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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

Just when you thought it was safe to put your pen down and head into the festivities of Christmas, we send you this! Well, let the 5th Edition of TGC's Costs Newsletter add some spice to your festive cheer as we reflect on the last 6 months or so...

From a practical point of view, don't forget that October brought change in approach to budgeting: (i) counsel's brief fees should now be reflected in the Trial Prep phase, and only refreshers should be reflected in the Trial phase; and (ii) incurred costs include the CCMC phase, so budgets may need to be revised shortly prior to the CCMC. On the very near horizon, CE-Filing becomes mandatory in the SCCO from 20/01/20 (see https://www.judiciary.uk/wp-content/uploads/2019/10/Practice-Note-CE-File.pdf).

We introduce a new column in this edition: "Silk Road." Simon Browne QC give us his insight on three very recent cases that have caught his eye, picking up on the "death clause" in CFAs, a recent return to the Arkin Cap principle, and a headline on the competing strength of the mighty Part 36 as against Fixed Costs. Perhaps most interesting of all is his connection to the 7th Indian Infantry Division...

We follow up "Silk Road" with more meat on the bones of the *Adelekun* case (Part 36 vs. Fixed Costs). As if a salute to the Part 36 guru himself (Professor Dominic Regan), we stick with the theme: Defective Part 36s (*Flannagan*); late acceptance of Part 36s (*Campbell*); and interim payments on account of costs in cases where Part 36 is active (*Global Assets Recovery*). If the importance of Part 36 was not underscored enough, we review a case seeking payments on account of costs where the substantive matter had not even been determined yet (*I v Hull & East Yorkshire Hospitals*)!

Away from Part 36, but sticking with prescribed outcomes on costs, we consider the application of QOCS in mixed claims (*Brown*).

Speaking of outcomes, we review a Supreme Court judgment dealing with the prospect of a non-party costs order against an insurer in a case which was the subject of a GLO spanning both insured and uninsured claimants.

Breathe.

Now that we're at it, let's just cover the whole spectrum, shall we? I give you my thoughts on Guideline Hourly Rates and then we rugby tackle the elephant of *West* (hope you caught some of it on livestream) – seems like it was so long ago! From elephants to donkeys: what do you get when you cross a Judge with a Donkey and an ATE premium? I'll leave you to work that one out.

Finally, we wrap up with a word about the recoverability of counsel's fees in infant settlement cases. Could this be yet another fork in the dual-carriageway of access to justice and profit?.

Allow me to take this opportunity, on behalf of Matt, Richard myself and indeed the whole Costs Team at TGC, to wish you all a wonderful and relaxing festive break! We hope to see you in the new year, if not before, and we'll certainly be updating you in our 6th!

Silk Road

By Simon Browne QC

In Episode 5 of the current series of the Crown, released this month, Lord Mountbatten (played by Charles Dance) is seen to recite Kipling's poem *"The Road to Mandalay"* to a meeting of the Burma Star Association in 1968. For me the scene had significance.

My father was part of the 7th Indian Infantry Division which distinguished itself at the crossing of the River Irrawaddy in Burma (now Myanmar). Shortly thereafter he contracted malaria and was sent to the hospital in Deolali, India (hence the phrase *"he has gone deolali"* when soldiers suffering from the disease lost sense – note to Ben Elton when using the phrase in Blackadder The First World War you were 30 years too early!). My mother to be was an 18-year old nurse mopping his fevered brow. The rest is history. After 7 years away with a young family on the way he took a job selling baked beans. He sold enough of them (and spaghetti hoops) for me to study law.

Of course, the XIV Army in Burma was known as the "Forgotten Army", or as Mountbatten told them *"You're not the forgotten army, no one has bloody heard of you yet."* Those words bore an uncanny resemblance to the words used by our Editor, Shaman Kapoor, when he asked me recently to start contributing a regular article for one of the finest publications around – **The Temple Garden Chambers Costs Newsletter**. So, in honour of the South East Asia connections here is the first of the **Silk Road** articles.

At the end of September, I had the unenviable task at the Costs Law Reports conference of summarising the previous years' worth of costs cases into one lecture. The written notes I provided were no doubt of more assistance than the half hour talk; nevertheless, the whole exercise was a reminder of how the area of costs and litigation funding leads all other areas in the rapid development of the law. The regularity and content of this Newsletter is testament to that alone in keeping up with developments.

In the seven weeks since that conference there have been three cases of note I wish to mention.

On **24th October** Mr Justice Saini gave judgment in *Higgins & Co. v Evans* [2019] EWHC 2809 (QB), allowing an appeal and ruling that the use of a clause in a CFA (based on the Law Society standard model) which made the estate liable for basic charges up to the time of the Claimant's death was enforceable. Further, it was not unfair for the purposes of the Consumer Rights Act 2015. This ruling thereby enabled the solicitor to recover his basic charges even though the claim, which had been continued by the Personal Representatives through other solicitors, had not yet concluded. The case has been described as an important decision both as to the construction of such terms and as to the correct approach to assessing whether such terms are unusual, onerous or unfair. The clause in question will be familiar to practitioners and states:

(c) Death

This agreement automatically ends if you die before your claim for damages is concluded. We will be entitled to recover our basic charges up to the date of your death from your estate.

If your personal representatives wish to continue your claim for damages, we may offer them a new conditional fee agreement, as long as they agree to pay the success fee on our basic charges from the beginning of the agreement with you.

This was an asbestosis case when the Claimant signed up for the CFA aged 89 years. During the course of the litigation he died. Of note, the above clause created no obligation for the solicitor to continue the action on behalf of the estate. In this case they chose not to. A number of other high profile firms have amended their clauses to be obliged so to do but there are hundreds if not thousands of CFAs currently in force which do require the solicitor to complete the case on behalf of the estate following the Law Society model agreement.

In upholding the clause the Judge particularly relied upon the fact that under the CFA the solicitor takes on a risk that the claim may not succeed and if it succeeds they are compensated by the success fee. He also recognised that there will be neither a win nor a loss during the term of the CFA in a number of situations which are all catered for under the familiar heading *"What happens when this agreement ends before your claim for damages ends."* Various situations may arise and each is catered for in its own way. Comparisons do not assist where the wording of the relevant clause is unambiguous as it was here.

On **7th November** Mr Justice Zacaroli handed down judgment in *Burnden Holdings & Hunt v Fieldings v Project Appledene PC and Griffins (A Firm)* [2019] EWHC 2995 (Ch) which re-visited the application of the "*Arkin*" cap for funders. It may be recalled that Snowden J in *Davey v Money* [2019] Costs LR 399 earlier in the year held that the *Arkin* Cap was not a rule to be enforced and in the right circumstances could be departed from by Judges. In the *Burnden* case Griffins, Insolvency Specialists, had acted as part funders of a claim for one of their liquidators. Its involvement ended upon the appointment of litigation funders Appledene. The claim was unsuccessful, and the Defendants sought costs orders against the funders including Griffins. The arguments centred upon the applicability of the "Arkin" cap (where funders' liability is capped at the level of investment). Recent case law has sought to remove the cap (see above) as did the Defendants in this case, seeking costs of £3.5 million whereas the Griffins funding was £472,000. The Trial Judge Mr Justice Zacaroli found that the reasonable sum to pay was £472,000 and based his decision upon what was reasonable in all the circumstances and no liability could be attached for the sums involved once the professional funder had become involved.

On **19th November** the Court of Appeal handed down judgement in *Ho v Adelekun* [2019] EWCA Civ 1988. Once again, the Court has held that fixed costs apply in an original portal case. In this matter, whilst awaiting allocation to the multi-track a Part 36 offer was made and accepted. The offer referred to the payment of costs in accordance with Part 36.13 and the parties submitted a Tomlin Order to the Court which referred to the payment of "reasonable costs on the standard basis to be the subject of detailed assessment if not agreed." The parties disagreed whether fixed costs or reasonable assessed costs were payable; the difference between fixed and assessed costs was between £15,000 and £42,000. It was held by the Court of Appeal that acceptance of a Part 36 offer which makes reference only to r.36.13 (which refers to assessed costs rather than to r.36.20 which sets out entitlement to fixed costs) and offer and agreement to pay assessed costs, does not lead to a contracting out of the fixed costs regime. There is a clear difference between fixed costs and assessed costs (*Broadhurst v Tan* [2016] EWCA Civ 94). The Court of Appeal was quite clear in its judgement but did advise it was wise to include in the Order the entitlement only to fixed costs and avoid reference to reasonable and assessment on the standard basis.

