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# TGC Costs Update

The Newsletter of the TGC Costs Team

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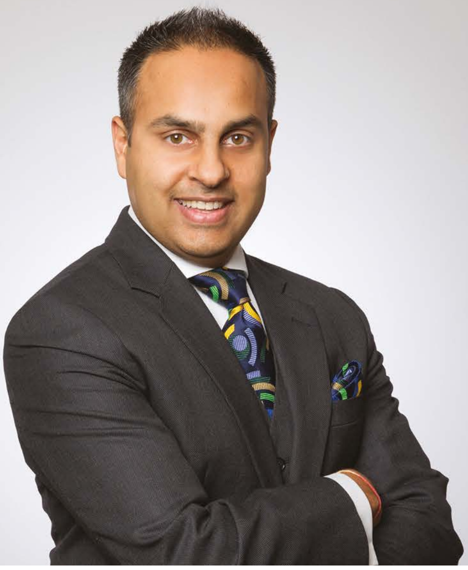
# A note from the Editor



**By Shaman Kapoor** skapoor@tgchambers.com

**Welcome to the fourth edition of TGC's Costs Newsletter.**

As always, there is plenty to report. We start with the very recent High Court decision of Snowdon J in *Dunbar* which seems to have pulled the rug from under any Aladdin-like litigation funder that thought its risk would be capped by *Arkin*.

We go from flying carpets to the magic of costs budgeting: Master Davison certainly thought he had the magic in *Yirenki*, but Jacobs J has made sure he will not rub that lamp again! What can we expect? Well, the tick-tack of the judge's calculator at budgeting will continue no doubt, but the judge should simply not mention the basis of the calculation. What a farce! Maybe the odd High Court judge might let slip what they are actually thinking, heaven forbid (*Arcadia Group Ltd*)? How will that be received by the costs judge? Time will certainly tell.

Then we take you on another magical journey, where 100% success fees always apply, subject only to the 25% cap of damages. Never mind about risk assessing the actual case, right? Errr… no – see *HH v Herbert Law*.

Away from the magic, we take you to the serious matter of misconduct. Nothing will quite beat the chestnut of *Gempride* (see 3rd Ed.), but thankfully a heap of common sense applied to a claim of 'mis-certification' of the bill in *Andrews*. More wars continue on challenging ATE premiums and the evidential threshold required (*Kelly v Bellway Plc*).

Then we journey on to a case where the termination clause in a CFA was properly exercised leaving the Claimant with an incredible liability in costs to her own solicitor (*Butler*). Part 36 then makes its entrance again with the so-thought mandatory 10% frill not being so mandatory (*JLE*)!

If you think you might have read enough by now, think again! The term 'exceptional circumstances' could only mean a high-bar when considering the escape of the fixed costs regime in *Ferri*, and if that was not enough on fixed costs for one publication, we bring to your attention the care needed in drafting a consent order in fixed costs cases as demonstrated by *Adelekin*.

On the home straight, we could not resist the review of *Ketchion* and *Waring* knowing that we had whet your appetite in the last edition about QOCS protection and the interplay between the claim and the counterclaim. We begin to round up with a helpful review of risk assessment considerations when setting a success fee (*NJL*) before giving you an inside track on the new Costs Capping Pilot Scheme. Having heard the reviews from certain quarters about just how well costs budgeting is working, isn't it surprising that costs budgeting plays no part whatsoever in the pilot scheme? Is this really the death-knell of costs litigation as we know it? Doubt it.

Knowing that you simply cannot wait for more, we are the main sponsor of the upcoming Costs Law Reports conference in September and we look forward to seeing you there if you can make it. If not, we'll be sure to update you in the 5th!

Shaman

# What are you Arkin on about? It all about the money, money, Money...

Shaman Kapoor & Olivia Rosenstrom

## *Davey v (1) Money (2) Stewart-Koster v ChapelGate Credit Opportunity Master Fund Limited; Dunbar Assets Plc v Davey v ChapelGate Credit Opportunity Master Fund Limited [2019] EWHC 997 (Ch)*

### Summary

When the Claimant did not satisfy an order to pay the Defendants' indemnity costs, the Defendants sought a non-party costs order under s. 51 of the Senior Courts Act 1981 against the Claimant's litigation funder. There were two key questions: (i) could the funder be responsible for costs incurred before its involvement? and (ii) was the funder's costs liability limited to the total amount of funding that they had provided for the Claimant, as per the *Arkin* cap?

Mr Justice Snowden held that the funder could not be liable for any period prior to its involvement given the need for a causal connection. Further, that the Court of Appeal had not intended for the Arkin cap to be applied in every case involving a commercial funder, and that the court retains an absolute discretion as to the extent of a section 51 order. On the facts of the case, Mr Justice Snowden found that it would not be just to apply the cap.

### The facts of the case

Dunbar appointed the administrators to Ms. Davey's company (AHDL). AHDL's main asset was a commercial office in the Docklands. That property was sold by the administrators for £17.05 million. After payment of expenses and Dunbar's secured claim, there was nothing left for AHDL or Ms. Davey as its shareholder. Ms. Davey brought proceedings against the administrators alleging breach of fiduciary duty, a failure to exercise independent judgment in the administration and selling the property at a substantial undervalue. Later, Ms. Davey amended her claim alleging that Dunbar had interfered in the conduct of the administration and had conspired with the selling agents to sell at an undervalue and to cause her harm. Her claim was estimated to be worth somewhere between £10 million and £49 million and was given good prospects of success.

After the pleadings and after divergent expert evidence from each party had been served, Ms. Davey entered into a litigation funding agreement with ChapelGate.

In due course, the trial took place (over nearly 2 months) and Snowden J rejected all of the material allegations of breach of duty and misconduct against the administrators together with all of the allegations of improper interference in the administration against Dunbar. He found that the property had not been sold at an undervalue. Significantly, he found that whilst 'dishonesty' had not been pleaded, that was nonetheless the main plank of the case. He found that the serious nature of the allegations together with the inappropriate and unreasonable manner in which they continued to be made was well out of the norm, justifying an award of costs on the indemnity basis adverse to Ms. Davey. The administrators and Dunbar together claimed costs just under £7.5 million and Ms. Davey was ordered to pay on account of those costs a combined amount of £3.9 million.

Ms. Davey failed to pay those costs and so the administrators and Dunbar applied for a non-party costs order pursuant to s.51 Senior Courts Act 1981 as against ChapelGate, and for their costs of the entire action notwithstanding that ChapelGate only became involved at a later stage in the proceedings.

### ChapelGate's funding agreement

ChapelGate's funding investment was originally to be £2.5 million. That was on the condition that the Ms. Davey would take out ATE insurance and £1 million of the investment was to be applied to it. On that basis they agreed to a profit share on an increasing scale based on the stage of the proceedings reached, ranging from 30% of the invested amount to 250% of the invested amount, or alternatively, 25% of the net winnings (i.e. net after reimbursement of the investment). Ms. Davey would retain control of the conduct of the claim but ChapelGate were to be kept informed about key steps in the proceedings. The Waterfall provisions were such that ChapelGate was to be paid its investment and return on investment first, the lawyers would be paid second, and Ms. Davey would take any residue third.

In the event, no ATE insurance was purchased. Instead, ChapelGate renegotiated its terms such that the funding investment would be reduced to £1.25m, but the profit entitlement would remain the same (i.e. still calculated on the basis of a £2.5 million investment). Separately, ChapelGate later purchased ATE insurance for itself for a sum of £650,000.

Interestingly, ChapelGate's investment manager (Orchard) explained the terms of the investment and the initial requirement of ATE insurance specifically with reference to what it described as ChapelGate's maximum liability being an amount in costs up to the amount funded and referred to it as the "Arkin liability" or "Arkin risk". Quite plainly as far as they saw it, the Arkin cap was an absolute maximum liability.

## ChapelGate's position

ChapelGate did not resist the order being made against it in principle, nor the principle of the order being on the indemnity basis[1], given that those principles had been well-established in *Excalibur*. In considering the first instance court's review of the authorities in *Excalibur*, Snowden J noted the Privy Council decision in *Dymocks*[2] which stated: *"...their Lordships are content to assume for the purposes of this application that a non-party could not ordinarily be made liable for costs if those costs would in any event have been incurred even without such non-party's involvement in the proceedings."*

*Dymocks* was observed by *Excalibur* at first instance to create a need to show causation, and that need had met with approval elsewhere[3]. *Excalibur*, on its own extreme facts, did not result in a departure from the need to show causation. As a result, Snowden J held that ChapelGate could not be responsible for the costs incurred by the administrators and Dunbar before they even became involved.

## The Arkin cap[4]

Arkin was a case where the litigation funder ("MPC") became involved some two years after the claim had been issued and at a point when expert evidence (and thus disbursement) was required. The expected settlement range was £3.5 million to £7 million. MPC was to receive 25% of recoveries up to £5 million and 23% of anything above. MPC was to attend meetings with counsel and expert. Mr. Arkin was to consider the opinions of MPC before taking any significant steps, and any compromise required MPC's prior consent. No ATE premium was taken out. The case was lost at trial and Mr. Arkin was the subject of adverse costs orders.

The Defendants sought a non-party costs order against MPC. No order was made at first instance. The Defendants appealed, but before hearing the appeal, the Privy Council had delivered its judgment in Dymocks which set out the main principles on the exercise of discretion on non-party costs orders[5].

The Court of Appeal in Arkin reinforced the rule that costs should normally follow the event. That rule rendered it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action. Recognising that a champertous funding agreement would likely render the funder liable for the opposing party's costs without limit anyway, it sought to devise a just solution for *"...the commercial funder who is financing part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable."*

The Court of Appeal then articulated the "Arkin cap": *"...We consider that a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party to the extent of the funding provided."*

Justice was better served to protect a successful defendant in recovery of its costs, even if the flip side was that the net recovery of a successful claimant will be diminished as a result of the inevitable commercial price of funding. The Court of Appeal considered that funders would likely cap their funds in order to limit their exposure, which would in turn have a salutary effect in keeping costs proportionate and thus also serve the public interest. The Court of Appeal went on to state: *"In the present appeal we are concerned only with a professional funder who has contributed a part of a litigant's expenses through a non-champertous agreement in the expectation of reward if the litigant* *succeeds. We can see no reason in principle, however, why the solution we suggest should not also be applicable where the funder has similarly contributed the greater part, or all, of the expenses of the action. We have not, however, had to explore the ramifications of an extension of the solution we propose beyond the facts of the present case, where the funder merely covered the costs incurred by the claimant in instructing expert witnesses."*

## Follow the Money...

Snowden J accepted that the funding industry had readily adopted the Arkin cap[6]. However, he noted that Sir Rupert Jackson[7] had observed that *"...it is wrong in principle that a litigation funder, which stands to recover a share of damages in the event of success, should be able to escape part of the liability for costs in the event of defeat...I recommend that either by rule change or by legislation third party funders should be exposed to liability for adverse costs in respect of litigation which they fund. The extent of the funder's liability should be a matter for the discretion of the judge in an individual case."*

Snowden J went on to note disquiet about the automatic application of the Arkin cap from other quarters. Foskett J in *Bailey*[8] had said: *"...the choice made by the funder of the amount of its funding of the litigant should not dictate the amount of costs it should pay to the litigant's opponent in the event the litigation fails."*

Upon being invited to consider that ChapelGate's agreement was champertous, Snowden J found that it was not. He considered that the crucial issue on such a question was whether the non-party can exercise excessive control or influence over the conduct of the proceedings (for example, suppressing evidence, influencing witnesses or procuring improper settlement). There was no evidence of that in the instant case.

Snowden J did not consider that the Court of Appeal in Arkin intended to prescribe a rule to be followed in every subsequent case involving a commercial funder. He considered that the Court of Appeal had set out an approach which might commend itself to other judges exercising their discretion in similar cases in the future. He was fortified in that view noting that there had been no subsequent authority which held that the Arkin cap applied automatically in any case involving a commercial funder. He went on to reject the suggestion that Sir Rupert Jackson had seemingly recognised that the Court of Appeal had set down a rule (in Arkin) of general application in all cases.

As a result, in exercising his own discretion in the instant case, he reflected on:

- the principle that justice usually requires that the funder must pay the successful party's costs;
- Ms. Davey's conduct of litigation was significantly out of the norm and warranted an order for indemnity costs;
- whilst ChapelGate did not direct that conduct, it had every opportunity to investigate it before choosing to fund the litigation;
- if the Arkin cap applied, ChapelGate would be insulated from the decision that costs should be assessed on the indemnity basis;
- ChapelGate would have known that Ms. Davey could not have paid adverse costs and that any adverse costs were likely to be very substantial and in excess of their own investment;
- ChapelGate focussed on its own self-interest by removing the requirement for ATE protection and there was no correlation between its invested amount and the costs to which the Defendants were exposed (per Foskett J in Bailey);
- ChapelGate negotiated, through its Waterfall provisions, to take its commercial profit in priority over any compensation payable to Ms. Davey;
- respecting the need to avoid assessing matters with the benefit of hindsight, that whilst ChapelGate could not be seen from the start of its involvement to be the only person with a financial interest in the Claim, the use of the Waterfall structure meant that Ms. Davey's access to justice came a clear second to ChapelGate receiving a significant return on its commercial investment, and in that sense ChapelGate was the party with the primary (i.e. first) interest in the Claim.

