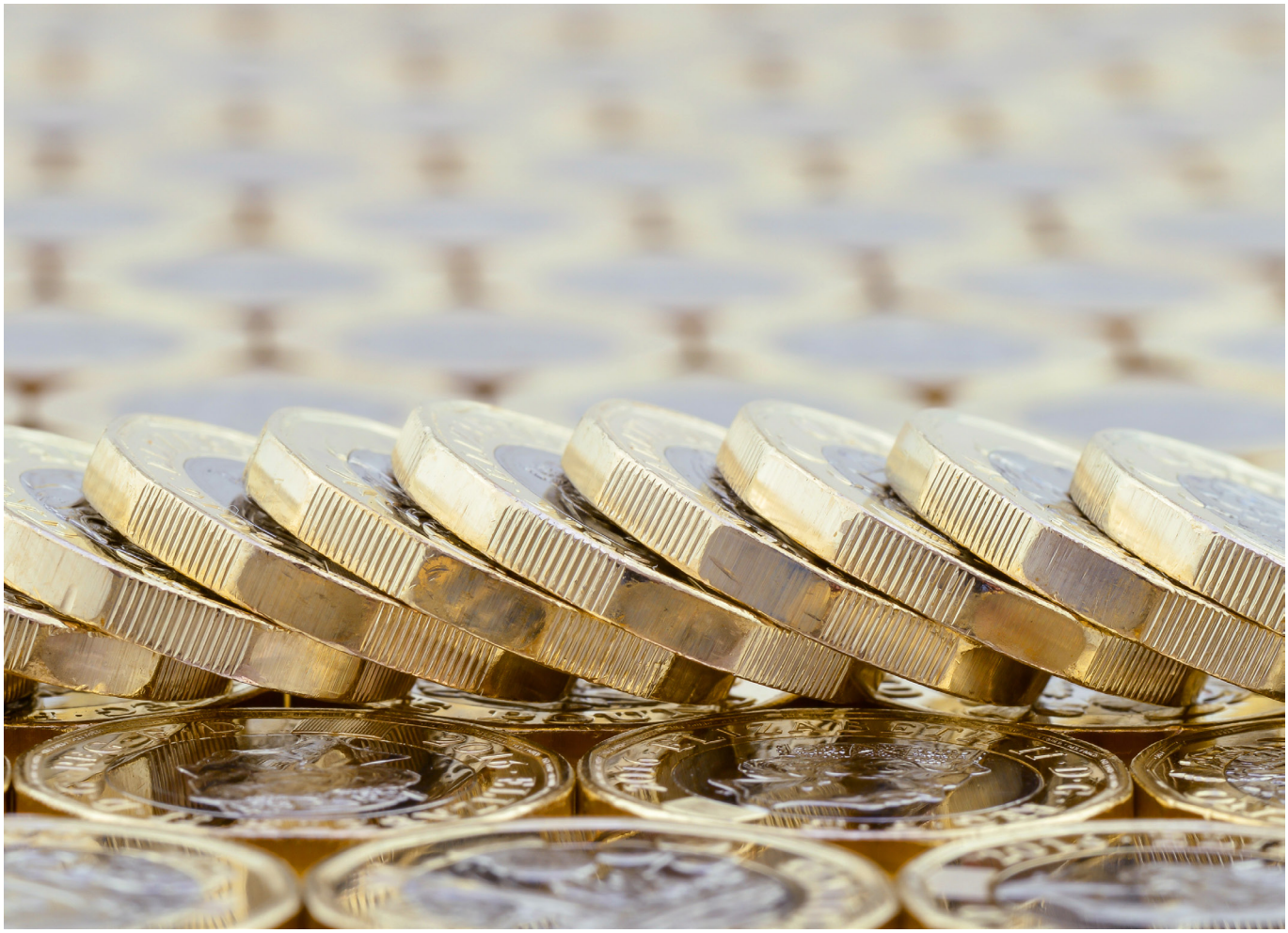
39 Essex CHAMBERS

3+9=Costs

April 2022



INTRODUCTION

EDITOR: Shaman Kapoor

Welcome to the 5th Edition of 39 Essex Chambers' Costs Newsletter. The socio-political climate in the world has dramatically changed in the last few months beyond the comprehension of most. The crimes committed to the Ukranian people (and so too the Russian people) will scar humanity for generations to come. Much like the impact of Covid, we have to poke the fires of normality in our contribution to ensure that democracy and the rule of law triumphs above all.

So, on we go. We have several successes in the 39 Costs Team to celebrate. First, we are delighted to announce that **Simon Browne QC** has joined Chambers reinforcing our expertise at senior-silk level. Second, **Vikram Sachdeva QC** has been appointed as a Deputy High Court Judge. And third, **Judith Ayling QC, Nicola Greaney** and **myself** have joined the editorial team of the White Book's Costs and Litigation Funding supplement, which is already co-edited by **Peter Hurst.**

Moving on to developments in law and practice, there is always plenty to report. **Summary Assessments** do not normally feature in our Newsletter, but there are two judgments worthy of mention.