Ho v Adelekun [2019] EWCA Civ 1988

James Yapp

Regular readers will recall HHJ Wulwik's previous decision in this case. On the first appeal, it was decided that the terms of a Tomlin Order signed following acceptance of a Part 36 offer took the case outside the scope of the fixed recoverable costs regime at section IIIA of 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, fixed costs would cease to apply following re-allocation. 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 subject to detailed assessment if not agreed. As readers will be aware, r36.13 deals with 'standard costs' cases but is subject to r36.20.

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 to 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.

At first instance the Deputy District Judge concluded that only fixed costs were recoverable: the consent order following acceptance of the Part 36 offer was unnecessary and 'ultra vires.' HHJ Wulwik overturned this decision on appeal.

The Court of Appeal

On appeal to the Court of Appeal, both sides concentrated on the terms of the Part 36 offer itself. Neither argued that the terms of the subsequent consent order were important. Accordingly, there were two issues to be determined:

Issue 1 – Did the appellant's solicitors, by their letter of 19 April 2017, offer to pay "conventional" rather than fixed costs?

Issue 2 – If not, should the claim be re-allocated to the multi-track with retrospective disapplication of the fixed costs regime?

Issue 1

Newey LJ allowed the appeal. The offer, correctly construed, did not offer to pay conventional costs rather than fixed costs. He identified 6 key reasons:

i 36.5(1)(c) did not require an offeror to make a choice between 36.13 (conventional costs) and 36.20 (fixed costs).

ii The reference in the offer letter to 36.13 instead of 36.20 was of no great significance. 36.13 itself refers the reader to 36.20 for those cases formerly within the RTA Protocol.

iii It was clear that the offeror intended to make a Part 36 offer, yet an offer made in a case formerly within the RTA Protocol would be incompatible with Part 36 if it offered to pay costs on a basis which departed from Part 45 fixed costs. The *'self-contained procedural code'* of Part 36 made it clear that the Part 45 fixed costs regime would apply *"where… a claim no longer continues under the RTA… Protocol pursuant to rule 45.29A(1)*."

iv While the reference to detailed assessment in the letter was *"far from ideal if the appellant intended the fixed costs regime to apply, it was not wholly inapposite*." Fixed costs and conventional costs are conceptually different but computing the level of fixed costs does involve an assessment of sorts. Referring to detailed assessment should not be taken to imply an intention to displace the fixed costs regime where there were other indications that this was not intended.

v It was inherently improbable that the reasonable recipient of the offer letter would intend to offer conventional rather than fixed costs. It was not inevitable that the court would retrospectively disapply the fixed costs regime upon re-allocation[1], or that there would be an award of 'exceptional circumstances' costs under 45.29J. In those circumstances, it was improbable that the offeror would have been willing to concede higher costs in the offer.

vi It was of some relevance that the fixed costs regime was designed to ensure that both sides begin and end the proceedings with the expectation that fixed costs will be all that will be recoverable. That made it more unlikely that the letter would be understood as offering 'conventional' costs.

As an aside, Newey LJ rejected the Appellant's argument based upon *Solomon v Cromwell*. He did not accept that this case was binding authority for the proposition that the fixed costs regime could not be displaced by an agreement to pay costs on the standard basis. At the time, 36.10 and section II of Part 45 were inconsistent: the court had resolved this by reference to the provision that general provisions are intended to give way to the specific. Now that Part 36 has been revised to take account of the fixed costs regime, the basis for the decision in *Solomon* has disappeared.

Issue 2

The Claimant's alternative position was that the claim should be re-allocated to the multi-track with a direction that the fixed costs regime should be disapplied with retrospective effect.

The claim had been stayed upon acceptance of the Part 36 offer. Re-allocation was not a *"a question of costs… relating to the proceedings"* even if the desire to re-allocate was motivated by costs. The court therefore did not have the power to deal with re-allocation. Even if it had the power, there was a good reason to refuse to re-allocate where the parties had not agreed to displace the fixed costs regime.

Parting shots

Newey LJ and Males LJ gave some guidance to parties looking to settle cases on the basis of fixed costs. They would be well-advised to refer to 36.20 rather than 36.13. Equally, it would be best to avoid any reference to an assessment on the standard basis in any offer letter or consent order.

The Court of Appeal has again confirmed that the 'escape routes' from fixed costs are limited. It seems that the courts will be slow to conclude that the parties have 'contracted out' from the fixed costs regime.

1. Newey LJ did not consider that 45.29B would necessarily imply that the fixed costs regime would apply retrospectively to all work already done if the case was re-allocated to the multi-track. He considered that the more natural reading of the rule was that the fixed costs regime would cease to apply prospectively.

Part 36 offers: word them carefully, and face the consequences if you accept them late

Ellen Robertson

Flanagan v Royal & Sun Alliance Insurance PLC (Manchester County Court, 16 May 2019) and Campbell v Ministry of Defence [2019] EWHC 2121 (QB)

Two recent decisions demonstrate the strict requirements of the Part 36 regime when making offers, and the difficult consequences of accepting Part 36 offers late, as well as a timely reminder of the importance of seeking a stay where there is uncertainty regarding the risk posed by an offer.

Making a valid offer

The recent decision of District Judge Osbourne in *Flanagan v Royal & Sun Alliance Insurance PLC* is a useful example of the importance of careful drafting of Part 36 offers.

The Claimant had succeeded at trial and was awarded a sum of just over £2,000. The Claimant's solicitors had made an offer around two years before trial, with the following wording:

"We are instructed by the claimant to put forward an offer in the gross sum of £1,702.50 in full and final settlement of their claim for damages, subject to the payment of our cost disbursements incurred to date in proceedings in this matter, to be assessed in default of agreement. In accepting this offer, the gross sum indicated above constitutes the value of the claim, which is exclusive of any agreed position on liability, and consequently the defendant accepts their liability for standard costs exclusive of disbursements and VAT. The offer relates to the whole of their claim and is inclusive of interests as set out in part 36.54 and is made pursuant to part 36 of the Civil Procedure Rules 1998. This offer is open for acceptance for 21 days from the date this letter is received by you. After 21 days the offer can only be accepted if we're able to reach an agreement on costs or the court gives permission."

The offer then went on to threaten various costs consequences in different scenarios.

The Defendant contended that the offer was not a valid Part 36 offer, contending that the reference to standard costs was an attempt to oust the role of CPR r.36.20 which provides for a fixed costs regime, and that the offer failed to state whether or not it included any counterclaim, contrary to CPR r.36.5.

The Defendant raised further objections to the statement that the offer could only be accepted after 21 days if agreement was reached on costs or if the court gave permission, which appeared inconsistent with CPR r.36.11 and r.36.13, and seemed to suggest the offer would be withdrawn after 21 days.

District Judge Osbourne held that the wording was an attempt to oust the fixed costs regime and therefore invalidated the offer[1], as did the failure to refer to a counterclaim. He noted that at the time of the offer the parties did not know whether or not there was a counterclaim.

Even if the offer had been valid, the judge also considered that the wording regarding acceptance after 21 days constituted a conditional withdrawal, noting that the wording used was the same wording as used in the offer in *Shaw v Merthyr Tydfil County Borough* [2014] EWCA Civ 1678, which had not complied with the wording of the Part 36 regime then in force. He found that the effect of that paragraph was that the offer was withdrawn after 21 days. Given the punitive effects of the Part 36 regime, which would lead to indemnity costs claimed at around £34,000, the judge considered that Part 36 consequences should only follow offers that complied with the strict terms of Part 36. The Claimant was limited to fixed costs.

Accepting a Part 36 offer late

The judgment of Mrs Justice Lambert in *Campbell v Ministry of Defence* is a warning for Claimants who accept Part 36 offers out of time. The Claimant was a non-commissioned officer who recovered damages for psychiatric injury sustained in 2014 as a result of pilot negligence. Liability was admitted prior to the issue of proceedings in January 2016. The Defendant made a valid Part 36 offer of £100,000 in January 2018, which the Claimant accepted thirteen months after expiry.

The Claimant contended that the usual costs rule pursuant to CPR r36.13(5), leaving the Claimant bearing the costs after the expiry of the offer, would be unjust in the circumstances. The Claimant argued that the loss of earnings element of the claim was dependent on the outcome of the Claimant's application for a commission, which was not known until October 2018, and it was not until January 2019 that the Claimant's solicitors were informed that the Claimant's intended post was not jeopardised by his phobia of flying. The Claimant accepted that no application for a stay had been made but submitted that the Defendant was better placed to know the likely outcome of the commission process.

