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TGC Costs Update

The Newsletter of the TGC Costs Team

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Editorial

By Richard Boyle and Matt Waszak

Welcome to the December 2020 TGC Costs Newsletter – our seventh edition. Our last newsletter came out in May when procrastination was the biggest barrier to completion. Diaries were pretty barren and, while many enjoyed the slower pace of life, the accompanying slow down in court capacity was alarming, alongside of course the gloomy global outlook. This time it has been a manic rush to get the newsletter out before everyone leaves their desks – admittedly not to go much further than the next door room – for Christmas. The courts have got to grips with social distancing, remote hearings and a mounting backlog which has meant a busy few months. This means that, while we appreciate the newsletter won't fill the void of a cancelled Christmas party (or even worse a replacement Christmas quiz), a number of significant cases have been handed down since the last newsletter and our diligent costs team have summarised and explained them for you, pulling out all the key practice points.

The line up includes four decisions from the Court of Appeal and four High Court decisions. The Court of Appeal has given guidance on: sums on account of costs before detailed assessments in *Mousavi-Khalkali v Abrishamchi*, no orders as to costs in *Deepchand & Anor v Sooben*, entitlement to enhanced interest under Part 36 in *Telefonica UK Ltd v The Office of Communications* and more on Part 36 in the costs slant on one of the biggest personal injury cases of the year, *Swift v Carpenter*. While *Telefonica* and *Swift* state what you might get if you beat a Part 36 offer, *Essex County Council v UBB Waste (Essex) Ltd (No. 3)* contains a warning as to the form of such offers and highlights a possible pitfall. On the topic of pitfalls, we have two articles on retainers which raise potentially costly mistakes *(Belsner v CAM Legal Services Ltd; Lexlaw Ltd v Zuberi, Toms (t/a Goldbergs Solicitors) v Brannan)*. We also bring you the answer to yet another of the seemingly infinite fixed costs lacunae *(Coleman v Townsend)*.

Stepping back from case law, we've also got the big picture covered. We have an explanation of the new rules and precedent for costs budgeting, an update on the review of guideline hourly rates and Simon Browne QC's Silk Road looking at how the legal system is coping with Covid-19.

Happy reading and we do hope you enjoy a undoubtably well-earned Merry Christmas.

Matt & Richard

Silk Road

By Simon Browne QC

During Lockdown-2 my family lost a great Aunt. It wasn't that we didn't know where she was. She passed away peacefully in her sleep aged 93.

She was a formidable lady. Having served in the Navy as a WREN she was recruited into military intelligence and then into Whitehall, where she was a member of the team in the 1960s dealing with the fallout from the defections of the Cambridge Five spy ring.

She was not one to pull her punches, probably because she was not a politician. When briefing a Cabinet Minister on her findings into the functioning of his department, she informed him "Minister, I have been here long enough to know how this place works. It doesn't".

I concluded my last Silk Road column with suggestions as to how a combination of personal attendance and remote hearings may be used in the courts in future. In summary, my views were that whereas remote hearings may be useful for interlocutory matters they were not suitable for substantive final hearings.

My observations have been cemented since then by having to conduct a detailed assessment of a substantial electronic bill by telephone. Not only was the forum unsuitable from the outset, but when the Judge did not have adequate internet connection or technology to handle larger electronic files at his home rather than attending his chambers in Central London this was not an advertisement for the smooth running of the legal system.

So, as my great aunt would immediately ask, "Does the present legal system during the Covid-19 crisis work?" The Lord Chief Justice, Lord Burnett of Maldon, gave evidence on Tuesday 10 November at the Justice Select Committee in the House of Commons to answer the question.

As expected, he gave a reasoned and optimistic presentation, somewhat assisted, it must be observed, by the chair of the Committee appearing rather unctuous towards the LCJ. Lord Burnett was invited to reflect on where the system is now and where it is going through and after the pandemic.

On the lessons learned so far he commented:

"We have learnt a lot. In particular, we are getting a fairly good sense in all jurisdictions of the types of hearings that lend themselves to either all or one or two of the participants attending remotely and those that do not. That is being carried forward at the moment. There is in development a much better video-hearing system, which, again, was being trialled at the time this all started. My hope is that that will be accelerated because it will, undoubtedly, make life easier."

For Mac users whose software is incompatible with Skype favoured by the Courts this is not very encouraging. For costs practitioners the willingness of certain Costs Judges to use Microsoft Teams for remote hearings is a blessing. There must also be concerns that the LCJ "hopes" the video hearing system will be accelerated does not instil confidence. As ever, finances, or lack of, may well undermine such aspirations. Many of us will recall the Woolf Reforms at the turn of the century floundering due to the non-arrival of the much-flaunted computer system which would enable the Courts to manage cases.

As to other aspects of the future of the legal system the LCJ stated:

"For the future and for so long as we have to live with COVID, we will continue in all jurisdictions with a mix of face-to-face hearings, a mix of some that can be entirely remote – that is to say, all the participants attend by phone or by an online platform – and increasingly what we call hybrid hearings, which means that some people are in court, some people attend remotely, and different people attend remotely at different times of the hearing. Flexibility and adaptability are the key to keeping things going."

As before then. Plenty of intent but little by way of example. So, in answer to the question "Does the present legal system during the Covid-19 crisis work?", the answer is yes in that it has kept ticking over in the civil courts. Is there room for improvement going forward – definitely. It may well be that individual court user groups will have to develop their own way of doing things. The SCCO is a tight knit division with pro-active court users and can surely find a suitable way forward. For the Regional Costs Judges and District Judges, they may well be subjected to the system and procedure imposed in the County Courts and the Registries of the High Court.

It is perhaps not for us to sit back and criticise but to roll our sleeves up and be pro-active with the Courts as to how we wish for matters to procced by way of hearings. To those who serve on various court users committees we thank you and encourage you to continue your work in finding our way through this crisis.

So, to the latest edition of the Temple Garden Chambers Newsletter. A Christmas present come early and some excellent festive reading. There is a wide array of articles covering many different subjects. Just like a tin of Quality Street – something for everyone. I note the article on hourly rates by Matt Waszak. The time delay on the guideline hourly rates and the arguments still based on the postcode lottery have to be removed by the latest review. This year alone separate judges in the SCCO have awarded different Grade A rates for similar commercial work performed by firms not in the City (South Bank and Canary Wharf) at £750 ph and £450 ph. The law should provide certainty, not promote a lottery.

With best wishes for the festive season and New Year. I wish you all a settled and prosperous 2021.

Cost Budgeting Rules: What's New? (Or, All I Want for Christmas is... yet another bloody Precedent Form that I probably won't recover the costs of completing...)

Richard Wilkinson

Dear Reader, all being well, you are not completely unaware that the cost budgeting provisions have recently undergone fairly major revision. This article aims to summarise both what you need to know about the new provisions by considering what has (and hasn't) changed, whilst also reflecting on potential implications of the new regime.

Most importantly, the new rules came into effect on **1 October**: if this news had passed you by completely, now would be a good time to become acquainted with them.[1]

To start with, the good news. First, many of the revisions are largely cosmetic and appear designed to make it easier to navigate one's way around the various provisions. Whereas previously it was necessary to consult the Rules, the Practice Direction and Guidance Notes (the latter, unhelpfully not even printed in the White Book), everything has now been condensed into just two sources: CPR 3.12 – 3.18 and Practice Direction 3E. The Guidance Notes are no more.

