.

The claims were subject to the old Part 36 rules, pre-2015, however it was accepted that the changes to Part 36 made no practical difference.

The judgment

Coulson LJ gave the leading judgment. He noted that the rule dealing with costs consequences following judgment (r 36.17 CPR) is expressly preserved, with modifications, by the corresponding rule that sets out the position for the fixed costs regime (r 36.21 CPR). This is why a Claimant offeror is entitled to indemnity costs when beating its own offer at trial (*Broadhurst* ibid). However, that is not the position for the acceptance of a Claimant's Part 36 offer before trial. That general rule (r 36.13 CPR) is not preserved by the corresponding rule that sets out the position for the fixed costs regime (r 36.20 CPR). Furthermore, r 36.13 CPR expressly states that it is subject to r 36.20 CPR. There is also a signpost in brackets stating that r 36.20 CPR makes provision for fixed costs cases and r 36.13(3) CPR states standard costs apply except where the costs are fixed by the rules. The judge concluded that, in a fixed costs case, r 36.20 CPR applies where a Claimant's offer is accepted late and that r 36.13 CPR does not apply at all.

The judge further stated that this was a sensible result because it is in accordance with the fixed costs regime applying to all relevant pre-action protocol cases, with limited exceptions. In other words, litigants should struggle to escape fixed costs and must expect to take the rough with the smooth. He noted that the position would be the same for the late acceptance of a Defendant's Part 36 offer. He noted that r 45.29J CPR still provides an escape from fixed costs in exceptional circumstances.

The judge gave some limited guidance on r 45.29J CPR. He did not consider that a Defendant's late acceptance of a Claimant's Part 36 offer could always be regarded as an "exceptional circumstance". He did not consider the 19 month delay with no apparent justification in Hislop to be exceptional. However, he also disagreed with the Defendant's submission that a Claimant must show a causative link between the exceptional circumstances and a consequent increase in their incurred costs.

The upshot in *Hislop* was that the costs judge's decision was restored and fixed costs were awarded until the acceptance of the offer. *In Kaur*, the Defendant's creative attempt backfired because the Claimant recovered a further £1,000 in damages and thereby recovered fractionally higher fixed costs (as fixed costs include a percentage of damages). However, the Defendant will be happy to have overturned the costs judge, secured a result he considered *"frankly perverse"* (albeit based on a misconception) and succeeded in the Court of Appeal, its costs no doubt dwarfing those at first instance.

Practical considerations

This is not the first time the courts have been required to clarify the fixed costs provisions, including matters as simple as whether they apply on the multi-track (*Qader v Esure Services Limited* [2016] EWCA Civ 1109). A number of grey areas still remain and these areas continue to provide work for costs practitioners, over five years after they came in to force. However, in this case, the intention of the Rules Committee was made relatively clear. This intention is in some ways surprising, given the effects of *Broadhurst* and the intended penalties provided by Part 36, but in others not especially, given the post-1st April 2013 clamp on costs and Jackson LJ's stated intention to extend fixed costs yet further.

For practitioners in these cases, it means that a Defendant accepting a Part 36 offer out of time receives little punishment. The increase in profit costs from the first to the last stage of the fixed costs process (i.e. from pre-action to issue to allocation to listing as per r 45.29C CPR) is not significant. Assessed costs are bound to be greater: in *Hislop* they were over £5,000. It will therefore often be worthwhile, from a tactical point of view, for Defendant offerees to await further evidence before they consider accepting an offer.

A Claimant offeror is in a trickier position. They can withdraw the offer after the 21 day period or try a Calderbank offer and hope the court makes a more favourable costs order (unlikely). However, in doing the former, they will lose the potential benefit of the Part 36 consequences, including a 10% uplift on damages and indemnity costs after expiry of the offer (*Broadhurst* (ibid)), if the offer is beaten at trial (see r 36.17(7) CPR). Certainly, Claimants must be wary to withdraw offers which are no longer competitive as the claim develops.

The headline is that the balance of power with Part 36 offers has swung somewhat towards the Defendant offeree. Ultimately, reducing the penalty for late acceptance of an offer may have the effect of reducing the number of cases that settle as Defendants decide to run more cases closer to trial.

Cartwright v Venduct Engineering: Tomlin Order avoids QOCS implications

Lionel Stride

The case of Cartwright v Venduct Engineering Ltd [2018] EWCA Civ 1654, has perhaps raised as many questions as it has provided answers. The Court of Appeal held that, where there are multiple defendants in the same proceedings that are subject to QOCS, a successful defendant is unable to obtain an order for costs under CPR 44.14(1) if damages have been paid by the other defendant(s) under the terms of a Tomlin Order. Coulson LJ found that a settlement set out within the schedule to a Tomlin Order is not an award of damages; and that the same would be true for a Part 36 settlement. The case makes vital reading in any claim involving multiple defendants.