The Defendant submitted that there was nothing unusual about the case and it was common for Part 36 offers to be made before the evidence was complete. Further expert evidence could have been obtained to assist the Claimant or a stay could have been sought.

Lambert J considered the circumstances of the case including the matters identified in CPR r36.13(6); the terms of the offer, the stage in the proceedings the offer was made, the information available to the parties when the offer was made, the conduct of the parties in the provision of information enabling the offer to be made or considered, and whether the offer was a genuine attempt to settle proceedings. She noted that the burden of proving injustice was on the offeree, and that a finding of injustice required grounds particular to that case.

Lambert J held that no injustice arose and the Part 36 regime should apply. The question of whether to accept a Part 36 offer required judgment and expertise, but that was the role of the Claimant's advisors. She noted that had a stay been sought and granted, the Defendant would not have incurred costs after the expiry of the offer, and that the Claimant had been unable to explain why no stay had been sought. She rejected the contention that the Defendant was better placed to assess the likely outcome of the commission application, accepting that the relevant decision-makers were independent of the Defendant and did not pass that information onto the Defendant or its solicitors. In the circumstances, the Claimant had continued the litigation at his own costs risk, a risk that could have been avoided had he made an application for a stay.

Both cases demonstrate that the Part 36 regime is an exacting regime with harsh consequences at times. Offers should be made carefully with close attention to the rules, particularly in relation to the costs consequences of those offers. Offerees must give careful consideration to acceptance of risky offers, and where uncertainty prevents acceptance, should consider a stay to avoid further costs being incurred.

1. Note that this conclusion somewhat jars against the conclusions reached by the Court of Appeal in *Ho v Adelekun* [2019] EWCA Civ 1988, covered elsewhere in this newsletter. In that case a reference to costs being the subject of detailed assessment if not agreed was held not to displace the fixed costs regime. If a difference can be extracted, it is perhaps that in *Flanagan* it was the Claimant who made reference to standard costs whereas in Ho the Defendant referred to standard costs (or rather assessment which indicates standard costs). In *Ho*, the Court's reasoning relied on the fact that there would be no incentive for a Defendant to oust the fixed costs regime.

Part 36 and interim payments on account of costs: *Global Assets Advisory Services Ltd v Grandlane Developments Ltd* [2019] EWCA Civ 1764

Richard Boyle

The Claimants sought a final injunction restraining the Defendants from using confidential corporate information. The Claimants made a Part 36 offer to settle the claim and this offer was accepted within the relevant period.

Under r 36.13(1) CPR, when an offer is accepted by a Defendant within the relevant period, the Claimant is entitled to the costs of proceedings up to the date when the notice of acceptance was served. Those costs are to be assessed on the standard basis in default of agreement, under r 36.13(3) CPR. Under r 44.9(1)(b) CPR, where a right to costs exists under r 36.13(1), a costs order will be deemed to have been made on the standard basis. Under r 44.2(8) CPR, where a court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is a good reason not to do so.

After the settlement, a draft consent order was prepared and the Claimants sought an interim payment on account of costs, under r 44.2(8) CPR. The Defendants resisted such a payment and therefore the Claimants made an application. Teare J dismissed this application, holding that he was bound by the decision of *Finnegan v Spiers* [2018] EWHC 3064 (Ch); [2018] 6 Costs LO 729 unless he was convinced that it was wrong. In *Finnegan* it was held that Part 36 is a complete code which made no provision for a payment on account. It was held that r 44.2(8) CPR did not apply in these circumstances because acceptance of the offer meant only a deemed order.

The Court of Appeal allowed the Claimants' appeal holding that:

1 There was no reason to restrict r 44.2(8) CPR to circumstances in which the court had made an order at a hearing, as opposed to circumstances where the order was deemed to be made;

2 The rationale for ordering a payment on account of costs was the same whether or not the costs order was a deemed order. It enabled a party to recover part of its costs before the potentially protracted process of detailed assessment. It may reduce points of dispute;

3 This was consistent with the position in relation to discontinuance found in *Barnsley v Noble* [2013] 2 Costs LO 150; [2012] EWHC 3822 (Ch), which was correctly decided;

4 The latest version of r 44.2(8) CPR required the court to make an interim payment on account of costs and therefore previous case law, stating that a judge who had not heard the trial could dismiss such an application, was longer applicable (referring to *Dyson Ltd v Hoover Ltd* (No 4) [2004] 1 WLR 1264);

5 Any other conclusion would create a number of anomalies which were perverse. Interim payments on account of costs could still be ordered where a Part 36 offer was accepted after expiry of the relevant period, where a Part 36 offer was accepted before issue and where the offer related to only part of the claim and the Claimant abandoned the balance with the relevant period;

6 It was wrong to conclude that one can only look to the terms of CPR Part 36 itself to find the jurisdiction to order an interim payment on account of costs. There is nothing in Part 36 which suggests that it is entirely freestanding and all costs consequences of accepting a Part 36 offer are to be found within Part 36 itself. For example, rule 36.13 CPR makes reference to r 44.3(2) CPR. In any event, there was no conflict between r 36.13(1) and r 44.2(8) CPR.

This is a victory for common sense over a technical interpretation of the rules. There was no sound logic to restrict Claimants from interim payments on account of costs where Part 36 offers are accepted within the relevant period. Practitioners should now be sure to include such a provision in any consent orders drawn up in these circumstances.

Payments on Account of Costs: Putting the Cart Before the Horse?

Harriet Wakeman

Introduction

In *X v Hull & East Yorkshire Hospitals NHS Trust* (Unreported, Sheffield County Court 25/02/19), His Honour Judge Robinson gave useful guidance on a court's powers to award interim payments on account of costs in lengthy litigation.

Factual Background

The case of *X v Hull & East Yorkshire Hospitals NHS Trust* concerned a clinical negligence claim which arose out of a birth injury which left the Claimant with catastrophic injuries. The Claimant was aged 11 at the date of judgment. A liability settlement was approved in December 2012, and judgment was given on liability for 90% of the value of the claim. In relation to costs, the order provided that:

"The Defendant shall pay the Claimant's reasonable costs to date, to be subject to detailed assessment in default of agreement and such costs to be paid within 28 days of the agreement or assessment."

An interim payment on account of costs was made in the sum of £100,000 and a further voluntary payment on account of costs of £115,000 was also made.

The Claimant then applied for a further interim payment on account of costs in the sum of £150,000. The Claimant's application was heard by District Judge Batchelor. At the hearing, the Defendant argued that there was no entitlement under the Civil Procedure Rules that enabled the Claimant to be entitled to what were effectively quantum costs before quantum had in fact been resolved. District Judge Batchelor refused the application, stating that *"it is putting the cart before the horse to ask me to make a further Order in relation to quantum costs"* where the Claimant had not yet resorted to a detailed assessment of the costs on liability, as provided for in the previous order (and set out above). The Claimant appealed.

Appeal

On appeal, two questions were considered:

1 In circumstances where quantum had not yet been determined, did the Court have the power to make an order for the payment of costs?

2 If so, did the Court have the power to make an order for a payment on account of such costs?

The Decision

On the question of whether the Court had the power to make an order for the payment of costs in those circumstances in principle, HHJ Robinson concluded:

"In my judgment, rules 44.2(1) and 44.2(2) are wide enough to allow the Court to make an order for costs of the kind sought by the Claimant:

1 *The discretion conferred by rule 44.2(1) relates to the questions whether costs are payable, the amount and when the costs are to be paid.*

2 *Rule 44.2(2) sets out the general rule that the unsuccessful party pays the costs of the successful party."*

Considering the facts of the case, HHJ Robinson highlighted three key factual issues which were relevant:

"There are three factual issues which need to be stated:

1 *Interim payments on account of damages totalling £1.2m have been paid. These have all been made without recourse to stage 2 of Eeles (see Cobham Hire Services Limited v Benjamin Eeles [2009] EWCA Civ 204).*

2 *It is a near certainty that the Claimant will receive a great deal more money than that at trial or earlier settlement (subject to judicial approval);*

3 *There is, as yet, no Defendant's Part 36 offer."*

He remarked that, allowing for the 90% valuation, the final award was "very likely" to be in the region of a lump sum in excess of £3m with a periodical payment order in excess of £150,000 per annum. Equally, the Defendant had not made any Part 36 offers and as such, it was "virtual certainty" that the Claimant would be entitled to his costs to date. HHJ Robinson went on to allow the appeal, concluding:

"As such, in my judgment, the exercise of her discretion was flawed in that it gave no consideration to the point that Switalskis would not benefit from the December 2012 costs order. She was also plainly wrong to rule that a total of £200,000 by way of an interim payment on account of costs to date might exceed a reasonable proportion of the costs to which the claimant's solicitors would be entitled, a matter to which I will return below. In the circumstances it seems to me that I should exercise my discretion afresh."

