39 Essex CHAMBERS

3+9=Costs

October 2020

INTRODUCTION

EDITOR: Shaman Kapoor

Welcome to the 2nd Edition of 39 Essex Chambers' Costs Newsletter. If anyone thought that Covid-19 would mean a quieter time for legal developments, this newsletter demonstrates that view to be mistaken!

This edition brings you right up to date with the rumbling judgment of Lavender J in *Belsner* which held that solicitors owed a fiduciary duty at the time of entering the retainer and are thus saddled with a duty to obtain informed consent. Our analysis is provided by none other than the former Senior Costs Judge. We take you back to 2014 to shine a light on what might lie ahead on hourly rates, sweeping up recent judgments of interest from the SCCO corridor. We move on to an extremely interesting development – the award of a success fee as part of the substantive award in an Inheritance Act claim, thus seemingly circumventing the prohibition against adverse awards of success fees *(Re H (Deceased))*.

Fancy a quiz? What do you get when you cross a withdrawn Part 36 offer with a claim in which the big-ticket item is lost by the Claimant and only 10% of the rest is won? Read on to find out more about winners, losers and indemnity costs *(Blackpool BC)*.

October, October – tends to mark a rule change, and sure enough you should all be aware by now of the new Precedent T. We give you the pointers, some tips and consider the as yet undefined "oppressive behaviour".

As we round up this edition, we review a decision of the Court of Appeal on the making of costs orders against a regulator, particularly before the Competition and Markets Authority and the Competition Appeal Tribunal *(Flynn Pharma)*. We consider the starting point for such orders and the tests for departure. We also review *Swift v Carpenter* for the rare consideration by the Court of Appeal of Protective Costs Orders in private law proceedings.

Finally, we close with an article first published in our Construction & Commercial Group newsletter last month, but repeated here because of its wide costs relevance, reviewing a solicitor-client fall-out on an epic scale with costs of £12m odd in issue, a fight about the validity of the CFA and a finding that the best interests of the client were left in the rear-view mirror! *(GEHC v Winros Partnership)*

All round, a good read, I am sure you will agree.

As we experience our first winter of Covid-19, the entire team and I wish all our readers, their families and colleagues the very best of health.

Shaman

Contents

CFAS AND INFORMED CONSENT

Peter Hurst

In February 2015 the writer prepared a paper for the Master of the Rolls which stated:

"All reforms to civil procedure run the risk of producing unintended (and unwelcome) consequences... Costs law and procedure are particularly susceptible to this phenomenon. In 1995, the Government, realising that many potential litigants were not eligible for legal aid and not wealthy enough to contemplate undertaking litigation at their own expense and risk, introduced Conditional Fee Agreements (CFAs), with a view to taking a large portion of the risk away from the client and transferring it to the legal representatives... Originally the success fee was borne by the successful client and not by the other party to the litigation. The maximum uplift was set at 100% which was intended to enable lawyers to take cases with a risk up to 50 per cent. Lord MacKay of Clashfern, the Lord Chancellor, made it clear that he did not intend 100 per cent to become the standard uplift, stating:

> "... the availability of detailed assessment will help to ensure that uplifts reflect the true risks in individual cases."

All might have been well had this system been allowed to develop gradually. In the event however, following a change of Government, the Access to Justice Act 1999 was passed permitting CFAs to be used in large numbers of cases and also providing for success fees and ATE premiums to be paid by the losing parties. Failure to comply with the regulations rendered the CFA unenforceable. This change led swiftly to the "costs wars" which generated massive amounts of satellite litigation, enormous costs and took up a disproportionate amount of court time.

The situation became so bad that the Conditional Fee Agreement Regulations were revoked in 2005. The situation was not

fully rectified until the implementation of the Jackson Civil Justice reforms... Many legal commentators expect an upsurge in Solicitors Act assessments as disgruntled clients find they are having to pay out a proportion of their damages."

That is exactly what has now happened. There has grown up an industry where clients, particularly personal injury clients, are encouraged to challenge the amount they are charged by their solicitors in respect of success fees under CFAs. The most recent example is *Belsner v Cam Legal Services Ltd* [2020] EWHC 2755 (QB) Lavender J.

In *Belsner* there was an assessment under section 70 of the Solicitors Act 1974 of the Claimant's former solicitor's bill of costs in relation to a claim for damages for personal injury arising out of a road traffic accident on 5 February 2016. The claim was made under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents and settled following submission of the Stage 2 Settlement Pack, for £1,916.98 in damages, plus fixed costs and disbursements of £1,783.19 including VAT.

On the section 70 assessment the District Judge allowed the solicitor's bill at £3,104.15 of which £208.80 was the success fee. The solicitors had deducted £385.50 i.e. 25% of the damages.

The Claimant appealed. One of the grounds was that, although there was a written agreement which expressly permitted payment to the solicitor of an amount of costs greater than that which the Claimant could have recovered from another party to the proceedings it was also a requirement that the Claimant had not merely signed that agreement, but had given informed consent to it, which required the Defendant to give the Claimant "a full and fair exposition of the factors relevant to it", which the Claimant contended that the Defendant did not do.

The solicitor appealed the order that it should pay the Claimant's costs of assessment.

The Judge recognised that this was clearly a test case. The Claimant's new solicitors had acted for the clients in other, similar cases, several of which had resulted in assessments conducted by the same District Judge being the subject of appeal. No doubt similar issues could arise in many other cases. The case was thought to be the first occasion on which a court has had to decide whether a solicitor seeking to rely on CPR 46.9(2)[1] had to show that the client gave informed consent to the payment to the solicitor.

Lavender J, having reviewed the law and authorities stated (so far as relevant to this article):

> *80. I also bear in mind that the Defendant was under a professional obligation to give the Claimant the best possible information about the likely overall cost of her matter... I was unimpressed by [counsel's] submission that that obligation only applied to information about the Defendant's costs and not to information about the extent to which those costs could be recovered from the Insurers. Both of those factors contribute to the likely overall cost to the Claimant of her claim.*
>
> *81. Pursuant to that obligation, the Defendant provided the estimate... This was, in effect, an estimate of the basic charges for the work necessary to take the case to Stage 2 and the service of the Stage 2 Settlement Pack, if the claim remained within the Protocol.*
>
> *82. The estimate was £2,500 plus VAT. There is a striking contrast between that figure and either:*
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> *1) the figure of £500 plus VAT, which is the amount of the fixed costs which would have been recoverable from the Insurers if the claim had settled at Stage 2 for less than £10,000 while remaining within the Protocol; or*

1 CPR r.46.9(2) states: Section 74(3) of the Solicitors Act 1974 applies unless the solicitor and client have entered into a written agreement which expressly permits payment to the solicitor of an amount of costs greater than that which the client could have recovered from another party to the proceedings. [Section 74(3) states: The amount which may be allowed on the assessment of any costs or bill of costs in respect of any item relating to proceedings in the county court shall not, except in so far as rules of court may otherwise provide, exceed the amount which could have been allowed in respect of that item as between party and party…]

2) *the figure of £550 plus VAT, which is the amount of the fixed costs which would have been recoverable from the Insurers if the claim settled at that stage for £2,250 or less after leaving the Protocol.*

83. *If the claim had settled at that stage... the Claimant would have owed the Defendant £2,400 (i.e. £2,500 - £500, plus VAT) plus 25% of the damages. In that event, unless the damages were at least £3,200, the effect of the agreement was that the Claimant would have had to pay all of her damages and more to the Defendant...*

84. *It is necessary to ignore for these purposes the fact that the Defendant subsequently chose not to claim everything which it was entitled to claim by way of costs. The Defendant acted as if it, like HH Law,[2] had agreed to cap the costs which it could recover from the Claimant at 25% of the damages. Many solicitors agree to do this, but the Defendant did not.*

85. *If it had been pointed out to the Claimant that, while the Defendant's estimate of costs was £2,500 plus VAT, she might recover only £500 or £550 plus VAT from the Insurers, then that may have affected the Claimant's consent to the agreement between them insofar as it permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from the Insurers. It may, for instance, have led the Claimant to ask whether her liability could be capped, or to approach a different firm of solicitors, who would cap her liability. Prima facie, therefore, it ought to have been disclosed.*

