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3+9=Costs

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INTRODUCTION

EDITOR: Shaman Kapoor

Welcome to the 3rd Edition of 39 Essex Chambers' Costs Newsletter. Never a dull moment in the world of costs making it difficult to filter the best topics from all the others to ensure this read is worthy of you precious time. But we've done it! And whilst we are congratulating ourselves, let me share the fantastic news that our costs team now boasts another Silk in **Judith Ayling QC**. Many congratulations to her! Whilst in focus, Judith reports on a case in which she acted as junior counsel in the Court of Appeal (January 2021) and Competition Appeal Tribunal which determined that percentage-based litigation funding agreements are not DBAs where the funders do not have control over the conduct of litigation.

Simon Edwards writes two articles in this edition: the first deals with a case which considered the *Chorley* principle as it applies (or not) to a litigant in person in the Court of Protection where the usual litigant in person costs provisions are disapplied; the second sticks with the Court of Protection theme and reviews the need for a Deputy to have obtained authorisation before undertaking or commissioning legal services, setting out other mandatory requirements and considerations not to be missed.

David Brynmor-Thomas QC and I put the risk of arbitrators meeting costs themselves under the lens in the face of statutory immunity, following on from the important and fascinating case of *Halliburton* in which the Supreme Court dealt with the issues of apparent bias and a challenge to remove an arbitrator.

If you thought that applications for amendments to pleadings were fairly clear cut in terms of the consequences and scope of costs, **Karen Gough** sets out salutary warnings against making such assumptions and revisits those wonderful words: "of and occasioned by". Beware!

Can we get an edition in without mentioning Part 36? It seems not! **Caroline Allen** offers analysis of the Court of Appeal judgment in *Telefonica*, which restored all the punitive elements of Part 36 and explores the "unless unjust to do so" provision.

Contents

No room for proportionality in Part 36 when deciding whether to dish out the various penalties – thank you very much!

A tale of two tells **Peter Hurst** in a concise summary of cases dealing with Part 36, indemnity costs applications and a consideration of which day was the day when the offer was "made", where the timing of the accompanying email was 4:54pm.

To see you on your way, we close with the subject of applications for relief from sanctions. **Daniel Laking** warns us of the perils of failing to take seriously enough such an application in a Default Costs Certificate context.

Well, I hope you will agree that this edition certainly offers variety! From all of us to all of you…keep well and keep costing.

PERCENTAGE-BASED LITIGATION FUNDING AGREEMENTS ARE NOT DBAS

Judith Ayling QC

On 5 March 2021 a very significant judgment [2021] EWCA Civ 299 was handed down in which the Court (Henderson LJ, Singh LJ and Carr LJ) upheld the ruling of the Competition Appeal Tribunal ('CAT') at [2019] CAT 26 that third party litigation funding agreements ('LFAs') based on a percentage of recoveries, where the funders do not have control over the conduct of the litigation, are not damages-based agreements ('DBAs'). The case raised an important point of general concern to those engaged in the business of litigation funding in England and Wales, specifically in the context of collective proceedings before the CAT under section 47B Competition Act 1998. Given the potential significance of the issue for

third party funding, the Association of Litigation Funders of England & Wales ('ALF') was granted permission to intervene.

The Court found that there was no jurisdiction to entertain an appeal from the CAT on this issue and (reconstituting itself as a Divisional Court) dismissed an application for judicial review of the Tribunal's decision.

Background

On 28 October 2019, the CAT dismissed the argument that the LFA put in place by UKTC constituted a DBA under the Court and Legal Services Act 1990 (as amended) ('CLSA') and found that the activity of third-party litigation funding does not constitute "claims management services". It reached the same conclusion in respect of the arrangements put in place by the Road Hauliers Association, which is making a parallel application for a collective proceedings order. DAF was the only one of the three original equipment manufacturers which ran this argument before the CAT to seek to overturn the CAT's decision, in respect of both UKTC and the RHA.

Jurisdiction under section 49 Competition Act 1998

The CAT determined that it did not have jurisdiction to hear an appeal, looking at the construction of section 49 Competition Act, but in case it was wrong on the jurisdiction question, went on to express its view – had there been jurisdiction, permission to appeal would have been refused.

DAF then sought both to appeal the CAT's decision, and to bring judicial review proceedings.

The Court of Appeal agreed with the CAT on the jurisdictional question, and so it followed that DAF's challenge to the CAT's decision had to be determined in the parallel judicial review proceedings.

Substantive question

The substantive issue in DAF's appeal was whether LFAs entered into by the applicants with third party funders but whose remuneration is fixed as a share of the damages recovered by the client are DBAs within the meaning of section 58AA CLSA 1990. This turned on whether the funders were providing "claims management services" within the definition of section 4(2) of the Compensation Act 2006 on the basis that the funding was "the provision of financial services or assistance", see subsection (3)(a)(i). DAF argued for a broad interpretation, relying on a literal interpretation that "claims management services" means "advice or other services in relation to the making of a claim" and the provision of services includes "the provision of financial services or assistance". UKTC and the RHA argued a purposive approach should be taken and the provision of third-party funding on a percentage of recoveries model was not the provision of claims management services.

Of course, by the time the Court of Appeal/ Divisional Court heard the case, a differently constituted Court of Appeal had just adopted a purposive approach to the DBA regime in *Zuberi v Lexlaw Ltd and The General Council of the Bar of England and Wales* [2021] EWCA Civ 16.

Decision

The Court of Appeal/Divisional Court upheld the CAT's findings on third party LFAs.

Although on a literal, acontextual reading of "claims management services" in section 4(2) Compensation Act 2006 the words "the provision of financial services or assistance" "in relation to the making of a claim" could be read as including the provision of litigation funding by a third party which plays no part in the management of a claim, the CAT was right to accept the submission that "those words are to be interpreted in the context of the management of a claim", for two main reasons.

Firstly, Parliament had already enacted a comprehensive scheme for the regulation of litigation funding arrangements in the Access to Justice Act 1999 by inserting a new section

58B intoCLSA. Although this provision had not been brought into force, that did not matter. The Court took the view that it was most improbable that Parliament would have intended "by a sidewind" to bring LFAs under DBA regulation when a competing regulatory scheme had already been drafted. The creation of the ALF with its own Code of Conduct and self-regulation has its own part to play in the development of the regulation of litigation funding. The provision made by Parliament for the regulation of claims management services was very detailed and comprehensive, and nowhere was there anything to suggest, apart from the contested words, an intention that LFAs were automatically to fall within its ambit, even if they did not involve any significant element of claims management.

Secondly, looking at the structure and wording of the definition itself, and the composite nature of the phrase "claims management services", regard must be had to "the potency of the term defined" and the presumption against absurdity. It was entirely natural to read the words of the definition as coloured and conditioned by the reference to claims management in the phrase which was being defined. "Claims management services" as defined in the Compensation Act 2006 was aimed at protecting consumers, rather than being aimed at third party litigation funding. The construction which DAF had submitted would be both anomalous and unreasonable, as it would bring any form of the provision of financial assistance for making a claim within the ambit of the Compensation Act, without regard to the fact that pure litigation funding was not then perceived to be a problem which required legislative intervention.

DAF also argued that permission should be granted because there was a conflict of first-instance authority, given the decision in *Meadowside Development Ltd v 12-18 Hill Sreet Management Company Ltd* [2018] EWHC 2651 (TCC). The Court had no hesitation in distinguishing *Meadowside*, like the CAT before it – the CAT was correct to find that the agreement there came within the statutory definition of a DBA and the facts were very different from the typical case of an independent third-party litigation funder. So, it is not to be forgotten that if a funding agreement also provides for claims management, then it may come within, and fall foul of, the DBA regime.

Accordingly, the Court granted DAF permission to apply for judicial review but dismissed it on the merits.

DAF sought to raise a further argument specifically about the insurance arrangements in the UKTC claim. The Court found that it was too late for DAF to raise this point but was satisfied in any event that it was devoid of merit. So, on this ground DAF was refused permission to apply for judicial review. The judgment is of great importance to the litigation funding industry, as well as for UKTC's application for an 'opt-out' order allowing it to pursue its action for damages arising out of the long-lasting trucks cartel.