He noted that another very significant fact was the likely delay between determination of liability and determination of quantum. He noted at paragraph 37:

"Failure to ensure adequate cash flow during the period of inevitable delay may lead to the perverse and undesirable consequence that solicitors are unwilling to take on case such as this at an early stage. It is in everyone's interests to determine liability as early as possible. But if the consequence is that solicitors must then fund the quantum investigation for 10 years or more, they may not be anxious to take the case on early."

As such, the appeal was allowed and HHJ Robinson stated that he envisaged making an order that the Defendant pay the Claimant's costs to 22 September 2017 to be assessed on a basis to be determined at the conclusion of the proceedings or by a further order, with an order that £150,000 be paid on account of such costs.

Permission to appeal to the Court of Appeal was subsequently refused by Lord Justice Irwin.

Comment

This decision will no doubt be welcomed by those representing Claimants in long running clinical negligence cases. It provides helpful guidance in terms of the circumstances where a Court may be willing to make an order for a payment on account of costs even where there has not yet been a determination of quantum. For those representing Defendants, it is important to remember that applications for payments on account of costs are highly fact sensitive and as such, each case will turn on its own facts. This case also serves as a reminder of the importance of a robust Part 36 offer, as the absence of a Part 36 offer appears to have been a key consideration in this case.

Andrea Brown v (1) Commissioner of Police for the Metropolis (2) Chief Constable of Greater Manchester [2019] EWCA Civ 1724

Lionel Stride

The case of *Brown* considered the applicability of Qualified One-Way Costs Shifting (QOCS) in relation to claims comprising both damages for personal injury and non-personal injury. The Court of Appeal held that, in such cases, QOCS did not automatically apply; but that the assessment of costs would remain a matter for the court. In doing so, a sensible and straightforward interpretation of the rule under CPR 44.16 was applied; this was on the premise that it would be against the spirit and intention of the QOCS regime to allow claims outside the scope of personal injury to attract automatic costs protection.

Qualified One-Way Cost Shifting

The QOCS regime protects claimants in personal injury claims in multi-defendant proceedings by limiting recovery of the costs of a successful defendant to the award achieved at trial. As set out under CPR 44.13, and applied to all claims for damages for personal injury (encompassing both personal injury and Fatal Accidents), the principle of QOCS is as follows: *'orders for costs made against a claimant may be enforced without the permission of the court* ***but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant***.' In effect, this means that a claimant will be protected in costs by only being liable for a successful defendant's costs to the extent that the claimant has himself recovered damages, unless an exception to QOCS applies.

In addition to the main exceptions to QOCS (such as where a case is struck out for misconduct or where there has been a finding of fundamental dishonesty), CPR 44.16(2)(b) allows for orders for costs made against the claimant to be enforced in full, *'where a claim is made for the benefit of the claimant* ***other than a [personal injury] claim***.' It was the interpretation of this rule, in so called "mixed claims" where there is an element of the claim that is not linked to any personal injury, that was the subject of the appeal in *Brown*.

Background to Case

The instant case arose from the defendants' unlawful obtainment, and use of, private information relating to Ms Brown and her family. The claimant brought claims against the police for damages under the Data Protection Act and Human Rights Act (liability admitted), and for damages for breach of contract (not pursued at trial), misfeasance in public office, and misuse of private information. At trial, the judge upheld the claimant's claim for damages for misuse of private information, but rejected her claim for damages for personal injury arising out of the defendants' conduct; namely, it was rejected that Ms Brown had shown her depression was caused, or materially contributed by, the actions of the defendants.

Accordingly, although her claim was brought as a "mixed claim" for personal injury and other damages, at trial, her claim for personal injury was rejected and there was no appeal.

Ms Brown was awarded general damages under the DPA and HRA, and received a further award in the sum of £9,000 for the misuse of private information; this was apportioned between the defendants (2/3 against the D1 and 1/3 against D2). In relation to costs, however, the claimant had failed to beat an earlier defendants' Part 36 offer (£18,000). Accordingly, the defendants were ordered to pay 70% of the claimant's costs up to the offer, but, thereafter, the claimant was ordered to pay the defendants' costs. At first instance, the claimant

successfully argued that, because her claims included a claim for damages for personal injury, she was automatically protected by QOCS against adverse cost orders (i.e., for costs above £9,000). On appeal to the High Court, allowing the defendants' appeal, it was held that because this was a "mixed claim", involving claims for personal injury and for unconnected damages, the express exception under CPR 44.16(2)(b) was engaged; there was therefore no automatic costs protection under QOCS, and the assessment of costs would remain at the discretion of the court.

Decision

The Court of Appeal, dismissing Ms Brown's appeal, held that the exception under CPR 44.16(2)(b) was clear: if the proceedings involved claims which were not claims for damages in personal injury, the exception would apply. Coulson LJ held that the QOCS regime only applied to claims for damages for personal injury, not to other types of claim. This meant that there was no justification for allowing such claims to attract automatic QOCS protection (including, as here, in "mixed claims"). In those circumstances, the automatic QOCS protection fell away, and it was then within the trial judge's discretion to assess costs. It was held that the narrower wording of the exception under CPR 44.16, when compared to the more "broad gateway" under CPR 44.13, clearly excluded such claims from the QOCS regime "within the widest possible umbrella of the proceedings as a whole." The Court rejected the alternative approach on the basis that, if "mixed claims" did not fall to be excluded from automatic protection, it would be impossible for the exception ever to be engaged; and that, on a liberal interpretation, the exception could not arise in any proceedings to which QOCS applied, and accordingly would no longer be an exception to the regime at all.

Applying those principles, Ms Brown's case was no longer a case of personal injury, but rather a valid non-personal injury claim under the DPA and HPA, and in tort. She could therefore not rely on the protection of QOCS for such a claim.

The Court of Appeal provided further, general guidance on the "outer limits of the QOCS regime." First, the Court reaffirmed that QOCS protection only applies to claims for damages for personal injuries; this includes damages for PSLA and all other consequential losses, including (amongst other things) the cost of treatment, adapting accommodation, long term care, and loss of earnings. It follows that a large number of personal injury claimants would enjoy the full, automatic protection of QOCS. However, where there are claims that are not consequential or dependent upon physical injury – for example, the damage to a vehicle in a road traffic accident – these would fall within the "mixed claim" exception of CPR 44.16. Nevertheless, the Court went on the say that this did not necessarily mean that the effect of QOCS protection would not apply, but rather that via judicial discretion a cost-neutral judgment should be delivered, such that often in "mixed claims" (where the claim can 'in the round' be considered a personal injury claim) the costs protection would still in effect apply unless, as in *Brown*, there were exceptional features of the non-personal injury claims. The example given of an 'exceptional feature' included gross exaggeration of an alternative car hire claim.

In the judgment of Coulson LJ in *Brown*, the key point to emphasise was that QOCS protection would not be automatic in claims involving a non-personal injury element, although the final outcome could often be similar, upon the normal assessment of costs.

Analysis

The decision in *Brown* clarifies the application of the exclusionary rule under CPR 44.16(2)(b). There would be no justification for extending the costs protection under Qualified One-Way Costs Shifting simply because a predominately non-personal injury case has an element of personal injury. The ruling does not act to prejudice claimants or defendants, but rather returns the assessment of costs to the discretion of the trial judge. Coulson LJ rejected both arguments in this regard: on the one hand, it was important for judicial flexibility to be preserved, so that claimants could not merely 'hide behind QOCS protection' in other (non-personal injury) litigation; but on the other, this ruling is not intended to effect the vast majority of "ordinary" personal injury claims, or those with minor non-injury elements (such as property damage).

Whilst a literal interpretation of CPR 44.16 has been applied, however, the judgment in Brown is at odds with the guidance in the Practice Directions; paragraph 12.6 of PD 44 states that where rule 44.16(2)(b) applies, *'the court will normally order the claimant or, as the case may be, the person for whose benefit a claim was made to pay costs notwithstanding that the aggregate amount in money terms of such orders exceeds the aggregate amount in money terms of any orders for damages, interest and costs made in favour of the claimant.*' There is in fact no such general rule: application of the exception to QOCS under CPR 44.16(2)(b) will be at the discretion of the judge; and, if proceedings can fairly be described in the round as a personal injury case, the judge deciding costs will be expected to achieve a cost neutral result through the exercise of that discretion unless there are 'exceptional features.'