Second, whilst there has been some re-arranging of the deckchairs, the shape of the Titanic remains largely unaltered. Whether this truly counts as "good news" may be moot, but at least the text remains familiar. The fact that chunks of what used to be Practice Direction are now ensconced within the new Rules seems unlikely to make any practical difference, but to save you the trouble of a painstaking exercise in cross-referencing, the main movers (if not shakers) are as follows:

Previous source in PD3E	New source in CPR	Provision	Comment
2a	3.13(3)(a)	Ordering cost budgets in cases otherwise outwith the rules	
4	3.13(3)(b)	Ordering cost budgets if parties consent	Court "shall" do so rather than "will" do so
6a	3.13(4)	Limiting budgets to part only of proceedings in substantial cases	
6a	3.13(5)	Statement of Truth	
7.2	3.15(5)	Recoverable costs of completing Prec H and other costs of the cost management process	
7.5	3.15(6)	Court can set timetable for future reviews of budgets	
7.7	3.15(7)	Re-filing budgets after approval	
7.8	3.13(6)	Providing budgets to LIPS	
7.10	3.15(8)	CMOs concern phase totals. Hourly rates not approved	

Similarly, some parts of the old Guidance Note have now re-surfaced in the revised Practice Direction, including the provisions in relation to lodging documents (now at **PD para 3** – but with the perhaps unnecessary inclusion that other documents should be lodged "where the court orders otherwise"); and **PD para 13** – applications in cases where one party believes the other is behaving oppressively in a way that causes money to be spent disproportionately. Will this latter move give more prominence to a provision which, certainly in the author's experience, has attracted little attention to date? Time will tell.

So, what then is new? The main changes concern what are now to be called "Variation Costs". Before considering these, there are 4 other new provisions to flag up.

First, as far as **Interim Applications** are concerned, not only have the provisions moved from the PD (para 7.9) to the Rules at 3.17(4), but there is a (very) subtle change of wording. No doubt there is some significance to the change from "interim applications which, reasonably were not included in the budget" to "if [the court] considers it reasonable not to have included the application in the budget", but it escapes me. In the former case, the PD provided that additional costs "shall be treated as additional" whereas now the Court "may" do so.

Second, para 5 of the new PD helpfully reminds us that in deciding the **reasonable and proportionate costs**, the Court should have in mind the usual factors in CPR 44.3(5) and 44.4(3). For emphasis, the PD makes clear that it is where the work is done, not where the case is heard that matters.

Third, further guidance in relation to **Contingency Costs** is provided in para 9 of the PD for those cases where the parties are proceeding on the basis of different assumptions. The example given is over the need for particular experts, but it will apply equally for example to the likely length of trial. It is now suggested that where such costs are disputed they should be set out in the appropriate phase of the budget and marked as disputed. In other words, they should no longer appear by way of a separate contingency. Whether this does anything to ease the presentation and understanding of budgets remains to be seen.

Fourth, there is even more explicit discouragement of the practice of providing additional "explanatory" documents with your budget. The old Guidance Notes simply said such documents were "not encouraged". Now they should only be prepared "in exceptional circumstances" – i.e., almost never.

Finally, we come to the main event, all contained within the new **Rule 3.15A** – headed: **Revision and variation of costs budgets on account of significant developments ("variation costs")**. The first point to note is that the trigger for varying a budget remains the same: significant development. As before, no guidance is provided in the Rules as to what constitutes such a development.

However, in my experience, hearings to revise budgets have in the past not infrequently descended into chaos and farce, the result of parties taking wholly differing approaches to the exercise, compounded by a lack of uniformity in judicial approach. The sub-title of this article notwithstanding, the innovation that is the new "**Precedent T**" should therefore be welcomed. It spells out clearly what information is to be provided (and how), gives the applying party (some) space to explain the nature of the significant development relied on in each phase and affords the opposing party the opportunity to respond. Although Precedent T implies that explanation is only required for those significant developments which increase costs by more than £10,000, parties would seem well advised to provide explanation in all cases. The wording of Rule 3.15(A)(6) puts beyond doubt that the Court can vary costs incurred since the CMO. Rule 3.15(A)(5) indicates a presumption that, armed with such information, most applications will be resolved on paper, without the need for a further hearing.

Two aspects of these new provisions merit particular attention. The requirement to revise budgets has now been strengthened. Whereas previously the PD suggested that each party "shall" revise, now they "must" do so: **3.15(A)(1)**. Even under the former provisions, parties were expected to incur the expense of revising budgets downwards if issues in the case resolved (e.g. where liability is resolved after the CMO has been made). I personally cannot recall many, if any, cases in which this happened in practice. Now they are required to do so. However, the rules contain no sanction at all for not doing so and there is no obvious way in which such failure can be penalised in later assessment proceedings either. The provision is thus likely to remain honoured more in the breach unless those, such as Defendants in personal injury claims, who perceive themselves as likely to end up as the

paying party force their opponents into action. Why wouldn't they, when there is clear advantage in minimising the budget before the case concludes?

An interesting question is whether this toughening of the rules will make it more difficult for receiving parties who fail to apply subsequently to argue "good reason" at detailed assessment? Clearly not in those cases where the 'good reason' would not have amounted to a "significant development". Turner J has also recently held that an unsuccessful attempt to vary did not prevent a later application to depart for good reason: see ***Hutson v Tata Steel*** [2020] EWHC 771 (QB) [see James Laughland's article in the May 2020 newsletter]. But what if no application is made when it should have been? The rules provide no other explicit sanction for a failure to apply, so perhaps this will be seen as a way of giving the new provisions more bite.

Second, the mandatory process for making budget revisions is set out in **3.15(A)(2) – (4)**. Parties must submit their proposed revisions to the other parties for agreement **before** submitting them to the Court. The variation must be certified to confirm that the costs claimed are not included in any previous budgeted costs (rather difficult one imagines if one is revising one's budget downwards …). And this must all be done "promptly" (both to the other parties and to the Court). As to the former, does this mean the Court will refuse to entertain an application that has not first been submitted to the other party? Probably – not least because it will presumably mean Precedent T has not been completed. As to the latter, will delay in submitting a variation, either to the other party or subsequently to the Court, provide a stand-alone reason for refusing to vary the budget? Save in extreme cases, the justice of such an approach would seem hard to discern in circumstances where the Court can still adjust costs even if incurred by the time of the variation hearing (especially if any delay pales by comparison with Court listing delays).

So in summary, whilst not too much has changed, the devil as always lies in the detail with some potential bear traps for the unwary when it comes to budget revisions.

1. They were implemented by Rule 4 of the Civil Procedure (Amendment No.3) Rules 2020, SI 2020/747

Guideline Hourly Rates: where are they going?

Matt Waszak

Introduction

Protest at the inadequacy of using guideline hourly rates (GHRs) at detailed assessment has become an all too familiar argument made by receiving parties in costs proceedings.

The minutes from the March 2020 meeting of the Civil Procedure Rules Committee recorded that a Civil Justice Council (CJC) working group had been formed to conduct an evidence-based review of the basis and amount of GHRs. Its aim was to circulate its recommendations in a draft report, ready for consultation, by the end of 2020. The judiciary website[1] currently indicates that the working group will make recommendations to the CJC and the Deputy Head of Civil Justice (Lord Justice Coulson) during Trinity Term 2021.[2]

But why a review now? How is the review being conducted and what might it achieve? And what stage has the review reached?