It remains to be seen whether DAF will try to take the issue further. The Divisional Court granted the necessary certificate for a leapfrog appeal to the Supreme Court but the Supreme Court must still give permission itself; and an appeal to the Court of Appeal from the Divisional Court would have been very peculiar given that the Court of Appeal had already heard the appeal from the CAT.

Judith was junior counsel for UKTC in the Court of Appeal/Divisional Court, led by Rhodri Thompson QC, and instructed by Weightmans.

CHORLEY PRINCIPLES AND LITIGANT IN PERSON COSTS IN THE COURT OF PROTECTION

Simon Edwards

***JMH v CFH, SAP* [2020] EWCOP 63 HHJ Evans-Gordon**

In this case, the court had to decide what costs a litigant in person is entitled to in the Court of Protection.

The first point that was argued was made by SAP who was a party to the application because she was a nominated attorney under a disputed lasting power of attorney. She was also an employed solicitor.

She argued that as an employed solicitor she was entitled to costs on the Chorley principle. This derives from *London Scottish Benefit Society v Chorley* [1884] 13 QBD 872. Its modern formulation can be found in *Halborg v EMW Law LLP* [2017] EWCA Civ 793, extended by *Robinson v EMW LLP* [2018] EWHC 1757. Its effect is that where a solicitor is party to litigation and instructs the firm of which he is partner, member or employee/ consultant to represent him, the party can recover costs to include the solicitor's profit costs of the party's own time to the extent that that time would be time another solicitor would otherwise have spent on the case.

The court held that that principle applied in the Court of Protection (see paragraph 33) but held that it did not apply in this case as SAP had, throughout, asserted that she was acting in person (see paragraphs 15, 25 and 32).

There then fell to be considered whether SAP was entitled to litigant in person costs. CPR 46(5) which deals with litigant in person costs is disapplied in the Court of Protection. It was argued that that meant that SAP was not entitled to any costs (save disbursements). The court held otherwise at paragraphs 35-38 as follows:

35. *"It follows that the only inter partes costs the second respondent can recover are those that any litigant in person could recover and those are the disbursements/court fees and any time costs recoverable on a detailed assessment. I appreciate that in considering that SAP is entitled to her time costs as a litigant in person I am differing from DJ Eldergill in London Borough of Hounslow v A Father & A Mother Case No. 13020924. I was provided with this case the day before I handed down judgment. Having considered it, and with great respect, I am not persuaded that the effect of the disapplication of CPR 46.5 or the fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 necessarily results in a litigant in person being unable to recover time costs.*

36. *In my judgment, the disapplication of CPR 46.5 simply gives the Court of Protection wider discretion to deal with costs justly and proportionately in every case. In a large estate where a litigant has necessarily been required to carry out a lot of work, it may be proportionate to allow him some or all of his time costs at a rate that the costs assessor deems fit in the circumstances of the case. That may result in no time costs being allowed or the rate being limited. A blanket ban on the recovery of time costs would mean that a litigant in person could be severely disadvantaged. As DJ Eldergill noted, this would be an extremely unfair outcome, particularly in cases where a litigant in person must undertake considerable work to defend themselves against, say, an allegation of fraud. In my judgment, such a blanket ban, if intended, would have been set out clearly in the rules.*

37. *The fact that the Court of Protection is not a Senior Court for the purposes of the Litigants in Person (Costs and Expenses) Act 1975 is of no assistance. The Court of Protection did not exist in 1975 and there is no material before me which would indicate that a deliberate decision was made to disapply the 1975 Act in the creation of the Court of Protection with a view to preventing litigants in person from recovering any time costs – that is a leap too far. The rules applicable to deputies are not, in*

my judgment analogous to inter partes costs in litigation. Part of, if not the primary, reason for the rules regarding deputies is to prevent conflicts of interest arising and/or to avoid a fiduciary profiting from their position. Only the court can allow a deputy remuneration for time spent discharging their duties and, as far as I am aware, this power is only used in cases involving professional deputies.

38. *Notwithstanding its disapplication, in my judgment CPR 46.5 and/or the 1975 Act may, nonetheless, be helpful to a costs' judge in formulating his or her approach to the quantification of SAP's costs. This is a relatively large estate and the costs involved are relatively low once one disregards the client/solicitor costs and any deputy/client costs. It seems to me that SAP is obliged to reimburse KSN for disbursements under the common law therefore they are recoverable."*

This judgment clarifies that a solicitor party in the Court of Protection is entitled to charge for his time as a solicitor pursuant to *Chorley* principles and what such a solicitor needs to do to be able to do so.

It also holds that, in default, a litigant in person in the Court of Protection is entitled to some costs for their time with CPR 46(5) as a guide without its being of direct application. In so ruling, as the judge acknowledged, the court was departing from the view taken by DJ Eldergill. The common law position is that a person who does not engage a solicitor to act for him cannot (outside of Chorley principles) get costs for his time he can only recover expenses. The Litigants in Person (Costs and Expenses) Act 1975 was passed to reverse that rule but it only applies where the Act or an Order made thereunder so provides. By its terms, the Act is not applied to the Court of Protection as the Court of Protection is not a Senior Court and it has not been added to the list by an Order. The fact that the Court of Protection was not a court in 1975 is not especially helpful as the Act has been amended since the Court of Protection became a court without including the Court of Protection in the courts to which it applies.

WHEN DOES A DEPUTY FOR PROPERTY AND AFFAIRS NEED AUTHORISATION BEFORE UNDERTAKING ANY LITIGATION OR INSTRUCTING ANY LEGAL SERVICES ON BEHALF OF THE PERSON FOR WHOM THEY ARE DEPUTY (P)?

Simon Edwards

Article

1. These issues are of interest to costs lawyers because they are frequently instructed to prepare a deputy's bill for the assessment of their fees by the SCCO. In so doing, when the deputy has billed time in relation to litigation, inevitably the costs lawyer will need to enquire of the deputy as to the authorisation for that work, likewise when the deputy has instructed lawyers, again the costs lawyer will need to enquire as to authorisation, in both cases so as to be confident that the items are properly included in the bill.

2. Equally, any deputy, before undertaking litigation on behalf of P, must satisfy themselves that either authorisation is not required or that it has been obtained and, again, likewise in relation to the instruction of legal services.

3. The matter was comprehensively reviewed by the Senior Judge of the Court of Protection, Her Honour Judge Hilder, in *Re ACC, JDJ and HPP* [2020] EWCOP 9. Judgment was handed down on 27 February 2020 and the Office of the Public Guardian ("OPG") gave guidance in relation thereto on 14 December 2020.

Conducting Litigation

4. In an Appendix to her judgment, HHJ Hilder gave a summary of her conclusions. At paragraph 5, she concluded that:

"In relation to P's property and affairs, the general authority encompasses steps in contemplation of contentious litigation up to receiving the Letter of Response but no further."

In particular (see 5(d)), that would include obtaining counsel's opinion.

5. By contrast, where the question relates to P's welfare, the deputy's authority is very limited (see paragraphs 6 and 7). The authority extends to making an application to the Court of Protection for further directions/ specific authority in respect of welfare issues but, specifically, does not encompass steps in contemplation of an appeal against the decision of an Education, Health and Care Plan.

6. In circumstances of urgency, when prior authority to litigate cannot reasonably be obtained, a deputy proceeds at risk as to costs, but may make a retrospective application for authority (see paragraph 8).

7. There is an exception in relation for the need for specific authority and that is in relation to applications in the Court of Protection in respect of property and affairs (see paragraph 4). In those circumstances, prior authority is not required.

8. This is all admirably clear and precise, and by and large reflects existing practice, namely that property and affairs deputies have, generally, sought prior authority before undertaking any litigation on P's behalf. The specific issue that was "*new*" and was, in part, the subject of the applications before the court, was in relation to Education, Health and Care Plans, and it is now confirmed that prior authority is required for a deputy to appeal decisions in these fields on P's behalf.