First, *HHJ Paul Matthews,* sitting as a High Court Judge in *Crypto Open Patent Alliance v Wright* [2022] EWHC 242 (Ch) recently said that *costs decisions were supposed to reflect the broad*

justice of the case…They are therefore intended to be "merely the tail to the dog, and not the dog itself"…The concept of summary assessment was an example of this. Despite the benefits of the process, parties "persist in arguing minor costs assessment issues, seeking to claw back this or that fraction of costs or small expenditure. This is not cost effective. It is merely disruptive. The costs of the argument must often outweigh even the value of what is in issue".

Second, the Court of Appeal in *Samsung Electronics Company Limited & Ors v LG Display Company Limited & Anor (Costs)* [2022] EWCA Civ 466, considered that a departure from GHRs even in a competition claim, required "clear and compelling justification". Generic submissions that the case was a commercial case or a competition case or that it had an international element were not enough unless there was something of substance to each of those factors, noting also that the top GHRs were in any event reserved for *"very heavy commercial work"*.

In a sentence then, don't be a dog at summary assessment, but if you start barking, make sure there is some substance to it!

We headline this edition with a round-up about costs in **large loss claims**, touching on budgets and interim payments on account of costs, reinforcing GHRs and QOCS and set-off, before turning to Part 36. We follow up with an article on **disclosure of ATE premium** in the Competition Appeal Tribunal in the case of *Coll*, in the context of an application for a collective proceedings order which also sought disclosure of success fees. We move back to the Court of Appeal for a judgment in *McKeown* on the approach to a **global *Calderbank* offer in a split trial,** as distinct from the approach to Part 36 offers, dealing with a claim for unfair prejudice under the Companies Act 2006. We then take you to a case summary of *Hankin*, where the Court had to consider when **counsel's brief fee** fell due before assessing the fee itself and going on to identify a number of relevant considerations. Finally, we close off this edition with a worthy chequered flag in a detailed review of the operation of a **solicitor's equitable lien** as it came very recently before the Supreme Court in the case of *Bott & Co.,* only for the second time, and even then within 3 years of the last judgment.

That's it for now. Happy Easter!

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COSTS IN LARGE LOSS CLAIMS

Simon Browne QC

Relevance of Costs Budgets and Interim Payments on Costs

Pursuant to CPR rule 44.2(8) "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, the Court must order an interim payment". The former rule, which stated that a Court "may" make such an order, was amended to "will" do so.

For guidance in determining what may be a "reasonable sum on account of costs" the Courts have been able to refer over the last few years to the judgment of Christopher Clark LJ *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm). Those principles apply to any non-budgeted costs – which of course include incurred costs in any approved budget. In general terms the Courts, following *Excalibur*, have awarded an interim payment in the region of 50% - 60% of claimed costs.

As to a reasonable sum on account of budgeted costs the Courts have acknowledged that as approved costs budgets reflect a range of reasonable and proportionate costs for each phase of the litigation then the percentages on account of costs can be much higher at the interim payment on account stage.

In *MacInnes v Gross* [2017] 2 Costs LR 243; [2017] EWHC 127 (QB); [2017] 4 WLR 49 it was held that the court should have regard to the fact that on detailed assessment the costs judge will not depart from the approved or agreed budget unless satisfied that there is good reason, pursuant to CPR 3.18, to do so. Coulson J (as he then was) regarded 10% as the maximum deduction appropriate in a case where there is an approved costs budget thereby allowing an interim payment of 90% of budgeted costs.

Thomas Pink Ltd v Victoria's Secret UK Ltd [2015] 3 Costs LR 463; [2014] EWHC 3258 (Ch) is another case where 90% of the approved budgeted costs was awarded.

The above approaches were repeated in the *Puharic v Silverbond Enterprises Ltd* [2021] EWHC (QB) 2021 Costs L.R. 499. On an application for an interim payment of the Defendant's costs under CPR 44.2(8), the sum of 50% offered by the claimant across all costs was held too low because it failed to have regard to the developing body of law as to the relationship between costs management and detailed assessment. 90% was an appropriate sum for those costs which had been budgeted and 50% was an appropriate sum for unbudgeted costs.

New Guideline Hourly Rates 2021 (GHR)

Rather than having the old practise of District Judges having a piece of paper in the bottom drawer listing local hourly rates, the GHR were introduced for summary assessment of cases up to one day.

The original GHR included an inbuilt uplift of 50% on the base rate (under the old A and B calculations and a case had to go to trial for an uplift to be applied of 100% or more). As the GHR developed over the years that uplift calculation waned and in 2010 the rates were last approved prior to recent developments. As the GHR have always been recognised as the starting point on a detailed assessment of costs, the lack of updating since 2010 caused concern. An attempt was made by the Civil Justice Council in 2014, under a committee then chaired by Sir David Foskett, to update them on an evidence-based approach – there was so little evidence that Lord Dyson MR rejected the recommendations. Mr Justice Stewart chaired another committee reviewing the GHR in January 2021. The evidence obtained during 2021 was more detailed and following consultation the new Guideline rates were implemented from October 2021.