Background

The Claimant issued proceedings against six named defendants for noise induced hearing loss ("NIHL"). The third defendant, Venduct Engineering Limited ("Venduct"), accepted that it was responsible for any liability that was established against D1 and D2. The claims against those defendants were discontinued by consent.

The Claimant then compromised its claim against D4 to D6 in the form of a Tomlin Order. The agreed terms of the settlement were set out within a separate schedule and included a sum of £20,000 payable to the claimant.

Venduct subsequently sought to recover their costs of approximately £8,000 out of the £20,000 paid by D4 to D6 and contained within the terms of the Tomlin Order. Venduct relied upon CPR 38.6(1), which provides that, unless the court orders otherwise, *'a claimant who discontinues is liable for the costs which the defendants against who the claimant discontinues incurred before the date on which notice of discontinuance was served on the defendant';* and CPR 44.14(1), which allows for enforcement of costs orders '*to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant'.*

There were two issues before Regional Costs Judge Hale: Firstly, whether Venduct could seek a costs order against the claimant, which he found it could; and, secondly, whether the amount included within the schedule to the Tomlin Order was subject to CPR 44.14(1), on which issue he found in favour of the claimant. The Costs Judge concluded that, if the claimant had been awarded damages, then CPR 44.14(1) would have applied and Venduct would have been able to recover its costs; but that as the schedule to a Tomlin Order is not an order of the court, it is not included within CPR 44.14(1).

The Decision on Appeal

Venduct appealed, seeking to argue that the Costs Judge was wrong to say that they could not recover the costs on discontinuance merely because the £20,000 was paid pursuant to a Tomlin Order rather an ordinary order of the court. The Claimant sought to uphold the Costs Judge's decision on that issue but also to ask the Court of Appeal to find that the Costs Judge was wrong to find that one defendant could recover costs from sums payable by way of damages and interest to the claimant by another defendant.

Issue 1: *Can One Defendant Take Advantage of Sums Paid to the Claimant by Another Defendant?*

Lord Justice Coulson found paragraph 4.5 of Sir Rupert Jackson's Final Report of December 2009 instructive, highlighting that the necessary elements of a QOCS regime were:

a) Deterrence against bringing frivolous claims or applications; and

b) Incentives for claimants to accept reasonable offers.

"...In my view, a result which requires a claimant, in the appropriate case, to pay a successful defendant the amount of a costs order made in favour of that defendant, out of sums payable by way of damages and interest to the claimant by an unsuccessful defendant, is precisely in accordance with what Sir Rupert calls "the necessary elements of a one-way costs shifting regime". It is important that claimants are discouraged from bringing proceedings which are unlikely to succeed. Claimants with QOCS protection should not think that this general principle does not apply to them, or that they can issue proceedings against any number of defendants with impunity." [paragraph 32]

He cited further fact specific reasons why the Costs Judge's decision was correct, including the nature of NIHL claims, and concluded that the costs judge made the correct decision.

Issue 2: *Does it Make a Difference if Sums Are Due by Way of a Tomlin Order?*

Coulson LJ recorded that he did not find this issue easy to decide, not least because of the risk that upholding the Costs Judge's decision on this issue may encourage claimants, who would otherwise be liable to pay a successful defendant's costs, to use a Tomlin Order as a means to evade this liability.

He dealt with CPR 44.14(1) first:

"In respect of the rule in its current form, the Costs Judge was right. The wording of the rule cannot, on even the most liberal interpretation, be construed in the wide way urged by Mr Williams QC [Venduct]. What is more, for the reasons explained below, ***I do not consider that this is merely a technical point, which could be cured by adding a few words to r.44.14(1). It would in truth require a wholesale recasting of the rule because, amongst other things, it would require a mechanism to allow the court to consider the terms of a confidential schedule in order to try and identify the sum payable to the claimant by way of damages and interest (which may not be expressly identified in the schedule).*** As Mr Hogan [claimant] submitted, these complexities may explain why settlements were not a part of the simple QOCS rules...

The starting point is this: a Tomlin Order is not an "order for damages and interest made in favour of the claimant". The order itself is curial: but the schedule is not a part of the order of the court. Instead it reflects the agreement reached between the parties." [paragraphs 40–41]

Coulson LJ cited the cases of *Community Care North-East v Durham CC* and *Watson v Sadiq & Sadiq* as authorities that:

"...make it clear that a Tomlin Order cannot be described as "an order for damages and interest made in favour of the claimant". It is no such thing. It is a record of a settlement reached between the parties which is designed to have a binding effect. In that sense, as the parties agreed in the present case, it is not different to the settlement that arises when there is an acceptance of a Part 36 Offer. Such acceptance does not require any order from the court, so a settlement in consequence of an acceptance of a Part 36 Offer would also be outside the words of r.44.14(1)." [paragraph 44]