Snowden J also rejected the argument that by not applying the Arkin cap litigation funders would be discouraged from funding cases and thereby inhibit access to justice. He found that the very disapplication of the Arkin cap would cause funders to keep a closer watch on the costs being incurred, both by the funded party and the opposing side, and by deploying the mechanism of the CPR to limit exposure to adverse costs, the principles of access to justice or any other public policy considerations would be preserved. As a result, the Arkin cap was not applicable.

## Analysis

The Court of Appeal in Arkin quite clearly provided guidance on the exercise of discretion when considering a non-party costs order against a litigation funder. As with the exercise of any discretion, consideration will always be case and fact specific. But in the exercise of a discretion which derives from a statutory power (s.51) that places the costs in the discretion of the court subject to any other enactment or rules of court, should Arkin ever have been given the status of cap, rather than guidance? Could the Court of Appeal properly impose a "cap" on an otherwise unrestricted statutory discretion? Isn't the route to any "cap" only by further statutory provision or rules of court anyway? Are we likely to see satellite litigation between litigation funders and the lawyers (and/or their insurers) if there is some adverse finding about the way in which the litigation was conducted? Are we now expecting litigation funders to move from commercial investors to some sort of hybrid supervisor of quality control of legal professional services and (that well-defined concept of) proportionality? Do we expect litigation funders to have bottomless financial resources so that they will always be able to pay anyway? Will each piece of litigation now be funded through a special purpose vehicle so as to limit the actual liability of any adverse costs order made against a funder?

Just because the industry has appeared to label it as a "cap" and even assess risk by reference to the so-called cap, this case has un-pealed the layers of industry speak and cut right back to the original source of the discretion when making orders on costs. Litigation funders should not calculate their risk of investment by reference to any notional cap. The market seems to be ripe for further ATE insurance activity, but in the absence of ATE, litigation funders must calculate their risk with a greater care for adverse costs. This judgment is also likely to cause funders to re-evaluate their risk on existing litigation if their original risk assessment factored in the notional protection of a cap, albeit keeping in mind their already subscribed contractual commitments to provide funding. What is clear is that risk assessment will need to be broad, and the mechanics of and models of funding are likely to become all the more interesting.

Going forward, litigation funders will be concerned with:

- Funding only parts of litigation if that is all that is required, rather than becoming a 'whole' funder;
- Considering the timeframe over which it is to be a funder when considering the total course of the litigation;
- Keeping a very close eye on both parties' costs, incurred and estimated;
- The Claimant's own ability to meet adverse costs whether through ATE insurance or otherwise;
- The need to be closely supervising, but not straying into the territory of becoming the controlling party;
- Keeping a watchful eye on the reasonableness of the way in which the litigation is being conducted.

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**1.** *Excalibur Ventures LLC v Texas Keystone Inc (No.2) [2017] 1 WLR 2221*, Court of Appeal ("Excalibur"). In particular, Tomlinson LJ endorsed the first instance court's approach (Christopher Clarke LJ as he then became): "...I particularly agree with and wish to associate myself with the judge's general approach, which is to emphasise that the derivative nature of a commercial funder's involvement should ordinarily lead to his being required to contribute to the costs on the basis upon which they have been assessed against those whom he chose to fund. That is not to say that there is an irrebuttable presumption that that will be the outcome, but rather that that is the outcome which will ordinarily, in the nature of things, be just and equitable."

**2.** *Dymocks Franchise System (NSW) Pty v Todd [2004] 1 WLR 2807 at [20]*

**3.** *Goodwood Recoveries v Breen [2006] 1 WLR 2723* at [74], per Rix LJ: "...whether the third party had caused the costs in issue and then to leave other considerations for the exercise of a principled discretion in the ultimate interests of justice."

**4.** *Arkin v Borchard Lines Ltd (Nos 2 and 3) [2005] 1 WLR 3055*

**5.** (1) Exceptional really meant – whether it was just in all the circumstances to make the order; (2) discretion not usually exercised against "pure funders"; (3) where the non-party not merely fund the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if proceedings fail, he will pay the successful party's costs... nor indeed is it necessary that the non-party be the 'the only real party' to the litigation.

**6.** At [61].

**7.** Final Report of the Review of Civil Litigation Funding in December 2009 at [4.6], [4.7]

**8.** *Bailey v GlaxoSmithKline UK Limited [2018] 4 WLR 7* at [59]

# And so to bed – but don't be shy

**Richard Wilkinson**

**Should a costs judge who reduces the receiving party's hourly rates on assessment in relation to incurred costs by the same logic reduce costs which have previously been budgeted pursuant to a costs management order? The issue has significant practical implications, not just at detailed assessment, but also at the earlier costs management stage.**

Debate has raged ever since Deputy Master Campbell entered the fray with his decision in the summer of 2017 in *RNB*[1] in which he decided that a reduction on hourly rates for incurred costs did amount to a good reason to depart from the previously approved budget at the detailed assessment stage.

The argument intensified when, during the course of 2018, two judicial colleagues in the SCCO reached precisely the opposite conclusion. First came the decision of Master Nagalingam in Nash[2], followed shortly by the decision of Master Rowley in Jallow[3].

Now, it seems, the argument can at last be put to bed as an indirect effect of the decision on appeal of Mr Justice Jacobs in Yirenki[4]. Strikingly, this appeal did not arise from a detailed assessment, but rather from a costs management order. Nonetheless, when I recently appeared on a detailed assessment before Deputy Master Campbell[5] he readily accepted that he was now bound by the decision in Yirenki to find that any decision he made in relation to hourly rates for incurred costs could not justify a departure from the budgeted costs.

The facts of the Yirenki case also illustrate the many and varied approaches adopted by Judges charged with cost budgeting. As anyone who can recall Master Leslie's "summary cost budgeting" methodology could attest to, even amongst QB Masters, practices vary significantly. The appeal in Yirenki arose from a particular practice adopted by Master Davison who approved budgets *"subject to the proviso that it remains open to [the parties] to dispute [hourly rates] (and to that extent the figure for each phase) at a detailed assessment."* The Master's approach in reality involved approving only the number of hours and, where appropriate, the amount of disbursements, rather than an overall sum to be spent. In effect, a provisional rather than final budgeting exercise. This approach did not survive on appeal because Jacobs J accepted it was contrary to the requirement of CPR 3.15 (which requires the Court to produce a final, approved figure) and because the Practice Direction makes clear that the "constituent elements" should not themselves be subject to specific approval. The Judge was also concerned that it would unnecessarily reduce the receiving party's flexibility as to precisely how to spend their budget as the case developed.

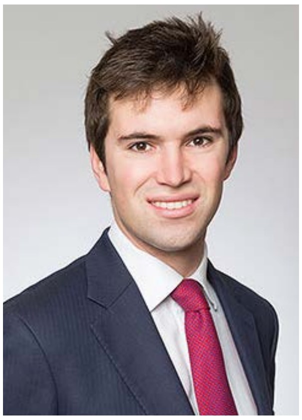
By making clear that hourly rates for budgeted costs should not be revisited at assessment, this decision should increase the confidence with which parties can predict the outcome of detailed assessments and further shorten the time spent at assessment dealing with budgeted costs in those remaining cases which proceed that far.

The more profound significance however may be on the approach to be taken at the costs management stage, in particular by those who may in due course expect to be the paying party. If the putative paying party considers that the opponent's estimated costs are inflated by reason of high underlying hourly rates, the only opportunity to address this now will be at the CCMC stage. I still frequently see Precedent R's drafted with phrases such as *"phase agreed, subject to hourly rates"*. Challenges such as this are essentially meaningless. If not challenged at the CCMC, the hourly rates never will be revisited and the phase will simply get rubber-stamped as claimed. Even worse, in some cases offers are made throughout the Precedent R expressly by reference to the claimed (but disputed) hourly rate. Again, this will likely result in the claimed hourly rates underpinning the Judge's calculations at the budgeting stage.

Of course we know that it is not the role of the Judge at the CCMC to fix or approve hourly rates[6]. No Judge is ever likely to admit that they are applying a particular hourly rate when calculating phase totals (even if well aware what they would be likely to allow, if sitting with a different hat on at detailed assessment). But the Judge should still "have regard to the constituent elements" when setting phase totals[7]. Given the format in which budgets are presented, inevitably many judges will cling to a calculation of hours spent x rate claimed to arrive at a proportionate phase total (or, at the very least, as a cross-check).

It follows that the putative paying party should provide the Judge at the CCMC with as much assistance as possible with whatever alternative arithmetic process they want them to undertake. In practice, this means putting forward offers in the Precedent R based expressly on what are considered to be the reasonable hourly rates. Whilst this may often be what is actually done, all too frequently this is not clear from the face of the Precedent R itself. Instead, the reader is expected to work backwards from the sum offered (after first deducting counsel's fees and other disbursements), in order to work out the rate being applied. Such reticence helps no-one. Offering an 'appropriate' rate does of course require the exercise of judgment and skill in each case. Thus simply offering guideline rates in a multi-million pound claim is unlikely to assist anyone. But once the rates have been selected, don't be shy in deploying them: identify them clearly in the preamble to the Precedent R and then apply them explicitly to each offer made. At the very least, this should get the Judge thinking about the impact of different hourly rates on the totals claimed.

**1.** RNB v London Borough Of Newham, 4/8/17
**2.** Nash v Ministry of Defence [2018] EWHC B4 (Costs)
**3.** Jallow v Ministry of Defence [2018] EWHC B7 (Costs)
**4.** Yirenki v Ministry of Defence [2018] EWHC 3012 (QB)
**5.** Amin v Topps Tiles Limited (23rd January 2019)
**6.** We know because PD3E, para 7.10 says so
**7.** See PD 3E, para 7.3



# Hourly rates and Costs Budgeting: *Arcadia, Topshop & Sir Phillip Green v Telegraph Media Group [2019] EWHC 96 (QB)*

**Richard Boyle**

**This case arises out of the well-publicised allegations made against Sir Phillip Green and the Claimant companies by former employees. The former employees had signed non-disclosure agreements ("NDAs") and the Defendant had investigated these allegations. The Claimants sought an injunction to prevent the Defendant from publishing any details. An interim injunction was awarded by the Court of Appeal and an anonymity order made. However, Sir Phillip's identity was subsequently revealed in Parliament causing much controversy.**

Unsurprisingly, the case was keenly fought and, as a result, it raised costs budgeting issues. Two weeks before trial, the claim came before Warby J to consider costs budgeting, as well as a number of other interim applications. The judge approved the budgets in sums close to £500k for each side although, because of the urgent application for an interim injunction and with trial fast approaching, much of the costs were already incurred. The judge made the following comments of note:

**1** Although hourly rates are for detailed assessment, it is almost inescapable for the court to give some thought to the hours and hourly rates that are justified for the work in question.

**2** The Claimant was claiming hourly rates of up to £690 for a partner which is well in excess of the Guideline Hourly Rates of £409 for a Grade A fee earner.

**3** Fees in excess of the guidelines can be and often are allowed. The Defendant and the judge accepted that enhanced rates were justified but the judge held not to the extent claimed. Proportionate reductions were to be made to the rates. Rates in excess of £550 could not be justified.

**4** Given the rates, the Claimant's budget included an unnecessary degree of partner involvement.

The headline rate of £550 remains striking, but perhaps not surprising in high profile and, at the time, hard fought litigation.

The fact that the judge referred to the guideline rates at all will cause consternation to many acting for receiving parties. The guidelines were first set in 2010 and have not been updated to reflect inflation. Furthermore, they were intended for use in summary assessments and therefore aimed at cases that conclude within a day. This is far removed from the high value litigation in this case. However, the judge did acknowledge that fees in excess of the guidelines are often allowed and therefore the decision is not likely to have far reaching effects on this issue.

Most significant is the judge's treatment of hourly rates while costs budgeting. Paragraph 7.10 of CPD 3E states that the making of a costs management order under CPR 3.15 concerns the totals allowed for each phase of the budget; it is not the role of the court in the costs budgeting hearing to fix or approve the hourly rates claimed in the budget and the underlying detail in Precedent H for each phase is provided for reference purposes only to assist the court in fixing a budget.

Paragraph 7.3 of CPD 3E states that the court's approval on costs budgeting will relate only to the total figures for each phase although, in the course of review, the court may have regard to the constituent elements of each total figure. The court will not undertake a detailed assessment in advance but will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

It is fair to say that courts have struggled to set phase totals while pretending to turn a blind eye to hourly rates. To some extent, the case adds a dose of realism and reflects that it is often hard for judges to set phase totals without having regard to the times and hourly rates involved. Indeed, the Practice Direction notes that these details are provided for reference purposes. However, the judge's decision could cause confusion at a later stage. What regard is the costs judge to have to these comments at detailed assessment? How is the costs judge to treat the budget if he or she considers that the hourly rates should be higher than those allowed at the CCMC? Would a further change to the hourly rates amount to a good reason to depart from the budget (considered in the previous article)? Is the position different in circumstances where the hourly rates were considered at the CCMC?