Master Rowley, Costs Judge, in *R v Barts Health NHS Trust* [2022] EWHC B3 (Costs) on 6th

January 2022 stated that *"The guideline hourly rates operative from 1st October 2021 are, in my view, likely to be the preferred starting point in most cases (rather than the 2010 version)"*. This is significant as the 2021 GHR are based upon data from 2019/2020. In his introduction statement Sir Geoffrey Vos MR stated *"that there were, and were no more, than a starting point for judges on summary assessment."* On detailed assessment it will be regular for those rates in large loss claims to be enhanced to reflect the factors set out in CPR 44.4(3).

Those producing the 2021 GHR did not succumb to the temptation of having London and The Rest. Instead, they opted for London Bands 1 – 3 and National Bands 1 and 2.

THE LONDON BANDS

London band	Area	Postcodes
London 1	Very heavy commercial and corporate work by centrally based London firms	Not restricted to any particular London postcode
London 2	City and Central London	EC1 to 4, W1, WC1, WC2 and SW1
London 3	Outer London	All other London boroughs, plus Dartford and Gravesend

National Band 1

Berkshire
Buckinghamshire
Dorset
Essex
Hampshire (and Isle of Wight)
Kent
Middlesex
Oxfordshire
Suffolk
Surrey
Sussex
Wiltshire

PLUS:

Birkenhead, Birmingham (Inner), Bristol, Cambridge City, Cardiff (Inner), Leeds (Inner) (within 2km of City Art Gallery), Liverpool, Manchester (Central), Newcastle City (within 2m of St Nicholas Cathedral), Norwich City, Nottingham City, Watford

Everywhere else National Band 2

For individual locations see: https://www.gov.uk/guidance/solicitors-guideline-hourly-rates

The hourly rates for each area are set out in the table below.

Grade	Fee earner	London 1	London 2	London 3	Nat 1	Nat 2
A	Solicitors and legal executives with over 8 years' experience	£512	£373	£282	£261	£255
B	Solicitors and legal executives with over 4 years' experience	£348	£289	£232	£218	£218
C	Other solicitors or legal executives and fee earners of equivalent experience	£270	£244	£185	£178	£177
D	Trainee solicitors, paralegals and other fee earners	£186	£139	£129	£126	£126

QOCS – *Ho v Adelekun* made simple

In cases falling within the scope of the qualified one-way costs shifting regime, CPR r.44.14(1), properly construed, did not allow the court to order that the parties' costs liabilities be set off against each other.

In ***Ho v Adelekun*** the Court of Appeal had been right to doubt whether *Howe v Motor Insurers' Bureau (Costs)* [2020] Costs L.R. 297, [2017] 7 WLUK 84 was correctly decided, but it was bound by its previous decision. The matter was sent to the Supreme Court for a definitive answer. The decision required the interpretation of the Rules of Court to be reviewed as to QOCS. The result was

that the Supreme Court favoured the Claimant as to whether there could be set of costs. The paragraphs below explain how the QOCS rules are to be applied in cross orders.

Rule 44.14, properly construed, required the creation of two comparators:

(a) the aggregate amount in money terms of all costs orders in favour of the defendant, and

(b) the aggregate amount in money terms of all orders for damages and interest in favour of the claimant.

If the first sum was less than or equal to the second, the defendant could enforce their costs order without limit.

If the first sum was more than the second sum, the defendant could only enforce their costs order up to the value of the second sum.

The phrase "in money terms" meant the defendant taking account of the monetary benefit of setting off costs against the claimant's damages even though it might not generate actual cash but only cancel out a liability to pay the damages and interest. A Defendant cannot set off against costs.

Two recent Part 36 cases

Pallett v MGN [2021] EWHC 76 (Ch)
This was a phone hacking case. The Claimant made a P36 Offer which was accepted on 22nd day i.e., one day after expiry. The purpose of doing this by MGN was to render the automatic costs provisions of acceptance of a Part 36 ineffective. The reason for this approach was that MGN wished to invite the court to consider its liability for the costs under r.36.13(4). HELD by Mann J that MGN was entitled to argue the costs in this manner as P36 is a self-contained regime but in the absence of any good reason why C should be penalised (e.g., failure to negotiate, failure to act upon early disclosure made) the normal costs order would follow as costs for C.

FKJ v RVT & Ors [2022] EWHC 411 (QB)
Claimant's P36 offer. D wished to refer to an offer under rule 36.16 (2) (which states that it must not be shown to Trial Judge) on CCMC as to proportionality, costs budgeting, case management and a forthcoming strike out application. There was no direct authority on this point as to whether it is permissible to allow the Court to see the P36 in such circumstances but before Master and High Court Judge on appeal the Court refused its admission on the facts of the case. D has lodged an appeal.

DISCLOSURE OF ATE PREMIUM IN THE CAT

Judith Ayling QC

In two recent judgments the Competition Appeal Tribunal ('CAT') has declined to order the proposed class representative ('PCR') to give disclosure of the ATE premium, most recently in *Coll v Alphabet Inc and others* [2022] CAT 6 (decision 3 February 2022), following closely on *Kent v Apple Inc* [2021] CAT 37.