86. *It does not seem to me that it would have been an unduly onerous burden to require the Defendant to make this disclosure. It would not involve explaining all of the detail and complexity of the provisions of the Civil Procedure Rules and the Protocol which I have set out. Nor would it have required identifying every possible outcome of the Claimant's claim. Rather, it involved taking the outcome which the Defendant had itself assumed for the purposes of its estimate of costs and stating what the recoverable costs might be in that case."*

The Court did not think that the general terms in which the Defendant described what the Claimant might have to pay, were sufficient to alert her to the fact that she might recover only £500 or £550 plus VAT towards her costs liability. Lavender J continued:

90. *Each case has to be decided on its own facts. In this case, it is a very striking feature of the agreement being proposed to the Claimant by the Defendant that the Defendant's estimated basic charges were five times the amount which the Claimant might be entitled to recover from the Insurers if her claim settled for less than £10,000 at Stage 2 in the Protocol and that, in that event, she might have to pay the first £3,200 of her damages to the Defendant. This was so striking that it ought, in my judgment, to have been brought specifically to the Claimant's attention, if she was to give informed consent to the agreement insofar as it permitted payment to the Defendant of an amount of costs greater than that which the Claimant could have recovered from the Insurers, that, while the Defendant's estimate of costs was £2,500 plus VAT, she might recover only £500 or £550 plus VAT from the Insurers..*

91. *I conclude that the Claimant did not give her informed consent to the agreement and the Defendant cannot rely on it for the purposes of CPR 49(2)."*

The terms of the CFA provided for basic charges and a success fee. Whilst the success fee was capped at 25% of the value of the damages, the claimant remained liable for uncapped basic charges, and, on the face of the agreement,

2 Distinguishing *Herbert v HH Law Ltd* [2019] 1 WLR 4253 for this reason and for the fact that no argument about informed consent had been advanced in the Court of Appeal.

any shortfall not recovered from the opponent. The Court held that the Claimant had no way of knowing what her ultimate liability would be. The judgment raises several interesting questions: (i) does s.74(3) properly apply to claims settled within Stage 2 of the Protocol, which are arguably not 'proceedings in the county court'? (ii) Can the Solicitors really have owed a fiduciary duty to the client at a time when they are negotiating their own fees for work to be done in the future, as yet to be the subject of any contract between them, and in respect of someone who is not at that time an actual client? A solicitor's fiduciary obligations normally arise out of the contract of retainer. In some cases a fiduciary duty has been held to arise outside of contract, but it has tended to be in situations where there was a particular relationship of trust and confidence between the material parties. It seems clear that this case did not fall into the first category; and as to the latter, we simply don't know if there was such a particular relationship. The reference to a 'professional obligation to give the Claimant the best possible costs information' appears to be the bridge used to get across the water as it is common place to set out the terms of retainer together with an initial estimate of costs. But if the retainer gave costs information that meant in certain circumstances the costs would exceed the overall recovery for the claimant, is that really a breach of duty? This case appears to emphasise the risk in equity of an own interest conflict for solicitors operating through CFAs notwithstanding the legislative framework that enables such operation. (iii) If there had been an overall cap to the totality of the fees (basic charges and success fees) would that have provided adequate information to the client?

Unsurprisingly the defendant solicitors have sought permission to appeal.

Given that this is the first, long awaited, test case, we can be certain that we have not heard the last of it. In the meantime, solicitors would be well advised to review their retainers and costs information provided to their clients.

HOURLY RATES... WHAT COULD LIE AHEAD?

Shaman Kapoor

We have known since the Civil Procedure Rule Committee minuted it in March 2020 that a sub-committee of the Civil Justice Council, chaired by Mr. Justice Stewart QC, has been established to review the Guideline Hourly Rates and will report directly to committee chair, Lord Justice Coulson. We are told that it aims to report before the end of this year (how realistic that is, we shall see). It is gathering evidence in two ways: (i) an Excel spreadsheet looking to record information on assessments (determined or settled) between 01/04/19 and 31/08/20, and to be submitted by 31/10/20 by practitioners; and (ii) a form dealing with assessments between 01/09/20 and 27/11/20 which practitioners are requested to fill in as soon as possible after each assessment and this latter form can be found here.[1] The committee has plainly directed its surveys to the Association of Costs Lawyers. I have not seen any other advertisement and do not know of any other direct approach made to solicitors, but presumably the ACL's members will have to first take instruction from their clients before releasing any data, even if reassured that it will be confidentially treated.

What has gone before?

Calls for revision have been widespread since the last update was as long ago as 2010 and those figures were a simple uplift by inflation of the 2009 figures. Sadly revision has been left to linger despite other previous attempts and recommendations of a Civil Justice Council Costs Committee in 2014, Chaired by former High Court Judge, Sir David Foskett and Deputy Chaired by former Senior Costs Judge, Peter Hurst, both now members at 39 Essex Chambers.

In 2014, the committee included a consumer representative, a costs barrister, a 'claimant' solicitor, a 'defendant' solicitor, a commercial litigator, a costs lawyer a chartered legal executive, an insurer, a business representative, a trade union

1 https://forms.office.com/Pages/ResponsePage.aspx?id=V0U-chcv7UOecfG-slPlRtOHTIHF0jtIk6mE8FARggxUQ1pLOVlMUzVZRlIMMDNOU0NXUUZVSEgySi4u

representative and a MoJ representative. The committee also had the benefit of help from an advisory panel which consisted of Professors Fenn and Rickman,[2] two University based economists, who did an enormous amount of work. Its remit had been to make recommendations and thereafter to review the GHR annually. The 2014 -committee sought to make evidence-based recommendations and sought to gather the evidence through survey[3] of the Solicitor's profession and CILEX members in addition to surveys carried out by those professions already which were made available to the committee. Its approach was to make an assessment of the 'cost of time' and then to apply a reasonable profit margin – taken together, the 'expense of time' approach. The 'cost of time' was to be measured by reference to salaries, billed hours, overheads, grade of fee earner and location. None of the responses in the survey were mandatory and the identity of respondents were to be kept confidential and known only to the Chair and Deputy Chair. Nevertheless, the response rate was poor. To put it in context, alerts were sent out to tens of thousands of practitioners through extensive advertisement and direct correspondence and yet only 148 responses were received. On the other hand the liability insurers produced a mass of evidence.

The recommendations of the 2014 committee were set out in a 69-page report. Some key points and recommendations are set out below:

- Grade A fee earners should incorporate Fellows of CILEX with 8 years' post-qualification experience
- Costs Lawyers who are suitably qualified and subject to regulation should be eligible for payment at GHR Grades C or B, depending on the complexity of the work
- a new Grade E is introduced for paralegals or non-legally qualified fee earners with less than four years' civil litigation experience, with Grade D retained for trainee solicitors and more experienced paralegals, and Grade C for the most experienced paralegals and other fee earners
- There should be only two rates for London: "Inner London" based on geography and complexity of work; and "Outer London" for all other, but for the first year of implementation the third London rate should be maintained
- There is no need for GHR bands specific to specialist fields
- The GHR are themselves guidelines and a benchmark for summary assessments. As such, they may provide a helpful starting point in the detailed assessment process, but no more than that. The court's discretion and exercise of judgment in the application of the (now) eight pillars of wisdom will be of significance in both forms of assessment, more obviously so in detailed assessments
- The committee proposed new GHRs with a +10% / -10% variable (and -20% in respect of the new band E) as per the table below:

Current GHR bands	**Grade of fee-earner**									
	A		**B**		**C**		**D**		**E**	
	Current GHR	New GHR	Current GHR	New GHR	Current GHR	New GHR	Current GHR	New GHR	Current GHR	New GHR
London 1	409	392	296	281	226	210	138	143	138	124
London 2	317	346	242	254	196	195	126	137	126	118
London 3	248	255	200	187	165	152	121	116	121	102
National 1	217	227	192	175	161	144	118	110	118	97
National 2	201	219	177	167	146	136	111	106	111	93

2 Recruited again to assist the 2020 Sub-Committee.

3 See p.56-59 of the 2014 Report at: https://www.judiciary.uk/wp-content/uploads/2014/07/ghr-final-report.pdf . It was detailed and would have required significant time to complete.