Should the case reach detailed assessment hearing, the decision will be interesting. It is arguable that the judge went beyond the terms of the Practice Direction and that the costs judge, at the conclusion of proceedings, is best placed to set hourly rates. Certainly, the case reflects the fine line judges have to tread when dealing with hourly rates and costs budgeting.

# 100% success fee in all our cases, right? And who is liable for the ATE premium? An analysis on *Herbert v HH Law Limited [2019] EWCA Civ 527*

**Shaman Kapoor & Olivia Rosenstrom**

## The Issues

**1** The proper meaning and application of CPR 46.9(3) as regards a success fee of 100% under a CFA which has been fixed without regard to any risk of failure of the claim; and

**2** Whether the costs of the premium for an ATE insurance policy was properly a solicitor's disbursement or merely an entry in the client account.

## The Facts

On 15/10/15 Ms Herbert was involved in a road traffic accident when the car she was driving was struck from behind by a bus. On 17/03/16 she entered into a CFA with HH (a specialist in personal injury claims).

## CPR 46.9(3) & (4)

**3** *Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed—*

**a** *to have been reasonably incurred if they were incurred with the express or implied approval of the client;*

**b** *to be reasonable in amount if their amount was expressly or impliedly approved by the client;*

**c** *to have been unreasonably incurred if—*

*(i) they are of an unusual nature or amount; and*

*(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.*

**4** *Where the court is considering a percentage increase on the application of the client, the court will have regard to all the relevant factors as they reasonably appeared to the solicitor or counsel when the conditional fee agreement was entered into or varied.*

## The CFA

The CFA included the following provisions (summarised and numbered by the author):

**A** *If you win your claim, you pay our basic charges, our disbursements, success fee and ATE premium. You are entitled to seek recovery from your opponent of part or all of our basic charges and our disbursements as set out in the document "Hampson Hughes Funding Agreements: What you need to know"*

**B** *The success fee is set at 100% of basic charges. The success fee cannot be more than 100% of basic charges. There is a maximum limit on the amount of the success fee which we can recover from you. The maximum limit is 25% of the total amount of any (i) general damages for pain, suffering and loss of amenity; and (ii) damages for pecuniary loss, other than future pecuniary loss. The maximum limit includes VAT and any success fee payable to a barrister who has a CFA with us.*

## The retainer letter enclosing "insurance information fact sheet"

HH sent the client a further document which included the following provisions (summarised and numbered by the author):

**C** *If you do not have suitable alternative funding then we will take out an insurance policy with Centron Insurance. The insurance policy costs £349 and will be deducted from your damages at the conclusion of the claim as well as up to 25% of your damages...*

**D** *We only deal with Centron Insurance for Legal Expense Insurance Policies.*

**E** *We are not contractually obliged to use Centron. You can choose your own insurance policy. The firm has not conducted a fair analysis of the market. The firm does not have an interest in recommending the policy.*

### The client's consent

The client signed the retainer letter and with her signature confirmed:

*…I…am happy for Hampson Hughes to waive the investigation into alternative forms of funding and proceed to take out an insurance policy with Centron at a cost of £349 to protect me. I am aware that the cost of the policy and a deduction of damages, up to a maximum of 25% will be taken upon successful conclusion of my claim.*

### Completing the chronology…

On 26/04/16, an internal HH review note concluded:

*"…enjoys reasonable prospects of success given it is a rear end shunt and liability has been admitted on the linked files. I am a little wary that the client may have slammed on rather than slowed to a stop given the earlier altercation with the Defendant driver, however I am of the opinion that she would not have done considering she had young children in the back of the vehicle."*

The Defendant's insurer made a Part 36 offer of £3,400, together with costs as agreed or assessed on 03/09/16. On 06/09/16, HH advised the Claimant to accept the offer. They also set out:

**i** Deductions from damages (and thus reflecting the cash account):

(a) £829.21 (25% of damages)

(b) £349 ATE insurance premium

**ii** An invoice for costs totalling £6,175.84 (comprising base profit costs, VAT and disbursements, namely, a medical report and court fee)

On 03/10/16 the Claimant accepted the Part 36 offer. The Defendant's insurer also paid £2,629 on account of the Claimant's costs and disbursements (being court fee and medical report).

On 30/11/16 the Claimant challenged HH's costs, and on 01/12/16 she issued a Part 8 Claim Form for assessment. On 14/02/17 by an Order the assessment was limited to the success fee claimed.

HH filed evidence which claimed that it was necessary to structure the fees (i.e. a 100% success fee in every case) in that way in order to enable HH to cover overheads and maintain a reasonable level of profit and so carry on in business. It also claimed that such a model was representative of the market norm.

### 1st Instance – DJ Bellamy

With CPR 46.9(3) in mind, the District Judge found no clear evidence that Ms. Herbert approved, expressly or impliedly, the cost to be incurred. He went on to find that a 100% success fee in the circumstances was both unusual in nature and in amount. He found that it was difficult to have justified much more than 12.5% for the success fee. Given that disbursements were funded by solicitors, he allowed 15%. Given that the bill had by then been reduced by more than 20%, the District Judge ordered HH to pay Ms. Herbert's costs (£4,500).

As to the ATE premium, the district judge found that the ATE premium was a solicitor's disbursement which should have been reflected in the bill, rather than the cash account. The effect was therefore to increase Ms. Herbert's cash account by £349. In so concluding, the District Judge had had regard for Cook on Costs [2017 edition, at 2.12] which, *inter alia*, states:

*"…[In distinguishing between items that should be in the bill as disbursements and items which should be reflected only in the cash account] Matters are not helped by the fact that definitions of disbursements are only to be found in Victorian cases such as Re Remnant (1849) 11 Beav 603. They are said to be 'such payments as the solicitor in the due discharge of his duty is bound to make whether his client furnishes him with money for the purpose, with money on account, or not'."*

### 1st Appeal – Soole J

Subject to the consent point. the assessed amount of 15% was not itself appealed. In considering CPR 46.9(3), the Judge found that in order for the presumptions at 46.9(3)(a) and (b) to bite, there was a requirement that Ms. Herbert had provided "informed consent" which required a clear explanation to be given to the client before entering into the CFA with regard to the 100% success fee. "Mere" consent was not enough. As a result, the appeal on success fee was dismissed.

In considering the ATE premium, the Judge considered yet further authorities and text but specifically referred again to *Re Remnant*. The Judge took the view that the purchase of ATE insurance cover was an inextricable part of the package which the solicitor provides to the client in "such litigation", and the fact that there was a contract between the insured client and the insurer was not decisive.

The Judge considered that the evidence and case law demonstrated a clear and established custom that the payment of the premium
is to be treated as a solicitor's disbursement.

The Judge concurred with the District Judge's approach on the cash account such that it should have excluded the ATE premium.

## 2nd Appeal – Court of Appeal: MR Lindblom LJ, Asplin LJ

The CA acknowledged that CPR 46.9(3) and (4) must be read together. The remaining question as to success fee was whether or not Ms. Herbert had expressly or impliedly approved the imposition of the success fee and its amount so as to give rise to the 46.9(3)(a) and (b) presumptions, namely, that it was reasonably incurred and reasonable in amount.

The parties agreed with Soole J's finding that "approval" should mean "informed approval" following a full and fair explanation to the client. The CA endorsed that consensus.

The CA found that, where the client brought proceedings the initial burden of proof as to "approval" fell to the client and should be articulated in the points of dispute. If the solicitor disagreed, then the solicitor carried the burden to show that 'informed approval' had been satisfied. Once the solicitor had adduced evidence on the point, the burden shifted back to the client to show why there was no consent or informed consent. The overall burden to demonstrate informed consent remained on the solicitor.

HH did not rely on any oral advice or information given to Ms. Herbert. HH confined its evidential case to the documents set out above.

Ms. Herbert adduced no evidence to make out her claim that she had not provide *informed* consent. The CA held that the absence of evidence from her did not prevent her from arguing that the documents were inaccurate, misleading or in some other way incomprehensible.

However, the CA found that Ms. Herbert's argument was not sustainable. All the information relating to the imposition and calculation of a success fee was clearly set out in the documentation with which she had been provided prior to agreeing the retainer.

As to the amount, the changes created by LASPO did not of itself justify the imposition of a 100% success fee across all cases, albeit subject to the 25% cap. The amount of a success fee remained in law related to litigation risk as reasonably perceived by the solicitor or counsel at the time the agreement was made. A 100% uplift as a starting point, irrespective of litigation risk, was (pre-LASPO) and is unusual. As a result, there was a presumption that it was unreasonable given CPR 46.9(3)(c)(i).

As to the ATE premium, the CA followed *Re Remnant*. It held that a disbursement qualifies as a solicitors' disbursement if either (1) it is a payment which the solicitor is, as such, obliged to make whether or not put in funds by the client, such as court fees, counsel's fees and witnesses' expenses, or (2) there is a custom of the profession that the particular disbursement is properly treated as included in the bill as a solicitors' disbursement.

Reflecting on the SRA handbook, *Hollins v Russell [2003] EWCA Civ 718 [at 114]* and *BNM v MGN Limited [2017] EWCA Civ 1767 [at 73]*, the CA found that the ATE premium was not a solicitors' disbursement. It held that an ATE policy was a contract made between the insurer and the client; that the client's liability to pay the premium arose from the contract of insurance not from her contract with the legal representative; that the premium was not a payment for which the solicitor was obliged, as such, to make irrespective of client funds; and that it was not technically speaking a litigation expense at all. The evidence in the case did neither establish a custom of the solicitors' profession for an ATE premium to be treated as a solicitors' disbursement. Finally, it reiterated the test: a solicitor's disbursement is what every solicitor, as such, is obliged to pay irrespective of funding by the client or what is properly included in a bill of costs on assessment as a matter of general custom of the profession.

## Conclusion

In that CPR 46.9(3) must be read together with CPR 46.9(4), it is interesting to observe that if the client provides informed consent to the amount of success fee claimed, that too will be assessed on the indemnity basis. If CPR 46.9(4) was to be read disjunctively, it might have been thought (or at least open to argument) that the success fee on a solicitor-client basis would nonetheless be on the standard basis. The business model for Claimant solicitors may yet be well preserved. Certainly, no solicitor should be in any doubt as to the need to prepare a risk assessment (or some equivalent assessment) and, in order to maximise recovery on a solicitor-client basis, to ensure the client provides informed consent to the success fee. Of course, the importance of the need to keep solicitor disbursements distinct from the cash account cannot be emphasised enough, but as this case demonstrates, if the Courts are called to spot the difference based on Victorian authorities, it may take significant cost, time and the Court of Appeal to get it right.

## Checklist for retainer documents:

- Contribution to success fee from recovered damages limited to 25%
- Which fee earner shall have responsibility for dealing with the claim and which fee earner shall supervise
- What will happen in terms of costs if there is a "Win", in particular, payment of base costs, disbursements, success fee and ATE premium
- Make all efforts to recover maximum costs from the Defendant and their insurers
- How the success fee will be calculated
- Specify the cap of 25% and explain to what part of damages it is derived from
- Set out how the base costs were to be calculated, the hourly rate to be charged and the imposition of VAT
- Risk assessment will be the primary factor when considering the success fee percentage increase
- Informed approval would require a clear explanation that in providing a 100% uplift, HH took no account of the risk in any individual case but charged that as a standard in all cases
- Risk was to be assessed (even on a solicitor and client assessment) by reference to the facts and circumstances as they reasonably appeared to the solicitor or counsel when the funding arrangement was entered into and at the time of any variation of the arrangement.

# Yet another slap on the wrist, or not this time! Misconduct in costs proceedings

**Matthew Waszak**

## Introduction

Misconduct and CPR 44.11 is currently a fashionable subject in costs litigation. Practitioners will need no reminder of the Court of Appeal's decision in *Gempride Ltd v Bamrah and Another [2018] EWCA Civ 1367* (covered by our last edition) or indeed familiarisation with the various misconduct challenges which have since followed it. Our coverage in this edition of *Andrews & Ors v Retro Computers & Ors [2019] EWHC B2* serves as yet a further example of this recent trend.

For practitioners who have been faced with these challenges, the unsuccessful appeal and decision of Stewart J in *Murray v Oxford University Hospitals NHS Trust [2019] EWHC 539 QB*[1] may provide some welcome relief.

## The facts

At the detailed assessment of the claimant's costs arising from his clinical negligence claim against the defendant and which totalled £182,212, the defendant contended that the Bill had been mis-certified in five respects:

**First**, the Bill certified that there had been no interim payments on account of costs when interim payments of £90,000 had been made.

**Second**, the Bill stated that the risk assessment was conducted by the claimant's solicitor when, in fact, it had been conducted by another firm, who had previously acted for the claimant in the same case.

**Third**, the Bill claimed a 100% success fee but the risk assessment stated that there was a 60% prospect of success which it is said equated to a 67% success fee.

**Fourth**, the statement of reasons for the percentage increase in the Bill narrative was inaccurate and bore no resemblance whatsoever to the true statement of reasons.