In *Coll* the PCR Elizabeth Coll had applied for a collective proceedings order ('CPO') pursuant to section 47B Competition Act 1998 on behalf of c19.5 million consumers said to have suffered losses due to allegedly abusive conduct by various Google entities in relation to app distribution and payment processing services. The PCR had disclosed the litigation funding agreement, the ATE policy, a litigation plan and a litigation budget but pursuant to rule 101 CAT Rules 2015 requested confidential treatment for part of the litigation funding agreement and ATE policy on the grounds of commercial confidentiality, strategic sensitivity and privilege. Accordingly, the documents disclosed had been redacted. The proposed Defendants objected. By the time of and during the CMC agreement had been reached on many issues but two remained outstanding: the proposed redaction of information about the deposit premium under the ATE policy, and whether the success fee percentage under CFAs with solicitors and counsel should be disclosed.

Section 47B(8) of the Competition Act 1998

provides that the CAT may authorise a person to act as class representative only if it considers it is just and reasonable for that person to do so; and rule 78 CAT Rules 2015 sets out the factors to be taken into account, which include whether the PCR will be able to pay the Defendant's recoverable costs if ordered to do so and whether it has prepared a litigation plan which includes any estimate of fees and details of arrangements about costs, fees or disbursements which the CAT had ordered it to provide. Rule 101 defines information which may need to be excluded.

The PCR objected to the point being taken at all, on the grounds that the documentation was to all intents and purposes identical to that in *Kent*. As a starting point the CAT held that the proposed Defendants were entitled to litigate the question despite *Kent*, because they could not be regarded as bound by a decision in proceedings to which they were not a party. However, it cited *Jacobs J in Tuke v Hood* [2020] EWHC 2843 (Comm), in turn citing Lord Neuberger in *Willers v Joyce* [2016] UKSC: puisne judges should generally follow the decision of a court of coordinate jurisdiction unless there is a powerful reason for not doing so.

The CAT in *Coll* examined and agreed with the approach in Kent to privilege and confidentiality but also looked at and agreed with the CAT's ruling in *BGL (Holdings) Ltd v Competition and Markets Authority* [2021] CAT 33: a wide confidentiality regime is prejudicial to and at odds with the principle of open justice. The starting point must be that the whole of a proposed class representative's funding arrangements are relevant to assessment of an application for a CPO. Thus, subject to issues of privilege or confidentiality, the presumption should be that if the litigation funding arrangement or ATE policy is relevant, then all of its terms are relevant, and redaction must be properly justified. An order maintaining confidentiality may be made, however, not just where information is privileged but also where another party might gain an "unfair tactical advantage" in relation to the litigation, noting that this formulation stressed the need to identify both the tactical advantage said to arise from disclosure, and the element of unfairness that would result should disclosure be required. The term "strategic sensitivity" should not lead to dilution of these requirements.

On the facts, the CAT held that the deposit premium in *Coll*, as in Kent, should remain redacted. ATE premia were possibly subject to legal advice privilege and, if not, disclosure might give rise to an unfair technical advantage because they reflected the insurer's assessment of the merits. Here the deposit premium was not relevant to the issues to be determined at the hearing for the CPO, and further there was a risk of giving an unfair tactical advantage to the proposed Defendants if disclosure were given. Should it be appropriate to revisit the issue at some future point, the CAT did not consider that the proposed Defendants would be prevented from making a further application, or the CAT from raising the point of its own motion.

The CAT stressed that that it was incumbent upon a PCR, if it wishes to seek confidential treatment to make its request clearly in writing, and to provide clearly and specifically articulated reasons why the release of the relevant documentation or information will, or might, cause material harm.

The CAT also decided that the proposed Defendants had not made out a case for being provided with information about success fees. As the CAT pointed out at [22], the collective proceedings regime is quite different from general civil litigation under the CPR. It seems unlikely that the decisions in *Coll* and *Kent* would assist in decisions in such general civil litigation. They are, however, of great importance in the high stakes world of the CPO regime.

Judith Ayling QC was a junior for UKTC in *PACCAR and others v (1) RHA (2) UKTC* [2021] EWCA Civ 299.

CALDERBANK OFFERS AND SPLIT TRIALS: *MCKEOWN V LANGER* [2021] EWCA CIV 1792[1]

Anna Lintner

The Court of Appeal has recently considered the question of whether the existence of a global *Calderbank* offer requires the Court to reserve the costs of the first stage of a split trial until the conclusion of the proceedings.

The case concerned an unfair prejudice petition pursuant to s.994 Companies Act 2006 that was brought by a minority shareholder (R) in the holding company for the Sophisticats lap dancing venues. Following a two-week trial to determine issues of unfair prejudice (the liability stage), the Judge found comprehensively in favour of R and ordered A to purchase R's shares at a price to be determined at the quantum stage. Notwithstanding the existence of a global *Calderbank* offer made by A in relation to the whole of the proceedings (which the parties agreed that the Judge should not have sight of), the Judge ordered that A pay R's costs of the petition up to and including the liability trial, largely on the indemnity basis, and ordered a payment of £450,000.