Despite costs being at the forefront of the mind of the profession in 2014 amidst a wholesale review undertaken by Jackson LJ, the then Master of the Rolls did not take up the recommendations. In fairness, if he intended to rely on an evidence-based survey, then, having regard to the response rate, he may not have got past the foreword: "Inevitably, our recommendations can only be as good or as valid as the quality of the evidence at our disposal…". The committee did an incredible job, not only evident from its work and analysis, but also because its members volunteered their time and the economists were prepared to advise pro bono. On the other hand, the professions let themselves down overall despite the efforts of the few who did respond and provide evidence to the committee. But perhaps the committee was too clinical in its approach by sticking to the ideology of a 20% profit margin over and above overhead cost which it had been led to by the economists. Could one size really fit all?

Since 2014, there has been better evidence filed at Court about market hourly rates in parties' Budgets, albeit not capturing those cases that fall below the budgeting threshold. But a committee without a viable budget for its own work is unlikely to be able to gather that evidence or have the resource to analyse it. Mix in the back-and-forth argument between claimants and defendants: those that say rates are artificially low because they are driven down by volume purchase by insurers; and those that say rates are artificially high because success fees are built-in to the hourly rate claimed. This back-and-forth is about as common as the argument about the relevance of GHRs at detailed assessment. But what is to be done about it all?

Given their previous response rate, the professions are not really in a position to call for revised GHRs. Much like the original call for GHRs, the calls for revision have come from the judiciary. Perhaps most notable last year was the High Court judgment of Mrs. Justice O'Farrell in *Ophen*,[4] which noted that the GHRs were based on rates as old as 2010 and were "unsatisfactory" and "not helpful", calling for updated guidelines.

And in recent weeks…

Much more recently, we have had the judgments of Masters along the Costs Corridor who appear to have had enough of the back-and-forth arguments about the relevance of GHRs at detailed assessment. Master Rowley's judgment in *Shulman*[5] refused to confine itself to the geographical banding of the GHR and readily applied City rates to Canary Wharf (E14), citing Peter Hurst's well-known phrase "City rates for City work". Moving to the GHR, Master Rowley said:

> *"The Guideline Rates were originally provided to judges when the Civil Procedure Rules arrived in April 1999 and the concept of summary assessment of costs first came into being. Many judges had little or no experience of costs and the guideline rates were there to provide assistance on summary assessment. They were not intended to replace a more thorough consideration of appropriate hourly rates in detailed assessments. But it is something of an indictment on the evidence usually provided at detailed assessment hearings that the Guideline Rates have often been used for detailed assessments as well without variation. This case is a good example of why Guideline Rates are often relied upon by advocates and the court. Despite the points of dispute challenging the rates wholesale, there is no evidence whatsoever from the second defendant or Skadden as to how the level of the hourly rates charged to the second defendant have been determined. However, one of the many issues that has arisen with the use of the Guideline Rates over time is the fact that there is a single figure for a*

4 *Ophen Operations UK Ltd v Invesco Fund Managers Ltd* [Sept 2019] EWHC 2504 (TCC), which concerned a half-day interlocutory application in the Business and Property Court. The receiving party's costs were £52,000 odd and the paying party's costs were £45,000 odd. Proportionality was not in issue. A Grade C fee earner was allowed at £445 an hour and a Grade B fee earner was allowed at £655 an hour (both rates potentially rising by a further 20% if the Defendant was unable to recover VAT as input tax, i.e. £534 and £786 respectively).

5 *Shulman v (1) Kolomoisky (2) Bogolyubov* [24/06/20], hitting the headlines on 12/10/20, a case in the Commercial Court dealing foremost with jurisdiction in a claim said to be worth between tens of millions and US$500m.

particular level of lawyer in a particular locality. That figure takes no account of the size of the firm, the nature of the work undertaken et cetera in the particular case. It is described as a broad approximation and it is really the roughest of rough guides as to what might be allowed. The potential range of litigation in the City can be seen in this case and it explains why the Guideline Rates are barely even a starting point in a case such as this. In the absence of any evidence, the court is required to consider the so-called seven pillars of Wisdom in CPR 44.4(3) in order to arrive at a conclusion as to whether or not the rates claimed are reasonable. Whilst the value of the claim and the amount of time spent may be capable of arithmetic calculation, most of the factors involved for assessing the "weight" of the case and the solicitors running it, simply lead to an evaluative decision."

Master Rowley allowed hourly rates of £750 (at Grade A); £400 (at Grade C); and £200 (at Grade D).

Master Whalan in *PLK*[6] consolidated the assessments in four cases that were specifically chosen to represent the costs claimed by Deputies in different parts of England in the management of the affairs of protected parties who had sustained significant brain or birth injuries. He considered witness evidence from six witnesses specialising in Court of Protection work which addressed 'overhead time' and further papers which addressed the cost of providing CoP work, but he was not persuaded that the evidence revealed 'a significant increase in hard and soft overheads'. Master Whalan noted the importance in CoP costs being predictably accurate given that a protected party's assets very often derive from an award of damages. He noted RPI inflation had increased by 31% between 2010 and 2018, and that CPI inflation increased by 21% between 2010 and 2019. The evidence before him also demonstrated a broad range of salary increases over that time. He found that *"…in 2020 the GHR cannot be applied reasonably or equitably without some form of monetary uplift…"* and as a result he found that *"… If the hourly rates claimed fall within approximately 120% of the 2010 GHR [across all bands and grades], then they should be regarded as being prima facie reasonable…"* and that determination should be applied *"immediately and is applicable to all outstanding bills, regardless of whether the period is to 2018, 2019, 2020 or subsequently"* .[7]

In a judgment handed down on 01/10/20 in the Competition Appeal Tribunal in the case of *Ryder*,[8] the President, Mr. Justice Roth, dealt with the summary assessment of costs claimed at over £1.4 million (by 20 defendants), described contextually as "an enormous sum for an application of this kind". The President endorsed the CAT's previously expressed approach (in 2016) that a Grade A City of London solicitor for competition litigation should not exceed £600 per hour; £300-400 per hour for a Grade B; not more than £275 for a Grade C; and between £120-£175 for a Grade D was reasonable. The President took the view that the passage of time had not justified an increase and that the instant case neither justified any uplift: *"The complexity of the proceedings is reflected in the number of hours spent and the degree to which more senior solicitors have to be involved, but not in the reasonable rates for each hour's work."* It is fair to state that the CAT has its own set of rules and is not governed by the CPR, but, particularly on the question of the assessment of costs on the standard basis, the CAT (a UK Tribunal) will interpret its own rules by reference to the

6 *PLK & Ors* [30th Sept 2020] from the Court of Protection

7 This judgment has been reflected in a Practice Note issued by the Senior Costs Judge, Master Gordon-Saker, dated October 2020, and clarifies that Bills up to 31/12/17 will continue to be assessed by costs officers based on 2010 GHR and seeks to discourage the potential practice of withdrawing or amending a Bill without permission or consent.

8 *Ryder Ltd & Ors v (1) Man SE (2) Man Truck & Bus AG & Ors* [2020] CAT 21, concerned the costs of and arising from the Claimants' application for disclosure, which costs were to be summarily assessed. The application was listed for 2 days although dealt with in 1 day and was on any view a very significant application in high value proceedings.

principles and guidance of the CPR keeping in mind that Scottish courts have distinct procedural rules too.

What concerns lie ahead?
GHR for summary assessment have the potential to apply to widely diverse litigation as to its context, specialty and complexity let alone the place where the work is done. Can a single set of rates do justice to such diversity? Is there even a need for GHRs now, some 20 years after the judiciary have had experience of summary assessment anyway? Is the short answer simply to disapply the GHR and leave it to each Court to formulate its own Guide? Have the requests for updated GHRs only sounded because the 2010 GHRs are left in place? Why should hourly rates on summary assessment be different to hourly rates at detailed assessment anyway? Do GHRs encourage the practice of price-fixing?