**Fifth**, the Bill narrative inaccurately stated the Part 36 risk as: *"if this happens we will not claim any costs for the work done after the last day for acceptance of the offer or payment"*. The CFA actually stated: *"if this happens we will not add our success fee to the basic charge for the work done after we receive notice of the offer or payment."*

Relying on those points, the defendant made an application under CPR 44.11 to disallow in full the claimant's solicitors' costs, contending that the Bill should be reduced from £182,212 to nil.

Deputy Master Campbell dismissed the application, and made no reduction under CPR 44.11 to the claimant's costs.

He made the following findings in relation to the alleged mis-certification(s):

**i.** The fact that the Bill certified that there had been no interim payments on account of costs when interim payments of £90,000 had been made was a *"trifling error"* [9][2] which *"should [not] sound in any disallowance of the costs claimed"* [9].

**ii.** The Master accepted the reason (two changes of solicitors[3]) for why the Bill stated that the risk assessment had been undertaken by the wrong solicitors, and for why the statement of reasons for setting the success fee was inaccurate. While the original risk assessment should have been disclosed when the claimant entered into the CFA with his first firm of solicitors, it was the standard form risk assessment of his subsequent solicitors that was recited in the Bill. The Master found that to be an error about which there was *"nothing deliberate"* [12], and for which he accepted the explanation.

**iii.** There was no error in the Bill in claiming for a 100% success fee [19]. Though the risk assessment stated that there was a 60% prospect of success, equating to a 67% success fee, the CFA provided for a 100% success fee.

**iv.** The inaccurate information as to Part 36 risk in the CFA was not *"an error or omission or misconduct that should sound in any disallowance of the solicitor's costs"* [23]. The effect of the inaccurate information would instead, as held by the Master, sound in the level of success fee allowed.

The Master assessed the Bill in the sum of £114,364.80. The defendant appealed the Master's decision on that issue and in relation to the Master's decision to allow the ATE premium in full[4].

## The appeal

Stewart J held that Deputy Master Campbell *"was fully entitled to find that this was not a case of improper or unreasonable conduct within the terms of CPR 44.11"* [44], and dismissed the appeal.

He did so after considering the detail of the arguments which had been made by the defendant in relation to its CPR 44.11 application, and the consequent findings which had been made by Deputy Master Campbell in relation to them.

Stewart J held that:

**i.** The finding that the mis-certification of the interim payments on account was a *"trifling error"* which *"should [not] sound in any disallowance of the costs claimed"* was *"an entirely proper one that [could] not be interfered with"* [34].

**ii.** The Master was entitled to find that there was no mis-certification in relation to the claim in the Bill for a 100% success fee [35].

**iii.** The other three mis-certifications – (i) that the risk assessment was stated to have been conducted by the wrong solicitors (ii) that the statement of reasons for setting the success fee was inaccurate and (iii) the inaccurate statement in relation to Part 36 risk – were likely to have arisen from the error of using the standard risk assessment terms of the claimant's subsequent solicitors [43.1(iii)]. Importantly, there was nothing to suggest that the claimant's solicitors realised their errors prior to the detailed assessment hearing and the defendant was not misled such that events would have turned out differently.

## Conclusion

For practitioners, this case serves as a useful example of judicial resistance (and common sense) towards the recent flurry of applications under CPR 44.11 in relation to misconduct.

Where such an issue is raised, the starting point for any practitioner is consideration of CPR 44.11 and its extensive exposition in the Court of Appeal's judgment in *Gempride*. In this case, Stewart J helpfully summarised at [43.2] the relevant principles from *Gempride*:

**i.** Certification of a Bill is very important. The Court places trust in the solicitor's certification.

**ii.** Conduct does not have to be in breach of any professional rule nor dishonest so as to amount to "improper" or "unreasonable".

**iii.** Mistake or negligence, without more, is insufficient.

**iv.** Even when the threshold criteria are established, the Court still has a discretion whether to make an order.

However, while this case serves as useful factual example of the application of those principles, in a situation in which the CPR 44.11 application was unsuccessful, costs practitioners must be alive to the sanctity of certification and adverse consequences which may follow mis-certification. tgc

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**1.** The decision also considers an appeal against Deputy Master Campbell's decision to allow the claimant's ATE premium in full. This article does not consider that aspect of the judgment, at [45] to [57].

**2.** All numbered references are references to paragraphs in Stewart J's judgment and not the judgment of Deputy Master Campbell.

**3.** There had been two changes of the claimant's solicitors during the conduct of the case. The claimant was first represented by Marshall and Galpin. He was then represented by Withy King, followed by Royds Withy King, after the merger between Royds and Withy King.

**4.** That second aspect of the decision is not covered by this article. Those interested should read the judgment at [45] to [57].

# The effect of misconduct in a substantive case in the assessment of costs at detailed assessment: Andrews & Ors v Retro Computers & Ors [2019] EWHC B2 (Costs)

**Lionel Stride**

**In Andrews & Ors v Retro Computers & Ors [2019] EWHC B2 (Costs), the High Court held that the power to impose cost sanctions in relation to misconduct pursuant to CPR 44.11(1)(b) could not be used to negate a party's liability for costs where such issues could have been dealt with at the time the costs order was made. The issue of conduct was not open to reconsideration on grounds of issue estoppel; to allow otherwise would increase the risk of double-jeopardy and would be an inappropriate "overstepping" of the jurisdiction of the costs judge.**

The matter initially arose from a notice of intended forfeiture by the Defendants served upon the Claimants. The Claimants made an application for injunctive relief, which included numerous claims of harassment, defamation and intimidation by the Defendants; these so-called "Conduct Issues" were not subsequently pursued by the Claimants and, consequently, the Defendants became entitled to the costs arising from those issues (the allegations were vehemently denied, the Defendants' case being that the Conduct Issues were raised in an attempt to incur additional costs and cause distress). Ultimately, however, the interim injunction application was still successful; the Defendants were ordered not to declare the shares to be forfeit and costs were reserved. After the final hearing, the Court made an issue-based costs order requiring the Defendants to pay costs generally, but with the Claimants to pay the costs of the Conduct Issues. Unsurprisingly given the litigation history, the Defendants then took issue with the provisional assessment of the Claimants' costs and requested a post-provisional hearing.

Costs were assessed at just over £38,000 at the post-provisional assessment (over two days) but the Judgment addresses a further application made by the Defendants between the two hearing dates; they sought the partial or total disallowance of the Claimants' costs pursuant to CPR r.44.11(1)(b) on the basis that *"the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper."* Multiple allegations of misconduct were made, namely that the Claimants had lied in witness statements; misled the court through redacted documentation; intimidated, denigrated and defamed the Defendants; intercepted communications to the police and the Defendants' solicitors; abused their positions in the Defendant company by contacting trading partners and advisors to prevent the Defendant from pursuing its business effectively; and knowingly raising false allegations.

Unreasonable and improper conduct during the course of litigation that gives rise to costs is capable of engaging CPR 44.11(1)(b). As highlighted by Deputy Master Friston ('the Judge'), a finding of misconduct on this basis is a two-stage affair: Firstly, the court must determine whether the relevant threshold criteria has been met (i.e., whether there had been improper or unreasonable behaviour); and, secondly, the court must consider whether it would be just to impost a discretionary sanction. The Judge noted that, although CPR 44.11(1)(b) does not itself contain the word "misconduct", it is contained within the title to the provision, which points to the nature of the court's discretion [§64]. Citing *Gempride v Bamrah* [2018] EWCA Civ 1367, he emphasised that an action would amount to misconduct where no reasonable explanation was given or which the consensus of professional opinion would regard as improper. The scope of "misconduct" was therefore to be construed narrowly, being so serious as to justify serious professional penalty and not merely mistakes or errors (despite in this case the allegations being against a litigant personally, rather than his representatives) [§65]. However, the state at which the alleged misconduct occurs is also critical: In reliance upon the comments of Dyson LJ in *Lahey v Pirelli Tyres Ltd* [2007] EWCA Civ 91 (amongst other cases), the Judge highlighted the need to ensure that conduct issues raised during assessment are not attempts to vary a costs order made during substantive proceedings; this should be addressed when deciding the principle of costs. On this basis, given that the Conduct Issues occurred during the litigation, all nine allegations of misconduct were rejected; and the assessed costs were awarded in full.

It was held that a costs judge would be overstepping the mark by making reductions in costs for arguments that should properly come before the trial judge, unless such issues had been specifically reserved for detailed assessment; it would be contrary to the overriding objective and the effective management of the court's resources to allow parties "to lengthen detailed assessment proceedings by allowing them to have, what in effect, are second bites at the cherry" [§75]. In this instance, the court had already made an issue-based costs order that took into account the conduct of the parties, which gave rise to issue estoppel; at this late stage, to revisit those issues would have amounted to double jeopardy [§§76-77]. Accordingly, the court's ability to impose a sanction based on the alleged misconduct of the Claimant as sought by the Defendants was limited; the Judge held **"CPR r 44.11(1)(b) is not to be used in such a way as to allow a paying party to adjust or negate his or her liability for costs for reasons that were or could have been addressed at the time the costs order was made" [§80]**.

Although the nature of the alleged misconduct was unusual, Andrews provides a clear indication of the scope of the costs judge's discretion in costs proceedings; save for matters which have been expressly reserved for the detailed assessment, a judge will not consider issues which have, or ought to have, been considered at the substantive trial (and in particular at the time when the costs order was made). For a party to rely on rule 44.11(1)(b) to obtain punishment for the other side's misconduct during proceedings, that party must act before the making of the costs order; the costs judge will ordinarily be bound by the terms of that order; and the costs to be disallowed will be limited to those incurred during the litigation as a result of that conduct. Such an order does not, however, limit the ability of the costs judge otherwise to reduce costs at his or her discretion, nor to sanction misconduct during the course of the costs assessment itself.

# Challenging the reasonableness of block-rated ATE premiums using 'comparator evidence'

**Matthew Waszak**

## Introduction

Can a paying party challenge the reasonableness of a block-rated ATE premium by relying on evidence of comparator premiums from other cases?

In *Kelly v Bellway Plc (2019)*, His Honour Judge Gosnell DCJ allowed an appeal against a District Judge's reduction to a block-rated ATE premium which had been based on comparator evidence provided by the receiving party. I acted for the successful appellant on appeal. The judgment can be read at: https://tgchambers.com/wp-content/uploads/2019/04/Kelly-v-Bellway-PLC.pdf.

## This case

The claimant took out a pre-LASPO ATE policy to fund a personal injury claim arising from a tripping accident, which settled for £6,500 four days before trial. The premium, which was staged and block rated, came to a total of £20,698.83 (including Insurance Premium Tax).

At detailed assessment, the defendant challenged the reasonableness of the ATE premium by contending that the premium in this case was significantly more expensive than the expected range of ATE insurance premiums for other low value, fast track public liability claims. The defendant relied on a witness statement which exhibited four 'comparator ATE insurance premiums':

**i** An Abbey Legal Policy which was a staged public liability policy with a premium of £2,115 if the claim concluded after issue of proceedings without being allocated to the multi track;

**ii** An Allianz policy which was a stand-alone Non-RTA fast track policy with an indemnity of £100,000 with a premium of £793.94;

**iii** A Claimsafe policy which was a stand-alone Non-RTA policy with an indemnity of £35,000 and a premium of £795; and

**iv** An Allianz policy which was a stand-alone Non-RTA fast track policy with an indemnity of £100,000 for a premium of £1,848.36.

In addition, the witness statement exhibited a publication from the University of Lincoln, titled Excessive and Disproportionate Costs in Litigation, which appeared to show that the average ATE premium for a public liability personal injury claim was £1,385.

At detailed assessment, the District Judge held that she could rely on the defendant's evidence of comparator premiums. She reduced the ATE premium from £20,698.83 (including Insurance Premium Tax) to £2,115.00[1] (also including Insurance Premium Tax) on the basis that:

- The claimant had failed to show she acted reasonably in the selection of the ATE policy.
- She was not satisfied that the claimant had done all that was reasonably required in the selection of the policy.
- It was appropriate to reduce the ATE premium because appropriate steps were not taken at the inception of the ATE policy.

## Appeal

His Honour Judge Gosnell allowed the appeal against the reduction to the ATE premium and restored the original claim for the ATE premium to the Bill[2]. The two main planks of the decision were:

**First**, the District Judge fell into error in relying on the comparator evidence provided [49].

**Second**, a careful assessment of the methodology used by the ATE insurer would have shown that the premium was reasonable, at least reasonable by the standards set out in *Rogers v Merthyr Tydfil Borough Council [2006] EWCA Civ 1134* [51].

Readers will need no reminder of the Court of Appeal's landmark decision in Rogers v Merthyr Tydfil, or the case law which has followed that.

Practitioners will also be aware of the landmark appeals in the cases of *West v Stockport NHS Foundation Trust* and *Demouilpied v Stockport NHS Foundation Trust* (judgments of HHJ Smith in the Manchester County Court) which are finally scheduled to come before the Court of Appeal in July 2019.

The appeal in *Demouilpied* concerns how the new proportionality test should be applied in relation to post-LASPO ATE premiums in clinical negligence cases. 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 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. In view of the Court of Appeal's decision in *Rogers v Merthyr Tydfil CBC [2006] Civ 1134*, the key question is whether expert evidence is required to challenge the reasonableness of a block rated ATE premium. 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.