Instructing Lawyers

9. This aspect of the judgment considered the thorny issue of managing conflicts of interest. Professional deputies are often solicitors and will, commonly, use the firm of which they are an employee or member to provide legal services for P. This gives rise to an obvious potential conflict of interest because, particularly if the deputy is a member of the firm, that deputy may stand to profit from the instruction of their firm in these matters. The conclusion of the court is set out at paragraph 9 of the Summary of Conclusions. The ruling applies to all forms of legal work and not just legal work in relation to litigation or contemplated litigation. Thus, if the deputy wants to instruct their own firm to carry out a conveyance, the procedures set out in paragraph 9 should be followed.

10. Paragraph 9 reads as follows:

"Where a deputy wishes to instruct his own firm to carry out legal tasks, special measures are required to address the conflict of interest:

(a) the deputy may seek prior authority (paragraph 56.7(a)-(e));

(b) the deputy is required to seek – in a manner which is proportionate to the magnitude of the costs involved and the importance of the issue to P – three quotations from appropriate providers (including one from his own firm), and determine where to give instructions in the best interests of P (paragraph 56.7(f)(i));

*(c) the deputy **must** seek prior authority from the court if the anticipated costs exceed £2,000 plus VAT;*

(d) the deputy must clearly set out any legal fees incurred in the account to the Public Guardian and append the notes of the decision-making process to the return (paragraph 56.7(f)(iv))"

11. These are quite strict requirements. They apply in every case where the deputy wishes to instruct their own firm to carry out legal tasks and a good number of such cases would involve costs of over £2,000 plus VAT. The Guidance is not clear as to whether that simply relates to profit costs or includes disbursements, such as experts or counsel.

12. The OPG Guidance states that deputies are expected to comply by 1 April 2021. It

is anticipated that at least after that period any deputy's costs incurred without proper authorisation, or legal costs incurred without following those guidelines, will not be allowed absent a successful application for retrospective authorisation. Such applications will require clear justification and may very well not be granted.

Litigation Friends

13. The case also concerned the position of a deputy suggesting that they should act as P's litigation friend in contemplated litigation. This was in the context of the deputy concerned seeking not only to be so appointed but also to be able to charge for the work of the litigation friend. At paragraph 58 of the judgment, the Official Solicitor was recorded as saying that the prospect of P paying for their litigation friend for so acting "*raises significant concerns*". At 58.3, the Official Solicitor reiterated her offer to act as litigation friend without charge in any of the existing classes of cases in which she acts where her usual criteria are met (that is to say evidence of lack of capacity to litigate, no other person willing to act without charging and a source of funding to cover her costs of solicitors and counsel). In those circumstances, in such cases, the court would very rarely, if at all, allow a deputy to become litigation friend on the basis that they were to be paid for their services.

The Appointment of Deputies

14. This was not the subject of ACC or the OPG's Guidance, but it is an issue that has, to an extent, troubled the writer over the years and it arises in cases of severe acquired brain injury damages. Commonly, in such cases, the litigation solicitor is engaged before any deputy is appointed. The litigation solicitor will enter into a conditional fee agreement made on the claimant's behalf by their prospective litigation friend.

15. Usually, a deputy is not appointed until it becomes clear that an interim payment is going to be made, at which point a deputy is necessary and there will be funds available to pay the deputy. Commonly, that deputy is a solicitor who is an employee or member of the litigation solicitor's firm. The writer has even seen cases where the deputy is the litigation solicitor themselves.

16. The scope for conflicts of interests, particularly in the latter situation, and the difficulty of managing them is, to the writer's mind, obvious. In line with the philosophy of ACC and the Guidance, should the Court of Protection ask in such cases for three quotations from potential deputies, particularly as the costs of deputyship in such cases are very substantial, are not always recovered 100 percent from the tortfeasor, due perhaps to contributory negligence or causation doubts?

COSTS AND THE ARBITRATOR – WHERE NOW?

David Brynmor-Thomas QC and Shaman Kapoor

Hot on the heels of the recent Supreme Court judgment in Halliburton Company v Chubb Bermuda Insurance Ltd,[1] ***David Brynmor-Thomas QC*** *and* ***Shaman Kapoor*** *consider the Arbitrator's risk as to costs and whether there should be a greater concern to the arbitrating community.*

Halliburton has been the subject of much review including our own webinar which can be found here.[2] But this article seeks to address a discrete point about the exposure of an arbitrator to costs sanctions.

1 [2020] UKSC 48

2 39 Essex Chambers | Halliburton – The decision of the Supreme Court – the implications for International Arbitration | 39 Essex Chambers | Barristers' Chambers

Halliburton dealt with the issue of apparent bias in relation to an arbitrator. At para. 111 of the judgment, Lord Hodge delivering the unanimous judgment of the Supreme Court said:

> *It has been suggested that the breach of a legal obligation to disclose a matter which might, but on examination after the event did not, give rise to a real possibility of bias would be a legal wrong for which there was no legal sanction. I do not agree for two reasons. First, in a case in which the matter is close to the margin, in the sense that one would readily conclude that there is apparent bias in the absence of further explanation, the non-disclosure itself could justify* ***the removal*** *of the arbitrator on the basis of justifiable doubts as to his or her impartiality: paras 117-118 below. Secondly, in cases where the matter is serious but the non-disclosure of that matter, on later examination, does not support the conclusion that there is apparent bias,* ***the arbitrator might, depending on the circumstances, face an order to meet some or all of the costs of the unsuccessful challenger or to bear the costs of his or her own defence.*** *The existence of such a duty provides support to the fairness and impartiality of arbitral proceedings under English law by allowing non-disclosure to carry greater weight in the basket of factors to be assessed* ***under section 24(1)(a) of the 1996 Act*** *than a mere deviation from best practice.* [emphasis added]

That there is a duty to disclose a real possibility of bias is unlikely to come as a surprise. But the suggestion that the arbitrator may face an order to meet some or all of the costs of the unsuccessful challenger or to bear the costs of his or her own defence is very likely to be of great concern. Unpicking the judgment, it seems to be dealing directly with the scenario where the court becomes seized of an application to remove an arbitrator. That is quite distinct (and in the authors' view narrower in scope) from the potential liability of an arbitrator on an application to resign. In examining the scope, it is useful to set out the key provisions of the Arbitration Act 1996 ("AA"), which state:

Power of court to remove arbitrator

s.24(1) A party to arbitral proceedings may…apply to the court to remove an arbitrator…

s. 24(4) Where the court removes an arbitrator, it may make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses, or the repayment of any fees or expenses already paid.

Resignation of arbitrator

s.25(3) An arbitrator who resigns his appointment may (upon notice to the parties) apply to the court—

a) to grant him relief from any liability thereby incurred by him, and

b) to make such order as it thinks fit with respect to his entitlement (if any) to fees or expenses or the repayment of any fees or expenses already paid.

s.25(4) If the court is satisfied that in all the circumstances it was reasonable for the arbitrator to resign, it may grant such relief as is mentioned in subsection (3)(a) on such terms as it thinks fit.

Immunity of arbitrator

s.29(1) An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is shown to have been in bad faith.

s.29(3) This section does not affect any liability incurred by an arbitrator by reason of his resigning (but see section 25).

As far as the AA is concerned, it is straight forward enough to understand that save for acts or omissions in bad faith, the arbitrator shall have a general immunity. However, what is meant by "fees or expenses"? s.24(4) appears to naturally read the fees and expenses of the arbitrator rather than the fees and expenses of the parties. This is somewhat endorsed by the use of the same terminology in s.28 which itself distinguishes between fees and expenses on the one hand and "costs of the arbitration" on the other. And if further endorsement of that interpretation was required, s.59 appears to provide the ultimate answer, distinguishing between "the arbitrators' fees and expenses" on the one hand, and the "fees and

expenses of any arbitral institution" and the "legal or other costs of the parties" on the other.

In the event of removal requiring court intervention, the court shall thus have a discretion as to the fees and expenses of the arbitrator (paid and unpaid), which in turn appears to ringfence the potential risk exposure of an arbitrator to the total amount of the said fees and expenses.

In the event of resignation, s.25(3)(b) appears to create the same ringfence around the potential liability faced by the arbitrator. But s.25(4) is curious. It clearly sets out the consideration for the court dealing with such an application, namely, to assess what was reasonable in all the circumstances. However, it then goes on to provide that such relief may be granted on "such terms as it thinks fit". This appears to be much broader than the ringfenced liability referred to at 25(3)(b). Prima facie the provisions look circular. But on closer examination they appear to be readily able to co-exist and to make provision for entirely separate things. It seems that the event of resignation carries with it the potential for greater exposure for an arbitrator.