Why now?

The efforts of the current CJC working group are not, of course, the first time that the 2010 GHRs have been reviewed.

In May 2014, the Civil Justice Council Costs Committee, chaired by Mr Justice Foskett (as he then was), reported to the Master of the Rolls after attempting a "comprehensive evidence-based review" of GHR.[3] The Committee relied upon different sources of data, including its own survey. However, responses to the Committee's survey were limited: only 148 completed responses were received. In his foreword to the Report, Foskett J described the response rate to the survey as "*poor*", and that the Committee's recommendations could "*only be as good or as valid as the quality of the evidence at [their] disposal*".

New rates were recommended by the Committee but were rejected by the then Master of the Rolls (Lord Dyson).[4] He could not accept the recommended rates because *"the evidence on which [the] recommendations [were] based [was] not a sufficiently strong foundation on which to adopt the rates proposed"*.[5] The "shortcoming in the evidence", said the Master of the Rolls, was "fundamental".

Desire for change therefore, but a lost opportunity because of the insufficiency of evidence. Practitioners had only themselves to blame.

In December 2019, the ACL's survey at its Manchester Conference showed a consensus for change amongst practitioners.[6] Of the 72 costs lawyers who responded, 60% said that a review of GHR was "urgent", while a further 26% said that a review would be "helpful".[7]

Appetites for change were given fresh impetus by the widely-reported decision of Mrs Justice O'Farrell in ***Ohpen Operations UK Limited v Invesco Fund Managers Limited*** [2019] EWHC 2504 (TCC), handed down on 24 September 2019. The decision concerned the summary assessment of the defendant's costs of a half-day interlocutory application in which the Court, after considering whether the claim had been issued in breach of a contractually agreed dispute resolution procedure, stayed the proceedings to allow a mediation to take place.

It was argued by the claimant that the defendant's costs were unreasonable, in part because *"the hourly rates of the defendants' solicitors [were] unreasonably high, particularly when compared against the Senior Courts Costs Office ("SCCO") guidelines rates*".[8]

In a paragraph which has since attracted significant attention, and has been cited with increasing regularity, O'Farrell J held that:

"It is unsatisfactory that the guidelines are based on rates fixed in 2010 and reviewed in 2014, as they are not helpful in determining reasonable rates in 2019. The guideline rates are significantly lower than the current hourly rates in many London City solicitors, as used by both parties in this case. Further, updated guidelines would be very welcome".[9]

Ohpen is the first in a series of recent decisions which have poked criticism at the inadequacy of GHRs. In particular, three subsequent decisions stand out.

The first of those was Master Rowley's decision in Shulman v Kolomoisky & Anor [2020] EWHC B29 (Costs), handed down on 24 July 2020, which concerned the assessment of hourly rates for work done by Skadden, Arps, Slate, Meagher & Flom LLP in a substantial case in the Commercial Court. In relation to the application of GHRs, Master Rowley held at [33] that:

"...one of the many issues that has arisen with the use of the Guideline Rates over time is the fact that there is a single figure for a particular level of lawyer in a particular locality. That figure takes no account of the size of the firm, the nature of the work undertaken et cetera in the particular case. It is described as a broad approximation and it is really the roughest of rough guides as to what might be allowed. The potential range of litigation in the City can be seen in this case and explains why ***the Guidelines Rates are barely even a starting point in a case such as this****".*

On 30 September 2020, Master Whalan handed down the widely-reported judgment in ***PLK & Ors (Court of Protection: Costs)*** [2020] EWHC B28 (Costs), which concerned the application of GHRs in the assessment of costs incurred in the Court of Protection. Evidence in relation to hourly rates was submitted to the Court. At [35] of his judgment, Master Whalan held in relation to the application of GHRs:

"I am satisfied that in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift that recognises the erosive effect of inflation and, no doubt, other commercial pressures since the last formal review in 2010. I am conscious equally of the fact that I have no power to review or amend the GHR. Accordingly my finding and, in turn, my direction to Costs Officers conducting COP assessments is that they should exercise some broad, pragmatic flexibility when applying the 2010 GHR to the hourly rates claimed. If the hourly rates claimed fall within approximately 120% of the 2010 GHR, then they should be regarded as being prima facie reasonable. Rates claimed above this level will be correspondingly unreasonable".

The last in the trilogy of recent decisions is that of His Honour Judge Hodge QC (sitting as a High Court Judge) in ***Cohen v Fine & Ors*** **[2020] EWHC 3278 (Ch)**. ***Cohen*** concerned an appeal of a District Judge's summary assessment of costs in a trusts case. Having allowed the appeal against the District Judge's decision, he conducted a fresh summary assessment of costs. Perhaps of some significance was the fact that His Honour Judge Hodge QC had been a member of the Foskett Sub-Committee in 2014. In relation to the application of GHRs, he held at [28] of his judgment:

"In my judgment, pending the outcome of the present review, the Guideline Hourly Rates should be the subject of, at least, an increase that takes due account of inflation. Using the Bank of England Inflation Calculator, it seems to me that an increase in the (Band One) figures for Manchester and Liverpool broadly in the order of 35% would be justified as a starting point (appropriately rounded-up for each of calculation)".

What might we expect from the review?

It is assumed from the working group's previous timescales that evidence gathering has now been concluded. Evidence was collated in two parts.

First, information was obtained on the hourly rates allowed at assessments between 1 April 2019 and 31 August 2020; and, where possible, of hourly rates agreed between parties, whether or not the case ultimately went to assessment. That information was obtained by an excel spreadsheet distributed by the working group.

Second, information was obtained from costs assessments between 1 September 2020 and 27 November 2020. Practitioners were asked to provide as much information as they could as soon as possible after each assessment. Parties were able to submit the information by way of an online form, designed to obtain information on the level of judge; the court where the assessment took place; the type of claim; the value of the claim and/or detail of any non-monetary remedy sought; the location of the receiving party's solicitors (both city/town and postcode); total

of the bill/schedule; the type of assessment; the hourly rates claimed; the hourly rates allowed; and any 'out of the norm' features that affected the hourly rates allowed. However, in October 2020, the Senior Costs Judge made clear that the working group was happy to receive data in any format, whether raw or refined.[10]

Where is the review likely to take us? Well, it's worth remembering that as with 2014, the recommendations of the CJC working group will not simply be rubber stamped. Change will only be made if approved by the Master of the Rolls (Lord Justice Vos takes office on 11 January 2021) and if supported by evidence. While nothing more than the author's own opinion, there is appears to be clear consensus for change. 2021 is likely to see recommendations for new GHRs at levels significantly above those set in 2010.