Coulson LJ then considered the practical implications of extending r44.14(1) to include Tomlin Orders:

"But there is more to it than the straightforward construction of the rule. It seems to me that there are insurmountable practical difficulties which also militate against a conclusion that r.44.14(1) was designed to cover Tomlin Orders, or out-of-court settlements, or that the absence of the necessary words was a simple oversight or omission. Take just two practical difficulties by way of example. First, a Tomlin Order is often confidential. The normal practice is that a judge does not see or approve the terms of a confidential schedule before making the order. Although in certain cases courts have ordered the disclosure to defendant B of a Tomlin Order agreed between the claimant and defendant A, this has been in particular circumstances where justice has required it. So, for example, in L'Oreal SA & Others v eBay International AG & Others [2008] EWHC B13 (Ch), Master Bragge ordered the disclosure of a Tomlin Order, because there was a possibility that the terms of the order released other defendants from liability altogether. ***But in a case like this, where each defendant's liability is several, not joint, it may well be that a successful defendant with a costs order in its favour is not entitled even to see the Tomlin Order. If the QOCS rules had intended the contrary, they would have said so.***

Secondly, there is the issue of global settlements. Sometimes, the figure for damages in a lump sum settlement figure can be easy to determine. But on other occasions it may never have been articulated by anyone during the settlement process, because it was the overall lump sum for everything (including costs which was commercially attractive to the claimant). How in those circumstances could the court embark on the tasks of identifying the relevant figure?

Indeed, that point can be taken even further. ***It can sometimes happen that a claim will be settled by a process which does not identify any lump sum at all, such as where the defendant offers the claimant some form of benefit in kind (continued employment in a different location, for example). It would be quite impossible for that sort of benefit to be given a liquidated financial value, so impossible for r.44.14(1) to operate."*** [paragraphs 44–49]

Conclusion

Cartwright v Venduct provides definitive guidance that CPR 44.14(1) does make it possible for successful defendants to recover costs against a claimant who has been successful against one or more defendants in the same proceedings, and that this is in accordance with the essential elements set out by Sir Rupert Jackson. However, Cartwright also makes it clear that CPR44.14(1) cannot extend to Tomlin Orders or Part 36 settlements, or indeed any order made in confidence between the parties.

The decision in Cartwright satisfies Sir Rupert Jackson's second essential element for a QOCS regime, in that it will plainly incentivise claimants to accept reasonable offers where there are multiple defendants because of the increased risk of incurring an enforceable costs liability at trial if the claim does not succeed against all of them. However, it also serves to undermine the first element by removing a significant part of the costs risk and, consequently, the deterrence against bringing weak (if not frivolous) claims. The case provides an effective mechanism for claimants to circumnavigate the costs risk from bringing claims against multiple defendants in the same proceedings.

The reality is that, if a claim is genuinely frivolous or lacking in merit, defendants can always apply to strike out the claim and seek to apply the exceptions to QOCS under CPR 44.15(1); but the far greater danger to a claimant is where a claim against multiple defendants goes to trial. Where the claim fails against one or more of those defendants (but otherwise succeeds and an award of damages is made), the claimant will always now bear the risk of having to pay the successful defendant's costs out of his/her damages. In those circumstances, the only protection would be to ensure that a Sanderson or Bullock Order is made requiring the unsuccessful defendants to pay all the costs.

There would no doubt be argument, after trial, as to whether the successful defendant should recover its costs from the claimant in the first instance (a Bullock Order), such costs being capped by the award of damages, or from the unsuccessful defendant directly (a Sanderson Order). In either scenario, both types of order are subject to a test of reasonableness: whether the claimant behaved reasonably in suing all the defendants; if the claimant is found to have acted reasonably, then he/she should not normally end up paying costs to any party even if it has not succeeded against them all, regardless of QOCS (*King v Zurich Insurance Company* [2002] EWCA Civ 598); but there is always scope for challenging this basic principle, particularly where the unsuccessful defendant has not promoted the joinder of other parties or separate causes of action exist. There is therefore likely to be extensive costs arguments at the end of any multi-party proceedings that conclude at trial. In short, the case of Cartwright has certainly made navigating the costs risk more challenging for the Claimant, particularly if there is no insurance in place to mitigate the risk of an adverse costs order.

Brown v Commissioner of Police of the Metropolis and The Chief Constable of Greater Manchester Police [2018] EWHC 2471 (QB)

Ellen Robertson

The High Court has given further guidance on the application of QOCS in "mixed claims" and the nature of the court's discretion when considering whether to give permission for enforcement of QOCS in such cases. The decision is the third judgment from the High Court considering the application of the QOCS exceptions to claims including both personal injury and non-personal injury elements. Previous guidance has been given by Morris J in *Jeffreys v Commissioner of Police of the Metropolis* [2017] EWHC 1505 (QB) and by Foskett J in *Siddiqui v University of Oxford* [2018] EWHC 536 (QB), as discussed in the previous edition of this newsletter.