The significance of those looming appeals has been underlined by the fact that it is understood that Mr Justice Kerr and Master Leonard have been commissioned to prepare a paper on ATE premiums for the Court of Appeal, ahead of the hearing of the appeals.

In *Kelly v Bellway*, His Honour Judge Gosnell provided a lengthy exegesis of the law in relation to block-rated ATE premium recovery. However, while practitioners await further guidance from the Court of Appeal, *the real significance* of this judgment lies in the Judge's finding at [49] that the District Judge fell into error in relying on the comparator evidence provided by the Defendant. In arriving at that conclusion, HHJ Gosnell held that:

- The comparator premiums provided by the Defendant *"were not truly comparable"* [51].
- Three of the comparators the Defendant sought to rely upon were policies with a single premium, which, relying on paragraph 111 of Brooke LJ's judgment in *Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134*, did not bear legitimate comparison to the three-staged premium in this case [49].
- In relation to the remaining comparator, HHJ Gosnell found at [50] that: *"This leaves only one comparable policy which may be relevant.....[described as] a staged public liability personal injury policy with a premium of £2,115 if the claim concludes post proceedings on the fast track and £4,335 on the multi track. I have to say that the redacted policy schedule only describes the accident type as "other" and does not make clear what happens if a fast track claim goes to trial. No details are given about the facts of the claim which the policy covered nor what is covered or the limits of indemnity.* ***The main problem with this type of evidence is that there is no evidence that the policy in question could have been offered to and accepted by the Appellant****. For commercial reasons some ATE insurers only offer policies to solicitors on their panel who are bound by certain service standards, including the need to place all business with that insurer (as the solicitor in Rogers was obliged to do). Insurers may also refuse to write business in relation to particular types of claims.* ***The fact that a claimant has secured ATE insurance for their own claim against the Respondent's insurers in this case is not evidence that the Appellant in this case could have secured the same insurance on the same terms"*** (emphasis added).

## Conclusion

In *Kris Motors v Fox Williams [2010] EWHC 1008 (QB)*, Simon J (as he then was) held that where a paying party seeks to challenge the size of an ATE premium, "there is an evidential burden on the paying party to advance at least some material in support of the contention that the premium is unreasonable" [44], in relation to which he held that "the Court envisaged the hearing of expert evidence as the reasonableness of the charge". *Callery v Gray [2002] UKHL 28* at [43] and [44] and *Rogers v Merthyr Tydfil County Borough Council [2006] EWCA Civ 1134* at [117] provide clear authority for the proposition that Costs Judges, unassisted by expert evidence, do not have the appropriate information to alter the quantum of a block-rated ATE premium.

In allowing the appeal in this case, HHJ Gosnell held that the District Judge fell into error by relying on the comparative evidence provided by the defendant to challenge the claimant's block-rated ATE premium. To that extent, this judgment serves as a useful weapon in the armoury of receiving parties who seek to head off challenges to block-rated ATE based on comparator evidence. However, costs practitioners wait in anticipation of the further guidance from the Court of Appeal as to the general issue of the evidence required to challenge the reasonableness of a block-rate ATE premium.

**1.** Eagle-eyed readers will note that this was the cost of the ATE premium for the Abbey Legal Policy in the defendant's comparator evidence

**2.** Which was conceded in the sum of £19,800.93.

# Liability to pay solicitor's costs after a CFA came to an end following the client's rejection of legal advice: *Butler v Bankside [2019] EWHC 510 (QB)*

**Lionel Stride**

**In Butler v Bankside [2019] EWHC 510 the High Court held that a client would be liable to pay her solicitor's costs following termination of a CFA under standard clause 7(b)(iii); this applied whether the rejected advice was in relation to the making of, or acceptance of, an offer for settlement.**

The Respondent, Bankside Commercial Limited, was a company of solicitors instructed by the Appellant, Ms Butler. The parties had entered into a Conditional Fee Arrangement ("CFA") in respect of Ms Butler's claim against Nikon Metrology NV. By clause 7(b)(iii) of the standard terms, the solicitors were entitled to end the agreement if the client rejected its opinion *'about making a settlement to an opponent'*; this meant that, if rejected, Ms Butler would become contractually liable for the basic charges and disbursements incurred by her solicitors, as well as any success fee if she subsequently succeeded in her claim for damages in the absence of her solicitors.

Nikon made an unsuccessful settlement offer of €90,000, followed by an unsuccessful session of mediation. With an arbitration hearing looming, her solicitors strongly advised that she make a counter-offer of €90,000 plus 50% of her costs. Ms Butler refused this advice, prompting her solicitors to invoke the termination clause of the CFA. Ms Butler proceeded with her claim alone but was then awarded a far lower sum of £40,000, with a costs order not entirely in her favour.

The solicitors successfully applied for summary judgment in the sum of £238,500, the costs recoverable under the retainer. Ms Butler sought to appeal this decision, on the basis that her failure to accept her solicitor's advice did not fall within clause 7(b)(iii) of the CFA; emphasising the difference between the making of a settlement offer and the process of *"making a settlement"*, the latter was said to be the active process that ends the matter through acceptance of an offer, and the only scenario under which the clause could reasonably apply.

On appeal to the High Court it was held that the facts represented a clear rejection of the solicitors' opinion on making a settlement offer; **CFA clause 7(b)(iii) was construed to include both the making of settlement offers and the acceptance of any such offers made – "a settlement is an end point but the making of one is a process". [§24]** To interpret this clause as simply applying to the acceptance of settlement offers would be inconsistent with the language of the clause and would "lead to procedural distinctions devoid of either logical justification or practical coherence" [§19]. Mr Justice Turner identified clear circumstances where a claimant would reasonably be expected to make an offer to settle, and her solicitors would be expected to take the initiative in negotiations; for example, where the claimant's case had deteriorated, where the defendant was waiting for the claimant to make an offer (or simply "dragging its heels"), or where the financial position of the other side was deteriorating such that a settlement offer from the claimant would be prudent [§20].

Amongst the Appellant's arguments was the need to protect against the spectre of unscrupulous solicitors, "who wilfully undersell their client's case in order to serve their own financial interests in costs". This was rejected by the Court, which highlighted that construing the term of the retainer narrowly would provide a random and wholly ineffective protection against advice to settle a case an undervalue (i.e., to accept a low offer), whilst excluding those advising on the making of a realistic higher counter-offer; that solicitors are bound by their Code of Conduct to provide services to their clients in a manner which protects their clients' interests; and that bad advice leading to loss would be liable to expose solicitors to a claim in professional negligence.

In upholding the costs judgment, the High Court emphasised that the letters sent by the Respondent had clearly and unambiguously set out its opinion; that opinion was about making a settlement with the opponent; and the Appellant had rejected that opinion. This is therefore a very useful guideline for solicitors seeking to terminate a retainer in similar circumstances (and with the same standard clause about rejection of 'making a settlement' with an opponent). It was emphasised that the applicability of the termination clause remains fact-centric; the circumstances of the advice given, the timing of the opinion and the manner in which it was communicated will determine whether a solicitor can reasonably terminate the CFA. However, provided there is clear evidence that their opinion has been rejected, *Butler* is helpful authority for the proposition that solicitors may terminate a CFA with such a clause, and recover its costs, where a client rejects their reasonable advice in any aspect of settlement.

# Can a court award some but not all of the Part 36 consequences under CPR r.36.17(4)?

**Harriet Wakeman**

**The question before Master McCloud in *JLE v Warrington & Halton Hospitals* [2018] 12 WLUK 450 was whether the Court has the power to award some, but not all, of the consequences set out in CPR r.36.17(4).**

Readers will no doubt be familiar with the provisions of CPR r.36.17(4). It provides that where the claimant obtains judgment against the defendant which is at least as advantageous to the claimant as the proposals contained in the claimant's Part 36 offer, the court *"must, unless it considers it unjust to do so"*, order that the claimant is entitled to:

**a** interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;

**b** costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;

**c** interest on those costs at a rate not exceeding 10% above base rate; and

**d** provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount (not exceeding £75,000) which, in cases up to £500,000, is 10% of the amount awarded (see CPR r.36.17(4) itself for the full provision).

The circumstances in *JLE v Warrington* were that on 21st June 2018, the Claimant had made a Part 36 offer to accept costs inclusive of interest in the sum of £425,000.00. That offer expired on Friday 13th July 2018. At a detailed assessment on 16th July 2018, Master McCloud assessed the Claimant's costs in the sum of £421,089.16 plus interest of £10,723.89. The amount awarded therefore totalled £431,813.05. As such, the Claimant had beaten its offer on costs by approximately £7,000. It therefore fell to Master McCloud to determine the costs consequences of the Claimant beating its own offer.

There was a dispute between the parties as to whether consequence (d), the 10% additional amount, should be awarded. On behalf of the Defendant it was argued that the Court had to approach the question of whether it was 'unjust' to make the order separately in relation to each one of the four consequences, and as such, it was open to the court to award all, some or none of the consequences. In contrast, the Claimant argued that there was no discretion for the court to omit one of the consequences, here consequence (d).

Master McCloud considered the cases of *Thinc Group Limited v Kingdom* [2013] EWCA Civ 1306 and *Davison v Leitch* [2013] EWHC 3092 (QB), which both concerned CPR r.36.14(3); a predecessor to CPR r.36.17(4). In *Thinc*, Master McCloud noted that only a proportion of the costs on the indemnity basis had been awarded. Equally, Master McCloud cited paragraph 73 of Davison, where Andrews J stated: *"I consider that it would not be unfair to the Defendant for some of the consequences of Part 36.14 to be visited on him but that it probably would be unfair for all of them to apply."*

Master McCloud also considered the case of *Bataillion v Shone* [2015] EWHC 3177 (QB), which related to the current version of CPR r.36.17(4). In that case, Waksman J had awarded $50,000 USD under consequence (d), whereas a strict application of the 10% additional sum would have led to an automatic award of the maximum £75,000.

Master McCloud held that the penalties in CPR r.36.17(4) were indeed severable and the 10% additional amount was not awarded. The most significant factors in reaching the decision not to award the additional amount were stated, at paragraph 40, to be:

*"(1) the very small margin by which the offer was beaten relative to the much greater size of the bill (2) the fact that where a bill is reduced (and seems to have been expected to be reduced) significantly, it will on the whole generally be very difficult for a party to know precisely or even approximately to within a few percent, where to pitch an offer such that even a competent costs lawyer would operate close to chance level as to whether an offer is likely to be 'over' or 'under' at the end of the hearing, and (3) the large size of the 10% 'bonus' award relative to the margin by which the offer was beaten."*

It was therefore held to be "disproportionate" to award the 'bonus' of 10%.

Leaving aside the fact that proportionality remains wholly undefined as a concept, this judgment does not sit comfortably with the progress made in the CPR since the Court of Appeal's judgment in *Carver v BAA Plc* [2008] EWCA Civ 412 and the rule changes as reflected in the current CPR 36.17(2), that being the same applicable rule before Master McCloud, namely: *in relation to any money claim or money element of a claim, "more advantageous" means better in money terms by any amount, however small.* For the time being at least, practitioners will have to be mindful of this decision. It is understood that this case is the subject of an appeal to be heard in June 2019, and that Master Rowley will be sitting as an assessor.

# Escaping the fixed costs regime: what constitutes "exceptional circumstances"?

**Ellen Robertson**

**In *Ferri v Gill [2019] EWHC 952*, Mr Justice Stewart considered the relevant criteria to be applied when determining whether there were "exceptional circumstances" warranting a departure from fixed costs, in a claim where the claimant argued fixed costs should not apply where the case had started in the portal but settled for an excess of £25,000.**

The claimant, a cyclist, had sustained injury when he collided with the defendant's opening car door. His initial medicolegal expert, a GP, considered that he would make a full recovery from his injuries and so his claim was commenced within the protocol for low value personal injury claims ("the Portal"). Liability was admitted. The claimant then instructed new solicitors, who wrote to the defendant advising that they did not consider this to be a fast-track Portal claim, and instructed an orthopaedic surgeon. The surgeon diagnosed damage to the acromioclavicular joint and the Claimant underwent surgery. The claim eventually settled for £42,000 without proceedings being issued.

The claimant issued Part 8 proceedings, seeking more than fixed recoverable costs. The matter came before Master McCloud on 25 May 2018, who considered that neither the value of the claim or the question of the level of costs incurred would be determinative, but considered that it was wrong to say that the case itself needed to be exceptional. She considered that the value of the claim and the value of the costs did take the claim out of the general run of the cases dealt with within the portal. In reaching her decision, she described the test of being "outside the general run" as being a "low bar". Her reason for considering it a low bar was that the portal was intended to deal with simple cases that would usually be fast-track cases.

On appeal, Mr Justice Stewart noted Coulson LJ's observations in *Hislop v Perde* that the purpose of the fixed costs regime was to ensure that parties began and ended proceedings with the understanding that only fixed costs would be recoverable, providing certainty and ensuring that costs remained proportionate.

Mr Justice Stewart found that the Master was wrong to use a "low bar" when considering whether there were exceptional circumstances. He noted that at that point, the judgment of *Hislop* was not available to the Master, and noted the *obiter dictum* of Coulson LJ that "it goes without saying that a test requiring 'exceptional circumstances' is already a high one".