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1. https://www.judiciary.uk/related-offices-and-bodies/advisory-bodies/cjc/working-parties/guideline-hourly-rates/

2. 8.06.21 to 30.07.21

3. Report to the Master of the Rolls: Recommendations on Guideline Hourly Rates for 2014, May 2014- available online at: https://www.judiciary.gov.uk/wp-content/uploads/2014/07/ghr-final-report.pdf

4. See Master of the Rolls, **Guideline Hourly Rates**, 28 July 2014, available online at: https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf

5. See Master of the Rolls, **Guideline Hourly Rates**, 28 July 2014, available online at: https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-mor-decision-july2104.pdf

6. See the ACL's article at: https://www.associationofcostslawyers.co.uk/%2FPress-Releases/costs-lawyers-call-for-review-of-guideline-hourly-rates

7. See the ACL's article at: https://www.associationofcostslawyers.co.uk/%2FPress-Releases/costs-lawyers-call-for-review-of-guideline-hourly-rates

8. See the judgment at [13(ii)]

9. See the judgment at [14]

10. https://www.litigationfutures.com/news/gordon-saker-lack-of-evidence-threatens-guideline-rates-review

Belsner v Cam Legal Services Limited: Informed consent and solicitor-client assessments

Sian Reeves

In *Belsner v Cam Legal Services Limited* [2020] EWHC 2755 (QB), Lavender J held that a solicitor seeking to rely on CPR 46.9(2) has to show that the client gave informed consent to the payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings. Lavender J held that the written retainer did not give the informed consent required in order to entitle costs to be deducted out of the client's damages.

The decision has caused quite the commotion. Some commentators have suggested that it will likely generate a deluge of challenges to deductions from damages in respect of unrecovered costs and success fees. This article considers whether the implications of the judgment may not, in fact, be as significant as some have predicted.

Background

The claimant in *Belsner* was injured in a road traffic accident. The claimant instructed the defendant solicitors to act for her in her personal injury claim. The client care letter, terms and conditions, and conditional fee agreement ('CFA') set out the claimant's liability for basic charges, success fee and disbursements. These retainer documents set out that the claimant's costs liability may exceed the costs recoverable from another party. The CFA provided for a success fee capped at 25% of the claimant's damages. Significantly, however, none of the contractual documents provided an overall cap on the amount of costs payable by the claimant to the defendant. As observed by Lavender J at [15], solicitors can, and some do, put an overall cap on the amount recoverable from the client.

The claimant's claim settled within stage 2 of the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The insurer paid £1,916.98 in damages, plus fixed costs and disbursement of £1,783.19 (inclusive of VAT).

The defendant deducted £385.50 for their costs from the claimant's damages, but did not give her a bill of costs or an invoice. The claimant sought delivery of a statute bill. The statute bill delivered amounted to £4,306.07 (including VAT). The defendant was thus asserting that it could have charged the claimant £2,522.88 (£4,306.07 less £1,783.19 paid by the insurer). As the judge pointed out at [21], engaging the defendant on the terms proposed by them would have left the claimant with no damages and £605.90 out of pocket. In these circumstances, the defendant's agreement to limit the costs they sought from the claimant to those recovered from the insurer plus the (capped) success fee of £385.50 is perhaps unsurprising.

Legal framework

Section 74(3) of the Solicitors Act 1974 provides:

"The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party in those proceedings, having regard to the nature of the proceedings and the amount of the claim and of any counterclaim."

This can, however, be disapplied by CPR 46.9(2) which provides that:

"Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings."

The judgment

In view of the way in which the case was argued, the main issue for Lavender J to decide on appeal was whether informed consent was required under CPR r. 46.9(2). The defendant argued that CPR 46.9(2) did not require informed consent, and the retainer documentation represented the required " written agreement".

Lavender J held at [70] that:

"A solicitor who wishes to rely on CPR 46.9(2) must not only point to a written agreement which meets the requirements of the rule, as the Defendant did, but must also show that his client gave informed consent to that agreement insofar as it permitted payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings. For this purpose, the solicitor must show that he made sufficient disclosure to the client."

Lavender J held that this requirement arose because of the fiduciary nature of the relationship between the solicitor and the client.

The key question was then whether the defendant had made sufficient disclosure to the claimant for the purposes of s. 74(3) and CPR 46.9(2). Lavender J held (at [85]) that it ought to have been brought specifically to the claimant's attention (for her to give informed consent) that while the defendant's estimate of costs was £2,500 plus VAT, she might recover only £500 or £550 plus VAT from the insurer. It may, for example, have led the claimant to ask whether her liability could be capped, or to approach a different firm of solicitors, who would cap her liability. Lavender J held (at [86]) that it would not have been an unduly onerous burden to require the defendant to make this disclosure. Consequently, Lavender J held that Claimant did not give her informed consent to the agreement.

Commentary

Whilst some have predicted that Lavender J's decision may open the floodgates to a deluge of challenges, there are a number of potential ways in which that tide might be stemmed.

Firstly, the fact that the CFA retainer did not contain an overall cap of the claimant's liability meant that there was a real prospect of her damages being not only extinguished by her costs liability, but also requiring her to be out of pocket. This was central to Lavender J's judgment. In essence, the absence of an overall cap meant that the defendant's estimate of costs alone, without an indication of the likely fixed costs figures, was insufficient to enable the claimant to understand her potential costs liability. Where a CFA provides an overall cap to the client's costs liability, solicitors have a decent argument that informed consent has been given. As many firms do provide for such an overall cap in their solicitor-client retainer documents, Lavender J's decision may not throw open the proverbial floodgates as originally feared.

Secondly, there are a number of decent arguments to be explored in other cases and/or if the defendant is given permission to appeal. For example:

a) CPR 46.9(2) does not contain an express requirement of informed consent. Rather, Lavender J's construction imports a requirement of informed consent on the basis of the fiduciary nature of the relationship. It might be argued that this is an inappropriate basis for importing such a requirement into a statutory regime;

b) Although no claim form was issued in *Belsner*, it was not disputed before Lavender J that s.74(3) applied, except insofar as rules of court may otherwise provide. It is open for argument in other cases that s. 74(3) only applies when "proceedings in the county court" have been issued; and

c) On the particular facts of a given case, it may be argued that sufficient disclosure was given by the solicitor to the client.

Even if the ramifications of *Belsner* do not transpire to be as significant as some commentators predict, it would be a bold solicitor who did not immediately review the terms of their retainers, and give consideration to applying an overall cap on clients' costs liabilities.

Further Guidance on Payment on Account of Costs

Anthony Johnson

***Mousavi-Khalkali v. Abrishamchi* [2020] EWCA Civ 493 was a rare case of the Court of Appeal being asked to consider an appeal against the size of a payment ordered pursuant to CPR 44.2(8) which states, *"Where the 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 good reason not to do so."* As with many arguments of this nature, which rarely find their way into the higher courts, it was the interpretation of the key word 'reasonable' that lay at the heart of the dispute.**

The difficulties in adopting such a course on appeal are well illustrated by the judgment of Phillips LJ in *Mousavi-Khalkali* in which he upheld the figure allowed by the trial judge on the basis that it was within the range of reasonable sums that could have been awarded. His judgment refers to the limited basis in which an appellate court could/should interfere with the first instance judge's exercise of a discretion, quoting the well-known principle identified by Brooke LJ in *Tanfern v. Cameron Macdonald* [2000] 1 WLR 1311 that *"the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which reasonable disagreement is possible."* This meant that the Court of Appeal was not required to re-exercise the discretion afresh and consider the level of an alternative figure.

The successful Respondent had represented that its incurred costs were £633,000. The costs presented by the Appellant had been £263,000; the Appellant's representatives suggested that £200,000 was an appropriate level for payment on account of costs, and maintained that contention on appeal. The figure that the trial judge had arrived at was £325,000.