The Claimant had brought a claim against her previous employers, the Met Police, and Greater Manchester Police seeking damages for personal injury, loss and damage, various declarations, an order that the Met Police erase certain information held regarding the Claimant, and damages pursuant to the DPA and HRA. The Claimant was awarded the sum of £9,000, which was less than the Met Police's Part 36 offer and equal to Greater Manchester Police's Part 36 offer. The trial judge held that the Claimant was entitled to QOCS protection, considering that as she had advanced a claim including personal injury she was entitled to the protection of QOCS.

Whipple J held on appeal that the claim fell within the exception to QOCS found in CPR r.44.16(2). The Claimant had advanced claims other than for personal injury, and so the exception applied. The Court identified the relevant question as whether the Claimant was claiming anything other than damages for personal injury, which the Court noted would usually be a simple question. It was not necessary to delve into whether there were separate causes of action or remedies claimed, or to dissect out which remedies arose from individual causes of action. The Court agreed with the approach taken by Morris J and Foskett J in *Jeffreys and Siddiqui*.

Of particular note to those dealing with RTA claims, the Court noted that, at least in theory, a standard claim arising out of an RTA for vehicle damage and personal injury would be subject to the discretion in CPR r.44.16(2). However, the Court noted that it was a discretion, and in some cases it would not be just to remove QOCS protection in such circumstances. Factors such as the relative sums claimed for injury and for other losses would go to the exercise of discretion. The Court therefore allowed the appeal as the trial judge had been wrong to consider that the Claimant was automatically entitled to QOCS protection.

Inquest costs – Securing a conclusion

James Yapp

***Powell & Others v The Chief Constable of West Midlands Police* (unreported, SCCO, 10th July 2018)**

Can a successful claimant recover, as "costs incidental to the proceedings", the costs associated with securing a particular conclusion at a preceding inquest? This was one of the issues in dispute in Powell.

The action arose from a death in Police custody. The Defendant initially denied liability. At the inquest, the jury found that the deceased had died of positional asphyxia which was contributed to by conduct on the part of the Defendant's officers.

Nearly six years after the inquest, the civil claim was settled on terms that the Defendant would pay damages; that it accepted the conclusion of the inquest; and that it would publish a document of lessons learned.

One of the preliminary issues on the detailed assessment of the Claimants' costs was whether the costs incurred in securing a particular conclusion at the inquest were recoverable.

General principles

So-called 'inquest costs' can be recovered in civil proceedings insofar as they are "of and incidental" to those proceedings per s.51 Senior Courts Act 1981: *Ross v Bowbelle (Owners)* [1997] 2 Lloyd's Rep 196 and *Roach v Home Office* [2010] QB 256.

The extent to which those costs are of and incidental to civil proceedings is a question of fact in each case to be considered in accordance with the Gibson principles. These are the three *"strands of reasoning"* derived from Sir Robert Megarry VC's review of the authorities in *re Gibson's Settlement Trusts, Mellors and another v Gibson and others* [1981] 1 Ch 179:

1) Proving of use and service in the action;

2) Relevance to some of the issues which are to be tried; and

3) Attributability to the defendant's conduct.

Davis J refused to give specific guidance in Roach. Instead, it is for the Costs Judge to apply these principles *"in a way appropriate to the circumstances of each case"*. Perhaps inevitably, this had led to varying outcomes.

Decisions

In *Wilton v Youth Justice Board* [2010] EWHC 90188 (Costs), Master Campbell allowed the costs incurred obtaining a conclusion of unlawful killing as this would be *"overwhelmingly more helpful in subsequently obtaining an admission of liability"*.

More recently, Master Leonard allowed the costs of making submissions designed to secure a conclusion that would assist the Claimant's case in *Douglas v Ministry of Justice* [2018] EWHC B2 (Costs). In his view, this followed from the recoverability of the costs of attending to obtain evidence.

In other cases, such costs have been disallowed on the basis that the conclusion is not relevant to civil proceedings. This was the decision reached by Master Gordon-Saker in *Powell*.

In *King v Milton Keynes Healthcare* (unreported, SCCO, 13th May 2004), Master Gordon-Saker observed that work done achieving a particular conclusion:

"...may have brought a speedy settlement, [but it] was not done with the purpose of obtaining information or evidence for the proposed claim"

In *Lynch v Chief Constable of Warwickshire Police*, Master Rowley concluded that:

"The concept of use and benefit, in my judgment, must be viewed in respect of the proceedings themselves and not any negotiations outside those proceedings... As far as the proceedings are concerned, the verdict and all the matters that go immediately before it are irrelevant."

A definitional distinction?

The difficulty for Costs Judges is how broadly one should define "the action" when applying the *Gibson* considerations.