Within the confines of the AA, one could suppose therefore that the reference in *Halliburton* to "*depending on the circumstances*" could only have been a reference to the "bad faith" requirement in section 29(1) which would, if engaged, remove the limits of liability altogether.

In that the court should be restricted by s.29 AA, perhaps there is further weight to this interpretation because if one was to consider the court's jurisdiction pursuant to s.51(3) Senior Courts Act 1981 ("SCA") which empowers the court with *"full power to determine by whom and to what extent the costs are to be paid"*, that is in fact subject to the proviso at s.51(1), namely, *"Subject to the provisions of this or any other enactment and to rules of court"*.

Following this analysis through to its conclusion, it is noteworthy that s.25 AA deals with the scenario when an arbitrator chooses to apply for relief consequential upon resignation, rather than making it mandatory for an arbitrator to so apply. This suggests that, in the absence of agreement, either one of the parties will have to apply pursuant to s.24 or the arbitrator will apply pursuant to s.25. Given the real and appreciable difference in liability for an arbitrator as between s.24 and s.25, it seems that an arbitrator should tread extremely carefully before engaging s.25 instead preferring one or other of the parties to engage s.24. The rationale for the difference in scope between s.24 and s.25 is not easily understood.

It is also interesting to be reminded of the proviso at s.51(1) SCA as it refers to rules of court. The Civil Procedure Rules at Rule 44.2 provide the court with a very broad discretion as to costs, both in terms of whether costs are payable by one party to another and as to the amount of costs to be paid. On a s.24 application, the arbitrator must be a named defendant (CPR 62.6(1)) and ordinarily Rule 44.2 would be at the disposal of the court. But there is nothing in the CPR to suggest a disapplication of the s.29 AA immunity, and it is unreal to suggest that the generality of a procedural rule should in some way trump the specificity of statutory provision.

But without more, there is a concern that *Halliburton* has in some way (re)enforced a minority view that arbitrators faced with a s.24 AA application to remove can be liable for costs beyond the scope of s.24 AA and despite the immunity at s.29 AA. That minority view when expressed has been said to be supported by the case of *Cofely v Bingham*,[3] a case where Hamblen J (as he then was) dealt with a s.24 application for removal in the face of an allegation of apparent bias. Hamblen J. considered that the application, once formulated, should have been acceded to and failing to do so was unreasonable, sounding in adverse costs without limitation from s.29 AA. The costs awarded were the costs of and incidental to the s.24 application save for the costs of preparing

3 [2016] EWHC 240 (Comm). Of more relevance is the judgment on costs at [2016] EWHC 540 (Comm).

the application notice and the supporting witness statement.

Respectfully, this decision does not appear to sit well with the fact that the jurisdiction in the CPR mirrors (and thus appears to be derived from) the SCA, which expresses itself to be subject to any other enactment, which must surely include s.29 AA. The facts and findings of *Cofely* point to the arbitrator taking an active part in resisting the application to remove and that his articulation of adopting a 'neutral position' was not the reality. In those circumstances the claimant sought its costs against both the opposing party but also the arbitrator. The court was referred to s.29 AA but swiftly recorded that "there is in this case no suggestion of bad faith".[4] Notwithstanding the absence of bad faith, the court agreed with the submissions made to it by the claimant that "this section does not apply to court proceedings". There is no detail in the judgment about how or why that submission was made. Other than citing another case of *Wicketts & Sterndale and Anr v Siederer*,[5] there is no discernible reasoning given for why the court felt that it even had a "discretion in relation to costs".[6] The remainder of the judgment deals with features specific to *Cofely* and articulates the operation of a discretion, and thus the only source for potential reason for disapplying s.29 AA is to consider the judgment of *Wicketts*.

In *Wicketts*, the arbitrator, Mr. Siederer (a quantity surveyor by profession and a Fellow of the Chartered Institute of Arbitrators), was appointed in 1999 to a building dispute with a valuation of circa £60,000. Directions were issued in the arbitration on at least 19 occasions (some without request) and hearings in relation to directions and liability took up some 7 days or so. The arbitrator's fees had totalled some £20,000 and there had been directions for security for costs as well as security for the arbitrator's fees. An application pursuant to s.24 AA to remove was made on grounds including that the arbitrator was "physically or mentally incapable of conducting the proceedings" and had "refused or failed to properly conduct the proceedings".

Prior to the hearing before HHJ Seymour QC, there had been an application for an injunction restraining Mr. Siederer from proceeding with an arbitral hearing notwithstanding the fact that the s.24 AA application had been issued. The injunctive relief came before Cresswell J and during the course of that hearing Mr. Siederer agreed to adjourn the arbitral hearing pending the outcome of the s.24 AA application. The costs of the injunctive relief had been reserved to the court which dealt with the s.24 AA application, and thus came to be determined by HHJ Seymour QC.

A fair summary of HHJ Seymour QC's judgment is this: there was extensive consideration of various provisions of the AA, but not a single reference to s.29 AA. The court found that Mr. Siederer had failed to properly conduct the arbitration proceedings and that some of the directions given by the arbitrator were "quite the most outrageous that I have ever seen given in any arbitration proceedings".[7] He was found to have demonstrated a "wholly inadequate grasp of the nature of his functions and powers"[8] and as a result the application to remove was acceded to.

As to the "fees or expenses" of the arbitrator, it is perhaps astonishing that in all of these circumstances it was still thought appropriate that the arbitrator should be paid £10,000 on account of his fees. Nevertheless, in dealing with the claim for reserved costs and the costs of the application, Mr. Siederer was encouraged by the court to say something, and he said: "If I'm taking the risk of getting penalised for costs, it wasn't a risk that I

4 Paragraph 4
5 Unreported, 8 June 2001, TCC, per HHJ Seymour QC
6 Paragraph 9
7 Paragraph 52
8 Paragraph 55

ever thought an arbitrator should have to take. I was under the impression that I was immune from suit. There's nothing more than I can add."

That was it. There was no mention of s.29 AA. There was no consideration by the court of s.29 AA. The loose reference to immunity from suit was not explored, and certainly there is no reasoning for disapplying s.29 AA.

Whilst *Wicketts* was clearly an exceptional case, and one which could well have triggered the escape clause under s.29 AA itself in the context of bad faith, it can hardly be cited as authority for the proposition that s.29 AA does not apply to court proceedings. It is therefore entirely unclear on what basis Hamblen J in *Cofely* considered that s.29 AA did not apply to court proceedings. And yet the idea that s.29 AA does not apply to court proceedings has been allowed to perpetuate seemingly without any careful examination.

More recently, in C Ltd v D and X,[9] the court again considered an application for removal pursuant to s.24 AA together with a determination that X (the arbitrator) should not be entitled to payment of any fees, in the face of an allegation that the arbitrator had deliberately misrepresented their[10] arbitration experience in their CV. A complaint made to the SRA about X's continued involvement led to X subsequently resigning on the basis X's position had become untenable. C Ltd then made an application for both defendants to pay its costs of and incidental to the s.24 application. D and X resisted such an order and cross-claimed for their own costs.

By the time of the hearing, costs had aggregated to approximately £256,000 in circumstances where the monetary claim (amongst others) in the arbitration amounted to €166,000, and where both C and D were companies carrying on activities with philanthropic aims. The application for costs was refused primarily on the basis that C Ltd was not considered to have been the winner given that the resignation came about because of the SRA complaint rather than the merits of the application itself and instead an adverse costs order was made against C Ltd for failing to have accepted an earlier offer as well as running an application that was without merit. There was a detailed examination of how the rules on costs (and the discretion therein) should apply and in particular the operation of the general rule that the unsuccessful party will be ordered to pay the costs of the successful party.