Non-party costs orders: is the position now clear?

Anthony Johnson

The Supreme Court has handed down its decision in *Travelers Insurance v. XYZ* [2019] UKSC 48 in which it allowed the Appellant insurance company's appeal against a High Court decision, upheld in the Court of Appeal, to make a Non-Party Costs Order against it (s.51 Senior Courts Act 1981) in the context of group litigation arising from the supply of defective breast implants. It is clear from the decision, particularly the speech of Lord Reed, Deputy President of the Court, which seeks to deal with the Scottish Law aspects of the issue (the Scottish Courts having had the power to make such Orders long before legislation permitted them in England and Wales), that the intention of the Court was to provide general guidance as to the application of what all sides accepted was a broad jurisdiction. In the light of XYZ, is the position in relation to the making or refusal of Non-Party Costs Orders now clear?

The facts are important: The group litigation featured approximately 1000 claimants, 623 of whom were bringing claims against Travelers' insured, Transform Medical Group. Of those claims, insurance was in place for 197 of those claims, but not for the remaining 426 whose symptoms came outside the cover or had not yet suffered a rupture in their implants but were deeply concerned that they might (referred to in the proceedings as 'the worried well'). Under the terms of the product liability cover, Travelers were bound to pay the costs of defending the insured claims, including the costs of defending issues that were common between the insured and the uninsured claims once the Group Litigation Order had been made. The terms of the policy conferred on Travellers the right to control the conduct of the litigation on behalf of Transform and prohibited Transform from making admissions or offers to settle without Travelers' consent. Also, as is extremely common in policies of this nature, Transform were under a duty to give Travelers all information and assistance which it might require in connection with any such claim.

A trial of preliminary issues was ordered in four test cases in which two of the claimants were insured and two were uninsured. Around that time, Transform began experiencing severe financial difficulties and subsequently went into insolvent administration. The uninsured claimants remained part of the group litigation, which their representatives subsequently confirmed was largely due to advice that they had received about the hope of obtaining a Non-Party Costs Order against Travelers in due course. Travelers' funded the whole of Transform's defence costs, as the preliminary issues were common to both the insured and the uninsured claims. Around that stage, Transform sought permission from Travelers to make a 'drop hands' offer or admission in relation to different categories of claimants, but such consent with withheld by Travelers. A negotiated settlement was reached in respect of the insured claims, but the uninsured claims continued until the claimants obtained a Default Judgment against Transform.

At that point, the uninsured claimants made the Application for the Non-Party Costs Order that formed the subject matter of the proceedings that ended up in the Supreme Court. The claimants relied upon five features of the case which they argued justified a section 51 Order: *(i)* the insurers determined that the claim would be fought; *(ii)* the insurers funded the defence of the claim; *(iii)* the insurers had the conduct of the litigation; *(iv)* the insurers fought the claim exclusively to defend their own interests; and *(v)* the defence failed in its entirety.

These arguments found favour with Thirlwall J. (as she then was) at first instance. She considered that the key feature was that the solicitors who were acting for both Transform and Travelers in relation to the preliminary issues trial had advised Transform not to disclose the fact that some of the claims were uninsured. She held that the situation could be considered 'exceptional' because, but for Travelers' interest, Transform would have disclosed the lack of insurance and, in all likelihood, the uninsured claims would not have been pursued thereafter and the costs would not have been incurred. Her decision was upheld by the Court of Appeal, although they were of the view that the decisive feature confirming that the claim was exceptional was not so much the failure to disclose the lack of insurance, but the asymmetry in costs risks between the uninsured claimants and the insurer, i.e. the uninsured claimants faced the risk of having to pay costs if they lost but would not recover their costs from the other side in the event that they won.

Both parties relied upon the case of *TGA Chapman v. Christopher* [1998] 1 WLR 12 which set out two separate bases upon which a liability insurer might become exposed to non-party costs liability; the *Chapman* principles had been applied in many subsequent cases including by the Court of Appeal in *XYZ*. In *Chapman*, Phillips LJ identified two separate bases upon which a liability insurer might be exposed to non-party costs liability. The first basis was where there was 'intermeddling', which is a test derived from the concepts of maintenance and champerty: the test in *Giles v. Thompson* [1994] 1 AC 142 was whether there was *"wanton and offensive intermeddling with the disputes of others in which the meddler has no interests whatever, and whether the assistance he renders to one or the other party is without justification or excuse."* The second basis was the 'real defendant' test, which it was said arose from a combination of the insurers' interest in the outcome of the proceedings, its contractual obligation to indemnify a defendant for its costs liability and its exercise of control over the conduct of the defence.

Analysing the *Chapman* principles in his lead judgment in XYZ, Lord Briggs stated (at paras.55-56):

"This basis for the costs liability of the non-party does not necessarily depend upon showing that it has taken control of the litigation, or done anything approaching becoming the real defendant in it. Nor is there any fixed benchmark which will establish whether involvement has become a form of intermeddling. In every case the nature and extent of the non-party's involvement will have to be measured against the alleged justification or excuse for it. In sharp contrast with the real defendant test, the question whether the non-party has become involved under a framework of contractual obligation is likely to be of primary relevance. It may even be decisive against liability, especially where the relevant contract is of a type which is recognised and supported by public policy, such as liability insurance...

The key feature of the present case is that every one of the successful claims for which the claimants seek a non-party costs order is wholly uninsured. The uninsured claimants can have had no real expectation, if successful, of being paid their costs by the insurers, unless those costs were incurred as a result of some unjustified intervention in their claims by the insurers. This is sufficient on its own to take them out of the proper ambit of the Chapman principles, and to make it necessary to ask whether Travelers' involvement in the defence of the uninsured claims amounted to intermeddling."

Lord Briggs went on to analyse the 'asymmetry' argument that had formed the main basis of the Court of Appeal decision below. In paragraph 61, he set out his reasoning for rejecting this approach:

"First, leaving aside the incurring of costs by the uninsured claimants, the asymmetry in risk was not itself in any sense the result of any aspect of the intervention in, or conduct of, the defence of the uninsured claims by Travelers. It arose from the combination of the facts that Transform was insolvent, had insurance for only some of the claims, excluding those of the respondents, and that the claimants' liability for and therefore entitlement to costs was several-only, and extended to the prosecution of the common issues in the test cases. They chose, no doubt for good reason, to undertake that several-only costs burden regardless of whether their claims were insured, taking the risk that they would not recover their outlay if they were not, even if successful."

It is perhaps unsurprising that, in the light of the two quoted extracts, the Supreme Court reversed the Court of Appeal's decision and found for Travelers. Lord Briggs set out that whilst the *Chapman* principles were useful guidelines for establishing whether the liability insurer had become the real defendant in all but name, they were unlikely to be of assistance in a situation (as in the present case) where the liability insurers had crossed the line in becoming involved in the funding and conduct of the defence of wholly uninsured

claims, as opposed to where there was limited cover. At paragraph 78 he stated, *"In such cases the insurer may cross the line by conduct falling well short of total control, and without becoming the real defendant, if the insurer intermeddles in the uninsured claim in a manner which it cannot justify."* However, he qualified that in the following paragraph by emphasising that the legitimate interests of the insurer may justify some involvement and even funding the defence of uninsured claims in a situation such as the present case where there was a very close link between the insured claims and the uninsured claims.

It is also important to bear in mind the distinct issue of factual causation. Paragraph 80 of the judgment suggests that even if the claimants had succeeded in every other respect, their Application may have nevertheless failed on the grounds of causation alone. There Lord Briggs stated:

"Fifthly, causation remains an important element in what an applicant under section 51 has to prove, namely a causative link between the particular conduct of the non-party relied upon and the incurring by the claimant of the costs sought to be recovered under section 51. If all those costs would have been incurred in any event, it is unlikely that a section 51 order ought to be made."

Responding to the question in this title, it appears that the answer is that the position is certainly much clearer, but it may well be going too far to say that it is now clear. Claimants in group litigation will certainly need to be particularly careful to check the insurance position of the defendant, especially if there is a concern about solvency and mixed claims of insured and uninsured.