Defendants will argue in favour of a restrictive approach. This has the benefit of certainty and consistency. Accurately divining a party's reason (or reasons) for settling a claim is often impossible. Even if were possible, should the conclusion of the inquest be a reason for settlement, a material reason, the sole reason?

Moreover, this approach appears consistent with the Court of Appeal decisions upon which Gibson itself was based. Lord Hanworth MR gave judgment in both Societe Anonyme Pecheries Ostendaises v Merchants' Marine Insurance Co [1928] 1 KB 750 and Frankenburg v Famous Lasky Film Service Ltd [1931] 1 Ch 428.

In Frankenburg, his Lordship held that materials gathered would not be "of value or service in the action unless they were relevant to some of the issues which had to be tried". Lawrence LJ, concurring, held that a Taxing Master must assess whether materials "would have been of use and service at the trial of the action". These dicta tend to support the approach of Master Rowley in Lynch.

On the other hand, Claimants might suggest that defining "the action" restrictively puts semantics above the realities of litigation. A 'damning verdict' is often a significant factor in achieving settlement. Given that parties are encouraged to settle disputes, why not allow costs incurred which have tended to further this objective?

Conclusion

Master Gordon-Saker referred to the recovery of so-called 'inquest costs' as well-trodden ground. That we have had contradictory decisions within the last 12 months (in *Powell and Douglas*) illustrates that this remains fertile ground for disputes.

Vindication and the sums in issue: proportionality under scrutiny again

Robert Riddell

***Various Claimants (Wave 1 of the Mirror Newspapers Hacking Litigation) v MGN Limited* [2018] EWHC B13 (Costs) (in which Simon Browne QC of TGC acted for the Claimants) represented a further opportunity for the SCCO to consider the new proportionality test.** While Senior Costs Judge Gordon-Saker expressly cautioned against drawing wider conclusions from this decision (given what he warily described as the *"anxious scrutiny"* which proportionality decisions are subjected to), in the absence of higher authority it is perhaps inevitable that costs lawyers will fall on the judgment to glean something—anything—about the applicability of the new test, with the intensity of the lost traveller in the desert.

Background

The court had to determine the application of the post-2013 proportionality test to the agreed costs of a number of Claimants involved in the phone hacking litigation against the Mirror Newspapers Group. Most of the 28 claims involved in Wave 1 had settled for between £15,000 and £85,000, but 2 of the claims, brought by Alan Yentob and Paul Gascoigne ("the Representative Claimants"), had proceeded to trial where they had been awarded substantial damages. As part of the settlement packages (and the ancillary relief awarded at trial), the Defendant had provided undertakings with respect to future conduct including: not intercepting the Claimants' voicemails, not republishing and indeed deleting copies of articles which had been sourced from illegal activities, and delivering up all documents regarding the Claimants and the Claimants' mobile phones and providing information about the extent of all illegal activities conducted. The level of damages awarded or agreed, and the scope of ancillary relief obtained, reflected the serious and prolonged breaches of privacy to which the claimants were exposed.

While the parties had been able to agree a reasonable and proportionate quantum for the common costs of the claims (£61,976 for each claimant), and the reasonable base costs of individual Claimants, what remained in dispute was the effect, if any, of proportionality on the costs of the individual Claimants. The matter came before the Senior Costs Judge with judgment handed down on 1 June 2018.

The Law

CPR 44.3 provides that when assessing costs of the standard basis, the court will only allow costs which are *"proportionate to the matters in issue"*. The question of proportionality is determined by reference to the familiar five factors set out in CPR 44.3(5), namely: (a) the sums in issue; (b) the value of non-monetary relief; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) wider factors involved in the proceedings, such as reputation or public importance.

In the absence of any additional information provided by the Rules Committee in the Costs Practice Direction or elsewhere, practitioners have been keen for some (preferably unambiguous) authority. But although the fly has been cast over the Court of Appeal on a number of occasions, their Lordships have so far declined to rise to the bait. As a result, first instance decisions have acquired greater significance, the most notable of which are *Kazakhstan Kagazy Plc v Zhunus* [2015] EWHC 404 (Comm), *Hobbs v Guy's and St Thomas' NHS Foundation Trust* (SCCO, 02/11/2015) and May & *May v Wavell Group Ltd & Bizarri CC* (Central London, 22/12/2017).

May, in which the appeal court overturned a decision at first instance to reduce the reasonable costs of a rock star's nuisance claim from about £100,000 to £35,000 (in the name of proportionality), offered two particular insights. First, while the Costs Judge is required to

consider both the reasonableness and proportionality of individual items on the bill, it is better to have both tests in mind while conducting the assessment, rather than to impose on the reasonable costs a subjective and arbitrary global assessment of proportionate costs. Second, when determining the sums in issue, the court had to undertake *"an objective evaluation of the sums which are in issue having regard to all the material before it"*. In other words, to determine *"the range of figures realistically in dispute"*. The Senior Costs Judge approved this analysis in *MGN*.