He also held that the Master was wrong to compare the present matter to claims within the portal. The relevant test would be to compare it to other claims that had exited the portal, as that was the relevant costs regime that the Claimant was seeking to depart. He therefore allowed the appeal and the matter was remitted for reconsideration.

Practitioners should therefore note that the "exceptional circumstances" test remains a high test. Settling for more than £25,000 will not necessarily amount to exceptional circumstances. When considering whether the circumstances are exceptional, the Court should compare the present case to other cases that have exited the portal, not to cases remaining in the portal.

# Contracting out of Fixed Recoverable Costs – *Adelekun v Siu Lai Ho*

**James Yapp**

**In *Adelekun v Siu Lai Ho* (unreported), County Court at Central London, 18th October 2018, HHJ Wulwik concluded that the terms of a consent order signed following acceptance of a Part 36 offer took the case outside the fixed costs regime at section IIIA of CPR Part 45.**

## The Facts

The Claimant brought a claim for personal injury arising from a road traffic accident. Her claim was allocated to the fast track and would ordinarily have been subject to the aforementioned costs regime. She subsequently applied to reallocate the claim to the multi-track. In accordance with *Qader v Esure* [2016] EWCA Civ 1109, re-allocation would have taken the case outside that regime. The application was due to be heard on 24th April 2017.

On 19th April the Defendant made a Part 36 offer in the sum of £30,000. The offer stated that if it was accepted within 21 days then the Defendant would pay the Claimant's costs in accordance with r36.13, such costs to be assessed if not agreed. As readers will be aware, r36.13 deals with 'standard costs' cases but is subject to r36.20 where section IIIA of CPR Part 45 applies.

On 20th April the Defendant's solicitor emailed the Claimant's solicitor to chase a response to the offer. Within her email she stated that *"we can consent t o the matter being multi track"*.

The following day the Claimant's solicitor emailed the Defendant's solicitor confirming that the Claimant would accept the offer. She attached a draft Tomlin order *"setting out the terms of the settlement"*. She explained that the court had asked the parties to submit a consent order so the application hearing could be vacated. Both solicitors signed the order.

By this order, the parties agreed to stay proceedings and to vacate the application hearing. The order did not provide for re-allocation to the multi-track. As for costs, it stated:

*"The defendant do pay the reasonable costs of the claimant on the standard basis to be the subject of detailed assessment if not agreed".*

Perhaps inevitably, the parties were unable to agree whether or not the fixed recoverable costs regime applied. The Defendant issued an application to determine this issue.

## The Decision At First Instance

Deputy District Judge Harvey rejected the Claimant's preliminary contention that the issue should be left for detailed assessment. He proceeded to vary the terms of the consent order so that it provided for fixed recoverable costs only, subject to the Claimant's right to apply for costs in excess of that amount pursuant to r45.29J.

He referred to the consent order – by which the parties purported to agree to *"come out"* of the fixed recoverable costs regime – as unnecessary. In his judgment, once the Claimant had accepted the Part 36 offer, Part 36 provided everything necessary for her costs to be assessed. He also considered that the order was *"ultra vires"* and should not have been approved by the court because of the conflict with the wording of the fixed recoverable costs regime.

## The Arguments On Appeal

The Claimant appealed. For present purposes, the first ground of appeal is of interest. The Claimant argued that the Deputy District Judge had wrongly varied the consent order which contained the parties' contractual intention that her costs should be subject to detailed assessment on the standard basis.

The Defendant opposed the appeal. By her respondent's notice, she argued that there was an additional reason to uphold the DDJ's decision. She contended that an order for *"reasonable costs on the standard basis to be the subject of detailed assessment if not agreed"* (or similar) did not oust the fixed recoverable costs regime.

## Solomon v Cromwell

HHJ Wulwik considered in detail the decision of the Court of Appeal in *Solomon v Cromwell Group Plc & Ors* [2012] 1 WLR 1048. *Solomon* related to two consolidated appeals concerning Part 36 offers in cases subject to the fixed recoverable costs regime set out at section II of Part 45. In one case the offer stated that the Defendant would pay the Claimant's reasonable costs to be assessed if not agreed. In the other, the Defendant offered to pay the Claimant's reasonable costs in accordance with CPR r36.10 (now replaced by r36.13).

Moore-Bick LJ, delivering the lead judgment, accepted that there was nothing in the rules to prevent the parties settling a dispute on whatever terms they pleased (including terms as to costs). However, there might be limitations on the means of enforcing any such agreement given the limited costs which a court could award within costs-only proceedings under r44.12A (as it then stood, now replaced by r46.14). Despite the particular limitations of r44.12A, Moore-Bick LJ concluded that an agreement to pay more than fixed recoverable costs could be enforced by ordinary process.

He therefore held that parties could, in principle, contract out of the fixed recoverable costs regime. He also concluded that whilst the fixed recoverable costs regime *"does involve an assessment of some kind... I do not think that one can properly regard it as representing an assessment on the standard basis"*.

Notwithstanding that one of the offers referred to the *"assessment"* of the Claimant's reasonable costs, Moore-Bick LJ found that neither offer indicated a willingness on the part of the Defendant to take on a costs liability beyond that provided for in the rules (i.e. beyond fixed recoverable costs). He therefore held that neither Claimant could recover more than the prescribed fixed recoverable costs.

## The Decision In Adelekun

The Part 36 offer in *Adelekun* stated that the Defendant would pay the Claimant's costs in accordance with r36.13 and that such costs would be subject to detailed assessment if not agreed. It therefore combined the wording of the two offers considered in *Solomon*, neither of which was held to have effectively 'contracted-out' from the fixed recoverable costs regime.

HHJ Wulwik distinguished *Solomon* on two grounds: 1) the existence of the subsequent consent order; and 2) the fact that – because of the agreement that the case should be re-allocated to the multi-track – this costs issue was likely to be in the parties' minds at the relevant time.

He concluded that the consent order providing for *"costs on the **standard basis** to be the subject of assessment if not agreed"* (emphasis added) could not be construed as an agreement to pay costs on the usual fixed costs basis. He noted that the costs order agreed was entirely consistent with the parties' intention that the matter should be re-allocated to the multi-track. The consent order therefore ousted the fixed recoverable costs regime.

HHJ Wulwik also considered the Court of Appeal's decisions in *Sharp v Leeds City Council* [2017] EWCA Civ 33 and *Hislop v Perde* [2018] EWCA Civ 1726. It was not suggested in either case that the parties had reached an agreement contrary to the usual position where a Part 36 offer was accepted in a fixed recoverable costs case. As such, HHJ Wulwik concluded that there was no reason to doubt the dicta of Moore-Bick LJ in *Solomon*.

A number of questions arise from the decision in *Adelekun*. Was the subsequent consent order an effective variation of the concluded settlement when the Claimant accepted the Part 36 offer? Was the Claimant's response to the offer (with the consent order attached) actually a counter-offer which the Defendant subsequently accepted? What wording is necessary or sufficient to 'contract-out' from the fixed recoverable costs regime?

## Other Cases

As well as other first instance decisions, this issue was considered on appeal in *Bratek v Clark-Drain Limited* (unreported), County Court at Cambridge, 30th April 2018. HHJ Yelton concluded that the terms of r45.29D are mandatory and that the parties could not contract out of them.

This position is arguably difficult to reconcile with the dicta of Moore-Bick LJ. Why should the parties be able to reach an agreement contrary to the fixed recoverable costs regime at section II of Part 45, but not the section IIIA regime?

## Final Thoughts

The Defendant in *Adelekun* was recently granted permission to bring a second appeal. It seems we can hope for further guidance from the Court of Appeal before the end of January next year. Given that we have conflicting County Court appeal decisions – and given the ongoing consultation on the extension of fixed recoverable costs – this is likely to be watched closely.

Until then, the best way to avoid disputes of this sort is to ensure that any settlement agreement is expressed in clear and unambiguous terms.

# QOCS: THE OUTER LIMITS

**Anthony Johnson**

**Whilst the meaning and application of the Qualified One-Way Costs Shifting (QOCS) regime now appears to be straightforward and largely understood in typical situations, there continues to be dispute about issues arising on the margins in cases with characteristics outside the norm. Much satellite litigation turns on the existential question of whether the QOCS regime is engaged in the first place rather than about the finer points of its application.**

One of the main contentious issues that currently exists in relation to QOCS concerns the costs position in cases where the Defendant has pursued an unsuccessful counterclaim for personal injury. Can a Claimant (who may or may not have themselves pursued a personal injury claim) recover costs in the ordinary course of events or can the Defendant rely upon QOCS protection deriving from their own personal injury claim?

Whilst one might think that this is a fairly common situation that must have been envisaged by the architects of the revised CPR 44.13-CPR44.17, the position is actually unclear as the rules are silent in relation to their approach in specific situations out of the ordinary, of which counterclaims are only one example that has been troubling the Courts. Ultimately, the answer to the question turns upon the interpretation of the term 'proceedings' in CPR 44.13, i.e. is the 'proceedings' the claim as a whole including the counterclaim or can it be construed as referring to one of the claim or the counterclaim which each constitute a separate set of proceedings?

Matters were further complicated in 2018 when there were two conflicting reported Circuit Judge level cases (the very existence of both makes it difficult to refer to them as even persuasive 'authorities') on the point. In his judgment in *Ketchion v. McEwan [2018] 6 WLUK 625* handed down in Newcastle on 28.06.18, HHJ Freedman found in favour of the Defendant, i.e. he upheld DDJ Thorn's decision to apply QOCS on the facts of the case, thus entitling the Defendant to benefit from QOCS protection in relation to the Claimant's successful claim. However, in her competing judgment in *Waring v. McDonnell [2018] 11 WLUK 203* handed down in Brighton on 06.11.18, HHJ Venn found for the Claimant, drawing a distinction between the Defendant's counterclaim in respect of which QOCS clearly applied and the Claimant's claim in respect of which it was held that it didn't.

## The Decision in Ketchion

One of the key considerations for HHJ Freedman was the Court of Appeal's judgment in *Cartwright v. Venduct Engineering [2018] EWCA Civ 1654* which was handed down on 17.07.18, just over two weeks after he had heard the appeal. He gave the parties permission to serve supplemental written submissions within fourteen days of the judgment being handed down. He indicated that the first relevant point that could be discerned from the judgment in **Cartwright** was that a wide meaning should not be given to the term 'proceedings' in the context of CPR 44.13. He felt that it also suggested that only very limited attention should be paid to the preparatory materials leading up to the relevant sections of CPR 44 coming into force, including the Final Report of December 2009.

The Judge also considered the decision in *Wagenaar v. Weekend Travel [2014] EWCA Civ 1105* where the Court of Appeal had held that QOCS protection does not extend to a Part 20 Claim brought on the back of a claim to which QOCS does apply. He noted that the Court in Cartwright had relied upon the fact that **Wagenaar** does not permit a claim brought against six defendants to be interpreted as six separate sets of proceedings as opposed to a single set of proceedings.

In paragraph 13 of his judgment, the Judge considered various issues that had been raised by the Claimant's Counsel about the potential consequences of a decision in the Defendant's favour. It had been pointed out that the Deputy's decision gave a strong incentive for defendants to bring counterclaims, even in situations where the same were of dubious merit, and that claimants would be placed under undue pressure if they were potentially liable for the defendant's costs. Perhaps most persuasively (although evidently not to HHJ Freedman!) was that the outcome, if upheld, could mean *"that an insurance company is able to avoid its obligations to meet the costs of a claimant who has succeeded in the main action."* Counsel for the Claimant sought to distinguish Cartwright on the basis that a distinction should be drawn between cases against multiple defendants and proceedings brought by a Part 20 Defendant in the same case.

Counsel for the Defendant sought to differentiate between setting the boundaries of QOCS protection, which he said was the aim of the relevant section of Coulson LJ's judgment in Cartwright, and the pursuit of spurious claims which he contended was a separate matter. The Defendant's position was that upholding DDJ Thorn's decision would not encourage frivolous or vexatious claims because a control mechanism already existed in respect of these- if Courts were of the view that a Part 20 claim was totally devoid of merit or was being used as a vehicle in order to give a defendant QOCS protection that it would not otherwise have been entitled to then the Part 20 claim could be struck out either as an abuse of process or as disclosing no reasonable grounds.