Phillips LJ relied upon the well-known decision in *Excalibur Ventures LLC v Texas Keystone Inc.* [2015] EWHC 566 where Clarke LJ rejected the proposition that the test for the sum to award was the 'irreducible minimum', emphasising that the question is what is a 'reasonable sum on account of costs'. He went on to state:

> *"What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject...to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure if the range itself is not very broad."*

He noted that, in determining the reasonable level for a payment on account, the trial judge had adopted the middle of the three approaches suggested by Clarke LJ in *Excalibur*, referring to the endorsement of that approach by Leggatt LJ in *Dana Gas v Dana Gas Sudek* [2018] EWHC 332 where he stated, *"A logical approach is to start by estimating the amount of costs likely to be recovered on a detailed assessment and then to discount this figure by an appropriate margin to allow for error in the estimation."*

The trial judge had described the Respondent's total costs of £633,000 as 'an eye-watering sum'. Taking into account that those costs were to be assessed on the indemnity basis, and taking into account the points that the Appellants would make, he said that *"I cannot conceive that the figure on detailed assessment will exceed £450,000 and that might well be a generous figure."* He then said that the discount that he applied should be quite substantial given the scale of the sums, although he cautioned himself against 'double discounting' given that he had already discounted the total figure claimed by a significant sum.

The Appellant argued on appeal that the figure of £325,000 that resulted from that process was 'astonishing' and 'divorced from reality'. In rejecting this, Phillips LJ set out the following reasoning at paras.79 and 80 of his judgment:

"In my judgment the level of the respondents' total costs, whilst perhaps on the high side, is not particularly surprising in the context of proceedings in the Business & Property Courts which involved a worldwide freezing injunction and a two-day hearing on jurisdiction and discharge, with both leading and junior counsel instructed. That remains my view even though the sums at stake were relatively small in Business and Property Court terms: the appellant chose to apply for draconian relief, did so without making full and frank disclosure and raised a panoply of issues and arguments throughout the proceedings. The costs of defending such proceedings with vigour will necessarily have been very substantial, regardless of the sums claimed.

In that context, the Judge cannot be criticised for taking a starting point of £450,000, particularly as the costs relating to the WFO were awarded on an indemnity basis. Further, his application of a 28% discount (in arriving at a figure of £325,000) appears entirely reasonable. Whilst I might have ordered payment of a slightly lower sum, the sum chosen by the Judge was well within the ambit of his discretion."

It is clear from that last comment that Phillips LJ was not intending to endorse the trial judge's figure, which he evidently felt was on the high side. Instead, the rationale behind upholding the decision was a deferral to the relatively generous ambit of the judge's discretion. It is, however, equally clear that he was intending to endorse the trial judge's approach that was based on Dana Gas. Effectively this was a two-stage process:

1) Make an approximate appraisal of the amount that the receiving party might expect to recover at a Detailed Assessment; and

2) Apply an appropriate discounting factor to allow for the potential margin for error in the estimation of that sum.

Both stages of this process are clearly matters that are entirely specific to the facts of any given case, and can be the subject of arguments up or down by both sides in the usual fashion. The Court will inevitably adopt a conservative approach to considering the amount that the receiving party could expect to recover on a Detailed Assessment due to the invariably limited information that would be available before it at that stage, and long before the Bill had been drawn up and Points of Dispute provided. Moving on to the second stage, the application of the further Dana Gas discounting factor would be to a large degree subjective, with it being open to both sides to raise arguments for a smaller or larger discount in accordance with their interests.

The receiving party should be alert to the possibility of arguing against a 'double deduction' being made in relation to these two phases, particularly in cases such as the instant case where the trial judge evidently thought that the Respondent's costs were significantly higher than they could ever expect to recover. The paying party will wish to have its likely arguments for the Detailed Assessment ready to deploy in order to ensure the largest possible ambiguity (and therefore deduction) at the first stage of the exercise, and also should bear in mind any arguments specific to a payment on account such as any difficulties recovering all or a proportion of the costs, the likelihood of a successful appeal the means of the parties, the imminence of assessment etc. (a helpful note on this point is found at 44.2.12 in the *White Book 2020).*

In too Deepchand

James Laughland

It is not often that the Court of Appeal entertains an appeal brought solely against an order for costs. Even less frequent are cases where the Judge below had made no order as to costs. Thus, *Deepchand & Lambeth Solicitors v Sooben* [2020] EWCA Civ 1409 is a rare beast and merits some attention.

The background facts are complicated, and I will not here do them all justice. The Appellants, Mr Deepchand and Lambeth Solicitors, had been the recipients of an application against them for a Non-Party Costs Order (NPCO). Mr Sooben, who made the NPCO application, had been the victor in a contested libel trial against the editor of a niche newspaper (circulation 1,000); *"Mauritius Now"*. Mr Deepchand had been the subject of the published interview and spoke the words complained of. Lambeth Solicitors had represented the editor, as well as successfully representing Mr Deepchand in defeating an application to join him as a defendant outside the limitation period.

The reasons why Mr Sooben thought a NPCO was merited need not concern us. What concerned the High Court Judge, Nicklin J., was the complexity of the issues the proposed application raised. Mr Sooben's counsel had submitted that determination of the NPCO application would require three days of court time with four witnesses, preceded by disclosure and exchange of witness statements. Nicklin J did not quite run for the hills, but he did *"decline to embark on the exercise of determining [Mr Sooben's] application"* because *"it will not be possible to do so proportionately"*. NPCO applications are meant to be a summary procedure, not something that requires a fully contested trial. He then made no order as to costs in respect to the costs of the application. He said *"here, the outcome is neutral. On the one hand I have accepted that the Court will not hear [Mr Sooben's] application, but on the other, neither have I determined that the application ought to be dismissed"*. The Judge's failure to declare them to be the winners is what upset Mr Deepchand and Lambeth Solicitors, who by then had been put to considerable time, trouble and expense.

One point of interest within the Court of Appeal's judgment is the reminder that the Court does have the power, sometimes, to make no order as to costs. Whilst we are all familiar with the concept, and often invoke it if trying to avoid paying an opponent's costs, it is worth being reminded of the circumstances in which it is appropriate for a court to choose to decline to make any order as to costs.

This can be appropriate if the Court concludes it does not have a proper basis to make a determination, such as where there are too few agreed or determined facts to allow the Court to give effect to the "general rule" of costs going to the winner (CPR 44.3(2)(a)).

In the instant case, the Court of Appeal concluded that the trial judge had been wrong to think he was not in a position to determine who the winners had been. First, the simple fact that a NPCO application had been issued when such, on the particular facts of that case, would require such a disproportionate exercise to achieve its determination had led to the application being rejected, without a decision as to the merits of the underlying contentions. The proposed application's objective had failed, and the proposed respondents were therefore the winners. The potential complexity had been apparent from the outset; this was not a case where something the respondents said or did in response had led to the complexity. As the Court put it: *"if the application cannot be determined proportionately, then it should not be made"*.

Whilst fact-specific, the underlying merits of the proposed application were also considered. The Court of Appeal usefully reminded us that in respect to the claim for a NPCO against the solicitors, *"advancing defences of no merit on behalf of their client would not justify a non-party costs order"*. Nor would *"extending credit to a client"* be grounds for a NPCO against a solicitor. The need to warn the potential respondent to a NPCO that such application might be made was also reiterated, albeit it was also noted that a failure to give such a warning would not necessarily be determinative against making the order if otherwise appropriate.