The exercise for a Judge assessing hourly rates is to determine what rates were reasonable by reference to his/her experience of the general level of fees being charged for comparable work taking into account all of the relevant factors. It is strongly arguable that the publication of a generic GHR at all lulls a Judge into a false sense of security by endorsing what some will consider to be rough justice (certainly on summary assessment). The diversity of litigation cries out for specialty focussed GHRs, if at all. If GHRs are to be produced, will they be sufficiently updated and by those that routinely have an appreciation of what is reasonable? Too rigid and too infrequent updates will be unreliable and give rise to the back-and-forth again.

SUCCESS FEES IN INHERITANCE ACT CLAIMS

Simon Edwards

1. In *Re H (Deceased), SH v NH and KH* [2020] EWHC 1134 (Fam), Cohen J, in a claim made under the Inheritance (Provision for Family & Dependants) Act 1975, included provision for a claimant's success fee payable upon success to her solicitors as part of the award under the Act. Since 2013, pursuant to section 58A(6) Courts & Legal Services Act 1990, a costs order made in proceedings may not include provision requiring the payment by one party of all or part of a success fee payable by another party under a conditional fee agreement and, from the start, it has not been possible to have conditional fee agreements in family proceedings. See, now, section 58A(1)(b) Courts & Legal Services Act 1990. At first sight, therefore, the ability of the court to include a success fee payable by a claimant in Inheritance Act proceedings pursuant to a conditional fee agreement as part of the court's award appears contrary to the broad thrust of parliament's intention as expressed in primary legislation.

2. Inheritance Act proceedings are, however, not family proceedings and, therefore, it is perfectly possible for any party thereto to enter into a conditional fee agreement with respect thereto. The success fee element of such a conditional fee agreement cannot be recovered from another party by way of an order for costs, but, as set out above, Cohen J, in *Re H* decided that he could include in the award provision for that success fee. In so doing, he preferred the views of His Honour Judge Gosnell in *Bullock v Denton* [2020] Lexis Citation 199, Leeds County Court, to those expressed by Deputy Master Linwood in *Clarke v Allen and Smith* [2019] EWHC 1193 and 1194 (Ch).

3. The facts of each of those three cases are irrelevant. The court, in an Inheritance Act

claim has first to decide whether or not the provisions of the deceased's will or the intestacy make reasonable financial provision for a qualified applicant and then, if it is determined that such provision has not been made, the court then passes to the question of what provision to make. The latter question involves considering the factors set out in section 3 of the Act and the factor that provides the route by which Cohen J, in *Re H* considered he had the jurisdiction to include provision in the award for the claimant's success fee, is that listed under section 3(1)(a), namely:

> *"The financial resources and financial needs which the applicant has or is likely to have in the foreseeable future."*

4. In the *Clarke* case, Deputy Master Linwood addressed this issue at paragraphs 192 to 196 of his judgment. He rejected the claimant's submission that the success fee could form the basis of part of the claimant's needs for the purposes of the award for the following reasons:

   "1) The calculation of damages is a matter of procedure carried out before costs are concerned. It has never included an element of or for costs;

   2) To permit the interpretation Mr Ng suggests would be contrary to the deliberate policy of the legislature that the losing party should not be responsible for the success fee, that policy having been changed from that prior to 19 January 2013 when such fees could be so claimed from the losing party;

   3) It would amount to an increase in damages by way of costs;

   4) It may put a CFA funded litigant in a better position in terms of negotiations due to the risk of a substantial costs burden. Likewise, absent negotiations it could lead to grossly disproportionate costs if a contested claim got to a trial and the defending party lost;

   5) There is no reason why a claimant seeking reasonable financial provision under the Act should be in a better position than one seeking, for example, damages for personal injury."

5. In the *Bullock v Denton* case, His Honour Judge Gosnell came to the opposite conclusion, although the decision of Deputy Master Linwood was not cited to him. At paragraph 77 of his judgment, the judge listed as one of the applicant's financial needs the substantial sums that she would have to pay her previous and existing lawyers by way of additional liabilities and then, at paragraphs 90 to 96 of his judgment, considered whether to make an award that included provision for such liabilities and, if so, how much. At paragraph 94, the judge stated this:

   "In my view, I am entitled to take them (the additional liabilities) into account, both because they fall within the claimant's financial needs under section 3(1)(a) and because they are debts incurred since the death and the court is enjoined to make this the assessment under the Act at the date of trial, not at the date of death (section 3(5)). I am sympathetic to the defendant's argument that these are not costs that could in law be awarded against the defendant, but I think I have to look at the reality of the situation or as Briggs J put it "in the real world". If I make no award under this head of the claim, the claimant will have a substantial debt that she could only pay out of the other lump sum awards I have made. There may be very little left in the light of the fact that I have only awarded a life interest in her accommodation. When assessing what would amount to reasonable financial provision for her maintenance, I felt she was entitled to have her accommodation needs met and for her to be placed in a situation where she could manage afterwards an independent yet modest lifestyle. If no award at all is made, this overall aim is placed in jeopardy."

6. Turning, lastly, to *Re H* and the decision of Cohen J, he accepted the proposition that the

liability for the success fee in that case could be considered a part of the Claimant's needs (see paragraph 55 of his judgment).

7. He continued at paragraph 58 in this vein:

"I intend to adopt the same approach as HHJ Gosnell. I think that it would not be fair on C for me to ignore completely her liability to her solicitors. But, I recognise that there is a risk of injustice to the estate, in particular if an appropriate Part 36 offer had been made, of which I am necessarily unaware at this stage of the proceedings. In addition, I flag up that I do not know the precise terms of the agreement and what is the definition of 'success'. If my award does not bring about the operation of the uplift, I will revisit this element of the award."

8. In the result, Cohen J adopted the same attitude towards the additional liability as HHJ Gosnell and allowed a part of the success fee in the award.

9. Both Cohen J and HHJ Gosnell had in mind the very different way in which costs are dealt with in financial remedy proceedings in family proceedings. There, rule 28.3 of the Family Procedure Rules provides that the general rule in financial remedy proceedings is that the court will not make an order requiring one party to pay the costs of another party. That is subject to the court being able so to do if it considers it appropriate because of the conduct of the party in relation to the proceedings. Both judges referred to comments of Briggs J (as he then was) in *Lilleyman v Lilleyman* [2012] 1 WLR 2801 in relation to the way in which an award under the Inheritance Act could be undermined by the effect of undisclosed negotiation offers. Briggs J, at paragraph 26, said this:

"I must in concluding express a real sense of unease at the remarkable disparity between the costs regimes enforced, on the one hand for Inheritance Act cases (whether in the Chancery or Family Divisions) and on the other hand, in financial relief proceedings arising from divorce. In the latter, my understanding is that the emphasis is all on the making of open offers, and that there is limited scope for costs shifting, so that the court is enabled to make financial provision which properly takes into account the parties' costs liabilities."

10. Inheritance Act proceedings are, of course, wholly governed by the CPR. In those circumstances, the parties may not refer to Part 36 offers and offers made without prejudice save as to costs continue to have full force. That is in sharp contrast to financial remedy proceedings in the Family Courts. There the making of offers without prejudice save as to costs is, in effect, prohibited. Offers to be taken into account at all must be made openly. A party's costs are taken into account in the assessment of the assets of the parties to be divided amongst them. A crucial difference, however, is that, as mentioned above, conditional fee agreements (and damages based agreements) are not allowed in family proceedings. There is, therefore, no question of the recovery, as part of the award or otherwise, of any success fees.

11. Comparison with what happens in the Family Courts, therefore, is not comparing like with like. That is not only in relation to the costs rules, but also in financial remedy proceedings in the Family Courts, the assets of both parties are up for division. In a claim made under the Inheritance Act, the only assets that are available for distribution are those contained in the estate.

12. Whilst it is true to say that the Inheritance Act requires the court to take into account an applicant's financial needs and resources, that exercise is not the same exercise as in the Family Courts in financial remedy proceedings because those resources are not part of the "*cake*" to be cut up.

13. The question should be asked whether or not, when parliament enacted in 2013 the ban

on the recovery of success fees by way of an order for costs, it truly contemplated the recovery of any part of a success fee in any other way. It may well be that, technically, the decision in *Re H* is correct, but it does, on its face, go against the grain of what the Jackson reforms were seeking to achieve.