The Defendant's submissions

With respect to the calculation of the sums in issue, the Defendant contended that it could be assessed by reference to the value of the agreed damages. Although the judgment of Mann J in the trials of the Representative Claimants created a new, and more generous, regime for claimants, the Defendant argued that the settled claims had already been compromised by this point. In these cases, the best evidence as to the level of the sums in issue was not provided by the value identified on the claim forms (which was in part a technical requirement to ensure calculation of the correct court fee) but by what had been agreed between the parties.

As to the five factors, the Defendant contended that they divided into two parts: of primary consideration was the value of the claim – i.e. the sums in issue and the value of non-monetary relief (factors (a) and (b)) – while the remaining factors were of secondary importance. The Defendant submitted that the claims were primarily concerned with financial compensation, while the non-monetary relief obtained as part of the settlements were characterised as *"of little real value"*. The thrust of the Defendant's submissions was that the costs exceeded the sums in issue and should be proportionately reduced, and that there was no material provided by the Claimants in relation to the additional factors (c)–(e) which justified displacing that inference.

Judgment

The Senior Costs Judge began his judgment by inserting a heavy caveat: nothing in his decision should be taken as an attempt to provide guidance. Not only was it obviously not a Court of Appeal decision, but the facts of the instant case were very unusual and certainly not what might be considered run of the mill civil litigation. Further, the parties had already agreed the reasonable costs, which meant that the court had not had the benefit of undertaking an item by item assessment of the bill of costs; in effect, the court was being forced to apply the proportionality test separately from the reasonableness test (the two-step process deprecated in *May*).

With those qualifications, the Senior Costs Judge turned to the consideration of 44.3.

(a) Sums in issue

The court accepted the Claimants' submission that the starting point for calculating the sums in issue was the value of the claim forms. Accepting the analysis in *May* (as above), the Senior Costs Judge emphasised the need for a broad view, grounded in the reality that the sums in issue may well change as the claim proceeds (as borne out in the instant case: higher figures were contended on the basis of substantial material disclosed by the Defendant in 2014 which revealed the scale of the hacking). It was also noted that had the settled claims progressed to trial, they would have been eligible for considerably higher awards under Mann J's compensation scheme. The court therefore found the sums in issue to be higher than those allowed for by the Defendant.

(b) Value of non-monetary relief

The Senior Costs Judge again emphasised the need for a broad view, given the difficulties with placing a value on the injunctions or undertakings obtained by the Claimants. Although he appeared to accept the Defendant's submission that some of the undertakings were of little value (there was virtually no prospect of the Defendant resuming its hacking activities given the public revulsion which it provoked), he found the undertakings will have provided *"significant comfort"* to individual Claimants. Further, deleting copy which had been obtained through illicit means would have been of more material value, given the distress that the articles had been found to have caused.
He summarily rejected the Defendant's contention that the claims were driven by financial motive, noting: *"... the impression that I have gained from what I have read over the period that I have been involved is that the Claimants were...motivated principally by the desire to hold the Defendant to account"*. In summary, the value of the non-monetary relief was found to be *"substantial and at least as great as the sums in issue"*.

(c) Complexity of the litigation

The Senior Costs Judge dismissed the suggestion that the claims were not complex. Looked at purely from what he considered to be a *"lazy, but arguably fool proof"* rule of thumb that the complexity of the case is directly related to the amount of court time devoted to it, he found that the claims were complex litigation in the High Court. But even apart from that he considered that the Claimants had not had a straightforward task on their hands. The Claimants had to "piece together the evidence of wrongdoing", not only in relation to the common case but also in relation to their individual cases. The Defendant had raised a limitation argument. There were complexities about running the case in parallel with criminal proceedings, as well as the need for Norwich Pharmacal disclosure applications.

(d) Additional work generated by conduct

The Senior Costs Judge found that the word "conduct" had to apply to the conduct of the litigation; the Claimants therefore could not pray in aid the Defendant's "disgraceful behaviour" (as it was described in the Court of Appeal) in the hacking itself. There was nothing in the way that the Defendant had approached the litigation itself which had given rise to additional work. This was not a relevant factor for the purposes of deciding the issue. Somewhat enigmatically, the Senior Costs Judge observed that "conduct relied on does not need to be misconduct". As Simon Browne QC has observed elsewhere, it is difficult to imagine what other type of conduct the Senior Costs Judge might have had in mind.