Henshaw J. specifically examined s.29 AA and reflected on *Cofely*.[11] In doing so, Henshaw J. held *"it seems correct in principle that section 29 would not preclude an arbitrator from being ordered to pay costs in relation to a section 24 application that he had opposed."* Sadly again, on this particular point, there was no further examination or reasoning, save to acknowledge that Cofely was a particular case and had elsewhere been held to be "no safe guide". Finally, on this point, Henshaw J. went on to consider *Wicketts*. But other than to summarise what was involved in *Wicketts*, there appears to be no further analysis of the s.29 AA point, or even an unpicking of *Cofely* and *Wicketts* themselves. This may have been because the court came to exercise its 'discretion' as to costs against the claimant anyway, but arguably by then the court had seemingly accepted it had the discretion in the first place. This is a troubling endorsement.

In summary, it could be thought that Lord Hodge in *Halliburton* has seemingly endorsed the minority view. But it is our considered opinion that Lord Hodge's judgment at paragraph 111 is *obiter*; that it may have sought to reflect a noted minority view that has been allowed to perpetuate without careful examination over the years; and that when one comes to properly examine the point, it is difficult to understand how or why there should (indeed could) be a disapplication of s.29 AA at all.

9 [2020] EWHC 1283 (Comm)

10 This slightly clumsy wording is adopted from the judgment seemingly so as not to reveal even the gender of X in the court's efforts to maintain confidentiality.

11 Paragraphs 56-59

THE UNEXPECTED, BUT PERHAPS PROPER, COST OF AMENDMENT

RG CARTER PROJECTS LIMITED V CUA PROPERTY LIMITED

Karen Gough

Introduction

Amendment is common-place in litigation. Parties trot out the traditional principles "in order to determine the real controversy between the parties…and the other party can be compensated in costs". Notwithstanding the apparent dilution of that principle, by the introduction of the "overriding objective" and "all the circumstances" considerations that suggest greater restriction of the ability to amend a case or defence, the reality is different. Cases where amendments have been refused are few and far between, even when the amendment is substantial and brought forward on the eve of trial. The reasons for amendment of cases are many and varied, but the costs consequences of amendment are generally as already described.

This note is about costs. While in theory, the disruption caused by an amendment to a party's case is compensated by an order for costs, this is seldom genuinely the case. Interestingly, it could be through the medium of the costs regime as it applies to applications to amend that the courts might finally impose some restraint on the enthusiasm of parties to make substantial and late amendments to their case. The case of ***RG Carter Projects Limited v CUA Property Limited*** **[2020] EWHC 3417** is a salutary tale about the costs of amendment where the amending party got a great deal more in terms of a liability for costs than it probably had bargained for.

The R G Carter case

The contract between CUA and RG Carter concerned the demolition and rebuilding of the Cambridge University Arms Hotel. The Contract Price was £34 million and the works were carried out between 2015 and 2018. Disputes arose and RG Carter issued proceedings in June 2019 which included a claim for more than £14 million damages for misrepresentation, a number of claims for extensions of time and a declaration for a final account value in excess of £40 million.

Pleadings closed in January 2020. RG Carter changed solicitors after close of pleadings and on 10 July 2020 gave notice of intention to amend and, to provide a draft in good time for the scheduled CMC on 9 September 2020. In the event the CMC date in September was vacated and rescheduled dates for October and early December were also vacated. The CMC was rescheduled and actually took place on 14 December 2020.

A draft of the proposed amendments was provided on 24 November 2020. They were extensive. They abandoned the misrepresentation claim, dropped a major element of the extension of time claims and reduced the final account claim from £40 million to just under £37 million. The net effect of the amendments was to reduce the claim from over £14 million to £1.85 million.

There was no dispute that RG Carter should be given permission to amend their case but the parties could not agree on the order for costs. RG Carter contended for the usual order that it should pay the costs of and occasioned by the amendments. CUA argued that the usual order would not compensate them for the extent of the costs wasted investigating and responding to the now abandoned claims. The application for costs was put on the basis that the amendments amounted to a partial discontinuance of the claim such that RG Carter should pay 80% of CUA's costs incurred to date in the proceedings. That may sound a little ambitious, but paved the way for the alternative, which was for RG Carter to pay the costs of the abandoned issues, assessed on the indemnity basis because, said CUA, the abandoned case was always hopeless. Pressing the advantage CUA also sought either a summary assessment of the costs or a substantial payment on account.

Costs orders on amendments and discontinuance of all/part of a claim

So what does the usual order of "costs of and occasioned by the amendment" actually entail in terms of costs recovery? In terms it means that the receiving party is entitled to be paid the costs of preparing for and attending the application and the costs of any consequential amendment to their own statement of case.

It was accepted however that in this case the situation was akin to a partial [and substantial] discontinuance of a claim. The principles for costs which apply when a party discontinues all or part of its claim are:

i. The abandonment of one or more remedies is not to be treated as a discontinuance where the claimant continues their case for other remedies (r.38.1(2)).

ii. The "claim" for the purpose of Part 38 probably means the entirety of the claimant's action against a particular defendant: ***Kazakstan Kagazy plc v Zhunus*** **[2016] EWHC 2363.**

On the facts of this case the removal of the misrepresentation claim was akin to a partial discontinuance rather than the abandonment of a claim for a particular remedy, even though the discontinuance was achieved by an amendment under Part 17, and not through the usual medium of a notice of discontinuance under Part 38.

Had the discontinuance been effected under Part 38, the costs consequence would have been:

i. For a claim that was discontinued, the claimant is liable for the costs incurred on or before the date on which notice of discontinuance was served on the defendant;

ii. For a partial discontinuance, while the claimant is liable for the costs relating to that part of the case which is discontinued, unless the court orders otherwise, those costs are not assessed until the conclusion of the proceedings.

The judge opined that in many cases [for amendment] the usual order under Part 17 would meet the justice of the case. In others the amendment may abandon a claim that the defendant has spent a significant amount of money defending. Sometimes the amended claim will still pursue other causes of action arising out of the same facts, or put a new label on facts already pleaded, so that not all the earlier costs will be wasted, as was the case in ***Begum v Birmingham City Council*** **[2015] EWCA Civ 386.**

Where however a cause of action is abandoned and substantial costs have been incurred and are wasted, the usual Part 17 order would compensate the defendant for the deletion of the answer to the abandoned plea but, without more, it would not compensate for the costs of investigating the original case or pleading the first defence. In such circumstances, in order to achieve a just order, the defendant may recover both the costs of the amendment and also the costs of the abandoned cause of action.

On the facts of this case, and unsurprisingly, the judge decided that the just order was for RG Carter to pay both the costs of the amendment and also the costs of the abandoned cause of action.

Basis of assessment

The discussion then turned to the basis of assessment. It is worth mentioning because increasingly parties seem to encourage the courts to make orders for indemnity costs against parties who are accused of conducting themselves in a less than straight forward way. CUA were extremely critical of RG Carter's conduct of its case to date.

In this case, after summarising the principles for the recovery of indemnity costs the judge returned to the position which ordinarily obtained on amendment (Part 17) applications or on discontinuance of all or part of a claim (Part 38), which is that costs are payable in both cases on the standard basis. Different orders can be made, in particular there is a growing practice of awarding indemnity costs where a claimant discontinues a claim pleaded in fraud. The court

referred to the case of ***Clutterbuck v HSBC*** **[2015] EWHC 3233.** However, in the ***Clutterbuck case*** the claimant there discontinued a claim pleaded in fraud only on the evening before an application was due to be heard to strike it out. A parallel was drawn between the likely order for costs where a fraud claim fails at trial, which would generally support an order for indemnity costs, and where the claim is abandoned and discontinued on the eve of the trial. In either case, a defendant had no alternative other than to attend court and to defend the allegations. The court concluded that it was just to make the same order in both circumstances. **Clutterbuck** was followed and an order made also to award indemnity costs in the case of ***Aeroflot – Russian Airlines v Leeds & Ors (Trustees of the Estate of Boris Berezovsky) and Anr*** where in a hard fought case proceedings involving allegations of fraud which had been maintained against the defendants for years were withdrawn, without apology or explanation on the eve of the trial. In that case the court stated:

"51. … But I respectfully consider that the approach in Clutterbuck is sound. Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail."