14. It is right to say that there is a striking contrast to the way in which Inheritance Act claims and financial remedy claims in the Family Courts are dealt with, not only in relation to costs. They do share some similarities and, perhaps, the way forward would be for Inheritance Act claims to become "*family proceedings*" and, therefore, this issue would not arise again and costs issues would be dealt with in the same way as in the Family Courts.

15. That said, not everything is rosy on the costs front in financial remedy claims in family proceedings. The courts frequently make adverse comments about the amount of costs that are run up and the way that hampers a fair distribution of resources. A good example of this is the judgment of Mostyn J in *J v J* [2014] EWHC 3654 (Fam) where the judge called for proper control of costs in such cases. One irony here is that Mostyn J was in the van of the move to no costs shifting in these proceedings.

16. It is, however, worth bearing in mind that this is not the only instance where the courts have found a way to include in an award additional liabilities such as, in one case, third party funding. That occurred in *Essar Oilfield Services Limited v Norscott Rig Management PVT Limited* [2016] EWHC 2361 (Comm). In that case, HHJ Wacksman QC (sitting as a Judge of the High Court) held that third party funding costs were, in principle, recoverable in an arbitration award under section 39(1)(c) of the Arbitration Act 1996 as "*other costs*" of the parties.

WINNERS, LOSERS AND A WITHDRAWN PART 36

Judith Ayling

In *Blackpool Borough Council v Volkerfitzpatrick and others* [2020] EWHC 2128 (TCC) the Court looked at a particularly difficult question – what consequences to apply when a party fails to accept a Part 36 offer which is later withdrawn, and fails to beat that offer. The judgment is also interesting because the Part 36 offer had not been in respect of the whole of the claim, and because the claimant failed on substantial parts of its claim. The main judgment is at [2020] EWHC 1523 (TCC) but the salient facts are helpfully summarised at the start of the costs judgment. Briefly, the claimant council claimed that significant parts of the new tram depot completed in 2011 did not meet their intended design life of 50 years and were not suitable for seaside life. It sought as damages the cost of remedial work, at over £6m. The defendant brought additional proceedings against 3 other parties, but only the claim against the fifth party remained outstanding at trial, plus the fifth party's contribution claim.

At trial the claimant recovered damages of £1.1m. It failed on the biggest item, and recovered only c10% of the next two biggest items. The defendant had made a Part 36 offer of £750,000 but not in respect of all of the claim. That offer was made on 15th August 2019, and it was withdrawn on 21st November 2019. The claimant failed to beat that withdrawn offer in respect of the items included in it, and recovered only £631,510, but if it had accepted the offer, it would have had to pursue the excluded claims to trial and it would have succeeded on them.

The Judge held that the council was the successful party although it had recovered only 16% of its claim and lost completely on the largest head of loss, and warned against applying *'the considerable benefit of hindsight from having reached a firm decision at the end of the litigation.'* It had succeeded on 6 of 7 heads of claim, and

30% of the claim as advanced on an alternative basis. The real question was whether the court should depart from the starting point that it should therefore recover its costs. The lack of success on the biggest item and substantial failures in money terms on 2 other significant items **did** justify a departure, where they had taken up significant court time and costs.

Where a Part 36 offer has been withdrawn, the automatic costs consequences under CPR 36.17(1)(a) and (3) do not apply, but it can be taken into account as a relevant circumstance under CPR 44.2(4)(c). Following Jackson LJ in *Thakkar v Patel* [2017] EWCA Civ 117 the crucial question is whether the offeree acted reasonably or unreasonably in failing to accept the offer when it was on the table, but that is not the only question and each case turns on its particular facts. That formulation of the test begs the further question, however, how to judge whether the offeree acted reasonably or unreasonably: is the question just whether the offer was beaten or should the court look also at the offeree's reasonable perception of its interests. The Judge held that (a) the court must put itself into the position of the claimant at the time and not simply decide the case by reference to hindsight; but (b) the focus must be on the reasonableness of the refusal by reference to the facts and matters relevant to the merits of the claim as they ought reasonably to have appeared to the claimant at that time, not by reference to wider commercial factors. Looking at the case on that basis, the claimant knew or was in a position to know after test results that its claim had been significantly weakened on the three big ticket items, and it had acted unreasonably in rejecting the offer. The fact the offer had been withdrawn was irrelevant because the claimant would not have taken it.

The Judge concluded that the defendant should pay 80% of the claimant's costs of the claim up to and including 5 September 2019 and that the claimant should pay 80% of the defendant's costs of the action thereafter, including the costs of additional claims.

The judgment is a model of clarity. It also reviews the recent case law on the award of indemnity costs, as well as the law on when a party is to be judged the winner, and when a departure from the 'loser pays' starting point is appropriate.

VARYING A COST BUDGET: TIME FOR PRECEDENT T

Samantha Jones

On 1 October 2020, a number of new cost budgeting rules and a new version of Practice Direction 3E came into force. One of the most significant rules to come into force was CPR rule 3.15A, with the introduction of a codified procedure for revising a costs budget upwards or downwards. The aim was to rationalise the current structure of the rules on variation of costs budgets so that there is no need to refer to the lengthy Guidance Note any longer. PD3E sets out the detail in respect of this process, re-iterates a number of the paragraphs of the previous PD3E and also gives the court the power to grant relief if a party is "behaving oppressively" in seeking to cause another party to spend money disproportionately on costs.

As a reminder, parties must revise their costs budgets, upwards or downwards, if "significant developments in the litigation warrant such revisions". A significant development is not defined but the following definition from the editorial comment in the White Book 2020 (paragraph 3.15.4), which was seemingly informed by *Sharp v Blank* [2017] EWHC 3390 (Ch) was approved by Worster J in *Seekings v Moores* [2019] EWHC 1476 (Comm):

> "any circumstance or step which is of such a size and nature as to go beyond the events, circumstances and steps which were taken into account, expressly or impliedly in the budget previously approved or agreed. A development is taken into account impliedly if it is something that was, or should reasonably have been anticipated by the applicant for revision."

Previously, by virtue of paragraph 7.6 of PD3E, parties were required to submit amended budgets to each other for agreement. In default of agreement, parties had to submit the amended budgets to the court with a note of the changes made and reasons for the changes and the objections of any party.

Now, CPR rule 3.15A sets out a similar process albeit it with some tweaks and further elaboration and requires parties to use Precedent T.

In the new rule, the revising party is required to submit the revised budget to the other party "promptly". Contrary to the previous rule, even if the parties reach agreement, the revising party must still subsequently submit the revised budget to the court "promptly" for approval.

In so doing, the revising party must:

- serve particulars of the variation proposed on every other party, using Precedent T;
- confine the particulars to the additional costs occasioned by the significant development; and
- certify in Precedent T that the additional costs are not included in any previous budgeted costs or variation.

The rule sets out that the revising party must submit the particulars of variation with the last approved or agreed budget and an explanation of the points of difference if they have not been agreed. As Precedent T provides a section for parties to set out the particulars of the variation and the explanation of the points of difference (and the opposing party's objections, if there are any), it appears that all that is required is to complete and submit Precedent T together with the last budget.

As before, the court has the power to approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the budget was agreed. The new changes additionally direct the court to consider listing a further costs management hearing if appropriate (although in itself, arguably not a new power).

Rule 3.15A(6) also make clear that the court's power to make an order in respect of a variation applies as much to costs already incurred by the time of consideration of the application, as it does to future costs beyond the time of consideration by the court. This makes good sense and is a useful clarification from the outset.

Oppressive behaviour

Paragraph 13 of PD3E sets out the following:

> "Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate."

There is as of yet no guidance on what is meant by "oppressive behaviour" and whether the phrase "seeking to cause" means that a court will have to find that a party is deliberately causing another to spend money or merely a lesser threshold of "seeking". There could be sources of guidance from Rule 44.11 as it pertains to misconduct; or from the scope of Rule 3.9 as it applies to discouraging opportunism by the non-defaulting party; or even from the wasted costs arena. A new wave of satellite litigation is no doubt in the offing.