(e) Wider factors

The Senior Costs Judge considered there were a range of wider factors involved in these proceedings. First, these were claims attracting significant public interest. Other tabloid hacking claims had settled before trial, whereas these ran all the way to a trial. Second, there were reputational issues at stake. Third, while it was not appropriate to take into account the vindication which the Claimants obtained as part of non-monetary relief (this type of vindication not strictly being a remedy), it was something to which the court could give weight in this part of the assessment: *"In the face of the Defendant's denial, the Claimants pursued difficult claims to bring the Defendant to account for its disgraceful behaviour. These claims were not about claiming compensation for an injury. There were about seeking vindication for the Claimants' position that they were the victims of appalling breaches of privacy by a national newspaper group motivated only by commercial gain".*

Conclusions

The Senior Costs Judge rejected the Defendant's submission that the first two factors in 44.3 were of primary importance. Nor did he consider that the rule prevented the recovery of costs in excess of the sums in issue: such a rule could easily have been stated had that been the intention of the Rules Committee. There would be cases – such as this – where factors other than the sums in issue will lead to the conclusion that the costs are proportionate even though they exceed the sums awarded or agreed. Notwithstanding the Senior Costs Judge's reluctance to provide guidance, this observation may well have a resonance beyond the parameters of this case.

Who is the Winner? – Another such victory and I am undone

James Yapp

Pyrrhic victories and "the successful party" – Ashdown and Others v Griffin and Others [2018] EWCA Civ 1793

In *Ashdown*, the Court of Appeal held that a party who succeeded in principle but failed to achieve any financial benefit was not "successful" for the purposes of CPR r44.2(a).

The Facts

The petitioners were shareholders in a company set up to sell advertising space on outdoor bins ("Addbins"). The venture proved unsuccessful and eventually the only buyer of advertising space was Addison Lee PLC ("Addison Lee").

The first respondent became a director of Addbins. He was also Chairman of Addison Lee. Addbins initially charged Addison Lee £5/week for advertising space. This later dropped to £1/week and then to 50p/week. Eventually, Addbins stopped invoicing Addison Lee at all.

First instance

At a trial on liability, the Judge found that the first respondent had caused Addbins to allow Addison Lee the use, without charge, of the advertising bins. Indeed, he had caused Addbins to purchase thousands of extra bins. This amounted to *"the grossest possible breach of his duty to act in good faith in the best interests"* of Addbins.

The Judge found that there had been unfairly prejudicial conduct. As such, the first respondent was ordered to purchase the petitioners' shares. At the subsequent valuation hearing it was determined that those shares were valueless.

As to costs, the Judge concluded that the petitioners had succeeded in establishing there was unfairly prejudicial conduct and had received the standard relief, namely a share purchase order. The fact that the shares turned out to be valueless did not mean they had not succeeded. The first respondent was ordered to pay the petitioners' costs of the proceedings and the Judge declined to make any order as to costs between the petitioners and the remaining respondents.

The respondents appealed against this order.

The Appeal

Newey LJ concluded that identifying the "successful party" for the purposes of CPR r44.2(a) is an evaluative exercise rather than a discretionary one.

He was satisfied that the Judge was *"plainly mistaken"* in thinking that the petitioners were successful. They brought the petition to obtain a substantial sum for their shares *"and they wholly failed in that objective"*. Whilst they established unfairly prejudicial conduct, the respondents were not ordered to make even a nominal payment. In the circumstances:

> *"It is plain that, "as a matter of substance and reality", the appellants won and "substantially denied the [petitioners] the prize which the [petitioners] fought the action to win" (to adapt Bingham MR's words)."* [See *Roache v News Group Newspapers Ltd* [1998] EMLR, 161].

The petitioners were ordered to pay the respondents' costs of the action. Part of the background to this order was the fact that the respondents had made six offers, all of which were rejected. If the petitioners had accepted any one of these offers, they would have been better off. Were it not for these offers, the petitioners would not have been ordered to pay all of the First Appellant's costs given that they have achieved some success.

Newey LJ refused to separate the costs of the initial trial on liability (which the petitioners 'won') from the subsequent evaluation hearing. He concluded that the litigation should be looked at as a whole. From the petitioners' perspective, the initial trial was hoped to be a *"staging post on the road"* to financial relief.

The electronic bill: A practitioner's view seven months on

Matt Waszak

Introduction

The use of the electronic bill has become compulsory for all work done in CPR Part 7 multi-track claims from 06.04.18, subject to a few limited exceptions.

Its introduction came as no surprise to practitioners. In October 2011, the ACL Report, titled **Modernising Bills of Costs**, recommended investigating the use of standardised time recording codes for litigation in the UK. Fast forward through the tremendous work of the Morgan and then Hutton Committees and the pilot scheme in the SCCO in 2015, and the process arrived at the formation of a standardised electronic bill precedent (Precedent S) in November 2017.

Thanks to the Hutton Committee, there has been no shortage of education on the new format and functionality of Precedent S. Rarely has a costs seminar in recent years not included at least one talk on the new electronic bill.

But how familiar and comfortable are judges and practitioners with the electronic bill? Now seven months after its implementation date, how is the electronic bill working in practice?