HHJ Freedman's decision is summarised in paragraphs 22–24 of his judgment:

*"Accordingly, I accept the submission, without hesitation, that it would be patently absurd and illogical if the word 'proceedings' is deemed to cover all of the claims brought against six separate defendants, but not a claim and Part 20 claim, both of which arise out of the same accident and are joined in one action. Whilst, on one view, it may seem unjust that the defendant can avoid payment of costs in the main action, purely as a result of bringing Part 20 proceedings for damages for personal injuries, it seems to me that it is an inevitable result of the wording of CPR 44.13 and 44.14. I agree with Mr. Lyons [for the Defendant] that if the intention was to limit a Part 20 claimant's protection in costs, such would have been expressly set out in the rules.*

*In my judgment, therefore, the proper interpretation of CPR 44.13 is that the reference to 'proceedings' is to both the claim and the counterclaim; and that since it is expressly stated that a Claimant includes a person who brings a counterclaim/additional claim, it follows that the Defendant/Part 20 Claimant has the protection of QOCS. For the reasons advanced by Mr. Lyons, I reject the submission that to interpret the provisions in this way will encourage spurious or hopeless claims for damages for Personal Injuries.*

*In my view, therefore, the decision of the Deputy District Judge was correct."*

## The Decision in Waring

Unlike **Ketchion**, **Waring** is a first instance decision, albeit one from a Circuit Judge. It is of some import, however, that having given her decision allowing the Claimant's claim and dismissing the Defendant's counterclaim in its entirety on 25.09.18, HHJ Venn adjourned the issue of costs to 11.10.18 and ordered the parties to file Skeleton Arguments in relation to the specific argument on the effects of the QOCS regime in the case.

It appears from the summary of the parties' arguments contained in the judgment that the arguments were on similar lines to those in **Ketchion**, albeit that they appear to have been rehearsed in a higher level of detail. Counsel for the Defendant's argument was effectively that the word 'proceedings' should not be 'artificially dissected' when the true position was simple- an unsuccessful counterclaimant benefits from costs protection. It was submitted that the status of a litigant is only important sometimes, and not in the present circumstances. The Claimant's Counsel argued that **Cartwright** can be distinguished on the basis that a claimant can choose how many defendants he pursues but has no control over whether or not a counterclaim is brought against him. He also referred the Court to the principle in the old case of *Medway Oil v. Continental Contractors [1929] AC 88* (not referred to in the judgment in Ketchion) that the costs of a claim are to be assessed as if the claim stood by itself and the costs of the counterclaim will compromise only those costs attributable to the increase in costs that the counterclaim has caused.

When analysing the case-law that she had been referred to, the Judge noted that Lewison LJ said in *Howe v. MIB [2017] EWCA Civ 2523* that in some contexts *"the word 'proceedings' can have a narrower* *meaning"* and that Lord Sumption held in *Plevin v. Paragon Personal Finance (No.2) [2017] UKSC 23* that 'proceedings' is not a term of art but that rather *"Its meaning must depend on its statutory context and on the underlying purpose of the provision in which it appears, so far as that can be discerned."* She commented that *"The underlying purpose of the QOCS regime is, as set out above, to protect those who suffer injuries from the risk of adverse costs orders obtained by insured, self-insured or well-funded defendants. The purpose is not to protect those who are liable to pay damages to an injured party from the risk of adverse costs made against them in their capacity as defendants or paying party."*

The most significant part of the judgment is probably paragraph 42 when the Judge lists five unjust consequences 'inconsistent with the stated aims of the QOCS regime' that would eventuate if the Defendant's approach were to be accepted: (a) insurers would be incentivised to encourage counterclaims irrespective of their merit (it being impractical to hold 'mini-trials' to determine which are meritorious and which are not; (b) road traffic claimants would be at a disadvantage when compared to EL and PL claimants who almost never face counterclaims; (c) access to justice would be reduced as most solicitors would surely cease to act when a counterclaim was received. This would be particularly stark in catastrophic injury claims where they might be extensive disbursements; (d) the Part 36 regime would have no teeth; and (e) Liability insurers would avoid having to pay costs to a successful claimant at all (it being noted that the QOCS regime was intended to remove recoverability of success fees and ATE premiums, but with base costs remaining recoverable).

The Judge accepted Counsel for the Claimant's point that the word 'proceedings' is often used interchangeably with the word 'claim' in the CPR. She held that the fact that there were two different claims was obvious from the Order that both parties had agreed at the conclusion of the trial, *i.e. judgment for the Claimant for agreed damages and counterclaim dismissed. She concluded, "The defendant in this case was not an unsuccessful claimant in the claimant's claim for damages for personal injury (he was not a claimant at all in the claimant's claim for damages for personal injury); he was an unsuccessful defendant (and an unsuccessful claimant in his counterclaim for damages for personal injury. He only has the protection of the QOCS regime in respect of his claim for damages for personal injury and does not benefit from it in the claimant's claim for damages for personal injury."*

## Which Case is Right?

It is only appropriate to begin this section with a caveat. Neither **Ketchion** nor **Waring** is binding and they illustrate that different Circuit Judges can reach diametrically opposed viewpoints in relation to what is essentially the same set of facts. It seems inevitable that this is a point that is likely to trouble the higher Courts sooner rather than later given the current lack of clarification.

In the absence of a binding authority on the point, it appears much more likely to this writer that **Waring** represents the correct position rather than **Ketchion**. Notwithstanding that **Ketchion** is an appellate authority and **Waring** is first instance, this is surely outweighed by the fact that Judge Venn had the opportunity to fully analyse, consider and reject the judgment in **Ketchion** when reaching her decision. The judgment in **Waring** is more than twice as long and its reasoning is elucidated in a much greater level of detail. It is also arguable that the adjournment in Waring for Skeleton Arguments and then eventually oral submissions on the specific costs point means that the process would be virtually indistinguishable from that in the appeal in Ketchion in any event.

It is notable that, in declining to follow **Ketchion**, HHJ Venn stated that *"It should be noted that HHJ Freedman did not have the benefit of the full argument I heard."* This comment certainly seems to be borne out by analysis of the legal arguments that are referred to in the two judgments. In particular, it does not appear that HHJ Freedman's judgment is consistent with the Medway Oil principle which has survived relatively unchanged for the best part of a century. This perhaps gives some force to Judge Venn's conclusion in paragraph 43 of her judgment that if such radical changes were intended then Parliament would have explicitly spelled them out (as opposed to HHJ Freedman's converse determination that Parliament would have spelt out the Claimant's interpretation if that were correct).

I believe that the key differentiator between the two decisions is their analysis of the applicable policy considerations- HHJ Venn focussed very much on the nature of the scheme itself and its implications in reaching her decision. It seems to me that it cannot possibly be right (or intended) that a claimant who recovered a multi-million pound sum in a catastrophic injury claim could be deprived of several hundred thousand pounds worth of budgeted costs because the Defendant pursued an unsuccessful claim for a six-month whiplash injury that would attract low-end Fast-Track/Portal costs in its own right.

Even if we were to take the benevolent view that defendants would resist the temptation to pursue frivolous counterclaims in those circumstances (despite the obvious tactical advantages of doing so if **Ketchion** were correct), at the very least it would be a factor that would encourage defendants to pursue borderline claims that they may not have otherwise pursued. Added to HHJ Venn's list of policy considerations, it is clearly in nobody's interests for the system to encourage litigating over liability rather than making an early admission and continuing on a quantum-only basis. I share Judge Venn's (implied) view that Judge Freedman was being way too optimistic in relying upon strike out/summary judgment as the mechanism to determine whether counterclaims were meritorious or not, but even if he we were right then that itself would generate increased strain on Court resources.

For all of the reasons advanced in the previous paragraphs, and lucidly by HHJ Venn on page 16 of her judgment, it seems quite likely that even if **Ketchion** were preferred in a higher Court appeal then Parliament would be likely to soon step in to change the law on account of the presumably unintended consequences that might arise if that case were correct.

Nevertheless, I can see no reason why unsuccessful Defendant counterclaimants should not continue to raise the argument based upon **Ketchion** that QOCS applies to the entirety of all claims included within 'the proceedings', and thus that the Defendant is protected from having to pay the Claimant's costs in the ordinary fashion. This would certainly not be the first time in costs law where the correct interpretation of a legislative provision was found to be at odds with original intention of the legislation. However, it would be sensible for Defendant solicitors to proceed on the basis, and certainly to advise their clients on the basis, that **Waring** is much more likely to be preferred in the ultimate clash between the two decisions.

# Guidance on Reckoning the Success Fee in Personal Injury Claims

**Anthony Johnson**

**In *NJL v. PTE* [2018] EWHC 3570, the Queen's Bench Division considered an appeal against an assessment of the Claimant's solicitor's success fee at 65% in a claim concerning a serious brain injury where a Conditional Fee Agreement had been entered into in August 2012 (i.e. before LASPO 2012 came into force), by which point the Defendant had formally admitted liability but was disputing causation and quantum. The claim had settled in the three-month window before trial for £1,150,000 plus £34,000 pa in periodical payments.**

The CFA in question was a 'CFA Lite' which provided for a success fee of 25% if the claim settled more than three months before trial and 100% thereafter (in actual fact, Leading Counsel had a separate CFA which included a 75% uplift at the intermediate stage). However, before District Judge Searl on the original costs assessment, the Claimant had conceded that the 100% success fee could not be justified and argued for a 67% success fee, which equated to a 60% chance of recovering costs if a 'ready reckoner' approach were adopted. Accordingly, the Judge's determination of the success fee actually amounted to only a nominal 2% reduction.

The Claimant's position was that the District Judge's reasoning could not be impugned as there were 'significant and real risks' regarding causation and quantum present. The Defendant's submission was that neither the Claimant's solicitors nor the District Judge had properly analysed the relevant risks. In actual fact, there was little Part 36 risk at the point that the CFA was entered into, and the fact that the Claimant was a protected party reduced the likely costs potency of any potential Part 36 offer due to the need for Court approval of any settlement reached. Both Counsel agreed that the legal position was governed by the Court of Appeal's decision in the leading case of *C v. W* [2008] EWCA Civ 1459, although the Claimant's Counsel sought to distinguish that and some of the subsequent cases on the basis that their risk profile differed from the instant case.

Spencer J. (sitting with Master Leonard as an assessor) held that the starting point had to be that *"a 100% success fee can never be justified in a case where liability has been admitted and there has been no Part 36 offer of settlement."* The challenge facing the Claimant's solicitor (and by extension, the appellate Court) had been to assess the risks that some of the costs incurred would be unrecoverable.

The two factors affecting that risk were: (i) the timing of the offer, as all costs up the 21-day expiry period of the offer would be recoverable in any event, and the success fee will attach to all of the costs even those that are not at risk; and (ii) the risk arising from rejecting a Part 36 offer but failing to better it at trial, in respect of which the solicitor's knowledge, expertise and experience would be relevant.

The Judge stated that *"if a solicitor could show that he had at least attempted to make a judgment of those matters and had devised his success fee accordingly, a District Judge would be slow to say that the solicitor had got it wrong and that the success fee should not be allowed. The court would give the solicitor some considerable leeway given that the assessment of these risks is by no means a precise exercise and a solicitor would not be blamed for taking a relatively conservative approach, given what is at stake."*

Having rejected the District Judge's figure of 65% as being too high and unsound based upon the analysis articulated above, Spencer J. moved on to assessing the appropriate success fee. He felt that the case was a standard, high-value personal injury claim with some issues in relation to causation, in respect of which an experienced personal injury solicitor would be used to taking a view. He commented that it is often the position in such cases that there were difficult questions of causation or divergent medical opinion, which did not make it out of the ordinary. At the point that the CFA was entered into, the Claimant's solicitors could have anticipated the Defendant making a late Part 36 offer as is common in such high value litigation, meaning that even on a conservative estimate only 25% of their costs might be at risk.

Given their experience and the fact that they could anticipate having the advice of Leading Counsel, the risk of advising the Claimant to reject a Part 36 which they then failed to better at trial was relatively low. It would be very surprising if they assessed that risk to be as high as 50%, but even if they did then it was only 25% of the costs that were likely at risk. This would mean an overall chance of success of 87.5%, which using the ready reckoner would justify a 14% success fee. Whilst the possible success fee may *"at a pinch"* have been assessed at 20%, it would not have been higher than that and more likely lower.

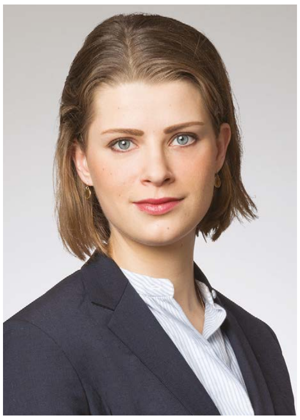
The Court emphasised that a proper analysis of *C v. W*, and the other relevant authorities referred to, places the focus of the analysis on the chances of the costs not being recovered, with a specific consideration on what costs are at risk and when. It emphasised that it is also important to bear in mind that complexity should not be conflated with risk- the instant case was an example of a case that is 'inherently complex but not necessarily risky'. The Judge stressed that if there was a 'standard' or 'usual' success fee then, since C v. W, it should be considered to be 20%; the District Judge would have required very good reasons to depart from that so significantly.

Pursuant to CPR 45.18(4) and CPR 45.19 (as they then were), the Claimant required an allowance of a success fee of 21% or more to escape the fixed success fee regime (on the basis that the agreed award exceeded £500,000) and, therefore, the claimed fee of 100% was reduced to the fixed level of 12.5%, which applied to the CFAs of both the solicitors and Counsel. That decision alone reduced the potential costs liability of the Defendant to the Claimant by a figure of almost £400,000.

The judgment is a useful reminder to Claimants as to the exercise that must be undertaken in order to justify a higher success fee in claims of this nature, and a useful reminder to Defendants as to the bases upon which a challenge could and should be made to a success fee claimed above the fixed level. This is particularly important given that many of the pre-LAPSO success fee cases that remain 'in the system' concern catastrophic injuries with high levels of costs at stake due to the typical longer lifespan of such claims, particularly those involving children and protected parties. In my experience, it is not uncommon to see consideration of the level of costs that are actually at risk and the timing at which an offer is likely to be received neglected in the CFA risk assessment analysis.