On appeal to the Court of Appeal against the costs order, A argued that: (i) cases such as *HSS Services Group v BMB Builders Merchants* [2005] EWCA Civ 626 establish that, where a global Part 36 offer has been made, the Court should – save in exceptional circumstances – reserve costs until the conclusion of proceedings; and (ii) there was in substance no difference between Part 36 and *Calderbank* offers such that the Judge ought to have reserved costs in light of R's undisclosed global *Calderbank* offer. The overarching submission made by A was that the Court should only make an immediate costs order after the first stage of a split trial if it can be reasonably sure that nothing is likely to happen subsequently that would render the costs order unfair to the paying party.

The Court of Appeal dismissed the appeal, for three reasons. First, it held that A's analysis was inconsistent with the language of CPR 44.2, which confers a broad discretion on the Court and provides that the Court is required to take into account any *admissible* offers in the exercise of that discretion. On the express terms of CPR 44.2, the Judge was entitled to conclude that the *Calderbank* offer was inadmissible and proceed to make the costs order.

Secondly, there were important policy considerations in play. Citing *Merck KGaA v Merck Sharp & Dohme Corp & Ors* [2014] EWHC 3920 (Ch), the Court of Appeal held that *"an overly robust application of a principle that costs should follow the final event discourages litigants from being selective as to the points they take in litigation and encourages an approach whereby no stone or pebble, howsoever insignificant or unmeritorious, remains unturned"*. The merits at trial were overwhelmingly in favour of R and the Judge had recorded his displeasure at the taking of unmeritorious points by A. Further, the Judge had condemned the behaviour of A in the conduct of the litigation as falling below the standards to be expected of a professionally advised litigant. The Court of Appeal observed that the making of discrete, issue-based costs orders and interim costs orders encourages professionalism in the conduct of litigation. The Court of Appeal also acknowledged the role of the principle of equality of arms; in certain types of litigation such as minority shareholder suits there may be an asymmetry of information between the parties such that a petitioner is poorly placed to assess the reasonableness of an offer to settle. The Court of Appeal held that the Appellant's position, if accepted, *"would represent the antithesis of good policy"* and would be *"an enticement to strategic gameplaying"*, because it would enable a party to use the existence of an undisclosed, derisory *Calderbank* offer to prevent the making of an immediate costs order.

1 First published in *Litigation Funding magazine* (see https://www.lawgazette.co.uk/litigation-funding)

Thirdly, the case law on Part 36 that was relied upon by A to the effect that the Court should reserve costs in the event of an undisclosed Part 36 offer could not be "read across" to *Calderbank* offers.

The effect of the Court of Appeal's decision is that the Court is only *required* have regard to a *Calderbank* offer when determining costs if the offer is admissible (for example because it relates only to decided issues or because the offering party consents to its disclosure). That being the case, a party wishing to protect itself in costs by making a global offer to settle proceedings that are the subject of a split trial should always do so by making a Part 36 offer rather than a *Calderbank* offer.

Also of interest is Green LJ's *per curiam* comment to the effect that, where the Court reserves the costs of a split trial on the basis of a global Part 36 offer, there is nothing to prevent the Court from making an immediate costs order in relation to the costs incurred prior to the Part 36 order being made. In making this comment, Green LJ disagreed with the view expressed in *Lifestyle Equities CV v Sportsdirect.com Retail Ltd (No. 2)* [2018] EWHC 962 (Ch).

Anna Lintner appeared as sole counsel for the successful Respondent in *McKeown v Langer.*

HANKIN V BARRINGTON AND OTHERS

Daniel Kozelko

In Hankin v Barrington and Others,[1] Deputy Master Campbell was faced with the interesting issue of when a liability in costs arises for counsel's full brief fee. On the facts, the main proceedings had been settled following a mediation two and a half weeks before the trial. The mediation had occurred two days after the brief fee was deemed incurred. The question was whether the Defendants were liable for the Claimant's leading counsel, Mr Weir's, full brief fee of £125,000 plus VAT.[2]

Deputy Master Campbell began from the principle that, where a case settles after the brief has been delivered, it is no longer the case that counsel is entitled to a full fee. There will instead need to be a renegotiation, applying a reasonable reduction to the fee. The Deputy Master's judgment gives a useful summary of the case law on assessing such a reasonable reduction.

Turning to the decision, Deputy Master Campbell first concluded that the £125,000 brief fee was unsupportable in itself. Such a fee placed leading counsel in the category of pre-eminence which set him apart from the typical fees allowed for such catastrophic injury cases. Following *Simpsons Motor Sales,*[3] when assessing the appropriate fee, a Costs Judge should consider a hypothetical counsel able to conduct the case effectively but unable or unwilling to insist on a particularly high fee on account of pre-eminence. Taking into account the fees offered in cases of a similar nature, Deputy Master Campbell reduced the fee to £75,000.

Second, Deputy Master Campbell then considered what reduction was appropriate to reflect the settlement. It was noted that Mr Weir was not

1 [2021] EWHC B1 (Costs).

2 The fee was initially £110,000 plus VAT but was renegotiated shortly prior to settlement to reflect an increased length of trial. Plus VAT is omitted for the remainder of the article.