So, a niche dispute concerning a niche newspaper has led to a niche decision on a niche topic. How niche.

Essex County Council v UBB Waste (Essex) Ltd (No. 3) [2020] EWHC 2387 (TCC): there is no 'de minimis' rule for procedural irregularity under CPR 36

Lionel Stride (with assistance from Philip Matthews)

In *Essex CC v UBB Waste*, the High Court considered whether a settlement offer which stated that the 'relevant period' ran for 21 days from the date of the offer letter (as opposed to 21 days from the date of service) was compliant with CPR Part 36. Mr Justice Pepperall ruled that it was, construing the offer in its procedural context as having been made the day after it had been dated. Nevertheless, although rescuing the offeror here, the judge reaffirmed, *obiter dicta*, that if he were wrong, neither the rules of *de minimis* or estoppel would be capable of saving the offer.

Part 36 offers and the rules of 'deemed service'

As readers of this newsletter will no doubt be aware, in order to comply with the requirements of CPR Part 36 (and thus to trigger its unique cost consequences) an offer must, amongst other formalities, "specify a period of not less that 21 days within which the defendant will be liable for the claimant's costs [...] if the offer is accepted" (CPR r. 36.5(1)(c)). This 21-day timeframe is known as the 'relevant period'. A Part 36 offer is 'made' when it is deemed served (CPR r. 36.7(2)). Per the deemed service provisions set out at CPR r. 6.26, where an email is sent after 4.30pm, it is not deemed served until the following business day.

Background to the Case

The case arose from an action by the local authority ("the Claimant") against the defendant company ("the Defendant") for breach of contract regarding the construction of a waste treatment facility. The High Court ruled in the Claimant's favour, awarding damages of approximately £9 million, and dismissed the Defendant's counterclaim of £77 million.

The judgment in question addressed the issue of costs. The Claimant was plainly the successful party in the litigation and entitled to a costs order in its favour per the general rule. However, there remained several issues in dispute, not least whether a Part 36 offer made by the Claimant in March 2019 complied with the requirements of CPR r. 36.5(1)(c) set out above. The offer stated:–

> "If the Defendant accepts the offer within 21 days ***of this letter*** (the 'Relevant Period'), the Defendant will be liable for the Claimant's costs ... in accordance with CPR 36.13".

The critical issue was the reference to the 'date of this letter'. The offer was dated 7 March 2019 and was emailed to the other side at 4.45pm. It was the Defendant's argument that, as the offer had run from the date of the email, the 'relevant' period expired 20 days from receipt, such that it did not comply with CPR r. 36.5(1)(c) (offer open for a minimum of 21 days).

Judgment

The High Court held that the Claimant's offer complied with the requirements of CPR r. 36.5(1)(c). Key to the court's analysis was the authority of *C v D* [2011] EWCA Civ 646, which considered whether a seemingly time-limited settlement offer was valid for the purposes of CPR Part 36: "Any ambiguity in an offer purporting to be a Part 36 offer should be construed so far as reasonably possible as complying with Part 36" (Burnton LJ, at paragraph 84).

Applying this principle, Pepperall J found that that the offer could reasonably be construed as compliant if read against its contextual background (i.e., in accordance with CPR r. 36(5)(1)(c)), such that "it was not "made" for the purposes of Part 36 until 8 March 2019." (paragraph 19)

Approached in this way, Pepperall J considered that the statement that the relevant period ran for "21 days of the date of this letter" could be construed in one of two ways:–

1) Firstly, it could mean that that the 21 days ran from the date stated on the face of the offer (i.e. 7 March). If so, a mistake was made, and the offer did not comply with r.36.5(1)(c).

2) Secondly, it would mean that the 21 days ran from the date when the offer was "made" (i.e. 8 March).

Pepperall J preferred the latter construction because it was consistent with the Claimant's clear intention to make a Part 36 offer and ensured it was effective.

Obiter dicta

In view of the above, it was not necessary to consider the Claimant's fallback arguments that i) any non-compliance was *de minimis* and that the court should, in any event, treat the offer as a Part 36 offer; and ii) the Defendant was estopped from relying upon any defect in the offer. Nevertheless, in case he was "wrong on the construction point", Pepperall J briefly considered the consequences of a finding that the offer was not compliant. His views here have wider implications.

De minimis errors

The Claimant submitted that the court could overlook minor defects in a Part 36 offer that mislead no one. Pepperall J disagreed, reasoning that, where the non-compliance is a failure to comply with one of the mandatory requirements set out in r.36.5, the position is as follows: -

> "Rule 36(2) is clear and there is no possibility of such an offer being treated as a Part 36 offer. Like any other settlement offer, the non-compliant offer must be taken into account when exercising the court's discretion under Part 44 [...] **In exercising the court's discretion under Part 44, the court cannot, however, treat an offer that is a "near miss" as if it were a compliant Part 36 offer."**

Estoppel

On this point, the basis of the Claimant's argument was that the offer had stated:–

> "Should ... the Defendant consider this Offer to be in any way defective or non-compliant with Part 36 of the CPR, please notify us ... within seven days ... Any failure to do so will be relied on by the Claimant to preclude the Defendant from attempting to avoid the adverse costs consequences of Part 36."

The Defendant's response, rejecting the offer, expressly referred to the Claimant's 'Part 36 offer', the service point having not yet been identified. Consequently, the Claimant contended that the Defendant thereby represented that it was a valid Part 36 offer and, as it had relied on the representation, was estopped from raising the technical point under CPR r. 36.5(1)(c).

Pepperall J was unconvinced, stating that "estoppel should play no part in the Part 36 regime". He reasoned as follows:–

1) Part 36 is a "self-contained procedural code," and introducing the rules of estoppel would "breach this core principle";

2) Per r.36.2(2) "... if the offer is not made in accordance with rule 36.5, it will not have the consequences specified in this Section". If parties want the substantial benefits which flow from Part 36, they have to follow the rule in every respect;

3) Construing Part 36 so as to incorporate the rules of estoppel would "introduce yet further uncertainty and complexity into the operation of the Part 36 regime";

4) The parties cannot agree that an offer is in accordance with Part 36 if, on analysis, it is not; and,

5) Finally, as a matter of policy, the responsibility for ensuring that an offer is compliant with Part 36 "should lie squarely upon the offeror and his lawyers".

Conclusion

This decision should serve as a timely reminder to parties drafting Part 36 offers of the need fully to comply with the mandatory requirements of CPR r. 36.5 and the rules on deemed service set out in CPR Part 6 (which will be taken into account when calculating the 'relevant period'). Whilst, in exceptional cases, the court may construe an offer in terms that render it compliant with Part 36, it is plainly preferable to avoid any scope for argument in the first instance. Moreover, if the court is unable to make such a construction, it is now clear that submissions of *de minimis* mistake and/or estoppel will not rescue the offeror. If in doubt, therefore, practitioners would do well to use form N242A when making Part 36 offers so as to avoid subsequent challenge.