However, and as the judge noted, in this case RG Carter's allegations stopped short of a plea of fraud and even though the position had been reserved pending exchange of witness statements and disclosure, they were never elevated above the plea of misrepresentation. Accordingly, to have lost at trial would not necessarily have resulted in an order for indemnity costs and the court should, it was said, be wary of departing too readily from the usual rule that costs on a discontinuance should be payable on the standard basis. The court did not want to introduce a disincentive to parties who upon review were minded to discontinue rather than pursue a bad case to trial, simply on the basis that to discontinue would result in a penal order for costs when, after trial, the usual order could be expected. In the event, this was where the court settled. The court ordered the costs to be paid on the standard basis.

Detailed assessment and order for payment on account

Given the sums claimed as costs (£370,000) the court decided that it was appropriate to order a detailed assessment of the costs wasted on the discontinued aspects of the claim, and that it should be undertaken at the conclusion of the proceedings rather than immediately. The court also considered, but dismissed, the idea of making a percentage based costs order under Part 44.2(7) because, while potentially easier for the costs assessment, the judge had no real feel for what the appropriate percentage would be. It therefore made an issues-based order as noted above. Finally, in order not to penalise CUA and keep it out of the benefit of the costs order pending later assessment, the court ordered a payment of £100,000 on account which was described as *"26. …a prudent approach to the sums already spent and the likely recover on the standard basis…"*. It rightly dismissed RG Carter's submission that order for payment on account should be confined to discrete applications [which ordinarily would be subject to summary assessment and payment anyway] or after the end of the trial.

Conclusion

So, how is this case to be regarded? Is this a fact sensitive case with no particular implication for amendment applications going forward, or may we see the development of a culture of genuine compensatory costs orders in response to amendment applications?

The first thing to note is that this was an application to discontinue a substantial part of a claim and while not an extraordinary event, it is far less common than the usual application to amend, which increases the pleas and/or size of the financial compensation sought. Secondly, and perhaps more helpfully, it does breathe some life into the principle of orders which genuinely

compensate the recipient of the amended claim [or defence or counterclaim], for the costs that have been wasted. The decision may well encourage parties and the courts to scrutinise with greater care the real costs consequences of substantial applications to amend. Going forward, the "usual order" could be the starting point for the costs claim consequent on an application to amend, rather than both the beginning and end of the matter.

Either way, let's hope for two things, firstly some more rigorous control of parties' unbridled desire for wholesale recasting of their cases well after the pleadings have closed and/or close to trial when the burden in time and costs on the opposing party or parties is highest, and secondly, where that happens, let's hope that the court will not be slow to impose an order for costs which genuinely reflects the reality of the costs situation.

PART 36: (*TELEFÓNICA UK LTD V THE OFFICE OF COMMUNICATIONS* [2020] EWCA (CIV) 1374)

Caroline Allen

In *Telefónica*, the Court of Appeal considered the scope of the court's discretion when awarding enhanced relief pursuant to CPR 36.17(4). The Court allowed the claimant's appeal against the trial judge's decision to award only two of the four costs consequences, holding that whilst it remained open to a judge to conclude that it would be unjust to award some, but not all, of the enhancements, it would unusual for the circumstances of a case to yield a different result for only some of the consequences (*JLE v Warrington & Hatton Hospitals* [2019] 1 WLR, which post-dated the trial judge's decision, followed).

Facts

Telefónica brought a claim against Ofcom for the return of annual licence fees it had paid between 2015 and 2017, pursuant to a licensing regulation that was introduced in 2015 but subsequently quashed by the Court of Appeal in judicial review proceedings. Following a short trial, the High Court awarded Telefónica its damages in full: approximately £54.5 million plus interest. Telefónica had made two previous Part 36 offers, approximately 8% and 9% lower respectively than the damages that they subsequently recovered and accordingly it fell to the trial judge to order additional costs consequences pursuant to CPR 36.17(4).

Exercising his discretion, the judge awarded Telefónica its costs on the indemnity basis, pursuant to CPR 36.17(4)(b) and an additional sum of £75,000 with reference to the damages table at CPR 36.17(4)(c) (as conceded by Ofcom), but refused to make an award of enhanced interest on either the sum awarded or the costs. He made it clear that he *"certainly cannot determine that* [the offers] *were not genuine attempts to settle the proceedings"*, and that therefore the normal Part 36 approach ought to be engaged. He subsequently held, however, that it would be disproportionate to award the enhanced interest on damages pursuant to CPR 36.17(4)(a) given the sums involved (£3.2 million, assuming that interest would be awarded at 10% above base rate), whilst he was not prepared to award interest on costs under CPR 36.17(4)(d) as he did not believe that the case was conducted by the Defendant in an unreasonable manner and so costs were not thereby enlarged. His decision was further influenced by the fact that the offers made by Telefónica were *"at the very highest end of a settlement proposal"* and that *"It does seem to me that the nature of the offers, even if genuine attempts to settle the proceedings, has a bearing on the overall question of whether the order that I am being asked to make is or is not just"*. Moreover the case was 'binary' in nature, rendering settlement more difficult. Telefónica appealed, the exercise of the judge's discretion forming the substance of the appeal.

Judgment

The appeal was allowed. In his leading judgment, with which Arnold LJ and Peter Jackson LJ agreed, Phillips LJ held that the trial judge was wrong to adopt different positions in respect of

(i) the enhanced interest and (ii) the indemnity costs and additional sum. The same decision as to whether it was just or not to award costs consequences should apply to all four costs consequences collectively, given that the judge had accepted that the Part 36 offers made by Telefónica represented genuine attempts to settle the proceedings, and that the normal Part 36 approach should therefore be adopted. Nor was it appropriate for the judge to factor into his thinking that, by awarding two of the costs consequences, it would be unjust to award the others, particularly in the context of a £55m judgment, in which the enhanced interest was the key costs consequence, absent which the overall consequences for not having accepted the Part 36 offer were ultimately trivial.

The judge's reasoning, that it would be unjust to award enhanced interest on the sum awarded, pursuant to CPR 36.17(4)(a), was flawed. His finding, that it would be "disproportionate", given the "very high nature of the offers" and the other benefits awarded, did not bear scrutiny. The key consideration was whether the Defendant could have avoided the proceedings by accepting the offer and been in as good a position (or better than) the position it found itself after trial. Such a consideration might be valid in evaluating whether the offers of settlement had been genuine offers, but this was not the case here: the judge had stated expressly that the offers were genuine (or at least that he could not say that they were not). Nor was it open to the judge to take into account the margin between the Claimant's offer(s) and the sum awarded. In so doing, he impermissibly 'reintroduced' the overturned approach in *Carver v BAA plc* [2009] 1 WLR 113 (in which it was held that the Claimant had not achieved a "more advantageous" result than the Defendant's Part 36 offer, albeit that he had recovered £51 more than that offer), effectively and improperly declining to implement Part 36 because of the small margins involved (paragraph 44).

Furthermore, whilst proportionality might be considered when assessing the enhanced rate of interest to be awarded (between 0 – 10% above base rate), it was not relevant in the context of deciding whether to award the interest at all. In *OMV Petrom SA v Glencore International AG* [2017] 1 WLR 3465, the Court of Appeal had emphasised that decisions as to whether to award enhanced interest at all are to be regarded separately from decisions as to the rate of enhancement. Insofar as proportionality is relevant, it is that the level of interest awarded must be proportionate to the case. The judge had also misdirected himself in assuming that enhanced interest would be awarded at 10% above base rate; he had failed to take into account his discretion as to the rate of interest. (In fact, the rate sought by Telefónica was 3% above base rate, not 10%.)

As to the decision not to award interest on costs pursuant to CPR 36.17(4)(c), Phillips LJ once again rejected the trial judge's approach and reasserted the principle (albeit with a different emphasis) that the key question was which party was responsible for costs being incurred when they should not have been. A defendant's reasonable conduct of proceedings after rejection of a claimant's offer may be a major factor in increasing or decreasing the level of interest awarded, but such reasonable conduct is not sufficient, in itself, to render it unjust to make an award at all. The Court's discretion, therefore, was as to the level of interest to be awarded, not whether to award interest at all.

Accordingly the appeal was allowed and the Claimant awarded enhanced interest on both the principal sum awarded and its costs. Exercising its discretion in that regard afresh, and taking into account all relevant circumstances, the Court of Appeal awarded an additional 1.5% per annum: c. £900,000 in total at 3.5% above base rate on both principal and costs from the relevant date.