3 *Simpsons Motor Sales (London) Ltd v Hendon Corporation (No.2)* [1964] Costs LR (Core) 29

said to have been working up the brief before the mediation; such work preparing for a mediation was of a different type. While it took a further week for the settlement to be approved by the Court, the evidence did not show that Mr Weir had worked up the case in that time. Instead, the matter simply could not be removed from his diary until the date of approval. In considering this issue, the Deputy Master considered Lewis where such evidence of little preparation was significant in reducing the fee allowed by 50%.[4]

As to the loss of a chance to fill counsel's diary with other work, the Deputy Master accepted this will be relevant and some fee should be permitted to reflect the commitment. In this case the period between delivery of the brief and the expected trial date was around three weeks. In *Bowcott,*[5] Hallett J attributed 50% of the brief fee to the commitment element; in *Miller*[6] Jack J allocated one third of the fee to the fact that the diary time was booked and may be difficult to fill. In *Lewis* it was 50% of the fee that was permitted when a case settled three weeks before trial. Taking this together, Deputy Master Campbell applied a 50% reduction to bring the fee to £37,500.

Third, Deputy Master Campbell then considered mitigation. While it is not permitted to speculate what counsel may have earned in the time that was newly available, in this case Mr Weir had undertaken work. The Defendant asserted these were £11,000 of earnings and the Deputy Master reduced the fee by £10,000 to reflect the mitigation. Thus, the final fee permitted was £27,500 plus VAT.

In concluding Deputy Master Campbell made a number of further observations useful to costs practitioners:

- On the facts, it was an impermissible application of hindsight to suggest that, if the Defendants had known when the brief fee would have been incurred, they would have planned the mediation earlier.
- On the facts, the Claimant was not at fault for not offering unprompted the date on which Mr Weir's brief fee was incurred.
- There is no obligation on solicitors to agree staged fees; failing to do so did not make Mr Weir's fees irrecoverable.
- Where a question arises as to a claimant's approval of the fees, there needs to be a good reason to go behind a certificate of accuracy. It is normal that solicitors will expect to be paid.

This case is interesting because of the significant reduction of Mr Weir's brief fee, and the clear and staged approach adopted by the Deputy Master. Of particular note to those seeking to maximize the fee claimed should be particularly conscious of the need to evidence whether significant work was done on the brief. Those seeking to minimise the fee should be conscious of mitigation, and particularly the need to evidence actual work done by counsel; speculation is not enough.

SOLICITORS' EQUITABLE LIENS IN THE SUPREME COURT (AGAIN)

Simon Edwards

The Supreme Court dealt, for the first time, with a solicitor's equitable lien in *Gavin Edmondson Solicitors v Haven Insurance Company Limited* [2018] UKSC 21; [2018] 1 WLR 2052. The matter had not come before the House of Lords either. In that case, Lord Briggs gave the leading judgment.

Thus, when, in *Bott & Co. Solicitors Limited v Ryanair DAC* [2022] UKSC 8 the Supreme Court was again asked to look at solicitors' equitable liens, Lord Briggs, one of the justices, expressed

4 *Lewis v The Royal Shrewsbury Hospital* 20 May 2005 (Unreported)
5 *Bowcott v Wilding* [2003] EWHC 9042 (Costs)
6 *Miller v Hales* [2007] EWHC 1717 (QB)

some surprise. At paragraph 144, he said this:

> *"This is an appeal about the solicitor's equitable lien. It is remarkable that two cases about the same lien have come before this court in a mere three-year timeframe, having never previously troubled this court or its predecessor. Having delivered the lead judgment in* [the *Gavin Edmondson* case] *I hope I may be forgiven for having thought, during the intervening period, that this court had dealt sufficiently comprehensively with the principles underlying the lien and it would not have to be revisited at this level for many years, if ever. I was wrong. The issues raised and argued, both in the Court of Appeal and in this court have raised a serious uncertainty as to the boundaries of the type of work for which payment is secured by the lien with which the* Edmondson *case did not deal, at least expressly. The disagreement between us as to outcome of this appeal shows that, if it did so by implication, it was not one which simply jumped off the page."*

That paragraph is, perhaps, a testament to the ingenuity of lawyers and it is a further testament to their advocacy skills that, on this occasion, the losing Respondents in the Supreme Court managed to persuade the first instance judge (Mr Edward Murray, sitting as a Deputy Judge of the Chancery Division), all three of a very strong Court of Appeal and the two minority judges in the Supreme Court that they were right and that, in these circumstances, the solicitors were not entitled to an equitable lien for their fees. Unfortunately for them, they did not manage to persuade the three judges in the Supreme Court who formed the majority – Lord Burrows, Lady Arden and Lord Briggs – and, therefore, the Appellant's solicitors won the appeal and the solicitors established their right to an equitable lien for their fees.

Although the solicitor's equitable lien is called a *"lien"*, in contrast to other types of lien, it involves no element of possession. In other words, it does not depend on the solicitor having in its possession property which it is entitled to retain until paid. Rather, as set out in paragraph 730 of Volume 66, *Halsbury's Laws of England (Legal Professions),* it is more accurately described as a right to ask for the court's intervention for the solicitor's protection. In this case, the protection that the solicitors sought was to require Ryanair (the defendant) to pay its costs, Ryanair having paid a compensation sum due to the solicitor's client direct to the client and the client not having accounted to the solicitors for the costs the client was due to pay them.