Terminated Agreements: They'll Be Back

Robert Riddell

In two recent cases, the High Court considered the circumstances in which lay clients may be liable for their own solicitors' costs after termination of the retainer before proceedings are issued. As might be anticipated, resolving the disputes depend on careful analysis of the form and types of agreement which the parties choose to enter.

Toms (t/a Goldbergs Solicitors) v Brannan [2020] EWHC 2866 (QB)

The Defendant entered a standard form Conditional Fee Agreement (CFA) with the Claimant solicitors in March 2015 regarding a claim against his insurance broker, Sabre. The Claimant provided an initial confident assessment of the claim's prospects and advised obtaining an expert report. Soon after, Sabre sent a detailed denial of liability. The Claimant wrote to the Defendant promising further advice. It appears as though the claim was never properly reassessed. Although counsel was instructed to provide an opinion (some 18 months or so later), this also did not materialise. Shortly before the expiry of limitation in July 2017, the Claimant informed the Defendant that the claim had to be issued and that he would be required to pay the 5% court fee. The Defendant decided not to proceed and limitation accordingly expired. The Claimant then terminated the CFA for failing to provide instructions to issue, and subsequently issued their own claim for professional fees of £12,600 which had been incurred.

At first instance before HHJ Mitchell, the Claimant's claim was dismissed on the basis that the Defendant was not in breach of the CFA because the Claimant "had failed to act in the Defendant's best interests". The matter came before Griffiths J on an appeal which was strictly limited to the question of whether HHJ Mitchell had erred in law, rather than in exercise of his discretion; the Claimant could not therefore challenge the first instance findings (including whether the Defendant had in fact breached the CFA or not). On reviewing the original Agreement, and the terms of HHJ Mitchell's judgment, Griffiths J found that there was no error of law: HHJ Mitchell had found – in the absence of any breach of the Defendant's responsibilities – that the Agreement had been terminated only because the Claimant considered the Defendant was "unlikely to win" (limitation having already expired). Under the terms of the CFA, the Claimant was only entitled in those circumstances to recover expenses and disbursements, but not charges. Accordingly, the appeal was dismissed.

Lexlaw Ltd v Zuberi [2020] EWHC 1855 (Ch)

In 2012, the Defendant instructed the Claimant in a mis-selling action against two banks. Following an FSA review which reported in February 2014, the Defendant rejected an offer of recompense from the banks. There were discussions between the parties as to how to proceed The parties subsequently entered a damages-based agreement (DBA). In time, the relationship between the parties soured, and the Defendant sought to terminate the Agreement. She subsequently accepted a further offer of settlement from the banks. The Claimant – not having accepted the Defendant's attempt to terminate the retainer – subsequently issued a claim against the Defendant for over £125,000 of professional fees which they had incurred.

The form and content of DBAs are controlled by the provisions of the Damages-Based Agreements Regulations 2013 ("the Regulations"). They typically involve a claimant agreeing to pay to the solicitor a percentage of any award of damages. Regulation 4(1) states that any agreement *"must not require an amount to be paid by the client other than"* the agreed percentage payment net of any costs paid or payable to

another party and expenses. In the instant Agreement, clause 6.2 permitted the Defendant to terminate the DBA at any time subject to liability for "costs and expenses incurred up to the date of the termination". The question arose whether the provision was incompatible with Regulation 4(1) and therefore unenforceable against the Defendant. The uncertainty surrounding the point is often cited as a major factor in their disappointing take-up adoption by civil practitioners.

The matter came before HHJ Parfitt (sitting as a High Court Judge) as a preliminary issue. On considering the context and conducting a proper analysis of the Regulations, HHJ Parfitt found that the Defendant's construction of Regulation 4(1) was inconsistent with the purpose of the legislation and would produce a result that was irrational and without justification. Regulation 4(1) was primarily concerned with describing *"how sharing the spoils should work"*; preventing a solicitor from recovering any time costs in any circumstances other than when the DBA continued to apply at the conclusion of successful litigation would require (in his view) a clear and unambiguous statement of parliamentary intent.

Last week, the case went on appeal before the Court of Appeal. So this one will certainly be back!

Telefónica UK Limited v The Office of Communications [2020] EWCA Civ 1374

Ellen Robertson

The Court of Appeal has held that a deputy High Court judge was wrong to refuse to award enhanced interest to a claimant who had beaten their Part 36 offer, where the judge had found that the offer was a genuine attempt to settle proceedings and where he had considered it just to award the other forms of enhanced relief.

On 17 May 2019, the deputy High Court judge had given judgment in favour of the appellant, Telefónica, in the principal sum of £54,379,489.05, with simple interest thereon of £2,995,007.55. It was common ground that Telefónica had obtained a judgment more advantageous than a Part 36 offer it had made on 6 April 2018. That offer had been based upon 100% of the principal sum claimed, with a discount only on the interest claimed. The judge accepted, however, that the offer (and another offer) were genuine attempts at settlement. The judge then awarded indemnity costs from the expiry of the offer pursuant to CPR 36.17(4)(b) and an additional amount of £75,000 pursuant to CPR 36.17(4)(b). However, he refused to make any award for an enhanced rate of interest above the sum already awarded, which was at the agreed commercial rate of 2% above base rate. The judge therefore made no award for enhanced interest on the principal sum or on the indemnity costs. His reasoning was that such an award would have been disproportionate, given that the Part 36 offer was a very high offer.

On appeal, Philip LJ, giving the judgment of the Court, noted that the judge had not identified any factors that rendered it unjust to award Telefónica indemnity costs or the maximum additional amount of £75,000, and had found that the *"normal Part 36 approach"* should be engaged. The fact that the offer was a very high percentage of the maximum that Telefónica could be awarded after judgment might have put the offer in a territory where the judge would consider it was not a genuine attempt to settle the proceedings. However, given that the judge had accepted that the offers were genuine attempts at settlement, the level of the offer could not, in itself, form the basis of an assessment of the *"proportionality"* of enhanced interest, or a finding that any enhanced interest would be unjust.

The Court of Appeal considered that in making no order for interest on the basis of the high amount of the offer amounted to reintroducing the overturned approach in *Carver v BAA plc* [2009] 1 WLR 113, *"effectively and improperly declining to implement Part 36 because of the small margins involved"*. The decision in Carver that it was open to a judge to find a claimant had not obtained a more advantageous judgment in circumstances where she had narrowly beaten the defendant's offer had been reversed by the Rules Committee, who had made it clear in r.36.16(2) that *"more advantageous"* meant *"better in money terms by any amount, however small."*

The Court noted the "clear guidance" in *OMV Petrom SA v Glencore International GA* [2017] 1 WLR 3465 that decisions as to whether to award enhanced interest at all are to be regarded separately from decisions as to the rate of enhancement.

The Court also cited with approval the observation of Stewart J in *JLE (A Child) v Warrington & Halton Hospitals NHS Foundation Trust* [2019] 1 WLR 6498 (a decision post-dating the judgment at first instance in the present case) that although it was open to a judge to conclude it was unjust to order some, but not all, of the consequences of failing to beat a Part 36 offer, it would be unusual for the circumstances to yield a different result for only some of the consequences.

The Court also considered there was limited, if any, scope for consideration of disproportionality when deciding whether it was unjust to make any such award, given the Court's wide discretion as to the rate of enhanced interest. The Court noted that if any significant element of enhanced interest would be disproportionate, it would have been open to the judge to award a very low or even a nominal enhanced rate. It was not open to him, however, to refuse to make any order for enhanced interest at all. The judge was also not entitled to take into account the award of other enhancements under Part 36 (the award of indemnity costs and the additional amount of £75,000) when considering whether it was unjust to award interest.