Analysis

Whilst this was perhaps not a surprising decision in light of the relevant case law concerning CPR 36.17(4), this case nonetheless sends out a strong message that the courts will actively seek to apply the full force of the Part 36 costs consequences

in encouraging parties to settle proceedings, and that the use of the courts' discretion will not ordinarily be applied to dilute the effect of those consequences. Parties should therefore expect that, where a claimant has made a Part 36 offer in a genuine attempt to settle proceedings and subsequently beats that offer at trial, all four of the costs consequences set out at CPR 36.17(4)(a) – (d) will be awarded, absent unusual circumstances: particularly when a failure to award the consequences in full would result in the claimant benefitting little from beating its own offer. This is a ruling of obvious significance to those practitioners engaged in dispute resolution in its various guises, and should be borne in mind when consideration is given to settlement options and strategy.

TWO PART 36 CASES

Peter Hurst

In proceedings relating to a claim for breaches of a design and build contract where the Claimant succeeded both in substance and in reality but was awarded significantly less than the amount claimed, and the Defendant had made a Part 36 offer and had done better than that offer at trial, the Court held that the Claimant had failed completely on the element of its claim that was the largest in money terms and took the most time and effort regarding expert evidence and the trial itself. It had also failed substantially on two other large value elements in its claim. Overall, however, the Claimant's conduct of the case was not unreasonable or deliberately exaggerated. The failure to accept the Part 36 offer did not merit indemnity costs. The Claimant had been in a position to undertake its own assessment and valuation of the case at the time of the offer and was in a position to know that the result of independent tests significantly weakened the major elements of its claim, and that there were real risks that if it went to trial it would not recover more than was on offer. On that basis, the Defendant was ordered to pay 80 % of the Claimant's costs up to a date 21 days after the offer was served with the reduction being the appropriate amount having regard to the Claimant's partial lack of success. The Claimant was ordered to pay 80 % of the Defendant's costs thereafter.[1]

In proceedings between a local authority and a waste disposal company, the local authority was successful. An issue arose as to whether the local authority's Part 36 offer was valid. The offer stated that if it was accepted within 21 days of the date of the offer letter (7 March 2019), the Defendant would be liable to pay the Claimant's costs in accordance with CPR Rule 36.13. The Defendant argued that the offer did not comply with CPR Rule 36.5(1)(c) because it was sent by email at 4:54pm and was therefore "*made*" on 8 March 2019. The relevant period accordingly expired 20 days from the date the offer was made. The Court, applying *C v D*[2] construed the statement that the relevant period ran for *"21 days of the date of this letter"* as meaning that the 21 days ran from 8 March 2019, i.e. the date the offer was made. This was consistent with the Claimant's intention to make a Part 36 offer and ensured that the offer was effective. In the light of the Defendant's unreasonable failure to engage with the Part 36 offer and its conduct in pursuing a defence and large counterclaim based on unwarranted allegations of lack of good faith, false allegations and a compromised expert witness, interest was awarded at the maximum rate of 10 % above base rate from the date of expiry of the Part 36 offer, together with indemnity costs from that date and interest on those costs at 10 % above base rate.[3]

1 *Blackpool Borough Council v Volkerfitzpatrick Limited and Ors* [2020] EWHC 2128 (TCC), HHJ Stephen Davies.

2 [2011] EWCA Civ 646

3 *Essex County Council v UBB Waste (Essex) Limited (No. 3)* [2020] EWHC 2387 (TCC), Pepperall J.

MASTEN V LONDON BRITANNIA HOTEL LTD – A SALUTARY TALE FOR ALL

Daniel Laking

We all, perhaps from time to time, fall into the trap of thinking that relief from sanctions will be a "routine administrative matter" rather than a course of action fraught with litigation risk. The case of *Masten v London Britannia Hotel Ltd* [2020] EWHC B31 (Costs) reminds us that a relaxed attitude to seeking relief can be a painful experience, particularly in the context of Default Costs Certificates. It also cements some legal principles which will assist in any upcoming applications to set aside you might be bringing or resisting.

Legal Framework

In *Masten*, Master Leonard considered an application to set aside a Default Costs Certificate brought under CPR r47.12. As a reminder, r47.12 records as follows:

> *"(1) The court will set aside a default costs certificate if the receiving party was not entitled to it.*
>
> *(2) In any other case, the court may set aside or vary a default costs certificate if it appears to the court that there is some good reason why the detailed assessment proceedings should continue.*
> *(Practice Direction 47 contains further details about the procedure for setting aside a default costs certificate and the matters which the court must take into account)…"*

The rule directs the reader to Practice Direction 47, which at paragraph 11.2 contains considerations the court will take into account in deciding an application:

> *"(1) An application for an order under rule 47.12(2) to set aside or vary a default costs certificate must be supported by evidence.*
>
> *(2) In deciding whether to set aside or vary a certificate under rule 47.12(2) the matters to which the court must have regard include whether the party seeking the order made the application promptly.*
>
> *(3) As a general rule a default costs certificate will be set aside under rule 47.12 only if the applicant shows a good reason for the court to do so and if the applicant files with the application a copy of the bill, a copy of the default costs certificate and a draft of the points of dispute the applicant proposes to serve if the application is granted."*

Facts

In this case, the Claimant/Receiving Party served a Notice of Commencement and a Bill of Costs on 3 January 2020. The parties agreed Points of Dispute should be filed by 28 February 2020. However, for a series of unfortunate reasons including overwork and personal issues, the Defendant/Paying Party's solicitor did not file Points of Dispute by the deadline. On the date the deadline expired, the Claimant's solicitor indicated that he would be filing a request for a DCC.

The Defendant's solicitor assumed a DCC would be issued within a few days of the request. He passed the case to another file handler with instructions to complete the Points of Dispute and revert to him with an application to set aside the DCC as soon as it was received.

In fact, the DCC was not processed until 16 June 2020, three months later. Shortly after receiving the DCC, the Defendant's solicitor realised that the file had not been successfully handed over. He recommenced preparing the Points of Dispute and an application to set aside the DCC. He attempted (unsuccessfully) to file that application via the SCCO's electronic filing system on 15 July 2020 and successfully filed it on 26 August 2020.

Points of Principle

Master Leonard addressed some points of principle which are useful to bear in mind in future cases:

1. He rejected the Claimant's submission that the application must be dismissed because it was not framed as an application for relief from

sanctions under CPR r3.9.

2. Promptness in making the application was to be measured from the date at which the paying party knew that a DCC had been issued, and not from the expiry of the deadline for filing Points of Dispute.
3. It was not appropriate, when considering whether to set aside the DCC, to take into account the fact that the parties had already agreed an extension to the deadline for filing Points of Dispute.
4. Promptness had to be measured taking into account Practice Direction 47 paragraph 11.2 which expressly required the applicant to file Draft Points of Dispute with the application to set aside. In this case, the Defendant's solicitor had to draft detailed and substantial Points of Dispute. Master Leonard accepted that, between 16 June 2020 (when the Defendant became aware of the DCC) and 15 July 2020 (when the Defendant first attempted to file the application), the Defendant was drafting the Points of Dispute. Despite that taking approximately one month, the application *"was made as promptly as [the Defendant's solicitor] could reasonably manage."*
5. The Denton criteria had a bearing on the application to set aside. Master Leonard found, *"CPR 1.2 requires the court to give effect to the overriding objective at CPR 1.1, which requires that cases be dealt with justly and at proportionate cost … It seems to me that this is the primary reason why (although this is not, strictly speaking, an application for relief from sanctions) the Denton criteria must have a bearing on this application."*

Ultimately, the court refused the application to set aside the DCC. Despite the fact that the Claimant stood to make a significant recovery if the matter proceeded to a Detailed Assessment Hearing, the failure to serve Points of Dispute and the mismanagement of the file thereafter rendered it just to refuse the application. Master Leonard concluded: *"It seems to me that if I am to place appropriate weight on the importance of dealing with cases expeditiously, of complying with rules, practice directions and orders, and of the inevitable prejudice to the Claimant on setting aside the DCC, this application must be refused."*

Practice Points

If an agreement to extend a deadline cannot be reached with the other side, it is always better to make an application to extend the time for compliance, rather than waiting for the sanction to take effect and making an application to set aside/for relief. As Master Leonard said in his judgment: *"Given that agreement to a further extension after 28 February was not likely to be forthcoming then [the Defendant's solicitor was] simply unable to prepare points of dispute in time, the obvious step would I suggest have been to apply to the court for an extension, making arrangements in the meantime for them to be prepared before the application was heard."*

It is dangerous to treat any application for relief or set aside as an administrative matter with a high chance of success. Any default should be prioritised and treated seriously. The application to cure the default should be made as promptly as possible. These seem like obvious points, but in this case, the Defendant's solicitor appeared to overlook them.