The decision is by no means uncontroversial and has been vocally criticised by Kerry Underwood, who considers it as so poor and irrational that it should be regarded as per incuriam, and in a blog post describes the ready reckoner approach adopted by the Judge as 'wholly discredited'. He says, *"Maybe the senior judiciary should make up its mind what particular combination of Mystic Meg and Artificial Intelligence we are meant to deploy."*

Nevertheless, such criticisms notwithstanding, it is understood that the decision in NJL is not being appealed and, therefore, it is likely to be followed by most first instance judges in situations involving questions of enhanced uplifts under old-style, pre-LASPO CFAs. One suspects that the temptation in future cases may be for both sides to lean towards an agreement of a 20% success fee, rather than pursuing cases into the senior appellate Courts that may well end up only applying to a rapidly diminishing number of extant pre-2013 CFAs.



# The Capped Costs List pilot scheme: challenges and opportunities

**Juliet wells**

**On 14 January this year, a voluntary two-year pilot of Capped Costs ("CCP") launched in the Business and Property Courts ("BPC") under CPR 51.2. The CCP rules are contained in Practice Direction 51W, and represent a marked innovation in the procedure governing cases falling within the ambit of the scheme. Here I provide a brief introduction to the CCP, and highlight some of its key procedural and costs-recovery provisions.**

## Introduction to the CCP:

The CCP arose out of Sir Rupert Jackson's 2017 review of fixed recoverable costs. During the consultation phase of that review, he proposed a pilot of capped recoverable costs in commercial and chancery cases to test whether there was a genuine appetite for such a scheme amongst litigants and the wider legal profession, and to assess how effective such a scheme would be in practice. To that end, in March 2017 he appointed a working group to set the policy of the scheme (taking cues to some extent from the proposals for fixed recoverable costs that were then taking shape behind the scenes)[1], and to devise draft rules for consideration by the Rules Committee. The working group's draft rules[2] were approved by the Civil Procedure Rule Committee in May 2017, subject to minor amendments, and came into force in January this year.

Three basic points about the CCP should be noted at the outset:

**1** First, the scheme provides for the recovery of *capped* costs rather than *fixed* costs (that is, costs which are incurred and assessed in the normal way, but are subject to a financial cap or series of caps, as opposed to fixed costs which are recovered according to pre-set tariffs). The principal reason for this is that the BPC handle a diverse range of cases, frequently proceeding under Part 8 rather than Part 7. The fields covered include, to name but a few: professional negligence, breach of contract, breach of trust, insurance disputes, disputes relating to share sale agreements, disputes relating to interests in land, landlord and tenant disputes, and contentious probate and Inheritance Act claims. Such cases do not follow a standard pattern – for example, some may require a large volume of work to be done at the pleadings stage, but little at the witness statements phase, and vice versa. Often, non-monetary remedies such as injunctions, orders for specific performance, and orders for rectification are sought. In consequence, the usual model for fixed recoverable costs, whereby costs are pre-set by reference to the *stage* of the claim reached and its *financial value*, does not easily map on to these cases when taken as a group. Further, to divide up these cases in order to establish subject-specific fixed costs regimes would run counter to the overall objective and trajectory of the BPC project, which is to streamline the structures and procedures of the various specialist courts and lists which sit within the initiative. Accordingly, the working party determined that the best way of flexibly accommodating the very different species of claim within the BPC, and the fact that value does not necessarily equate with complexity in these cases, was: (i) to set recoverable fees by references to *phases of work* rather than *stage of the claim* reached;

(ii) to retain the indemnity principle but subject the recoverable fees to a maximum cap, so as to allow for the fact that some types of claim may not need very much to be done in certain phases; and (iii) to *disregard value* in setting the caps.

**2** Second, it should be noted that the CCP rules draw heavily on the established model of the Intellectual Property Enterprise Court ("the IPEC"), although there are some significant points of departure. It remains to be seen how far judges of the BPC will rely on decisions of the IPEC in interpreting the CCP rules, though where the rules under consideration cohere with those of the IPEC, I would expect IPEC caselaw to be regarded as highly persuasive (if not determinative) authority.

**3** Third, the CCP does not just set up a new costs regime for commercial and chancery litigation; it embodies a holistic approach to costs reform, which recognises that if recoverable costs are going to be set in advance, the accompanying procedural regime needs to radically streamline the process of litigation so that (i) the work done broadly conforms to the costs recoverable, *not the other way around*, and (ii) the volume of work done is radically reduced so as to drive down costs overall. This philosophy is espoused in para 1.1 of the CCP rules (which sets out a kind of 'Overriding Objective' for the scheme), and it is reflected in the stripped back procedures which apply to cases proceeding within the CCP.

## Key procedural features of the CCP:

There are too many procedural innovations in the CCP to explore in detail here; suffice it to say that litigating within the scheme will be a very different experience for those who do not have experience of the IPEC or the Shorter and Flexible Trials Scheme.

Important rules to bear in mind include para 2.9, governing the form and content of the statement of case. Particulars of claim and counterclaims are required not just to set out *"a concise statement of the facts upon which [the party] rel[ies]"*, but also a run-down of the legal arguments and a list of the anticipated issues. Although this will inevitably result in some front-loading of work, the underlying idea is that litigants and the court will have thought carefully about the future trajectory of the case at the outset, which will in turn inform case management decisions and promote settlement.

In addition, statements of case must be accompanied by a bundle of *"core documents"* (para 2.9(2)). This is not defined, but in my view is likely to be very similar to *"initial disclosure"* under the mandatory disclosure pilot which is running alongside the CCP in the BPC. Beyond this, the normal rule will be that there is no further disclosure, and any further disclosure will be based on carefully calibrated requests for specific disclosure made prior to the CMC. In this regard para 2.30 is instructive, in setting out factors which the court is required to take into account in deciding whether to order specific disclosure:

> *"When considering whether to make an order for disclosure the court will take into account–*
>
> **1** *the requirements of paragraph 2.3(3) [i.e. that "before making any order which departs from the general principles set out in the Pilot, the court must be persuaded that the benefits that arise from the making of the order are likely to justify the cost of complying with the order"];*
>
> **2** *how narrow and specific the request is;*
>
> **3** *whether the requested documents are likely to be of real probative value; and*
>
> **4** *the reasonableness and proportionality of any related search required, having regard to the factors set out in rule 31.7(2)."*

Further, other evidence is very strictly limited (for example, under para 2.32 no more than two lay witnesses will be permitted to give oral evidence at trial), and any evidence beyond the general limits set by the CCP rules will only be allowed if it passes the exacting cost-benefit test enshrined in para 2.3(3) (see above).

## Provisions governing the recovery of costs:

Cases proceeding within the CCP will be free of costs budgeting. There are three interconnected reasons for dispensing with costs budgeting in the CCP: first, there is no need for a bespoke budget to set maximum expenditure in advance, because that function is performed by the costs caps; second, the stage and overall caps are set at a level which is expected to be proportionate to the general run of cases within the CCP, with the result that recoverable costs cannot run out of control in any given case; and third, the costs budgeting process can be disproportionately cumbersome and expensive for the types of cases falling within the remit of the scheme. Instead of costs

| Work done in respect of– | Maximum amount of costs |
|---|---|
| Pre-action | £10,000 |
| Particulars of claim | £7,000 |
| Defence and counterclaim | £7,000 |
| Reply and defence to counterclaim | £6,000 |
| Case management conference | £6,000 |
| Disclosure | £6,000 |
| Witness Statements | £8,000 |
| Experts' reports | £10,000 |
| Trial and judgment | £20,000 |
| Settlement/negotiations/mediation | £10,000 |
| Making or responding to an application | £3,000 |

budgeting, the court will summarily assess costs by reference to schedules of costs which need to detail the costs incurred in relation to each applicable stage in the Capped Costs Table. Those stages are noted in the table above.

It will be noted that the caps relate to stages of work which are fundamentally similar to Precedent H phases. Although one might expect that the scope of these phases will be uncontroversial, since we are now well-used to drafting costs budgets, I anticipate that parties will inevitably shoehorn items of work into phases where they have not used up the maximum allowance, instead of allocating them to a more appropriate phase where they have already exceeded the cap. In so doing, they will hope to maximise recovery by spreading their costs across the different phases. If so, there are likely to be fights at the margins as to what work should be appended to which phase. Similarly, the final 'catch-all' phase is intended to allow for work which needs to be done but does not readily fit elsewhere. Again, it is to be expected that parties will sometimes claim costs under that phase when the work done should properly go into one of the conventional phases.

Assuming that the approach in the CCP will broadly cohere with that of the IPEC[3], the structure of the costs assessment will be as follows: (i) the court will summarily assess the costs incurred in relation to each work phase; (ii) if the assessed figure for a given stage is less than the limit for that stage then nothing further need be done, but if it exceeds the relevant cap then that cap will be applied; (iii) the assessed sums in relation to each work phase will be added together; and finally (iv) if the total exceeds the overall cap[4] (which in most cases will be £80,000 pursuant to para 3.6) the overall cap will be applied.

In what circumstances will the caps be modified or even disapplied? The extent to which parties should be permitted to escape from rules imposing strict limits on costs-recovery is a vexed issue in any costs-fixing or costs-capping regime – since it exposes the tension between the need to give the courts sufficient discretion and flexibility to do justice between the parties, and the desire for certainty in the operation of such schemes. Indeed, the issue of 'escape routes' has been one of the less successful aspects of the IPEC scheme[5]. There, it has been held that indemnity costs awarded to Claimants under Part 36 are not subject to the caps; and similarly, the IPEC has held that the general discretion as to costs can justify lifting the phase caps, or the overall cap, or both, in cases which are exceptional but do not amount to abuse of process[6]. The CCP rules aim to avoid both of these outcomes, as follows:

**1** Under paras 3.12–3.15, the effect of Part 36 is modified so that CPR 36.17 will simply result in the caps being uplifted by a fixed percentage, rather than eviscerating them altogether[7].

**2** There is no express reference to the court's general discretion as to costs, in contrast to the IPEC rules. Instead, the CCP rules oblige the court to apply the stage and overall caps, and only a finding of abuse of process will enable the court to increase or disapply the caps: see para 3.4. It remains to be seen whether this is enough to effectively oust the court's general discretion to lift the caps, or whether the court will invoke the general discretion when faced with a set of genuinely exceptional circumstances which do not classify as abuse.

## Conclusion:

In addition to exploring some of the most important provisions of the CCP scheme, I have attempted to pick out some of the issues that may arise in the interpretation of the costs rules. Although the possibilities for 'gaming' the costs rules are in my view limited, paying parties should be prepared for attempts by receiving parties to exploit the issues highlighted above.

At the same time, I have endeavoured to show that the CCP is as much a pilot of an altogether different way of conducting litigation, as it is a pilot of a new costs regime. To that extent, it is guided by the same philosophy of reform that underpins much of Sir Rupert Jackson's *Supplemental Report*, namely that if recoverable costs are going to be set in advance, the work done and costs incurred should be reduced by improved procedures which radically streamline the process of litigation. If the CCP is successful, this approach could provide a promising model for future reform, so litigants and their advisers (even those not operating within the BPC) would do well to keep a weather eye on the progress of the pilot scheme.

*Juliet was a member of the working group appointed by Sir Rupert Jackson to prepare the draft rules for the CCP. All views expressed in this article as to the interpretation of Practice Direction 51W are her own, and are not necessarily shared by other members of the working group.*

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**1.** And which were later set out in Sir Rupert Jackson's *Review of Civil Litigation Costs: Supplemental Report* (July 2017), available at https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf.

**2.** Available at https://www.judiciary.uk/wp-content/uploads/2017/07/Appendix_15_Review-of-Civ-Lit-Costs-Supp-Report-FRC.pdf.

**3.** See *Westwood v Knight* [2011] EWPCC 11 for the approach to summary assessment in the IPEC.

**4.** Which it might well do, since the overall cap of £80,000 is less than the sum total of the individual phase caps by some £18,000.

**5.** See *OOO Abbott v Design & Display Ltd* [2014] EWHC 3234 (IPEC), and *Phonographic Performance Ltd v Hagan t/a The Brent Tavern & Ors* [2016] EWHC 3076 (IPEC) (applying *Broadhurst v Tan* [2016] EWCA Civ 94).

**6.** See *Henderson v All Around the World Recordings* [2013] EWPCC 19, *PPL v Hamilton* [2013] EWHC 3467 (IPEC), and *Brundle v Perry* [2014] EWHC 979 (IPEC).

**7.** Intriguingly, in Martin and Anor v Kogan and Ors [2017] EWHC 3266 (IPEC) the IPEC referred to the proposed draft rules appended to Sir Rupert Jackson's Supplemental Report, and approved the approach of applying a fixed uplift to the stage and overall caps, rather than disapplying them altogether, as the proper course in the IPEC. *Martin and Anor v Kogan and Ors* is currently on appeal to the Court of Appeal.

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