The Court therefore allowed Telefónica's appeal, awarding enhanced interest on both the principal sum and on costs. Taking into account all relevant circumstances, including those the judge at first instance had identified in his refusal to make any award, the Court determined the appropriate rate was an additional 1.5% per annum, which made the total interest payable 3.5% above base rate on principal and costs from the expiry of the offer. That amounted to an additional £900,000.

Costs consequences following *Swift v Carpenter* [2020] EWCA Civ 1467

Paul Erdunast

Introduction: a Christmas present of a costs judgment

The Court of Appeal laid down a decision in *Swift v Carpenter* which will be regarded as authoritative guidance on accommodation claims for years to come (in which James Arney of TGC appeared for the Claimant). It has been chewed over by all the commentators worth reading. But you, the reader, are here for hefty costs arguments, not more analysis of how to calculate reversionary interests. I am pleased to say that the Court of Appeal has given you a Christmas present of a costs judgment.

While it does not lay down new principles, it provides examples of the application of the existing rules to several arguments on costs, with a part 36 offer in the background. At the end of each subsection, where relevant, I will highlight points which can be put into practice in future cases.

Facts: Claimant beat her own Part 36 offer as a result of her successful appeal

'Claimant' and 'Defendant' are used instead of 'Appellant' and 'Respondent' for ease of reference.

I will not rehash the facts of *Swift v Carpenter* save to observe that this was a sizeable personal injury claim which became a test case at the Court of Appeal on accommodation claims. The Claimant succeeded in the Court of Appeal having appealed from the High Court, which had been bound by a previous Court of Appeal case, *Roberts v Johnstone*. This meant that she beat her part 36 offer that had been made on 1 July 2019 (the final day of the relevant period therefore being 22 July 2019).

Argument 1: should the Claimant pay the costs prior to the adjournment of the appeal in July 2019?

At a hearing on 23 July 2019, the appeal was adjourned so that the Claimant could reformulate her case. On this basis, the Defendant argued that the appeal costs up to and including this adjournment should be borne by the Claimant. The Defendant relied upon a case called Cheeseman v Bowaters [1971] 1 WLR 1773, which was authority that where damages exceed a payment-in only because of amendments permitted at trial, the Claimant should pay the costs after the payment-in.

In reality, the adjournment was made because the Court of Appeal required extensive expert evidence to determine how to approach accommodation claims. The High Court would not have admitted the expert evidence because its approach was bound by *Roberts v Johnstone*. The Claimant stressed in submissions that the reversionary interest approach which ultimately succeeded was not part of either side's case until it was first raised at the preliminary hearing. The Claimant emphasised the costs risks taken by her and her lawyers, and stressed her efforts to settle the appeal.

The Court distinguished *Cheeseman* on its facts. It pointed out that efforts to settle the case after the adjournment were irrelevant to costs before the adjournment. The same point was made regarding the Claimant's other argument that she might have succeeded on a different basis if adjournment had not occurred.

The Court therefore concluded that the Claimant should be paid her costs on the standard basis before the Part 36 offer took effect on 23 July 2019 (there had been suggestion by the Defendant that the relevant date was 24 July but this was rejected).

The take-home point here is that there should be sensitivity to what arguments are likely to be relevant to costs falling within a defined period, and what are not. A focused argument is much more likely to win the day than general arguments about the parties' conduct.

Argument 2: should there be no order as to the costs of an application to admit expert evidence, where it was only made because the Claimant's solicitor misunderstood the existing directions?

The Claimant had applied to call Mr Cropper and Mr Smith as experts in circumstances where (it appears from the judgment) that the existing directions already allowed this. The Claimant acknowledged the error at the time. The Defendant argued that there should be no order in respect of the costs of this application. The Court accepted the Defendant's argument.

The Claimant had submitted that these costs were incurred following the part 36 offer. However, this did not affect the Court's reasoning on this point – by contrast with Argument 3.

Argument 3: should the Claimant pay the cost of their unsuccessful application to prevent the evidence of the Defendant's witness Mr Robinson from being admitted?

The Defendant had applied to add an expert witness, Mr Robinson, but late in the day. The Claimant in response applied to prevent the admission of this evidence. The Defendant argued that they were right to rely on this evidence and the Claimant should not have attempted to have it excluded. Accordingly the Defendant argued that the Claimant should pay the cost of this unsuccessful application.

The Claimant submitted that the Defendant's application was late, the Defendant already had the opportunity to seek such evidence, that the admission of the evidence had been granted "as an indulgence", and that this application was subject to the Claimant's part 36 offer.

The Court accepted the Claimant's arguments. It was specifically stated that although Mr Robinson's evidence was perfectly relevant, it was caught by the part 36 offer and it was legitimate on the part of the Claimant to seek to resist the late application for the evidence to be admitted. It is notable that the fact that an application was caught by the part 36 offer was relevant here to the Court's reasoning.

Argument 4: what rate of interest should be applied to the Claimant's damages and costs under CPR 36.17?

The Court concluded that a relatively low interest rate of 4.5% should be awarded on both damages and costs. It was emphasised in relation to damages that the case was unusual and that on the facts of the case there was no call for interest to be "greater than purely compensatory" so as to foster settlement.

As for costs, the Court took several considerations into account in settling on 4.5%. One relevant factor was that the Appellant did not have to discharge her lawyers' costs because they were acting under a CFA – this is likely to be a useful defendant argument in almost all personal injury cases where a part 36 offer has been successful.

Conclusion

The two major points to take from this article to your turkey and brussels sprouts are: (1) ensure that any argument on costs relating to a specific time period is relevant to that period; and (2) the fact that a Claimant's lawyers have acted under a CFA may be argued to lower the percentage interest awarded on costs subsequent to a successful Part 36 offer.

Coleman v Townsend, SCCO, 13th July 2020

James Yapp

Where a fixed costs case settles the day before trial is a claimant entitled to recover counsel's abated brief fee or the fee for preparing a skeleton argument as disbursements? No, according to Master Howarth.

The claim started in the RTA Protocol but dropped out. It was therefore subject to Part 45 IIIA costs. The directions required skeleton arguments 2 days before trial. The claim settled the afternoon before trial.

Where a case settles post-listing but prior to the date of trial the fixed costs allowed are £2,655 plus 20% of the damages (Section B, Table 6B). If disposed of at trial a fixed trial advocacy fee would also have been recoverable (Section C).

The Claimant argued counsel's fees were recoverable as disbursements reasonably incurred due to a particular feature of the dispute: r45.29I(2)(h). The Defendant argued that the regime's overall purpose was to ensure that, save for express exceptions, costs were limited to those in the tables.

Master Howarth referred to the dicta of Coulson LJ in *Aldred v Cham* [2019] EWCA Civ 1780:

"If an item of work is deemed (or can be said implicitly) to be within the fixed recoverable costs in Table 6B then it would not be separately recoverable as a disbursement"

Section C of Table 6B provides for trial advocacy fees. This implicitly includes the costs of preparing for a trial, including skeleton arguments. The day of trial was not yet at hand so the Claimant was limited to Section B costs.

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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