The case arose out of the solicitors operating, initially through a website, a scheme whereby it sought clients who had suffered flight delays and, therefore, were, pursuant to an EU Directive, entitled to compensation for that delay unless the airline could show that the delay was caused by *"extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken"*.

Once the prospective client had put details into the solicitors' website, those details were reviewed for viability purposes and then the client was invited to enter into a CFA which entitled the solicitors to 25 percent of any compensation paid, plus VAT, plus an administration fee of £25 per passenger upon compensation being paid.

The solicitors handled many thousands of such cases and Ryanair decided that it did not particularly want to deal through solicitors, so set up its own website encouraging claims to be made directly to them. Notwithstanding that, many claims continued to be made through the solicitors and, therefore, Ryanair went a step further and started to make payments directly to clients, notwithstanding the fact that Ryanair had had the claims submitted to it from the solicitors expressly on behalf of the client and expressly on notice of the fact that the client had retained the solicitors for the purposes of making that claim.

The evidence from the solicitors was that in some cases the client would make the payment to the solicitors of the fees that were, in those

circumstances, due from the client to the solicitors, but in many cases the client did not and that, given the size of the fees (on average £95), the economics of pursuing the client for payment of that sum were uncommercial.

Thus, the solicitors brought a claim against Ryanair, asking the court for its assistance and, in particular, asking that the court order Ryanair to pay the money which their clients owed it. As set out above, the matter eventually reached the Supreme Court, where the solicitors' claim was finally upheld.

The five Supreme Court justices were agreed on many things. The first was that the principle underlying the solicitor's equitable lien was as important today as it was some 200 or so years ago when it was first recognised. The justification for it is the promotion of access to justice. It enables a solicitor to act for a client on credit and, in particular, in cases such as this where the solicitor's business model is to represent many claimants in small claims where the engagement of legal professionals would otherwise be wholly uneconomic.

The justices also agreed that the equitable lien operates on third parties by affecting the *"conscience"* of the third party, so that where the third party has notice of the solicitor's entitlement it becomes *"unconscionable"* for the third party to pay the client direct, thus potentially depriving the solicitor of its fees and, therefore, right that the third party should be obliged to pay the solicitor direct for the fees the client owes it, notwithstanding the fact that the third party has paid the client everything that it owes the client.

The justices also agreed that the equitable lien arose even if the payment resulted otherwise from any form of court proceedings or arbitration – in other words, if what had happened was that the solicitors had made a claim on behalf of the client which had been settled without the necessity for any form of proceedings. The latter had been firmly established in the *Gavin Edmondson* case.

Finally, they agreed that the solicitors must significantly contribute to the successful recovery of the fund or property over which the lien is asserted.

What divided the justices was whether there was an additional requirement for the equitable lien to arise. The minority considered that there should be an additional requirement so as to keep the equitable lien within proper bounds. They feared that if there was not such an additional requirement, the equitable lien could apply in cases where it should not apply, in particular in commercial or property transactions.

In order to allay that concern, the minority considered that, first, the solicitors must make a claim on behalf of a client with whom it has a contractual retainer; second, that the third party should be on notice of the fact that the solicitors are retained in pursuit of that claim; third, that the solicitors had in some way been instrumental in the success of the claim and the obtaining of whatever was claimed; and, in addition, that the claim either had to be disputed or there had to be a reasonable anticipation of a dispute.

Applying that test, the minority considered that, in this case, although the first three of those conditions were satisfied, the last one was not. They so held because in this case the payment of compensation was largely automatic, it being set down in the Directive, both in terms of the length of the delay and the amount of compensation payable, with only very limited grounds for refusal. They held, therefore, that in those circumstances when the claim was first made by the solicitors on behalf of its client there was no dispute and no reasonable anticipation of one. In those circumstances, they reasoned, the solicitors were not actually doing anything to enhance access to justice. Rather, it seems, the minority considered that the solicitors were performing an unnecessary task.

The above is a distillation of what is said in the joint judgment of the minority (Lord Leggatt and

Lady Rose) at paragraph 67 to 72, in particular at paragraph 72 where they say this:

> *"It is also important to bear in mind that the solicitor's lien operates in equity on the conscience of the paying party. If the payer, when aware or on notice of the solicitor's involvement, pays a sum in settlement of a claim directly to the solicitor's client to whom the sum is owed, the effect of the lien is to render the payer liable to pay part of this sum again if the claimant fails to pay her own solicitor's fees. Imposing this burden on the payer is equitable where it is reasonable to expect that the claim may be disputed and that negotiation or some other formal process in which the solicitor would represent the claimant may therefore be required to resolve the dispute. In such circumstances bypassing the solicitor and agreeing a settlement directly with the client which has the result of depriving the solicitor of his fees can be regarded as unconscionable. But it is hard to see how the payer's conscience can be sufficiently affected if all that he does is to pay directly to the claimant a debt which the payer has never contested and which there was never any reason to expect that he would refuse or fail to pay. If in such a situation the person to whom the money is payable chooses for whatever reason to retain a solicitor (or any other agent) to claim it on her behalf, paying the solicitor's charges would be her sole responsibility in the ordinary way. There is no equitable justification for imposing on the payer responsibility for ensuring that the claimant's solicitor is paid."*