Other Developments

Parties would do well to review the costs rules in CPR rule 3.13 and 3.15 and 3.17 as a number of other amendments of a more minor nature have taken place. The majority of the new rules have simply been moved from the paragraphs of the former version of PD3E but one key amendment appears in CPR rule 3.17(3). The rule states that:

"Subject to rule 3.15A, the court—

a) may not approve costs incurred before the date of any costs management hearing; but

b) may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of all budgeted costs.

This paragraph used to exist in paragraph 7.4 of PD3E but it formerly stated that the court may not approve costs incurred "up to **and including** the date of the costs management hearing". The deletion of the underlined wording could cause the re-emergence of arguments about the CCMC costs itself, although in reality, the costs of the CCMC will have been incurred by the time of the hearing, save for representatives attending on an hourly rate basis. Nevertheless, it seems like a very odd amendment to what had been clear and welcome wording.

COMPETITION AND MARKETS AUTHORITY V FLYNN PHARMA LTD AND OTHERS [2020] EWCA CIV 617

Michael Standing

On 12 May 2020, Lord Justice Lewison handed down the Court of Appeal's decision on costs in the case of *Competition and Markets Authority v Flynn Pharma Ltd and Others* [2020] EWCA Civ 617. The judgment provides helpful clarification as to the correct approach to the imposition of costs awards against regulators when acting in their regulatory capacity.

Background

The Competition and Markets Authority ("the CMA"), by way of its decision of 7 December 2016, found that the Respondents had abused their position in the UK market for phenytoin sodium capsules by charging inflated prices. They were subject to a total fine of £89.7 million.

The Respondents appealed to The Competition Appeal Tribunal ("CAT"), who found that the CMA had made substantive errors in their conclusions, and therefore set aside the fines and remitted the matter to the CMA for redetermination. The CMA subsequently appealed (largely unsuccessful) the matter to the Court of Appeal (see [2020] EWCA Civ 339).

Following the appeal to the CAT, the question of costs was determined. In its ruling of 29 March 2019, the CAT held that the starting point for appeals of this nature was that the unsuccessful party should pay the successful party's costs, ("costs follow the event"), and ordered that the CMA pay a proportion of the Respondents' costs, the CMA being broadly the losing party.

The CMA appealed this decision to the Court of Appeal.

The Arguments

The CMA submitted that the CAT had erred in its application of the appropriate principles. It was submitted that the overarching, guiding "Principle" was that no order for costs should be made against a public body performing its functions in the public interest unless there was good reason. It was accepted that this Principle could be displaced where the rules of court or tribunal lay down a different starting point (such as for example CPR 44.2(2)(2)(a)), or where there was some other *"good reason",* but where, like in the CAT rules, there was nothing to do so, the Principle was the default or starting point. It was submitted that an outcome adverse to a regulator was not a "good reason". A good reason would include unreasonable conduct on behalf of the regulator or if financial hardship was likely to be suffered by the successful party if no order was made.

The Respondents submitted that it was open to the CAT to take "costs follow the event" as the starting point. They suggested that the CAT was right to hold that case fell outside the scope of the Court of Appeal's decision in *British Telecommunications plc v Office of Communications* ("BT v Ofcom") [2018] EWCA Civ 2542, (where the starting point was no order for costs against the regulator). It was argued that competition infringement cases did not fall within a sufficiently similar regulatory regime so as to be bound by that authority.

Analysis

Lewison LJ provided a helpful and extensive analysis of the leading authorities in this area. From these, at [79], he distilled six principles:

i) Where a power to make an order about costs does not include an express general rule or default position, an important factor in the exercise of discretion is the fact that one of the parties is a regulator exercising functions in the public interest.

ii) That leads to the conclusion that in such cases the starting point or default position is that no order for costs should be made against a regulator who has brought or defended proceedings in the CAT acting purely in its regulatory capacity.

iii) The default position may be departed from for good reason.

iv) The mere fact that the regulator has been unsuccessful is not, without more, a good reason. I do not consider that it is necessary to find "exceptional circumstances" as opposed to a good reason.

v) A good reason will include unreasonable conduct on the part of the regulator, or substantial financial hardship likely to be suffered by the successful party if a costs order is not made.

vi) There may be additional factors, specific to a particular case, which might also permit a departure from the starting point.

Lewison LJ rejected the CAT's analysis of *BT v Ofcom,* finding they had looked at that case *"through the wrong end of the telescope*". The CAT had found that the principles contained in *BT v Ofcom,* had not been expressly stated to apply to competition infringement cases and on that basis found that the matter fell outside the scope of that case. However, Lewison LJ held that had the Court of Appeal intend CMA cases not to be bound by this principle, they would have expressly *excluded* them. As they had not done so, *BT v Ofcom* applied.

Comment

This judgment will no doubt bring comfort to regulators, and concern to the regulated. Like the CAT, many regulatory codes do not include a "general rule" as to the determination of costs. The starting point will therefore be that a costs award will not be made against an unsuccessful regulator.

The Court of Appeal however, was clearly minded of the potential impact that this might have upon those who are detrimentally affected by the regulator's actions. Only a "good reason", rather than "exceptional circumstances" are required to depart from the default position. What constitutes a good reason, however is not precisely defined, and will undoubtedly by the subject of significant argument. Little guidance is given as to what "additional factors" will be relevant when considering whether a departure is appropriate, and it appears that this has been left deliberately wide.

It is further noteworthy that *"substantial financial hardship likely to be suffered by the successful party"* was specifically identified as a factor that would amount to a good reason. This is not a factor which plays any part in the principle of the payment of costs, or the quantum of any such costs, under the CPR. Successful parties seeking to recover their costs from regulators will be well advised to prepare cogent evidence of the impact that no award as to costs will have upon them. It can well be envisaged that another significant battleground in this area will be whether the hardship can be properly be labelled "*substantial*", especially given the demographic of the regulated.

Whilst both the Appellant and Respondents in this appeal warned of the *"chilling effect"* of the opposing default starting points, the Court recognised that the public interest in encouraging regulators to make and stand by reasonable and sound decisions without fear of exposure to undue financial prejudice, was an objective that had been, and should continue to be given, significant weight.

In a very short concurring judgment, Lord Justice Arnold recognised (at [110]) that the court's decision had been made in the *"classic common law method of making a series of decisions, initially on a case-by-case basis, which have come to be recognised as establishing a general principle."* Noting that the court had not been able to take into account any wider consideration of policy, he suggested that there might be merit in this issue being considered by the Law Commission. Whilst, as yet, it is unknown whether this offer will be taken up, we may yet see further reform to this area should the Law Commission decide to do so.

PROTECTIVE COSTS ORDERS IN PRIVATE LITIGATION: AN UNOBTAINABLE GOAL?

Daniel Laking

Specialists in civil liability will likely be familiar with the substantive judgment in *Swift v Carpenter*[1] which was handed down by the Court of Appeal on Friday 9 October 2020. The substantive case concerned the appropriate method of valuing accommodation claims for seriously injured claimants. However, even the most attentive litigator may have missed the previous judgment of the Court in respect of the Claimant's application for a protective costs order ("PCO").[2] The judgment from the Court of Appeal on that issue provides useful clarity as to when, if ever, PCOs will be available in private civil litigation.

Facts

Mrs Swift was a front seat passenger who sustained life changing injuries in a road traffic accident. Those injuries ultimately resulted in her undergoing a left below-knee amputation. At trial, she was awarded damages of £4,098,051 by Mrs Justice Lambert DBE. However, she was awarded nil in respect of her claim for appropriate accommodation on the basis the Judge considered herself bound by the formula set out by in *Roberts v Johnstone*[3] which produced a nil award. The Claimant was granted permission to appeal by Lambert J who reasoned:

> *"I granted permission as there exists an, in my view, important point of principle which the CA needs to resolve; that is, whether the Roberts v Johnstone formula remains consistent with the principle of full restitution… Although therefore whilst historically Roberts v Johnstone has been regarded as a practical, if imperfect, solution to the difficult problem of reasonable (but not over) compensation when a claimant is intended to purchase an appreciating asset, there is a real issue now as to whether the formula remains fair and fit for purpose in the current economic climate of high housing prices, low interest rates and the use of PPOs for the delivery of damages for care."*[4]

The point on appeal was an important one: whether the authoritative formula laid down in *Roberts* for the calculation of accommodation claims in 1989 remained fit for purpose in the present day. The appeal had the potential to impact every current and future claim brought by injured claimants for alternative accommodation. The Claimant applied for a PCO to protect her from an adverse costs order in the event that she was unsuccessful. That application was opposed by the Respondent.