A few introductory thoughts

No electronic bill case has been fought through to conclusion at a detailed assessment. It is understood that the furthest one has reached is settlement after argument on the preliminary points.

After only seven months, that is not surprising. Although parties can prepare an electronic bill for work done before 06.04.18, many have (understandably) chosen not to. Some firms have followed a hybrid model in which a paper bill has been used for work done before 06.04.18, with the electronic bill used for work done from 06.04.18.

Of further note is the fact that under CPR PD 47, Paragraph 5.1, one of the exceptions to the compulsory use of the electronic bill for work done from 06.04.18 is where the Court orders otherwise. In cases which settle soon after 06.04.18, and where the majority of the work in the case is done before 06.04.18, there is a compelling case to dispense with the need to use the electronic bill for what represents a minority of the costs claimed. There may well have been cases where that has been ordered by the Court, or where the Court has consented to it after agreement between the parties.

A further point relates to training. Many firms have provided their own training to practitioners. While it is of course true that there is no single or correct approach to conduct a hearing (of any kind), only when these electronic bill detailed assessments come before the Courts will the scale of any practical issues, and divergences in approach, become apparent.

The positives

On 27.09.18, Master James, Shaman Kapoor and I demonstrated a mock detailed assessment using the electronic bill of costs at the Costs Law Reports Conference at Eversheds Sutherland in London. The demonstration was repeated, with both Master James and Deputy Master Campbell, for the Association of Personal Injury Lawyers' (APIL) Conference in Whitehall on 20.11.18. What positives have I taken from it?

First, the implementation of the new electronic bill is an extremely positive step for the costs market. Costs disputes are an obvious beneficiary of the technological innovation in legal practice and the ambitions of movements towards digital justice. The work that has gone into the development of the electronic bill has been tremendous.

Second, in almost any detailed assessment, a significant proportion of time is devoted to the re-calculation of the bill after the Costs Judge's decisions and deductions. With the ability to adjust hourly rates, time entries and disbursements as the hearing proceeds, the electronic bill will remove that inefficiency. After every decision, the figures in the bill can be adjusted to produce a new running total. That will lead to enormous time savings at the end of hearings.

Third, the ability to produce running totals will also, from an early stage, help focus parties' minds on whether an existing Part 36 offer in a case is likely to bite. For example, after a decision on hourly rates, it might be so obvious to the parties that a Part 36 offer will be beaten (in one direction or the other) that the case settles. However, what is true for one party will be true for both. That the result of one decision makes one outcome more likely than another should be equally apparent to both sides.

Fourth, the fact that the electronic bill is presented in Microsoft Excel means that there are countless opportunities for the analysis of the data within the Bill. The Bill automatically summarises costs by: phase; bill part; task, activity and expenses; and communications. The Bill can be searched, while the option for selecting a specific fee earner can identify the extent of that fee earner's time contribution. Overly generalized arguments about the extent of costs claimed are unlikely to survive the scrutiny of the analysis that the new bill provides for.

Fifth, the fact that the electronic bill automatically generates and includes Precedent Q and summarises costs by phase, will bring tremendous benefit and efficiency to detailed assessments in costs budgeted cases.

Food for thought

However, it would be falsely optimistic to say that the electronic bill has been met by the same positivity and hunger in all corners of the profession. Many people question whether the Courts are ready for electronic detailed assessment. Perhaps that skepticism is forgivable. For many practitioners, the ambitions of digital justice are a far cry from a day-to-day Court system struggling with resources and creaking under the pressure of demand. Such concerns will only be assuaged as the electronic bill cases proceed to detailed assessment with success.

However, the debate about the Court system detracts attention from the more important fact that, like it or not, electronic detailed assessments will soon become a staple in the diet of any costs practitioner. The following are issues that costs practitioners might like to consider.

First, much of the focus of an electronic bill detailed assessment is on the use of the bill, and the amendment of information in the different Excel spreadsheets. With the risk of both advocates and the Judge being buried behind the computer screen, it is important that the quality of the advocacy is preserved. After all, the parties have proceeded to detailed assessment to fight their position through to conclusion. The electronic bill should not dilute the potency of the parties' arguments. Certainly for the early assessments, and potentially for the larger bills moving forward, the possibility that the advocate at the hearing will be supported by someone with custody of the bill seems likely.

Second, advocates will need to consider how they keep track of the different changes made to the bill as the assessment proceeds. After each decision, the bill will be amended creating a new running total. Though tremendously useful, there is no obvious way to use the bill to record the changes made at each stage incrementally.

Conclusion

The message from this parish about the new electronic bill is a very positive one. However, it is perfectly understandable that until detailed assessments have proceeded with success, some concern about how the electronic bill will work in practice will remain.

Disclaimer

These articles are not to be relied upon as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.