As with most issues of this nature, however, there are likely to be some continued areas of tension, particularly at the margins and no doubt fact specific. It is suggested that the following three issues are least likely to have been 'resolved' by the judgment in *XYZ*, and indeed may well lead to future arguments being generated:

i XYZ certainly leaves scope to argue that a liability insurer has interfered in a claim in a manner that it cannot justify, e.g. if the interests of the uninsured and the insured claimants were not identical as they were on the facts of the present case. This is clear from Lord Briggs' words in paragraph 78 quoted above;

ii In the same regard, paragraph 78 of XYZ also confirms that the position would have been different if some of the claims involved limited insurance cover, i.e. as opposed to wholly uninsured claimants; and

iii Had the uninsured claims made out their primary case for the section 51 Order, it is anticipated that the causation issue referred to by Lord Briggs above would have been a much more hard-fought issue on its facts.

Guideline Hourly Rates – where did it begin, and where are we now?

Shaman Kapoor

Sources

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When it comes to the assessment of hourly rates on the standard basis, the Court will only allow costs which have been reasonably incurred and are reasonable in amount (CPR 44.3(1) and (2)); and only allow costs which are proportionate to the matters in issue (CPR 44.3(2)).

The GHR were originally intended to assist judges who were faced for the first time with the task of making a summary assessment of costs at the end of a short hearing, being the obligation put upon them by the Woolf reforms and the implementation of the CPR. Pre-reform, some guideline on hourly rates did exist, but those were collated locally by district judges and later communicated to the SCCO for publication. But it was the introduction of the CPR, and the widespread task of summary assessment, that led to a call from the judiciary for guidance and, in response, the SCCO published periodically (until 2006) its guide to summary assessment and the GHR.

In 2005, the Civil Justice Council ("CJC") in its paper "Improved Access to Justice – Funding Options & Proportionate Costs", recommended the creation of 'The Costs Council' in response to what it considered to be a developing "costs industry" driving satellite litigation of arguments about the costs of arguments about costs, which it considered to be "an undesirable barnacle on the civil justice system." The Costs Council was to:

"...have responsibility for deciding annually after consultation and by reference to objective economic criteria, appropriate guideline hourly rates ***allowable*** *between the parties on a fair and reasonable basis..."*

The language used clearly indicates that what was intended was a prescribed set of hourly rates, seemingly removing any element of discretion from the assessing Court and thereby altogether removing any scope for argument. However, the proposals for The Costs Council were not implemented. In 2007, the Master of the Rolls (as head of Civil Justice) took on responsibility for publishing guideline hourly rates. In 2009, bands were based on the recommendations made by the then Advisory Committee on Civil Costs (ACCC). In 2010, the GHR were updated on the basis of inflation (as recommended by the ACCC) only as an interim measure. However, the Master of the Rolls did not accept the same recommendation in 2011 in the absence of a broader base of evidence from practitioners. The responsibility for recommending GHR was transferred by the MoJ from the ACCC to the CJC's Costs Committee. However, since 2010, the GHR have not been updated.

The GHR have only ever been intended to be a starting point on summary assessment, and only ever a "guide." The fact that the CJC's 2005 proposal was not accepted only serves to underline the non-prescriptive nature of the GHR and the preservation of the Court's discretion. They were not intended to be rigid and were certainly not intended for detailed assessment. Further, the GHR do not distinguish between different types of work, perhaps reflecting their original purpose: to assist judges at the end of short hearing in mainstream civil work governed by the CPR. Nonetheless, experience

suggests that the GHR convey a strong sense of magnetism in every case, no matter the type of work and no matter whether the assessment is summary or detailed.

On 28/07/14, the Master of the Rolls issued a paper on GHR (referenced above). It becomes clear that the task for the Costs Committee is to produce evidence-based recommendations as to what the GHR should be. The approach has been to focus on the "expense of time" approach to which will be applied ***a reasonable profit margin***. By assessing salaries, billed hours and overheads, all in relation to grade of fee earner and geographical location of the firm, the "expense of time" produces the break-even figure per fee earner. This process necessarily involves surveys, cooperative participants, gathering data, analysis and assessment. A judgment is then made as to a reasonable profit margin, and by adding the "expense of time" to the "reasonable profit margin", the result is the recommendations for the GHR to the Master of the Rolls.

But the paper went on to note this:

"...It is also important to emphasise that the guidelines were originally intended to be broad approximations of ***actual rates in the market****. As Sir Rupert Jackson noted in his Final Report on Review of Litigation Costs "the aim of the GHR should be to reflect market rates" (Chapter 44, paragraph 3.12)."*

There thus appears to be a contradiction in approach. If the intention is to strictly preserve the Court's discretion in applying the principles of reasonableness and (even) proportionality in order to control costs (at least between-the-parties), then why is the Costs Committee being tasked with performing another tier of what appears to be control by substituting its own view of a "reasonable profit margin"? In any event, one asks rhetorically, "reasonable" to whom? One might respond, "Well, to the Costs Committee, of course." But knowing full-well the composition of the Costs Committee (and holding the utmost respect for the individual members), why are they collectively best placed to dictate "what is a reasonable profit margin"? Shouldn't the concept of reasonableness be a connection to the case in question, and if so, then the lens of reasonableness should be applied by the assessing Court.

It might be thought that a sensible response to the question of "what is a reasonable profit margin" is that it is whatever is dictated by the market. Usual market forces balancing efficiencies, healthy competition for work, maximising profit, and so on, will surely elicit the correct answer to that question. And, therefore, isn't it quite right that the GHR should *only* reflect what the actual rates are in the market so that the concepts of reasonableness and proportionality are left in the hands of the assessing Court?

As I understand it, the Costs Committee was largely without financial resource when it was tasked to survey and analyse the market. Together with the profession in large part refusing to engage, the Costs Committee had an impossible task. Is it any wonder that the Master of the Rolls refused to endorse a further set of guidelines?

It is in everyone's interest to have guideline hourly rates. It is in the consumer's interest to know that there is a measure of protection through assessing Courts and it may even assist them at the time of contracting with the legal profession. It is in the profession's interest to be clear about the rates at which it operates for a consumer and indeed it would assist in the recovery of that rate, consumer satisfaction and surely alleviate a large proportion of satellite dispute. And of course the Courts require guideline hourly rates so that a harmonised and relevant starting point to assessment is utilised, ensuring confidence in that process for all.

In order to collate the data, a ***mandatory*** (conditional to the issuing of a practice certificate) survey (easily anonymised much like the gathering of data on diversity) of solicitors and barristers (no doubt through their professional bodies) is required. Given recent calls for price transparency from the SRA and the BSB, one would hope that such a proposal could only be welcomed. Such a survey need not be extensive as the intention of the GHR is for matters in which only summary assessment is appropriate. But the surveying points might be: practice areas by reference to where Court business is mainly conducted (type of Court as well as broad location); level of fee earner; and composite rates charged.

Such data could help practitioners particularly in specialist fields at summary assessment and all practitioners even at detailed assessment to produce evidence of comparable rates in the market in order to direct the Court to a "starting point" on hourly rates. In the absence of that evidence being brought to the Court's attention, the vacuum in which hourly rates are assessed at summary assessment in a specialist field or at any detailed assessment is likely to be preserved and the risk that assessed hourly rates have no bearing to market reality continues. Evidence of market rate will

not only assist at assessment; it will have a knock-on effect of educating practitioners and judiciary of the market reality when budgeting costs too.

Assessing Courts have from time to time expressed their own frustration. A most recent example, perhaps best known for the headline "£786 for a Grade B", is the case of *Ohpen Operations UK Limited v Invesco Fund Managers Limited [2019] EWHC 2504 (TCC), per O'Farrell J.* Most interesting of all issues was the fact that the parties had agreed that proportionality was not in issue (such soothing words, readers may think). In summarily assessing the costs of an application in which the winning defendant's costs were £52,000 odd, and the claimant's costs were £45,000 odd, the judgment records:

"Although the value of the case is not particularly high for this Court, the technical nature of the dispute justifies the engagement of solicitors with the appropriate skill and expertise to ensure proper and efficient conduct of the litigation. Solicitors providing such skill and expertise are entitled to charge the market hourly rate for their area of practice. The hourly rates charged cannot be considered in isolation when assessing the reasonableness of the costs incurred; it is but one factor that forms part of the skill, time and effort allocated to the application. It may be reasonable for a party to pay higher hourly rates to secure the necessary level of legal expertise, if that ensures appropriate direction in a case, including settlement strategy, with the effect of avoiding wasted costs and providing overall value.

...The Hourly rates claimed by the defendant must be considered together with the time spent on necessary work to assess overall reasonableness of the costs incurred."