Judgment

The Court (Etherton MR, Irwin LJ and Davies LJ) refused the Claimant's application. They began by noting that the Court had a wide jurisdiction under s 51 of the Senior Courts Act 1981 and CPR Part 44 and thus had the power to make a PCO in the instant case. However, they considered that *"as a matter of judicial policy and practice"* a PCO should not be made.

1 [2020] EWCA Civ 1295

2 *Swift v Carpenter* [2020] Costs LR 415, [2020] EWCA Civ 165

3 [1989] QB 878

4 *Swift v Carpenter* at §20

The Court went on to consider the conditions laid down in previous case law for the making of a PCO. These were initially stated in *R (Corner House Research) v The Secretary of State for Trade and Industry*[5] as follows:

> *"A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing."*

The condition that has generated the most consideration in private law cases is, unsurprisingly, condition (iii): the requirement that the applicant must have no private interest in the outcome. That would, on its face, appear to exclude any private law action, regardless of a broader public benefit to the appeal. The Court went on to summarise subsequent cases in which condition (iii) was considered[6] and concluded that PCOs should not be made in private litigation. The Court held (at §44):

> *"The present proceedings are standard private litigation for damages for personal injury caused by the defendant's negligence. Inevitably, in the context of such litigation, and contrary to the second Corner House condition, the appellant has an overwhelming private interest in the outcome of the appeal, notwithstanding that the outcome may be of wider interest to future litigants in a similar position, insurers and the legal profession. Such wider interest is true of many, if not most, of the appeals in the Court of Appeal in private litigation."*

The Court went on to hold that, even if a more flexible approach to PCOs in private litigation was available, it would not have been appropriate to grant one in Mrs Swift's case. First, because much of the delay and cost increase was due to the Claimant's own tactical decision to seek an adjournment to adduce further evidence. Second, because there was a delay of some four months in the making of the application for the PCO.

Comment

In *Swift*, the Court of Appeal reaffirmed the position in respect of the private interest condition set out in *Corner House*. The fact that an appeal raises issues of wider public importance is not enough to satisfy the conditions set out. Indeed, a strict reading of the case law would suggest that a PCO is never available in private litigation. On the basis of the law as it currently stands, practitioners would be well advised that, unless your case is brought on pure public law principles and without any private interest in the outcome, a PCO will not be available.

Having said that, the Court of Appeal in *Swift* left open the (remote) possibility of a PCO in a future private law case. The Court noted, at paragraph 50:

> *"The binding nature of Corner House and Eweida as precedents must be qualified to the following extent. As we have emphasised, those decisions are about how the wide discretion of the court as to costs should be exercised. They are not decision (sic) on law but on policy and practice. Like any other policy or practice, they may be subject to adjustment in the light of circumstances that did not exist or were not anticipated at the time they were set."*

Thus a PCO may be available in cases where it can be demonstrated that circumstances have developed since *Eweida*. A change in the Civil Procedure Rules to amend or clarify the costs jurisdiction on appeal might be such a development. However, changes in 'policy or

1 [2005] 3 Costs LR 455; [2005] EWCA Civ 192; [2005] 1 WLR 2600 at §74

2 For a helpful summary of the key case law, see paragraphs 31 to 43 of the Court's judgment.

practice' are few and far between, and it may be that, on the current law, amendments to the PCO jurisdiction are best left to the Rules Committee rather than litigators. It remains to be seen whether the current law is sustainable; the purpose of a PCO is to prevent litigants being discouraged from pursuing their cases due to prohibitive costs risk. As the distinction between private law and judicial review becomes increasingly blurred, the *Eweida* conditions risk becoming progressively outdated.

ALL-IN OR ALL-OUT?

Shaman Kapoor

This case provides an example of a solicitor-client fall-out on an epic scale.

GLOBAL ENERGY HORIZONS CORPORATION v THE WINROS PARTNERSHIP (formerly ROSENBLATT SOLICITORS), SCCO Ref: JJ1602737, Master James, 20/08/20

Back in December 2016, I recall a year in which the candle appeared to have been burning at both ends and looking forward to a rare skiing holiday with friends after Christmas. And then, on about 27th December, my then senior clerk phoned to see if I would be interested in being a part of the counsel team on what was on its face an exciting and long-running commercial dispute requiring immediate hands-on. As many (I am sure) in my position would have done, I bowed out of the holiday and looked forward to reading-in to 180 lever-arch files. I was recruited by the Defendant, Mr. Gray, amidst a change in his legal team, and in due course the counsel team took on more leaders and evolved itself. My contribution was, in the grand scheme of things, very small. Nevertheless, the case was fascinating and I witnessed supreme skill from solicitors and leaders at the common law and commercial Bar. Upon my arrival, it appeared that the Claimant had also had a change in legal team from Rosenblatt Solicitors ("RS") to Bird & Bird LLP. The dispute between the parties was bitter. Allegations and cross-allegations were made at every level. It took its toll on the Defendant. It had been running for years. The significant judgments were given first by Vos J (as he then was) in 2012, later from Sales J (as he then was) in 2014 and later still Asplin J (as she then was) in 2015. And here it is again, in

2020, this time unravelling some detail about the massive dispute between solicitor and client on the Claimant side.

The basic facts

GEHC is a Canadian based venture capital corporation which had invested in new technology in the oil and gas sector. Specifically, it had invested in exploring the use of ultra-sound technology to regenerate old (and considered spent) oil and gas wells. The technology applied ultrasound stimulation to the wellbore area in order to diminish wellbore damage and restore or enhance production in low-performing or late-life wells. The tools delivering the technology were inserted into the wellbore area and applied a wide range of frequencies and power in continuous or pulse modes, designed to stimulate oil and gas production. The financial upside to the technology being proved successful would obviously have been immense. Mr. Gray, a former partner of GEHC, parted company from GEHC after many years together exploring the potential of the technology. After his departure, GEHC asserted that Mr. Gray had diverted an opportunity for it to acquire interests in the technology, and further claimed that Mr. Gray had, in breach of fiduciary duty, wrongfully applied the technology with success, generating a profit in Russia and later in the USA, for which he was accountable to GEHC. Mr. Gray denied those claims and asserted that the technology had been a commercial failure.

Liability and quantum were tried separately.

As for quantum, the claim was said to be worth at least hundreds of millions of dollars by GEHC, but by the time the case came to face valuation, expert valuation obtained by RS put the value at about US$15 million. Further, as GEHC considered the litigation had changed in focus towards Patents Law, GEHC brought in a new firm in Bird & Bird LLP in the hope that the two firms would work in tandem but that disbursements would remain the responsibility of RS. RS considered that the situation was untenable and thought that GEHC had engineered a situation that would cause RS to walk away and thus potentially forfeiting their success fee under the CFAs. GEHC contended that there was no such engineering. They maintained that RS held the favour of successive CFAs each of which carried substantial payments the consideration for which was the funding of disbursements and acting on a no win no fee basis (save for one CFA).

In the event, Mr. Gray lost the liability trial and was ordered to pay £2.6m in costs to GEHC (although Mr. Gray succeeded in avoiding a success fee for a period of time due to RS's failure to serve a Notice of Funding). GEHC and RS were agreed that all of that money ought to have been paid to GEHC. In fact, RS laid claim to around £1.5m to which GEHC agreed, and despite that agreement, RS retained the entire sum refusing to pay any amount to GEHC. GEHC claimed that the fall-out came about because GEHC demanded the return of funds received from Mr. Gray.