Beware the court making findings or comments as to the defaulting party's behaviour in any judgment on an application for set aside. In this case, Master Leonard went as far as to find that the Defendant's solicitor was negligent: *"Both the failure to serve points of dispute within the agreed period and the subsequent mismanagement of the file were, by an objective standard, negligent. The loss of the opportunity to challenge the bill is the result of that negligence."* This would appear to me to lay firm foundations for a professional negligence action which parties will want to avoid if at all possible. Complying with deadlines and making advance applications to extend time limits will mitigate this risk as far as possible.

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Judith has a very substantial costs practice. She has advised and represented both paying and receiving parties and has considerable experience in solicitor/own client disputes. Her experience ranges from detailed assessment hearings in the County Court and the Senior Courts Costs Office to appeals in the County and High Courts, and in the Court of Appeal. She also has a substantial practice in personal injury and clinical negligence, and is often instructed on costs issues as they arise in those areas, for instance in costs budgeting issues in the context of high value personal injury and clinical negligence claims. She has a good deal of experience in costs issues arising in the context of group litigation. Judith lectures regularly on costs matters, including at the Association of Costs Lawyers annual conference. She was, until 2014, a member of the Attorney General's B panel and has been an editor of Cordery on Solicitors. *"A very good grasp of the figures and key issues."* The Legal 500. *"An incisive and excellent advocate, particularly in detailed assessment."* The Legal 500. *"Her style is very straight to the point and efficient. She can be relied upon to adhere to her brief and to present the case with determination and vigour."* Chambers UK. *"...Costs guru."* Chambers UK. To view full CV click here.

Simon Edwards

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Simon has advised and spoken extensively on conditional fee and other costs issues. He also appears regularly at the SCCO. He drafts solicitors' retainers including, conditional fee agreements, both individual (bespoke) and group (standard terms), and contingency fee agreements. He has advised on third party funding agreements (for clients and funders). His extensive experience of litigation in many different fields equips him with an understanding of the varied occasions in which costs are actually incurred, ranging from common law through commercial and property to family. When acting for insolvency practitioners he has advised on the specialist costs considerations that arise in that field. *"A key name in this area."* The Legal 500. *"Clear and concise in court."* The Legal 500. *"He has a very professional attitude and shows very good attention to the technical issues of a case." "He's very experienced and knowledgeable, and is an empathetic barrister whose sensitivity is appreciated by lawyers and clients."* Chambers UK. *"He is a very bright chap."* Chambers UK. To view full CV click here.

Karen Gough

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Karen practises globally as counsel, attorney-at-law, arbitrator, adjudicator and ADR neutral and in the UK has appeared before the courts at all levels, including the Privy Council. She is also an Attorney-at-Law with full rights of audience in Jamaica and Trinidad and Tobago. She is a past president of the Chartered Institute of Arbitrators, a Chartered Arbitrator, a member of a number of arbitral institution panels, and an accredited adjudicator. Karen specialises in complex major construction, engineering, infrastructure and energy disputes, and general commercial litigation, with a strong emphasis on international commercial arbitration and ADR. She regularly deals with substantial and complex issues of costs in the context of major litigation and arbitration cases, when acting as arbitrator, adjudicator and as counsel. She has particular experience of dealing with claims for costs against arbitrators in proceedings challenging their conduct or seeking their removal. To view full CV click here.

CONTRIBUTORS

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Shaman's practice covers several fields of commercial and common law with his costs practice bridging over both fields. He is regularly in the High Court and SCCO and receives instructions domestically and internationally. He is a regular speaker at seminars for membership organisations as well as for clients in-house and Chambers' seminar programme. He is frequently instructed for his opinion as an "expert" in costs as a result of the new practice in the SCCO in protected party cases, and he has been regularly trusted by both sides to a dispute through his appointment as Mediator. Shaman is ranked in Chambers & Partners for Costs where he is described as having a *"broad range of knowledge, and is adept at dealing with all manner of knotty problems thrown up during costs hearings"; "absolutely at the cutting edge"; "Solid, reliable and innovative, he offers good-quality advice in a timely fashion"* (2021) *"A fighter for the client who has got an encyclopaedic knowledge when it comes to costs. He is able to act for individual clients as well as commercial ones, and can explain things well to them. He knows this area of law inside out and presents his cases with sophistication."* (2020/2019) *"Has the right mindset to be able to compromise with the other side on commercial terms; if not able to settle, he is, however, a robust advocate who stands up for the cause." "He is concise and easily understandable."* (2018) *"Absolutely brilliant with the client". He is ranked in Legal 500 as a leading Junior in Costs and is described as being "one of the most commercially savvy barristers one can find and a very formidable advocate"* (2021), *"clear, to the point and his advice is always solution focussed"* (2020/2019). To view full CV click here.

Caroline Allen
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Caroline is a member of Chambers' specialist costs group and often appears in the SCCO and County Courts in detailed assessment hearings and appeals for receiving and paying parties. She also undertakes regular advisory work. To view full CV click here.

Daniel Laking
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Daniel has a broad civil practice, and specialises principally in the fields of personal injury and clinical negligence, insurance fraud, costs, inquests and inquiries, and health and safety. In his costs law practice he has been instructed in cases dealing with a wide range of costs issues such as the recoverability of ATE premiums and joint / several liability. He is familiar with the law in respect of both pre- and post-LASPO costs and is available to advise on tactics and procedure in relation to Detailed Assessment Hearings and related applications. He is also available to assist in cases where he specialisms overlap, for example recovering costs of inquest proceedings in subsequent civil litigation. As a personal injury specialist, Daniel is familiar with all aspects of costs as they relate to PI and clinical negligence cases. He is frequently instructed in Costs and Case Management Conferences as well as costs applications that arise in civil proceedings. He has a full understanding of the exceptions to Qualified One-Way Costs Shifting and has been successful in recovering costs under both CPR r44.15 and CPR r44.16 in bespoke applications. He has also been instructed in applications for wasted and indemnity costs as well as in relation to Part 36 offers. He is currently instructed as junior counsel to the Grenfell Tower Inquiry alongside his court practice. To view full CV click here.

CONTRIBUTORS

Peter Hurst
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Peter is the former Senior Costs Judge of England and Wales. He is an expert in Costs and Litigation Funding. This covers all sectors of litigation as well as solicitor/ client disputes which may arise out of non-contentious matters as well as out of litigation. He accepts instructions as a Mediator, Arbitrator and Expert Witness. Recent cases include:

- In The Matter Of Peak Hotels and Resorts Limited (In Liquidation), Russell Crumpler & Sarah Bower (Joint Liquidators Of Peak Hotels & Resorts Limited (In Liquidation)) – And – Candey Limited [2017] EWHC 3388 (Ch), HHJ Mark Raeside QC. Valuation of services provided under a fixed fee agreement the subject of a floating charge. Judgment for the Defendant solicitors.
- Persona Digital Telephony Limited & Sigma Wireless Networks Limited and The Minister for Public Enterprise, Ireland and the Attorney General, and, by order, Denis O'Brien and Michael Lowry. [2017] IESC 27. Whether third party funding agreement was champertous.
- *Harlequin Property (SVG) Ltd v Wilkins Kennedy*, [2016] EWHC 3233 (TCC); [2016] 6 Costs L.R. 1201; Coulson J. Concerning the validity of DBAs – settled before trial concluded.
- *Energy Venture Partners Ltd v Malabu Oil & Gas Ltd,* [2013] EWHC 2118 (Comm); Gloster LJ. Validity of Third party funding arrangement.

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