I should say that I am not advocating a control-free zone on costs. Firstly, I wonder whether the market will control itself anyway. But secondly, all I am suggesting is that the function of reflecting reasonableness should not be confused with the function of proportionality, and that it should be for the Court to find the balance of that criteria in any given case knowing that it has the best information to begin with.

Reasonableness, Proportionality, ATE in clinical negligence cases and the wider assessment process

James Laughland

"Access to justice must therefore be the starting point for any debate about the recoverability of ATE insurance premiums in any dispute about costs." **There, I have done what I am told. The Court of Appeal's judgment in *West & Demoulipied v Stockport NHS* [2019] EWCA Civ 1220 dictates what must be the first line for this article.**

However, this judgment is not solely of interest to those concerned with the recoverability of ATE premiums in clinical negligence cases. The Court's comments about proportionality and how that issue is to influence the conduct of the assessment of costs have wider significance, applicable in all cases.

The primary issue in these appeals was how should a reasonableness challenge to an ATE premium be made and resolved. Linked with this was consideration of whether a proportionality challenge was limited to the circumstances of the particular case or can it go wider and deal with *"all the circumstances"*? Likewise, if the ATE premium is deemed reasonable, the Court addressed the question of whether it should also be subjected to a proportionality assessment. In doing so attention was turned to the wider approach for considering reasonableness and proportionality in all cases.

Dealing first with the niche area of clinical negligence ATE premiums, the Court reaffirmed the *"important and useful authority"* of *Rogers v Merthyr Tydfil CBC* [2006] EWCA Civ 1134 to the effect that judges are unable, without the assistance of expert evidence, sensibly to address the reasonableness of the premium (except in very broad brush terms) and there is a risk to the entire market if they fail to recognise that. This does not mean that using a broad brush is condoned. Issues of what is reasonable should be considered at a macro, not micro, level: macro here means by reference to the general run of cases and the macro-economics of the ATE market, as opposed to a micro level that considers the facts in any specific case.

There are unavoidable characteristics of the complex ATE market and so it is for the paying party to raise a substantive issue as to the reasonableness of the premium, which will generally only be capable of being resolved by expert evidence. Such care is required, and a broad brush avoided, as the availability of ATE is integral to the means of providing access to justice in clinical negligence cases.

Most recoverable ATE premiums in clinical negligence cases will be a block-rated policy. This fact restricts the scope for challenge by a paying party compared to a bespoke policy. Comparison with other block-rated policies is also fraught with danger unless the Court is satisfied, by expert evidence, that the alternative is directly comparable and would have been available.

More interestingly, it was stated that a simple comparison between the value of the claim and the amount of the premium was not a reliable measure of the reasonableness of the premium. Such an approach would be to ignore the wide basket used to create the block-rated policy.

Where an ATE premium has been held reasonable, or not challenged on this ground, then as a consequence of this decision in *West & Demoulipied*, it can no longer be deemed disproportionate or adjusted for that reason. This is for two reasons. First, comparing the premium to the value of the claim is a micro-level consideration; not macro. Second, as ATE is critical for access to justice that outcome will be defeated if the viability of the ATE market and the full recoverability of the premiums necessarily incurred is imperilled.

In developing this last point recommendations were given that will be of wider significance for all assessments of costs. When considering proportionality certain fixed and unavoidable costs should be left out of account. Aside from an ATE premium this will include court fees, the costs of drawing the bill itself and VAT. It is the remaining costs, costs not subject to an irreducible minimum and likely incurred as a result of the exercise of judgment by the solicitors or counsel, that will be subject to the not-so-new rules on proportionality.

The Court of Appeal gave guidance on what it saw as *"the right approach to costs assessment."* First there should be a line-by-line assessment of the reasonableness of each item of cost. If possible, reasonable and convenient the proportionality of any particular item can be considered simultaneously, but this should not necessarily occur. It is probably only possible to do this when the Judge thinks the item is clearly disproportionate, irrespective of the final cumulative total.

After the line-by-line scrutiny the cumulative total of reasonably incurred costs (including, at this stage, the irreducible / unavoidable costs described above) must then be judged for proportionality. If the total figure is found to be proportionate, then nothing further need be done. If the conclusion is that the total is disproportionate, then further reassessment is required. This should not be line-by-line but should instead consider various categories or phases of cost. However, the ring-fenced-from-proportionality costs should now be excluded from this process.

As ever with the Court of Appeal, this is all easier said than done. What they did say is that the costs judge undertaking the proportionality assessment by category should consider whether the costs incurred in each category are disproportionate. If yes, then such reduction as felt appropriate can be made; thereby making (so it was claimed) reductions for proportionality *"clear and transparent."*

What the court did not say is whether, when deeming the original total disproportionate, the costs judge should at that stage indicate what would be a proportionate figure. At least that approach would allow all to know the size of the quart that was then to be squeezed into a pint pot. If the costs judge merely says that costs are disproportionate, without elaboration, and then reviews the costs phase by phase, s/he may still find that the recalculated total remains instinctively disproportionate and want to start the re-evaluation all over again.

The Court felt that such might lead to the danger of double counting and warned against a second / further stage of standing back after the re-evaluation and undertaking yet further review by reference to proportionality. In doing so they assumed that the initial re-evaluation and its reductions would necessarily lead to an outcome that would, by definition, be proportionate. If only life were so easy. It seems unlikely that merely adjusting the costs in one or more category for proportionality will ***necessarily*** produce a result that a costs judge will think appropriate.

Challenges to block-rated ATE insurance following West v Stockport: Master Leonard's judgment in *Judge v Donkey Sanctuary Trustee Ltd* (31.10.19)

Matt Waszak

Introduction

On 17.07.19, the Court of Appeal handed down its long-awaited judgment in *West v Stockport NHS Foundation Trust* [2019] EWCA Civ 1220. For ATE insurers, it provided welcome news: to challenge a block-rated ATE premium, expert evidence is required. The ATE insurance market, said the Court of Appeal, *"is integral to the means of providing access to justice in civil disputes."* In post-LASPO clinical negligence cases, ATE premiums are unavoidable items of costs which, if assessed to be reasonable, cannot then be assessed as disproportionate.

On 31.10.19, Master Leonard handed down judgment in the case of *Judge v Donkey Sanctuary Trustee Ltd*, following a detailed assessment hearing at the start of August 2019. In *Judge*, heard six weeks after *West* was handed down, Master Leonard dismissed the defendant's challenge to the reasonableness of a block-rated ATE premium in a pre-LASPO personal injury case[1]. I acted for the claimant/receiving party. A copy of the judgment can be accessed here: https://tgchambers.com/news-and-resources/news/challenge-to-block-rated-ate-premium-following-court-of-appeals-decision-in-west-v-stockport/.

Judge v Donkey Sanctuary Trustee Limited: the facts

The claimant brought a personal injury claim against the defendant, his employer, arising from injury sustained during the course of his employment. His claim was funded by an ATE policy with DAS Insurance. The premium for the ATE policy comprised three stages, triggered at different points in the litigation: the first stage when the policy was taken out; the second stage when the claim was issued; and the third stage 14 days before trial.

The third stage of the ATE premium was triggered 14 days before the liability trial. Like the premium considered by the Court of Appeal in *Rogers v Merthyr Tydfil Borough Council* [2006] EWCA Civ 1134, it was calculated by reference to the total costs the claimant was liable to pay in the event of losing at trial. That figure comprised the total for the defendant's costs and the claimant's solicitors' insured disbursements. A 125% multiplier was then applied to that total figure, which allowed 100% for the insurance risk and a 25% allowance for overheads. The figure for the defendant's total costs (in this case, £55,799) was taken from the defendant's budget. Applying the 125% multiplier to the total of £55,799 (the defendant's costs) and £2,851 (insured disbursements) produced a third stage premium of £73,312.50 plus IPT.

The Defendant's Challenge to the ATE premium

At detailed assessment, the defendant challenged the ATE premium on two principal bases[2]:

i First, it argued that the third stage of the ATE premium should have been calculated by reference only to the defendant's costs of the liability trial. It had been agreed between the parties, and was subsequently approved by the Court, that there would be an initial trial on liability only. The third stage of the premium, said the defendant, should not have been calculated by reference to the defendant's costs budget, because those costs were based upon the case progressing to a full liability and quantum trial.

ii Second, the application of the risk multiplier of 125% was inappropriate. Seeking to rely on evidence considered by the Court of Appeal in *Rogers*, the defendant sought to argue that the appropriate allowance for operating costs was 4%.

Judgment

Master Leonard dismissed both arguments and allowed the premium in full.