As far as quantum was concerned, and not known to the parties when the costs proceedings were issued, the Valuation hearing was held in May 2019 before Arnold J and the Court found that the interests held by Mr. Gray were valueless and was scathing in its dismissal of GEHC's case and its expert evidence. It should also be noted that Master James appears to have been informed that GEHC were still pursuing Mr. Gray, although the basis of that pursuit was not articulated.

Clearly, the relationship between GEHC and Rosenblatt Solicitors never recovered. Indeed, before Master James, GEHC's made allegations that RS, through its evidence, had lied to the Court and RS made cross-allegations that GEHC's witnesses were dishonest making untrue and unfounded allegations. Nonetheless, GEHC appears to have expressed its gratitude to RS for a sterling job on a number of occasions. The Judgment of Master James handed down on 20/08/20 (79 pages) raises points of general interest in costs and commercial litigation generally.

The Issues

The matter was funded under several CFAs with so-called 'Advance Fees' to be payable in any event. GEHC additionally raised funds from investors for certain disbursements. If the quantum valuation was only to have been about US$15m, after lawyers being paid there would have been little, if anything, from which the investors could recoup their financial support and nothing by way of compensation for GEHC. When the relationship between GEHC and RS ended, GEHC issued proceedings for a solicitor-client assessment of invoices rendered by RS. Those proceedings were issued on 31/03/16, and preliminary issues were directed to be determined. The judgment of Master James was the determination of those preliminary issues, and that after ten days of hearing (December 2018, March and May 2019), live evidence and written submissions (August and September 2019), together with live transcription throughout. The core preliminary issues enquired as to (i) the validity of the CFAs; (ii) RS's entitlement to terminate the retainer; and (iii) whether an invoice dated 21/12/12 fell within the scope of the assessment.

If GEHC won on either of the first two issues, any fees unpaid to RS would not require payment and any fees already paid to RS would have to be reimbursed. GEHC asserted that it had already paid approximately £7.6m to RS, several £m in disbursements, an alleged outstanding liability of £800,000, and a potential success fee of £3.4m, thus a total exposure of up to £12m.

It is noteworthy that if GEHC were relieved of its liability to RS, then there would be a reduction in the liability paid by, and inevitable repayment to, Mr. Gray given the indemnity principle. This matter, although recognised, was not the subject of determination before Master James.

The Court found that there were numerous instances where, on RS's best case, binding decisions relating to large sums of money being volunteered to RS by GEHC, and said to have been made in the course of a single conversation, were never reduced to writing nor even kept by way of contemporaneous records on RS's own file. And although there was not a finding of dishonesty as such, the Court found that ABC's evidence (a witness for RS) was simply not consistent with reality.

Dealing with the issues in reverse order, the Court found that the December 2012 invoice was not an interim statute bill. It noted a tension between clauses in the CFA itself as to when fees would become payable. On the one hand, success was defined as *"you achieve a settlement or any other benefit arising out of the Claim, or if you do not achieve a settlement and you go on to issue proceedings, the Court orders in your favour an order your opponent to pay you costs."*; yet on the other, and presumably as part of the risk assessment, the success fees were set, inter alia, on the basis of *"the fact that if you win we will not be paid our basis charges until the end of the claim."* The Court referred back to the scope of the CFA for the definition of 'claim' in this context where it was stated: *"The claim is brought y against Robert Gray and others…Any proceedings you take to enforce a Judgment, Order or agreement. Negotiations about and/or a court assessment of the costs of this claim."* The Court noted that the scope included the work involved in the assessment of costs, albeit that it excluded its scope from any appeal. The Court was further encouraged to its conclusion by RS's inability to demonstrate 'delivery' of the bill, having maintained a vivid recollection of it being sent by post with voluminous timesheets and asserting that it had never been sent by email, to being forced to change its evidence in the face of GEHC's received email which was unravelled during the course of the hearing. Upon review of that email, the Court found it to have been sent without covering letter, without any accompanying timesheet, and therefore falling foul of the solicitor's obligation to inform the client about the purpose of sending the bill, the consequences of the client's action to pay upon its right to later challenge the Bill and the expectation of payment. A copy of a covering letter on RS's file would have been compelling evidence

of service by post, but there was none. As a result, the Bill, amounting to about £3.4m itself, would fall within the scope of the detailed assessment.

The Court found that the failure to serve a Notice of Funding in respect of a part of the success fee fell at RS's door. There was no documented record of GEHC having given instructions on an informed consent basis or indeed any other, and as a result, GEHC would be not be responsible for that success fee on a solicitor-client basis either, given the express terms of the retainer. Similarly, the Court found that GEHC would not be responsible for the shortfall in recovery of success fee after the between-the-parties assessment.

The Court found that RS had not stuck to the terms of the first CFA, and rather than limiting its fees to the 'Advance Fee' when a "win" had not been achieved, it sought to recoup its lost fees by entering into the second CFA, making that CFA retrospective and to cover the fees that it had already lost. The 100% success fee did not make sense in that light and the Court found that *"RS had overreached themselves, and certainly left GEHC's best interests in their rear-view mirror…RS favoured its own interests over its client's."*.

Moving to the validity of the CFAs, the Court found that the CFAs were poorly drafted insofar as they said two conflicting things. They stated that the 'Advance Fee' would be credited against future billing, but they also stated that the 'Advance Fee' would belong to RS, "win or lose". Despite being recognised as an old-style technical point going right back to the early days of satellite litigation under CFAs, the Court found that the "win or lose" provision rendered the CFAs fatal. GEHC's argument that the sum total of the agreement, taking into account the 'Advance Fees', base costs and success fees meant that RS would in fact be entitled to a sum greater than twice the base costs (i.e. equivalent to a success fee of more than 100%) and thus contrary to the Regulations, struck a chord with the Court.

The Court also found that RS had wrongly advised GEHC that the second CFA had come to an end resulting in a "win" thus requiring a new retainer; and wrongly did the same thing again in respect of the third CFA.

On the final core issue of termination of the retainer, the Court found that the true reason for termination was not Bird & Bird's involvement but in fact because of the fall-out between RS and GEHC over the entitlement to the monies which had been received from Mr. Gray, and which RS belatedly accepted they were not entitled to retain.

This is unlikely to be the end of the dispute and an appeal is highly likely if only because of the sums at stake and the deep rooted animosity that festered between solicitor and client, despite the solicitor having done a "sterling job". And that, seemingly over the course of several intense years of high-pressure litigation, only to be undone by the failure to properly draft the retainer or even take advice along the way. Beware.

CONTRIBUTORS

Simon Edwards
simon.edwards@39essex.com

Simon Edwards 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.

Judith Ayling
judith.ayling@39essex.com

Judith Ayling 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.

Shaman Kapoor
shaman.kapoor@39essex.com

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.

Samantha Jones
samantha.jones@39essex.com

Samantha has a broad civil litigation practice and public law practice. She is a member of Chambers' specialist costs team. She frequently advises clients on discreet costs issues in wider litigation, particularly part 36 offers, and she frequently represents Claimants and Defendants at cost budgeting hearings and summary assessments. She is ranked in the Legal 500 as leading junior for Inquests and Inquiries: *"She is bright, sensible and all her work is characterised by a detailed grasp of the evidence."* To view full CV click here.

CONTRIBUTORS

Michael Standing
michael.standing@39essex.com

Michael practises across the full range of chambers' civil liability work with a particular interest in cases where fraud is alleged or suspected. Michael has a specialist costs practice, and is increasingly instructed in discrete costs disputes. He has extensive knowledge of all elements of Qualified One-Way Cost Shifting (QOCS) and fundamental dishonesty. To view full CV click here.

Daniel Laking
daniel.laking@39essex.com

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.

Peter Hurst
peter.hurst@39essex.com

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.

To view full CV click here.

Chief Executive and Director of Clerking: Lindsay Scott
Senior Clerks: Alastair Davidson and Michael Kaplan
Senior Practice Managers: Sheraton Doyle and Peter Campbell

clerks@39essex.com • DX: London/Chancery Lane 298 • 39essex.com

LONDON
81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER
82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE
28 Maxwell Road #04-03 & #04-04
Maxwell Chambers Suites
Singapore 069120
Tel: +65 6320 9272

KUALA LUMPUR
#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur, Malaysia
Tel: +(60)32 271 1085