The majority (Lord Burrows, Lady Arden and Lord Briggs) disagreed. Each gave a judgment but, in essence, the principles that emerged from those judgments are simple to state. The test is best set out at paragraph 88 in the judgment of Lord Burrows, where he says:

> *"Therefore, assuming that the solicitor is acting for a potential claimant rather than a potential defendant, the appropriate test for a solicitor's equitable lien is whether a solicitor provides services (within the scope of the retainer with its client) in relation to the making of a client's claim (with or without legal proceedings) which significantly contribute to the successful recovery of a fund by the client. … Although, given the context, further elaboration of the test seems unnecessary, one might add, lest there be any doubt, that by 'claim' one is referring to a claim asserting a legal entitlement or, as one can also describe it, a legal claim."*

The boundary to the doctrine that the majority chose, therefore, was that the solicitor should be retained to make a *"claim"*. This, so said the majority, would exclude most if not all *"transactional cases"*. Lord Briggs dealt with this at paragraphs 175 to 177 of his judgment. He asserted that the test the majority favoured would, indeed, exclude transactional work. He said that they (the majority) all agreed that such work is wholly excluded. He said that this was because the lien is a legal incident of the relationship between client and solicitor arising from a retainer to pursue a claim and not from any other kind of retainer.

At paragraph 176, he acknowledged that there might be unusual borderline cases where there was a composite retainer, but sorting out that part of the retainer to which the lien applied from that part to which it did not should not pose difficulty. He gave as an example that in a transactional case where a solicitor simply writes to the other party to remind that other party to make a payment on time, there is no element of claim and there would be no notice of a retainer to make a claim.

In response to the point that the minority made about the lack of any unconscionability in the case in question, Lord Briggs, at paragraph 178, made the point that the test for the solicitor to demonstrate that its activity contributed to the recovery was a *"low threshold"*. One might comment here that in this case the threshold must be considered to have been very low indeed where Ryanair responded to the solicitor's claim by simply paying up.

Thus, it can be seen that it is now settled that where a solicitor acts for a client in some form of claim, it is retained in circumstances which

create a contractual obligation on the client to pay at least in the event of success, and the solicitor makes that claim which in some way contributes to recovery on the part of the client and the third party is on notice of the solicitor's retainer, the equitable lien will arise.

It might be said that what the solicitors were doing in this case, and in many cases like it, was, in effect, acting simply as a claims management company. It is presently the case that claims management companies in such circumstances have no recourse to the courts to enforce any form of equitable lien. It is apparent from the judgments that the question of whether that is a limit on equitable liens remains to be seen, and perhaps equitable liens of this sort will reach the Supreme Court yet again.

Furthermore, an argument which Ryanair put forward, but was rejected, might assist other potential defendants to such claims if the circumstances were right. That argument centred on the equitable nature of the lien and the requirement that those who come to equity must come with *"clean hands"*. This was dealt with briefly in the judgment of Lord Burrows, at paragraph 98.

Essentially, what was being put forward was that it was inequitable for a solicitor to act in this way because Ryanair had instituted its own online system for a claimant to make claims, whereby the claimant would be able to make the claim easily and get 100 percent of the compensation payable, rather than 75 percent. Lord Burrows said:

> *"Clearly, it is important that people are not misled by solicitors and, in certain situations, it may be strongly argued that any reputable solicitor would first advise a prospective client that he or she should utilise an online claims procedure without incurring any legal costs. Insofar as it is thought that a system of online compensation is being abused by solicitors to charge unnecessary fees, this would be a matter for the Solicitors' Regulation Authority to investigate. In relation to an equitable lien, there is a well established equitable doctrine that could be invoked to prevent any abuse, namely that the solicitor asserting the lien would need to 'come to equity with clean hands'… But although Mr Kennelly put forward, as a fallback submission, that, in the exercise of the court's general equitable discretion, the equitable lien for Bott should be refused, it has not suggested before us or in the courts below that the conduct of Bott was such that it was barred by the 'clean hands' doctrine from asserting an equitable lien. In any event, we do not have the factual basis on which we could now consider applying such a bar and I do not think it would be appropriate to remit the proceedings back on an issue that was not specifically argued."*

That seems to open the door to other defendants in this situation to argue, on appropriate material, that the solicitor acted inequitably in agreeing with the client to take a proportion of the client's compensation when the client could have got the whole for virtually no effort and certainly no expense. Alternatively, the potential defendant could put it in a slightly different way, namely that in those circumstances the solicitor had been in such fundamental breach of its duties to its client as to render the client not liable for the fees in the first place, so that, in essence, the third party would be relying on the indemnity principle to avoid having to pay the solicitor direct.

Having said that, however, it is likely that most third parties in these circumstances will want to avoid, rather than encourage, litigation by disappointed solicitors and, therefore, will take away from this judgment that attempts by potential defendants to *"cut out"* solicitors from receiving their fees are unlikely to succeed.

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