The first argument, he held, was *"quite plainly unsupportable"* [68] and *"hopelessly simplistic"* [69].

i The claimant was at risk from the outset in relation to the costs of quantum, which did not disappear when the split trial was ordered [70].

ii The defendant was effectively arguing that when the decision was made to have a split trial, it was incumbent on DAS to change the terms of the insurance contract to create a new kind of four-stage ATE policy, insuring the claimant against liability and quantum costs in two stages [67]. There was no evidence that such a policy has been offered by any insurer [67].

iii The defendant's argument did not address how separate cover (for quantum costs) could have been provided, or what the cost of such insurance cover would have been. It assumed that no further premium would have been payable after the liability trial notwithstanding that the case proceeded in relation to quantum. Nothing was said by the defendant about the hypothetical fourth stage premium [70].

Dismissing the second challenge, Master Leonard held:

i The calculation of the multiplier for the third stage of the premium was based on evidence provided by the Claimant. Such evidence had not been challenged by the Defendant [72].

ii The calculation of the multiplier was based on underwriting experience. A judge should not interfere with such figures without sound, most probably expert evidence [74].

iii The defendant's challenge to the 25% operating costs figure was based on supposition about the evidence considered by the Court of Appeal in *Rogers* [76].

iv The defendant urged the Judge to substitute his own judgment for that of the insurer by reference to *"a hypothetical (and, in this case, unrealistic) calculation of a reasonable premium."* Such an approach has been expressly disapproved of by the Court of Appeal in *West* and *Rogers* [82].

Conclusion

Master Leonard's judgment in *Judge v Donkey Sanctuary Trustee Limited* serves as a useful example of the application of the *West* principles to block-rated ATE insurance, and specifically in relation to a block-rated ATE premium in a pre-LASPO personal injury litigation.

Of broader significance, Master Leonard emphasised that:

i Though *West* concerned the recovery of ATE premiums in post-LASPO clinical negligence cases, the Court of Appeal restated established principles which continue to apply to all assessment of ATE premiums [60].

ii In *West*, the Court of Appeal [at 30] expressed its concerns about the practice of challenging an ATE premium with weak evidence in an attempt to create an element of doubt and falling back upon CPR 44.3(2)(b) [83].

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1. In issue between the parties was also the recoverability of the claimant's ATE premium for an appeal to the Court of Appeal. That aspect of the case is not considered by this article.

2. A further point of challenge was advanced by the Defendant which is considered in the judgment at [84].

A characteristic of the claimant is not a feature of the dispute...

Elizabeth Gallagher

Mr Philip Aldred – v – Master Tyreese Su-lay Alieu Cham [2019] EWCA Civ 1780; CA

This case concerned the fixed costs regime set out in CPR Part 45 IIIA and, specifically, the recoverability of the cost of Counsel's advice as to the proposed settlement of a claim, in circumstances where the claimant is a child. The question was whether the cost of counsel's advice was a disbursement 'reasonably incurred due to a particular feature of the dispute' within the meaning of CPR r 45.29I (2) (h).

Section IIIA of Part 45 sets out the fixed costs regime which applies to claims started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ('the RTA Protocol').

The recoverable disbursements are prescribed by CPR r 45.29I, which states:

'(1) [...] the court—

(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but

(b) will not allow a claim for any other type of disbursement.

(2) In a claim started under the RTA Protocol, [...] the disbursements referred to in paragraph (1) are— [...]

(h) any other disbursement reasonably incurred due to a particular feature of the dispute.

The Respondent ('the Claimant') was aged 7 when he was injured in a road traffic accident caused by the Appellant ('the Defendant'). The claim started under the RTA Protocol in the usual way, but no longer continued under the Protocol after liability was denied.

Nonetheless, following negotiations, the Defendant conceded liability and offered £2,000 in full and final settlement of the claim. The Claimant's solicitors sought the advice of counsel as to the amount of the offer. Such advice was required pursuant to CPR r 21.10 (1) and Practice Direction 21, paragraph 5.2 (1). Counsel recommended acceptance of the offer and the matter came before the court for approval. The settlement was approved and the Defendant was ordered to pay the Claimant's costs to be assessed if not agreed.

The Claimant served a bill of costs and, in response, the Defendant objected to the fee for Counsel's advice, saying that it was outside the fixed costs regime provided for by CPR Part 45 IIIA. The matter came before District Judge Hale for provisional assessment and thereafter an oral assessment, at which he allowed the recovery of Counsel's fee on the basis that it was a disbursement 'reasonably incurred due to a particular feature of the dispute.' He held: *'It seems to me that the fact that the claimant is a child is a particular feature of the dispute which entitles and indeed requires the court to look to the exception to decide whether or not it is recoverable.'*

The Defendant appealed. The appeal was heard by His Honour Judge Owen QC sitting in the County Court at Nottingham. He concluded:

If the claimant is a child, the need to obtain counsel's advice on valuation would constitute a particular feature of the dispute. There is no justification for implying that those fees, when incurred, are already provided for within the fixed recoverable costs. The fact that counsel's fees are expressly provided for under sections II and III [of CPR Part 45] in addition to the provision for any other disbursement(s) does not of itself admit to the inference argued for by the Defendant. On the contrary, it seems to me that the absence of such express reference within section IIIA to these fees supports the District Judge's conclusion. Clearly, where reasonably incurred there must be provision for the recovery of those fees. Since they

are not otherwise expressly provided for or referred to it is clear, in my judgement, that the provision of "any other disbursement reasonably incurred due to particular feature of the dispute" under rule 45.29I (2) (h) must include the fee in question. There is no need or room within the structure or content of section IIIA to infer that that fee is provided for within the fixed costs identified in Table 6B.

The Defendant sought permission to appeal to the Court of Appeal and, notwithstanding that it was a second appeal, permission was granted on the basis that the point in dispute was one of wide application.

The Court of Appeal considered two main issues: (1) Was Counsel's advice due to a particular feature of the dispute? (2) If yes, was the cost thereof a disbursement reasonably incurred which the court should allow in addition to the fixed recoverable costs?

In respect of the first issue, Lord Justice Coulson – with whom Lady Justice Nicola Davies and Lord Justice McCombe agreed – held (at paragraphs 35 to 37):

The fact that, in a particular case, a clamant is a child, or someone who cannot speak English, or who requires an intermediary, is nothing whatever to do with the dispute itself. Age, linguistic ability and mental wellbeing are all characteristics of the claimant regardless of the dispute. They are not generated by or linked in any way to the dispute itself and cannot therefore be said to be a particular feature of the dispute. The particular features of the dispute in an RTA claim will commonly be matters such as: how the accident happened, whether the defendant was to blame for the accident, the nature, scope and extent of the injuries and their consequences, and other matters of that kind. For example, the particular circumstances of the accident may be sufficiently unusual to require an accident reconstruction expert, or the injuries may be so complex that they require a number of different experts' reports. Such additional involvement of experts may also require specific advice from counsel. Depending always on the facts, such costs may be said to be a disbursement properly incurred as a result of a particular feature of the dispute. In contrast, the cost of counsel's advice in the present case was not necessitated by any particular feature of the dispute, and was instead required because it is an almost mandatory requirement in all cases where the claimant is a child. It was therefore caused by a characteristic of the claimant himself and does not fall within the exception.

In respect of the second issue, Lady Justice Nicola Davies and Lord Justice McCombe held that it was useful to compare the wording of Section IIIA of Part 45 with that of Sections II and III, whereas Lord Justice Coulson thought that such an exercise was unhelpful. In any event, they agreed that the cost of Counsel's advice was deemed to be within the fixed costs in Table 6B of CPR r 45.29C.

This decision will undoubtedly raise immediate practical concerns in those cases where the cost of a particular disbursement has already been incurred, but it is now irrecoverable. In such cases, solicitors may have no choice but to pay the cost of the disbursement(s) out of their fixed profit costs. However, it is doubted whether such an approach will be sustainable in the long term. Further, the reasoning adopted by the Court of Appeal does not merely apply to the cost of Counsel's advice in cases where the claimant is a child. It will also impact any claimant who requires an interpreter because their first language is not English, as well as (potentially) disabled claimants – if they require specific assistance as a result of their disability. As such, there is some concern that this decision may have an adverse impact on access to justice moving forward.

It is believed that the Claimant is intending to seek permission to appeal to the Supreme Court, but the threshold for such an appeal is a high one. The question of whether to amend CPR Part 45 IIIA in the light of this decision is a matter for the Civil Procedure Rule Committee and it remains to be seen what (if any) action they will take.

Disclaimer

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

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